Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle

I. Bennett Capers†

INTRODUCTION

The story of the development of our criminal procedure jurisprudence is largely a story about race.[1] The right to counsel for indigent felony defend-

†Associate Professor of Law, Hofstra University School of Law. B.A. Princeton University; J.D. Columbia Law School. This Article benefited from presentations at the Criminal Justice Roundtable at University of Chicago Law School and the "Prawfs" Workshop at Hofstra Law School, as well as faculty presentations at Fordham Law School, University of Cincinnati Law School, Chapman University School of Law, and Loyola-Los Angeles Law School. While many people deserve thanks, a few deserve special mention. They are Laura Appleman, Fabio Arcila, Susan Bandes, Kenworthey Bilz, M. Katherine B. Darmer, Deborah Denno, Jeffrey Fagan, Mary Anne Franks, Mark Godsey, Bernard Harcourt, Holning Lau, Robin Lenhardt, Dan Markel, Tracey Meares, Melissa Murray, Alexandra Natapoff, Alice Ristroph, David Alan Sklansky, Christopher Slobogin, Carol Steiker, and my excellent research librarian Toni Aiello. Lastly, this Article also benefited from a generous grant from Hofstra Law School.

[1] *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV.

ants,[2] the right to be free from coercion during interrogation,[3] the right to *Miranda* warnings,[4] the right to trial by jury,[5] indeed, the entire process by which the Fourth, Fifth, and Sixth Amendments were incorporated and made applicable to the states,[6] owes much to the Court's concern about the police treatment of minorities, especially in the South.

Notwithstanding the promises of these "rights" or recent claims that the election of President Barack Obama signals a post-racial epoch,[7] how officers police remains very much racially inflected. To borrow from Cornel West, race matters.[8] This is especially true when we think of the criminal justice system. Racial minorities face the double bind of being subject to both underenforcement and overenforcement[9] and "testilying" in cases involving minority suspects is pervasive.[10] Furthermore, our methods of policing contribute to racial balkanization,[11] and levels of distrust between minority communities and the police remain high.[12] Even when racial animus is absent, the perception that racial bias is present,[13] or even inevitable, often persists, as the firestorm over the arrest of Harvard Professor Henry Louis Gates attests.[14] What are we to make of this paradox: that at a time of

215 (2003); Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 841–44 (1994). As David Sklansky recently argued, concern for the rights of sexual minorities may have also played a role in the development of our criminal procedure jurisprudence. *See* David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875 (2008).

[2] *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[3] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

[5] *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

[6] Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

[7] Post-racialism was recently the subject of the 2010 Mid-Year Meeting of the Association of American Law Schools (Workshop on Post-Racial Civil Rights Law, Politics, and Legal Education: New and Old Color Lines in the Age of Obama), as well as a symposium issue in the *Georgetown Law Journal.* *See* Symposium, *Post-racialism in American Law and Lawyering*, 98 GEO. L.J. 921 (2010). For a recent critique of the notion that post-racialism has been achieved, see Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

[8] CORNEL WEST, RACE MATTERS (2001).

[9] *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008).

[10] *Id.*

[11] *See* I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.–C.L. L. REV. 43 (2009).

[12] For example, nearly a quarter of blacks indicate that they have very little confidence in the police, and 42% of blacks report that they have a real fear that they will be arrested for a crime that they have not committed. BUREAU OF JUSTICE STATISTICS, 2002 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 116 tbl.2.13, 123 tbl.2.25 (2002), *available at* http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section2.pdf.

[13] As Russell Robinson has observed, perception itself is often race-dependent. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

[14] *See, e.g.*, Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES, July 20, 2009, at A1. For an excellent analysis of Gates's arrest and the ensuing controversy, see CHARLES J. OLGETREE, JR., THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES, JR. AND RACE, CLASS, AND CRIME IN AMERICA (2010).

waning racism our system of policing remains very much color-coded? Scholars such as Randall Kennedy have long argued that disparate treatment by police amounts to the imposition of a "racial tax."[15] But this comparison, while descriptively apt, falls short of capturing the complexity and interconnectivity of the harms resulting from disparate treatment. It is time for a broader argument. It is time to identify such disparate treatment, as well as the *perception* of disparate treatment, for what it is: a flaw in our claim of equal citizenship. This Article makes that argument.

It is also time to think about the direction in which we are heading. To that end, this Article proposes a doctrinal foundation for another criminal procedure revolution, one that understands criminal procedure rights as inextricably linked to citizenship rights. It argues that the foundation for that revolution need not be made from whole cloth. Rather, the foundation was set during the criminal procedure revolution that took place between the 1920s and 1960s.

The Justices responsible for that revolution—Douglas, Stewart, Brennan, and Marshall, to name a few—fashioned a procedure to ensure the rights of minority law breakers *and* the rights of minority law abiders at a time when minority law abiders faced harassment and victimization by the police, risked arrest without probable cause, and were subject to physical brutality under the guise of interrogation.[16] Other scholars, of course, have noted the connection between these cases and race,[17] but this Article goes several steps further. It argues that in addition to being concerned about discriminatory treatment, these Justices were also concerned about the Fourteenth Amendment's promise of equal citizenship. My claim here is a bold one, and one that calls for a paradigmatic shift in how we think about the first criminal procedure revolution. Though rarely invoking the Fourteenth Amendment's Equal Protection Clause or extension of citizenship rights, these cases were in fact very much informed by these provisions. To be sure, these were criminal procedure cases. But they were also, on a fundamental level, equal citizenship cases. Understanding this has consequences for understanding where we are now, and where we should be.

This Article proceeds as follows: Part I provides a brief overview of the role race played in shaping our criminal procedure jurisprudence between the 1920s and 1960s, and argues that many of the seminal cases also reveal a utilitarian concern for the goal of equal citizenship.[18]

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[15] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159 (1998); *see also* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK 13–14 (1997) (discussing a "black tax").

[16] *See infra* Part I.

[17] *See* sources cited *supra* note 1. **R**

[18] By citizenship, I am referring to the legal status of citizenship as well as to the more capacious concept of citizenship as belonging, as being included in the larger community of citizens, which is arguably implicit in the Fourteenth Amendment. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1991). Part of the work of critical race scholars in recent years has been to reveal the many ways in which the

Part II jumps ahead to current Fourth Amendment jurisprudence, which has all but abandoned the equal citizenship concerns of the Warren Court. This is particularly evident in the Court's seeming indifference to the prevalence of racial profiling. This indifference matters, Part II argues, because racial profiling creates harms—scripting harms, race-making harms, stigma-legitimizing harms, virtual segregation harms, and feedback loop harms—that undermine the very notion of equal citizenship. Part II then turns to a case that marks the Court's retreat from equal citizenship: *Terry v. Ohio*.[19]

Part III begins the process of putting us back on the right path with respect to the Fourth Amendment. It does this by arguing for equal citizenship as a guiding principle for interpreting the Fourth Amendment. With the goal of equal citizenship in mind, Part III adumbrates a proposal that involves re-conceptualizing reasonable suspicion, consensual encounters, and probable cause; encouraging randomization; and reinvigorating civil actions. My proposal will not just benefit racial minorities. It will benefit us all, moving us closer to the goal of equal citizenship, and closer to truly realizing a post-racial America.

I. Criminal Procedure as Citizenship: 1920s to 1960s

> Miners often carried a canary into the mine alongside them. The canary's more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected, thus alerting the miners to danger. The canary's distress signaled that it was time to get out of the mine because the air was becoming too poisonous to breathe.
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> Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.[20]

Our criminal procedure as we know it, particularly as it evolved between the 1920s and 1960s as a "code of criminal procedure,"[21] owes much to racial minorities or, to build on Lani Guinier and Gerald Torres's trope, canaries. To be clear, this Article is not the first to connect our story of criminal procedure to race.[22] Other scholars have persuasively argued that but for the Court's concern about the unfair treatment of racial minorities, much of our criminal procedure protections as we know them would not

United States has failed to fulfill the promise of citizenship as belonging. For an overview of such scholarship and its connection to immigration scholarship, see Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 Fordham L. Rev. 2493 (2007).

[19] 392 U.S. 1 (1968).

[20] Lani Guinier & Gerald Torres, The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy 11 (2002).

[21] Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965).

[22] *See* sources cited *supra* note 1. R

exist.[23] However, this Article excavates deeper to reveal a more significant subtext: the Court's commitment to the promise of equal citizenship. The existence of this subtext is in itself important as a historical matter. But this subtext also has significant purchase going forward. It provides a ready-made doctrinal foundation for the next criminal procedure revolution. To contextualize this foundation, this Part first provides a synoptic retelling of the role race played in the incorporation of the Bill of Rights,[24] from which our criminal procedure protections originate. It then turns to the deeper and more significant subtext of equal citizenship.

The story of incorporation of the Bill of Rights is familiar to many. Its connection to race, however, is less well known. Pre-incorporation, the Bill of Rights was originally understood as limiting the power of the federal government vis-à-vis citizens, not the state government.[25] Even ratification of the Fourteenth Amendment in 1868, which by its terms *did* impose limits on state action—by prohibiting a state from depriving "any person of life, liberty, or property, without due process of law" and by prohibiting a state from denying "any person within its jurisdiction the equal protection of the laws"[26]—did not initially change this dynamic.[27] Hence, notwithstanding the Fifth Amendment's requirement of an indictment for serious crimes, a *state* defendant could be arrested and tried for first-degree murder, without ever being indicted by a grand jury, as was the case in *Hurtado v. California*.[28] And notwithstanding the Fifth Amendment's privilege against self-incrimination, a *state* jury could be instructed to consider the fact that the defendant refused to take the stand in his own defense, as was the case in *Twining v. New Jersey*.[29] The one concession of the *Twining* Court was its acknowledgment that it was theoretically "possible" that some "personal rights safeguarded by the first eight amendments . . . may also be safeguarded against state action" as necessary to the Fourteenth Amendment's Due Process Clause.[30]

What prompted the Court to shift course was race. Faced with a modicum of procedure in cases involving white defendants, the Court had repeatedly exercised restraint, invoked precedent, and held that the Bill of Rights did not apply in state criminal proceedings. This judicial restraint continued

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[23] *Id.*

[24] Many scholars have of course written about the process by which the Bill of Rights was incorporated. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

[25] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247–48 (1833). As Chief Justice Marshall observed, the Constitution "was ordained and established by the people of the United States for themselves . . . and not for the government of the individual states." *Id.*

[26] U.S. CONST. amend. XIV, § 1.

[27] The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), presented the Court with its first real opportunity to interpret the Fourteenth Amendment, and it did so narrowly.

[28] 110 U.S. 516 (1884).

[29] 211 U.S. 78 (1908).

[30] *Id.* at 99.

even after the ratification of the Fourteenth Amendment.[31] The treatment of minority suspects in the South during the 1920s and 1930s changed this. Due process suddenly had limits that were binding on the states. And faced with cases involving the mistreatment of minorities, the Court set about defining those limits, turning a "federal no [into] a national no."[32]

Invoking the Fourteenth Amendment's Due Process Clause and the notion of fundamental fairness, the Court began to invalidate convictions where racial discrimination was obviously at play. For example, the Court held in *Strauder v. West Virginia*[33] that to convict a black defendant where state law limited jury service to "white male persons" offended due process, and thus the Fourteenth Amendment. In *Powell v. Alabama*,[34] the Court reached the same conclusion to vacate the conviction of black youths accused of gang-raping two white women and sentenced by an all-white jury to death, where no lawyer had been "named or definitely designated to represent the defendants" until the actual morning of trial. In *Norris v. Alabama*,[35] where blacks were systematically excluded from the jury pool, the Court again intervened on the ground that due process had been violated. And as the Court held in its first confession case, *Brown v. Mississippi*,[36] the conviction and death sentence of three black sharecroppers accused of murdering their white landlord, based on confessions obtained by torture, offended due process.[37] Such practices, the Court made clear, were simply unconstitutional.

By the 1960s, the Court's methodology had changed—the Court began selectively to incorporate specific provisions of the Bill of Rights rather than to rely simply on the broad notion of due process and fundamental fairness.[38]

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[31] Thus, in *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court upheld Connecticut's practice of permitting prosecutors to appeal and retry acquitted defendants, notwithstanding that the Double Jeopardy Clause of the Fifth Amendment would have barred retrial. Similarly, in *Adamson v. California*, 332 U.S. 46, 51 (1947), the Court reaffirmed *Twining*.

[32] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 301 (1993).

[33] 100 U.S. 303, 305 (1879).

[34] 287 U.S. 45, 56 (1932). The Court held that "the failure of the trial court to give [the defendants] reasonable time and opportunity to secure counsel was a clear denial of due process." *Id.* at 71. This case, perhaps more than any other during the early criminal procedure era, signaled the beginning of the Court's heightened sensitivity to the treatment of African Americans in the criminal justice system.

[35] 294 U.S. 587 (1935).

[36] 297 U.S. 278 (1936).

[37] For more on the story behind *Brown v. Mississippi*, see RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND BROWN V. MISSISSIPPI (1986).

[38] For a brief overview of this development, see STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE 9–10 (7th ed. 2004). Because these decisions were predicated on the Due Process Clause and its vague, subjective, labile notion of fundamental fairness, these cases left little room for predictability, other than to suggest some outside limits. They allowed every case to become a due process case, and made the Justices vulnerable to the criticism that what offended due process depended on their personal predilections. By the 1960s, the Warren Court was taking a different approach. Instead of invalidating convictions because the facts offended due process, the Court began to invalidate convictions because the rights asserted were fundamental and specifically referenced under the Bill of Rights.

But the motivating factor behind many of the Court's landmark decisions remained the same: the police treatment of minorities.[39] At the center of *Mapp v. Ohio*,[40] the case that ushered in the Warren Court's criminal procedure revolution, was the legal issue of whether the Court should extend the Fourth Amendment's exclusionary rule to the states, notwithstanding its decision to the contrary just twelve years earlier.[41] The facts on the ground were also at the center of *Mapp*: that the police, purportedly looking for a fugitive, had assumed license to ignore Dollree Mapp's demands for a search warrant, to force open the door to her apartment and physically bar her attorney from entering, to flash a "pretend" warrant, and to run "roughshod" over Mapp, handcuffing her, grabbing her, and twisting her hand.[42] That Dollree Mapp was a black woman and the police were white men spoke volumes about the presumed basis for this license.

The actions of the police were not so transparently egregious in *Miranda v. Arizona*,[43] in which the Court read the Fifth Amendment to require the reading of rights as a precondition to the admissibility of statements made during custodial interrogation. Nevertheless, coming on the heels of its decision in *Escobedo v. Illinois*,[44] the Court's concern that the police had taken advantage of yet another Mexican American, trading on the fact that the suspect was likely unaware of his right to remain silent or to have counsel, permeates *Miranda*.[45]

Race was also at the bottom of the Court's decision in *Duncan v. Louisiana*,[46] the case that made the Sixth Amendment right to a jury trial binding on the states. It was one thing to intimate in the abstract, as the Court had done earlier,[47] that trial by jury was not fundamental to due process. It was

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[39] The connection between the Court's criminal procedure jurisprudence and the civil rights movement was not lost upon observers. *See* Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 240 (1966) ("Perhaps the most powerful propellant of the trend toward the Due Process Model has been provided by the Negro's struggle for his civil rights and the response to that struggle by law enforcement in the Southern states—as well, it needs to be said, by law enforcement in some Northern cities."); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968) ("The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights.").

[40] 367 U.S. 643 (1961).

[41] Wolf v. Colorado, 338 U.S. 25 (1949).

[42] *Mapp*, 367 U.S. at 645.

[43] 384 U.S. 436 (1966).

[44] 378 U.S. 478, 482 (1964) (in which the police secured a confession from a "22-year-old of Mexican extraction" after ignoring his requests to see his attorney and barring his attorney from the interrogation room).

[45] *See* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 751 (1992) ("An important impetus for [*Miranda*] was the desire to constrain the unchecked police discretion promoting the official violence that reinforced subjugation of the black underclass."). In fact, an earlier draft of the opinion was explicit about the racial dynamics of police interrogations. The discussion of race and police practices was omitted in the final version, apparently in response to an objection from Justice Brennan. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 591 (1983).

[46] 391 U.S. 145 (1968).

[47] Mawell v. Dow, 176 U.S. 581, 603 (1900).

another to act on that principle in the case of Gary Duncan, the nineteen-year-old African American who was convicted and sentenced to two months imprisonment for allegedly slapping a white boy "on the elbow."[48] It could not have escaped the Court's notice that Duncan was convicted without a jury in a parish that was the focus of national news for its repeated efforts to resist court-ordered desegregation,[49] for its suppression of black voters,[50] and for its threatened use of an abandoned fort to incarcerate any northern civil rights agitators.[51] Similarly, it could not have escaped the Court's notice that the presiding judge, elected solely by whites, had completely disregarded the defense testimony undercutting the prosecution's case.[52] With this type of structural racism front and center, the Sixth Amendment right to a jury trial, especially a jury comprised of a cross-section of the community, was suddenly fundamental and binding on the states.[53]

Even in cases involving white defendants, one can sense the Court's concern about the treatment of minorities. Clarence Earl Gideon, the defendant in *Gideon v. Wainwright*,[54] the case that established the right to counsel, was a white drifter too poor to afford an attorney to defend him on charges that he broke into a poolroom and attempted to steal money from a vending machine. By declaring that the Sixth Amendment's guarantee of assistance of counsel required the state to provide Gideon an attorney, and relying heavily on the racially-tinged Scottsboro Boys case of *Powell v. Alabama*,[55] the Court clearly recognized the impact its decision would have on minority defendants especially, given the correlation, at the time and still, between race and indigence.[56]

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[48] *Duncan*, 391 U.S. at 147. Duncan was apparently attempting to stop four white youths from harassing his two younger cousins, who had reported several racial incidents since transferring to a formerly all-white high school. Duncan was ordering his cousins to climb into his car when one of the white youths reportedly muttered to Duncan, "You must think you're tough." The youths later testified that Duncan responded to this statement by slapping one of the boys on the elbow. Defense witnesses testified that Duncan had merely touched the boy's elbow and urged him to head home. *Id.* at 148–49; *see also* Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, *in* CRIMINAL PROCEDURE STORIES 262 (Carol S. Steiker ed., 2006) (*quoting* Jurisdictional Statement, Duncan v. Louisiana, 391 U.S. 145 (1968) (No. 410), 1967 WL 129492, at *4–5).

[49] Jack Langguth, *Louisiana Parish Fights Pentagon: Leander Perez Keeps Area Bastion of Segregation*, N.Y. TIMES, Sept. 5, 1963, at A20.

[50] *La. County Resists FBI Vote Probe*, WASH. POST, Aug. 19, 1961, at A2.

[51] *See Prison Perez Style: Ready for Race Demonstrators*, U.S. NEWS & WORLD REP., Nov. 4, 1963, at 16.

[52] *Duncan*, 391 U.S. at 152.

[53] Indeed, this was precisely the argument made in Duncan's brief before the Supreme Court. Brief for Appellant, Duncan v. Louisiana, 391 U.S. 145 (1968) (No. 410), 1967 WL 113845, at *18 ("It would be ironic indeed if a state were permitted to nullify this Court's carefully developed protections of the jury system by substituting for trial by jury trial by a single judge, who obviously does not represent a fair cross section of the community and who is frequently exposed to official and unofficial influences prejudicial to the defendant.").

[54] 372 U.S. 335 (1963).

[55] 287 U.S. 45 (1932).

[56] Charles Ogletree has also read *Gideon* as a race case, arguing that the Court recognized that "failure to provide adequate assistance of counsel to accused indigents draws a line not

This story of the racialized birth of our criminal procedure jurisprudence has been told before.[57] But there is another story that has not been told: discrimination alone did not motivate the Court to make much of the Bill of Rights binding on the states. Nor was the Court motivated simply by the sense that the criminal justice system, especially in the South, was fraught with institutionalized racism. Rather, the Court's decisions were also informed by an aspirational goal of making good on the Fourteenth Amendment's promise of citizenship rights to African Americans and equal protection of the law.[58] Though the Court rarely referenced citizenship or equal protection in these cases, the Court's concern is there, sometimes between the lines and sometimes in the lines themselves.

Consider the major cases. In *Strauder*, the case involving the exclusion of blacks from jury participation, the Court explicitly invoked the Fourteenth Amendment's grant of citizenship to African Americans, and stressed the right of "every *citizen*" to a trial by a jury selected without racial discrimination.[59] In *Duncan*, which involved a black defendant's right to a jury trial, the Court described the jury trial right as one inherent to citizenship.[60] Referencing equality, the *Duncan* Court characterized the right to jury trial as essential to assure "that fair trials are provided for *all* defendants."[61] Justice Black, in his concurrence, was even more explicit about the connection to citizenship, stressing that certain rights belonged to "all Americans, whoever they are and wherever they happen to be."[62]

The Warren Court cases similarly reveal a concern for the dual goals of citizenship and equality. *Mapp*, which made the exclusionary rule binding on the states, stressed the role of courts to protect "the constitutional rights

only between rich and poor, but also between white and black." Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 83 (1995).

[57] *See* sources cited *supra* note 1. **R**

[58] There was another subtext, of course, and that subtext was minority innocence. In *Powell* and *Norris*, the two decisions arising out of the infamous Scottsboro Boys case, there was very real evidence that the nine youths on trial for raping two white women on a train were in fact innocent, and were being railroaded. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 81–84, 206–13, 229–32 (1969). Similarly, in *Brown v. Mississippi*, the fact that the only evidence against the defendants were their confessions, which the defendants made only after the beatings became intolerable—two defendants were "laid over chairs and their backs were cut to pieces with a leather strap with buckles" while a third was hanged repeatedly by a rope to the limb of a tree—also suggests actual innocence. Brown v. Mississippi, 297 U.S. 278, 282–84 (1936). Actual innocence likely played a role in *Mapp*, *Duncan*, and *Gideon* as well. All three defendants maintained their innocence. Mapp's conviction was overturned, Mapp v. Ohio, 367 U.S. 643, 660 (1961), and a court barred the district attorney from retrying Duncan. Duncan v. Perez, 321 F. Supp. 181, 184 (E.D. La. 1979), *aff'd*, 445 F.2d 557 (5th Cir. 1971). Gideon, once he had assistance of counsel, was acquitted on retrial. David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES, *supra* note 48, at 102.

[59] Strauder v. West Virginia, 100 U.S. 303, 306 (1879) (emphasis added).

[60] *Duncan*, 391 U.S. at 156.

[61] *Id.* at 156–58.

[62] *Id.* at 169 (Black, J., concurring).

of the citizen."[63] In *Gideon*, the Court stressed that the right to counsel was among the safeguards sounding in equality "to assure fair trials before impartial tribunals in which *every* defendant stands equal before the law."[64] *Gideon*, in turn, was presaged by the cases of *Griffin v. Illinois*[65] and *Douglas v. California*,[66] which made the connection between the right to counsel and the right to equal treatment explicit. As Justice Black, writing for the *Griffin* Court, put it:

> Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned "stand on an equality before the bar of justice in every American court."[67]
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> [T]o deny adequate review to the poor . . . is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.[68]

Justice Douglas, writing for the Court in *Douglas v. California*, was similarly firm. Comparing the denial of a transcript for appeal and the denial of assistance of counsel, he wrote:

> [T]he evil is the same: discrimination against the indigent. . . . There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel[ ] . . . while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[69]

Even *Miranda*, upon a close reading, reveals concerns about equal treatment and citizenship. Perhaps nothing was more influential in shaping the Court's decision in *Miranda* than Yale Kamisar's article, *Equal Justice in the Gatehouses and Mansions of American Procedure*.[70] The title alone speaks volumes, and Kamisar's argument for prophylactic warnings was in turn predicated on equal treatment. As he put it, such protections were the "point of 'fourteenth amendment [sic] equality'";[71] its "equality norm" dic-

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[63] *Mapp*, 367 U.S. at 647 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).
[64] 372 U.S. 782, 796 (1963) (emphasis added).
[65] 351 U.S. 12 (1956).
[66] 372 U.S. 353 (1963).
[67] 351 U.S. at 17 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).
[68] 351 U.S. at 19.
[69] *Douglas*, 372 U.S. at 355–58.
[70] 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 25 (A.E. Dick Howard ed., 1965).
[71] *Id.* at 11.

tated that all suspects be advised of their rights.[72] *Miranda* also explicitly noted its concern for citizenship, emphasizing that the privilege against self-incrimination was a limitation of "governmental power over the *citizen*."[73] The Court added, "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its *citizens*."[74]

In a sense, the Court's accomplishment in these cases was radical. Though only rarely invoking equality or the Fourteenth Amendment's extension of citizenship rights to African Americans, the Court nonetheless fashioned a criminal procedure jurisprudence that was very much informed by the notion of equal citizenship. Viewed in this light, it was not just institutionalized racism that prompted the Court first to give the Due Process Clause teeth, and then to transfer those teeth to the Bill of Rights through selective incorporation. It was also the promise of equal treatment, the most tangible marker of equal citizenship.

Even more significantly, the Warren Court in particular was concerned about the rights that should be accorded all citizens. To be a citizen meant more than to have the legal status conferred on blacks by the Fourteenth Amendment. After all, such legal status, without more, permitted the "separate but equal" doctrine of *Plessy v. Ferguson*.[75] Rather, being a citizen also meant enjoying "dignity and integrity."[76] It meant being accorded a level of respect, regard, and autonomy in dealings with the police. In other words, the Warren Court seemed to say in these cases that the *sine qua non* of equal citizenship was both equality before the law *and* a baseline of treatment to be accorded all citizens. For everyone then, not just minorities, these cases expanded the very idea of what it meant to be a citizen. Viewed in this light, these were not only criminal procedure cases, but also equal citizenship cases, integral to the larger project of the Warren Court, which began in *Brown v. Board of Education*[77] and continued in *Loving v. Virginia*.[78]

In sum, the Court, starting in the 1920s and continuing through the Warren era in the 1960s, attuned to the registers of race and attentive to the disparate treatment of racial minorities, attempted to fashion a criminal procedure that would be both available and fair to all. In doing so, the Court interpreted the Bill of Rights in a way that was both informed and bounded

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[72] *Id.* at 93.

[73] Miranda v. Arizona, 384 U.S. 436, 460 (1966) (emphasis added).

[74] *Id.*

[75] 163 U.S. 537, 552 (1896).

[76] *Miranda*, 384 U.S. at 460.

[77] 347 U.S. 483 (1954). Kenneth Karst, I think, would agree. *See* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 115 (2007) (suggesting that the move toward incorporating the Bill of Rights was "an extension of the Warren Court's civil rights jurisprudence").

[78] 388 U.S. 1, 11–12 (1967) (invalidating laws prohibiting intermarriage between whites and non-whites and holding that such laws unlawfully "restrict the rights of citizens on account of race").

by notions of equality and citizenship. It is this doctrinal underpinning of equality and citizenship that provides the groundwork for the argument made in Part III that a new criminal procedure revolution is much needed. But first, in Part II below, I consider the Court's current indifference to one of the most obvious markers of unequal citizenship—racial profiling—and trace the Court's retreat from equal citizenship as a guiding principle, at least in the Fourth Amendment context, to *Terry v. Ohio*.

II. The Fourth Amendment, Racial Profiling, and Citizenship

Simply put, our current Fourth Amendment jurisprudence is flawed. After all, one method for judging this jurisprudence is to look to the effect that the jurisprudence has had on minorities and on the promise of equal citizenship. Here, the fact that our current Fourth Amendment jurisprudence now fosters an atmosphere in which racial profiling is often unremarkable and juridically tolerated, and in which racial minorities perceive themselves to be second-class citizens, evidences the current Court's retreat from concerns about equality and citizenship.

Consider *Illinois v. Caballes*,[79] decided in 2004. In *Caballes*, the Rehnquist Court held that the use of a narcotics-detection dog to sniff the exterior of a vehicle during a routine traffic stop did not "compromise any legitimate interest in privacy,"[80] and thus was not a search within the meaning of the Fourth Amendment.

To a certain extent, *Caballes* is an unremarkable case. The police conducted a routine traffic stop of an individual who had violated the traffic laws, and during the course of issuing a ticket, conducted a canine sniff. The Court, in a rather perfunctory, four-page opinion, ruled that the use of a narcotics-detection dog during a routine traffic stop does not require reasonable suspicion or otherwise run afoul of the Fourth Amendment. But in another respect, it is the very unremarkableness of the police practice, and the Court's imprimatur on that practice, that should concern us all. After all, the Court did not extensively remark upon the basis for Caballes's traffic violation. He was traveling six miles above the speed limit: 71 mph in a 65 mph speed zone.[81] It also did not extensively remark upon why a second officer, hearing over the radio about the stop of Caballes for exceeding the speed limit, brought a narcotics detection dog to the scene to sniff Caballes's car.[82] The Court completely failed to remark upon what role, if any, Caballes's status as a Hispanic played in these decisions. It also completely failed to

[79] 543 U.S. 405 (2004).

[80] *Id.* at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).

[81] *Id.* at 417–18 (Ginsberg, J., dissenting).

[82] According to the opinion, a trooper "overheard the transmission [reporting the stop of Caballes] and immediately headed for the scene with his narcotics-detection dog." *Id.* at 406 (majority opinion). The opinion does not elaborate on why the trooper thought a canine sniff might reveal the presence of narcotics.

remark upon what impact the decision would have on other minority citizens. Put another way, to read *Caballes* as an unremarkable Fourth Amendment case is to accept as unremarkable the current status of Fourth Amendment jurisprudence.

To be clear, racial profiling is not the only example of unequal policing. As I have written elsewhere, other examples include the use of excessive force against minority suspects, and the underenforcement of crimes committed in minority neighborhoods.[83] But racial profiling is the most well-known example. As the controversy surrounding the arrest of Harvard professor Henry Louis Gates last fall[84] and the anger surrounding Arizona's immigration enforcement law[85] indicate, the *perception* of racial profiling continues to stoke strong emotions about the place of race in this country. Consider some recent numbers. According to a recent CNN poll, 56% of all blacks believe that they have been treated unfairly by the police because of their race.[86] Moreover, 46% of blacks believe racism against blacks by police officers is "very common."[87] By contrast, only 11% of whites share this belief.[88]

The first section below accordingly focuses on the continued pervasiveness of racial profiling, in fact and in perception.[89] The second section then thickens the discussion by incorporating new thinking from feminists,[90] queer scholars,[91] and critical race theorists[92] regarding the promise of equal citizenship. The argument here is basic: racial profiling has its own citizen-

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[83] *See* Capers, *supra* note 9, at 844–56. **R**

[84] Peter Baker, *A Presidential Pitfall: Speaking One's Mind*, N.Y. TIMES, July 27, 2009, at A13 (discussing the fall-out after President Obama opined that the Cambridge police had acted "stupidly" in arresting Professor Gates for disorderly conduct).

[85] *See, e.g.*, Julia Preston, *Latino Groups Urge Boycott of Arizona Over New Law*, N.Y. TIMES, May 7, 2010, at A16.

[86] CNN/Opinion Research Corporation Poll, Jul. 31–Aug. 3, 2009, *available at* http://www.pollingreport.com/race.htm (last visited Oct. 2, 2010).

[87] *Id.*

[88] *Id.*

[89] For some of the recent scholarship on racial profiling, see BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007); DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL. F. 163; R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089 (2005); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004).

[90] *See, e.g.*, JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991); GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP (Joanna L. Grossman & Linda C. McClain eds., 2009); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010).

[91] *See, e.g.*, CARL STYCHIN, GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM (2003); BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING (2007).

ship effects.[93] Equally important, these effects should matter to Fourth Amendment jurisprudence. To concretize these effects, I identify five harms which stem from racial profiling—scripting harms, race-making harms, stigma-legitimizing harms, virtual segregation harms, and feedback loop harms—and demonstrate how these harms collectively diminish citizenship rights along racial lines.[94] The final section then turns to the case that has enabled racial profiling to flourish: *Terry v. Ohio*.

A. Racial Profiling

How we police is very much racialized. To be sure, this racialized policing is often subtle, is rarely the product of intentional discrimination,[95] and simultaneously operates on many levels, from which acts legislatures choose to criminalize,[96] to how resources are allocated in combating crime.[97] The type of racialized policing that has received the most attention in recent years, in part because of its very measurability, is racial profiling. Here, the numbers *are* the argument.

For example, a report compiled by the Maryland State Police revealed that, during the period examined, African Americans comprised 72.9% of all

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[92] Devon Carbado, *Racial Naturalization*, 57 AM. Q. 633, 634 (2005); Jennifer Gordon & Robin Lenhardt, *supra* note 18, at 2502–07; Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People,"* 76 OR. L. REV. 233 (1997); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1574–75 (1996); Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579 (2007). R

[93] Again, by citizenship, I am referring primarily to the notion of social citizenship advanced by Karst and taken up by critical race theorists. *See* KARST, *supra* note 18; *see also* Jennifer Gordon & Robin Lenhardt, *supra* note 18, at 2494–95 (arguing that "belonging" requires "the realization by individuals and groups of genuine participation in the larger political, social, economic and cultural community"). R R

[94] My argument is unconventional, but not radical. In *Against Prediction*, Bernard Harcourt argues that even if racial profiling were efficient, its use should be abandoned because it lulls us into overvaluing what is measurable, and undervaluing what is just. HARCOURT, *supra* note 89, at 173–92. My argument seconds this notion and advances it by foregrounding profiling's citizenship effects. R

[95] Using implicit association tests ("IATs"), which measure the speed with which an individual associates a categorical status with a characteristic, social cognition researchers have shown that implicit biases continue to be widespread, even among those who consider themselves to be unbiased. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Such implicit biases inform all of our interactions, and have particular implications with respect to policing. For further discussion of the pervasiveness of implicit racial bias, and the resulting real world consequences, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–1528 (2005).

[96] The decision to punish offenses involving crack cocaine more severely than offenses involving powder cocaine is but one example. For more on race and crime selection, see JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

[97] *See, e.g.*, Capers, *supra* note 9, at 853–56; *see also* I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345 (2010) (discussing the racialized application of resources in rape cases). R

of the drivers that were stopped and searched along a stretch of Interstate 95, even though they comprised only 17.5% of the drivers violating traffic laws on the road.[98]

But numbers like these are only part of the story. The other part is how these numbers impact law-abiding minority citizens. For example, in the Maryland study, even though blacks were disproportionately the subjects of searches, the hit rate for blacks, i.e., the rate at which contraband was found, was statistically identical to the hit rates for whites.[99] What this means in numbers is that the vast majority of the individuals stopped and searched were law-abiding minorities[100] not in possession of contraband. More recent numbers analyzing searches through 2008,[101] as well as numbers from a June 2009 report issued by the ACLU, also confirm that law-abiding minorities bear the brunt of the error costs associated with such pretextual traffic stops.[102] Professor Ian Ayres's findings—based on data obtained from over 810,000 "field data reports" collected by the Los Angeles Police Department—are representative.[103] Controlling for variables such as the rate of violent and property crimes, Professor Ayres found that the stop rate was 3,400 stops higher per 10,000 residents for blacks than for whites, and 350 stops higher for Hispanics than for whites.[104] In addition, police were 127% more likely to search stopped blacks than to search stopped whites, and 43% more likely to search stopped Hispanics than stopped whites.[105] Notwithstanding the fact that these groups were searched more often, blacks in fact were 37% less likely to be found with weapons than searched whites, and 23% less likely to be found with drugs than searched whites.[106] Similar

[98] *See* Wilkins v. Md. State Police, No. MJG-93-468 (D. Md. 1993); *see also* David Harris, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 563 (1997). This is not to suggest that hit rates tell the whole story. For example, hit rates reveal nothing about the quantity (personal use or distribution use) or type of contraband seized. For critiques of the use of hit rates, see Banks, *supra* note 89, at 585; Barnes, *supra* note 89, at 1098; Harcourt, *supra* note 89, at 1303–14. R

[99] Banks, *supra* note 89, at 585. R

[100] To be clear, I use the term "law-abiding" here to refer to the fact that the stopped individuals did not appear to be engaged in any wrongdoing beyond the traffic violation prompting the stop. Beyond this, the term would be meaningless, since most individuals are law breakers in some respect. As Professor Louis Schwartz observed more than fifty years ago, "[t]he paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at one time or another committed acts that the law regards as serious offenses." Louis B. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 157 (1954).

[101] *See, e.g.*, ACLU OF ARIZ., DRIVING WHILE BLACK OR BROWN (2008), *available at* http://acluaz.org/DrivingWhileBlackorBrown.pdf.

[102] *Id.* I use "pretextual traffic stops" here to refer to stops based on valid traffic violations where the primary purpose of the stop is to seek contraband or otherwise uncover criminal behavior.

[103] IAN AYRES, ACLU OF S. CAL., RACIAL PROFILING AND THE LAPD: A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008), *available at* http://www.aclu-sc.org/contents/view/3.

[104] *Id.*

[105] *Id.*

[106] *Id.*

numbers were found for searched Hispanics: Hispanics were 33% less likely to be found with weapons than searched whites, and 34% less likely to be found with drugs than searched whites.[107]

Statistics also suggest that law-abiding minorities face the brunt of the additional discretionary decisionmaking permitted officers upon conducting a stop.[108] Traffic stops, which are already largely discretionary,[109] permit officers the further *discretion* to order occupants out of the vehicle,[110] to engage in questioning unrelated to the traffic stop,[111] to request consent to a search,[112] and even without consent to conduct a canine sniff of the vehicle.[113] In certain jurisdictions, officers even have the discretion to make a custodial arrest based on the traffic violation.[114] An arrest may in turn give the officer the discretion to search both the car and its contents.[115] Who is ordered out of a vehicle, who is subject to questioning unrelated to the traffic stop, and who is searched are strongly correlated to race.[116]

Although racial profiling is usually associated with car stops—hence the well-known phrase "driving while black"—racialized targeting also oc-

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[107] *Id.*

[108] Harris, *supra* note 98, at 562; *see also* Barnes, *supra* note 89, at 1113 (noting that police search the vehicles driven by blacks 2.6 times more often than vehicles driven by whites). R

[109] Traffic codes grant officers both affirmative and negative choice. Most motorists drive above the speed limit. What this means in terms of affirmative and negative choice is that, setting aside resources and feasibility, law enforcement officers have the discretion to stop all motorists, some motorists, or indeed no motorists exceeding the speed limit. *See* Kim Forde-Mazrui, *Ruling out the Rule of Law*, 60 VAND. L REV. 1497, 1516–30 (2007) (arguing that specific laws do not necessarily resolve the problem of discretion that plagues vague laws, since even specific laws continue to invest officers with negative choice, i.e., the choice not to enforce the law or make an arrest). This has particular implications for minority drivers, who may find themselves in a double bind. If minority motorists drive with traffic, i.e., five to ten miles per hour above the posted speed limit, they become vulnerable to discretionary traffic stops. However, driving at or below the posted speed limit does not exempt them from the category of individuals who may be subjected to traffic stops. This is because officers often target minorities traveling at or below the speed limit on the theory that certain drug traffickers try to avoid traffic stops by complying with speed limits. Harris, *supra* note 98, at 558–59.

[110] Pennsylvania v. Mimms, 434 U.S. 106 (1977) (drivers); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers).

[111] *See* Harris, *supra* note 98, at 574; Bernard E. Harcourt, *Henry Louis Gates and Racial Profiling: What's the Problem* (U. of Chi., Law & Economics, Olin Working Paper No. 482, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474809; *see also* Arizona v. Johnson, 129 S. Ct. 781, 788 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the stop's duration.").

[112] Harris, *supra* note 98, at 562.

[113] Illinois v. Caballes, 543 U.S. 405 (2004); United States v. Place, 462 U.S. 696 (1983).

[114] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[115] Arizona v. Gant, 129 S. Ct. 1710 (2009) (narrowing, but not eliminating, the rule permitting the search of vehicles incident to arrest).

[116] For extensive data on search (as opposed to stop) disparity, see Gross & Barnes, *supra* note 89, at 663–69. In terms of how minority drivers and passengers are treated, see, for example, Patrick McGreevy, *Question of Race Profiling Unanswered*, L.A. TIMES, July 12, 2006, at B3. In *Pennsylvania v. Mimms*, Justice Stevens anticipated that officers are likely to use race not only as a factor in deciding whom to stop, but also whom to order out of a vehicle. 434 U.S. 106, 122 (1977) (Stevens, J., dissenting). R

curs on buses,[117] on planes,[118] and even on foot.[119] Recent numbers from New York City's stop-and-frisk data are particularly revealing. There, blacks and Hispanics constituted over 80% of the individuals stopped, a percentage far greater than their representation in the population. Moreover, of the blacks stopped, 95% were found *not* to be engaged in activity warranting arrest.[120] When considered as a percentage of the population, the numbers are even more jarring. Stops of whites, if spread across the population of New York City, would amount to stops of approximately 2.6% of the white population during the period. By contrast, stops of blacks, if spread across the population, would amount to stops of approximately 21.1% of the population.[121]

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[117] Bus sweeps are particularly popular. *See, e.g.*, United States v. Drayton, 536 U.S. 104 (2002); Florida v. Bostick, 501 U.S. 429 (1991). Consider the recently reported story of Tunde Clement, a black man who was traveling from New York City to Albany, New York, and was carrying a backpack, which alone may have been enough to pique the interest of plainclothes officers. According to news reports:

> [The officers] cornered Clement and began peppering him with questions.
>
> He was quickly handcuffed and falsely arrested. He was taken to a station to be strip-searched and then to a hospital, where doctors forcibly sedated him with a cocktail of powerful drugs, including one that clouded his memory of the incident.
>
> A camera was inserted in his rectum, he was forced to vomit and his blood and urine were tested for drugs and alcohol. Scans of his digestive system were performed using X-ray machines, according to hospital records obtained by the *Times Union*.
>
> The search, conducted without a warrant, came up empty.

Brendan J. Lyons, *Harsh, Unwarranted Tactics? Outcry Over Sheriff's Department Search Methods*, TIMES UNION (Albany, N.Y.), Mar. 2, 2008, at D1. After ten hours in custody, Clement was given an appearance ticket for resisting arrest and released. The resisting arrest charge was later dismissed. *Id.* The fact that the New York Court of Appeals had rebuked the sheriff's department for its methods two years earlier was apparently of little consequence. The stories heard by local defense lawyers are equally disturbing. "[E]very black man who came through the bus station was being literally grabbed and dragged into the men's room and searched . . . . Occasionally, of course, they would get lucky and find some drugs. But the vast, overwhelming majority of black men searched were clean." *Id.*

[118] A report released by the U.S. General Accounting Office found that black women traveling internationally were nine times more likely than white women to be subjected to x-rays or strip searches by U.S. Customs officials, even though they were less than half as likely to be carrying contraband. *See Black Women Searched More, Study Finds*, N.Y. TIMES, Apr. 10, 2000, at A17.

[119] *See generally* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 128 (1990) (discussing street encounters between citizens and the police, and the Court's decisions that have facilitated such encounters at the expense of individual liberty).

[120] Between January 1, 2006, and September 30, 2007, the New York City Police Department completed stop-and-frisk forms for 867,617 individuals. Of that number, 453,042 were black, and another 30% were Hispanic, numbers grossly disproportionate to their representation in the general public. Only one in every 21.5 blacks stopped was found to be engaged in activity warranting arrest. Put another way, of the 453,042 stop-and-frisk forms police officers completed for black suspects, approximately 402,943 were for stopping and frisking blacks *not* engaged in unlawful activity warranting arrest. *See* ACLU OF N.Y., *Analysis of New NYPD Stop-and-Frisk Data Reveals Dramatic Impact on Black New Yorkers* (Nov. 26, 2007), http://www.aclu.org/racialjustice/racialprofiling/33095prs20071126.html.

[121] *Id.*

It should be noted that profiling affects racial minorities regardless of class. Even middle-class and upper-class minorities, who often live and travel in predominantly white communities, are subjected to race-based policing, often predicated on little more than racial incongruity. For example, a number of law-abiding minority professors—Cornel West,[122] William Julius Wilson,[123] Paul Butler,[124] and Devon Carbado,[125] to name just a few—have been subjected to police stops based on little more than racial incongruity.

For many readers, these statistics are familiar, as is the debate about whether racial profiling is consistent with higher offending rates, and therefore defensible as efficient policing,[126] or consistent with racial discrimination plain and simple, and therefore wrong whatever its merits.[127] My interest here is not to participate directly in this debate. Rather, my interest is in drawing attention to the perceptual consequences of this unequal policing, and in linking this perception to unequal citizenship.[128]

Consider the perceptual numbers again. According to a CNN poll, 56% of all blacks believe that they have been treated unfairly by the police because of their race.[129] When it comes to profiling, the numbers are equally revealing. A Gallup poll found that 40% of blacks pulled over for traffic stops believed that the police had targeted them because of their race.[130] The percentage is even higher when it comes to young black men: 75% believe they have been victims of racial profiling.[131] Even when presented with the identical facts, blacks and whites may see them differently. For example,

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[122] WEST, *supra* note 8, at xii (describing being stopped while driving to Williams College under suspicion that he was a drug dealer, and being stopped three times in his first ten days at Princeton for driving too slowly on a residential street). **R**

[123] Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 4 (describing the *Terry* stop of William Julius Wilson near a small New England town by a policeman who wanted to know what Wilson "was doing in those parts").

[124] Paul Butler, *Walking While Black: Encounters with the Police on My Street*, LEGAL TIMES, Nov. 10, 1997, at 23.

[125] *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

[126] *See, e.g.*, John Knowles et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203 (2001); *see also* Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641 (2005).

[127] *See* KENNEDY, *supra* note 15, at 159. **R**

[128] There is also the "ratchet effect" that Bernard Harcourt has examined. Harcourt, *supra* note 89, at 1329–35 (police, proceeding under the assumption that racial profiling is efficient, are likely to allocate additional resources to profiling, leading to the further over-representation of blacks within the larger class of drug dealers, which in turn will prompt putting additional resources into profiling, deleterious collateral consequences to minority communities, and so on, resulting in a ratchet effect). **R**

[129] CNN/Opinion Research Corporation Poll, *supra* note 86 (asking "[h]ave you personally ever felt treated unfairly by the police or by a police officer specifically because of your race?").

[130] HARRIS, *supra* note 89, at 119–20. **R**

[131] *See* Will Lester, *Most in Poll Think Police Racially Profile Motorists*, ARIZ. REPUB., Dec. 11, 1999, at A1 (citing Gallup poll finding that 73% of young black males believe they have been targeted by the police because of their race).

polls taken shortly after the police arrest of Professor Henry Louis Gates Jr. suggest that race plays a significant role in how his arrest was perceived. Of those surveyed, 66% of whites believed the police would have arrested a similarly situated white homeowner.[132] Only 25% of blacks shared this sentiment.[133] The point is not that blacks are right and whites are wrong. Indeed, as Russell Robinson has observed, because blacks and whites tend to view events through different racial schemas and pools of knowledge, their differing perceptions are often both reasonable.[134] Rather, the point is that these perceptual discrepancies have consequences when it comes to equal citizenship. Tellingly, a recent Pew poll revealed that 81% of blacks believe that the United States has yet to fulfill its promise of equal rights.[135]

The sections below illustrate how racial profiling, in fact and in perception, undermines the notion of equal citizenship, and in particular undermines one of the most crucial components of citizenship: that of belonging.[136]

B. Citizenship

Racial profiling is the source of at least five citizenship harms: scripting harms, race-making harms, stigma-legitimizing harms, virtual segregation harms, and feedback loop harms. Each alone is problematic. Collectively, they are citizenship diminishing, suggesting a racial hierarchy inconsistent with our goal of equal citizenship.

1. Scripting Harms

In recent years, legal scholars, especially those working in the area of employment discrimination, have turned their attention to the harmful effects of ascribed scripts, those "cluster[s] of expectations"[137] imposed on individuals by virtue of their perceived membership in particular groups.[138]

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[132] CNN/Opinion Research Corporation Poll, *supra* note 86 (asking "[d]o you think a white homeowner would have been arrested if he acted the same way in the same circumstances, or don't you think so?").

[133] *Id.*

[134] Robinson, *supra* note 13. **R**

[135] PEW RESEARCH CTR., BLACKS UPBEAT ABOUT BLACK PROGRESS, PROSPECTS (2010), *available at* http://pewsocialtrends.org/assets/pdf/blacks-upbeat-about-black-progress-prospects.pdf.

[136] *See* KARST, *supra* note 18. **R**

[137] *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 290 (1995) (defining scripts as "cluster[s] of expectations").

[138] In interactions, one individual will identify the other individual as a member of a particular group, and mentally ascribe scripts that she believes correspond to membership in that group. Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 902–10 (2010). To be clear, these scripts can operate along multiple axes. *Id.* at 31. For example, a 6'2" black male who has a dark complexion is likely to face a different set of scripts than a 5'4" black female who has a light complexion. Scripts are also context-depen-

These scripts can be particularly harmful for women, minorities, and other outgroup members. A female running for political office, as we saw with Sarah Palin during the 2008 presidential campaign, might face gender scripts that prompt questions concerning child rearing arrangements that would not be asked of a male candidate.[139] Similarly, female attorneys may be ascribed a gender script that assumes them to be "softer, less aggressive, and burdened in their ability to put work first because of family commitments."[140] At the same time, a script predicated on race might assume that an Asian employee is less likely to be assertive or commanding, or that a black employee is less likely to work as hard as a white employee.

Because these outgroup-oriented scripts are based on negative stereotypes, they are by definition harmful. But the harm is not limited to the stereotypes themselves. Rather, there is a double-bind that accompanies such scripts. The individual who conforms to the script is harmed because her chances for advancement are correspondingly limited. The individual who counters the script, i.e., the female associate who works aggressively to make partner, may also be harmed; her failure to conform to gender expectations may be held against her.[141] Lastly, the individual who negotiates the script is also harmed. A female attorney interested in making partner will likely negotiate her gender script by "toeing a fine line—at times, rejecting the script to convey that she is assertive enough to compete in male-dominated environments and, at other times, performing the script to avoid the stigma imposed on aggressive women."[142] The black employee interested in advancing might negotiate the script by working longer hours than the other employees,[143] or by taking steps to perform "racial comfort."[144] All of this takes work.[145] And employers, consciously or not, expect this work.[146] Put

dent. I am ascribed a particular script when I travel alone through white neighborhoods. I am ascribed an entirely different script when I travel through those same neighborhoods with my white partner.

[139] *See, e.g.*, Monica Davey, *GOP Women Call Palin Criticism 'Sexist,'* N.Y. TIMES, Sept. 3, 2008, at A1; Jodi Kantor & Rachel L. Swarns, *A New Twist in the Debate on Mothers*, N.Y. TIMES, Sept. 1, 2008, at A1.

[140] *See* Robinson, *supra* note 13, at 1132. **R**

[141] This was precisely the issue in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Cf.* Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress & Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2547 (1994).

[142] *See* Lau, *supra* note 138, at 898. **R**

[143] Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1267, 1292–93 (2000).

[144] *Id.* at 1289–90. The term "racial comfort" comes from Carbado and Gulati, and refers to performance strategies that racial minorities employ to appear racially palatable and to put non-minorities at ease. *Id.* at 1294–95. Racial comfort can be performed by downplaying race, and performing a type of racial erasure or de-racialization. Racial comfort can also be performed by evoking "good" racial stereotypes. For example, a black female employee may provide racial comfort by appearing maternal and matriarchal. A black male employee may provide racial comfort by joining an employer's basketball team, and by dating only members of his own race.

[145] *See id.*

[146] Such work demands are inherent in such cases as *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) and *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir.

differently, in addition to doing her assigned work, the outgroup employee who hopes to advance must also do script-negotiation work.

While much has been made of scripts' harmful effects on members of outgroups in the employment context, such scripts are also at play when police engage, consciously or unconsciously,[147] in racial profiling. A police officer who uses race as a factor in deciding whom to "encounter" or whom to stop, and uses race because she either consciously or unconsciously correlates race with criminality or some other characteristic, is ascribing scripts based on perceived group membership. This in turn requires minorities, at least law-abiding minorities, to do the work of negotiating the script. A law-abiding minority stopped by the police will likely feel compelled to take considerable steps to negotiate but not counter the script.[148] For example, the law-abiding minority may present himself[149] as excessively obsequious or exceedingly compliant. He may decline to terminate any encounter even when he knows that, technically, he is free to leave. He may comply with a request for consent to search even when he knows that he can refuse. In short, the law-abiding minority is likely to feel less able to claim or assert any right ostensibly provided by the Bill of Rights.[150]

What this means in practice is this: a stop of a white motorist that might last a few minutes might instead for the law-abiding minority last a half-hour or more because of the script the officer has ascribed to the minority motorist, and because of the script-negotiation in which the law-abiding minority must engage to successfully terminate the stop.[151] Moreover, this script-negotiation is not work in which minorities engage solely during police encounters and stops. Rather, script-negotiation is often a full-time endeavor. For example, law-abiding minorities curtail their travel through

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2006). On these demands generally, see KENJI YOSHINO, COVERING (2006); PAUL BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (2000); Paulette M. Caldwell, *A Hairpiece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 367 (1991).

[147] *See* Lawrence, *supra* note 95 (relying on psychological evidence to demonstrate that much racial discrimination is unconscious). R

[148] Countering the script can have negative consequences. For example, in his encounter with the Cambridge police, Professor Henry Louis Gates Jr. countered the script by "pulling rank" to assert his status as a Harvard professor. This likely contributed to his arrest on disorderly conduct charges, later dismissed. *See* sources cited *supra* note 14. R

[149] Given that racial profiling is usually coupled with a gender profiling component—i.e., the targeting of black men—the male pronoun here is particularly appropriate. For example, in New York, more than 90% of the individuals stopped are male. *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES, July 12, 2010, at A16.

[150] Tracey Maclin has made a similar point. *See* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991) (observing that "the dynamics surrounding an encounter between a police officer and a black male are quite different from those that surround an encounter between an officer and the so-called average, reasonable person," and often implicitly involve a degree of coercion); *see also* Carbado, *supra* note 125, at 966 ("[P]eople of color are socialized into engaging in particular kinds of performances for the police."). R

[151] For example, Katherine Darmer has written eloquently about how her interactions with the police during a traffic stop were informed by her status as a white woman. *See* M. K. B. Darmer, *Teaching* Whren *to White Kids*, 15 MICH. J. RACE & L. 109, 113 (2009).

majority white neighborhoods to avoid stops and encounters based on racial incongruity,[152] and limit their styles of dress.[153] All of this is work.

The effect on such police-citizen encounters is analogous to a trial. Our system of justice has at its core the notion that all citizens are presumed innocent, and accordingly places the burden on the government to establish guilt. When race is used as a proxy for criminality, the presumption fails and the burden of proof shifts. The law-abiding minority must mount an affirmative defense, must in effect take the stand, and must rebut the presumption that she is carrying contraband or otherwise engaged in criminal activity.

2. Race-Making Harms

Next, consider race-making.[154] Geneticists and biologists have recognized for some time now that race, as a matter of biology, has little if any inherent meaning.[155] Rather, race is largely a social construct.[156] It is the social meaning that we attach to racial markers (skin color, difference in phenotype) that invests race with meaning, constructs race, and gives race salience. As individuals, we engage in race-making every day when we make assumptions about individuals because of surface differences in skin color. These assumptions can be negative ("he looks dangerous"), positive ("she looks friendly"), and/or neutral ("she's probably a law student").[157] We should be deeply concerned, however, when the government, through its representatives, engages in race-making. Racial profiling, almost by definition, is a type of race-making. Its harm is not limited to its use of skin color as a proxy for criminality, which again has a disparate impact on law-abiding minorities. Its harm is also that it ratchets up racial salience. Put differently, when government actors engage in racial profiling, they perpetuate the

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[152] *See generally* Capers, *supra* note 11.

[153] *Id.* at 274, 305.

[154] Sociologist David R. James borrows the phrase "race-making situation" from Edgar T. Thompson, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407, 413 n.19 (1994) (citing E. T. Thompson, *The Plantation as a Race-Making Situation*, *in* PLANTATION SOCIETIES, RACE RELATIONS AND THE SOUTH 115 (1975)).

[155] *See, e.g.*, STEPHEN JAY GOULD, THE MISMEASURE OF MAN (rev. ed. 1996); Lynn B. Jorde & Stephen P. Wooding, *Genetic Variation, Classification and 'Race*,*' in* 36 NATURE GENETICS S28 (2004).

[156] *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55 (2d ed. 1994) (describing "*racial formation* as the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed") (emphasis in original); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.–C.L. L. REV. 1 (1994); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 774 (1994) ("'[R]ace' is neither a natural fact simply there in 'reality,' nor a wrong idea, eradicable by an act of will.").

[157] As these examples should make clear, there are probably few, if any, assumptions that are purely positive, negative, or neutral. Rather, assumptions based on race are often simultaneously positive and negative.

notion that race matters—that it matters to be black or brown or yellow,[158] and that it matters to be white.[159] In short, racial profiling reinforces notions of racial difference. At a time when we hope to render bankrupt the salience of race, especially with regard to citizenship, this is a problem.

3. Stigma-Legitimizing Harms

Racial profiling, then, both produces and reproduces race, communicating that race *still* matters at a time when we aspire to be post-racial, and at a time when we have yet to fulfill the promise of equal citizenship without regard to race. This alone is harmful to equal citizenship. But what compounds this harm is the racial stigma that accompanies race-making.[160] By racial stigma, I am referring to more than the feeling of embarrassment or the hyper-visibility that may accompany being singled out for an "encounter," or a traffic stop, or a stop-and-frisk. Rather, in a similar vein as social scientist Erving Goffman,[161] economist Glenn Loury,[162] and legal scholar Robin Lenhardt,[163] I am referring to the social outcast-ing and outcaste-ing that occur when negative meanings are socially inscribed based on skin color.

In his highly influential *Stigma: Notes on the Management of Spoiled Identity*, Goffman examined a variety of stigmas, including group-based stigmas such as race, and observed that such stigmas operate to categorize individuals as spoiled, "reduced in our minds from a whole and usual person

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[158] Although "brown" and "yellow" are sometimes used pejoratively, they are also terms embraced by critical race scholars. *See, e.g.*, RICHARD RODRIGUEZ, BROWN: THE LAST DISCOVERY OF AMERICA (2002); FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002); Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009).

[159] *See* Darmer, *supra* note 151. Consider traffic stops again. Because most individuals violate speeding and other traffic regulations, and officers have limited resources, they must make an affirmative choice about whom to stop, and a negative choice about whom not to stop. The use of race to stop minority drivers, either because of intentional racism or "rational" decisionmaking or implicit biases, has the collateral effect of unfairly benefiting non-minority drivers. This is because an officer, given a choice between stopping a minority motorist traveling over the speed limit and a non-minority motorist traveling over the speed limit, is likely to pursue the minority motorist. This has the effect of reifying white privilege. For more on white privilege, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). Indeed, this quite possibly has the perverse effect of increasing crime. For whites, who face less scrutiny and are in fact under-policed, the cost of crime is reduced, thus making crime itself more profitable. *See* Harcourt, *supra* note 89, at 1300–02. R R

[160] Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle, The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 8 (1976) ("Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior."); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 593 (1977) (describing how stigma creates a sense of inferiority and shame).

[161] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

[162] GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002).

[163] R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004).

to a tainted, discounted one."[164] This is precisely what using race as a proxy for criminality does. When police use race to determine whom to "encounter," or whom to stop, the police in effect stigmatize race by ascribing negative meanings to racial difference. Put differently, profiling both communicates that race matters (through race-making) and communicates why (through stigma). It suggests that individuals, because of the color of their skin, are by definition suspect. It suggests that because those individuals have a different phenotype, it is perfectly acceptable to target them for traffic stops, or to engage them in questions unrelated to the traffic violation, or to ask them for consent to search, or to order them out of their vehicles. To make matters worse, this profiling often occurs at the same time that crime within minority communities involving minority victims is decidedly underenforced.[165] In short, minorities suffer a double devaluation.

There is something else that makes the stigma resulting from racial profiling particularly harmful to citizenship. Coming from government actors, it is a stigma that is both socially inscribed and officially inscribed. It is representative of the state assigning worth, engaging in caste-ing. All of this has consequences. To borrow from Gowri Ramachandran, the repeated message to persons that they are criminal "itself does some of the work of material subordination."[166]

There is more to the harm of stigma than the scope of this Article allows,[167] but one additional point is worth mentioning here precisely because it adds a significant dimension to stigma and profiling that other scholars have not examined. Imagine you are a law-abiding minority pulled over purportedly for traveling six miles per hour over the speed limit, as was the case in *Illinois v. Caballes*.[168] The officer asks for your license and registration, and also demands that you and any passengers step out of the vehicle. He demands to know your destination and reason for travel, your business on this road, and whether you are in possession of narcotics. His tone is neither friendly nor cordial; if anything, his tone expresses suspicion, distrust, and disdain. The officer brings a narcotics-detection dog to sniff the

[164] GOFFMAN, *supra* note 161, at 3. R

[165] *See* Capers, *supra* note 9, at 853–56; Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1722–44 (2005) (describing how minority communities are often victims of both overenforcement, in terms of profiling, and underenforcement, in terms of attention to the minority victims of crime). R

[166] Gowri Ramachandran, *Antisubordination, Rights, and Radicalism*, 40 CONN. L. REV. 1045, 1053 (2008).

[167] For example, building on Goffman's work, several criminal law scholars have suggested that there may be a connection between stigma and increased crime; in other words, that those who are stigmatized as criminal may in fact join with others who face the same stigma, and as a group develop "subnorms that may be antithetical to those of the law-abiding world . . . . [inducing] further crime." Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1184 (2004). Although their argument focuses on actual criminals, there is no reason to assume that it would not apply to individuals perceived as criminal.

[168] 543 U.S. 405 (2005).

exterior of your car, says he needs to search the interior of the car, and asks, "Do you have a problem with that?" From your point of view, having seen other drivers travel six miles per hour above the speed limit without being stopped, or stopped without this extra interrogation, the sense that the decision to stop and interrogate you was partially, if not entirely, informed by race is deeply stigmatizing, sending an expressive message about your status in society as an outsider, as an unequal citizen, as belonging to a lesser caste.[169] But it is also the public nature of profiling that compounds the harm.[170] It is not only that the police singled you out to be stopped, to be ordered out of the vehicle, or to be searched. It is also that all of this occurs in full view of passing motorists.[171] The profile thus metastasizes into a public dressing down, a public diminishing.

4. Virtual Segregation Harms

Racial profiling instantiates a virtual segregation that, but for its virtuality, would run afoul of the Fourteenth Amendment. Again, an analogy is useful. Imagine a scenario where a jurisdiction segregated its highways along racial lines. Thus, racial minorities traveling through this jurisdiction would be required to travel in the far right lane, while whites would be required to travel in the far left lane. Even if the lanes were in all tangible ways equal, such *de jure* segregation would clearly violate the Fourteenth

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[169] On the expressive content of laws, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 62 U. CHI. L. REV. 591 (1996). On the promulgation of social meaning generally, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

[170] Using as an example *Florida v. Jimeno*, 500 U.S. 248 (1991), which involved a pretextual car stop and a subsequent search for narcotics, William Stuntz makes a similar point:

> The real harm in a case like *Jimeno* arises from the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers . . . . The harm flows not from the search but from the encounter.

William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995). What further compounds the harm—and what Stuntz misses—is the racial nature of such stops. The names of the respondents in *Jimeno*—Enio Jimeno and Luz Piedad Jimeno—suggest that they were both Hispanic, which likely was a factor in why the police targeted them for a pretextual stop. Put differently, the harm from the encounter is compounded by the expressive message about who can travel free from police interference, and who cannot; about who belongs, and who does not. In short, the message is about the very inequality of citizenship.

[171] Interestingly, the Court has acknowledged that the typical traffic stop occurs in public where it is witnessed by passersby, but viewed the public nature of stops as benefiting the individuals by, among other things, reducing "the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminish[ing] the motorist's fear that, if he does not cooperate, he will be subjected to abuse." Berkemer v. McCarty, 468 U.S. 420, 438 (1984).

Amendment. Such is the lesson of *Brown v. Board of Education*,[172] which rejected the teachings of *Plessy v. Ferguson.*[173]

But in many jurisdictions today, travel along highways already mimics this very segregation. Along these highways, police officers mentally put minority drivers in a separate lane for heightened scrutiny, looking for traffic violations as a pretext for a stop. While this separate lane may be a virtual rather than physical one, this does not take away from its real harms. Moreover, as the analogy should make clear, these separate lanes are anything but equal. The heightened scrutiny alone renders them unequal, even to the minority drivers who are never stopped. Moreover, to the minority drivers who are the targets of pretexual stops, the inequality is even more manifest. To these minorities, the virtual "minority" lane is more than a stigmatizing lane. It is also a slow lane, a lane where they can expect delay, the opposite of the EZ-Pass lane enjoyed by whites. Long after we eliminated separate train cars for racial minorities, we continue in effect to have separate lanes and race-based travel rights. This is what I mean by virtual segregation.

5. Feedback Loop Harms

This public aspect of profiling leads me to a fifth harm: police profiling creates damaging feedback loop effects. Most noticeably, it adds legitimacy to private discrimination. If the police view race as a proxy for criminality, the thinking goes, then private individuals should also be permitted to view race as a proxy for criminality.[174] The white woman who repeatedly witnesses the police engaging in "consensual" encounters with African Americans and Hispanics receives the message that it is perfectly legitimate, indeed even prudent, for her to clutch her purse when she sees an approaching racial minority. The white supervisor who sees the police stopping African Americans and Hispanics for traffic violations and ordering them out of their vehicles while a narcotics-detection dog is brought to the scene receives the message that it is perfectly legitimate, indeed even advisable, to scrutinize minority job applicants more closely and to think twice before hiring them.[175] The cab driver who notices police singling out African Americans receives the message that he is wise, even justified, in refusing to

[172] 347 U.S. 483 (1954).

[173] 163 U.S. 537 (1896).

[174] Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 810 (1999) ("Race-based policing tells the community that Blacks are presumed to be lawless and are entitled to fewer liberties.").

[175] There is evidence to suggest that employers do in fact use race as a proxy for criminality. Using testers, Princeton sociologist Devah Pager found that white tester applicants were treated more favorably than identically situated black tester applicants, even when the white applicants disclosed that they were convicted felons. *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 90–92 (2007).

pick up African American passengers.[176] The white twenty-something who repeatedly observes police cruisers slowing down when they pass minorities on the streets receives the message that it is perfectly appropriate, and perhaps even financially savvy, only to consider all-white neighborhoods when looking for a place to live; it may even play a role in the twenty-something's decision about whom to date or marry.[177] Even the black reverend, after repeatedly observing police frisking minority youth, may to a certain extent internalize the stigma of race and believe it appropriate for him to cross the street when he sees a young black or Hispanic male.[178] In short, if the police mentally separate citizens according to race, then this legitimizes citizens separating each other according to race. If the goal we have set for ourselves is a color-blind world, a world in which equal citizenship is not contingent upon race, the police undermine that goal every time they engage in racial profiling. This is true whether that profiling is rational, or efficient, or not.

6. Citizenship Effects

All of these effects are interconnected and mutually reinforcing. To the law-abiding minority who is singled out for a traffic violation, then interrogated and "asked" for consent to search his vehicle, and perhaps made to stand outside while a narcotics detection dog inspects his vehicle, the stop is highly inconvenient and humiliating. But it also forces him to engage in script work, adopting a response to negotiate the criminality script that the officers have assumed. This script-negotiation may prompt him to consent to a search even when he knows that he has the right to refuse, or to answer questions unrelated to the traffic stop—*Where you headed? You live around here? Where do you think you're going?*—when he knows that he has the right to refuse, or not to protest when asked to step out of his car. At the same time, the mere fact that such stops usually occur in full view of other motorists means that he is also likely to experience the stigmatic harm of being singled out because of his race. To the minority motorist, it communicates that race matters, and that *de jure* racial segregation still exists, virtually if not physically. And from the point of view of passing motorists, the very fact that the minority motorist was stopped may serve to confirm the

[176] *See, e.g.*, Calvin Sims, *An Arm in the Air for That Cab Ride Home*, N.Y. TIMES, Oct. 15, 2006, at A1; Shelby Steele, *Haling While Black*, TIME, July 20, 2001, at 1.

[177] As Elizabeth Emens has observed, the government continues to play a partisan role in facilitating discrimination in terms of whom we choose to date and whom we choose to marry. Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009). My point here is that one of the factors many individuals consider before coupling and reproducing is the lives that their children are likely to lead. For a white individual contemplating marriage to a black individual, this may mean including in the mix that she will be bringing someone into the world likely to face increased scrutiny from the police, someone who may be viewed as inherently suspect.

[178] The Reverend Jesse Jackson has admitted his own stereotypes about young black men and criminality. *See Perspectives*, NEWSWEEK, Dec. 13, 1993, at 17 (quoting Jesse Jackson).

notion that race matters because it signifies criminality, and to legitimize private discrimination.

But the larger point is this: collectively, these harms have detrimental citizenship effects.[179] Immigration scholars have long argued that the profiling of Latinos and Muslims to determine nationality is inconsistent with notions of equal citizenship.[180] And Randall Kennedy, as noted earlier, has suggested that racial profiling imposes the equivalent of a "racial tax" on minorities.[181] But these observations only begin to capture the breadth of the problem. The more significant part is that racial profiling unequally burdens racial minorities with harms that collectively send the expressive message, from a representative of the state, about the continued existence of a racial hierarchy in which some citizens enjoy more privileges and immunities, more freedom of movement, and a greater sense of belonging, than others.

Consider again scripting. The law-abiding minority who negotiates the criminality script by being overly obsequious, by not asserting his right to proceed, his right not to answer questions, or his right not to grant consent, is doing more than accepting a "racial tax" or, to borrow from Devon Carbado and Mitu Gulati, performing "racial–comfort."[182] In declining to assert any rights guaranteed by the Bill of Rights, he is assuming the position of a second-class citizen, or three-fifths of a citizen,[183] or a denizen,[184] or an at-will citizen allowed autonomy only at the discretion of the law officer.

This sense is heightened by its historical provenance. It suggests not only the citizenship rights that were denied black slaves, but also the "not quite" citizenship rights—think *Dred Scott*[185]—that were allowed free blacks, including free blacks in the North, prior to the Civil War.[186] It suggests the "passes" that blacks, even free blacks, were historically required to carry in order to travel, to justify their presence on public roads.[187] It sug-

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[179] Another way of thinking about how these individual harms have aggregate effects is by analogy to Derek Parfit's "harmless torturers." In Parfit's hypothetical, the "harmless torturers" each apply a trivial electric shock that is imperceptible in isolation, but dreadful in the aggregate. *See* DEREK PARFIT, REASONS AND PERSONS 80–81 (1984). The various harms that I have elucidated work in a similar fashion.

[180] *See, e.g.*, Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (arguing that racial profiling in the interior in connection with immigration enforcement functions to undermine citizenship status for Latinos); Kevin R. Johnson, *Open Borders*, 51 UCLA L. REV. 193, 218 (2003).

[181] KENNEDY, *supra* note 15, at 159. R

[182] *See* Carbado & Gulati, *supra* note 143, at 1289–90. R

[183] This is, of course, a reference to how slaves were officially counted for the purposes of representation and taxation prior to the ratification of the Fourteenth Amendment. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

[184] JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 320 (1978) (tracing the uncertain citizenship status of even free blacks in the decades leading up to the *Dred Scott* decision, as well as efforts by some to categorize blacks as "denizens").

[185] 60 U.S. (19 How.) 393 (1856).

[186] *Id.* at 420–29.

[187] SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001); ANDREW TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURES, 1789–1868, at 106–21 (2006). As several scholars have observed,

gests the "ceremonies of degradation"[188] in which slave patrol posses engaged when they encountered blacks, both slave and free. Moving into the twentieth century, it suggests W.E.B. Du Bois's observation that blacks exist as "a nation within a nation."[189] It suggests the sundown towns—towns that excluded blacks and other minorities after sundown[190]—that existed well into the 1960s. It suggests that, notwithstanding the extension of citizenship rights to blacks with the Fourteenth Amendment, our history of passes, of not being equal citizens, of being merely denizens, of having to watch where we travel, exists still.

Understood this way, racial profiling instantiates harms that evidence the very caste-ing and non-belonging that mark *un*equal citizenship.[191] It says: nearly 150 years after "technical citizenship"[192] was extended to African Americans, more than fifty years after the Warren Court overturned *Plessy v. Ferguson*[193] with *Brown v. Board of Education*,[194] and more than four decades after the Warren Court jump-started a criminal procedure revolution that was in large part an equal citizenship revolution, a peculiar contradiction remains. Yes, we may be equal, but some of us are more equal than others. Moreover, notwithstanding this country's protestations that our Constitution is color-blind, and notwithstanding our proclamations of equality, more work needs to be done. Under our Fourth Amendment jurisprudence, a color-coded, multi-tiered caste system still exists. The transformation of African Americans from "a subject population into citizen-subjects"[195] is still incomplete.

Before turning to how reclaiming equal citizenship as a guiding principle can provide the foundation for a new criminal procedure revolution, it is useful first to trace the Court's retreat from equal citizenship.

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racial profiling dates back to the 1700s and the slave patrols of that period. Indeed, Carol Steiker has argued that the modern police force is traceable to the "slave patrols," which developed many of the trademarks—uniforms, arms, military drilling—that we associate with police forces. *See* Steiker, *supra* note 1, at 839. R

[188] I borrow this term from Walter Johnson, who uses it to describe a similar degradation occurring during slave sales. *See* WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 149–50 (1999).

[189] W.E.B. DU BOIS: A READER 559 (David Levering Lewis ed., 1995).

[190] For more on sundown towns, see JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005). *See also* Jeannie Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L.J. 537, 540–41 (2008).

[191] These references to caste and to belonging come from Kenneth Karst's highly influential *Belonging to America*, in which he read the Fourteenth Amendment as encompassing not just political and civic equality, but also the insistence that organized society treat each individual in a manner that is caste-free. KARST, *supra* note 18, at 3. R

[192] *See* Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.–C.L. L. REV. 361, 363 (2009) (describing blacks as vested with "technical citizenship" following ratification of the Reconstruction Amendments).

[193] 163 U.S. 537 (1896).

[194] 347 U.S. 483 (1954).

[195] NIKHIL PAL SINGH, BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY 14 (2004).

C. Terry v. Ohio *and Unequal Citizenship*

As demonstrated in the first part of this Article, between the 1920s and the 1960s, the Court fashioned a criminal procedure jurisprudence that had, as an important *telos*, the notion that equal citizenship was not yet reality, and that incorporation was one step toward making it reality. That concern for equal citizenship, however, has fallen into desuetude. Instead of reflecting a concern for equal citizenship without regard to race, our current jurisprudence has all but insured a state of affairs in which equal citizenship does not exist. This shift in concern, this juridical anaesthetization, has at times been so subtle that it has occasionally gone unnoticed. The goals of this brief section are both to notice and trace this shift. The shift is traced back not to a decision of the conservative Courts of Burger or Rehnquist, but rather to the Warren Court's decision in *Terry v. Ohio*.

In *Terry v. Ohio*, the Warren Court considered for the first time whether a person could be detained in the absence of probable cause to believe that he had committed a crime.[196] On its face, such a seizure would seem to violate the "probable cause" language of the Fourth Amendment.[197] However, weighing the Fourth Amendment in the context of rising crime rates, and placing newfound reliance on the Fourth Amendment's reasonableness clause,[198] the Court interpreted the Fourth Amendment as permitting limited detention and questioning of a person as long as an officer has specific and articulable facts, i.e., reasonable suspicion, to believe that "criminal activity may be afoot."[199] Expressing concern for the safety of officers,[200] the Court then went a step further. If the officer also has reasonable suspicion that a

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[196] 392 U.S. 1 (1968). The case stemmed from a detective observing two men who he had never seen before repeatedly peering into a store window in downtown Cleveland, walking away to confer, then returning to peer into the store window again. *Id.* at 5. The detective suspected that the men were "casing a job, a stick up," and might have a gun. *Id.* at 6. The detective stopped and searched Terry and his companions, recovering two pistols. *Id.* As a result of the search, Terry was convicted of carrying a concealed weapon. *Id.*

[197] The Fourth Amendment provides, in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[198] For a discussion of the Court's turn to reasonableness, which actually began with a non-criminal case in the year prior to *Terry*, see Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988).

[199] *Terry*, 392 U.S. at 30.

[200] As the Court put it:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.

Id. at 23. The Court went on to note that "every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Id.*

person is armed and dangerous, the officer can couple the limited detention and questioning with a pat down for weapons: in common parlance, a stop-and-frisk.[201]

In so ruling, the Warren Court recognized that stop-and-frisk practices, in which the police had already been engaging for years,[202] were not race-neutral, and would continue disproportionately to burden minorities.[203] Indeed, both Terry and his co-defendant were black,[204] though the Court's opinion elides this fact. The Court likely knew, in addition, that its decision would perpetuate the types of stigmatic and race-making harms that the Court had attempted to eliminate fourteen years earlier in *Brown v. Board of Education*. Nonetheless, the Warren Court accepted these likely results, and reinterpreted the Fourth Amendment as permitting the practice of forcibly stopping individuals based on "reasonable suspicion."

There are several external factors that might explain the Court's decision to allow reasonable suspicion as a compromise between barring all stops absent probable cause, and ceding complete discretion to the police to engage in stops without judicial oversight. Just four months after oral argument, and two months before issuing its decision, there was an outbreak of riots in many cities, including Washington, D.C., suggesting that what was needed was more state police power, not more individual rights.[205] In addition, the Court and Chief Justice Warren in particular had been attacked during the 1964 presidential campaign for promoting individual rights at the expense of law enforcement, and were expected to become targets again in the 1968 campaign.[206]

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[201] In fact, Chief Justice Warren's majority opinion paid only cursory attention to the authority of officers to engage in stops. Rather, the crux of the Court's opinion dealt with the authority of officers to engage in frisks. *Id.* at 27.

[202] John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 758 (1998).

[203] *Terry*, 392 U.S. at 14 n.11 (acknowledging that stop-and-frisks, to a large extent discretionary, would have particular costs on "minority group members").

[204] *See* Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 729 (1998). Perhaps not surprisingly, the arresting officer could not say what initially attracted his attention to Terry and his companion—he described the two as two Negroes—other than to say that he "just didn't like 'em." *Id*. at 730 (quoting Detective McFadden). That the black men were in a "white" section of town, and thus "racially incongruous," likely contributed to the arresting officer's suspicion. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

[205] *See, e.g.*, *Widespread Disorders*, N.Y. TIMES, Apr. 5, 1968, at A1; *Looting . . . Arson . . . Death . . . As Riots Swept U.S. Cities*, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 8; *Mobs Run Wild in the Nation's Capital*, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 8. For a more thorough discussion of the "long hot summers" of riots in the years leading up to *Terry*, see STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE, ONE NATION, INDIVISIBLE 158–70 (1997).

[206] *See* Earl C. Dudley, Jr., Terry v. Ohio, *the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 892–93 (1998). For more on the attacks on the Court during this period and the political climate at the time, see RICK PEARLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA (2008).

What if any role these concerns played in *Terry*'s outcome is unclear. What is certain is that, by settling for the compromise of reasonable suspicion, *Terry* had the effect of ushering in a shift in direction that would eventually invest officers with almost unfettered discretion.[207] Simply put, it is reasonable suspicion's very plasticity that has had lasting implications for the lives of racial minorities, and lasting implications for the goal of equal citizenship.[208] Allow me to put this another way: if the Fourth Amendment itself has a poisonous tree, its name is *Terry v. Ohio*.

This is not to suggest that the Warren Court necessarily realized that its decision would have the devastating impact on racial profiling and unequal citizenship that it has had. Nor is this to suggest that the Warren Court necessarily foresaw how its decision would subsequently be manipulated to justify a range of racially-inflected stops, or necessarily anticipated how police officers would "game" the reasonable suspicion standard. In fact, the Warren Court arguably took steps to mitigate the racial impact of its decision. It is telling that the Court omitted to make any reference to Terry's race, or the race of his companions, in explaining why reasonable suspicion was present. The implication is that, as a normative matter, race *should* be excluded from the analysis. But by de-racializing Terry—in fact (e)racing Terry, his companions, and the officer who knew by looking at them that he "just didn't like 'em"[209]—the Court also provided a template for subsequent courts and law enforcement officers conveniently to see and not see race: seeing race for the purposes of determining whom to stop, and yet not seeing race for the purposes of articulating, sanitizing, and sanctioning the basis for that stop.[210]

All of this suggests that the Warren Court, aware that permitting stops based on reasonable suspicion would have a disparate impact on racial minorities, and hence the notion of equal citizenship, nonetheless chose the

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[207] As Justice Marshall observed, reasonable suspicion became little more than a "'chameleon-like way of adapting to any particular set of observations.'" United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987)).

[208] *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998) ("One of the flaws of *Terry* was that this shift [to a reasonableness standard rather than a probable cause standard] was implemented without a full examination of the consequences for blacks and other disfavored persons."); Adina Schwartz, *"Just Take Away Their Guns": The Hidden Racism of* Terry v. Ohio, 23 FORDHAM URB. L.J. 317, 365–73 (1996) (summarizing studies of the impact of *Terry* on minority communities); *see also* Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on* Terry *"Stop and Frisk,"* 50 OKLA. L. REV. 451 (1997) (concluding that *Terry* and its progeny have resulted in discriminatory practices against blacks).

[209] *See* Stokes, *supra* note 204, at 730. R

[210] For more on this practice of seeing and not seeing race, see I. Bennett Capers, On Justitia, Race, Gender, and Blindness, 12 MICH. J. RACE & L. 203, 214–24 (2006). As David Cole observes, though the stop-and-frisk rule "is in theory color-blind, [it] has in practice created a double standard." DAVID COLE, NO EQUAL JUSTICE 43 (1999). "It does so principally by extending a wide degree of discretion to police officers in settings where race and class considerations frequently play a significant role." *Id.*

compromise of reasonable suspicion. Moreover, the Court settled on this compromise at a time when racial minorities were already being harassed by police in large numbers; indeed, the Court decided *Terry* just a few months after the Kerner Commission released its report on the causes of recent riots. As the Commission put it, "Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police."[211] This police harassment, the Kerner Commission emphasized, was part of a larger problem: America was moving towards "two societies, one black, one white—separate and unequal."[212] Against the backdrop of the Kerner Commission Report, the *Terry* Court acknowledged that its decision would likely "exacerbate police-community tensions in the crowded centers of our Nation's cities."[213] Furthermore, by expressly declining to "develop at length . . . the limitations which the Fourth Amendment places upon a protective seizure and search for weapons,"[214] the Court left the door open for an erosion of whatever limitations, racial or otherwise, were implicit in *Terry*.[215]

In short, the Court subordinated its concern for equal citizenship to its concern for crime control and police safety.[216] And we are living with that choice still. As Tracey Maclin has observed, *Terry* provided "a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions . . . For this reason alone, the result in *Terry* deserves censure."[217]

This becomes especially true when one considers that *Terry v. Ohio* in turn provided the foundation for *Whren v. United States*,[218] in which the Court gave its imprimatur to pretextual stops, i.e., stops based on a minor violation where the underlying motivation for the stop is to search for contraband or otherwise identify criminality.[219] By so holding, the Court essen-

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[211] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 158 (1968) [hereinafter KERNER COMMISSION REPORT]. A prior commission reached a similar conclusion to the Kerner Commission and was cited in *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968).

[212] KERNER COMMISSION REPORT, *supra* note 211, at 1.

[213] 392 U.S. at 12.

[214] *Id.* at 29.

[215] For example, several of the limitations articulated by Justice Harlan in his concurrence—such as limiting stops to situations involving suspicion of "a crime of violence" and recognizing that absent suspicion, a person has an equal right to walk away—have all but disappeared. *Id.* at 33.

[216] That police safety was crucial to Chief Justice Warren's thinking in *Terry* is also documented in two biographies. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 466–68 (1997); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 685–87 (1983).

[217] *See* Maclin, *supra* note 208, at 1278–79. R

[218] 517 U.S. 806 (1996).

[219] *Id.* In *Whren*, vice-squad officers of the D.C. Metropolitan Police Force observed two African American men in a Pathfinder, and used the fact that the driver had turned without first signaling as an excuse to conduct a "traffic" stop. *Id.* The vice-squad officers did not normally conduct traffic stops, but saw this as an opportunity to question the men and perhaps secure consent to search their vehicle. *Id.* Justice Scalia, writing for the Court, rejected the

tially green-lighted the police practice of singling out minorities for pretextual traffic stops in the hope of discovering contraband. Another way of thinking about *Whren* is to rethink what *Whren* permits. *Whren* permits officers essentially to use race as an "unofficial" proxy for suspicion—for example, officers can think black + male + Pathfinder = suspicion[220]—so long as the "official," articulated basis for the stop is a documentable, color-blind violation. Given that most drivers routinely violate traffic laws, i.e., by exceeding the speed limit,[221] this virtually gives officers carte blanche to engage in race-based pretextual stops. And if the driving while black statistics and stop-and-frisk data show anything, this is what officers do.

The canary metaphor that introduced Part I would suggest that these decisions, to the extent that they shift discretion to the police, have implications for us all. And they do. Undemocratic policing—i.e., policing based on racial profiling—increases the perception of illegitimacy, which in turn can increase levels of crime and reduce police-citizen cooperation.[222] But the larger issue is equal citizenship. If this country can simultaneously elect an African American president, yet accept a Fourth Amendment jurisprudence that fosters unequal citizenship, what does that say about our larger democratic project? What does it say about our task of "mak[ing] America what America must become"[223]—fair, egalitarian, responsive to the needs of all of its citizens, and truly democratic in all respects, including its policing? What does it say about our goal of creating, notwithstanding our patchwork quilt of ethnicities and races and religious denominations, one nation? A nation, in short, where all citizens belong?

Two decades ago, Professor John Mitchell laid down the following challenge to scholars and jurists: to rethink the Fourth Amendment in terms that would be "in keeping with some basic vision of America."[224] It is time to take up that challenge.

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challenge to the stop, and concluded that so long as the stop itself was based on an actual traffic violation, the subjective motivation of an officer in singling out a particular motorist is irrelevant under the Fourth Amendment. *Id.* at 813 ("Subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis."). The Court expressly left open the possibility that such discriminatory conduct might be sanctionable under the Equal Protection Clause. *Id. See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326–29. This, however, amounted to an empty gesture given the hurdles that the Court has erected to frustrate equal protection claims. For more on these hurdles, see Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1860–61 (2004).

[220] This is, of course, a variation of Elizabeth Gaynes's well-known article. See Elizabeth A. Gaynes, The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause, 20 FORDHAM URB. L.J. 621 (1993).

[221] As David Harris puts it, "no driver can avoid violating some traffic law during a short drive, even with the most careful attention." Harris, *supra* note 98, at 545.

[222] *See infra* Part III.C.

[223] *See* JAMES BALDWIN, THE FIRE NEXT TIME 24 (1963) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

[224] *See* John B. Mitchell, *What Went Wrong with the Warren Court's Conception of the Fourth Amendment?*, 27 NEW ENG. L. REV. 35, 41 (1992).

III. The Equality Principle and Citizenship

The argument thus far has been that our criminal procedure protections, as conceptualized between the 1920s and 1960s, owe much to a normative vision of equal citizenship, indeed a normative vision of America. In recent decades, however, the Court has turned away from that vision and subordinated it to an immediate concern for crime control. As I argued above, the Court that first subordinated that vision was not the Rehnquist or Burger Court, but the Warren Court when it reinterpreted the Fourth Amendment in *Terry v. Ohio*, vesting police with a level of discretion that the Warren Court knew would be racially inflected. That shift in focus has had negative consequences not just for minorities. It has had negative consequences for all of us and for our very ideal of equal citizenship. It is against this backdrop that I return to *Whren*.

Recall that in *Whren*, the Court rejected a Fourth Amendment challenge to a pretextual car stop designed to search for drugs and other contraband. But this was only part of Whren's claim. The second part, which Justice Scalia dismissed as a makeweight argument, was that the stop was racially motivated; specifically, that Whren and his companion were stopped because they were black men in a Pathfinder. Racial discrimination, Justice Scalia responded, is simply not cognizable under the Fourth Amendment. Rather, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[225] The Court read equality, racial or otherwise, as outside of the purview of the Fourth Amendment. In constitutional terms, the Court embraced a kind of acoustic separation[226] between various constitutional rights. Or to borrow from Albert Altschuler, the Court adopted a worldview in which rights are "hermetically sealed units whose principles must not contaminate one another."[227] Allow me to offer my own assessment: the Court sanctioned something akin to constitutional rights segregation.

Again, *Terry* was where the Court went off course, at least in the Fourth Amendment context, and veered from its commitment to notions of equal citizenship. The path that the Court took instead led to *Whren*, a decision that completely decoupled the Fourth Amendment from notions of equality. But this path was not an inevitable one. And it is still possible to imagine reconnecting the Fourth Amendment to broader notions of equality. The sections below begin this imagining.

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[225] Whren v. United States, 517 U.S. 806, 810 (1996).

[226] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law*, 97 Harv. L. Rev. 625 (1984).

[227] Albert W. Altschuler, *Racial Profiling and the Constitution*, 2002 U. Chi. Legal F. 163, 193.

A. Textual Support for Reinterpreting the Fourth Amendment

Although much has been written about how the Fourth Amendment should be interpreted, most of this scholarship has focused on the interplay between the Fourth Amendment's reasonableness clause and its warrant clause. But there is another aspect of the Fourth Amendment that has not been sufficiently attended to: its textual connection to notions of equality.

I began this Article by suggesting that one subtext of the seminal criminal procedure cases between the 1920s and 1960s was a commitment to the notion of equal citizenship. In fact, the concern was more than subtextual. It was an undertow, pulling the cases in certain directions and toward certain conclusions.

To a certain extent, one could argue that these were activist decisions. But looking at these cases from a different angle suggests otherwise. To explain what I mean, it is necessary to think about what the Bill of Rights meant when it was ratified, and how that meaning changed with ratification of the Fourteenth Amendment. After all, the first ten amendments were ratified when blacks were viewed as "natural slaves,"[228] as non-citizens,[229] and racial subordination was the law. Indeed, it is useful to recall that these amendments were ratified nearly contemporaneously with Article I, Section 9 of the Constitution, which prohibited Congress from taking any action to interfere with the slave trade prior to 1808.[230] In the case *Commonwealth v. Griffith*,[231] the Supreme Judicial Court of Massachusetts put it directly: none of the protections of the Bill of Rights extended to slaves.

However, as Akhil Amar, Andrew Taslitz, and I have separately argued elsewhere,[232] to interpret the Fourth Amendment based solely on *its* historical context and antecedents, and the so-called intent of the founding fathers, is to ignore the sea change ushered in by the Fourteenth Amendment. The Fourteenth Amendment was more than an addendum to the Constitution. Consider specifically the Fourth Amendment. Though the text on its face remained the same, its meaning was indelibly changed in 1868 by the ratification of the Fourteenth Amendment. At the most basic level, who constituted "the people"—as in "the right of the people to be secure . . . against

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[228] *See* William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81 (1972).

[229] This was the conclusion reached in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment,* U.S. CONST. amend. XIV.

[230] *See* U.S. CONST. art. I, § 2, cl. 3 (permitting the counting of slaves for purposes of representation and taxation); U.S. CONST. art. I, § 9, cl. 1 (regarding the slave trade); U.S. CONST. art. IV, § 2, cl. 3 (regarding fugitive slaves).

[231] 2 Mass. (2 Pick.) 11 (1823).

[232] *See* TASLITZ *supra* note 187, at 12 (arguing that the Fourteenth Amendment "mutated the meaning of the constitutional rules governing search and seizure"); Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805–10 (1994); Akhil R. Amar, *supra* note 24, at 1266 (arguing that the rights reflected in the Bill of Rights were each subtly but importantly transformed by the Fourteenth Amendment); Capers, *supra* note 11, at 74. R R

unreasonable searches and seizures"—necessarily meant something entirely different post-1868 than it did prior to 1868.

But this is only the beginning of the interpretive change ushered in by the Fourteenth Amendment. The Fourteenth Amendment was more than a "replace all" word processing command to the meaning of "people."[233] The substance was implicitly changed as well. Put differently, the Fourteenth Amendment functioned as a complete *revision*, giving a new breadth and meaning to all that preceded it. After all, one of the concerns of the Fourteenth Amendment was to render a dead letter various antebellum laws that gave officials free license to search and seize blacks.[234] What I am suggesting is that the Fourteenth Amendment, through its extension of citizenship rights to African Americans and its Equal Protection Clause, grafted a requirement of equal citizenship onto the Constitution as a whole, including the Fourth Amendment.[235]

As demonstrated earlier, between the 1920s and 1960s, the Court interpreted the Fourth, Fifth, and Sixth Amendments in a manner consistent with the promise of equal citizenship contained in the Fourteenth Amendment. In this sense, this Article is suggesting a return.

B. A New Criminal Procedure Revolution

The goal of this Article has been twofold: First, to re-read the seminal criminal procedure cases between the 1920s and 1960s—those cases to which we owe most of our criminal procedure protections—as cases that took as a guiding principle the goal of equal citizenship. Second, to argue for a new criminal procedure revolution, one that has as its animating principle a renewed commitment to equal citizenship.

This section sketches out, concededly in broad strokes, what such a commitment might look like in practice. To be clear, the proposals that I sketch out below are not intended to supplant the availability of challenges under the Equal Protection Clause. However, given the equal protection hurdles erected by the Court,[236] my proposals would provide alternative ave-

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[233] I am indebted to Akhil Amar for this turn of phrase. *See* Akhil R. Amar, *The Case of the Missing Amendments*: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 152 (1992).

[234] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 268 (1998); *see also* TASLITZ, *supra* note 187, at 250–53. Similarly, the Fourteenth Amendment, which was intended in part to allow newly freed slaves to arm themselves as citizens against attacks from white mobs, completely revised the meaning of the Second Amendment's right to bear arms. *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1327–36 (2009). **R**

[235] Other scholars have made similar arguments with respect to reading the Constitution holistically. *See, e.g.*, Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673 (2002) (using equality as a principle for understanding Establishment Clause cases); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103 (2004) (arguing that equality should inform due process jurisprudence).

[236] So long as police targeting is not based solely on race, courts tend to treat their actions as beyond the purview of the Equal Protection Clause. *See, e.g.*, United States v. Weaver, 966

nues for relief. Note too that my proposals are not dependent upon specific implementing actors. Where federal courts are reluctant to act, state courts can step in. Where legislators are loath to commit to change, law enforcement agencies, through internal policies, can fill the gap. Nor do the proposals outlined below exhaustively explore the ways that a renewed commitment to equal citizenship might shape Fourth Amendment jurisprudence. These proposals are but one imagining.

1. Rethinking the Fourth Amendment

Given that the Court's abandonment of its commitment to equal citizenship is traceable, at least in the Fourth Amendment context, to *Terry v. Ohio*, one place to begin imagining a new criminal procedure jurisprudence is in first re-conceptualizing, and then policing, reasonable suspicion.

Recall that in *Terry*, the Court authorized the limited detention of individuals so long as an officer has reasonable suspicion that criminal activity is afoot, and frisks so long as an officer also has reasonable suspicion that the individuals are armed. Recall also that one by-product of *Terry* has been racial profiling. Rather than interpreting the Fourth Amendment in a way that would further the goal of equal citizenship, the *Terry* Court endorsed the ductile concept of reasonable suspicion, which ultimately undermined that goal. However, this result was not inevitable. Nor is this result irreversible. One goal of the new criminal procedure revolution should be to re-conceptualize, rather than abandon, reasonable suspicion.

Here, my proposal is perhaps radical in its simplicity: reinterpret the Fourth Amendment to permit stop-and-frisks where articulable suspicion is present, *but only so long as such suspicion is free of racial bias or prejudice*.[237] In fact, *Terry* itself provides support for such an interpretation. In *Terry*, the Court deliberately omitted any reference to Terry's race or the

F.2d 391 (8th Cir. 1992) (permitting race as a factor in profiling so long as other factors are present); United States v. Avery, 137 F.3d 343 (6th Cir. 1997) (rejecting statistics showing that blacks were disproportionately targeted and finding that because the officers had a plausible, non-racially-based reason for detaining the defendant, defendant's equal protection claim could not be sustained); *see also* Johnson v. Crooks, 326 F.3d 995 (8th Cir. 2003); Bingham v. City of Manhattan Beach, 329 F.3d 723 (9th Cir. 2003); Bradley v. United States, 299 F.3d 197 (3d Cir. 2002). Moreover, after *United States v. Armstrong*, 517 U.S. 456 (1996), a complainant must show not only discriminatory effect but also discriminatory purpose to make out a claim of discriminatory enforcement. *Id.* at 465; *see also* United States v. Bullock, 94 F.3d 896 (4th Cir. 1996) (applying *Armstrong* to claim of selective enforcement); United States v. Bell, 86 F.3d 820 (8th Cir. 1996) (same). For a critique of *Armstrong*'s intent-based test, see Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

[237] While the focus of this Article has been on race and equal citizenship, its analysis can also apply to other categories. For example, since September 11, 2001, law enforcement officers have often used religion and ethnicity as markers of suspicion. *See* Andrea Elliott, *After 9/11, Arab-Americans Fear Police Acts, Study Finds*, N.Y. TIMES, June 12, 2006, at A1; *see also* Leti Volp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1578 (2002). This too would be prohibited under my proposal.

race of his companions;[238] by doing so, the Court was arguably sanctioning only race-neutral articulations of reasonable suspicion. In short, what I am suggesting is that the Court make explicit what was arguably implicit in *Terry*: that articulable reasonable suspicion must be race neutral. For too long the Fourth Amendment has been an area where the Court has spoken softly about racial discrimination, or not at all.[239] It is time for the Court to speak loudly and clearly.

Under my proposal, a similar principle would limit the concept of "consensual encounters," advanced in *United States v. Mendenhall*.[240] In *Mendenhall* and its progeny, the Court categorized certain "stops" as non-stops and thus outside of the purview of the Fourth Amendment where there has been no show of force and where a reasonable person—even if never advised of his right to leave, which is usually the case—would still feel free to leave. However, the fact is that minorities are disproportionately singled out for "consensual encounters," and minorities are least likely to "feel free to leave."[241] In renewing its commitment to equal citizenship, the Court can reduce the racial disparity in consensual encounters by reinterpreting the Fourth Amendment to require that the selection of individuals for encounters be free of racial bias or prejudice.[242]

Lastly, this limiting principle would also apply to determinations of probable cause. While a racial description of a suspect could continue to be a factor in determining whether probable cause exists, in the absence of a suspect description, using race to gauge whether probable cause exists to make an arrest would be impermissible.

In the recent *Seattle School District* cases, Chief Justice Roberts wrote: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[243] In an interview in *The New Republic,* Justice Scalia claimed, "In the eyes of the government, we are just one race here. It is American."[244] For his part, Justice Clarence Thomas espouses the idea of whites and blacks, and presumably other racial groups, being "blended into a common nationality."[245] One goal of the new criminal procedure revolution committed to equal citizenship would be to say this not just in affirma-

[238] *See* Stokes, *supra* note 204, at 729. **R**

[239] Others have also noted the Court's reticence in this area. *See* RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 569 (2d ed. 2005) (describing *Terry* as "one of the very few of the Court's Fourth Amendment cases that explicitly discuss issues of race").

[240] 446 U.S. 544 (1980).

[241] *See, e.g.*, Maclin, *supra* note 150, at 250. **R**

[242] There are numerous other Fourth Amendment areas where invoking the goal of equal citizenship could result in new standards. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), in which the Court gave its imprimatur to the police practice of not advising individuals of their right to refuse consent, comes immediately to mind.

[243] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[244] Jeffrey Rosen, *The Color-Blind Court*, THE NEW REPUBLIC, July 31, 1995, at 23.

[245] THERNSTROM & THERNSTROM, *supra* note 205, at 11.

tive action cases, or in magazine interviews, but also in cases involving the Fourth Amendment.

Some may counter that this proposed re-conceptualization is ineffectual, pure window dressing. The reasonable suspicion standard, this argument would likely state, is so malleable that requiring race neutrality is likely to be inconsequential. Moreover, officers know that referencing race may expose them to claims of racism, and accordingly omit race in their articulations of the bases for their encounters, stops, and arrests. Perhaps more importantly, an officer's decision to single out an individual for a limited detention or consensual encounter is more likely to be based on implicit racial biases unknown to the officer rather than deliberate racism.[246] Accordingly, merely re-conceptualizing reasonable suspicion and consensual encounters is unlikely to result in real change.

To a certain extent, these concerns are valid, but only to an extent. *First*, the above argument fails to recognize the signaling function that such a change would have. The Court functions as a schoolmaster of sorts.[247] Just articulating that reasonable suspicion and consensual encounters must be race neutral can foster an atmosphere that encourages race-neutral policing. In short, such changes have a function beyond signaling a change in requirements. Such changes also do the work of shifting norms and values.[248]

Second, by repeatedly foregrounding race and the notion of equality in its Fourth Amendment jurisprudence, the Court can make an immediate difference in police-citizen encounters that goes beyond norm shifting. The simple fact, and one that I readily concede, is that racialized policing *is* rarely the product of deliberate discrimination.[249] Rather, it is usually the product of implicit biases about race that we all have. But such biases are not ineradicable. One way to neutralize racial biases is explicitly to make race salient. "[E]ven when stereotypes and prejudices are automatically activated, whether or not they will bias behavior depends on how *aware* people are of the possibility of bias, how *motivated* they are to correct potential bias, and how much *control* they have over the specific behavior."[250]

By promulgating reasonable suspicion, probable cause, and consensual encounter standards that explicitly call attention to race neutrality and equal

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[246] Recent research on implicit biases confirms that individuals associate black men with guilt, and that such associations predict racially-biased judgments. *See* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, OHIO ST. J. CRIM. LAW (forthcoming 2011).

[247] *See* Kamisar, *supra* note 70, at 91; Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127. R

[248] For more on the role that the Court plays in shifting public norms, see generally Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

[249] This is one of the reasons why equal protection violations, which require evidence of discriminatory intent, are so difficult to prove.

[250] Dasgupta, *supra* note 95, at 157. R

citizenship, the Court can sensitize officers to their implicit biases, and provide officers with the tools for overriding such biases. Indeed, emphasizing race neutrality and equal citizenship could even lead to more efficient policing. Recall the racial profiling statistics discussed earlier.[251] Despite the fact that blacks and Hispanics bear the brunt of police stops and encounters, the likelihood that searched blacks and Hispanics will be found with contraband is statistically identical to the likelihood that searched whites will be found with contraband.[252] This suggests that officers could be more efficient by focusing on non-racial factors.

In an earlier article, I argued that calling officers' attention to race in a way that requires officers to then neutralize race is an effective way to minimize inappropriate biases:

> For example, officers learning about the reasonable suspicion requirement should be encouraged to switch the racial identity of the suspect in various fact patterns, i.e., would they reach the same conclusion about reasonable suspicion, or about electing to conduct an encounter, if the subject were white instead of black, or Hispanic instead of white? Officers reaching the same decision would know that they are not being influenced by racial bias. Officers making a different decision, however, can then determine for themselves whether their different decision can be justified. I.e., whether their consideration of race is appropriate or inappropriate.[253]

Now, a different example seems appropriate. An officer applying a standard that calls attention to race and equal citizenship might have thought twice about whether she had probable cause to arrest Henry Louis Gates, Jr. for "disorderly conduct."[254] Similarly, had officers applied an explicitly racially-neutral standard in assessing reasonable suspicion, it is likely that the law-abiding minority professors who I mentioned earlier—Cornel West, William Julius Wilson, Paul Butler, and Devon Carbado—would not have had to endure the citizenship-diminishing harm of being stopped based on little more than racial incongruity. It is even possible that the 402,543 African Americans stopped in New York City between January and September of 2007[255] and found not to be engaged in activity warranting arrest might have escaped having their citizenship diminished.

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[251] *See supra* Part II.A.

[252] *Id.*

[253] Capers, *supra* note 11, at 75. R

[254] In fact, since an element of "disorderly conduct" under Massachusetts's law is that the conduct occur in public, which Gates's conduct did not, probable cause was lacking. *See, e.g.*, Commonwealth v. Mulvey, 784 N.E.2d 1138, 1142-43 (Mass. App. Ct. 2003). This is undoubtedly one reason why the charges against Gates were dropped a few days after his arrest.

[255] *See supra* note 126. R

Third, making race neutrality and equal citizenship a component part of any Fourth Amendment analysis is likely to have the additional benefit of re-invigorating and fortifying the judiciary's (and the screening prosecutor's) policing function. In prior work, I have argued that inappropriate biases can be detected, and overridden, by engaging in switching exercises, in which decisionmakers switch the race of individuals under consideration.[256] One way to police reasonable suspicion and consensual encounters would be to subject such decisions to similar scrutiny. For example, a court (or screening prosecutor) reviewing the facts in *Terry v. Ohio* could easily conclude that reasonable suspicion would have existed even if Terry and his companion were white, all other factors being the same. Conversely, a court reviewing the *Mendenhall* or *Whren* or *Caballes* cases might conclude that the decision to engage Mendenhall, or to tail and stop Whren and Caballes, would not have been made were they white.

Since the Fourth Amendment also requires that all searches and seizures be reasonable, this requirement of race neutrality would also apply to the duration and terms of any stop or search. For example, even where, under this new standard, an initial stop is race-free and lawful, the stop can metastasize into an unlawful stop if the duration or terms are not race neutral. This would capture disparate treatment beyond the stop or encounter. A case in point is *Anderson v. Creighton,*[257] the leading case on the scope of police officers' qualified immunity. Officers entered the Creighton home apparently believing that exigent circumstances justified a warrantless search for Mrs. Creighton's brother, though they declined to inform the Creightons of this.[258] Instead, the officers proceeded to yell at the Creightons, punch Mr. Creighton in the face, and hit their ten-year old daughter, causing an arm injury that required medical treatment.[259] Ultimately, the Court rejected their civil rights claim on the ground that reasonable officers could believe that exigent circumstances justified the warrantless entry.[260] Had the Court focused instead on the reasonableness of the post-entry conduct of the police, my proposal would strengthen the Court's ability to find a violation. The police officers were all white; the Creightons were black.[261] The Court would thus ask whether the post-entry treatment of the Creightons

[256] I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 23 (2008) (proposing and exploring the benefits of decisionmakers engaging in a switching, or cross dressing, exercise); *see also* I. Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.–C.L. L. REV. 43, 75 (2009); I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. (forthcoming 2011). This idea builds upon the proposals of Cynthia Lee for analyzing self defense and provocation cases. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN 12 (2003).

[257] 483 U.S. 635 (1987).

[258] The facts are taken from the Eighth Circuit's decision. Creighton v. City of St. Paul, 766 F.2d 1269, 1270 (8th Cir. 1985).

[259] *Id.* at 1271.

[260] *Anderson*, 483 U.S. at 663.

[261] *Creighton*, 766 F.2d at 1270.

was reasonable under the Fourth Amendment, *and* whether the police would have engaged in such treatment had the Creightons been white.[262]

Fourth, my proposal has the advantage of simplicity. It does not jettison *Terry* stops, or the ability of officers to engage in consensual encounters. Nor does it require an overhaul of any other Fourth Amendment law. Rather, it merely asks the Court to make explicit what was arguably implicit in *Terry*, and certainly implicit in the decisions of the first criminal procedure revolution: that equal citizenship matters. My proposal—this part at least—requires only that the Court act as a schoolmaster and speak. As such, this part of the proposal largely maintains the status quo, but with the goals of eliminating racialized policing and achieving equal citizenship. To be sure, these proposals may not entirely eliminate unequal treatment. But they will constitute an important first step in the goal of democratic policing, the *sine qua non* of equal citizenship.

2. Randomization

There is an even more important way in which Fourth Amendment jurisprudence could reflect a renewed commitment to the promise of equal citizenship: by taking a liberal approach to Fourth Amendment searches and seizures that, by definition, apply to all citizens equally.

In several cases now, the Court has given its imprimatur to checkpoint stops and searches, permitting such intrusions so long as the primary programmatic purpose[263] of the checkpoint is not a law enforcement purpose. Thus, in *Michigan Dept. of State Police v. Sitz*,[264] the Court upheld a fixed sobriety checkpoint since the primary purpose was to prevent automobile accidents and fatalities, rather than to make arrests, and because the nature of the intrusion was free from arbitrariness or discretion.[265] In *Illinois v. Lidster*,[266] the Court approved a highway checkpoint to seek information from motorists about a hit-and-run accident where the police "stopped all vehicles systematically."[267] And in *United States v. Martinez-Fuerte*, the Court approved the stopping of vehicles at a fixed immigration checkpoint near the border precisely because such stops vested officers with no discre-

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[262] For example, consider a case in which an officer pulls over a black driver for running a red light, detains him for approximately fifteen minutes, points a gun at his family members, and threatens to "screw" him over, all while the driver is explaining that he was rushing to be by the side of his dying mother-in-law. The jury would be instructed to imagine the driver as white and determine whether the officer would have treated a similarly situated white driver in the same manner. This hypothetical is based on the recent and actual case of professional football player Ryan Moats. *See* Mark Maske, *Texans' Moats, Wife Says Officer Pointed Gun at Her*, WASH. POST, Mar. 31, 2009, at D3.

[263] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 46 (2000); *see also* Lynch v. City of New York, 589 F.3d 94, 100 (2d Cir. 2009).

[264] 496 U.S. 444 (1990).

[265] *Id.* at 454–55.

[266] 540 U.S. 419 (2004).

[267] *Id.* at 428.

tion to choose which cars to stop.[268] In contrast, the Court has struck down similar checkpoints where police still retain some discretion.[269]

In fact, such checkpoints have become a routine part of life, especially since September 11, 2001.[270] And in fact, such checkpoints do much to further the goal of equal citizenship. Thus my second proposal is that such non-discretionary searches should be encouraged, not discouraged. Ultimately, such searches are less harmful than racially discriminatory searches.

Consider what non-discretionary searches such as checkpoints do. They spread the cost of law enforcement to everyone, eliminating the risk of arbitrary or discriminatory enforcement. In short, checkpoints are by definition egalitarian. Unfortunately, the Court so far has upheld such searches only where the primary goal is not law enforcement.[271] But this reads the Fourth Amendment too narrowly. The Fourth Amendment is capacious enough, certainly under its reasonableness clause, to permit limited intrusions and non-discretionary searches even where the primary goal is law enforcement oriented. Let me state this differently. In determining the reasonableness of such an intrusion, the deciding issue should not be simply whether the primary goal is law enforcement or not. The deciding issue should be: how does the degree of intrusion on the individual, which in turn depends on how discretionary the intrusion is, balance against the state's police function? Just as we now permit non-discretionary, relatively innocuous searches at airports and on subways, we should permit non-discretionary, innocuous encounters and stops on the street, so long as such searches are conducted equally. The status quo is a system in which racial profiling undermines the goal of equal citizenship. What I am suggesting is a system where discretionary, racially-based stops are replaced by non-discretionary, race-free stops. This may sound radical, but it is entirely consistent with the goal of equal citizenship.

One can imagine the counter-argument: this proposal will tie the hands of the police. But this counter-argument misapprehends my proposal. I am not suggesting that randomization would replace consensual encounters or stops based on reasonable suspicion. What I am suggesting is that randomization should be used as a supplemental law enforcement tool; one that assists in the goal of eliminating racialized policing and achieving the goal of equal citizenship. To the extent that the police choose to select someone for a consensual encounter after making sure that their selection is racially neutral, they can engage in a consensual encounter. To the extent that they determine that they have reasonable suspicion based on articulable

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[268] 428 U.S. 543, 559 (1976).

[269] *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 661 (1979) (striking down roving patrol to check for drivers' licenses and registrations where the decision about which vehicles to stop was largely left to officers' discretion).

[270] *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE 433 (8th ed. 2007) (describing checkpoints as now a "routine part of life").

[271] *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

facts that are race neutral, they can conduct a *Terry* stop. In addition to the foregoing, they would be able to engage in truly random stops.[272]

One can also imagine the counter-argument that my proposal will erode personal liberties insofar as it will subject *more* people to police stops. But this also misapprehends my argument. By encouraging randomization, I am not suggesting that the police subject more citizens to stops. I am only suggesting that their selection of whom to stop be conducted in a way that is more egalitarian, racially neutral, and not citizenship diminishing. Instead of blacks and Hispanics disproportionately bearing the costs of police stops, my proposal spreads the costs of crime control to everyone. If the goal is equal citizenship, then we should all be equally willing to share the costs.

3. Civil Remedies

Since *Mapp v. Ohio*, the exclusion of wrongfully obtained evidence has been the *de facto* remedy for a Fourth Amendment violation. But this has resulted in a curious state of affairs. The primary beneficiaries of the exclusionary rule are, by definition, those individuals who have something to exclude. In terms of rights, this essentially means that the law breaker whose Fourth Amendment rights have been violated has recourse. By contrast, the law-abiding citizen who is wrongfully targeted for a stop and search is essentially left without recourse, even in situations where the stop and search was in contravention of the Fourth Amendment because either reasonable suspicion or probable cause was absent.[273] This has particular consequences for law-abiding minorities, who disproportionately bear the error costs of unequal policing. Given the close association between rights and equal citizenship,[274] this also has particular consequences for the goal of equal citizenship.

The third remedy thus involves reinvigorating the practice, in place at the time that the Fourth Amendment was first ratified, of allowing individuals whose rights are violated to seek redress, and punitive damages, through civil actions. It was, after all, the much-lauded punitive damages that John Wilkes won after challenging the general warrant used to seize items from his home—the well-known case of *Wilkes v. Wood*[275]—that laid the ground-

[272] Ultimately, my proposal still ties the hands of the police insofar as it takes away their ability to use race as a proxy for criminality. However, it replaces this discriminatory, inefficient, and citizenship-diminishing tool with an egalitarian, efficient, and citizenship-leveling tool.

[273] While law-abiding citizens in theory could seek civil recourse under 42 U.S.C. § 1983, in practice, seeking such recourse is rarely practical. Officers and municipalities usually enjoy immunity, and even when there is no immunity, obtaining damages is nearly impossible. On the inability of Section 1983 to provide real remedies in these cases, see Steiker, *supra* note 1, at 849. R

[274] *Cf.* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 146–56 (1991).

[275] 19 Howell's State Trials 1153 (C.P. 1763), 98 Eng. Rep. 489.

work for the Fourth Amendment. And as a practical matter, civil actions make sense.

Permitting punitive damages in civil actions is likely to deter government officials from violating the Fourth Amendment, even when such damages are indemnified by municipalities, in a way that the exclusionary rule has failed to do. Especially when there are limited resources to meet operating expenses, municipalities, and more specifically police departments, are likely to keep track of officers that are financial liabilities, especially since large punitive damages awards will likely impact across-the-board pay raises and cost-of-living adjustments. Indeed, such actions would likely prompt police departments to play an active role in routing out the "bad apple" officers—which may be very few[276]—who repeatedly commit constitutional violations.

Although others have argued for a return to civil actions,[277] my reason for advocating civil actions—to further equal citizenship—makes the implementation of my proposal tangibly different from the schemes that others suggest. My proposal also addresses the main concern that critics of civil actions have raised, namely that juries are likely to be pro-law enforcement, to have their own implicit biases, and therefore to reaffirm the status quo of unequal policing rather than challenge it. *First*, in the actions that I am proposing, the jury would not be told whether the police action resulted in the seizure of contraband or in a prosecutable offense. In other words, juries would be tasked merely with deciding whether officers violated the Fourth Amendment either because they lacked probable cause, reasonable suspicion, or an objection-free basis for selecting an individual for a consensual encounter, or because the duration or terms of any search or seizure were unreasonable. This would avoid the problem of hindsight bias. *Second*, in the actions that I am proposing, jurors would be encouraged to engage in the type of switching exercises that I described in the prior section as a method of overriding inappropriate biases.[278] *Third*, just as jurisdictions finance public defenders to defend indigent defendants, jurisdictions would be encouraged to finance public advocates to represent indigent plaintiffs in civil actions. The public advocates are likely to be best positioned to bring individual civil actions, to seek certifications of class actions where appropriate, and to pursue additional remedies where appropriate, such as injunctive relief.

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[276] As Malcolm Gladwell recently pointed out, there is evidence to suggest that the number of officers who engage in serious wrongdoing is relatively small. The problem, rather, is that these officers tend to be repeat offenders. *See* Malcolm Gladwell, *Million-Dollar Murray: Why Problems Like Homelessness May Be Easier To Solve Than To Manage*, NEW YORKER, Feb. 13, 2006, at 96 (focusing on the Christopher Commission's investigation into the use of excessive force by the L.A.P.D. following the Rodney King beating).

[277] *See, e.g.*, Amar, *supra* note 232, at 811–16; Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (proposing a damages regime as an alternative to the exclusionary rule).

[278] *See supra* note 256 and accompanying text.

While placing these matters in the hands of juries may on occasion result in inconsistent verdicts, those inconsistencies will ultimately advance the goal of equal citizenship, rather than frustrate it. The possibility that a stopped individual will bring a civil action and recover punitive damages will deter officers from fabricating reasonable suspicion, or using race as a proxy for criminality, or engaging in disparate treatment that undermines the goal of equal citizenship.

C. Legitimacy, Crime Control, Education, and Citizenship

My proposals above—re-conceptualizing and policing reasonable suspicion and consensual encounters, encouraging randomization, and reinvigorating civil actions for violations—attempt to redress the current state of affairs in which the use of race as a proxy for suspicion and justification for disparate treatment is pervasive and has permitted a race-based caste system to flourish. The goal is equal citizenship. My proposed remedies attempt to chart a way there.

Earlier, I posed the question: what does racial profiling say about our claim of equal citizenship and our democratic project? In this final section, allow me to ask another question: What might the absence of race-based policing do for our democratic project? To many, the answer is obvious: to eliminate race-based policing is to tie the hands of the police and ignore reality; it is to accept an increase in crime.

But as I have argued elsewhere, this answer, however correct it proves to be in the short-term, is likely to be wrong in the long-term.[279] Legitimacy theory suggests that individuals are more likely to voluntarily comply with the law when they perceive the law to be legitimate and applied in a non-discriminatory fashion.[280] From the point of view of racial minorities, this is precisely the opposite of the current state of affairs. By refashioning the Fourth Amendment and implementing remedies consistent with the goals of equal citizenship, we are likely to increase the perception that criminal justice is fair, which will likely increase voluntary compliance and result in a significant diminution of crime.[281]

Crime reduction, however, is just one collateral benefit of the retooling that I am proposing. The second benefit flows from the notion that a reinvigorated civil enforcement regime would also serve an educational function. The simple fact is that minorities and non-minorities continue to have very different perceptions about the police in regard to myriad issues including the pervasiveness of police use of excessive force, the pervasiveness of racial profiling, the equal deployment of police resources, and the simple

[279] Capers, *supra* note 9, at 877–80. **R**
[280] *Id.*
[281] *Id.*

matter of respect during police-citizen encounters.[282] In addition, even when non-minorities are cognizant of discriminatory policing such as racial profiling, many non-minorities view such unequal policing as amounting solely to a minor inconvenience.[283] Modifying judicial standards and reviving civil actions will do much to educate the populace about the realities of unequal policing, and perhaps even render visible the citizenship harms to law-abiding racial minorities. Indeed, because the civil regime that I am proposing includes switching exercises, this educational benefit is likely to have particular purchase. Alexis de Tocqueville, who early on saw juries as an educational tool, would be proud.[284]

The third benefit is related to the first two, but is arguably less tangible, less measurable. However, for me, it is even more important than the other benefits, and brings me back to the motivation for this Article. The third and most significant benefit is the idea that refashioning the Fourth Amendment can quite simply, and finally, send a message of belonging to America, that racial minorities are full citizens, and that all citizens truly are equal.

Justice Brandeis, offering his view of the Fourth Amendment back in 1928, suggested:

> The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[285]

Forty years later, the Court embraced Justice Brandeis' articulation of the "right to be let alone" as one of the animating principles, if not the animating principle, of the Fourth Amendment.[286] What I am suggesting is a better, more robust animating principle: the right to share in the language of the Fourth Amendment's protections, to share in "the right of the people"; in other words, the right of belonging.

CONCLUSION

"We stand today at a moment of comparative pause and quiet in the kinetic and turbulent development of the relation between the courts and the

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[282] *Id.* at 842–44.

[283] Indeed, the *Terry* Court categorized such stops as a "minor inconvenience." Terry v. Ohio, 392 U.S. 1, 10 (1968). For a critique of this categorization, see Andrea Wang, Illinois v. Wardlow *and the Crisis of Legitimacy: An Argument for a "Real Cost" Balancing Test*, 19 LAW & INEQ. 1, 20 (2001).

[284] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed., Doubleday 1969) (1840).

[285] Olmstead v. United States, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting).

[286] Katz v. United States, 389 U.S. 347 (1967).

police in this country."[287] So began Herbert Packer's article "The Courts, The Police, and the Rest of Us" some forty-odd years ago. Now, notwithstanding occasional flare-ups, the signs are all around us that we are at another time of repose. Crime rates are at historic lows. The concerns about widespread racial riots that prompted the Court's decision in *Terry* seem, for now at least, a thing of the past. Even in the recent Fourth Amendment case of *Arizona v. Gant*,[288] the Court acknowledged that times are different.

This is the interesting part. We are both at a moment of repose and one of great opportunity. With the election of President Barack Obama, our promise of equal citizenship for all, without regard to race, seems closer than ever. As we anticipate the changing composition of the Court, the time is ripe to think about the paths we have traveled, and about the direction in which we are heading. In thinking about that direction, we would do well to attend to the goal of equal citizenship. And we would do well to reincorporate that goal as a guiding principle in our jurisprudence.

In this Article, I have attempted to re-read and re-imagine the Fourth Amendment in a way that revives the guiding principle of equal citizenship and that benefits us all. In short, what I have argued for is a re-coupling of the Fourth Amendment to the promise of equal citizenship embodied in the Fourteenth Amendment. The ultimate ambition of this Article is broader, of course. For example, how do we extend the promise of equal citizenship embodied in the Fourteenth Amendment to other amendments? How might such a guiding principle better inform the Sixth Amendment, for example, and the goal of having truly effective assistance of counsel? How might such a guiding principle better inform the Eighth Amendment, and add weight to what it means to have a truly fair death penalty system? There are other questions of course, including, I am sure, ones that I have not anticipated. But what I am certain of is this: there are many of us, at this liminal moment, who are eager to roll up our sleeves and begin.

[287] Packer, *supra* note 39, at 238. **R**

[288] 129 S. Ct. 1710, 1713 (2009) (observing that twenty-eight years of experience since the *Belton* rule was decided weighed against blind adherence to *stare decisis* permitting automatic vehicle searches).