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A Citizenship Model of the Fourth Amendment

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Fourth Amendment law is in disarray. In recent years, courts and scholars have questioned central aspects of Fourth Amendment doctrine—in particular, the reasonable expectations of privacy test that has governed since the 1960s. Scholars and judges have argued for abandoning this test and instead looking to private law (sub-constitutional rules governing private conduct, such as tort, property, and contract law) to determine Fourth Amendment protection.

At a moment when judges and scholars are questioning core aspects of Fourth Amendment doctrine, the time is ripe to reconsider the values Fourth Amendment law ought to serve. I advance a novel vision for Fourth Amendment law, centered not around privacy or private law, but around the value of democratic citizenship. I argue that the prevailing Fourth Amendment rules and proposed private law alternatives are both deficient in one important respect: they both fail to recognize and address the ways in which policing impacts democratic citizenship. A large body of social science research shows that coercive encounters with police tend to diminish people's trust in government, sense of citizenship, and political participation. These citizenship harms, I argue, ought to be a central concern for Fourth Amendment law. This is necessary to realize the Fourteenth Amendment's guarantee of full and equal citizenship.

Under a citizenship model, when deciding whether an action is an unreasonable search or seizure, courts would consider what the action conveys about the subject's belonging and standing in the community. To evaluate this, courts would ask how the action comports with values associated with democratic citizenship, such as participation, autonomy, anti-subordination, and proportionality.

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A Citizenship Model of the Fourth Amendment

DANIELI EVANS*

INTRODUCTION

Fourth Amendment jurisprudence is in disarray.¹ Courts have long struggled to define what constitutes an unreasonable search in violation of the Fourth Amendment.² The Supreme Court has defined search by asking if the government either trespassed on constitutionally protected property,³ or violated reasonable expectations of privacy.⁴

Many judges and scholars have criticized the “reasonable expectations of privacy” test.⁵ There are several conceptual issues with the Court’s focus on expectations of privacy: Why is privacy the primary value that the Fourth Amendment ought to protect?⁶ Even if the Fourth Amendment is about protecting privacy, why are people’s *expectations* dispositive, rather than normative ideas about what privacy protections ought to be?⁷ And if reasonable expectations are the proper standard, how should judges decide

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¹ See, e.g., *State v. Wright*, 961 N.W.2d 396, 410 (Iowa 2021) (“Current Fourth Amendment jurisprudence is a mess.”). In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), there were five different opinions, each advancing a different view of how the Fourth Amendment should apply to the cell site location information at issue.

² See *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting) (stating that the governing Fourth Amendment precedent has yielded “unpredictable—and sometimes unbelievable—jurisprudence”).

³ *United States v. Jones*, 565 U.S. 400, 407 (2012).

⁴ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (“[A] person has a constitutionally protected reasonable expectation of privacy”); *Carpenter*, 138 S. Ct. at 2241.

⁵ See, e.g., Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 742 (2019) (describing the *Katz* test as “one of the most widely disparaged tests in all of American law” and citing scholarship critiquing it); Danielle D’Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L. J. 910, 923 (2023); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1824–25 (2016); see also *Carpenter*, 138 S. Ct. at 2261–62, 2266–67 (Gorsuch, J., dissenting) (suggesting that the “reasonable expectations of privacy test” does not adequately uphold the Fourth Amendment).

⁶ *Carpenter*, 138 S. Ct. at 2237–38 (Thomas, J., dissenting); *id.* at 2264–65 (Gorsuch, J., dissenting); Baude & Stern, *supra* note 5, at 1824–25, 1828.

⁷ Tokson, *supra* note 5, at 743 (arguing for a normative approach defined in terms of the harms of surveillance).

what expectations are reasonable?⁸ A test based on privacy expectations may diminish privacy protections over time, as expectations adapt to increasingly invasive technology; and it seems ill-equipped to handle digital information, which people routinely surrender in order to make use of pervasive technologies, such as cell phones and the internet.⁹

Frustrated with the current doctrine, many scholars and judges have advanced alternative approaches that would define Fourth Amendment protections by reference to private law, i.e., sub-constitutional law that governs relations between private individuals, such as property, tort, and contract law.¹⁰ While these approaches differ in significant ways, which I discuss below, they share a common conceptual logic: in evaluating whether an officer's action violates the Fourth Amendment, courts would ask whether the same action would be illegal for a private party to perform under common law and other regulations governing private conduct.¹¹ In recent years, private law approaches have gained more traction among judges.¹²

⁸ *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting); Michael C. Pollack & Matthew Tokson, *Decentering Property in Fourth Amendment Law*, 92 U. CHI. L. REV. 705, 715 (2025) (“Courts have applied different theories of what makes an expectation of privacy reasonable, and the Supreme Court’s interpretations of the standard are often inconsistent.”).

⁹ Tokson, *supra* note 5, at 742; D’Onfro & Epps, *supra* note 5, at 923; Baude & Stern, *supra* note 5, at 1824–25.

¹⁰ See, e.g., Baude & Stern, *supra* note 5, at 1825 (stating that “[t]his Article challenges the foundations of the privacy-centered understanding, offering an alternative vision of the Fourth Amendment and a replacement for the reasonable expectation of privacy doctrine.”); D’Onfro & Epps, *supra* note 5, at 913 (describing how there is an alternative to the *Katz* test); Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010, 1013 (2023) (describing how the Court could use property law when analyzing the Fourth Amendment). The private law approach has gained more attention since Baude & Stern, *supra* note 5, was discussed in *Carpenter*, 138 S. Ct. at 2206, 2263 (Gorsuch, J., dissenting). However, these ideas had been discussed in previous work. See, e.g., Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 251 (1993) (discussing “the misunderstood relationship between the Fourth Amendment and the positive law”); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 532–34 (2007) (describing the benefits of and issues with the positive law model); Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1232 (2015) (describing why the Fourth Amendment is mostly “contingent on state law”). On the distinction between public and private law, see John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012) (“Private law defines the rights and duties of individuals and private entities as they relate to one another. . . . [I]n contrast to public law, which establishes the powers and responsibilities of governments, [and] defines the rights and duties of individuals in relation to governments . . .”). As with most distinctions, the boundary between private and public law is not absolute. *Id.*; see also Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J. L. & PUB. POL’Y 267, 271–72 (1986) (showing that the private law approach is more effective provides a compelling justification for limiting reliance on the public law approach).

¹¹ See Baude & Stern, *supra* note 5, at 1825 (“Instead of making Fourth Amendment protection hinge on whether it is ‘reasonable’ to expect privacy in a given situation, a court should ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform.”); D’Onfro & Epps, *supra* note 5, at 925–26 (arguing for the same); see also *infra* Part I (discussing the idea that “in evaluating whether an act is an unreasonable search or seizure, courts should ask whether a civilian performing that same act would violate private law—e.g., tort, contract, property, or criminal law.”).

¹² See D’Onfro & Epps, *supra* note 5, at 925–26 (describing the increased popularity of the positive law model); see also *infra* notes 43–45 (discussing different approaches to the Fourth Amendment).

As scholars and courts continue to rethink central aspects of Fourth Amendment doctrine, the time is ripe to reconsider the fundamental values that Fourth Amendment law should serve.

I respond to the recent move toward centering private law in Fourth Amendment analysis. I argue for a novel approach to Fourth Amendment law, based on neither privacy expectations nor private law, but instead focused on the value of democratic citizenship. I contend that a citizenship model is superior to both current Fourth Amendment jurisprudence and proposed private law alternatives because a citizenship model would advance the Fourteenth Amendment's yet-unrealized guarantees of full and equal citizenship.

Both current Fourth Amendment jurisprudence and proposed private law alternatives overlook how policing can threaten democratic citizenship. As a result, both can allow police to treat people in ways that threaten and potentially undermine the value of democratic citizenship. As I elaborate below, a substantial body of social science research shows that coercive interactions with police tend to diminish trust in government, sense of citizenship, and political participation.¹³

Under current Fourth Amendment jurisprudence, the Court does not consider these citizenship-related harms when evaluating when police may detain, arrest, and search people.¹⁴ It has granted police broad discretion to engage in actions that subordinate, stigmatize, demean, and tend to teach people lessons antithetical to democratic citizenship and political participation.

Proposed private law alternatives do not directly consider these citizenship-related harms, either. As I explain below, they would likely sustain aspects of Fourth Amendment jurisprudence that grant police broad discretion to stop, question, arrest, and search people. Hence, private law approaches could maintain, and even potentially exacerbate, the citizenship harms associated with policing. Because bodies of private law are designed primarily to regulate civilians' conduct, their standards and rules are not calibrated to address the government's unique power and social role.¹⁵ The private law approaches overlook important differences between interactions with police and interactions with civilians: police are prominent representatives of government institutions. Hence, interactions with police

¹³ See *infra* Part II.A (describing how police encounters impact citizenship).

¹⁴ See *infra* Part II.B (describing how the current Fourth Amendment jurisprudence overlooks citizenship harms).

¹⁵ Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 322 (2016) ("In general, the government poses special risks of abuse because of its distinctive capabilities, incentives, and social role."); see also *infra* Part III.A (describing why Fourth Amendment law should recognize citizenship as a central value); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 391–92 (1971) (rejecting the government's argument that state tort law was an adequate remedy for a violation of the Fourth Amendment, and explaining that "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own").

serve a distinct educative and socializing function and have broader implications for people's sense of citizenship and political participation. These citizenship-related concerns are not central to the private law rules that would govern Fourth Amendment analysis under private law approaches.

To advance the Fourteenth Amendment's yet-unfulfilled promise of full and equal citizenship, Fourth Amendment law must address the ways in which policing can undermine citizenship. To accomplish this, rather than centering privacy expectations or private law, Fourth Amendment law ought to center the value of democratic citizenship. Under this approach, instead of focusing exclusively on privacy or private law, courts would consider what policing practices convey about the subject's belonging and standing within the community. They would ask how a policing practice comports with key values of democratic citizenship, such as voice, participation, autonomy, anti-subordination, and proportionality.¹⁶ This would not mean that private law and expectations of privacy are irrelevant to the Fourth Amendment analysis, but courts would consider these values in relation to the overarching values of citizenship.

While other scholars have raised different objections to defining the Fourth Amendment by reference to private law, this piece is the first to address these citizenship-related concerns, drawing from the large body of social science research on policing and citizenship.¹⁷ Based on these considerations, I advance a novel vision for a citizenship model of the Fourth Amendment.¹⁸

My argument proceeds in the following order:

In Part I, I briefly summarize recent proposals for defining the Fourth Amendment's scope by reference to private law, and I discuss the major critiques of these proposals.

In Part II, I begin by reviewing a large body of social science research showing that police encounters impact people's sense of citizenship and political participation. Then, I describe how current Fourth Amendment jurisprudence overlooks these citizenship-related harms, granting police

¹⁶ See *infra* Part III.B (describing how policing policies comport with key values, such as voice and participation).

¹⁷ See Re, *supra* note 15, at 314 (describing how courts would incorporate citizenship into their consideration of Fourth Amendment Law); Tokson, *supra* note 5, at 795–98 (arguing that the positive law approach would not provide adequate privacy protection, and arguing instead for a normative model of the Fourth Amendment centered on avoiding or minimizing the harms of surveillance); Pollack & Tokson, *supra* note 8, at 708 (“[P]roperty law is neither sufficiently clear nor sufficiently resistant to manipulation to justify making it the fulcrum of the Fourth Amendment.”).

¹⁸ An important precursor to my argument is I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 2–3 (2011). Capers argues that the Fourth Amendment law should be read in accord with Fourteenth Amendment protections for full and equal citizenship, and accordingly, should prohibit racial profiling. *Id.* at 49; see also *infra* note 154 and accompanying text (describing the Iowa Supreme Court's holding on what constitutes a search). The citizenship model I am proposing is significantly broader: it would not only prohibit racial profiling, but courts would ask how policing policies comport with values associated with citizenship, such as autonomy, self-determination, and anti-subordination. See *infra* note 154 and Part III.B (detailing the citizenship model).

broad discretion to treat people in ways that are antithetical to citizenship. Finally, I explain how private law approaches could replicate many of these aspects of Fourth Amendment jurisprudence, and thereby sustain, or even exacerbate, many of the citizenship-related harms associated with policing.

In Part III, I advance a vision for a citizenship model of the Fourth Amendment, centered primarily around the value of citizenship, rather than privacy expectations or private law.¹⁹ I argue that this is necessary to fulfill the Fourteenth Amendment's guarantee of full and equal citizenship. I discuss the types of values that courts might prioritize under a citizenship model—i.e., specific qualities of treatment that affirm a person's belonging and equal standing—including voice, participation, autonomy, anti-subordination, and proportionality. I explain how a citizenship model relates to considerations of privacy and private law. Finally, I outline how a citizenship model would apply in exemplary cases involving two central questions in Fourth Amendment analysis: (1) whether a search or seizure occurred, and (2) whether that search or seizure was reasonable.

I. THE PRIVATE LAW MODELS

The move toward centering private law in Fourth Amendment analysis arose out of discontent with current jurisprudence, particularly the reasonable expectations of privacy test. As noted previously, scholars and judges have widely criticized that test for being circular and somewhat arbitrary with respect to the Fourth Amendment's purpose and meaning.²⁰ The reasonable expectations of privacy test poses a particular challenge in the era of big data, where people knowingly expose vast quantities of personal information to third parties, and therefore arguably lack privacy expectations in that information.²¹ These concerns have led judges and scholars to look for an alternative standard for determining Fourth Amendment protection.

A growing number of scholars and judges have argued that, instead of defining Fourth Amendment protections through independent judge-made constitutional standards, courts ought to base these protections on private law.²² Proposed private law approaches advance different ideas about the relevant sources of private law and how private law should be used, but they all share a common conceptual logic: essentially, in evaluating whether an act is an unreasonable search or seizure, courts should ask whether a civilian performing that same act would violate private law—for example, tort, contract, property, or criminal law. Variations of private law models

¹⁹ See *infra* Part III.A (arguing for a citizenship model of the Fourth Amendment).

²⁰ See *supra* note 5 and accompanying text (discussing the problems with the “reasonable expectations of privacy” test).

²¹ *Carpenter v. United States*, 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting).

²² See Brady, *supra* note 10, at 1012 (praising both the positive and general law approaches for “recogniz[ing] the utility and centrality of private law as a mode of analyzing legal problems”).

include the property rights approach, the positive law model, and the general law model.

Property law: There is a long tradition of referring to property law in Fourth Amendment jurisprudence. Prior to 1967, to determine whether a search occurred, the Court focused largely on whether the government physically intruded on one's property.²³ In *Katz v. United States* (1967), the Court expanded the definition of search by holding that an act may be a search if it violates reasonable expectations of privacy, even without any intrusion on one's property interests.²⁴ Between 1967 and 2012, the Supreme Court focused primarily on whether an act violated reasonable expectations of privacy, and less on whether it intruded on one's property interests.²⁵

However, in *United States v. Jones* (2012), the Court took a significant step toward recentering property law in Fourth Amendment analysis.²⁶ Justice Scalia's opinion for the majority held that attaching a GPS device to the undercarriage of Jones's vehicle and monitoring it for twenty-eight days was a search.²⁷ In reaching this conclusion, the majority avoided deciding whether the monitoring violated Jones's reasonable expectations of privacy, and it instead concluded that physically attaching the device to the undercarriage of Jones's vehicle trespassed on Jones's property.²⁸

In *Jones* and cases following it, the Court looked to property law principles to hold that the police conducted a search.²⁹ While *Jones* signaled the Court's shift toward focusing on property law in defining a search, the Court has not (yet) held that a violation of property law is essential to the definition of search. However, several members of the Court signaled their desire to move in this direction in *Carpenter v. United States*.³⁰ The Court held that obtaining over seven days of historic cell site location information from Carpenter's wireless carrier was a search, though the government did not invade Carpenter's papers or effects.³¹ However, three of the four

²³ See, e.g., *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (discussing a search within the meaning of the Fourth Amendment as a “physical intrusion”); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that a wiretap was not a search under the Fourth Amendment because agents did not physically enter Olmstead's property); but see Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 77 (“A close look at the cases reveals a different picture. The Supreme Court never tied the definition of a ‘search’ to trespass law.”).

²⁴ *Katz v. United States*, 389 U.S. 347, 353 (1967); *id.* at 360–61 (Harlan, J., concurring).

²⁵ See, e.g., *Oliver v. United States*, 466 U.S. 170, 183 (1984) (stating that “[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon”) (internal quotation marks omitted) (citation omitted).

²⁶ *United States v. Jones*, 565 U.S. 400 (2012).

²⁷ *Id.* at 403–04.

²⁸ *Id.* at 409 (stating that the *Katz* reasonable expectation of privacy test augments, but does not replace, the prior property-based test).

²⁹ See, e.g., *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (showing how the Supreme Court looked to property law in deciding whether police conducted a search).

³⁰ *Carpenter v. United States*, 138 S. Ct. 2206, 2224 (2018) (Kennedy, J., dissenting).

³¹ *Id.* at 2218–19.

dissenting Justices suggested that this should not be considered a search because the government did not intrude on Carpenter’s papers or property.³²

Positive law: In an influential article published in 2016, Baude and Stern introduced a “positive law model” of the Fourth Amendment.³³ While Baude and Stern “applaud[ed]” the emphasis on property law in cases like *Jones*, they argued for refining this “property-ish” approach in several ways: First, courts should not focus exclusively on property law, but rather, should consider whether the government action would violate any positive law governing private conduct.³⁴ More specifically, they argued, when determining whether an action is a search or seizure, courts should ask whether “government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform.”³⁵ Second, courts should consult the precise, contemporaneous laws in effect in the jurisdiction where the act occurred, rather than looking to generic or historic common law principles.³⁶ Justice Gorsuch’s dissent in *Carpenter* cited Baude and Stern’s piece to suggest that, in evaluating whether the Fourth Amendment protects Carpenter’s cell site location information, the Court should ask whether it would be lawful for a private individual to access these records.³⁷

General law: Though Justice Gorsuch cited Baude and Stern’s positive law model approvingly in his dissent in *Carpenter*, he also raised several questions about how a positive law approach would work in practice, including which source of positive law courts ought to apply, and what courts should do if there are different rules in different jurisdictions.³⁸ In response to questions like these, D’Onfro and Epps proposed an alternative to the positive law model: a “general law” approach.³⁹ Under this approach, courts would determine whether an unreasonable search or seizure occurred by reference to “general law”—a consensus common law derived from the prevailing approach across jurisdictions, as well as predominant legal customs and norms.⁴⁰ This differs from Baude and Stern’s positive law

³² See, e.g., *id.* at 2228 (Kennedy, J., dissenting) (“The defendants could make no argument that the records were their own papers or effects.”); *id.* at 2239 (Thomas, J., dissenting).

³³ See Baude & Stern, *supra* note 5, at 1823 (discussing how the Fourth Amendment should be “anchored in background positive law”).

³⁴ *Id.* at 1834–35.

³⁵ *Id.* at 1825; see also Pollack & Tokson, *supra* note 8, at 720 (discussing Baude and Stern’s positive law model and noting that it emphasizes property law); Kerr, *supra* note 10, at 532–33 (describing the positive law model’s flaws).

³⁶ Baude & Stern, *supra* note 5, at 1835.

³⁷ *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting).

³⁸ D’Onfro & Epps, *supra* note 5, at 914; *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).

³⁹ D’Onfro & Epps, *supra* note 5, at 918.

⁴⁰ *Id.* at 927–28. General law is a source of law that is “not under the control of any single jurisdiction, but instead reflect[s] principles or practices common to many different jurisdictions.” *Id.* (internal quotation marks omitted) (citation omitted). D’Onfro and Epps summarize the general law

model in several ways. Most important for my argument is that courts would not give controlling weight to the positive laws of the jurisdiction where the search occurs. Instead, they would derive federal rules by looking to general law. In determining general law, courts would consider local positive laws as persuasive evidence alongside other sources of general law, such as laws in other jurisdictions, restatements of the law, and “societal norms and practices not codified as positive law.”⁴¹

The foregoing approaches differ in terms of which sources of law courts would consult, but they share the basic idea that the Fourth Amendment should be defined in reference to sub-constitutional law that governs private parties, rather than a distinct set of constitutional rules that apply uniquely to government officials. As such, these approaches share a distinct understanding of the value that Fourth Amendment law ought to promote: they suggest that the Fourth Amendment is fundamentally concerned with “legality” (i.e., holding government officials accountable to laws governing civilians), rather than privacy.⁴² In other words, they understand the Fourth Amendment as being primarily about restraining *government exceptionalism*—its power to do things that private parties cannot do.⁴³

In recent years, these private law approaches have gained traction among judges. Considering the property-centered holding in *Jones* and the dissents in *Carpenter*, lower courts have begun emphasizing private law in search and seizure cases.⁴⁴ For example, in *California v. Greenwood*, the e U.S. Supreme Court held that looking through garbage left out for collection does not

approach as follows: “(1) ‘searches’ and ‘seizures’ are defined broadly, using their commonsense meanings; (2) ‘persons, houses, papers, and effects’ are interpreted by reference to general-law property concepts; (3) whether a search or seizure is ‘unreasonable’ is determined by looking at general law; and (4) a proper warrant can immunize an otherwise-unlawful search or seizure.” *Id.* at 937.

⁴¹ *Id.* at 935. D’Onfro and Epps maintain that a general law approach would be an improvement over Baude and Stern’s “pure positive-law model,” as “the general-law approach leads to more uniform rules, avoids results that seem arbitrary or strange, . . . neither permits nor encourages legislatures to eradicate protections by rewriting rules that govern private parties[,]” and would enable courts to answer questions when there is no positive law in the relevant jurisdiction. *Id.* at 917.

⁴² Baude & Stern, *supra* note 5, at 1828 (“[T]he Fourth Amendment is not primarily about privacy in the typical sense. . . . [T]he ideals that guide it are legality, the rule of law, and the public trust, not the notion of an irreducible sphere of confidential dealings.”); *see also id.* at 1845–50 (explaining the impact of “legality and government power”). D’Onfro and Epps appear to agree with Baude and Stern’s focus on legality. D’Onfro & Epps, *supra* note 5, at 952 (“At a high level of generality, our approach has much in common with Baude and Stern’s. We agree that the . . . Fourth Amendment should be concerned with scrutinizing and limiting the situations where the state claims the authority to act in ways not permitted to private citizens.”).

⁴³ Baude & Stern, *supra* note 5, at 1828; D’Onfro & Epps, *supra* note 5, at 925.

⁴⁴ D’Onfro & Epps, *supra* note 5, at 925–26 (stating that the positive-law approach “might be growing”). Baude and Stern’s article was cited in an opinion by Sixth Circuit Judge Thapar, who argued for reconsidering the *Katz* test and adopting something closer to a positive law model. *Morgan v. Fairfield County*, 903 F.3d 553, 571 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part); *see also United States v. Clark*, 673 F. Supp. 3d 1245, 1262 (D. Kan. 2023) (referencing “positive-law solutions to Fourth Amendment questions championed by legal scholars . . .”) (citing D’Onfro & Epps, *supra* note 5, at 913–20).

implicate the Fourth Amendment, since one lacks a reasonable expectation of privacy in garbage one knowingly puts out on a public street.^{45,46} However, the Iowa Supreme Court declined to follow *Greenwood*, relying instead on Iowa property law and municipal regulations to hold that searching garbage left out for pickup violated the unreasonable search and seizure provisions of Iowa's constitution.⁴⁷ The Iowa Supreme Court's holding illustrates how private law approaches may, at times, lead to more protection for privacy than the *Katz* test. This may be particularly likely in scenarios where one knowingly exposes information to other people but retains a statutory or common law right to control how it is used or who accesses it.

Proponents of private law approaches make several arguments in support of them. First, they contend that private law approaches are more consistent with the Fourth Amendment's text, history, and/or original meaning.⁴⁸ Second, proponents argue that looking to private law would serve pragmatic or jurisprudential values, including constraining judges from imposing their own policy preferences, and making Fourth Amendment law more adaptable to evolving public preferences and technology.⁴⁹

Baude and Stern argue that a positive law model strikes a better balance of power between institutions: they contend that unelected federal judges should defer to legislatures' judgments about policing because legislators are elected, and presumptively more democratically accountable.⁵⁰ This argument draws from John Hart Ely's seminal theory of judicial review,

⁴⁵ 486 U.S. 35, 40–41 (1988).

⁴⁶ “When a citizen places garbage out for collection in a closed garbage bag, the contents of the bag are private, as a factual matter. The citizen understands, however, that the contents of the bag may be revealed to someone at some point in time.”

⁴⁷ *State v. Wright*, 961 N.W.2d 396, 412 (Iowa 2021) (“[W]e hold a peace officer engaged in general criminal investigation acts unreasonably under article I, section 8 when the peace officer commits a trespass against a citizen's house, papers, or effects without first obtaining a warrant”); *id.* at 416–18 (concluding that the officer's conduct constituted a trespass, and therefore violated the Iowa Constitution, because municipal ordinances prohibit anyone other than a authorized collector from taking or collecting trash placed out for collection).

⁴⁸ Baude and Stern make several historical arguments in support of the idea that the Fourth Amendment incorporated private law as part of the definition of search and seizure: in a pair of well-known English cases that inspired the Fourth Amendment, English courts invalidated “general warrants” granting officials unrestrained authority to search peoples' homes in search of evidence of sedition, the opinions stated the importance of securing property rights and the sanctity of the home. Baude & Stern, *supra* note 5, at 1838–39 (discussing *Wilkes v. Wood*, 98 Eng. Rep. 489 (King's Bench 1763) and *Entick v. Carrington*, 95 Eng. Rep. 807 (King's Bench 1765)). They also emphasize that, at the time of the Founding, private causes of action (e.g., false imprisonment and trespass) would have been the only way to hold state officials liable for unlawful searches or seizures. Baude & Stern, *supra* note 5, at 1839–41. D'Onfro and Epps likewise contend that a general law approach is more consistent with the text, history, and/or original meaning of the Fourth Amendment: they contend that the term “unreasonable” within the Fourth Amendment was widely understood to mean “against the reason of the common law”—and was meant to be defined by reference to evolving general common law. D'Onfro & Epps, *supra* note 5, at 938 (internal quotation marks omitted) (quoting Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1270).

⁴⁹ Baude & Stern, *supra* note 5, at 1851–52; D'Onfro & Epps, *supra* note 5, at 953–54.

⁵⁰ Baude & Stern, *supra* note 5, at 1852–53.

which essentially holds that “judicial review under the Constitution’s open-ended provisions . . . can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack.”⁵¹ In Baude and Stern’s view, choices about policing are substantive policy questions that should be determined by elected officials rather than unelected federal judges.⁵² I will return to this institutional argument in Part III.A.

Several scholars have expressed reservations about this recent turn toward private law in Fourth Amendment scholarship and jurisprudence. Some have questioned the evidence supporting claims that the Fourth Amendment was originally understood as incorporating common law or statutory law.⁵³ Some have questioned the practical benefits of private law approaches, pointing out that looking to private law would grant judges as much leeway to impose their own views about what Fourth Amendment protections ought to be.⁵⁴ Skeptics also point out that positive law is manipulable, such that any Fourth Amendment standard based on positive law would enable lawmakers to change the rules in order to authorize more extensive surveillance.⁵⁵ Finally, critics have noted that focusing on positive law is analytically arbitrary with respect to values such as privacy and security, long thought central to the Fourth Amendment.⁵⁶

⁵¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 181 (1980).

⁵² Baude & Stern, *supra* note 5, at 1853.

⁵³ See, e.g., David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1790 (2000) (arguing that “there is little evidence that most of them had mastered the common-law rules of search and seizure, let alone endorsed them”); Re, *supra* note 15, at 316 (“Baude and Stern adduce no evidence that anyone ever defined a ‘search’ with reference to legal demands, much less legal demands applicable to private parties.”); Brady, *supra* note 10, at 1021 (“[B]ecause the general law in [D’Onfro & Epps’s] Article can be derived not only from prevailing case law but also from minority approaches and a range of statutes and social norms, it would seem to be radically open-ended to an early American audience”); Pollack & Tokson, *supra* note 8, at 725 (“[T]he most common originalist claim about property, that the Founders were uniquely concerned about property rights to the exclusion of concepts like privacy and liberty, doesn’t hold up to scrutiny.”); see also Orin Kerr, *Katz as Originalism*, 71 DUKE L. J. 1047, 1101–02 (2022) (arguing that the original meaning and text of the Fourth Amendment is largely consistent with the *Katz* test). Other scholars have set forth different interpretations of the Fourth Amendment grounded in original meaning. See, e.g., Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1183 (2016) (arguing for an originalist interpretation); Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 254 (2019) (discussing how courts should move away from the *Katz* test).

⁵⁴ Brady, *supra* note 10, at 1036 (“There will be many cases in which an expansive conception of the general law will give judges ample room to justify any conclusion.” Also, “there are persistent differences in state property law that a court might draw on in a Fourth Amendment case.”); Re, *supra* note 15, at 330 (describing the same concept).

⁵⁵ See Re, *supra* note 15, at 321 (describing how “the positive law model would create an incentive for lawmakers to adjust privacy protections for private parties so as to expand the power of law enforcement”); Pollack & Tokson, *supra* note 8, at 742–43 (describing how property is manipulable because the government creates property laws).

⁵⁶ For example, an officer who uses a GPS system that violates a patent in the course of surveilling someone has violated positive law, but these laws “have little or nothing to do with the values of privacy

Whatever one makes of these critiques of private law approaches, my concern is different. In the next Part, I lay out an additional, yet unaddressed concern: Private law approaches do not center the value of democratic citizenship. Much like current Fourth Amendment jurisprudence, private law approaches could grant police broad discretion to treat people in ways that diminish trust in government, sense of citizenship, and political participation. In Part III, I will argue that these citizenship harms should be a central concern in Fourth Amendment law.

II. CURRENT FOURTH AMENDMENT JURISPRUDENCE AND PRIVATE LAW ALTERNATIVES OVERLOOK CITIZENSHIP HARMS

As some judges appear poised to shift toward private law approaches, the time is ripe to reevaluate the values that the Fourth Amendment protects, and how courts ought to interpret that Amendment. This Part argues that current Fourth Amendment jurisprudence and proposed private law alternatives both fail to consider the value of democratic citizenship, and the ways in which policing threatens citizenship. I begin by discussing how policing impacts citizenship and political participation. Then, I describe how Fourth Amendment jurisprudence overlooks these citizenship harms. Finally, I explain how, at least in the law governing seizures, proposed private law approaches could lead to results that replicate the citizenship-related deficiencies in current jurisprudence.

A. *How Police Encounters Impact Citizenship*

For people across the United States, particularly “race-class subjugated communities,”⁵⁷ police encounters are routine, formative experiences: approximately one-third of working-age adults in the United States have a criminal record.⁵⁸ This is about the same number of people who have four-year college degrees.⁵⁹ It is estimated that nearly half of Black males and almost forty percent of White males are arrested by the age of twenty-three,⁶⁰ and over forty percent of people with disabilities are likely to be arrested by

and security that have been thought to underlie the Fourth Amendment . . .” Re, *supra* note 15, at 315–16; see also Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 NORTHWESTERN U. L. REV. 140, 194 (2016) (“The protection that non-Fourth Amendment laws offer may often be arbitrary, because such laws are enacted for a wide range of reasons that may have nothing to do with privacy.”).

⁵⁷ Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 567 (2017) (describing the problems facing “race-class subjugated communities” and defining them as those whose race and class give them an underprivileged status in society).

⁵⁸ Matthew Friedman, *Just Facts: As Many Americans Have Arrest Records as College Degrees*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas>.

⁵⁹ *Id.*

⁶⁰ *Id.*

age twenty-eight.⁶¹ One study of students in highly policed neighborhoods found that most people with police contact were stopped for the first time before they were fourteen years old, and over fifty percent of those stopped reported having been stopped more than seven times.⁶² Approximately seventy percent of high schools—fundamentally socializing institutions—have on-site armed police officers who participate in maintaining discipline, order, and control.⁶³

For those who encounter police regularly, interactions with police are predominant sites of political socialization—experiences that teach lessons about one’s own status in the polity and the nature of government more generally.⁶⁴ In the words of Cadora, “[i]t used to be said that school is where society gets into your bones. Today, jail, not school, might better express that maxim’s deep truth.”⁶⁵ The experiences of being involuntarily detained, arrested, searched, and/or incarcerated are antithetical to the values of

⁶¹ Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 AM. J. PUB. HEALTH 1977, 1977 (2017) (stating that people with disabilities are at significantly higher risk of arrest (approximately forty-two percent by age twenty-eight), and Black people with disabilities have a disproportionately high risk of being arrested (fifty-five percent by age twenty-eight)). For more on the criminalization of disability, see generally Jamelia Morgan, *Disability, Policing and Punishment: An Intersectional Approach*, 75 OKLA. L. REV. 169, 171 (2022) (“These long-standing myths, stereotypes, and beliefs link ideas of Blackness and disability with notions of criminality.”); LIAT BEN-MOSHE, *DECARCERATING DISABILITY* (2020).

⁶² Vesla M. Weaver & Amanda Geller, *De-Policing America’s Youth: Disrupting Criminal Justice Policy Feedbacks That Distort Power and Derail Prospects*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 190, 201 (2019).

⁶³ *Percentage of public schools with security staff present at least once a week, and percentage with security staff routinely carrying a firearm, by selected school characteristics: 2005–06 through 2019–20*, 2021 DIGEST EDUC. STATISTICS, tbl. 233.70; Terry Allen, *Not Separate but Still Unequal*, 100 N.Y.U. L. REV. 971 (2025) (describing how Black students in integrated schools experience disproportionate surveillance and punishment by school police, how this causes feelings of marginalization and unsafety, and undermines purported academic benefits of integration).

⁶⁴ See, e.g., Soss & Weaver, *supra* note 57, at 574 (“[I]nterviewees have looked, not to City Hall, Congress, or political parties, but rather to their direct experiences with police, jails and prisons, welfare offices, courts, and reentry agencies as they sought to ground their explanations of how government works, what political life is like for them, and how they understand their own political identities.”) (citation omitted); AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP* 13 (Benjamin I. Page, Susan Herbst, Lawrence R. Jacobs & Adam Berinsky eds., 2014) (“[T]he character of the regime will affect the character of the citizens[.]” because “interactions with government . . . are the most direct source of information about how government works.”) (internal quotation marks omitted) (citations omitted); Joe Soss, *Making Clients and Citizens: Welfare Policy as a Source of Status, Belief, and Action*, in *DESERVING AND ENTITLED* 291, 321 (Anne Schneider & Helen M. Ingram, eds., 2005) (discussing how interactions with welfare agencies impact peoples’ sense of citizenship, trust in government, and political behavior); see generally Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 160–61 (2014) (discussing the effect of interactions with the criminal system on how citizens view themselves); Danieli Evans, *Carceral Socialization as Voter Suppression*, 28 MICH. J. RACE & L. 39, 57–58 (2023) (describing how stop, arrest, conviction, and incarceration can decrease trust in government and inhibit people from voting).

⁶⁵ Eric Cadora, *Civics Lessons: How Certain Schemes to End Mass Incarceration Can Fail*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 277, 277 (2014).

democratic citizenship.⁶⁶ Citizenship is, at its core, about belonging to a community of equals—a community where each individual’s views and interests are entitled to mutual respect and concern.⁶⁷ In contrast, police-initiated encounters, which often involve involuntary detentions, physical touching, physical restraint, and being taken into custody, are almost by nature degrading, demeaning, and stigmatizing.⁶⁸ They publicly label the person as a suspect, a deviant, and can lead to further discrimination and social exclusion.⁶⁹

⁶⁶ See Justice & Meares, *supra* note 66, at 167 (discussing how police encounters teach people lessons contrary to the ideals of democratic citizenship); see also LERMAN & WEAVER, *supra* note 66, at 30–31 (discussing harm that the U.S. justice system has done to its citizen’s “democratic capacities”).

⁶⁷ Evans, *supra* note 66, at 52 (“[C]itizenship is . . . about social experience—i.e., being treated in a way that establishes your status as a valued member of the community—as much as it is about legal rights.”); see also KENNETH L. KARST, *BELONGING TO AMERICA* 3 (1989) (“The principle of equal citizenship . . . means . . . [e]ach individual is presumptively entitled to be treated by organized society as a respected, responsible, and participating member.”); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 313 (1999) (defining democratic citizenship as being part of a community of equals whereby “each [person] accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocity, and recognition for granted”); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330, 342 (2006) (“[T]he social rights of citizenship suggest a broader conception of membership characterized not only by equality of legal status, but also by equality of that other kind of status which is a social fact—namely, one’s rank on a scale defined by degrees of deference or regard.”) (internal quotation marks omitted) (citation omitted).

⁶⁸ Weaver & Geller, *supra* note 62, at 203 (“Police stops are neither momentary nor neutral encounters with street-level bureaucrats . . . they are moments of humiliation, state force, and racial learning . . .”) (citations omitted); CTR. CONST. RTS., *STOP AND FRISK: THE HUMAN IMPACT* (2012) <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> (interviewees describing the experience of being stopped, frisked, and arrested). These harms are especially acute if the stop is motivated by race or seems to be. See Capers, *supra* note 18, at 25 (“[T]he 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.”); Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 *COLUM. L. REV.* 653, 699–707 (2018) (discussing how police officers command obedience, and tend to react negatively, often with force, when someone questions their authority or the lawfulness of their actions); see also LERMAN & WEAVER, *supra* note 64, at 13 (how interactions with the government shape citizens’ character); Gwen Prouse, Vesla M. Weaver & Tracey L. Meares, *The State from Below: Distorted Responsiveness in Policed Communities*, 56 *URB. AFFS. REV.* 1423, 1428 (2020) (“[Participants’] conception of government, then, was predicated on this dual position of being abandoned and overseen, unprotected and occupied. They were ‘up for the taking’ and regularly ‘fleeced’ because their racial position made them expendable actors in the political system.”); Kathryn Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 *HARV. L. REV.* 1318, 1342–43 (2014) (reviewing CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014), ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AMERICAN CITY* (2014) & JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015)) (discussing the stigma caused by encounters with the criminal system).

⁶⁹ In the words of one person who has experienced being stopped by the police: “When they stop you in the street, and then everybody’s looking . . . it does degrade you. And then people get the wrong perception of you. That kind of colors people’s thoughts towards you, might start thinking that you’re into some illegal activity, when you’re not. Just because the police [are] just stopping you for—just randomly. That’s humiliating [on] its own.” STOP & FRISK, *supra* note 68, at 6 (alteration in original).

Accordingly, Justice and Meares observe that experiences with the police and criminal system teach lessons in “anticitizenry”: members of heavily policed communities are “bombarded with messages that they are not citizens belonging to the group . . . in charge of governing, but are a class of problem people to be excluded, monitored, and surveilled, treated harshly and punished arbitrarily.”⁷⁰

A significant body of social science research shows that these lessons have real impacts on people’s sense of citizenship and political behavior.⁷¹ In interviews with people who had histories of criminal system involvement, Lerman and Weaver found that these individuals come to see themselves as “custodial citizens,” “constituted not as participatory members of the democratic polity, but as disciplined subjects of the carceral state” who are outside the bounds of political consideration.⁷² Many of these individuals saw voting or participating in politics as futile and even risky: Their experiences with the police and the criminal system led to the perception that “pressing one’s claims results only in further difficulties, such as the loss of benefits, or worse, harassment and retribution. The only option is to stay low, out of sight, and beyond reach.”⁷³

When one interviewee was asked about political participation, they responded: “I feel like if I contact a senator or governor, they’ll probably

One man described the experience when police first stopped him as an eleven-year-old while he was playing in a water-balloon fight: “[T]hey . . . like criminalized us, you know? . . . [B]ecause afterwards, even though we were kids, . . . the entire communities thought that we were up to something bad. So, . . . it really changed the perspective of how . . . my neighbors looked at me. And how they reacted towards me.” Weaver & Geller, *supra* note 62, at 203. “Labeling theory” posits that people who are labeled as deviant experience stigma and exclusion and this drives them to either withdraw from the environment or seek a sense of belonging by joining others who are likewise labeled. Stephanie Ann Wiley, Lee Ann Slocum & Finn-Aage Esbensen, *The Unintended Consequences of Being Stopped or Arrested*, 51 CRIMINOLOGY 927, 931 (2013). Studies have found that youth who are arrested or stopped by police are likelier to report a sense of social exclusion, a lower commitment to education, identify as “deviant,” and associate with “deviant” peers. *Id.* at 949. Terry Allen quotes one student describing their experience with policing in school:

I feel policed inside the school walls and inside the classrooms . . . [I]t starts with the school police officer, . . . but it leads to other things like being treated differently by teachers and other school people to . . . my coach[] now raising [his] eyebrows . . . based on conversations with the police. This all makes me feel like I’m in school but not a part of it . . . that I don’t belong.”

Allen, *supra* note 64, at 1012.

⁷⁰ Justice & Meares, *supra* note 64, at 167.

⁷¹ Political scientists use the term “policy feedback” to describe how policies and their implementation “are not just political objects; they are political forces that reconfigure the underlying terms of power, reposition actors in political relations, and reshape political actors’ identities, understandings, interests, and preferences.” Donald P. Moynihan & Joe Soss, *Policy Feedback and the Politics of Administration*, 74 PUB. ADMIN. REV. 320, 321 (2014).

⁷² LERMAN & WEAVER, *supra* note 64, at 111 (“[R]ather than communicating that they are worthy and valued citizens, their experiences with criminal justice teach them that they have little voice and mark them as outside consideration.”). When asked to describe government, participants frequently used words like “control” and alluded to fear. *Id.* at 139–40.

⁷³ *Id.* at 202.

want to put me in jail and leave me as a troublemaker.”⁷⁴ Cohen describes this orientation as a “politics of invisibility,” where the “best survival strategy is to . . . disengag[e] from all forms of politics and try[] to remain invisible to officials who possibly could provide assistance but [a]re more likely to impose greater surveillance and regulations”⁷⁵ In a related vein, Brayne found that people who have had contact with the criminal system are likelier to practice “system avoidance”—i.e., avoid any form of “surveilling institution” (ones that keep official records), including banks and hospitals as well as government institutions.⁷⁶

In addition to these qualitative accounts, there is quantitative evidence suggesting that law enforcement encounters have a significant effect on political participation. Using data from two nationally representative surveys of youth, Lerman and Weaver found that each increasing level of criminal system contact, from stop, arrest, conviction, to incarceration, significantly decreased both trust in government and the likelihood of voting among people *legally eligible to vote* (those not formally disenfranchised due to a felony conviction).⁷⁷ This analysis controlled for other variables related to political participation and found that the effects of being arrested, convicted, or doing time were larger than the effects of any other factor except having a college diploma.⁷⁸ These effects also remain significant after controlling for an individual’s previous voting behavior, which suggests that the experience with law enforcement changed their voting behavior.⁷⁹ Consistent with these findings, other studies using quasi-experimental designs have found that brief jail sentences and pretrial detention (both of which are largely determined by the police’s discretion to make low-level arrests) significantly decrease the likelihood of voting, especially among Black citizens.⁸⁰ Another study found that traffic stops

⁷⁴ *Id.* at 210.

⁷⁵ CATHY J. COHEN, *DEMOCRACY REMIXED: BLACK YOUTH AND THE FUTURE OF AMERICAN POLITICS* 195–96 (2010).

⁷⁶ See generally Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 *AM. SOCIO. REV.* 367, 368 (2014) (“System avoidance denotes the practice of individuals avoiding institutions that keep formal records . . . and therefore heighten the risk of surveillance and apprehension by authorities.”).

⁷⁷ Controlling for other factors related to voting, the probability of voting declined by eight percent for those who had been stopped and questioned, sixteen percent for those with a history of being arrested, eighteen percent for those with a conviction, twenty-two percent for those who were incarcerated less than one year, and twenty-six percent for those who were incarcerated more than one year. LERMAN & WEAVER, *supra* note 64, at 222–23, fig.8.2.

⁷⁸ *Id.* at 221.

⁷⁹ *Id.* at 222.

⁸⁰ See generally Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effect of Brief Jail Spells on Potential Voters*, 113 *AM. POL. SCI. REV.* 311, 311 (2019) (discussing how brief jail stays discourage people from voting in the future) and Anne McDonough, Ted Enamorado & Tali Mendelberg, *Jail While Presumed Innocent: The Demobilizing Effects of Pretrial Incarceration*, 84 *J. POL.* 1777, 1780 (2022) (discussing how pretrial incarceration reduces overall voter turnout). There are a few possible

had a significant negative effect on the likelihood of voting among registered voters of all races.⁸¹

In sum, a large body of research documents how encounters with law enforcement can shape people's sense of equal citizenship, trust in government, and political participation. Thus, policing has the potential to replicate and reinforce inequities in political power: Policing practices systematically subject members of powerless groups to subordinating and stigmatizing treatment. This socializes people to distrust government and withdraw from politics, which sustains political powerlessness, which begets further subordinating and stigmatizing treatment, and so on.⁸²

In considering the relationship between policing and citizenship, it is important to keep in mind the difficulties of quantifying the impact of any single socializing experience, given the multitude of factors that influence political behavior and that many of these factors tend to covary. In other words, many people who experience subordinating and stigmatizing police encounters also tend to have other experiences of social marginalization negatively associated with voting, such as less education, lower income, and more limited time and resources to dedicate to politics.⁸³ They may also routinely experience stigmatizing and subordinating treatment from other government agencies, such as welfare agencies or schools, and these are also sites of anti-democratic socialization that can influence political participation.⁸⁴ For the purpose of the argument I make here—that the Fourth

explanations for the particularly pronounced effect on Black citizens: one possibility is that the Black citizens who were incarcerated had higher baseline levels of participation before their incarceration. Because police arrest a significantly larger proportion of Black citizens compared to white citizens, they are likelier to arrest people who tended to vote prior to their arrest, so there is more potential for demobilization. *Id.* at 1781. Another possibility is that, against a long history of racial subordination and the carceral system's role in maintaining it, carceral encounters have a particularly degrading and subordinating meaning, and are likelier to be interpreted as evidence of a hostile, unwelcoming state. *Id.* This article also considered, and rejected, resource disparities as a possible explanation for the different effects.

⁸¹ See generally Jonathan Ben-Menachem & Kevin T. Morris, *Ticketing and Turnout: The Participatory Consequences of Low-Level Police Contact*, 117 AM. POL. SCI. REV. 822, 823 (2023) (discussing how traffic stops are related to decreased voter turnout from Black voters). The findings of this study revealed a nuanced dynamic related to race. Authors found that traffic stops depressed turnout more for Black voters in the short term but were less demobilizing for Black voters over a longer time horizon (compared to voters who are not Black). *Id.*

⁸² In this sense, policing and criminal system policies appear to be what political scientists have called a “degenerative policy system” where “group-based political inequalities and divisive policy designs reinforce each other in ways that threaten democracy.” Evans, *supra* note 64, at 54 (internal quotation marks omitted) (citation omitted).

⁸³ See Robert J. Sampson, *Criminal Justice Processing and the Social Matrix of Adversity*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 296, 297 (2014) (discussing how incarceration rates are higher in communities with poverty and racial segregation).

⁸⁴ *Id.* 298–99. Research shows that experiences with other government agencies, such as welfare agencies and courts, also shape peoples' orientation toward politics as well. See e.g., Soss, *supra* note 64, at 310 (discussing how interactions with welfare agencies impact peoples' sense of citizenship, trust in government, and political behavior); Soss & Weaver, *supra* note 57, at 567 (discussing the politics of subjugated communities).

Amendment should be concerned about the citizenship harms of policing—it is not essential to isolate the effect of police contact from the other experiences of marginalization that may influence political participation. What matters is that there is strong evidence that subordinating police encounters tend to co-occur with and compound other experiences that create a sense of alienation from the political community.⁸⁵

B. *Fourth Amendment Jurisprudence Overlooks Citizenship Harms*

Current Fourth Amendment jurisprudence neglects the value of citizenship.⁸⁶ This was not a foregone conclusion. During the Civil Rights Era, the Warren Court constitutionalized criminal procedure rights as part of an effort to realize full and equal citizenship for Black Americans, who had long been the targets of draconian policing, and whose rights had been inadequately protected by state common law.⁸⁷ Precisely because state legislatures and the common law courts had failed to protect against blatant abuses of power, the Court found it necessary to constitutionalize criminal procedure rules.⁸⁸

A paradigmatic example is *Mapp v. Ohio* (1961), which held that the state courts must exclude evidence obtained in violation of the Fourth Amendment.⁸⁹ In that case, police forcibly burst into Dollree Mapp's home, physically restrained and handcuffed her, prevented her attorney from seeing her, then searched her house thoroughly, including all drawers and boxes.⁹⁰ Though officers claimed to have a warrant, at no point could the State produce it, and the Ohio Supreme Court expressed serious doubt that it ever existed.⁹¹

⁸⁵ Sociology literature on legal estrangement helps to explain how interactions with police may overlap with other experiences of marginalization to produce a sense of alienation from the political community. Monica Bell introduces the theory of “legal estrangement” which “provides a rounder, more contextualized understanding of this relationship that examines the more general disappointment and disillusionment felt by many African Americans and residents of high-poverty urban communities with respect to law enforcement.” Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2066 (2017) [hereinafter Bell, *Police Reform*]. Bell attributes this perception to mistreatment by law enforcement and other government authorities, structural exclusion, and vicarious experiences of marginalization. *Id.* at 2067–68; see also Monica C. Bell, *Anti-Segregation Policing*, 95 *N.Y.U. L. REV.* 650, 652 (2020) [hereinafter Bell, *Anti-Segregation Policing*] (describing the ways in which policing perpetuates residential segregation).

⁸⁶ Capers observes, “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.” Capers, *supra* note 18, at 12.

⁸⁷ *Id.* at 11 (discussing the Warren Court’s focus on the rights of all citizens)

⁸⁸ *Id.* at 4–5; see also Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 *MICH. L. REV.* 48, 93 (2000) (arguing that modern constitutional criminal procedure emerged from the Supreme Court’s response to racist trials of Black defendants between World War I and II).

⁸⁹ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.”).

⁹⁰ *Id.* at 644–46.

⁹¹ *Id.* at 645.

Yet the Ohio Supreme Court had admitted the evidence on the grounds that it had not been taken “from defendant’s person by the use of brutal or offensive physical force”⁹² *Mapp* extended the Fourth Amendment exclusionary rule to state courts precisely because common law remedies had proven utterly ineffective at preventing this sort of police conduct.⁹³

Likewise in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971), the Court recognized a federal cause of action for damages arising from a federal officer’s violation of the Fourth Amendment.⁹⁴ In so doing, it rejected the government’s argument that state tort law provided adequate remedies.⁹⁵ The Court explained that “an agent acting in the name of the United States . . . possesses far greater capacity to harm than an individual trespasser exercising no authority other than his own,”⁹⁶ and “the interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.”⁹⁷

Cases like *Mapp* and *Bivens* recognized that requiring government authorities to respect constitutional interests would require distinct, and in some cases stricter, federal constitutional limits on how police interact with people, apart from any limits imposed by local common law.⁹⁸

However, beginning with cases such as *Terry v. Ohio* (1968),⁹⁹ the Court started down a path of granting deference to state and local officials in determining policing policy. In so doing, it has gradually abandoned citizenship-related values in Fourth Amendment law. In *Terry*, the Court permitted an increasingly pervasive practice of police stopping and frisking people based on “reasonable suspicion”—a plastic and malleable standard less demanding than probable cause.¹⁰⁰ The Court allowed this even though it explicitly acknowledged that *The President’s Commission on Law Enforcement and Administration of Justice* report found that police were using this tactic for the “wholesale harassment” of minority groups, particularly Black citizens.¹⁰¹

⁹² *Id.* (citation omitted).

⁹³ *Id.* at 651 (noting that the experience of state courts demonstrates that “other remedies have completely failed to secure compliance with the constitutional provisions”) (citation omitted). As one scholar notes, “[t]he illegal entry of Mapp’s house by the police was nothing extraordinary; it was an everyday fact of life for [B]lack[] [citizens] and other racial minorities.” Lewis R. Katz, *Mapp after Forty Years: Its Impact on Race in America*, 52 CASE W. RES. L. REV. 471, 473 (2001).

⁹⁴ 403 U.S. 388.

⁹⁵ *Id.* at 391–92.

⁹⁶ *Id.* at 392.

⁹⁷ *Id.* at 394. For a discussion of how constitutional torts address political and citizenship harms that are distinct from ordinary common law torts, see Sarah L. Swan, *Tort Logics for State Constitutional Injuries*, 2025 WIS. L. REV. 1405.

⁹⁸ Capers, *supra* note 18, at 45.

⁹⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁰⁰ *Id.* at 27.

¹⁰¹ *Id.* at 14, n.11. The opinion noted the Commission’s finding that “the friction caused by ‘[m]isuse of field interrogations’ increases ‘as more police departments adopt ‘aggressive patrol’ in which officers

In the decades since *Terry*, the Court has granted police even more discretion to invade people's bodily autonomy and to target people who are socially stigmatized with minimal levels of suspicion. In Justice Sotomayor's words, the Court has "given officers an array of instruments to probe and examine" people and to "treat[] members of our communities as second-class citizens."¹⁰² It has created a regime where a police officer can "stop [someone] for whatever reason he wants—so long as he can point to a pretextual justification after the fact"—and this justification may include "[their] ethnicity, where [they] live, what [they] were wearing, and how [they] behaved."¹⁰³ And "he may order [them] to stand 'helpless, perhaps facing a wall with [their] hands raised,'" and, "[a]s onlookers pass by, [he] may 'feel with sensitive fingers every portion of [their] body.'"¹⁰⁴

The Court has also granted police broad discretion to arrest people and subject them to the utterly degrading experience of being booked into jail. *Atwater v. City of Lago Vista* (2001) held that an officer may arrest someone so long as they have probable cause to believe they committed *any* infraction—including a fine-only infraction such as driving without a seatbelt or jaywalking—even if the arrest admittedly serves no purpose but "gratuitous humiliation[]." ¹⁰⁵ Under *Atwater*, courts have upheld the arrests of a seventh-grade student for "fake burping" in class,¹⁰⁶ and a fourteen-year-old for eating a single french fry in the subway.¹⁰⁷ Once a person is arrested, the officer "can fingerprint [them], swab DNA from the inside of

are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident," and that "[t]his is particularly true in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.'" *Id.* at 14, n.11 (citation omitted). Many have critiqued *Terry* for embracing these practices. *See, e.g.,* Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1321 (1998) (discussing the *Terry* Court's "failure to treat as dispositive the clear correlation between stop and frisk and the violation of their Fourth Amendment rights only served to remind blacks and other minorities of their second-class status in America"); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1512 (2017); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1198 (2017); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 313 (2009); Capers, *supra* note 18, at 31–32 (discussing the plasticity of the reasonable suspicion standard).

¹⁰² *Utah v. Strieff*, 579 U.S. 232, 252 (2016) (Sotomayor, J., dissenting).

¹⁰³ *Id.* (citations omitted); *see also* Capers, *supra* note 18, at 33–34 (discussing *Whren v. U.S.*, 517 U.S. 806 (1996), which held that racial motives were irrelevant in a Fourth Amendment claim so long as the officer had a pretextual basis for stopping the person); *see also* David B. Owens, *The Equal Protection-Fourth Amendment Shell Game: An Essay on the Limited Reach of the 2023 Affirmative Action Cases, the Fourth Amendment, and Race Beyond Skin Color*, 47 N.Y.U. REV. L. & SOC. CHANGE 425, 433 (discussing the *Whren* Court's decision on pretextual traffic stops).

¹⁰⁴ *Strieff*, 579 U.S. at 253 (Sotomayor, J., dissenting) (citations omitted).

¹⁰⁵ *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 (2001).

¹⁰⁶ *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1128, 1129 (10th Cir. 2016).

¹⁰⁷ *Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1150 (D.C. Cir. 2004).

[their] mouth, and force [them] to ‘shower with a delousing agent’ while [they are ordered to] ‘lift [their] tongue, hold out [their] arms, turn around, and lift [their] genitals.’”¹⁰⁸ Millions of people are subject to this sort of treatment each year.¹⁰⁹

Holdings like *Terry*, its progeny,¹¹⁰ and *Atwater* grant police broad discretion to treat people in ways that convey they “are not [] citizen[s] of a democracy but the subject[s] of a carceral state, just waiting to be cataloged.”¹¹¹ And the research discussed in Part II.A suggests these experiences impact peoples’ sense of citizenship, trust in government, and political participation. Many have critiqued Fourth Amendment jurisprudence for failing to consider these citizenship harms when evaluating the reasonableness of police conduct.¹¹² As I explain below, private law approaches, whatever their other advantages may be, could replicate many of these aspects of Fourth Amendment jurisprudence.

C. *Private Law Approaches Could Replicate and Perhaps Worsen Citizenship Harm*

As noted above, scholars who argue for centering private law in Fourth Amendment analysis contend that this approach would be more consistent with the Fourth Amendment’s text and original meaning and would have practical advantages (clarity, determinacy, and adaptability).¹¹³ Whatever one makes of these claims,¹¹⁴ they are not my concern here. My goal is to raise a distinct, yet unaddressed concern with centering private law in Fourth Amendment analysis: Doing so would replicate and perhaps exacerbate the citizenship-related harms I described above.

In arguing for a Fourth Amendment jurisprudence centered on private law—positive law and general law, respectively—Baude and Stern and D’Onfro and Epps each focus primarily on the law governing searches, and

¹⁰⁸ *Strieff*, 579 U.S. at 253 (Sotomayor, J., dissenting) (citations omitted).

¹⁰⁹ See *supra* notes 56–58 (discussing this treatment); see also Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 148 (2020) (“We do not know how many American children have watched a parent or family member get arrested, but it is likely in the millions.”).

¹¹⁰ See e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (finding that headlong flight is “not necessarily indicative of wrongdoing, but it is certainly suggestive of such”).

¹¹¹ *Strieff*, 579 U.S. at 254 (Sotomayor, J., dissenting).

¹¹² *Id.*; see also Capers, *supra* note 18, at 33 (discussing other scholars making this critique); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1104–06 (2014) (critiquing the Court as understanding privacy as control over information, and thus failing to appreciate the nature of the harm associated with strip searches, assaultive stop-and-frisks, and pretextual traffic stops and vehicle searches that find nothing); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994).

¹¹³ See *supra* notes 46–48, and accompanying text (discussing private law and originalism)

¹¹⁴ Other scholars have contested them. See *supra* notes 52–55, and accompanying text (discussing these scholars schools of thought on the issue).

dedicate significantly less attention to the law governing seizures.¹¹⁵ They suggest that positive and general law approaches would be largely aligned with current Fourth Amendment jurisprudence governing seizures.¹¹⁶

I focus on private law models' implications for personal seizures because, in modern street policing, unwarranted personal seizures—i.e., street stops, traffic stops, and street arrests—are among the most common and routine ways in which people interact with police.¹¹⁷ As discussed in Part II.A, these involuntary detentions strip people of bodily autonomy, are subordinating and demeaning, and have a demonstrated negative impact on people's sense of citizenship and political participation. Furthermore, seizures are often predicates to unwarranted searches, such as *Terry* frisks, searches incident to arrest, and routine strip searches during jail bookings.

I will discuss how private law approaches could sustain three aspects of Fourth Amendment jurisprudence which give police broad discretion to stop, question, and search people: (1) the ability to arrest any person who commits a non-jailable misdemeanor under *Atwater*; (2) the ability to stop and frisk people based on reasonable suspicion under *Terry*; and (3) the ability to question and search anyone, without any suspicion whatsoever, so long as they consent—or submit without resistance.

First, consider how the private law models would apply to the question in *Atwater*: whether the Fourth Amendment allows a warrantless arrest for a non-violent, fine-only traffic misdemeanor.¹¹⁸ Under Baude and Stern's positive law approach, the Court would examine the law in the jurisdiction to determine whether it would be unlawful for a civilian to arrest someone under these circumstances. The most apt tort would probably be false imprisonment (or false arrest), which requires intentionally restraining or detaining someone against their will without lawful authority.¹¹⁹ Assuming

¹¹⁵ Baude & Stern, *supra* note 5, at 1884–85 (stating that they focus on searches because “most of the attention in Fourth Amendment commentary seems to go to searches,” and dedicating just over one page to discussing seizures); D’Onfro & Epps, *supra* note 5, at 987–89 (dedicating only two pages to seizures).

¹¹⁶ See Baude & Stern, *supra* note 5, at 1884 (discussing how a positive law model would largely align with existing jurisprudence governing seizures); D’Onfro & Epps, *supra* note 5, at 945–49 (discussing how a general law approach would lead to results consistent with many Fourth Amendment cases); *id.* at 988 (“[I]t is somewhat rare for courts to explicate the general law of seizures in recent times”).

¹¹⁷ See *supra* notes 56–62, and accompanying text (discussing the private law models' implications).

¹¹⁸ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (holding that the Fourth Amendment does not forbid warrantless arrest for a minor offense).

¹¹⁹ 32 AM. JUR. 2D, *False Imprisonment* § 7 (2025); see also Baude & Stern, *supra* note 5, at 1885 (suggesting that false imprisonment would be the most apt tort for personal seizures, and noting there may be subtle (but potentially important) differences between the Fourth Amendment definition of seizure and the tort of false imprisonment, in terms of the intent, and the degree or means of restraint required). False arrest is often considered one means of committing false imprisonment. Though the elements are identical, some courts treat false arrest as a subset of false imprisonment where the detention is “committed by an officer or one who claims the power to make an arrest.” *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767–68 (Iowa 2002) (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 36, at 67 (2001)); see also *Burr v. Burns*, 439 F. Supp. 2d 779, 790 (S.D. Ohio 2006) (discussing the difference between

an arrest meets the imprisonment element, the central question would be whether the arrest was without lawful authority.

All states grant civilians some authority to arrest other civilians under the centuries-old “citizen’s arrest” doctrine.¹²⁰ Jurisdictions vary significantly in terms of the scope of citizen’s arrest power. For example, some jurisdictions allow a citizen’s arrest only if the arrestor is actually correct in their belief that the arrestee committed the crime.¹²¹ Some jurisdictions only grant citizens authority to arrest for a subset of more-serious crimes, such as felonies and misdemeanor breaches of the peace.¹²² In jurisdictions that limit citizen’s arrest power in this way, a positive law model of the Fourth Amendment might restrict police officers’ arrest powers more than *Atwater* and other Fourth Amendment jurisprudence.¹²³

However, other jurisdictions’ citizen’s arrest laws appear to grant civilians *as much* or *more* discretionary arrest power than Fourth Amendment jurisprudence grants police. Some jurisdictions authorize civilians to arrest for any misdemeanor committed in their presence, regardless of whether it is a breach of the peace.¹²⁴ Some do not require the arrestor to be correct about the arrestee committing the crime.¹²⁵ And some permit civilians to make an arrest if they have “reasonable grounds” or “reasonable cause” to believe the arrestee committed a crime—a standard lower than the probable cause required by Fourth Amendment law.¹²⁶ Under a positive law model, in jurisdictions where civilians can make arrests on “reasonable grounds,” police could likewise make arrests based on

false arrest and false imprisonment). For Baude and Stern, the relevant tort rules would be false arrest, as they would look to the law governing *private* civilians’ conduct, rather than distinct rules governing the actions of police.

¹²⁰ Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest*, 25 CORNELL J. L. & PUB. POL’Y 557, 558 (2016); see also Chad Flanders, Raina Brooks, Jack Compton & Lyz Riley, *The Puzzling Persistence of Citizen’s Arrest Laws and the Need to Revisit Them*, 64 HOW. L.J. 161, 169 (2020) (discussing citizen’s arrest statutes in the states).

¹²¹ Robbins, *supra* note 120, at 565–71.

¹²² *Id.* at 569–70.

¹²³ Baude & Stern, *supra* note 5, at 1825.

¹²⁴ Robbins, *supra* note 120, at 569 (“Some states . . . omit the phrase ‘breach of the peace’ . . . and allow citizens to arrest for misdemeanors committed or attempted.”) (footnotes omitted).

¹²⁵ *Id.* at 570.

¹²⁶ *Id.* at 570–71; Flanders, Brooks, Compton & Riley, *supra* note 120, at 195–237 (surveying all state citizen’s arrest laws); see also ARK. CODE § 16-81-106 (West 2025) (requiring a citizen has “reasonable grounds for believing that the person arrested has committed a felony . . .”); CAL. PENAL CODE § 837 (West 2025) (stating a private citizen may arrest when they have “reasonable cause for believing the person arrested to have committed [a felony]”); *State v. Johnson*, 930 P.2d 1148, 1154 (N.M. 1996) (holding the defendant must only show “a good-faith, reasonable belief that a felony had been or was being committed . . .”); IOWA CODE § 804.9 (West 2025) (requiring. A “reasonable ground for believing that the person to be arrested has committed [a felony]”); *Oramulu v. Washington Mutual Bank*, 699 F. Supp. 2d 898, 911 (S.D. Tex. 2009) (Texas law authorizes any person who “reasonably believes” that another person has stolen or is attempting to steal property to detain that person to investigate); *Dutton v. Roo-Mac, Inc.*, 426 N.E.2d 604, 608 (1981) (requiring “reasonable grounds to believe that an offense other than an ordinance violation is being committed”).

“reasonable grounds,” which may be less demanding than the “probable cause” required under existing Fourth Amendment law.¹²⁷ Citizen’s arrest laws generally authorize the arrestor to use a similar amount of force that a police officer would be authorized to use when effecting an arrest, and in some states, private citizens are authorized to use even more force than police officers are permitted to use.¹²⁸ In these jurisdictions, a positive law model would grant police as much or even more power to arrest than they have under current Fourth Amendment law.

Under a general law approach, a court would ask whether general common law principles would allow a police officer to arrest a person for a fine-only misdemeanor. As D’Onfro & Epps observe, this approach aligns with the approach the Court took in *Atwater*: The majority considered historic common law doctrines and more contemporary statutes, as well as restatements, commentaries, etc., to conclude that arrest power has *not* traditionally been limited to misdemeanor breaches of the peace.¹²⁹ This conclusion is debatable,¹³⁰ and the discussion in the preceding paragraphs illustrates one of the challenges of applying a general law approach: The common law and statutes governing citizen’s arrests vary significantly from state-to-state, so ascertaining the general law involves some measure of discretion. Regardless of whether *Atwater* was ultimately correct in its interpretation of general law, the decision illustrates how judges can rely on general law (or a selective reading of it¹³¹) to support the broad arrest power the Court announced in that case.

Second, private law approaches would, at least in some cases, permit investigative detentions based on reasonable suspicion, as the Court has done in *Terry* and progeny.¹³² A court applying a positive law approach would ask whether a private civilian could conduct such a detention under the jurisdiction’s positive law. Some jurisdictions allow private civilians to detain and even arrest others based on reasonable suspicion or “reasonable

¹²⁷ *Dunaway v. New York*, 442 U.S. 200, 213–214 (1979).

¹²⁸ Flanders, Brooks, Compton & Riley, *supra* note 120, at 172 (“[B]ecause of reforms to law enforcement officer’s use of force laws, citizens sometimes have a *greater* ability to use force than police officers do in certain circumstances.”) (emphasis in original).

¹²⁹ D’Onfro & Epps, *supra* note 5, at 988; *see also* *Atwater v. City of Lago Vista*, 532 U.S. 318, 340–42 (discussing “the numerous early- and mid-19th-century decisions expressly sustaining . . . state and local laws authorizing peace officers to make warrantless arrests for misdemeanors not involving any breach of the peace”).

¹³⁰ According to some scholars, at the time of the founding, peace officers and civilians had significantly less discretion to stop, search, or arrest people without warrants. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 578 (1999) (“[T]he Framers . . . did not perceive ordinary officers as possessing any significant discretionary authority at common law to initiate arrests or searches.”); *see also* Donohue, *supra* note 48, at 1223 (arguing that warrantless arrests were limited to pursuit of a known felon); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 263 n.64, 417 n.593 (2002).

¹³¹ *Atwater*, 532 U.S. at 361 (O’Connor, J., dissenting) (describing the history as “inconclusive”).

¹³² *Terry v. Ohio*, 392 U.S. 1, 15 (1968); *supra* notes 99–101.

cause” to believe the person is committing a crime.¹³³ And one could argue that the citizen arrestor’s ability to use reasonable force necessary to effect an arrest would allow a brief pat down for weapons in self-defense of the arrestor.¹³⁴ A general law approach may likewise support the rule from *Terry*: As D’Onfro & Epps note, the common law recognized the “rights of private persons to ‘arrest any suspicious night-walker, and detain him till he give a good account of himself.’”¹³⁵ Hence, they suggest that a general law approach could have provided the rationale for the outcome in *Terry*.¹³⁶

In considering the implications of private law approaches, whereby the Fourth Amendment rules governing seizures would depend largely on the law governing citizen’s arrests, it is important to recognize the sordid history of these citizen’s arrest laws. As one commentator explains, “one can draw a direct line from the slave patrol laws of the eighteenth and nineteenth centuries, to the Fugitive Slave Acts, to emancipation, to the discriminatory use and disparate impact of citizen’s arrest laws today.”¹³⁷

While citizen’s arrest laws date back to early English law, a number of southern states codified and broadened citizen’s arrest power in the 1860s, in response to the Civil War and the emancipation of enslaved people.¹³⁸ In the period following the Civil War, “citizen’s arrest statutes were prominently used to support the violence perpetrated on Black people by the Ku Klux Klan.”¹³⁹ Fast-forwarding to recent years, civilians who physically assaulted and killed Black citizens—including Ahmaud Arbery, Derrick Grant, and Kenneth Herring—have invoked citizen’s arrest power as a defense for their actions.¹⁴⁰ Likewise, vigilante groups who patrol the U.S.-Mexico border have relied on citizen’s arrest power as grounds for attempting to detain people they suspect of entering the U.S. illegally.¹⁴¹ Given this social context and history, we should be cautious about tethering Fourth Amendment seizure doctrine to these citizen’s arrest laws.

¹³³ Flanders, Brooks, Compton & Riley, *supra* note 120, at 195–237 (showing different jurisdiction’s requirements for arrest).

¹³⁴ Robbins, *supra* note 120, at 564.

¹³⁵ D’Onfro & Epps, *supra* note 5, at 989 (quoting *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 183 (2004) (citation omitted)); *see also Atwater*, 532 U.S. at 335 (discussing founding-era statutes authorizing civilians and peace officers to detain others for vagrancy, traveling on Sabbath, nightwalking, gaming, and the like).

¹³⁶ D’Onfro & Epps, *supra* note 5, at 989.

¹³⁷ Ira P. Robbins, *Citizen’s Arrest and Race*, 20 OHIO ST. J. CRIM. L. 133, 137 (2022); *see also* Roger M. Stevens, *A Legacy of Slavery: The Citizen’s Arrest Laws of Georgia and South Carolina*, 72 S.C. L. REV. 1005, 1023 (2021) (discussing eighteenth and nineteenth century fugitive slave laws).

¹³⁸ Robbins, *supra* note 137, at 138–39 (“In 1863 . . . Georgia was the first to codify the doctrine. . . [O]ther states . . . quickly followed suit [and] many of these statutes . . . extend[ed] [the citizen’s arrest power] to almost any crime, and not just those that threatened public safety.”) (footnotes omitted).

¹³⁹ *Id.* at 149.

¹⁴⁰ *Id.* at 134–37.

¹⁴¹ Patrick Strickland, *The U.S.-Mexico Border Has Long Been a Magnet for Far-Right Vigilantes*, TIME MAGAZINE (Feb. 17, 2022, 11:09 AM), <https://time.com/6141322/border-vigilantes-militias-us-mexico-immigrants/>.

Finally, private law approaches would also likely sustain the Court's jurisprudence regarding so-called "consensual" questioning and searches. Under current Fourth Amendment law, without any basis for suspicion, officers may ask anyone questions or for permission to search, and if the person submits, the interaction is usually deemed a consensual encounter, rather than a seizure.¹⁴² The Court has refused to require officers to inform subjects of a right to refuse to cooperate as a predicate to deeming the interaction consensual.¹⁴³ Because people consent in most cases, many suspicion-less seizures and searches are conducted this way.¹⁴⁴ A private law approach—either positive or general law—would likely reach similar results. Because the tort of false imprisonment requires the restraint to be involuntary, if a person complied with an officer's request to answer questions or to search, the officer could readily argue that the interaction was voluntary and no "imprisonment" occurred.¹⁴⁵

In sum, private law approaches could replicate many aspects of Fourth Amendment jurisprudence granting police broad discretion to stop, question, and search people. A Fourth Amendment jurisprudence tethered to private law would not do enough to address the citizenship harms discussed in Part II.A.

Furthermore, under Baude and Stern's positive law model, legislators and common law judges could expand civilians' and police officers' power to seize and search beyond what is permitted under existing positive law.

¹⁴² Under current law, a person is seized "only when, by means of physical force or a show of authority, [their] freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). A seizure may occur without physical force, but only if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave . . ." *Id.* at 544. The Court has stated that a police officer's authority is insufficient, standing alone, to render a seizure involuntary, and it has instead demanded evidence of more explicit coercion, such as "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554; *see also United States v. Drayton*, 536 U.S. 194, 201 (2002) ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions . . . provided they do not induce cooperation by coercive means.").

¹⁴³ *Mendenhall*, 446 U.S. at 555 ("Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry . . ."); *Schneekloth v. Bustamonte*, 412 U.S. 218, 226–27 (1973); *see also Drayton*, 536 U.S. at 196 (describing a situation where officers need not inform citizens of their right to refuse).

¹⁴⁴ Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 *YALE L. J.* 1962, 2009 (2019) ("Some commentators have taken high compliance rates as an indication that consent is all but impossible.").

¹⁴⁵ 32 *AM. JUR. 2D False Imprisonment* § 18 ("A restraint or confinement that is not against the plaintiff's will is not a false imprisonment; the restraint must be involuntary. There is no imprisonment if the plaintiff voluntarily agrees to be in a certain place, as when a person voluntarily complies with a request to remain on the premises."). It may be that, under a positive or general law approach, one could argue that the officer's apparent authority should weigh in favor of finding a person is effectively coerced into consenting when an officer approaches them for questioning, without informing them of a right to refuse. But it is not clear why this argument would be more persuasive to courts applying principles of false imprisonment than it has been to courts applying the Fourth Amendment definition of seizure, where the Court has squarely rejected this argument. *See Robbins*, *supra* note 137; *see also Baude & Stern*, *supra* note 5, at 1865 (noting that positive law often turns on consent); *D'Onfro & Epps*, *supra* note 5, at 990 (discussing how general law supports the Court's jurisprudence on consent searches).

For example, if a state legislature wanted to grant police more discretionary authority to stop and search people, it could enact a statute authorizing any person to stop and search any “suspicious” person, regardless of the reasonableness of the suspicion. In this jurisdiction, police officers could stop and search anyone they deemed “suspicious,” for whatever reason, without violating positive law or the Fourth Amendment.¹⁴⁶ Baude and Stern state that people should be allowed to “live in fishbowls” if they want to—i.e., if the majority supports laws authorizing civilians to intrude one another’s privacy, courts should not stop police from doing the same.¹⁴⁷ But this overlooks political inequality and the extent to which laws adopted by a legislature authorizing privacy intrusions may be unrepresentative of the preferences of marginalized groups, who are also likeliest to be subject to intrusive policing (by civilians and public officials alike). The foregoing discussion of citizen’s arrest laws shows the long history of legislatures and common law courts authorizing civilians to detain and arrest other civilians—a power that has been used to reinforce racial and other social hierarchies.¹⁴⁸ Those with political power may be willing to expand civilians’ authority to detain and search if they knew that doing so would correspondingly expand what police may do under the Fourth Amendment. They may not be too concerned about the abuse of this power, if they assume it would be used primarily to apprehend members of socially stigmatized, marginalized groups.¹⁴⁹

An example from Iowa illustrates the political malleability of a positive law approach: In *State v. Wright* (2021), the Iowa Supreme Court followed a positive law-like approach to conclude that under the Iowa constitution, looking through garbage put out for collection was a search—to the contrary of federal Fourth Amendment law.¹⁵⁰ The court relied on a local ordinance prohibiting anyone other than a licensed solid waste collector from taking garbage placed out for collection, which implied the owner still had some right to exclude others from the garbage bag, and that searching it violated the owner’s property rights.¹⁵¹

The events following this case illustrate how positive law approaches make the constitutional rules governing surveillance manipulable through

¹⁴⁶ Re, *supra* note 15, at 330 (providing an example of such a law).

¹⁴⁷ Baude & Stern, *supra* note 5, at 1866 (“If people want to live in fishbowls, the Fourth Amendment should not be what stops them, so long as the government swims alongside them.”).

¹⁴⁸ See *supra* notes 137–140, and accompanying text (discussing citizen arrest laws).

¹⁴⁹ Re, *supra* note 15, at 330 (“Yet the positive law model would allow politically empowered people to reduce everyone’s privacy from police, perhaps because the police are on their side.”) (emphasis omitted). Under D’Onfro and Epps’s general law approach, such legislation would be evidence of general law, but it will not necessarily govern courts’ reading of general law. D’Onfro & Epps, *supra* note 5, at 936 (“Because positive law is evidence of the general law, the latter will often track the former Still, it is possible that a court might find a majority rule ill advised and choose to chart a different path.”).

¹⁵⁰ *State v. Wright*, 961 N.W.2d 396, 414, 419 (2021).

¹⁵¹ *Id.* at 415.

the political process.¹⁵² After the *Wright* decision, the Iowa legislature passed a statewide law providing that garbage bags left out for collection are abandoned and preempting any local laws to the contrary.¹⁵³ Citing this newly-enacted statute, the Iowa Supreme Court held that searching garbage bags left out for collection is not a search under the Iowa constitution, since it no longer constitutes a violation of the owner's property rights.¹⁵⁴

D'Onfro and Epps suggest that a general law approach might place more limits on racially motivated policing than current Fourth Amendment law does.¹⁵⁵ This would depend on "whether there was an emerging general-law norm against discriminatory searches and seizures, [for which] a court could look to developing statutory law, norms, and social practices forbidding various forms of discrimination, racial and otherwise, by private parties."¹⁵⁶ While this would be an important improvement over current jurisprudence,¹⁵⁷ it would not protect against the broader range of citizenship harms caused by police-civilian encounters. Even if courts were to hold that general law prohibits discriminatory searches and seizures, absent a claim of racial discrimination, the general law approach would probably reach results similar to *Terry* and *Atwater*, which grant officers broad discretion to detain, frisk, and arrest people: For example, in a case like *Atwater*, a general law approach would center around whether common law traditionally allows arrests for misdemeanors that are not breaches of the peace. As D'Onfro and Epps observe, in *Atwater*, the Court employed something akin to this approach, and concluded (albeit controversially) that general common law principles did allow such arrests.¹⁵⁸ Police encounters are demeaning, subordinating, and stigmatizing, and they can inflict citizenship harms even if they are not race-based.¹⁵⁹ A citizenship-oriented reading of the Fourth Amendment like I advance below would consider citizenship harms more broadly, including but not limited to racial discrimination.¹⁶⁰

¹⁵² Re, *supra* note 15, at 330.

¹⁵³ *State v. Amble*, 22 N.W.3d 265, 267 (2025) ("The legislature responded by enacting Iowa Code section 808.16 (2023), which provides that such garbage is abandoned property conflicting local ordinances.").

¹⁵⁴ *Id.* at 268.

¹⁵⁵ D'Onfro & Epps, *supra* note 5, at 992.

¹⁵⁶ *Id.*

¹⁵⁷ *Whren v. United States*, 517 U.S. 806, 806 (1996) (holding that the temporary detention of a motorist does not violate the Fourth Amendment, even though a reasonable officer would not have stopped the defendant).

¹⁵⁸ D'Onfro & Epps, *supra* note 5, at 988 (discussing common law principles that arguably support the outcomes in *Atwater* and *Terry* and stating that "[t]he Court's approach in seizure cases [such as *Terry* and *Atwater*], which often stress traditional common-law rules, is largely consistent with this suggested approach"); *supra* notes 124–126, 130–131.

¹⁵⁹ Natapoff, *supra* note 109, at 147–48; *supra* notes 76–84; see, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 370 (O'Connor, J., dissenting) ("[T]he 3-year-old boy was 'very, very, very traumatized.' After the incident, he had to see a child psychologist regularly . . . Both . . . children are now terrified at the sight of any police car.").

¹⁶⁰ *Infra* Part III.B.

In sum, Fourth Amendment jurisprudence overlooks citizenship harms associated with policing. Private law approaches would not do much to address these harms, either. In the next Part, I argue that Fourth Amendment law should be oriented around the value of democratic citizenship.

III. ENVISIONING A CITIZENSHIP MODEL OF THE FOURTH AMENDMENT

In this Part, I make the argument for recognizing citizenship as a central value in Fourth Amendment law. Then I discuss the types of values that courts might prioritize under a citizenship model. I explain how a citizenship model would relate to and incorporate considerations of privacy and private law. Finally, I explore how a citizenship model might apply in two sample cases.

A. *The Case for Recognizing Citizenship as a Fourth Amendment Value*

Though the text of the Fourth Amendment does not explicitly mention citizenship, the Fourth Amendment is not “hermetically sealed” from other provisions of the Constitution.¹⁶¹ As Capers has argued, the Fourteenth Amendment amended the *entire* Constitution, and hence, effectively “grafted” guarantees of full and equal citizenship onto the Fourth Amendment.¹⁶² This reading implies that the Fourth Amendment should prohibit race-based police action, as the Fourteenth Amendment does.¹⁶³ However, this is not the only implication of grafting the Fourteenth Amendment’s guarantees of full and equal citizenship onto the Fourth Amendment: The Fourteenth Amendment also protects an individual right to vote, and infringements on one’s right to vote are suspect regardless of whether the infringement is based on race or another protected trait.¹⁶⁴ To

¹⁶¹ Capers, *supra* note 18, at 35.

¹⁶² *Id.* at 37.

¹⁶³ Capers argues that according to this reading, a stop, search, or arrest would violate the Fourth Amendment whenever racial bias or prejudice influenced the officer’s decision to conduct it. *Id.* at 38–39; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266 (1992); see Amar, *supra* note 112, at 805–10; the citizenship model I advance here would address racial profiling, but it would not be limited to that harm. It would address a broader range of citizenship harms caused by police-civilian encounters.

¹⁶⁴ Since the 1960s, the Court’s jurisprudence has recognized voting as an individual right of citizenship, and it has scrutinized burdens on the right to vote, even absent claims of racial discrimination. See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1345 (2011) (stating that “the universalist turn in this period established that . . . [t]he wrongness of disenfranchisement is not simply the wrongness of race discrimination or other similar group-based exclusion: it is also a violation of a fundamental right of citizens”); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 638 (1969) (Stewart, J., dissenting) (arguing that the Court struck down “New York’s statute by asserting that the traditional equal protection standard is inapt in this case, and that a considerably stricter standard . . . should be applied”); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (invalidating a rule prohibiting people who resided in the state for less than one year from voting); see, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (stating that “any alleged infringement on the right of citizens to vote must be carefully and meticulously scrutinized”) (internal quotation marks omitted) (citation omitted); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (invalidating a rule that disqualified members of the armed forces from voting).

realize the Fourteenth Amendment's guarantees of full and equal citizenship, the Fourth Amendment should be read to incorporate the Fourteenth Amendment's citizenship guarantees, including the individual right to vote, as well as its prohibition on racial discrimination. Hence, Fourth Amendment law should be concerned with how police encounters impact an individual's civic identity and voting behavior including but not limited to race-based policing.¹⁶⁵

The research discussed in Part II.A shows how police interactions may burden the individual right to vote and the citizenship-related values it advances. The right to vote is valuable for at least two reasons related to citizenship: First, having the right to vote serves the intrinsic value of officially recognizing (and thereby socializing) a person as one who belongs to the community, entitled to equal respect. This value is distinct from the second, instrumental value voting—i.e., being able to influence policy outcomes.¹⁶⁶ To the extent encounters with police subordinate, stigmatize, demean, and strip people of a sense of belonging and equal standing, they deprive a person of the intrinsic value of the right to vote (i.e., establishing a person's belonging and equal worth in the community).¹⁶⁷ And to the extent police encounters cause people to abstain from civic participation, they also deprive the person (or an entire community) of the instrumental value of the right to vote (i.e., influencing policy outcomes).¹⁶⁸ To realize the Fourteenth Amendment's guarantees of full and equal citizenship, courts must recognize that one's citizenship depends not only on formal equal

¹⁶⁵ Evans, *supra* note 64, at 74–79 (arguing that law should recognize encounters with police and the criminal system as a form of voter suppression).

¹⁶⁶ Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993) (“[T]he vote should be protected not simply because it enables individuals to pursue political ends, but also because voting is a meaningful participatory act through which individuals create and affirm their membership in the community”); Fishkin, *supra* note 159, at 1334 (“Disenfranchised people have sought ‘not just . . . the ability to promote their interests’ politically, but the ‘marks of civic dignity’ that inhere in counting as a full, equal citizen.”) (alterations in original) (citation omitted).

¹⁶⁷ *Supra* notes 65–69, and accompanying text (discussing encounters with police and their correlation to the right to vote); Evans, *supra* note 64, at 75 (stating that “carceral socialization would make it so that residents of heavily policed and criminalized communities have less opportunity to elect candidates of their choice”).

¹⁶⁸ Evans, *supra* note 64, at 52. If these demobilizing effects are concentrated within particular communities, the aggregate impact on voting behavior may be significant enough to change election outcomes and render political institutions less responsive to those communities' interests. For example, Traci Burch found that residents of neighborhoods with the highest rates of people under carceral control (276.7 people incarcerated or on community supervision per square mile, in her sample), were fifty percent less likely to vote compared to residents of neighborhoods with no people under criminal supervision. Traci R. Burch, *Effects of Imprisonment and Community Supervision on Neighborhood Political Participation in North Carolina*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 196–97 (2014). She interprets these results to “suggest[] that the criminal justice interactions of community members have important spillover effects that suppress participation not only of the supervised individual[s] but also of those living around him or her.” *Id.* at 197. Hence, “[t]he criminal justice system denies law-abiding citizens the right to participate on an equal footing with people from neighboring communities with lower criminal justice involvement.” *Id.* at 198.

rights, but also on how one is treated during interactions with government agents, including police.¹⁶⁹

The argument for orienting Fourth Amendment law around the value of citizenship also draws support from John Hart Ely's seminal theory of judicial review—based on *U.S. v. Carolene Products* (1938)¹⁷⁰—which essentially argues as follows: When interpreting open-ended provisions of the Constitution, courts ought to defer to elected officials' policy judgements, except where the policy in question distorts the political process so as to render it systematically unrepresentative of certain segments of the population.¹⁷¹ Baude and Stern invoke Ely's theory to argue for the positive law model, describing the theory as “remarkably influential” and the “starting point of normative constitutional thinking today.”¹⁷²

Citing Ely's theory, Baude and Stern argue that policies regulating searches and seizures are the sort of substantive policy judgements, unrelated to the political process, for which courts owe deference to legislators.¹⁷³ They contend that “[i]n the realm of privacy, [Ely's theory of judicial review] suggests that courts . . . should leave contested choices of substance to legislatures while ensuring that the processes protect political equality.” By assuming that the policies governing policing are “contested choices of substance” distinct from “the processes protect[ing] political equality,” Baude and Stern overlook how policing relates to and sustains political inequality.¹⁷⁴ If one appreciates how policing is both a product and a driver of political inequality, policies governing policing are inseparable from processes that protect political equality.

While Ely's theory holds that courts ought to defer to legislatures on contested policy questions, it maintains that stricter judicial review is warranted in two scenarios: first, when laws thwart a fair and open political

¹⁶⁹ Tracey Meares, *A Third Reconstruction?*, BALKINIZATION (Aug. 14, 2015), <https://balkin.blogspot.com/2015/08/a-third-reconstruction.html>; see Evans, *supra* note 64, at 75–79 (arguing for considering anti-democratic socialization as a form of voter suppression).

¹⁷⁰ *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 (1938).

¹⁷¹ ELY, *supra* note 51, at 75–76 (citing *Carolene Products*, 304 U.S. at 152–53 n.4); Baude & Stern, *supra* note 5, at 1852–53 (citing ELY, *supra* note 51, at 181); see also *supra* notes 51–52 (discussing how some scholars argue that deference should be given to elected officials when the constitution is ambiguous).

¹⁷² Baude & Stern, *supra* note 5, at 1853. Though Ely's theory has not been universally accepted, it has had tremendous influence in how courts and scholars think about judicial review under the Constitution. Many scholars have endorsed the basic idea in Ely's theory that stricter judicial review is appropriate when necessary to protect a democratic political process. Franita Tolson, *Countering the Real Counter Majoritarian Difficulty*, 109 CALIF. L. REV. 2381, 2385 (2021); Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1124 (2002) (discussing Ely's one-person, one-vote standard); David A. Strauss, *Is Carolene Products Obsolete?*, 2010 UNIV. ILL. L. REV. 1251, 1255 (2010); Geoffrey Stone & William P. Marshall, *The Framers' Constitution: Toward a Principled Theory of Constitutionalism*, AM. CONST. SOC'Y 1, 3 (2011), <https://www.acslaw.org/wp-content/uploads/olduploads/originals/documents/The%20Framers%20Constitution%20%20Stone%20and%20Marshall.pdf> (“This as an essential tenet of any theory of principled constitutionalism.”).

¹⁷³ Baude & Stern, *supra* note 5, at 1853.

¹⁷⁴ *Id.*

process, such that political outcomes are unlikely to fairly represent all segments of the population; and second, when laws discriminate against a group that lacks the political power to vindicate its interests through the political process.¹⁷⁵ In both scenarios, stricter judicial review is appropriate to compensate for or correct these deficiencies in the political process, to ensure that government responds to all segments of the population, not just the powerful.¹⁷⁶

If we recognize that policies governing policing both (a) disproportionately target politically powerless groups and (b) tend to suppress participation among those groups, these policies arguably fall within the scenarios where Ely endorses stricter judicial review. On the first point, policing (both private and public) has long targeted members of race–class subordinated communities who lack political power.¹⁷⁷ Indeed, the

¹⁷⁵ ELY, *supra* note 50, at 75–76 (analyzing a footnote in *United States v. Carolene Products Co.*, where Justice Stone argues that the courts should make sure channels of communication are kept open and concern itself with what “majorities do to minorities” particularly through lawmaking); *see also* Strauss, *supra* note 167 at 1269 (observing that the essential vision of *Carolene Products*, as further developed in Ely’s theory, is that “the role of the courts is to make sure that the democratic process remains open and inclusive, and that unfairly excluded minority groups are protected”).

¹⁷⁶ Strauss, *supra* note 172, at 1258.

¹⁷⁷ *See* MICHELLE ALEXANDER, *THE NEW JIM CROW* 66 (2010) (describing how the criminal-justice system functions as a racialized mechanism of control targeting politically powerless communities); *see* Darren Lenard Hutchinson, “*With All the Majesty of the Law*”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 418 (2022) (noting the correlation between racism and punitive sentiment as a mechanism for targeting marginalized racial groups); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) (“[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished.”); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 9 (2018) (empirically documenting how misdemeanor systems ensnare marginalized communities, reinforcing inequality); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 302 (2016) (tracing how crime-control policies supplanted social-welfare aims to manage marginalized populations); *see* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 14 (2017) (arguing that policing institutions operate as a racialized “chokehold,” constraining Black men’s agency and heightening their vulnerability to state control); *see* Bell, *Police Reform*, *supra* note 85, at 2079–80 (highlighting Bell’s argument that policing is a mechanism for sustaining racial segregation by enforcing spatial and social separation); India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576, 1584–85 (2023) (highlighting how vice policing has long served as a tool of racial control, disproportionately targeting communities of color); *see* Jamelia N. Morgan, *An Abolitionist Critique of Quality-of-Life Policing*, 69 UCLA L. REV. 1624, 1642 (2023) (noting how quality-of-life and vice policing regimes are critiqued as instruments of social control disproportionately deployed against marginalized communities); *see* Benett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 56–57 (2009) (arguing that criminal-law practices and policing contribute to maintaining racialized spatial hierarchies, reinforcing segregation of marginalized groups); *see* Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1952 (2014) (concluding that “exposing people to extreme racial disparities in the prison population heightened their fear of crime and increased acceptance of the very policies that lead to those disparities. Thus, institutionalized disparities can be self-perpetuating”); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1348

Warren Court was compelled to constitutionalize criminal procedure in the 1960s precisely because elected officials and state law failed to restrain draconian policing of politically marginalized groups.¹⁷⁸ Second, policing has the potential to suppress political participation among members of heavily policed communities,¹⁷⁹ and hence policing may contribute to and compound the effects of other forms of political suppression, such as laws restricting access to the ballot.¹⁸⁰ Hence, policies governing policing are both a product and cause of political inequality. Policing policy therefore cannot be separated from the processes that protect political equality.

The way courts currently read the Fourth Amendment, as distinct from the Fourteenth Amendment's values of full and equal citizenship, allows policing policies that tend to both reflect and deepen political inequality.¹⁸¹ These policing policies are precisely the sort of malfunction in the political process that renders positive law unresponsive and unaccountable to marginalized populations. In other words, because policing policies relate

(2006) (discussing how crime and punishment are affected by political and social systems); see Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 MO. L. REV. 1037, 1040 (2019) (emphasizing how disenfranchisement regimes use legal complexity to deter voting among formerly convicted individuals); see Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965, 1972 (2022) (emphasizing how the law enforcement lobby's outsized influence over criminal-justice policymaking, reinforcing structural subordination); see Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 882 (2019) (finding that implicit racial bias predicted support for retributivist views of criminal punishment); see Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1598–1600 (2015) (showing that Black Americans and lower income people are relatively powerless, meaning that their policy preferences are less likely to be enacted than those of similarly sized and classified groups). Volumes have been written documenting voter suppression in the U.S., both historically and today. These policies render political institutions less representative of Black people and lower income people. See, e.g., GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA 30 (2020); CAROL ANDERSON, ONE PERSON, NO VOTE (2018) (detailing how structural barriers and disenfranchisement practices systematically silence marginalized voters); ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 6 (1st ed. 2016); see generally RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2013) (arguing that post-2000 election disputes reveal how legal—and partisan—manipulations of electoral rules can disproportionately delegitimize and suppress certain votes); see generally TOVA ANDREA WANG, THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS' RIGHT TO VOTE 155 (2012) (highlighting how suppression efforts are framed through policy levers that disproportionately restrict voting access for marginalized communities); see generally ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 7 (2000) (noting that voting rights in the U.S. have been expanded and contracted in ways that mirror broader patterns of exclusion and power). The politics of control policy are notoriously pathological and captured by special interests. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 217 (2016); see generally RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (showing how punitive penal policies are often driven by political incentives rather than justice goals, constraining reform prospects).

¹⁷⁸ *Supra* notes 87–94 (discussing the Warren Court evolution).

¹⁷⁹ See *supra* Part II.A (discussing the impact of policing on political participation).

¹⁸⁰ See Evans, *supra* note 64, at 52 (arguing that police interactions are a form of political suppression comparable to laws restricting voting).

¹⁸¹ *Supra* notes 161–62.

to (and potentially cause) deficiencies in the “processes protecting political equality,” they should be subject to more careful judicial review under Ely’s theory.¹⁸²

In making this argument, I am not making any claims about the original understanding or public meaning of the Fourth Amendment. Rather, my argument is decidedly non-originalist: The founding generation did not embrace the same values of universal citizenship that the Constitution purports to today. To the contrary, from the Founding era through the 1960s, American law largely supported political inequality and exclusion.¹⁸³ Not until the Reconstruction Amendments and more contemporary jurisprudence did the Constitution reflect modern liberal democratic values, including universal voting rights and political equality.¹⁸⁴ My claim is that the Fourth Amendment should be read in a way that aims to fulfill these more recent constitutional changes that aspire to universal citizenship and political equality.¹⁸⁵ Furthermore, in evaluating whether these goals are met, courts should consider more contemporary social science research on political socialization, or how socializing experiences with government officials may impact peoples’ sense of citizenship and political participation.¹⁸⁶

Though I do not rely on any claims about the original meaning of the Fourth Amendment, the citizenship-oriented reading I advance here is potentially more aligned with the values animating the Amendment. The Framers may have endorsed this citizenship-oriented approach if they understood the nature of modern policing and the dynamics of political socialization. The prevalence of modern professionalized police forces would have been foreign to the Founding generation, and they could not have contemplated the role police encounters would play in socializing people about the nature of government.¹⁸⁷

¹⁸² Baude & Stern, *supra* note 5, at 1853.

¹⁸³ KEYSSAR, *supra* note 177 at xviii; *see generally* DANIELS, *supra* note 177, at 146 (“Race, gender, age, and criminal conviction as the basis for disenfranchisement are all vestiges of a white-supremacist movement that decided that only white males should enjoy the unfettered right to vote. This sentiment has lasted for centuries and had its origin in the founding of our country.”).

¹⁸⁴ Fishkin, *supra* note 164, at 1345 (describing the evolution of the individual right to vote); *see* Thurgood Marshall, *The Constitution’s Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987) (“[T]he government the[] [Framers] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”); *see generally* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (providing background on the expansion of political equality by striking down Virginia’s poll tax); *see generally* Reynolds v. Sims, 377 U.S. 533, 558 (1964) (providing background on the principle of political equality by enforcing the “one person, one vote” doctrine).

¹⁸⁵ *See, e.g.*, Meares, *supra* note 169; Marshall, *supra* note 184, at 1341.

¹⁸⁶ *See* Meares, *supra* note 169 (arguing that there is no “shared reality” between Black Americans and White Americans).

¹⁸⁷ The nature of policing was fundamentally different and much more limited at the time of the founding. *Dunaway v. New York*, 442 U.S. 200 (1979).

Despite different ideas about the original understanding of the Fourth Amendment, most agree that the Framers were particularly concerned with prohibiting general warrants, which granted officers broad discretion to search people's homes, papers, and property for evidence of a crime, without any basis for particularized suspicion.¹⁸⁸ General warrants were troubling because they violated property interests.¹⁸⁹ But they were also troubling because they subordinated members of the public to the discretionary whims of government officials: members of the founding generation described them as being "oppressive,"¹⁹⁰ and as "reduc[ing] a householder to being 'the servant of a servant.'"¹⁹¹

If general warrants troubled the Framers because they were subordinating and demeaning, the Framers might be similarly troubled by the discretionary power of modern police to stop, question, arrest, and search people.¹⁹² While one might be able to make a more robust originalist argument in support of a citizenship-oriented approach, that is not my goal here, as I believe that the Fourth Amendment should be read in light of more contemporary developments in democratic thought and jurisprudence, and social science related to political socialization.

B. *The Values of a Citizenship Model*

Reinterpreting the Fourth Amendment to incorporate democratic citizenship values would be a major undertaking and would require rethinking much of Fourth Amendment jurisprudence. Here I outline the citizenship model. I do not aspire to lay out a new Fourth Amendment test in comprehensive detail. My goal here is to advance ideas about the types of values that courts should consider under a citizenship model. These ideas are intended to start a conversation about incorporating citizenship-related values into Fourth Amendment law—a conversation that should include a diverse range of scholars, advocates, and judges.¹⁹³

Generally stated, under a citizenship model, when evaluating whether an action was an unreasonable search or seizure, courts would consider what that action conveys in terms of the subject's status as a full citizen—i.e., one

¹⁸⁸ Baude & Stern, *supra* note 5, at 1838–39 (noting that the framers were specifically concerned with English cases wherein the government searched homes without warrants looking for documents).

¹⁸⁹ *Id.* at 1839.

¹⁹⁰ Donohue, *supra* note 48, at 1266–68, 1287, 1288, 1291, 1297 (citations omitted).

¹⁹¹ Davies, *supra* note 130, at 578 (citation omitted). Davies suggests there was a classist dynamic in the objections to general warrants: wealthier property-owning White men considered it demeaning that low-level government officers, who they considered lower-class, would have unregulated discretion to forcibly search or seize their property. *Id.* at 580–81.

¹⁹² *Id.* at 578.

¹⁹³ Capers, *supra* note 18, at 40 (arguing that this conversation should be brought to police officers to induce change); Meares, *supra* note 169 (“[D]eep structural change in the law’s orientation towards all citizens especially in the operation of the criminal justice system is also necessary.”). This conversation includes the work of judges and scholars who have raised concerns about citizenship as a value in Fourth Amendment law. *See, e.g.*, *Utah v. Strieff*, 579 U.S. 232, 252 (2016) (Sotomayor, J., dissenting).

who belongs to a community of equals. To evaluate this, courts could assess how the government's action comports with specific qualities of government treatment that are positively associated with belonging, trust, and democratic legitimacy.¹⁹⁴

Procedural justice theory and research provides a starting point for identifying qualities associated with trust in government and democratic legitimacy. This research finds that people's trust in authorities and perception of legitimacy relates to how they are treated. Qualities of treatment, like voice and the opportunity to participate, demonstrated fairness and neutrality, respect and dignity, and apparent benevolent motives, are positively associated with a sense of belonging and status in the community, and accordingly with trust in government and perceptions of legitimacy.¹⁹⁵ Though procedural justice theory, which is rooted in social psychology, does not speak explicitly in terms of citizenship (a more legal concept), the qualities associated with procedural justice overlap significantly with the values of citizenship. These qualities are important to people precisely because they affirm one's belonging and equal standing in the community.¹⁹⁶ Below, I explore each of these qualities in more detail, and explain how they may fit into a citizenship model:

Voice and participation: Voice and participation are important components of citizenship and procedural justice, as they relate directly to both self-determination and belonging. Under a citizenship model, when evaluating a policing policy or practice, courts could ask whether there are mechanisms for members of impacted communities to effectively participate

¹⁹⁴ Scott Sundby argues that Fourth Amendment jurisprudence should focus on the value of government-citizen trust instead of privacy. Under this approach, courts would ask whether the government's action is inconsistent with notions of government-citizen trust. Scott E. Sundby, *Everyman's Fourth Amendment: Privacy Or Mutual Trust Between Government and Citizen*, 94 COLUM. L. REV. 1751, 1795 (1994). A citizenship model is consistent with this focus on government-citizen trust, since it would prioritize qualities of treatment that are associated with building trust and legitimacy. *Id.*

¹⁹⁵ A large body of research in the field of procedural justice shows that, when government treats people according to these qualities, people are likelier to see government officials as respecting them as a valued member of the community and to trust government officials. *See, e.g.*, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–5 (2006) (arguing that judges and police can maintain their authority by being perceived as fair by the people they are interacting with); Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525, 535 (2014) (“The quality of the treatment that people receive . . . sends messages that people use to interpret their degree of inclusion within society and their social status/standing.”); *see also* Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 115, 158 (1992) (arguing that good relations with authorities can lead to people feeling valued by their community).

¹⁹⁶ Procedurally just treatment, insofar as it affirms one's sense of belonging and status in the community, is likely to affirm and strengthen a person's civic identity and positively impact their political participation. Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1533 (2017) (“People tend to seek a favorable social identity within the groups to which they belong.”).

in overseeing and determining the policy or practice in question.¹⁹⁷ Along these lines, Friedman and Ponomarenko argue that “courts ought to defer to police decisions about enforcement methods only to the extent that those decisions represent considered, fact-based judgments formulated with democratic input.”¹⁹⁸ Similarly, under a citizenship model, if communities most impacted by a policing policy have a meaningful say in shaping that policy, this may weigh in favor of finding the policy is reasonable within the meaning of the Fourth Amendment.¹⁹⁹

Autonomy and consent: Consent is integral to autonomy and the related value of dignity, which are core components of procedural justice and democratic citizenship.²⁰⁰ Thus, treating a person as a democratic citizen means prioritizing their experience of autonomy and consent. This would mean that courts would define consent more stringently compared to either current Fourth Amendment jurisprudence or positive law alternatives. I will elaborate these differences in Part III.D.1, where I explain how a citizenship model would approach the question of whether a search or seizure occurred.²⁰¹

This emphasis on consent is consistent with a central premise of Baude and Stern’s argument for a positive law approach: they contend that the central function of the Fourth Amendment is to ensure that government officials—who have unique powers to use force and otherwise constrain liberty—abide by the laws governing ordinary people.²⁰² This understanding of the Fourth Amendment, as being concerned with the *legality* of government action, implicitly prioritizes the value of consent and political autonomy. Legality is important because it reinforces the notion that government officials serve at the will of the governed and should only be

¹⁹⁷ In evaluating the democratic quality of a policymaking process, it is important to consider not only whether it is open for public input, but *who* is giving public input. Opportunities for public input can be exploited by more powerful actors, who have more resources for voicing their claims. It is therefore vital to the democratic quality that the policy process have institutionalized mechanisms for incorporating the views and voices of people from communities most adversely impacted by the policy in question. For a discussion of some mechanisms that can accomplish this, see generally K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, *CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS* 3 (2019) (discussing how investments in participatory policymaking institutions can lead to a more inclusive democracy); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 682 (2020).

¹⁹⁸ Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1892 (2015).

¹⁹⁹ For versions of this argument, see *id.* (arguing that judges are able to measure police conduct against democratically accountable law); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1154 (1998) (arguing that deference to law enforcement policies should depend to some extent on the level of support from the community most impacted by the policy).

²⁰⁰ See Anderson, *supra* note 67, at 317 (discussing the importance of autonomy in democratic citizenship).

²⁰¹ See *infra* notes 259–271 and accompanying text (discussing how searches and seizures would be analyzed under a citizenship model).

²⁰² Baude & Stern, *supra* note 5, at 1846–48.

permitted to invade people's bodies and property to the extent that people have generally authorized (or consented to) such intrusions via laws governing private conduct.²⁰³ In arguing that positive law ought to serve as democratically legitimate authorization for intrusive government conduct, Baude and Stern rely on a theory of virtual consent, i.e., they infer that the public has authorized (and thereby consented to) certain intrusions via elected representatives, who presumably reflect the will of "the people."²⁰⁴

In contrast, a citizenship model would not rely so heavily on the notion of virtual consent—i.e., that laws governing private conduct related to searches and seizures represent the views and preferences of many or most members of the electorate. Well-recognized inequities in political power may render elected officials' judgements unrepresentative of the interests of race-class subordinated and otherwise marginalized communities.²⁰⁵ Hence, many people do not experience autonomy and self-determination by simple virtue of living in a democracy and having the right to vote. The research discussed in Part II.A shows how people who have the formal rights of citizenship do not *experience* themselves as full citizens—i.e., having a voice and the power to participate in and influence government policy—due to how they have been treated in day-to-day interactions with government.²⁰⁶ For this reason, a model that prioritizes autonomy and consent focuses more on the extent to which individuals experience autonomy during interactions with police.

²⁰³ The connection between legality (or rule of law) values and consent/autonomy is as follows: if government officials are exempted from laws governing private conduct, they would be able to take actions that the public generally does not regard as acceptable or permissible. This would render government officials "above the law," which also implicitly means acting without consent of the governed. See Baude & Stern, *supra* note 5, at 1846 ("James Madison argued that the Constitution implicitly proscribed general exemptions from the law for government officials, declaring such a limitation 'one of the strongest bonds by which human policy can connect the rulers and the people together.'") (quoting THE FEDERALIST NO. 57, at 352 (James Madison) (Clinton Rossiter ed., 1961)); See Baude & Stern, *supra* note 5, at 1846–47 (Stating that "'the principle which . . . subjects [our government officials] to the same rules of conduct that are commands to the citizen' lies '[a]t the foundation of our civil liberty'" (quoting *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting)).

²⁰⁴ See Baude & Stern, *supra* note 5, at 1853 (discussing Ely's theory of "representation reinforcement" and arguing that substantive policy choices regarding privacy are best left to legislatures since their judgements are presumably representative of public preferences and values); *id.* at 1866:

If people want to live in fishbowls, the Fourth Amendment should not be what stops them, so long as the government swims alongside them. And, conversely, if people want to live in a world with robust limits on the ability to obtain certain information about one another, the Fourth Amendment should keep pace.

²⁰⁵ See *supra* notes 146–153 and accompanying text (arguing that the positive law approach sometimes leads to an expansion of government intrusiveness); see also *supra* note 177 (discussing how public and private policing has often been targeted at marginalized groups that lack political power). For example, the laws permitting citizen's arrests have historically been adopted and used in ways that replicate and reinforce inequities in political power. See *supra* notes 137–141 and accompanying text (discussing how traditional forms of community policing have often been detrimental towards marginalized groups).

²⁰⁶ See *supra* notes 64–85 and accompanying text (arguing that negative treatment from the government can diminish an individual's sense of citizenship).

Anti-subordination: A citizenship model prioritizes the value of anti-subordination. This is because government actions that reinforce social hierarchies are incompatible with equal worth and respect, core tenets of both procedural justice and citizenship.²⁰⁷ Unlike either existing Fourth Amendment jurisprudence or proposed private law models, under a citizenship model, when evaluating whether a search or seizure is unreasonable, courts would consider whether a police officer’s action was race-motivated, and whether policing policies have the effect of maintaining or reinforcing existing hierarchies in social status and power.²⁰⁸

For example, scholars have identified various policing policies that reinforce and promote residential segregation. One such policy is “proactive” policing strategies that target communities perceived as being higher-crime—typically race and class subordinated communities—for intensive policing, including frequent *Terry* stops and other modes of surveillance.²⁰⁹ By concentrating surveillance-style policing in lower-income communities of color, police effectively “channel[] people of color

²⁰⁷ Framers of the Fourteenth Amendment expressed this vision of citizenship. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1001 (1869) (remarks of Sen. Edmunds) (“A citizen is a person in community who, other things being equal, is invested with all the privileges that belong to the highest class in community . . .”); *see also supra* note 67 and accompanying discussion (arguing that citizenship is about belonging to community of equals); Capers, *supra* note 18, at 23–25 (discussing how racialized policing stigmatizes and subordinates by conveying that government officials regard members of the targeted racial group with suspicion).

²⁰⁸ For similar arguments, *see, e.g.*, Capers, *supra* note 18, at 35–43 (arguing that stop-and-frisks should only be found reasonable if they are free from racial bias); Capers, *supra* note 68, at 699–707 (discussing an instance where a citizen questioned whether this was a country of equal citizenship); Hutchinson, *supra* note 177, at 420–21 (arguing for consideration of historical racism in equal protection litigation concerning criminal justice practices); Devon W. Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678, 1693 (2022) (rewriting *Whren* to hold that it is unreasonable for a police officer to stop a motorist because of their race); Gabriel J. Chin & Charles J. Vernon, *Reasonable But Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 926–29 (2015) (arguing that nondiscrimination should be incorporated into the reasonableness standard because unconstitutional searches are unreasonable); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 970 (2002) (arguing for a change of perspective from the perpetrator to the victim in Fourth Amendment jurisprudence); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 254 (2010) (discussing how the Fourth Amendment makes it easier for police to arrest black people); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164–65 (2015) (arguing that courts should take into account how police programmatically target communities of color when evaluating the reasonableness of a stop-and-frisk policy); Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection’s Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 137–38 (2012) (arguing that the Equal Protection Clause should force police departments to ensure that their conduct is not racially biased); Alisa Tiwari, Note, *Disparate-Impact Liability for Policing*, 129 YALE L.J. 252, 260–67 (2020) (discussing the potential disparate impact liability based on federal statutes); Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1409 (2021) (discussing police practices that disproportionately impact people with disabilities); Amar, *supra* note 112, at 805–10 (arguing that Fourth Amendment “reasonableness” analysis should incorporate Equal Protection principles).

²⁰⁹ Bell, *Anti-Segregation Policing*, *supra* note 85, at 707; Capers, *supra* note 177, at 64.

into the expansive criminal punishment system, which directly and indirectly contributes to the problem of housing dispossession and neighborhood-level structural inequality.”²¹⁰ This exclusionary treatment diminishes peoples’ sense of citizenship, belonging, and trust in government.²¹¹ Under a citizenship model, when evaluating the reasonableness of a policing policy like this, courts would consider how it interacts with and/or works to maintain social and economic and political inequality.²¹² If a policing practice demonstrably causes, sustains, or exacerbates social stratification, this should weigh in favor of finding the policy unreasonable, even absent proof of discriminatory motives.²¹³

Proportionality: A citizenship model would also center the value of proportionality. The principle of proportionality holds that when the government infringes on a person’s fundamental interests, the infringement must be necessary to serve a legitimate government purpose, and the purpose must be important enough to outweigh the harm.²¹⁴ Proportionality relates to procedural justice and citizenship in that requiring the government to justify the harm it causes conveys respect for the equal worth of those harmed.²¹⁵ Jurisprudence allowing government officials to do unnecessary or gratuitous harm conveys that the harmed parties’ interests are insignificant or not worthy of equal consideration.²¹⁶

²¹⁰ Bell, *Anti-Segregation Policing*, *supra* note 85, at 691. For a related argument see Meares, *supra* note 208, at 164 (suggesting that courts ought to consider aggregate data on who is targeted by stop and frisk programs and find these programs unreasonable if race appears to impact the likelihood of being stopped, apart from ostensibly “legitimate” factors, such as neighborhood crime rate).

²¹¹ Bell, *Anti-Segregation Policing*, *supra* note 85, at 659 (discussing the relationship between policing, segregation, and legal estrangement); Bell, *Police Reform*, *supra* note 85, at 2085–87; Meares, *supra* note 208, at 175–76 (“The fact that racial minorities in cities disproportionately encounter police in both constitutional and unconstitutional contexts fuels those minorities’ perceptions of the illegitimacy of the police.”); LERMAN & WEAVER, *supra* note 64, at 111.

²¹² See *supra* note 208 (discussing various arguments relating to how a citizenship model would analyze race motivation in searches and seizures).

²¹³ One possible consequence of such a rule would be to effectively require more police activity to be randomly distributed across all segments of the population rather than targeted at specific groups or profiles. See, e.g., Capers, *supra* note 18, at 43–44 (arguing that randomization is more just, in that it would eliminate the role of bias); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 815 (2011) (saying the same).

²¹⁴ For more on proportionality principles in U.S. constitutional law compared to other constitutional democracies, see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3113–14 (2015) (discussing the benefits of proportionality in other constitutional democracies as compared to the United States).

²¹⁵ For more on the importance of benevolence, respect, and trust, see sources cited *supra* note 195 (discussing this importance).

²¹⁶ See Anderson *supra* note 67, at 313 (arguing that in order to stand as an equal before others, one is entitled to participate in discussions without distinguishing themselves as inferior to others); Benjamin Ewing, *The Political Legitimacy of Retribution: Two Reasons for Skepticism*, 34 L. & PHIL. 369, 392 (2015) (“The characteristic feature of a political liberal state is that . . . it acts only on the basis of reasons that may at least in principle secure the principled endorsement of all reasonable people [B]y confining themselves to considerations that reasonable people can share, they can display respect for one another’s equality and capacity for freedom.”).

A jurisprudence concerned with proportionality would differ from both existing Fourth Amendment law and private law alternatives. Other scholars have argued that Fourth Amendment law should incorporate more meaningful proportionality review, since searches or seizures causing disproportionate harm are arguably “unreasonable,” and therefore prohibited by the text.²¹⁷ Though the Court often speaks in terms of balancing the government’s law enforcement interests against the intrusiveness of a search or seizure, the Court does this in a manner that defers heavily to law enforcement interests and minimizes the harm associated with stops, arrests, and searches.

For example, *Atwater* upheld the arrest of a woman with two small children for a fine-only traffic infraction, despite acknowledging that it was a “pointless indignity” and served no purpose but “gratuitous humiliation[.]”²¹⁸ The Court stressed the importance of creating a bright line rule that officers could easily follow, but this could have been achieved with a narrower bright-line rule, and thus the government’s interest in clarity arguably does not justify allowing officers to inflict the serious physical, emotional, psychological, economic, and citizenship-related harms caused by an arrest whenever they have probable cause to believe someone committed even the smallest traffic infraction.²¹⁹ But the Court eschewed any semblance of proportionality in upholding this arrest, expressly rejecting a requirement that police may only arrest someone if doing so is necessary (i.e., the least harmful alternative) to advance the government’s law enforcement objectives.²²⁰

Under a citizenship model, courts might convey respect for each person’s equal worth by requiring the government to show that searches and seizures are necessary to serve some public interest important enough to justify the harm. And when evaluating the harm, courts should consider evidence of all prospective physical, economic, psychological, and civic harm.²²¹ This should include not only potential harms to the targets of police

²¹⁷ Jackson, *supra* note 214, at 3102 (“Fourth Amendment cases like *Atwater v. City of Lago Vista*, with rigid rules allowing police to detain and search regardless of the severity of the offense . . . facilitate humiliating and badly intentioned police conduct.”) (footnote omitted); CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 21 (2007) (arguing for the adoption of a proportionality principle in Fourth Amendment jurisprudence where courts would ask whether the government’s justification outweighs the intrusiveness of a law enforcement technique).

²¹⁸ *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001).

²¹⁹ *Id.* at 364–68 (O’Connor, J., dissenting) (arguing that the majority’s rule “defies any sense of proportionality” and arguing for a rule that would limit warrantless misdemeanor arrests to scenarios where there is an articulable basis for finding an arrest warranted).

²²⁰ *Id.* at 350.

²²¹ On the potential harms of police stops, frisks, and arrests, see Ndujoh MehChu, *Policing as Assault*, 111 CALIF. L. REV. 865, 872–73 (2023) (arguing that policing in itself is violence and a tortious assault on marginalized groups); Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, 93 J. URBAN HEALTH: BULL. N.Y. ACAD.

action, but also potential harms to police officers themselves, who may also experience psychological or physical harm from using confrontational, coercive, and intrusive tactics on people, perhaps provoking aggression, resentment, and hostility.²²² Additionally, courts could consider the potential erosion of civility and social norms. As David Sklansky explains, authorizing and encouraging officers to invade others' bodily autonomy or to violate others' privacy "can train individuals and organizations in habits of dehumanization and depersonalization."²²³

On the other side of the balance, when evaluating the strength of the government's law enforcement interests, courts can consider the severity of the suspected crime and the danger the suspected person or activity poses to other people. Courts could also consider how policing policies that treat people according to the tenets of procedural justice (i.e., affirm people's sense of belonging and standing in the community) may ultimately advance law enforcement interests by increasing people's trust in government,

MED. 542, 554 (2016) (finding that *Terry* stops are correlated with individual-level illness); Jana L. Hirschtick, Sharon M. Homan, Garth Rauscher, Leah H. Rubin, Timothy P. Johnson, Caryn E. Peterson & Victoria W. Persky, *Persistent and Aggressive Interactions with the Police: Potential Mental Health Implications*, 29 EPIDEMIOLOGY & PSYCHIATRIC SCIS. 1, 4 (2019) (finding that there is a potential association between high police exposure and mental health status); Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2323–24 (2014) (finding that anxiety symptoms were significantly related to the amount of times young urban men were stopped by the police); Alyasah Ali Sewell, Kevin A. Jefferson & Hedwig Lee, *Living Under Surveillance: Gender, Psychological Distress, and Stop-Question-and-Frisk Policing in New York City*, 159 SOC. SCI. & MED. 1, 2, 6–7 (2016) (finding that there is a correlation between living in a neighborhood with more stop-and-frisk policing and psychological distress); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 316 (2016) ("[M]any arrests are for crimes that are so minor that the harms of arrest would be far too serious a punishment if they were imposed for a retributive or deterrent purpose."); Natapoff, *supra* note 109, at 157 (arguing that the way in which *Atwater* treats misdemeanors is the foundation of excessive incarceration). When evaluating the harm associated with police encounters, courts and other scholars have focused primarily on intrusiveness. *See, e.g.*, SLOBOGIN *supra* note 217, at 21 (arguing that a search or seizure should be found reasonable if the level of its intrusion is proportionate to the strength of its justification). But the balancing test I am contemplating would consider a broader range of harms beyond intrusiveness. *Cf.*, Orin S. Kerr, *Do We Need a New Fourth Amendment?*, 107 MICH. L. REV. 951, 959–60 (2009) (questioning whether the concept of "intrusiveness" adequately captures threats to civil liberties).

²²² Police officers have higher rates of mental health issues, PTSD, suicide, and various physical health problems compared to the general population, in part due to the stressful nature of their work, including traumatic experiences, threats to safety, and hostile encounters. *See, e.g.*, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 63 (Office of Community Oriented Policing Services 2015), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/final-report-presidents-task-force-21st-century-policing> ("Law enforcement officers are subject to more stress than the general population owing to the nature of their jobs . . . working with difficult—even hostile—individuals, responding to tragic events, and sometimes coming under fire themselves . . ."); *see also* MehChu, *supra* note 221, at 891 (discussing policing as "violence work"); Irina Komarovskaya, Shira Maguen, Shannon E. McCaslin, Thomas J. Metzler, Anita Madan, Adam D. Brown, Isaac R. Galatzer-Levy, Clare Henn-Haase & Charles R. Marmar, *The Impact of Killing and Injuring Others on Mental Health Symptoms Among Police Officers*, 45 J. PSYCHIATRIC RSCH. 1332, 1334 (2011) (discussing the psychological toll on police officers).

²²³ Sklansky, *supra* note 112, at 1111.

respect for the law, and voluntary cooperation.²²⁴ In other words, there may be times were the government's law enforcement and public safety interests actually weigh in favor of less intrusive action by police.

In a somewhat similar vein, Tokson has argued that courts should apply a proportionality-like test to determine whether an intrusion is a search under the Fourth Amendment. This test would weigh the harms of surveillance (deterring lawful activity; harming relationships and communications; and concrete psychological or physical harm) against the law enforcement benefits and ask whether this surveillance is the least invasive alternative for accomplishing the law enforcement objectives.²²⁵ A test like this aligns with a citizenship approach, as it recognizes the significant harms of surveillance and it requires the government to show the harms are necessary to serve some countervailing law enforcement value.

* * *

The values discussed above are not meant to be an exhaustive list of the values that courts might prioritize under a citizenship model. These ideas are preliminary, and there is much more to say about the values associated with democratic citizenship and how they fit into Fourth Amendment law. My goal is to inspire more discussion among scholars, advocates, and courts about what it would mean to incorporate citizenship values into Fourth Amendment law.²²⁶

²²⁴ Tyler & Meares, *supra* note 195, at 530–34 (summarizing a large body of research finding that people who perceive courts and police as being procedurally just are likelier to respect, trust, and cooperate with them). Consistent with this, cities have achieved significant crime reduction using community-based violence interruption strategies, which provide targeted outreach, resources, and social support to people who have been involved in violent crime. *See, e.g.*, Michel Martin & Ana Perez, *Baltimore Mayor Brandon Scott Discusses How the City Has Brought Violent Crime Down*, NPR (Aug. 20, 2025, 5:00 PM), <https://www.npr.org/2025/08/19/nx-s1-5503390/baltimore-mayor-brandon-scott-low-crime-rates> (describing the effects of community-based policing in Baltimore on crime levels); Kathy Chouteau, *Richmond ONS 'Loves On' at Risk People to End Gun Violence*, RICHMOND STANDARD (Feb. 6, 2024), <https://richmondstandard.com/community/2024/02/06/richmonds-ons-loves-on-at-risk-people-to-end-gun-violence> (describing the community-based methods that the city of Richmond is using to reduce crime rates); *Beyond Policing: Investing in Offices of Neighborhood Safety*, CTR. FOR AM. PROGRESS (Oct. 15, 2020), <https://www.americanprogress.org/article/beyond-policing-investing-offices-neighborhood-safety/> (recommending several measures to move police departments towards community-led policing).

²²⁵ Tokson, *supra* note 5, at 743.

²²⁶ *See supra* note 193 and accompanying text (discussing an intention to initiate a conversation about incorporating citizenship-related values into Fourth Amendment law).

C. Relationship to Privacy and Private Law

In arguing that courts should center citizenship values in Fourth Amendment law, I am not suggesting that Fourth Amendment analysis should completely exclude privacy and private law. Under this approach, courts could consider private law and privacy interests, but they would understand these to be important insofar as they affirm values associated with citizenship. In this sense, both privacy and private law could do some work in an analysis centered on citizenship.

Privacy: The concept of privacy has myriad uses and does not lend itself to straightforward definition.²²⁷ One way to understand privacy, and why it ought to be a fundamental constitutional value, is that privacy affirms and advances citizenship-related values, such as autonomy and dignity.²²⁸ In other words, privacy is a constitutional value because and insofar as it protects autonomy, and respecting a person's autonomy—ability to control their body, belongings, personal information, and personality—is part of respecting a person's standing as a full and equal citizen.²²⁹ When courts consider what violates a person's privacy, they should focus not exclusively on whether a person knowingly revealed information or whether an officer's action is physically intrusive, but they should consider these factors in relation to the overarching question of how an officer's action impacts a person's sense of autonomy and self-determination. This understanding of privacy would focus on consent: for example, whether a person voluntarily

²²⁷ Privacy has been defined in many ways, ranging from “the right to be let alone,” control over information, self-determination, intimacy, bodily integrity, and descriptively, in terms of social norms or understandings governing the use of information. Maria P. Angel & Ryan Calo, *Distinguishing Privacy Law: A Critique of Privacy as Social Taxonomy*, 124 COLUM. L. REV. 507, 509–10 (2023); Sklansky, *supra* note 112, at 1078–79 (discussing the different definitions of privacy); *see also* Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1092 (2002) (identifying six different uses of the term privacy). Others have argued for defining privacy pragmatically in terms of how the lack of privacy (or surveillance) disrupts peoples' personal and social activities, such as political participation, seeking health care, shopping, travel, thought, and self-expression. Tokson, *supra* note 5, at 751; *see also* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 412–26 (2008) (discussing intellectual privacy as it relates to special privacy, intellectual exploration, confidential communications).

²²⁸ *See* Judith Jarvis Thompson, *The Right to Privacy*, 4 PHIL. & PUB. AFFS. 295, 306 (1975) (“[T]he right to privacy is itself a cluster of rights, and that it is not a distinct cluster of rights but itself intersects with the cluster of rights which the right over the person consists in and also with the cluster of rights which owning property consists in.”); *see also* Sklansky, *supra* note 112, at 1110 (conceptualizing privacy as a set of civility norms as to the respect we owe other people in specific situations, which are violated by degrading and dehumanizing treatment) (quoting Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092–93 (2001)).

²²⁹ Privacy-related harms are often characterized by a restriction of autonomy and self-determination and by a sense of being demeaned or subordinated to those with power. *See, e.g.*, Tokson, *supra* note 5, at 758–68 (discussing how surveillance can deter people from engaging in lawful activities, impair relationships, and cause physical and psychological harms such as stress, anger, fatigue, depression, irritation, and infantilization); Sklansky, *supra* note 112, at 1106 (discussing “a long tradition of suggesting that privacy is a form of dignity, or that privacy is important in part because it protects dignity”); *see supra* notes 190–191 and accompanying text (discussing how general warrants were seen as “oppressive” and putting people in a position of servitude relative to government officers).

agreed to share their data or information with law enforcement (as opposed to whether they knowingly shared it with any third party), and whether a person was aware of and felt empowered to exercise their right to refuse an officer's request to submit to questioning or a search'.²³⁰

Private law: Private law might also inform the application of a citizenship model. A violation of private law may be evidence that an action demeans, degrades, subordinates, and thereby causes citizenship harm. Private law often reflects dominant societal values related to the respect and care that people owe one another.²³¹ As Brady explains, at common law, property rights were valued because they advanced citizenship-related values such as self-determination, dignity, and anti-subordination.²³² For example, Brady has shown that the common law of property would offer, in some circumstances, more protection for personal effects than courts recognize under current Fourth Amendment jurisprudence.²³³ In cases like this, the common law of property, tort, etc., may provide helpful guidance on what it commonly means to treat someone with dignity, and it could be relevant in establishing the standard of care that the government should follow if it is to affirm people's sense of full and equal citizenship. In this sense, a violation of private law may be evidence that an officer's action violates the values associated with citizenship, such as autonomy, consent, and anti-subordination.

However, there are also many scenarios where private law falls short of protecting citizenship-related values, as evidenced by the history of citizen's arrest laws.²³⁴ Thus, the fact that an officer's action complies with private law does not necessarily imply the act comports with the values of citizenship. Therefore, under a citizenship model, a violation of private law may be sufficient to show a Fourth Amendment violation, but it would not be necessary.²³⁵

D. *Applying a Citizenship Model*

To make these ideas more concrete, I will briefly discuss how a citizenship model would change the Fourth Amendment analysis in exemplary cases. First, I will discuss how a citizenship model would address the threshold question of whether a search or seizure occurred. Second, I will discuss how a citizenship model would approach the question of

²³⁰ See *supra* notes 200–206 and accompanying text (discussing the citizenship model's view of consent and how it relates to autonomy and self-determination).

²³¹ D'Onfro & Epps, *supra* note 5, at 958–59, 970–79.

²³² Property protections were designed, in part, to promote a certain kind of equity—to protect the interests of the powerless from forcible takings by the powerful. Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 993–94 (2016).

²³³ *Id.* at 1000–02.

²³⁴ See *supra* notes 124–145 and accompanying text (discussing the citizen's arrest laws).

²³⁵ For a similar argument, see Re, *supra* note 15, at 314 (suggesting that positive law should be a floor, but not a ceiling, in defining a Fourth Amendment violation).

whether a search or seizure is reasonable, and therefore permissible, under the Fourth Amendment. This shows how a citizenship model would focus on a different set of questions than either current Fourth Amendment jurisprudence or private law approaches.

1. *Did a search or seizure occur?*

Under a citizenship model, courts would take a different approach to the question of whether a search or seizure occurred. As previously discussed, under current Fourth Amendment doctrine, courts define a search by asking whether law enforcement officers physically invaded the subject's body or property,²³⁶ or violated the subject's reasonable expectations of privacy.²³⁷ This raises complex and difficult questions about how to define and evaluate reasonable privacy expectations, and in particular, how voluntarily exposing information to third parties—e.g., cell phone carriers, email servers, garbage collectors, people who may be flying over the person's property—impacts a person's reasonable expectations of privacy.²³⁸

Under current Fourth Amendment doctrine, courts define a seizure as a restraint on a person's freedom of movement by either physical force or show of authority.²³⁹ In scenarios where a person is arguably seized without any physical restraint, courts ask whether, in light of all the circumstances surrounding the encounter, a reasonable person would feel free to leave.²⁴⁰ In making this judgement, the Court has held that an officer may ask a person to submit to questioning or a search without advising that person of a right to refuse. If the person cooperates, the interaction may be deemed voluntary, and therefore not a search or seizure covered by the Fourth Amendment.²⁴¹

In terms of the private law approaches, Baude and Stern's positive law model defines search differently from D'Onfro and Epps's general law

²³⁶ U.S. v. Jones, 565 U.S. 400, 404–05 (2012).

²³⁷ Katz v. U.S., 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Carpenter v. U.S., 138 S. Ct. 2206, 2241 (2018).

²³⁸ See *supra* notes 5–9 and accompanying discussion (discussing the “reasonable expectation of privacy” test); see also Baude & Stern, *supra* note 5, at 1831 (describing the reasonable expectations of privacy question as “ambiguous” and “daunting to answer”). The Court has generally held that people lack a reasonable expectation of privacy in information voluntarily exposed to the public or shared with third parties. *Carpenter* recognized a limited exception to this rule for more than seven days' worth of cell site location information, because this information provides a comprehensive picture of a person's location over time, far more revealing than any individual snapshot of their whereabouts or activities. The data is retrospective and could be obtained for limitless individuals. *Carpenter*, 138 S. Ct. 2206 at 2217–18. Furthermore, individuals have little choice but to carry cell phones and to reveal their whereabouts to their cell phone carriers as a condition of doing so. *Id.* at 2220. There is an open question as to how *Carpenter* applies in other contexts where people voluntarily reveal information to third parties or the public. See, e.g., Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018–2021*, 135 HARV. L. REV. 1790, 1793 (2023).

²³⁹ United States v. Mendenhall, 446 U.S. 544, 553 (1980) (defining the term “seizure”); United States v. Drayton, 536 U.S. 194, 201 (2002) (defining what the term “seizure” does not encompass).

²⁴⁰ *Mendenhall*, 446 U.S. at 553; *Drayton*, 536 U.S. at 201.

²⁴¹ See *supra* note 143 and accompanying text (discussing the Court's holding in *Mendenhall*).

approach. Baude and Stern look to positive law only for the threshold question of whether a search or seizure occurred, and thus whether the Fourth Amendment applies.²⁴² In contrast, D’Onfro and Epps employ a relatively broad definition of search, such as “any examination of an object or space to uncover information,” and a definition of seizure that is similar if not identical to that under existing Fourth Amendment jurisprudence.²⁴³ Once it is determined that a search or seizure occurred, they look to general law in the remaining steps of the Fourth Amendment analysis, i.e., whether the search or seizure violated the rights of the claimant and whether it was nonetheless reasonable.²⁴⁴

A citizenship approach would differ from current jurisprudence as well as the positive law and general law approaches. For reasons explained in Part III.B, a citizenship model would stress the value of autonomy and consent because these are central tenets of democratic citizenship.²⁴⁵ This gets much more directly at some of the concerns that have historically animated Fourth Amendment law. One way to understand the value of privacy is as protecting and respecting a person’s autonomy—their ability to control their body, belongings, personal information, and personality—and this is part of respecting a person’s standing as a full and equal citizen, in other words, their dignity.²⁴⁶ Insofar as property rights have been thought central to Fourth Amendment protection, this also aligns with the underlying values of autonomy and consent: Property rights can facilitate individual autonomy and self-determination.²⁴⁷ Finally, an emphasis on autonomy and consent speaks to some of the Framers’ concerns with general warrants: that they subjected people to the whims of government officials, were oppressive, and in other words, violated a key tenet of democracy—that government officials are responsive to the will of the governed.²⁴⁸ In sum, the interests that have long been associated with the Fourth Amendment relate, at a fundamental level, to the values of autonomy and consent, and these should be central in determining whether the Fourth Amendment applies.

This would mean that an action would be a search or seizure if it violates a person’s sense of autonomy, meaning their control over their own body,

²⁴² Baude & Stern, *supra* note 5, at 1832.

²⁴³ D’Onfro & Epps, *supra* note 5, at 933 (noting that the threshold question of whether a search or seizure occurred “would not be particularly demanding” suggesting a definition of search that includes “any examination of an object or space to uncover information” and is broad enough to “cover various kinds of electronic surveillance and government attempts to access digital files and data”) (internal quotation marks omitted) (citation omitted); *id.* (stating that under a general-law approach, the definition of seizure “need not meaningfully change [from] how current precedent resolves that issue”).

²⁴⁴ *Id.* at 934–35.

²⁴⁵ See *supra* notes 200–06 and accompanying text (discussing the value of autonomy and consent).

²⁴⁶ See *supra* notes 231–33 and accompanying text (discussing private law’s reflection on societal values).

²⁴⁷ *Supra* notes 228–29 and accompanying text (discussing individual autonomy).

²⁴⁸ See *supra* notes 187–88 and accompanying text (discussing the issues with general warrants).

property, personal information, and personality. An action violates autonomy if it compromises a person's control over these aspects of personhood without the person's consent. Under this approach, consent would be of central importance. An approach that stressed consent would not categorically follow the "third party" and knowing exposure doctrines, which assume that one voluntarily forfeits any expectation of privacy in information one reveals to third parties or members of the public, and that government officers do not conduct a search when they obtain or observe this information.²⁴⁹ Instead, under a citizenship model, the question would be whether a person consented to their information being obtained and used *by law enforcement (or another government agent) in the particular way it was obtained and used*. Courts would not assume that because one consented to sharing information with another private party or civilians flying overhead, they automatically consented to sharing it with the government for law enforcement purposes.²⁵⁰

This would lead to a different analysis in cases like *California v. Greenwood* (1988), which held that one has no reasonable expectation of privacy in garbage bags left out on the street for collection and hence no search occurred when officers rummaged through these garbage bags²⁵¹; *Florida v. Riley* (1989), which held that one has no reasonable expectation of privacy in objects visible from a height at which aircraft legally fly in the airspace above one's property and hence no search occurred when officers flew a helicopter 400 feet above a person's fenced property in order to visualize objects inside a greenhouse through an open roof panel²⁵²; and *U.S. v. White* (1971), which held that one has no reasonable expectation of privacy in information one shares with an undercover informant and hence no search occurred when officers listened to a conversation with an undercover informant wearing a wire.²⁵³

Under a positive law approach, these actions would only be searches if they are unlawful for private individuals to perform.²⁵⁴ If lawmakers wanted to authorize police to engage in these practices without implicating the Fourth Amendment, they could do so by changing the law to allow any

²⁴⁹ *Carpenter v. U.S.*, 138 S. Ct. 2208, 2216 (2018); *United States v. Miller*, 425 U.S. 435, 435 (1976); *California v. Greenwood*, 486 U.S. 35, 35 (1988); *United States v. White*, 401 U.S. 745, 751–52 (1971).

²⁵⁰ *See, e.g., Carpenter*, 585 U.S. at 389 (Gorsuch, J., dissenting) ("People often *do* reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private.") (emphasis in original).

²⁵¹ *Greenwood*, 486 U.S. at 37.

²⁵² *Florida v. Riley*, 488 U.S. 445, 445 (1989).

²⁵³ *White*, 401 U.S. at 751–52.

²⁵⁴ *See State v. Wright*, 961 N.W. 2d 396, 414–15 (Iowa 2021) (discussing a positive law-type approach to the issue in *California v. Greenwood*).

civilian to perform these acts.²⁵⁵ Under a general law approach, these actions would all seem to meet the encompassing definition of search, and the inquiry would instead focus on whether they are reasonable—a question that would be determined by reference to general law principles.²⁵⁶

In these cases, under a citizenship model, the focus would not be on whether these actions comport with positive or general law, nor would it be on whether they violate reasonable expectations of privacy. The central question would instead be on consent. It would not be sufficient that people have voluntarily exposed information to *any other person* and therefore forfeited an expectation of complete secrecy in the information. Instead, the focus would be on whether people have voluntarily consented to share the information specifically with government officials for the particular use in question.²⁵⁷

A citizenship model recognizes that there is an important difference between knowingly revealing one's personal information to a civilian (e.g., a snoop neighbor, a bank teller, or someone traveling in a plane over your property) and a government official surreptitiously obtaining that information. This is because monitoring by a government official has a very different social meaning than monitoring by a civilian: only the former conveys that those wielding the power of the state regard the targets of surveillance with suspicion. Government surveillance signals that the government distrusts people being surveilled and regards them as outsiders to the political community. When government officials act surreptitiously in ways that are deceptive and sneaky, they put themselves into an adversarial position relative to the targets of their actions, and this undermines trust, which depends on transparency, openness, and the sense that government officials are benevolent with respect to those they serve.²⁵⁸ Hence,

²⁵⁵ See *State v. Amble*, 22 N.W.3d 265, 267 (Iowa 2025) (relying on a local ordinance to hold that garbage put out for collection had not been abandoned, and hence, rummaging through someone's garbage is a search, the state legislature passed a law providing that such garbage is abandoned, and the court accordingly reversed course.).

²⁵⁶ See, e.g., *D'Onfro & Epps*, *supra* note 5, at 966 (applying a general law approach to the issue in *California v. Greenwood*, and concluding “warrantless searches of garbage put out for collection would pose no new problems under a general-law approach to the Fourth Amendment: police can search abandoned property without a warrant”); *id.* at 967–68 (explaining that a general law approach would lead to different outcomes in cases involving lost or mislaid property, and real property, which cannot be abandoned at common law).

²⁵⁷ Compare *White*, 401 U.S. at 751–52 (1971) (holding that undercover surveillance is not a search because a person has no reasonable expectation of privacy in a conversation they have with another person), with *State v. Goetz*, 191 P.3d 489, 489 (Mont. 2008) (holding that warrantless electronic monitoring and recording of defendants' in-person conversations with confidential informants violated state constitutional privacy and search and seizure provisions because the defendant did not consent to having their private conversation recorded).

²⁵⁸ On the connection between procedural justice, trust, belonging, and citizenship, see *supra* notes 192–93. *C.f.* *Sundby*, *supra* note 189, at 1792 (arguing that a central focus in a case like *California v. Greenwood* should be how the government's action impacts government-citizen trust) (“Instead of

surveillance by government (as opposed to private individuals) has a distinct potential to undermine the relationship—the trust, sense of belonging, and mutual respect—between citizens and their government.

A citizenship model would recognize this.

In addition, the citizenship model’s emphasis on autonomy and consent would mean a more careful assessment of when, and under what circumstances, people validly consent to being detained, questioned, or searched. The Court has permitted officers to approach anyone for questioning and to ask for their consent to search. The officer is not required to inform the person of a right to refuse, and if the person complies with the officer’s request, the interaction is deemed consensual, not a search or seizure.²⁵⁹ This line of precedent deeming interactions “consensual” overlooks the immense pressure people may feel to consent when approached by someone in a position of authority.²⁶⁰

Requests for consent may be coercive and subordinating, especially for those who have historically lacked political and social power. Those who are more educated and powerful may feel more empowered to stand up for their rights and decline an officer’s request.²⁶¹ However, members of marginalized groups—especially Black Americans, who have historically been subject to police violence and draconian policing—may reasonably feel that declining or questioning an officer’s request may trigger retaliation and physical violence.²⁶² Individuals—especially ones with personal or vicarious exposure to police violence—can only experience a real choice to decline an officer’s request if the officer explicitly affirms that right and their intent to

speculating about animals and scavengers getting into trash cans, the Court would confront directly the much larger and more important question of whether government agents going through trash cans looking for evidence of wrongdoing is consistent with a constitutional system based on government-citizen trust.”).

²⁵⁹ See *infra* notes 264–67, and accompanying text (discussing consensual interactions).

²⁶⁰ Sommers & Bohns, *supra* note 144, at 1987 (finding that virtually all participants in a lab experiment consented to a search of their cell phone, even though most people predicted that they would decline consent); see generally Re, *supra* note 15, at 323–24 (discussing a policy officer’s official authority and its potential coerciveness).

²⁶¹ *Schneekloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting) (“[T]he holding today confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few.”); see also Scott E. Sundby, *The Rugged Individual’s Guide to the Fourth Amendment: How the Court’s Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights*, 65 UCLA L. REV. 690, 720–21 (2018) (arguing that Fourth Amendment jurisprudence invokes an archetype of a “rugged individual” who is not intimidated by standing up to the police to assert their rights, and that this archetype is unrealistic with respect to many people and dangerous).

²⁶² Carbado, *supra* note 208, at 1017–18 (discussing how people of color’s “racial vulnerability” makes them more likely to consent to searches); Sundby, *supra* note 261, at 722–23 (stating that individuals are consenting “not out of a knowing desire to cooperate, but because of the psychological pressures of the moment”); see also Daniel S. Harawa, *Coloring in the Fourth Amendment*, 137 HARV. L. REV. 1533, 1580 (2024) (arguing that courts should consider race as part of the analysis as to whether a person has been seized—i.e., whether a reasonable person would feel free to leave when approached by a police officer—and discussing lower federal court and state court cases that have done so).

respect it. Under a citizenship model, which places more emphasis on autonomy, courts would be more discerning about whether consent was truly voluntary: at minimum, this would mean requiring officers to advise a person of their right to refuse.²⁶³

This would lead to a different result in cases like *U.S. v. Drayton* (2002), where three officers boarded a bus, one officer stood at the front and the other at the back, and the third worked his way through the bus questioning passengers.²⁶⁴ This officer told passengers that he was conducting a drug and weapons interdiction and asked for permission to search their person and their luggage, to which Drayton agreed.²⁶⁵ The Court concluded that Drayton was not seized, and that the entire exchange was consensual, even though the officer never informed Drayton that he was free to leave and to refuse consent to search.²⁶⁶ Under a citizenship model, this would be considered a seizure because the officer did not explicitly inform Drayton of a right to leave.²⁶⁷

While requiring officers to inform people of their right to refuse consent would be an important first step in requiring the government to respect citizens' autonomy, this may not be sufficient to ensure that people experience a voluntary choice when faced with a request for consent from a police officer. Research shows that people almost always consent when an officer asks to search, even if they are warned of the right to refuse.²⁶⁸ This suggests that the request from an authority may be inherently coercive even if people are told they have a right to refuse.²⁶⁹ More robust protection for autonomy might mean recognizing this, and holding that an officer may only

²⁶³ See, e.g., Capers, *supra* note 68, at 708 (arguing that the Court should require police to warn people of their rights to refuse their request to search or answer questions); Carbado, *supra* note 208, at 1029–30 (stating the same); Sundby, *supra* note 261, at 748–49 (stating the same).

²⁶⁴ United States v. Drayton, 536 U.S. 194, 197–98 (2002).

²⁶⁵ *Id.* at 199.

²⁶⁶ See *id.* at 204 (reasoning that Drayton was free to leave, and any choice to engage was therefore consensual, because “[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice”).

²⁶⁷ *Id.* at 212 (Souter, J., dissenting) (“It is very hard to imagine that either Brown or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. No reasonable passenger could have believed that . . .”); see also United States v. White, 401 U.S. 745, 751–52 (1971) (holding that undercover surveillance is not a search because a person has no reasonable expectation of privacy in a conversation they have with another person); State v. Goetz, 191 P.3d 489, 489 (Mont. 2008) (holding that warrantless electronic monitoring and recording of defendants’ in-person conversations with confidential informants violated state constitutional privacy and search and seizure provisions because the defendant did not consent to having their private conversation recorded).

²⁶⁸ Sommers & Bohns, *supra* note 244, at 2014–15 (finding that an overwhelming majority of people consented to a request to search, and informing people of a right to refuse consent did not meaningfully increase refusal rates).

²⁶⁹ It is noteworthy that most participants in Sommers and Bohns’s study stated that they would refuse consent if they were asked to consent to a search, yet when placed in a live situation where they were approached by an authority figure who asked for consent to search, a vast majority consented. *Id.* at 1987.

seek a person to submit to questioning or a search if they have the suspicion required to justify the search or seizure under non-consensual terms.²⁷⁰

In sum, under a citizenship model, the threshold question of whether a search or seizure occurred would turn primarily on autonomy and consent: Whenever the government invades or compromises a person's control over their body, property, personal information, or personality without their consent, the government has performed a search or seizure, and the Fourth Amendment would be implicated.²⁷¹ This is not to say that the action is *per se* unconstitutional, only that the Fourth Amendment applies and a court must consider whether the action satisfies the Fourth Amendment's requirements.

2. *Was the search or seizure reasonable?*

Under prevailing Fourth Amendment law, very generally speaking, a search or seizure without a warrant is presumptively unreasonable and in violation of the Fourth Amendment.²⁷² However, the Court has recognized a number of scenarios in which warrantless searches and seizures comply with the Fourth Amendment. This includes scenarios where practical exigencies or other special law enforcement needs ostensibly make a warrant impractical.²⁷³

In *Terry*, the Court held that officers may stop people without a warrant if they have reasonable suspicion that the person was engaged in criminal activity, and they may conduct a weapons-frisk if they have reasonable suspicion the person is armed and dangerous.²⁷⁴ In this case—as in most of the Court's Fourth Amendment cases—the Court focused primarily on the quantum of evidence supporting the police officer's suspicion that Terry was involved in criminal activity.²⁷⁵ In focusing primarily on the officer's basis for suspicion, the Court barely mentioned the potential social, psychological,

²⁷⁰ Recognizing this, the New Jersey Supreme Court held that police may not request consent to search absent a “reasonable and articulable basis.” *State v. Carty*, 790 A.2d 903, 912 (N.J. 2002); see also Sundby, *supra* note 261, at 749 (arguing that the police should be required to articulate an “objective credible reason” before approaching a citizen to ask questions, and a “founded suspicion” before asking for consent to search) (internal quotation marks omitted) (citation omitted).

²⁷¹ *Cf.* Sundby, *supra* note 194, at 1787–96 (arguing that the terms search and seizure should be defined by asking whether the government's action violates the principle of government-citizen trust); D'Onfro & Epps, *supra* note 5, at 933 (arguing for an encompassing definition of search that would not be “particularly demanding,” and for instead focusing on the question of whether an action was unreasonable); Amar, *supra* note 112, at 768–69 (arguing for defining search broadly to include any effort to seek or gather information, and focusing on whether an action was reasonable).

²⁷² See, e.g., *Kentucky v. King*, 563 U.S. 452, 459 (2011) (finding that warrantless searches of a home are “presumptively unreasonable”).

²⁷³ *Id.*

²⁷⁴ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

²⁷⁵ *Id.* at 27–28; *cf.* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”*, 66 STAN. L. REV. 987, 989 (2014) (stating that, in Fourth Amendment jurisprudence governing arrests, the Court has focused exclusively on “a quantitative standard of confidence” to “stand in for a qualitative balancing of interests,” and this quantitative approach to constitutional reasonableness has missed important qualitative considerations, such as dignity) (citation omitted) (internal quotation marks omitted).

physical and civic harm that could result from holding that officers may conduct warrantless stops and frisks based on reasonable suspicion—particularly, how this tactic had been used to harass and intimidate members of marginalized groups, Black Americans especially.²⁷⁶

Subsequent decisions defining *Terry*'s reasonable suspicion standard continue to give no weight to potential social, psychological, physical, and civic harm, and likewise focus entirely on the quantum of suspicion. These cases extended *Terry* in ways that authorize police to stop people based on arguably innocent or ambiguous behaviors—ones that tend to correlate with race, class, and social circumstances. For example, while *U.S. v. Brigoni-Ponce* (1975) held that officers may not stop people based *exclusively* on apparent Mexican ancestry, the Court stated that “the characteristic appearance of persons who live in Mexico” is one factor that may be considered in the reasonable suspicion analysis, along with other potentially innocent behaviors/circumstances, such as proximity to the border, recent border crossings, the driver's effort to evade officers, and the type of vehicle.²⁷⁷ Similarly, *Illinois v. Wardlow* held that fleeing from an officer while in a high-crime area was sufficient for reasonable suspicion to conduct a *Terry* stop.²⁷⁸ And *U.S. v. Arvizu* held that an officer had reasonable suspicion to conduct a *Terry* stop based on a collection of factors that were all consistent with innocence, such as proximity to a border crossing area, the driver's apparent nervousness, and the way that children waved at the officer.²⁷⁹ In these cases, the Court focused exclusively on the quantum of suspicion in the case before it—where the officer's intuition turned out to be right—but it did not appear to think about the *programmatically* consequences of the rules they established (i.e., how these rules would allow many more police stops involving people who are not engaged in criminal activity, which will never reach the courts).²⁸⁰

²⁷⁶ See *supra* notes 99–105 and accompanying discussion (discussing the harmful consequences of *Terry*, and how it enabled abusive police tactics).

²⁷⁷ *United States v. Brigoni-Ponce*, 422 U.S. 873, 884–85 (1975).

²⁷⁸ *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

²⁷⁹ The officer's suspicion was based on: seeing a minivan (a type of vehicle purportedly used by smugglers) driving in an area near a border crossing, the driver slowed down upon seeing the officer, did not acknowledge the officer, and appeared stiff, the children in the back of the van were seated with their knees unusually high and waved in an “abnormal pattern,” the van turned onto a dirt road on which cars didn't regularly travel, and the minivan was registered to an address near a border area known for smuggling. *United States v. Arvizu*, 534 U.S. 266, 270–72 (2002). In finding these adequate grounds for a *Terry* stop, the Court reversed the Ninth Circuit's holding that most of these behaviors—because they were potentially innocent or ambiguous at best—should carry little-to-no weight in the reasonable suspicion analysis. *Id.* at 272.

²⁸⁰ Meares, *supra* note 208 at 162–64; Capers, *supra* note 177, at 63–64. The Court did not explicitly consider the fact that there is an inherent hindsight bias in evaluating the validity of suspicion in the cases that reach the courts—these cases, which come up on motions to suppress evidence, are the potentially rare or outlier cases in which the officer's suspicion actually turned out to be correct, in that they found evidence of criminal activity. The Court appeared not to be cognizant of how its ruling would allow stops

Under a private law approach, the analysis in cases like *Terry* and progeny would focus on whether the interaction violated either positive law or general law. For a *Terry* stop, the most analogous tort would likely be false imprisonment, so the central questions would be (a) whether the civilian was restrained in a way that meets the common law definition of false imprisonment, and (b) if so, whether a private individual would have lawful authority to detain them in the same situation.²⁸¹ The Fourth Amendment would allow these detentions to the extent that private individuals would have the authority to detain in the same situation—and in some jurisdictions, civilians do have the authority to stop or detain people based on reasonable suspicion, and this may be authorized under some readings of general common law as well.²⁸²

In contrast, under a citizenship model, when evaluating whether investigative detentions in cases like *Terry* and progeny satisfy the Fourth Amendment's reasonableness requirement, a court would not only ask whether the circumstances in this individual case gave rise to adequate individualized suspicion. It would consider how a ruling authorizing detentions based on reasonable suspicion, and permitting officers to base reasonable suspicion on such factors that are associated with geography, class, race, and nationality, might impact policing on a programmatic

in many cases involving innocent people—cases which will most likely never be reviewed by courts, since there is no prosecution and no need to file a suppression motion, and there is rarely a sufficient incentive to bring a civil claim. For more discussion of this problem, see Friedman & Ponomarenko, *supra* note 198, at 1866 (discussing how the exclusionary rule does an inadequate job of restraining police conduct, as courts never see the many cases in which officers stop innocent people).

²⁸¹ Some state laws do appear to give private individuals authority to detain based on reasonable suspicion. See *supra* notes 130–133, and accompanying discussion (discussing the various state laws). For a pat down or frisk, the positive and general law analysis would likely look to battery-related torts. The question here would be whether a private individual would have a defense to battery for use of force during an authorized arrest or investigative detention. See *supra* note 128, at 565 (discussing citizen's arrest); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

²⁸² Under Baude and Stern's positive law approach, the Fourth Amendment would only be implicated if the officer's actions would be unlawful for a private individual to perform. Baude & Stern *supra* note 5, at 1825. This seems to imply that if a private individual performing these actions would not commit a tort, crime, or statutory violation, there would be no seizure to begin with. Yet Baude and Stern also suggest that the positive law definition of seizure (derived from the first element of the tort of false imprisonment, being confined against one's will) would largely track with the definition of seizure in Fourth Amendment cases such as *Terry*. *Id.* at 1885 n.336. They do not clarify how the second element of false imprisonment—without lawful authority—would fit into a positive law approach. If the second element of false imprisonment is not met, would there be no seizure for Fourth Amendment purposes? Or would there be a seizure simply because the first element (restraint against will) is met? D'Onfro and Epps observe that the general law approach may support at least the authority to detain recognized in *Terry*. See *supra* notes 135–36. To the extent a court interprets general law as supporting *Terry*, it may support the holdings in subsequent cases like *Brigoni-Ponce*, *Wardlow*, and *Arvizu*.

level.²⁸³ In other words, what effect might this have in terms of the number of stops of innocent people, and the potential for stopping people based on common stereotypes, prejudices, and stigmas? Keeping the *programmatic* consequences in mind, a court would then consider how such a program would align with citizenship values, including those outlined above: voice and participation, autonomy and consent, anti-subordination, and proportionality.

In terms of voice and participation, a court might consider the extent to which members of impacted communities have meaningful input or oversight in determining when, where, and under what circumstances police conduct investigative detentions.²⁸⁴ In terms of autonomy and consent, a court might consider how authorizing investigative detentions based on potentially-innocent behaviors, such as being in a particular neighborhood and moving away from the police, impact people's sense of self-determination and freedom. Might this impair people's sense of freedom, perhaps by deterring people from engaging in perfectly lawful conduct, such as walking in certain neighborhoods, and wearing certain clothing?²⁸⁵ Or would authorizing more frequent investigative detentions enhance people's sense of autonomy by making people in higher crime communities feel safer in public spaces?²⁸⁶ If both are true, these competing interests can be weighed in the proportionality analysis discussed below.

Another key value to consider is anti-subordination: Will authorizing detentions based on potentially-innocent behaviors, such as being close to a border, driving a particular type of car, appearing to be of a specific nationality, evading police, or being in a higher crime neighborhood, tend to exacerbate disparities in police stops based on race, socioeconomic status,

²⁸³ See Meares, *supra* note 208, at 164–65 (arguing that courts ought to evaluate the programmatic nature of stop and frisk programs, and the aggregate effect of these programs on members of targeted communities, rather than regarding them as isolated, one-off incidents); Butler, *supra* note 208, at 248–49; see generally David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994) (discussing inappropriate application of stop and frisks based on race).

²⁸⁴ See *supra* notes 198–199, and accompanying text (discussing this notion of democratic input)

²⁸⁵ *Supra* notes 191 & 221, and accompanying text; see also Tokson, *supra* note 5, at 758–61 (arguing that courts should weigh the harm of deterring lawful activity against any benefits of surveillance); VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 81 (2011) (“[T]he boys remained in constant fear of being humiliated, brutalized, or arrested.”); STOP AND FRISK, *supra* note 68, at 7 (interviewees stating that they avoid walking places in order to avoid contact with police); Vesla M. Weaver & Gwen Prowse, *Racial Authoritarianism in U.S. Democracy*, 369 SCL. MAG. 1176, 1177 (2020) (discussing how “[p]olice have long proscribed the movement of Black communities and engaged in racial and social control”).

²⁸⁶ For a version of this argument, see, e.g., George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> (arguing that even if aggressive foot patrols do not reduce violent crime, they make people feel safer in public spaces).

national origin, and the like?²⁸⁷ And how might this compound other disparities, such as residential segregation, health outcomes, and the like?²⁸⁸

And, finally, the reasonableness analysis should include a careful assessment of proportionality—one that weighs the citizenship harms discussed above.²⁸⁹ Courts should ask whether granting officers the discretion to detain people based on reasonable suspicion, and holding that reasonable suspicion may be based on factors such as those allowed in *Wardlow*, *Brigoni-Ponce*, and *Arvizu*, advances a government interest weighty enough to justify the harm these stops may cause.²⁹⁰ On the harm side of this balance, courts should consider the range of harms listed above, including how being stopped might impact economic and psychological wellbeing, sense of citizenship, and political participation,²⁹¹ harms to police, and to civility norms.²⁹² On the other side of the balance, courts could consider the strength of the public safety justifications for stopping people based on these criteria, including evidence as to the actual association between criminal behavior and behaviors such as evading police, being in a high-crime area, being near the border, or driving a particular type of car.²⁹³ Courts should more generally consider evidence as to the rates at which police are relying on these factors to stop innocent people.²⁹⁴ Even if these stops have some apparent public safety value, courts could ask whether the

²⁸⁷ *Supra* note 208 and accompanying discussion; *see also supra* notes 199–203, and accompanying discussion (discussing democratic policing and the like); Meares, *supra* note 203, at 173. Evidence suggests that most people stopped are not engaged in criminal activity, and that the proportion of innocent people stopped is much larger for Black and Hispanic people. Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI 335, 344–45 (2014) (among 2.3 million stops of Black people by NYPD between 2004 and 2012, the stop-to-seizure ratio was 143:1; among 1.4 million stops of Hispanic people, it was 99:1; and among 435,000 stops of White people, it was 27:1).

²⁸⁸ *See supra* notes 199–202 and accompanying text (discussing the interplay of disparities); Geller, Fagan, Tyler & Link, *supra* note 221 at 2323.

²⁸⁹ *See supra* notes 209–211, and accompanying discussion (discussing this weighing of citizenship harms).

²⁹⁰ *See supra* notes 205–211, and accompanying text (discussing this balancing notion).

²⁹¹ *Supra* notes 61–82, 221 (discussing the harm side of the balancing).

²⁹² *See supra* notes 216–217, and accompanying text (discussing harms to police generally)

²⁹³ Evidence suggests that these are poor indicators of actual criminal behavior. *See, e.g.*, Tracey L. Meares & Bernard E. Harcourt, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 790–92 (2000) (according to data from New York City, when the officer’s suspicion is based on flight in a high crime area, there are forty-five stops for every arrest). Furthermore, because these factors are malleable and not well-defined, police may rely on these factors in situations where they are not present. Jeffery Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 78–80 (2015) (finding that police cited “high crime area” in over fifty percent of stops, and “furtive movements” in over forty percent of stops, regardless of whether the actual crime rates in the area where the stop occurred). There is a much broader literature on the harms of racial profiling in policing. *See generally* Feingold & Carbado, *supra* note 208, at 1679 (discussing the body of scholarship on race and the Fourth Amendment); Chin & Vernon, *supra* note 208, at 884 n.2 (collecting sources).

²⁹⁴ Evidence suggests that most people stopped are innocent. *See* sources cited *supra* note 276.

public safety benefits outweigh the costs.²⁹⁵ In evaluating this, they may also consider evidence of how frequent stops might undermine trust in government and cooperation with the law.²⁹⁶ Finally, they could consider whether there are feasible alternative approaches that could accomplish the same public safety benefits without the same degree of harm.

Upon evaluating all these considerations, a court may conclude that the harm caused by *Terry* stops, in aggregate, outweighs any law enforcement benefit, at least in cases where the officer suspects the person of committing a misdemeanor or a crime that does not pose a risk of serious harm or injury to anyone.²⁹⁷ And if a court does find that public safety benefits outweigh the costs in some cases, this may only be true only to the extent that suspicion does not rely on factors that are fully consistent with innocent behavior, particularly when those factors correlate with poverty, race, nationality, and other grounds of social stigmatization and subordination.²⁹⁸

The considerations outlined above would also govern in a case like *Atwater*, which held that officers may conduct a warrantless arrest whenever they have probable cause to suspect the person of a misdemeanor, even if that misdemeanor is a traffic infraction which carries no jail time.²⁹⁹ As discussed previously, without any consideration of proportionality, the Court permitted such an arrest while acknowledging that it served no purpose but “gratuitous humiliation.”³⁰⁰ Taking seriously the values of democratic citizenship outlined above, including proportionality—i.e., requiring the government display respect for equal worth by *justifying* harm it does to its citizens—would require, at minimum, holding that police may not arrest people in situations where doing so serves no legitimate state interest but for “gratuitous humiliation.”³⁰¹

²⁹⁵ See, e.g., Kevin Petersen, David Weisburd, Sydney Fay, Elizabeth Eggin & Lorraine Mazerolle, *Police Stops to Reduce Crime: A Systematic Review and Meta-Analysis*, 19 CAMPBELL SYSTEMATIC REV. 1, 36 (2023) (finding some evidence that stops reduce crime but suggesting that these benefits do not outweigh the harmful effects in terms of mental and physical health, trust in police, and increasing crime/delinquency among stopped individuals).

²⁹⁶ *Id.*; see also Meares, *supra* note 287, at 348 (“Repeated stop encounters with police appeared to lead people to find police less legitimate over time, and . . . those . . . who viewed the police as less legitimate were more likely to engage in criminal conduct (measured by self-report) and also reported themselves as less likely to cooperate with police.”); *supra* notes 195 & 196, and accompanying text.

²⁹⁷ See Sundby, *supra* note 261, at 750 & n.226 (suggesting that the Court hold that officers may not conduct *Terry* stops “for petty offenses”) (citing Alexandra Natapoff, *A Stop Is Just a Stop: Terry’s Formalism*, 15 OHIO ST. J. CRIM. L. 113, 117 (2017)).

²⁹⁸ Sundby, *supra* note 261, at 750 & n.226 (arguing the Court should hold that “an amorphous observation, for example that a citizen appeared nervous” is insufficient for reasonable suspicion).

²⁹⁹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

³⁰⁰ *Id.* at 346–47. For discussion of *Atwater* and its consequences for police-citizen interactions, see *supra* notes 102–106, and accompanying discussion. For a discussion of the shortcomings in the Court’s approach in *Atwater* and other Fourth Amendment cases, see Bowers, *supra* note 275, at 987–88.

³⁰¹ See *supra* notes 214–219, and accompanying discussion (discussing the “gratuitous humiliation” notion); Jackson, *supra* note 214, at 3102 (“Fourth Amendment cases like *Atwater v. City of Lago Vista*,

Similarly, a citizenship model would dictate a different approach in *Whren v. U.S.* (1996), where a plainclothes officer—a member of a special “vice” task force—stopped Whren for minor traffic infractions, such as failing to use a turn signal, even though D.C. metro policy prohibited plainclothes officers from conducting traffic stops unless the “violation [was] so grave as to pose an *immediate threat* to the safety of others.”³⁰² Whren argued that the officer, who violated department policy by conducting a traffic stop, was motivated to stop Whren based on racial stereotypes, to fish for evidence that Whren may be involved in drug-related crime.³⁰³ Whren argued that a stop should not be considered reasonable simply because an officer has probable cause to believe the driver committed some traffic infraction: this would give officers basically unbounded discretion to stop almost any driver, and the Fourth Amendment should preclude officers from exercising this discretion in a racially biased manner, or as pretext to fish for evidence of other crimes for which they have no basis for suspicion.³⁰⁴ The Court rejected this argument, instead holding that a stop is reasonable so long as the officer has adequate suspicion to believe that the person committed a traffic infraction, regardless of what actually motivated the officer to conduct the stop.³⁰⁵

Under a citizenship model, in a case like *Whren*, anti-subordination would be a predominant concern. If officers stop people because of their race, or in patterns that appear to be race-based (regardless of the actual motivation), this conveys that government authorities regard members of targeted racial groups as being suspicious, i.e., less credible and respectable than other members of the community.³⁰⁶ Those who experience frequent stops (particularly if they are or appear to be based on one’s social identity)

with rigid rules allowing police to detain and search regardless of the severity of the offense . . . facilitate humiliating and badly intentioned police conduct.”); *Atwater*, 532 U.S. at 364–68 (O’Connor, J., dissenting) (arguing that the majority’s rule “defies any sense of proportionality” and arguing for a rule that would limit warrantless misdemeanor arrests to scenarios where there is an articulable basis for finding an arrest warranted); Natapoff, *supra* note 109, at 148; Sundby, *supra* note 261, at 749 n.225.

³⁰² *Whren v. United States*, 517 U.S. 806, 808–11, 815 (1996).

³⁰³ *Id.* at 810–11.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 813.

³⁰⁶ See *supra* note 63, and accompanying text (discussing the notion of credibility and respect of targeted racial groups); see also Feingold & Carbado, *supra* note 208, at 1686 (“[R]acially selective policing compromises privacy and dignity by rendering its targets public spectacles, something exhibited to view; . . . a remarkable or noteworthy sight; an object of curiosity or contempt.”) (internal quotations omitted) (citation omitted); Carbado, *supra* note 208, at 947–64 (describing the experience of being stopped and searched by police); Justice & Meares, *supra* note 64, at 167 (finding that those who have more frequent encounters with the criminal system are “bombarded with messages that they . . . are a class of problem people to be excluded, monitored, and surveilled, treated harshly and punished arbitrarily”); Danieli Evans, *Institutionalized Ostracism*, 29 MICH. J. RACE & L. 155, 190–91 (2025). There is a much broader literature on the harms of racial profiling in policing. See generally Feingold & Carbado, *supra* note 208, at 1679 (collecting sources) (discussing the robust body of scholarship available on race); Chin & Vernon, *supra* note 208, at 884 n.2 (collecting sources).

suffer real emotional, psychological, and physical harm.³⁰⁷ Placing such disproportionate burdens on members of certain racial groups is incompatible with the values of equal worth and respect, which are essential tenets of full citizenship. As detailed above, the citizenship model's central premise rests upon Capers' argument that the Fourth Amendment incorporates the Fourteenth Amendment's guarantee of full and equal citizenship.³⁰⁸ At minimum, this would prohibit policing that harms, subordinates, and stigmatizes based on race.³⁰⁹

The foregoing examples all involve questions about the reasonableness of seizures, but a citizenship model would also alter the Court's analysis pertaining to the reasonableness of searches. Under a citizenship model, when evaluating whether a warrantless search is reasonable, courts would likewise consider the values of citizenship, discussed above. Though acknowledging that the Fourth Amendment presumptively requires a warrant for searches, the Court has categorically authorized warrantless searches in many scenarios, including automobiles (even a mobile home),³¹⁰ to prevent destruction of evidence,³¹¹ searching the body and clothing of arrestees (even if the officer has no basis to suspect the arrestee of possessing evidence or a weapon),³¹² and strip searches of people who have been mistakenly arrested for minor traffic infractions and booked into jail.³¹³

Under a citizenship model, in evaluating whether warrantless searches are categorically reasonable under these circumstances, instead of focusing exclusively on law enforcement-related justifications (i.e., the need to prevent destruction of evidence, to search for weapons, etc.) or diminished expectations of privacy,³¹⁴ courts would also consider the extent to which

³⁰⁷ See, e.g., sources cited *supra* notes 98, 216, and 301 (discussing the harm suffered by those who experience frequent stops with law enforcement).

³⁰⁸ See Capers, *supra* note 18, at 37 (discussing how the Fourteenth Amendment "grafted a requirement of equal citizenship onto the Constitution as a whole, including the Fourth Amendment").

³⁰⁹ This would be a minimal requirement of a citizenship model, but it would also extend beyond this to extend the Fourth Amendment to implicate policing policies that subordinate, stigmatize, demean on any basis, regardless of whether race is a factor. *Supra* notes 158–62, and accompanying text (discussing this notion).

³¹⁰ See, e.g., *California v. Carney*, 471 U.S. 386, 388, 391 (1985) (applying the automobile exception to a mobile home, even though one part of the rationale—that evidence in cars may be readily moveable—does not apply, as there is a lesser expectation of privacy in a vehicle).

³¹¹ *Kentucky v. King*, 563 U.S. 452, 455–56 (2011) (holding that officers could forcibly enter a home without a warrant after they knocked on the door and announced their presence, heard people moving inside the apartment and things being moved about, and came to believe that drug-related evidence was about to be destroyed).

³¹² *United States v. Robinson*, 414 U.S. 218, 236 (1973) (holding that it was reasonable for an officer to search Robinson's body and look inside a cigarette pack found in Robinson's pocket upon arresting Robinson for driving without a valid permit, even though the officer had no basis to suspect Robinson would have contraband or a weapon).

³¹³ *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 336 (2012).

³¹⁴ See, e.g., *Carney*, 471 U.S. at 392–93 (discussing two rationales for the automobile exception: securing evidence when it is in a mobile vehicle, and the reduced expectation of privacy in vehicles);

such searches comport with or threaten citizenship-related values such as voice and participation,³¹⁵ autonomy and consent,³¹⁶ anti-subordination,³¹⁷ and proportionality.³¹⁸

I do not claim answers to how courts should resolve these questions.³¹⁹ My goal here is simply to persuade readers that Fourth Amendment law ought to be oriented around the values of citizenship, and that these values should be dominant in Fourth Amendment analysis. I hope to spark a broader conversation about how courts could incorporate these values into Fourth Amendment law.³²⁰

Florence, 566 U.S. at 330–32 (discussing the law enforcement and administrative interests in conducting strip searches of all detainees); *Robinson*, 414 U.S. at 234 (discussing the rationale for the search incident to arrest exception: disarming the arrestee for officer safety and preventing the destruction of evidence).

³¹⁵ Has the community approved of or participated in deciding upon or overseeing the policy permitting officers to conduct searches under these scenarios?

³¹⁶ How might authorizing these searches impact subjects' sense of bodily autonomy, freedom, and dignity? Might the automobile exception encourage officers to conduct more traffic stops for minor infractions in hopes of developing probable cause to search the vehicle during the stop? Might the search incident to arrest exception create an incentive to arrest people for minor traffic infractions as a predicate for conducting a full-body search? *Robinson*, 414 U.S. at 248 (Marshall, J., dissenting) ("There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search.").

³¹⁷ Are stops to conduct searches pursuant to the automobile exception and arrests to conduct searches pursuant to the search incident to arrest exception likely to be disproportionately concentrated within marginalized communities? *Robinson*, 414 U.S. at 248; CHARLES EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 328; Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 943 (2002) ("[O]fficers who initiate these intrusions may well lack the requisite level of suspicion required to stop and search for criminal activity, and these minor traffic offenses may be used as a pretext to facilitate the discovery of illegal narcotics or other criminal evidence.") (citing DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 11–12 (2002) and DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE CRIMINAL JUSTICE SYSTEM 41 (1999)).

³¹⁸ Do the law enforcement interests in allowing officers to conduct these searches *without warrants* outweigh these potential civic harms? Or is there a way to serve those law enforcement interests while circumscribing the scenarios under which officers may conduct warrantless searches? (For example, the lower court and the dissent in *Robinson* suggested searches incident to an arrest should only be limited to a pat down for weapons to ensure the officer's safety, but that officers should not be allowed to do a full-body search for evidence. *Robinson*, 414 U.S. 218, 250–56 (1973) (Marshall, J., dissenting)).

³¹⁹ *C.f.*, D'Onfro & Epps, *supra* note 5, at 955 ("[W]e do not 'claim all the answers today.' But we hope to show that the general-law approach provides 'a pretty good idea what the questions are.'") (quoting *Carpenter v. U.S.*, 138 S. Ct. 2208, 2269 (2018) (Gorsuch, J., dissenting)).

³²⁰ A citizenship model of the Fourth Amendment might involve moving toward a more positive conception of rights—i.e., recognizing that the government has obligations to citizens—and beyond the negative conception of rights that has dominated U.S. constitutional law. *See, e.g.*, Capers, *supra* note 68, at 708 (suggesting that the Court should treat the Fourth, Fifth, and Sixth Amendments "as positive rights to be independently valued and enjoyed by citizens"). For a more general discussion of positive rights, see generally EMILY J. ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 109 (2013) (discussing examples of positive rights in state constitutional provisions related to education, the environment, and labor).

CONCLUSION

As courts and scholars are rethinking aspects of Fourth Amendment law, the time is ripe to reconsider the values that Fourth Amendment law ought to serve. I have argued that democratic citizenship should be the central value in Fourth Amendment law—an overarching value that informs courts' understanding and application of other considerations, such as privacy expectations or private law. If the role of courts in a constitutional democracy is to ensure that political processes are open to all on fair and equal terms,³²¹ Fourth Amendment jurisprudence must address how policing both results from and causes political inequality.

³²¹ See *supra* notes 163–168, and accompanying text (discussing this role of courts).