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BULLSHITTING THE PEOPLE: THE CRIMINAL PROCEDURE IMPLICATIONS OF A SCATALOGICAL TERM

by Andrew E. Taslitz*

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I. INTRODUCTION: WHAT IS “POLITICAL BULLSHIT”?

A. *What Is “Political Bullshit”?*

When I was a child, my mother, in a time-honored ritual, would wash out my mouth with soap if I used a vulgar phrase. The washing would be especially vigorous if the vulgarities were directed at a family member. As a teenager, the one vulgar word that came most easily to my lips, and thus most readily provoked my mom’s ire, was “bullshit”—B.S. for short.

Today, however, philosophers, rhetoricians, and social scientists have embraced the concepts embodied in the word bullshit as central to

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understanding the social world.¹ Most recently prompted by the publication of philosophy professor Harry Frankfurt's *New York Times* bestselling books list entry, *On Bullshit*—an unusual accomplishment for a serious work of philosophy—a “bullshit studies” industry has evolved.² The teachings of this new field of studies seem especially appropriate for this symposium; for when the state through its criminal justice agents, usually the police, tries to get citizens “voluntarily” to permit investigative techniques such as searches, seizures, and interrogations, the state engages in a classic act of political bullshitting.³

Bullshitting is a close cousin to lying. A liar consciously speaks untruths. But a bullshitter may combine lies, truths, half-truths, and irrelevancies in infinite combinations to hide some particularly important truth from the listener's observation.⁴ When the bullshitter cannot hide the truth, the bullshitter will distort it or compromise the bullshittee's ability to critique it.⁵

1. See generally BULLSHIT AND PHILOSOPHY (Gary L. Hardcastle & George A. Reisch eds., 2006) (collecting articles on bullshit authored by philosophers, economists, political scientists, sociologists, and linguists).

2. See HARRY G. FRANKFURT, ON BULLSHIT (2005); George A. Reisch & Gary Hardcastle, *On Bullshitmania*, in BULLSHIT AND PHILOSOPHY, *supra* note 1, at vii, vii-viii (“No other work by a living academic philosopher has been so well received. After twenty-six weeks on *The New York Times* bestseller list, *On Bullshit* is poised to sell more copies than any commercial philosophy book, ever.”). A quick Westlaw search for law review articles and texts containing some reference to bullshit yielded 500 such documents as of February 20, 2007. A similar search on that same date on Amazon.com yielded 26,896 books and articles with such references, many of them with the word “bullshit” in the title and several of them using the word as an organizing intellectual concept. See, e.g., GRAHAM EDMONDS, THE BUSINESS OF BULLSHIT (2006); SABRINA LAMB, KEEPIN' IT REAL: THE RISE OF BULLSHIT IN THE BLACK COMMUNITY (2006); RON SCHALOW, BULLSHIT ARTIST: THE 9/11 LEADERSHIP MYTH (2006).

3. See *infra* Part II.

4. See, e.g., George A. Reisch, *The Pragmatics of Bullshit, Intelligently Designed*, in BULLSHIT AND PHILOSOPHY, *supra* note 1, at 33, 38 (defining bullshit). Reisch explains:

[B]ullshitters conceal not some indifference to truth but instead a commitment to *other* truths and, usually, an agenda or enterprise that they take to be inspired or justified by those *other* truths. For many possible reasons, however, they do not want us to see these truths to which they are committed. Our knowledge of these other truths, the bullshitter may fear, will prove embarrassing or damaging to them or their cause. Or it may render their claims less persuasive and less effective. In some cases, revealing these truths would show that their project is in fact illegal or . . . unconstitutional.

Id. at 38. Reisch's definition is not quite the same as Frankfurt's, who sees bullshitters as indifferent to the truth, thus constituting “a greater enemy of the truth than lies are.” FRANKFURT, *supra* note 2, at 60-61; see also Sara Bernal, *Bullshit and Personality*, in BULLSHIT AND PHILOSOPHY, *supra* note 1, at 63, 64 (“Frankfurt claims that an ‘indifference to how things really are’ is of the essence of bullshit. Bullshitters say whatever they need to say to achieve a certain purpose, without regard for the truth of what they say.”). Philosophers, as is their wont, indeed vigorously debate the true meaning of bullshit. See generally BULLSHIT AND PHILOSOPHY, *supra* note 1. These differences might matter at the margin but, for purposes of this Article, they are little more than differences in emphasis. This Article's definition captures the core commonalities among the proposed definitions in the philosophical debates and is, in any event, most useful here. Other definitions would not fundamentally alter this analysis. The key is a willingness to do what it takes, whether silence on a topic or talking about it, whether speaking truths, or lies, or a combination, in order to achieve a goal that realization would be frustrated by the truth, the whole truth, and nothing but the truth.

5. See, e.g., Kenneth A. Taylor, *Bullshit and the Foibles of the Human Mind, or: What the Masters of the Dark Arts Know*, in BULLSHIT AND PHILOSOPHY, *supra* note 1, at 49 (“Public discourse in our times

The bullshitter acts with the goal not simply of hiding or muting the truth but also of using these tactics to alter the listener's behavior in some way that enhances the bullshitter's material, social, psychological, political, or economic status.⁶ Moreover, the bullshitter may act with varying levels of awareness of what he is doing, sometimes suppressing, or even being entirely consciously unaware of, his troubling dance with factuality.⁷

A classic but mundane example of bullshitting is the student who has done little research or thinking about a paper topic, who then frantically rushes at the last minute to craft a paper consisting of a wall of verbiage. The student hopes thereby to give the appearance of great effort, thus perhaps prodding the professor to give the student a good, or at least a decent, albeit undeserved, grade.⁸ The student's "bullshit is contained not in any single assertion within her essay," explains Professor Sara Bernal, but "rather by things like a pompous tone, a reluctance to get to the point, and general windiness."⁹ If she fails to receive a respectable grade, she may rail at the teacher's unfairness, all the while at least knowing deep down that she in fact got precisely what she earned.¹⁰

"Political bullshit," as defined here, is bullshit done by the State. Such bullshit is also political in that it affects the distribution of power and other social resources among individuals and salient social groups.¹¹ Like the

. . . contains a depressing stew of bullshit, propaganda, spin, and outright lies. . . . Those who seek to distract, manipulate, scam or mislead have full and easy access to the instruments of mass representation, . . . while those who aim merely to speak the truth . . . struggle to be heard."); *id.* at 51-59 (summarizing cognitive processes and circumstances making us susceptible to bullshit); *infra* text accompanying notes 23-40 (discussing tactics for weakening human resistance to bullshit's pernicious effects).

6. See, e.g., Vanessa Neumann, *Political Bullshit and the Stoic Story of Self*, in BULLSHIT AND PHILOSOPHY, *supra* note 1, at 203, 205 ("The first typical purpose of political bullshit is to depict the speaker as someone different ('better,' given the circumstances) than she is."). Neumann continues, "Bullshit is the main tool for the ultimately *unconstrained* struggle for the flexible and malleable rules of political power." *Id.* at 207; see also Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 758-65 (1999) (summarizing the processes by which language and other symbolic conduct is used to wage war over individual and group status, status being a good in itself and a means for gathering material and other social resources).

7. See Bernal, *supra* note 4, at 64. Bernal explains:

[I]n the typical case, the bullshitter is strongly connected to the truth *via* a desire to obscure a specific part of it. This desire may be more or less conscious. The bullshitter may have that part of the truth in mind clearly or fuzzily, or it may be in some mental compartment to which she has no immediate conscious access.

Id. at 64.

8. See *id.*

9. *Id.* at 65.

10. See *id.* at 64 (arguing that the student writing a bullshit essay either consciously "knows that she has nothing thoughtful or deep to say . . . but who aims to prevent her instructor from realizing all this" or at least knows this deep down so that she is ultimately "not surprised if her ruse fails and her grade is poor.>").

11. See Mark Evans, *The Republic of Bullshit: On the Dumbing-Up of Democracy*, in BULLSHIT AND PHILOSOPHY, *supra* note 1, at 185 ("It is the most popularly received wisdom about politics that politicians and others close to the exercise of power—media commentators, lobbyists, and suchlike—are inordinately disposed to pollute the polity with bullshit."); see also *infra* text accompanying notes 185-232

ordinary bullshitter, the political bullshitter generally proceeds in one of two broad ways, either by indirectly implicating a falsehood without actually stating it or by simply distracting the listener from seeing the truth.¹²

Political advertising techniques illustrate the first, indirect-implication approach. If a liberal pacifist runs for office, for example, he might appear in a television advertisement with military officers and the screen subtitled “Vote Johnson and vote for real national security.”¹³ It does not matter whether Johnson’s pacifism is a good or bad thing, which is something about which many voters will disagree. Either way, the ad is an act of political bullshit because it conveys the impression to at least some viewers that Johnson supports a strong military when his views are quite the opposite. Of course, Johnson never says he wants to beef up the military. He only indirectly implies it, and he does so in a way that enables him, if called on it, to deny duplicitous intentions with a straight face. After all, he would say, a smaller and less bellicose military will raise America’s standing among the international community. That will truly make us safer.

But this is why the ad is bullshit rather than a lie. Johnson may even believe his own protestations of innocent intentions, yet the ad still fairly implies to some a false message—though surely a message that helps to advance Johnson’s political career. Note, however, that the degree of Johnson’s success as a bullshitter importantly turns on his bullshitter’s ignorance. Viewers who rarely read newspapers other than the sports section and who listen to the evening news as background while eating dinner will not know Johnson’s true views in any depth. Accordingly, they will be less likely to spot that they are being bullshitted.¹⁴

Liberals, and increasingly, skeptics elsewhere on the political spectrum often accuse President Bush of the second type of bullshitting: distracting listeners from the truth. One liberal thinker declares that Bush used dubious intelligence reports about Iraqi efforts to obtain yellow cake uranium and unsubstantiated suggestions connecting Saddam Hussein to September 11 as red herrings, thus drawing the electorate’s vision away from the real truth — that the Bush Administration’s members “had an antecedent intention, and perhaps something like a plan, to invade Iraq no matter what.”¹⁵ Though conservatives will surely take umbrage at this description, if it is true, it is a

(explaining processes by which political bullshit affects the distribution of power resources among individuals and groups).

12. See Bernal, *supra* note 4, at 65.

13. See, e.g., ANTHONY PRATKANIS & ELIOT ARONSON, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* 115-57 (1992) (analyzing techniques of what this Article calls “political bullshit”); PHILIP M. TAYLOR, *MUNITIONS OF THE MIND: A HISTORY OF PROPAGANDA* (2003) (analyzing similar techniques); Taylor, *supra* note 5, at 49 (noting the similarity between commercial advertising techniques and political bullshit). The Johnson advertisement example is the author’s creation.

14. See *infra* Part I.B (discussing the work of writers in a variety of fields that recognizes the role of ignorance in prompting the effectiveness of political bullshit).

15. See Bernal, *supra* note 4, at 65-66.

quintessential example of bullshitting by distraction. Once again, its success depends in part on the audience's ignorance. Informed political junkies who closely followed the Bush Administration's statements about Iraq and the newspapers' leaking of internal Administration deliberations on the subject before September 11 would have had ample information to enable them to be among the strongest critics of Bush's early case for the war in Iraq, and they were.¹⁶

When police fail to inform suspects of their constitutional rights, they hope to play on citizen ignorance as a way to encourage citizen cooperation.¹⁷ Police officers may rarely directly lie to a citizen. Thus, for example, police who ask a passenger on a bus to open his backpack for inspection for illegal drugs may rarely, if ever, flatly and falsely declare that he has no right to refuse.¹⁸ Yet, like the political advertisement example, the police may subtly

16. See, e.g., Dana Priest & Joby Warrick, *Observers: Evidence for War Lacking*, WASH. POST, Sept. 13, 2002, at A30.

17. See, e.g., *United States v. Drayton*, 536 U.S. 194, 206 (2002) (rejecting "the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (finding that a consent-to-search can be voluntary under the Fourth Amendment to the United States Constitution even if citizens are not informed of, or even know of, their right to refuse given that "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime"); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (describing police tactics in obtaining "consensual" searches as "rel[ying] on ignorance and thinly veiled coercion").

18. See, e.g., *Drayton*, 536 U.S. at 194 (holding that obtaining consent to search bus passengers without informing them of their Fourth Amendment rights did not involve lying about authority to refuse). Indeed, outright lies about police authority to conduct a search may invalidate any consent, though bullshitting to take advantage of citizen ignorance rarely will. See ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* 409 (2d ed. 2003); see also *supra* note 17. Justice Souter, joined by Justices Stevens and Ginsburg in the *Drayton* case, in which the majority held that a bus passenger's consent to search in the drug interdiction context was voluntary despite the lack of rights warnings, essentially concluded that both the officers' efforts to obtain voluntary consent and the majority's conclusion that they had done so were classic instances of bullshit. *Drayton*, 536 U.S. at 211-12 (Souter, J., dissenting). Justice Souter said:

[F]or reasons unexplained, the driver with the tickets entitling the passengers to travel had yielded his custody of the bus and its seated travelers to three police officers, whose authority apparently superseded the driver's own. The officers took control of the entire passenger compartment, one stationed at the door keeping surveillance of all the occupants, the others working forward from the back. With one officer right behind him and the other one forward, a third officer accosted each passenger at quarters extremely close and so cramped that as many as half the passengers could not even have stood to face the speaker. None was asked whether he was willing to converse with the police or to take part in the enquiry. Instead, the officer said the police were "conducting bus interdiction," in the course of which they "would like . . . cooperation." The reasonable inference was that the "interdiction" was not a consensual exercise, but one the police would carry out whatever the circumstances; that they would prefer "cooperation" but would not let the lack of it stand in their way. There was no contrary indication that day, since no passenger had refused the cooperation requested, and there was no reason for any passenger to believe that the driver would return and the trip resume until the police were satisfied. The scene was set and an atmosphere of obligatory participation was established by this introduction. Later requests to search prefaced with "Do you mind . . ." would naturally have been understood in the terms with which the encounter began.

convey just that message in their overbearing body language, command tone of voice, and attitude of expected obedience.¹⁹ Similarly, an officer who has given *Miranda* warnings—supposedly curing citizen ignorance—may deliver them quickly, in a monotone voice, followed readily by launching into a description (perhaps some of it accurate, some of it not) of the evidence against the suspect and the horrific punishments awaiting him if he fails to cooperate.²⁰ Such tactics are an effort to distract the interrogatee from focusing on, or fully understanding, his rights, while simultaneously sending the indirect message that they are mere paper rights that the police have no intention to truly honor.²¹ Thus, the police bullshit by distraction to obtain a confession.²²

B. Why Does Bullshit Work?

Why does bullshit work? Although this Article is not intended to focus on this question, a brief answer to it helps in understanding bullshit's advantages and disadvantages for a democratic society.

Ignorance, as already mentioned, improves the prospects of bullshit's success by denying the bullshittee the tools needed to spot deception.²³ A speaker of bullshit may also be only semi-consciously or even unconsciously aware that his words mislead.²⁴ Self-deceiving bullshitters—those who therefore in part bullshits themselves—save themselves the pangs of an

Id. (citation omitted).

In other words, although the officers used misleading words like “cooperation,” occasionally adopted a soft tone of voice, phrased their commands in the form of a question, and never overtly lied about their authority, they also never revealed its limitations and created an atmosphere sending the tacit message that none existed. *See id.* This combination of omissions, misdirection, and fear was designed to give the police what they wanted—evidence of illegal drug use—thus constituting quintessential bullshit. *See id.* As Souter later explained, “A police officer who is certain to get his way has no need to shout.” *Id.* at 212. Indeed, concerns like these likely underlaid the now overruled position of the court of appeals that a positive indication of a right to refuse was required. *Id.* at 206.

19. *See, e.g.,* TAsLITZ & PARIS, *supra* note 18, at 408 (cataloguing police behaviors such as tone of voice, intimidating physical presence, and visible display of weapons that are relevant to a determination of the voluntariness of consent, but none of which alone or even in combination necessarily invalidate it). Compare the Court's current willingness to take advantage of citizen ignorance in the consent search area with its earlier statement in another context that “no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.” *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

20. *See* TAsLITZ & PARIS, *supra* note 18, at 641–42 (summarizing the literature on this point).

21. *See* Andrew E. Taslitz, Book Review, 17 CRIM. JUST. 57 (Winter 2002) (reviewing WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* (2001) and discussing that function of police tactics designed to minimize *Miranda's* impact); *cf.* Robert M. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Exclusion of an Entirely Unjustified Practice at a Particularly Sensitive Moment*, 39 TEXAS TECH. L. REV. _____, _____ (discussing pre-warning police deception designed to obtain post-warning *Miranda* waivers).

22. *See* Taslitz, *supra* note 21, at 57.

23. *See supra* note 14 and accompanying text.

24. *See supra* note 7 and accompanying text.

anguished conscience and appears sincere, for that is indeed a more or less accurate description of their conscious state of mind.²⁵ Those who seem sincere also seem more credible and likable, magnifying their power to effectively deceive.²⁶

Bullshit also alters the costs and benefits of the economy of attention.²⁷ In normal times, everyone has busy days, focusing on work, family, health, perhaps church, and a small bit of leisure time. People have only so much energy, time, and effort to expend in choosing the objects, duration, and intensity of their attention. The distracting powers of bullshit and its easy and pervasive availability work to occupy much of people's limited attention.²⁸ In turn, people have few reserves left to gather the information and develop the skills necessary to wade through bullshit's seas.²⁹

Bullshit also works to appeal to our emotions as well as our intellect.³⁰ Some emotions aid careful thought, but others retard it.³¹ Bullshit plays on the latter emotions, such as fear or resentment, engaging the listener's attention in powerful ways that still internal deliberation.³² Both the liberal pacifist politician Johnson, whose ads falsely conveyed military strength, and

25. See Bernal, *supra* note 4, at 82 ("But generally speaking, it is easier to make a habit of bullshitting than of lying, because outright deception ordinarily provokes a sting of conscience. When bullshitting is less than fully conscious, this sting is less than fully sharp, and is therefore a weaker deterrent.").

26. See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 420-21 (2005) (summarizing social science research on the advantages of self-deception for effectively deceiving others); Par Anders Granhag Aldhert Vrig, *Deception Detection*, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 43, 65 (Neil Brewer & Kipling D. Williams eds., 2005) ("[L]ie catchers who attributed positive trait characteristics (dispositional) to the person they were judging also tended to judge this person as truthful in a given situation (state).").

27. See JACOB NEEDLEMAN, WHY CAN'T WE BE GOOD? 110-16, 124-25, 136-42 (2007) (analyzing the personal and social importance of, and difficulty of, simply truly paying attention to our thoughts and actions and their impact on the material and social world); ELIZABETH V. SPELMAN, FRUITS OF SORROW: FRAMING OUR ATTENTION TO SUFFERING 1-14 (1997) (defining and explaining the term "the economy of attention" and its contribution to human suffering and political injustice).

28. See, e.g., MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE 310-14 (1998) (noting time pressures of everyday life combine with its increasing complexity to make it hard for citizens truly to be informed on many issues); Evans, *supra* note 11, at 196-97 (arguing that politics has been "dumbed-down" because citizens, "overwhelmed and embarrassed by the complexity of politics, perhaps jealous of those few who seem more capable of getting to grips with them," nevertheless feel compelled to speak on all political subjects, however uninformed their opinions on those topics might be).

29. See, e.g., Evans, *supra* note 11, at 199-200 (advocating wide citizen training in philosophical methods to promote more informed and critical thinking in a world of limited information resources); Taylor, *supra* note 5, at 61-62 (arguing for the necessity of continuing education to counteract the ignorance and lazy mental habits that make us more susceptible to the ill effects of political bullshit).

30. See Neumann, *supra* note 6, at 207-08.

31. See, e.g., Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 273-84 (2003) (explaining how moderate anxiety can sometimes improve political deliberation and prompt action, while fear can often do just the opposite).

32. See Neumann, *supra* note 6, at 211-12 (analyzing bullshit's relationship to fear, terror, and resentment of the "other" and how this relationship injures sound political deliberation).

President Bush's efforts to link Saddam Hussein to September 11, for example, sought to appeal to our fears of assaults on our physical safety, assaults not just by anyone but by foreigners, aliens, and outsiders.³³ Ignorance, self-deception, emotional pull, and limited attention thus combine to make bullshit a uniquely effective rhetorical tool. In the case of the police, the high incidences of purportedly voluntary consent searches and of *Miranda* waivers arguably suggest that police mastery of bullshit is impressive.³⁴

Yet, in a democracy, bullshit imposes both serious costs and offers tempting benefits. On the cost side, bullshit promotes citizen ignorance of the content and meaning of those rights that constitute our republic. If it is some basic understanding of a uniquely American conception of constitutional rights that defines us as a nation, as some thinkers argue, then bullshit's ability to obscure that understanding alters the very meaning of what it is to be American.³⁵ Even more than this, bullshit places each individual into a fantasy world rather than a real one. Decisions therefore result from illusion, a kind of craziness far from the autonomy and equal respect for individual rationality that democracy assumes.³⁶ Correlatively, bullshit prevents informed individual and group deliberation, both of which are essential to a well-functioning republic.³⁷ Moreover, by obscuring truth and appealing to base emotions, bullshit can encourage "them-us thinking" that entrenches class and racial inequality with society's oppressed being most likely to suffer bullshit's indignities.³⁸ Society's elites, in turn, benefit from the self-delusion and self-justification for oppression that bullshit provides.³⁹ The task of Part II is to

33. See *id.* at 212; COREY ROBIN, FEAR: THE HISTORY OF A POLITICAL IDEA 18-19, 23, 162-65, 184-98 (2004) (discussing how political fear generally, and that of terrorism specifically, can unite "us" against "them" while stifling dissent and empowering political elites); PETER N. STEARNS, AMERICAN FEAR: THE CAUSES AND CONSEQUENCES OF HIGH ANXIETY 21-52 (2006) (tracing how the American style of political fear affected public policy in the wake of September 11); *infra* Part II.C (discussing bullshit and fear of the outsider).

34. See *infra* text accompanying notes 287-95 (discussing the high incidence of consent searches); TASLITZ & PARIS, *supra* note 18, at 644 (summarizing data on the high incidence of *Miranda* waivers).

35. See *infra* Part II.A.4. See generally JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 54-58, 183-84 (2001) (defining democratic constitutionalism as a people's struggle over time to craft and live out its fundamental commitments made under its unique shared legal and political order).

36. See *infra* text accompanying notes 56-67 (analyzing bullshit and craziness).

37. See *infra* Part II.B.

38. See *infra* Part II.C.

39. See Neumann, *supra* note 6, at 206-07, 210-12; Taslitz, *supra* note 26, at 394-98, 413-23 (explaining how self-deception enables elites to consolidate power while consciously believing that they are adhering to purported egalitarian norms); *infra* Part II.C (analyzing processes by which political bullshit promotes them/us thinking and is differentially spread among, and harms, minority communities). Neumann notes:

[U]s-versus-them feeling is reinforced by the imagery of waging a war, which conjures visceral reactions of patriotism (possibly jingoism) and a call to violent and unquestioning action. If we are at war, then we must join our compatriots—and fight without questioning our orders. This is very useful for those seeking extra powers and a curb on civil liberties in order to wage this war.

explore each of these social costs of bullshit —the destruction of self, collapse of deliberation, and balkanization of political society.⁴⁰

Political bullshit in the criminal justice system, however, purportedly offers one great benefit. It aids in convicting the guilty, thus promoting both a just and safe society.⁴¹ This is no small benefit, and Part III of this Article takes a first cut at exploring the size of this benefit and whether its attainability is feasible in less deceptive ways.⁴² On balance, Part III finds that the social costs of police bullshitting citizens in the criminal justice system usually outweigh its benefits.⁴³ Nevertheless, as Part IV explains, merely informing citizens of their rights is a necessary, but not sufficient, step toward minimizing political bullshit's ill effects.⁴⁴ Cognitive awareness of the content of rights is worth little absent the tacit knowledge that comes from frequent exercise and defense of rights in a critical fashion. Accordingly, Part IV argues, relatively cheap but widespread social changes in how we educate citizens about their constitutional rights, from cradle to grave, is ultimately required.⁴⁵ Part IV offers a few, hopefully practical, suggestions for improvement.⁴⁶ Finally, Part V summarizes the arguments and conclusions in an effort to ensure that this Article does not inadvertently bullshit the reader.⁴⁷

II. THE COSTS OF POLITICAL BULLSHIT

Political bullshit imposes important costs on individuals, groups, and the polity as a whole. More specifically, political bullshit that relies on citizen ignorance or misunderstanding of constitutional rights in the criminal justice system expresses disrespect for individuals; severs the bonds of peoplehood, especially those linking racial and ethnic minorities to the broader political system; distorts individual identity and rationality; and hampers the quality of public deliberation. That bullshit causes these ill effects can be seen more

Id.

40. *See infra* Part II.

41. *See, e.g.*, U.S. v. Drayton, 536 U.S. 194, 205-07 (2002) (justifying deceptive consent-to-search techniques, including maintaining ignorance about constitutional rights, on crime-fighting grounds); Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 107, 109 (G. Daniel Lassiter ed., 2004) (arguing that under current law, police “are allowed to use ‘trickery and deception’ (e.g., telling suspects they have an eyewitness or fingerprints on the weapon when they do not) to obtain statements of guilt”); CHARLES L. YESCHKE, INTERROGATION: ACHIEVING CONFESSIONS USING PERMISSIBLE PERSUASION 12 (2004) (counseling interrogators that “trickery and deception are morally acceptable in the law enforcement context,” within limits and that “manipulat[ing] vulnerable culpable subjects” does not significantly cause false confessions).

42. *See infra* Part III.

43. *See infra* Part III.

44. *See infra* Part IV.

45. *See infra* Part IV.

46. *See infra* Part IV.

47. *See infra* Part V.

clearly by first defining just what we mean by “respect” and its opposite, “disrespect.”

A. *Dis-integration of the Rational Self*

1. *Defining Respect*

Some variant of the idea of equal respect for all citizens is at the heart of most modern democratic theories.⁴⁸ Human rights theorists go further, demanding equal respect for all human beings.⁴⁹ Such theories are based on the assumption that all citizens, or all persons, are in some way alike, therefore sharing the same status and thus requiring the state to give them equal treatment befitting of that status.⁵⁰ Commentators debate what attribute of sameness all persons share. Some think that it is being made in “the image of God,” others that it is the capacity to achieve moral goodness, and still others--the Kantians—that it is rationality and autonomy—humans’ nature as self-directing beings legislating their own life plans.⁵¹

This last vision, the one of rational autonomy, is most frequently embraced in some form by American courts and commentators and most clearly helps to examine the relationship between the state’s bullshitting its citizens and the disintegration of their political selves.⁵² Yet the other conceptions would lead to the same conclusion, for all share an understanding of equality that requires well-informed persons making reasoned choices. Moreover, all these conceptions entail as a corollary that whatever the quality that we all share, that quality entails certain rights and entitlements without which our status as citizens or humans respectively is ignored.⁵³ Freedom of conscience, privacy, the right to own property earned by the sweat of our brow, and freedom of movement are among the rights commonly deemed to

48. See generally KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1991) (discussing how equal citizenship has long served America as a unifying goal and has become a principle of our constitutional law).

49. See, e.g., JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* 3-15 (1999) (discussing how all rights in Western political thought are justified by appeal to an idea of a “distinctive existent” quality shared in equal measure by all humans); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2276-84 (2002) (defining “respect” and its legal significance).

50. See COONS & BRENNAN, *supra* note 42, at 3-15.

51. See *id.* at 13, 116-22 (summarizing and contrasting Kantian theory and an alternative focusing on the capacity to achieve moral goodness); MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11-41 (1998) (arguing that the idea of human rights is “ineliminably religious”); WILLIAM F. SCHULTZ, *IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL* 17-37 (2001) (offering pragmatic arguments for accepting the ideas of human rights and equality).

52. See COONS & BRENNAN, *supra* note 42, at 3-15.

53. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1697 (1992).

belong to all people simply by nature of their citizenship or humanity.⁵⁴ Respect for individuals in these and other ways thus requires treating them “fittingly,” that is, in accordance with their status on some specified trait, generally meaning their possession of rational autonomy.⁵⁵

But what does it mean to treat someone fittingly? Beyond according to citizens equality of the rights just catalogued that help to define them as citizens fully belonging to the body politic and treating them as the rational creature that a democratic republican system assumes, many fittingness theorists agree that respect necessarily implies diversity in life choices.⁵⁶ Such diversity stems from the belief that each person is in some sense unique, thus of infinite worth.⁵⁷ Social psychologists have indeed found strong evidence that there is a human drive toward uniqueness.⁵⁸ That drive prods us to work toward standing out in some ways as different from others, though we also strive in other ways to be much like them.⁵⁹ If each individual’s unique choices and goals are not treated as equally worthy, then it is hard to see how equal respect is being shown for that person as a rational being meriting autonomy in the individual’s thoughts and actions.⁶⁰ A sense of individual uniqueness is thus an important part of our sense of self, of who we are. Respect must therefore be shown for the sorts of differences that are central to personal identity.⁶¹ In short, people treat others the same in part by honoring their differences.

54. See, e.g., JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, & INTENT* 13-56, 73-75 (1999) (recognizing privacy, property, and free movement as universal rights); cf. Martha Minow, *Equality and the Bill of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer & William A. Parents eds., 1992) (discussing how human dignity and equality are embraced in the Bill of Rights, especially in the protections of the First Amendment).

55. See GEOFFREY CUPIT, *JUSTICE AS FITTINGNESS* 1-2 (1996). Cupit sees respect and justice as both parts of the fittingness family of concepts, with respect being the broader idea. See *id.* at 15-28. His distinctions are subtle and complex but of no moment whatsoever for the arguments made here, so they are ignored for purposes of this Article.

56. See Jean Hampton, *Retribution and the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117, 140-41 (defending a “perfectionist liberalism” as one in which the state must promote “value pluralism,” so that the citizenry has plenty of options and opportunities to choose from in creating its life). Professor Cupit is responsible for the terminology of “fittingness,” an idea that captures an underlying similarity among theorists writing about respect, dignity, insult, and humiliation. See CUPIT, *supra* note 49, at 1-4. This Article thus refers to them as “fittingness theorists.”

57. See CUPIT, *supra* note 49, at 65-80 (arguing that justice requires treating individuals both as unique persons of independent worth and parts of a larger whole); Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 3-4, 14-30 (1993) (defining “individualized justice” and its connection to respect for human uniqueness).

58. See generally JUDITH RICH HARRIS, *NO TWO ALIKE: HUMAN NATURE AND HUMAN INDIVIDUALITY* (2006) (attempting to solve the mystery of why no two people are alike or why even identical twins differ in the ways they do).

59. See *id.* at 228-31, 239-40, 242-43, 247.

60. See Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 MD. L. J. OF RACE, RELIGION, GENDER & CLASS 306, 324-30, 338-39 (2001).

61. See Taslitz, *supra* note 6, at 746-65 (1999).

2. Undermining Rationality

Bullshitting citizens about the existence and nature of their rights is a fundamental form of disrespect because it is inconsistent with treating them as rational creatures who are partly defined by equal rights, yet who deserve to make autonomous choices reflecting their uniqueness as individuals. Lying to citizens, or distracting them from the truth, is the very opposite of treating them as rational, autonomous beings. As the father of bullshit studies, Harry Frankfurt, has put it, “In telling his lie, the liar tries to mislead us into believing that the facts are other than they actually are. He tries to impose his will on us. He aims at inducing us to accept his fabrication as an accurate account of how the world truly is.”⁶² But the liar’s assertion of his dominance over his victim does more than overcome the latter’s will. In practical effect, the liar condemns his listener to an imaginary world.⁶³ Frankfurt elaborates:

Lies are designed to damage our grasp of reality. So they are intended, in a very real way, to make us crazy. To the extent that we believe them, our minds are occupied and governed by fictions, fantasies, and illusions that have been concocted for us by the liar. What we accept as real is a world that others cannot see, touch or experience in any direct way. . . . [T]he victim of the lie is . . . shut off from the world of common experience and isolated in an illusory realm to which there is no path that others might find or follow.⁶⁴

The victim of the lie is not only exiled to a sort of insanity but to a form of blindness as well.⁶⁵ All human interaction involves an effort to read one another’s minds.⁶⁶ We rely on language, nonverbal cues, and social context to divine another’s thoughts as best we can.⁶⁷ We are surprisingly good at this task, for it is how we communicate, resolve conflict, negotiate social status,

62. HARRY FRANKFURT, *ON TRUTH* 77 (2006). Although Frankfurt’s new book is called *On Truth*, it is less about truth versus lies than it is a companion to his work about bullshit. See *id.* at 3-6. For Frankfurt, bullshit cannot be understood without knowing the meaning and moral importance of truth.

63. See *id.* at 77-78.

64. *Id.* at 78-79.

65. See *id.*

66. See, e.g., DAVID LIVINGSTONE SMITH, *WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND* 34-35, 65-71 (2004). This human ability to mind-read is probably just a more refined version of a skill common to many social creatures. See, e.g., J.R. Krebs & R. Dawkins, *Animal Signals: Mind-reading and Manipulation*, in *BEHAVIORAL ECOLOGY: AN EVOLUTIONARY APPROACH* 385 (J.R. Krebs & N.B. Davies eds., 1984) (noting that for an animal that has any kind of social life, or that is a predator or preyed upon, some skill is required at reading the internal motivational state and probable future behavior of other animals—rivals, mates, parents, offspring, predators, parasites, and hosts).

67. See SMITH, *supra* note 61, at 65-71. Anthropologist Robin Dunbar argues that the need for effective social communication was indeed the primary evolutionary force promoting human intelligence. See ROBIN DUNBAR, *GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE* 65 (1998).

and bond with others.⁶⁸ For this reason, respect in social relationships, though involving reticence in invading another's privacy, also includes an expectation that, on the subjects about which that other person has agreed to speak, that person will allow at least a modest degree of intimacy: "the intimacy that consists in knowing what is on, or what is in, another person's mind."⁶⁹ As one author put it, "The liar refuses to permit himself, to the extent that he lies, to be known. This is an insult to his victims. It naturally injures their pride."⁷⁰ Like the autistic child, the victim is rendered at least partially and temporarily mind-blind.⁷¹ Someone rendered mind-blind about others' intentions regarding when and how he may exercise his rights, and about the content of his rights, cannot fairly be said to be treated equally with the sighted.⁷²

3. *Distorting Unique Individual Identity*

Bullshit not only undermines rationality but also the sense of individual human uniqueness.⁷³ Our sense of uniqueness necessarily implies some understanding of our separateness from others, our distinctions from them.⁷⁴

68. See DUNBAR, *supra* note 62, at 65; SMITH, *supra* note 61, at 65-71.

69. FRANKFURT, *supra* note 57, at 80; see Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 150-80 (2002) (explaining that privacy is needed precisely to obtain necessary respite from the mind-reading and judging of others whom, we fear, will draw unfair conclusions not so much about our likely current behavior as about our overall character and worth based upon incomplete information).

70. FRANKFURT, *supra* note 57, at 80.

71. See, e.g., TEMPLE GRANDIN & SEAN BARRON, *THE UNWRITTEN RULES OF SOCIAL RELATIONSHIPS* (2005) (describing how autistic children and adults understand and experience the social world very differently than most people, an experience fitting the description of "mind-blindness"); TEMPLE GRANDIN, *THINKING IN PICTURES: MY LIFE WITH AUTISM* (exp. ed. 2006) (describing Grandin's own autism).

72. See SMITH, *supra* note 61, at 65-78. Indeed, David Smith describes an evolutionary arms race in which, precisely because of the human ability to mind-read, other humans seek to develop new skills of deception. See *id.* In turn, evolution pushed us toward further-improved mind-reading to get past the fog created by deception, and the development of language and modern culture allows this competition to continue in a spiral. See *id.* The arms race metaphor is an apt one, however, for it conjures images of enemies competing to be better able to obliterate one another. See *id.* Deception is the Evil Empire in this vision, understood as an effort to manipulate and exploit a more vulnerable opponent. See *id.* at 35. Deception can increase social conflict, warn repeat players not to trust the deceiver, and ultimately lead to the deceiver being deprived of information that he himself needs to survive and prosper. See *id.* at 77. Accordingly, explains Smith, "When we discover that someone is trying to defraud us, our first response is often a surge of rage." *Id.* at 73. Some openness to mind-reading, at least free of substantial deceptive efforts to prevent it, though varying with the circumstance and type of human relationship, is still taken as the social norm. See Taslitz, *supra* note 54, at 355-66. Lies and their near-cousins breach these rules of engagement, thus eliciting righteous anger stemming from the sense that we have been abused and degraded. See *id.* (explaining that retributive feelings stem from the sense that we are being treated as of less worth than we are and than another, feelings triggered particularly when we believe we are treated by that other as solely a means to his own ends).

73. Cf. Taslitz, *supra* note 51, at 1, 3-4, 14-20 (explaining the human need to be thought of as unique, a "universe of one").

74. See HARRIS, *supra* note 52, at 160, 181, 210-11, 228-29.

This sense of separateness, argue some philosophers and developmental psychologists, in turn flows from our “coming up against obstacles to the fulfillment of our intentions,” that is, against aspects of the world that will not readily submit to our desires because they are independent of us.⁷⁵ Further experience with such obstacles and how to handle them teaches us about our individual strengths, vulnerabilities, and values.⁷⁶ These lessons help to define the “specific sort of being that we are.”⁷⁷ Our individual identity therefore necessarily develops in comparison to, and contradistinction from, the external physical and social world.⁷⁸ As one theorist put it, “It is only through our recognition of a world of stubbornly independent reality, fact, and truth that we come both to recognize ourselves as beings distinct from others and to articulate the specific nature of our own identities.”⁷⁹ If we base our identity on a false reality, then our identity is itself rendered false, and certainly if we learn that we have been duped, we doubt our own sense of self, no longer trusting who we think we are or what we think the world to be.⁸⁰ Indeed, most of us have some sense of a core or true self, aspiring to bring our thoughts and actions in line with the real us, to “live fully in accord with . . . [our] own natures.”⁸¹ We feel exhilaration when we respond to a challenge in a way that is consistent with what we see to be our “most authentic nature.”⁸² In turn, we despise what pulls us away from this personal authenticity, as famed philosopher Baruch Spinoza has convincingly argued.⁸³

Imagine an innocent person falsely suspected of using illegal narcotics.⁸⁴ An officer “asks” that person for permission to search him, never once mentioning that he has the right to refuse.⁸⁵ This individual thinks of himself as a law-abiding person in a relatively just world in which the innocent are rewarded, the guilty punished, and individual rights respected.⁸⁶ If he is unaware of his right to say no, subsequently finding out that he had such a right, these foundations of his identity will be shaken, though not shattered.⁸⁷

75. FRANKFURT, *supra* note 57, at 98-99.

76. *Id.* at 100.

77. *Id.*

78. See HARRIS, *supra* note 52, at 164-65, 173-75, 194-97, 210-13, 228-30.

79. FRANKFURT, *supra* note 57, at 101.

80. See *id.* at 47.

81. *Id.* at 46.

82. *Id.* at 44; see MIKE W. MARTIN, SELF-DECEPTION AND MORALITY 78 (1986) (explaining that authentic persons are best understood as those “who shape their self-identities on the basis of . . . concern for truth”).

83. See FRANKFURT, *supra* note 57, at 38-48; BARUCH SPINOZA, ETHICS, Part III, Proposition 13, Scholium (trans. R.H. M. Elwes 1989), available at <http://www.worldwideschool.org/library/books/relg/christiantheology/Ethics/chap11.html>.

84. COLLEEN A. WARD, ATTITUDES TOWARD RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVES 84-86, 182 (1995) (discussing this “just world” hypothesis, albeit in a different context).

85. See *id.*

86. See *id.*

87. See *supra* notes 59-67 and accompanying text (stating that discovering deception prompts rage).

If he does know of his refusal right, he may interpret an officer's silence about it as either an effort to fool the citizen or as an indication of an unwillingness to respect that citizen's rights.⁸⁸ These thoughts may occur at the time of the requested search or upon later reflection. The thoughts may be fully consciously articulated or less consciously entertained.⁸⁹ Either way, the duped citizen may react with anger, or at least irritation.⁹⁰ Perhaps a single incident will not destroy his previous conceptions about police and the rule of law, but repeated incidents—as are likely common in many poor, inner-city neighborhoods—will more likely do so.⁹¹ If he comes to believe that social reality is not what he previously believed it to be, he will feel that he has been living a lie.⁹² The resulting outrage may prompt him to change who he is, at least in some modest respects.⁹³ Concerning his law-abiding nature, he may at least be less willing to cooperate with the police, though perhaps also more willing to violate minor legal restrictions when he sees little chance of getting caught.⁹⁴ If he sees the officer's actions as, for example, stemming from stereotypes based on the citizen's race, ethnicity, or religion rather than based on his own unique character, words, and actions, the degree of these changes in law-abiding self-identity may be significantly amplified.⁹⁵

Would these effects disappear if the citizen were in fact guilty? Perhaps they would be reduced, but they would hardly vanish. A guilty suspect likely lacks a self-conception as a law-abiding person. Yet he still thinks of himself as unique and still wants to be judged for his own character and actions.⁹⁶ If he believes he is singled out based upon race, his resentment will be real, overlaying his fear or anger at simply being caught in the act.⁹⁷ He may

when we realize another has in effect driven us crazy, awakening us from a fantasy world to find we have been manipulated and exploited by the deceiver).

88. Cf. *Miranda v. Arizona*, 384 U.S. 486, 453-55, 465, 468-69 (1966) (making a similar point in the context of police interrogation).

89. See Taslitz, *supra* note 26, at 388-94 (defining and explaining the operations of the unconscious and semi-conscious minds).

90. See SMITH, *supra* note 61, at 73 (explaining how deception-discovery prompts anger).

91. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 57, 162-64 (2002) (noting empirical data supports the conclusions that "police officers and court officials can gain consent and cooperation from the public by behaving in ways that are perceived as procedurally fair" and that minority group experiences with police treating them respectfully or not have a significant impact on perceived procedural fairness). Other influences on law-abidingness are discussed in Part III.

92. See *id.*

93. See *id.*

94. See *id.* at 163; see generally TOM TYLER, WHY PEOPLE OBEY THE LAW (rev. ed. 2006) (extending the argument that procedural justice perceptions play a critical role in encouraging law-abiding behavior, even among those society has labeled "criminals").

95. See DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 94-144 (2003).

96. Cf. Taslitz, *supra* note 51, at 1, 3-4, 14-30 (discussing all persons' need for individualized justice).

97. See HARRIS, *supra* note 90, at 94-144.

further see an officer's silence about constitutional rights as yet another indication of poor treatment stemming from his race.⁹⁸ Police silence becomes perceived as police lies, which are in turn experienced as insults.⁹⁹ If, unlike with the case of the innocent citizen, police bullshitting about constitutional rights does not in fact alter the guilty suspect's self-conception, such bullshitting may nevertheless be understood as treating the suspect as in at least some ways inconsistent with that self-conception, and that too will emotionally unsettle the guilty man.¹⁰⁰

Every individual of course reacts differently to such situations. Yet ample social science suggests that these somewhat starkly drawn hypotheticals may capture much of the truth. Thus procedural justice research reveals that whether police inform persons of their rights importantly impacts whether they feel fairly treated, as does individualized justice—treating them for who they uniquely are and what they uniquely do.¹⁰¹ Furthermore, persons experiencing a reduced perception of fair treatment are more likely to disobey the law in the future.¹⁰² This vision of officer bullshit as harming individual identity, thus constituting disrespectful treatment, seems at least one plausible explanation for how officer deception or misdirection may contribute to these ill procedural justice effects.

4. Severing Social Bonds

a. Defining Peoplehood

Yet self-identity is not entirely a matter of an isolated individual's interactions with the rest of the world. To the contrary, there are important social aspects of each person's identity. For example, our group connections—as a Jew, Christian, or Muslim, a Democrat or Republican, a Kappa or a Delta—are critical pieces of who we are.¹⁰³ Likewise, our sense of being part of the “American people,” as opposed to the German, Russian, Chinese, or Egyptian people, is part of our individual identities.¹⁰⁴ Being part of a people, however, argues constitutional scholar Jed Rubenfeld, means individuals' “co-existence, over time, under the rule of a given legal and political order.”¹⁰⁵

98. *See id.*

99. *See infra* Part II.A.4.b.

100. *See* Taslitz, *supra* note 54, at 314-18, 330-40 (discussing the emotional reaction to being treated as less worthy than others).

101. *See* TYLER & HUO, *supra* note 86, at 91, 162, 183, 202; Taslitz, *supra* note 51, at 1, 3, 14-30; *infra* text accompanying notes 56-84.

102. *See* TYLER, *supra* note 89, at 50-57.

103. *See* Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 204-09 (1999).

104. *See* Taslitz, *supra* note 54, at 373-76 (analyzing the importance of government's conveying a sense that each citizen belongs to the American people).

105. *See* RUBENFELD, *supra* note 35, at 153.

Rubinfeld's reference to the temporal nature of peoplehood can be understood as meaning that a people are created in part by a narrative.¹⁰⁶ Just as to be a person is to be the combination of what you were, are, and will be, so is this true of a people.¹⁰⁷ To say that peoplehood is partly defined by a narrative is not to render it a fiction.¹⁰⁸ A person, in this view, is the story he tells himself to link his memories, current experience, and aspirations.¹⁰⁹ Likewise, a people are defined by the story of their past, present, and future.¹¹⁰ Of course, in a diverse nation, multiple and competing stories will abound. In what sense can it, therefore, be said that a shared story unites Americans into one people?¹¹¹ The answer to this question lies in the second and, for my purposes here, more important part of Rubinfeld's definition of peoplehood—living under the rule of a given legal and political order.¹¹²

The precise rules of such an order, of course, change over time. What makes it the same legal and political order is a shared set of commitments.¹¹³ Here again an analogy to individual personhood is helpful. A commitment is an enduring normative determination made in the past to govern the future.¹¹⁴ Commitments give purpose and direction to our lives. Each of us has numerous commitments. Some are initially chosen, while others can at first be imposed on us by circumstances, as happens when we are born into a family.¹¹⁵ "To be a son, in the normative sense . . . is to be committed to certain familial values, to find important aspects of my good in the life and flourishing of this family, to recognize certain obligations to other members of the family."¹¹⁶

This son may, out of thoughtlessness or limited abilities, fail fully to honor his commitments to his family. If they are still his commitments, however, he will feel guilty about his failures and will try to do better next time. But this last point reveals an unusual aspect of commitments: they must be open to constant reflection and occasional change. Their normative force stems from our sense that they are chosen, helping to define us. If we cannot

106. See JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 63-89 (2002) (discussing narrative creation of the self); RUBENFELD, *supra* note 35, at 137 (discussing an analogy between individual narrative of the self and group narrative of a people).

107. See RUBENFELD, *supra* note 35, at 137.

108. *Id.*

109. *See id.*

110. *See id.* at 148-59.

111. Cf. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1316-28 (recounting differing interpretations of slavery's meaning between the antebellum and immediate post-Civil War South and North).

112. See RUBENFELD, *supra* note 35, at 153.

113. *See id.* at 154-58. Rubinfeld initially declares that he cannot precisely define "rule" under the same order but then describes its characteristics as including the temporal extension of shared commitments. *See id.* at 154-56.

114. *See id.* at 92.

115. *See id.* at 91-102.

116. R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 50 (2001).

re-evaluate the wisdom of our commitments and accordingly change them, they are no longer chosen, thus no longer ours.¹¹⁷ On the other hand, if our commitments change too readily, they are no longer enduring, becoming momentary preferences rather than commitments.¹¹⁸

To make a commitment does not mean to understand all that the commitment entails.¹¹⁹ Our understanding of what our commitments require necessarily changes over time.¹²⁰ The son does not really know what it fully means to be a son until he must care for an aging parent. Indeed that aspect of sonhood may never have previously crossed the son's mind.

A legal and political order consists of a people's commitments. As with the son, a people's commitments must endure but may change, and as with the son, what a people's commitments require may only be realized over time.¹²¹

Diversity among individuals does not preclude this shared commitment.¹²² Commitments can be shared by people who radically disagree about the meaning of the commitments in one circumstance versus another.¹²³ If enough individuals are prepared to live under institutions embodying shared legal and political commitments, it is fair to consider them a people despite their interpretive disagreements.¹²⁴

Constitutionalism in a democracy is therefore a people's struggle over time to craft and live out its most fundamental commitments, even if the commitments are contrary to the popular will at a given moment in time.¹²⁵

117. See RUBENFELD, *supra* note 35, at 96-100.

118. See *id.*

119. See *id.* at 95.

120. See *id.* Rubenfeld writes that the committed person is "entrained in the task of working out the implications and possibilities of certain engagements he already has with the world." *Id.* at 95.

121. See *id.* at 54-58.

122. See *id.* at 156.

123. See *id.*

124. See *id.* This definition of peoplehood thus reconciles commonality with diversity. See *id.* at 158 ("To recognize a people as a subject persisting over time, despite the heterogeneity of its composition, is ultimately no more mystical than recognizing individuals as subjects persisting over time despite the heterogeneity of their composition.")

125. See *id.* at 183-84; cf. DUFF, *supra* note 111, at 59, 69 (arguing that the "common law" is a phrase best understood not as judge-made law but as law that "embodies the shared values and normative understandings of the community," meaning the shared commitments to certain political values); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 1-40, 192-98 (1994) (arguing that history helps to inform us how we should constitute ourselves as a people today). In an analogous argument, Professor George Fletcher argues that the Reconstruction Amendments embodied a recognition that we had moved from being a loose collection of individuals at the founding to being an "organic nation." See GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 57-74 (2001). Fletcher is inconsistent but seems to use the terms "people" and "nation" interchangeably. See *id.* at 73. Rubenfeld would likely argue that we were always one people whether we realize it or not because we are defined by who we are, were, and will be. See RUBENFELD, *supra* note 35, at 56-73, 80-88, 158. Both scholars would agree, however, that our current sense of political commitment requires exploring our past, particularly the changes wrought by slavery and Reconstruction. FLETCHER, *supra*, at 73 ("[A] practice can be [sic] become part of the accumulated historical constitution without this being the purpose of those who initiated the practice," as Lincoln's Gettysburg address has

Understanding the meaning of a constitutional provision therefore requires exploring both its relevant history and salient current social practices.¹²⁶ Importantly, commitments derive from passion. Our most important constitutional commitments indeed “tend to be enacted at times *not of sober rationality, but of high political feeling*.”¹²⁷ This passion is part of what unites us over time. Commitmentarianism “captures the sometimes superior claim of feeling over reason—of an enduring normative passion over day-to-day rationality.”¹²⁸

Furthermore, the members of a people, like the members of a family, owe obligations to one another.¹²⁹ These obligations arise from the people’s shared commitments. The political-legal order helps both to express those commitments and to encourage members to fulfill the obligations that they accordingly owe each other.¹³⁰

b. Exiled from the People

Because, under this conception, constitutional law is significantly what defines us as a people, denying individuals their constitutional rights is in a real sense marking them as outside of, or not fully part of, the people.¹³¹ Moreover, although living pursuant to the shared commitments embodied in the constitution is what makes us part of the people, ignorance of those rights would seem to affect the strength of the subjective sense of belonging to the people.¹³² Such ignorance is, of course, widespread in America.¹³³ So, if this

become “the preamble to a new order of nationhood, equality, and democracy.”); RUBENFELD, *supra* note 35, at 80, 199 (“In any particular nation, this *we* will have been the product of a history, a constitutional struggle, usually waged at the cost of considerable blood and fortune,” as is illustrated by the paradigm case of the struggle against the post-Civil War black codes.).

126. See RUBENFELD, *supra* note 35, at 56-73, 80-88, 158.

127. *Id.* at 129.

128. *Id.* at 94.

129. Cf. DUFF, *supra* note 111, at 46-48 (describing how members of a liberal political community share obligations to one another, including the duty to respect and encourage diversity); ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* 70 (1996) (“Where stigma exists, there is already community—and therefore communal obligations.”).

130. See *supra* note 115.

131. Cf. KARST, *supra* note 41 (making an analogous argument that denying constitutional rights excludes certain groups from fully belonging to the American people).

132. Cf. TYLER & HUO, *supra* note 86, at 80, 91, 205-06 (noting that those identifying more closely with society and its institutions, including its legal ones, put even greater emphasis on procedural justice and that telling a person her rights and the reasons for police action is a marker of procedural justice that, in turn, increases legitimacy and attachment to legal institutions and thus to willingness to obey the law in the long run).

133. See, e.g., SCHUDSON, *supra* note 28, at 309-12 (arguing that any practical American conception of citizenship must recognize most Americans’ ignorance about the details of many issues of the day); John J. Patrick, *Education on the Constitution*, ERIC Identifier ED 285801, ERIC Clearinghouse for Social Studies/Social Science Education, Bloomington, IN (1987), available at http://www.findarticles.com/pl/articles/mi_pris/is_198705/ai_4889488332/ (“[M]any Americans appear to be deficient in both knowledge and appreciation of fundamental values, principles, and issues of their constitutional government.”).

assertion is correct, many Americans may have less of an attachment to the constitutional order than may be hoped.¹³⁴ They may, in other words, have a reduced sense of being part of a single American people; instead, they may envision the nation as little more than divided factions, a country composed of various interest groups jostling for power.¹³⁵

Groups will, of course, necessarily struggle for power in a democracy, but a weak sense of interconnectedness cannot bode well for resolution of those struggles that enhance the common good, however defined.¹³⁶ Just as national identity implies a common narrative, so does each group's and each individual's self-narrative about its membership and role in the broader people help to define part of individual identity.¹³⁷ Deluding individuals about the existence and nature of the constitutional rights that help to define them as part of the uniquely American people surely must exacerbate the sense among those individuals of being less than fully connected to the nation.¹³⁸

When ignorance combines with the misstatements, distractions, and confusions that help to constitute political bullshit, this distortion of individual narratives as Americans is magnified further still. Bullshit obfuscates clear

134. Cf. TYLER & HUO, *supra* note 86, at 174 (“[M]inority group members have less positive societal orientations. Since societal orientations have an influence on decision acceptance, minority group members have more negative relationships with legal authorities.”).

135. Andrew E. Taslitz, *Interpretive Methods and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 355-56 (1995). This attitude is akin to that of many public choice theorists who see legal and political institutions as dominated by “rent-seeking groups” who “organize and try to ‘buy’ legislation, by promising to provide money, advertising, and the votes of members to help re-elect a legislator.” *Id.* These groups act entirely in their own self-interest rather than pursuant to a vision of the common good, and their success generally makes society as a whole worse. *See id.* The most effective groups “can use threats, promises, and conditional cooperation to ensure that members will act together for the good of the group.” *Id.* at 356. Some critical race theorists extend a similar set of assumptions to the process of racial domination, arguing for the theory of “interest convergence.” *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 144-45 (1997) (summarizing the interest-convergence theory). This theory holds that whites are, in general, more powerful than racial minority groups and work to further primarily white self-interest, regardless of whether their motivations are conscious or not. *See id.* The racial minorities’ lot improves, therefore, only when white and minority groups’ interests converge, that is, when whites see helping blacks as serving white self-interest. *See id.* The argument here is that many Americans routinely feel detached from the broader community, including its legal institutions, and this is in part because they view that community as not acting in the interests of the detached—not caring for them or seeing the necessity of even treating them fairly. *See* TYLER & HUO, *supra* note 86, at 52, 174 (analyzing motive-based trust and community identification). Although minorities are more likely than whites to feel less of a sense of identification with the broader community, African-Americans, as a whole, overwhelmingly identify with other Americans while still strongly identifying with the African-American community. *See generally* PAUL SNIDERMAN & THOMAS PIAZZA, *BLACK PRIDE AND BLACK PREJUDICE* 109-56 (2002) (discussing the common ground among races).

136. *See* Taslitz, *supra* note 31, at 266-84 (arguing that appeals to racial solidarity, if properly done, can motivate group political action, improve public debate, bring many whites on board, and build minorities’ sense of investment in, and commitment to, societal institutions; however, errors in this area can have the opposite effect).

137. *See id.* at 266-69; Taslitz, *supra* note 98, at 204-09 (discussing group-individual identity connection).

138. *See* Taslitz, *supra* note 31, at 266-84.

thinking by appealing more directly to emotions.¹³⁹ Emotions stem in part from beliefs. For example, if we believe that our next door neighbor is a serial killer, we will fear him.¹⁴⁰ Emotions also shape values.¹⁴¹ It seems right to harm that which one fears, a form of self-defense.¹⁴² Educating Americans about political states of affairs and about their abilities to exercise political judgment also serves to enlighten, and thus to alter their emotions.¹⁴³ How and what emotions they experience affect their personal narratives, and their personal stories affect what and how they feel.¹⁴⁴ If one's self-conception is as brave, one may less readily feel fear upon rumors that his neighbors are rowdy, even occasionally violent; the opposite is true if one sees oneself as timid about physical or social conflict.¹⁴⁵ By playing on one's emotions, political bullshit can thus alter how one views others as well as how one views oneself.¹⁴⁶ Ignorance makes it easier for bullshitters to manipulate people in ways that they would resent were they more informed, a manipulation that can add to social divisiveness.¹⁴⁷

One philosopher sees politicians' insistence that America is waging a war on terror as illustrating this destructive use of political bullshit.¹⁴⁸ Professor Vanessa Neumann argues that the war terminology paints the world as a "we"—the terrorized—and a "they"—the terrorists—who are in some fundamental way different from us.¹⁴⁹ Terror, explains Neumann, is an emotion; thus, the phrase sets Americans on a war against an extreme kind of fear, sparking a quest to identify the inhuman aliens who spawn this fear.¹⁵⁰ The war on terror, Neumann argues, "is a bullshit phrase because it is a narrative that evokes emotions, rather than the thought and discussion [that] wise, democratic policy and military decisions require."¹⁵¹

139. See Neumann, *supra* note 6, at 206-07.

140. See Andrew E. Taslitz, *Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 9-12 (2000) (discussing the cognitive theory of emotions).

141. Neumann, *supra* note 6, at 209.

142. See *id.* at 211 (noting that the term "war on terror" teaches us "to fear some vague Other, 'terror,' and, by tapping into our deep-seated craving for security, urges us to hunt this bogeyman Other").

143. See *id.* at 210 (noting that this effect can be either good or bad, but "the most dangerous of political bullshit tries to educate our emotions by telling us what should make us proud or patriotic, angry or frightened"); PETER GOLDIE, *EMOTIONS: A PHILOSOPHICAL EXPLORATION* 48 (2002) (noting that "the emotions can be educated").

144. See Neumann, *supra* note 6, at 208-10.

145. See Taslitz, *supra* note 135, at 9-12 (using other examples to make a similar point).

146. Neumann, *supra* note 6, at 210 (noting that bullshit "tells us what we should consider our civic duty, what we should covet and—ultimately—who we are with respect to those around us").

147. See *id.* (noting that bullshit "tries to make us desire and long for things we had not previously considered"); *supra* Part I.B (discussing bullshit and manipulation).

148. See Neumann, *supra* note 6, at 210-12.

149. See *id.*

150. See *id.* at 211.

151. *Id.*; see generally STEARNS, *supra* note 33, at 21-56 (analyzing the depth and widespread persistence of Americans' fears after September 11, the state's complicity in exacerbating those fears, and the policy implications).

The phrase thus illustrates how political bullshit degrades people in dual fashion. First, it “seeks to shape our values in a manner that circumvents our treasured human faculty to be moved by ideas. It appeals to our emotions and avoids engaging those faculties of reason and debate that make us human.”¹⁵²

Second, it relies on an almost irresistible appeal to our baser, rather than our more ennobling impulses.¹⁵³ It gives people a sense of group identity based on a narrative not their own, creating a false connection to some people—the favored group; the connection is false because it is based on untruths and misdirection rather than on an accurate and reasoned understanding of the real state of affairs.¹⁵⁴ Neumann’s point in her example is not that the war on terror is or is not wise policy but that the phrase and its attendant emotional appeals and distortions of individual and group identity contribute to fuzzy thinking by individuals, groups, and the polity as a whole concerning the wisdom of terrorism-related policies while also promoting social divisiveness.¹⁵⁵ In short, the phrase helps to mold individual, group, and national identity in ways other than by reasoned choice.¹⁵⁶

This whole discussion may seem far removed from the setting of a police officer seeking to search or interrogate without advising the suspect of his rights. But events that happen in these settings are micro versions of the setting in which appeals are made to the war on terror. The officer seeks, for example, to play one suspect off against another so that the suspect will identify more with the officer as savior than the rat-fink, coconspirator who, the suspect is led to believe, has turned on the suspect.¹⁵⁷ Moreover, the officer not only refrains from advising the suspect of his rights but also seeks to distract his attention from them by emotional game playing, attempting to

152. Neumann, *supra* note 6, at 212.

153. *See id.* at 210 (“The special problem with bullshit, however, is that it gets its power by appealing to and motivating that part of us that is base and non-rational.”).

154. *See id.* at 212.

155. *See id.* at 212-13; *infra* Part II.C (discussing bullshit and social divisiveness).

156. *See* Neumann, *supra* note 6, at 212-13.

157. *See, e.g.,* WELSH WHITE, MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 25-33 (2004) (summarizing modern interrogation techniques); YESCHKE, *supra* note 40, at xi, 141-61 (summarizing techniques as part of an interrogation training manual that purportedly counsels against outright lies, bluffing, or threats of force, yet concludes that interrogators avoiding duress or coercion and treating subjects with compassion respects human dignity, even though they “may use trickery and deceit to attain their confession”); Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 71-78 (G. Daniel Lassiter ed., 2004) (summarizing some modern interrogation techniques). Yeschke also declares that “[i]t is unreasonable to give culpable subjects a sporting chance during interrogations,” a statement that assumes police’s pre-interrogation ability to identify the culpable accurately, minimizing the likelihood of police errors and of false confessions. *Id.* at xi. *But see* AMERICAN BAR ASSOCIATION, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: THE REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS xv-xxix, 11-22 (2006) (challenging these assumptions of police accuracy and of vanishingly small percentages of false confessions).

elicit fear, anger, sadness, or whatever else makes the suspect comply.¹⁵⁸ If the ideal democratic citizen is one informed of and ready to exercise his rights, the officer seeks to degrade the suspect-citizen into an ignoramus and a puppet.¹⁵⁹ If many officers do this, and if they do this most often to members of a particular racial or similar group, they mark that group as outside the set of shared constitutional commitments that citizens unbowed by governmental aggression are ready to exercise.¹⁶⁰

The emphasis in this section of the Article has been on the ways that political bullshit harms and insults individual rationality and individual and group identity while fracturing the polity. But them-us thinking, weakened citizen character, muddled deliberation, and the other mechanisms by which political bullshit degrades and divides can impose other social harms as well, which need further elaboration. The next section turns to just such elaboration, beginning with political deliberation.

B. Skewing Public Political Deliberation

Bullshit can injure and degrade not only individual rationality but also that of the political system as a whole. Political scientists have so thoroughly embraced the “deliberative turn”—the idea that a system of political communication of publicly stated reasons for proposed collective outcomes is what defines a democracy—that few alternatives have influence in that field.¹⁶¹ The theory of political deliberation was not originally rooted in the democratic impulse, but rather in the idea that the “best men” should reason together toward wise decisions.¹⁶² For deliberation to be democratic, it must be inclusive, using an expansive definition of who is part of the process, that is, of who has the right to deliberate—or at least a voice in choosing the deliberators—and of who is included in the group to which the deliberators owe their justifications.¹⁶³ The debates among modern deliberative democrats largely concern what conditions are necessary to maximize the democratic nature of deliberation and its other social benefits.¹⁶⁴

158. See WHITE, *supra* note 152, at 34-36, 76-101 (cataloguing ways that interrogators avoid the *Miranda* warnings or minimize the impact of the warnings on the suspect).

159. See *id.*

160. Cf. Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 132-33 (2006) (suggesting a social and cognitive process that makes the risk of convicting the innocent fall disproportionately on racial minorities, a process involving social stigmatization and illustrated by flawed interrogation practices).

161. See JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 1-2 (2000); AMY GUTTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3-4 (2004).

162. See GUTTMANN & THOMPSON, *supra* note 156, at 8-9.

163. See *id.* at 9.

164. Compare DRYZEK, *supra* note 156, at 3 (arguing for a “discursive deliberation” more aggressive in empowering dissenters), with GUTTMANN & THOMPSON, *supra* note 156, at 3-13 (arguing for a form of

One such condition that few dispute is that there must be an adequate flow of information to citizens capable of using it.¹⁶⁵ That condition is not sufficient to ensure rational debate and scrutiny, but it is necessary.¹⁶⁶ According to philosopher Mark Evans, this assumption is seriously flawed.¹⁶⁷ Says Evans,

[E]lectorate democracy *has* to resist acknowledgment of this truth: in both its theory and practice it assumes a degree of political competence on the part of the citizenry—in the ideal of the ‘well-informed’ citizen—that it does not (indeed cannot reasonably be expected) to possess. Citizens are effectively encouraged, indeed they often feel themselves obligated *qua* citizens, to formulate what often turn out to be incorrect, over-simplified or otherwise flawed views on a whole range of issues *without a concern for these failings being properly accommodated in either the mindset or the institutional embodiment of democratic deliberation*.¹⁶⁸

Evans sees three major responses, all of them inadequate, to this reality of the uninformed citizen—elitism, relativism, or bullshit.¹⁶⁹ Democratic elitists see citizen ignorance as a primary justification for letting an informed political class rule the polity’s day-to-day affairs.¹⁷⁰ The elitists insist that their views are still democratic because the people can check abusive rulers by periodic elections.¹⁷¹ To allow too much citizen input into governance means dumbing-down political culture in a way that will lead to serious error.¹⁷² The broad citizenry simply cannot widely share those qualities of character necessary for avoiding mediocrity or worse in political debate and choice.¹⁷³

deliberative democracy less rooted in critical theory).

165. See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L., POL’Y, & ETHICS J. 271, 284-93 (2006) [hereinafter *Democratic Deliberation*] (noting that error correction and other benefits of public deliberation help to ensure the flow of a wide variety of information to decisionmakers); Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1610-18 (2006) [hereinafter *Political Factfinding*].

166. See GUTTMANN & THOMPSON, *supra* note 156, at 3-7 (discussing necessary versus sufficient conditions for quality public deliberation); Taslitz, *Democratic Deliberation*, *supra* note 160, at 284-95, 310-15 (discussing three “temporal prerequisites” to sound deliberation and the cognitive dangers posed by poorly designed deliberative mechanisms).

167. See Evans, *supra* note 11, at 192-93.

168. *Id.*; see also FRANKFURT, *supra* note 2, at 63 (suggesting that democracy is particularly prone to bullshit production because it fosters “the widespread conviction that it is the responsibility of a citizen in a democracy to have opinions about everything, or at least everything that pertains to the conduct of his country’s affairs”).

169. See Evans, *supra* note 11 at 195-97.

170. See *id.* at 195.

171. See *id.*

172. See *id.* at 196.

173. See *id.*

Yet the elitist response seems radically inconsistent with theories of inclusive democratic deliberation, with, in Evans's words, "the principle of equal respect for citizens, on which democracy is founded" and with the "dumbed-up self-images of the age."¹⁷⁴ Indeed, worries Evans, a relativist view often prevails in reaction to elitism, a view in which "equal respect" means treating all views as equally valid, no matter how ignorant or how free they are from the critical scrutiny and give-and-take, the common-good-centeredness, that sound deliberation requires.¹⁷⁵ This relativism certainly eschews the exclusivity of elitism, but it does so at the cost of replacing rational public conversation with massive confusion—the rule of a confused hoi-polloi.¹⁷⁶ This relativist turn is the elitist's nightmare in which "overwhelmed and embarrassed by the complexities of politics, perhaps jealous of those few who seem more capable of getting to grips with them, the ordinary citizen . . . reacts by stubbornly refusing the possibility of . . . qualitative distinctions in political knowledge."¹⁷⁷ Thus, do "timid little people" drag us all down?¹⁷⁸

Yet Evans suggests that the elitist explanation is wrong.¹⁷⁹ Most citizens do not, at least openly, embrace a vision in which there are no objective standards for judging the content and quality of civic discourse.¹⁸⁰ People recognize that individuals can and do speak political nonsense. But most citizens convince themselves that they know enough to make sound choices, though others may not.¹⁸¹ Citizens are not so much timidly fleeing from subjective to qualitative standards for public debate as they are aggressively, but falsely, insisting that they meet these standards.¹⁸² At some level, they

174. *Id.* at 195, 197.

175. *Id.* at 196.

176. *See id.*

177. *Id.* at 197.

178. *Id.* A well-known popularization of the whole idea of elitism and of its implications for self-government that provides a useful context for further exploring Evans's arguments, and a work worthy in its own right, is WILLIAM A. HENRY, *IN DEFENSE OF ELITISM* (1995).

179. *See* Evans, *supra* note 11, at 191-92.

180. *See id.* at 192. Evans notes:

The partisan belief that it is obviously *only* 'the other side' that bullshits is itself bullshit. . . .

[N]ot all citizens are political cynics, or are as cynical as they like to think themselves to be.

Many of them buy into the bullshit of their politicians in their own 'understanding' of the political world and doubtless do their own bit to embellish and propagate it.

Id. at 191-92. Evans's position about whether most people believe at least that their own involvement in deliberation is well-informed, is in fact more ambiguous than this Article presents it to be. His tone, however, suggests that he does not truly believe that most Americans are consciously unabashed relativists about how to judge the quality of civic discourse. In any event, even if this Article interprets Evans incorrectly on this point, this author's own study of the human capacity for self-deception leads to the belief that political actors will be likely to attribute more objective fairness to their own attitudes and behavior than might seem to be the case in the eyes of their observers. *See* Taslitz, *supra* note 26, at 394-98, 413-23 (discussing self-deception and its cognitive processes); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN ST. L. REV. 1181, 1181-96 (2005) (discussing the actor-observer bias).

181. *See id.* at 191-92.

182. *See id.* at 197.

know otherwise, but they prefer to live with this self-deceit. In short, the people bullshit themselves about themselves.

Simultaneously, and significantly, says Evans, politicians spew bullshit.¹⁸³ They do so because they know of citizens' ignorance of reality, resulting, in a practiced inability to handle the truth if it hits them in the head.¹⁸⁴ Needing a message understandable to the many, yet also needing to build diverse constituencies into a united coalition, politicians pander to this account while in fact hiding the truth and enabling an appeal to a diverse group.¹⁸⁵ Evans's solution, therefore, is to burst each of our bubbles, by calling "bullshit!" on a massive scale, recognizing a civic emergency caused by infectious ignorance.¹⁸⁶ If citizens can achieve high levels of political expertise, Evans insists, they can do far better than they do now.¹⁸⁷ Civic education must thus be invigorated to deepen political knowledge and sharpen critical acumen.¹⁸⁸ The media likewise must do a better job of exposing citizens to serious debate.¹⁸⁹ The persistent goal must be, explains Evans, for people "to learn more of the Socratic skills of self-examination: to recognize how their own views may be imperfect, and how one may go about refining them."¹⁹⁰

Evans's entreaties are noble ones, and this Article explores their value and practicality shortly. But Evans is wrong to condemn the current state of affairs quite so harshly, for there is a fourth way to understand the modern American polity, namely as one embracing the monitorial, rather than the informed, citizen ideal.

The monitorial citizen ideal recognizes that modern life has become increasingly complex, thus increasingly specialized.¹⁹¹ The ordinary citizen cannot, therefore, reasonably be expected to fully track or understand events in the stock market, foreign affairs, racial, gender, or other group-based discrimination, the decline of unions, global warming, growing economic concentration of certain industries, and the myriad other matters of concern that bombard us in daily media reports.¹⁹² A specialized citizenry is the only practical modern conception.¹⁹³

Furthermore, alongside the original idea of the informed citizen, the rights-bearing citizen has grown.¹⁹⁴ Citizens need not wait for elections to be

183. See Evans, *supra* note 11, at 187-92.

184. See *id.*

185. See *id.* at 193.

186. See *id.* at 199-200. Using the philosopher's tone, Evans describes his approach as fostering "an anti-bullshit discursive culture." *Id.* at 200.

187. See *id.*

188. See *id.*

189. See *id.* at 195, 200-02.

190. *Id.* at 200.

191. See SCHUDSON, *supra* note 28, at 310.

192. See *id.*

193. See *id.* at 310-13.

194. See *id.* at 309.

active in their roles as citizens, nor need they limit between-election activities to calls and letters to representatives or the occasional random call to jury service.¹⁹⁵ They can turn to courts and administrative agencies, and do so on a daily basis, for recognition and enforcement of a generous notion of their rights.¹⁹⁶ Citizens have different rights in their different roles, locations, and activities.¹⁹⁷ Rights govern what happens in schools, the workplace, the home, the environment, higher education, the professions, and the political process.¹⁹⁸ Rights permeate our private and public activities. Rights affect businesses, families, lovers, children, the elderly, and the ill.¹⁹⁹ Talk of rights suffuses all our relationships and conduct.²⁰⁰ At its worst, rights-consciousness promotes isolation, selfishness, and conflict.²⁰¹ At its best, it promotes responsibility and community.²⁰² But for better or worse, rights-consciousness helps constitute our sense of self and society.²⁰³

Rights-consciousness and the accessibility of courthouse and administrative agency doors have widely expanded the opportunities for civic participation because our everyday lives are deeply politicized.²⁰⁴ Citizen participation now exists in the “microprocesses of social life.”²⁰⁵ Americans are citizens in our homes, schools, and places of employment. Furthermore,

Women and minorities self-consciously do politics just by turning up, so long as they turn up in positions of authority and responsibility in institutions where women and minorities were once rarely seen. They do politics when they walk into a room, anyone’s moral equals, and expect to be treated accordingly. The gay and lesbian couples in Hawaii in 1991 or in Vermont in 1997 are political when they try to be legally married Others do politics when they wear a “Thank You For Not Smoking” button or when they teach their children to read nutritional labeling at the supermarket or when they join in class action suits against producers of silicone breast implants, Dalkon shields, or asbestos insulation.²⁰⁶

195. *See id.*

196. *See id.* at 240-74, 300-09 (defining, defending, and tracing the rise of the “rights-bearing citizen”).

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.* at 240-74, 299-309.

201. *See id.* at 287-92. *See generally* MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (describing the limits of our rights-obsessed society).

202. *See generally* SAMUEL WALKER, *THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA* (1998) (discussing the impact of rights-consciousness in America).

203. *See id.* at vii.

204. *See* SCHUDSON, *supra* note 28, at 298-301.

205. *See id.* at 298.

206. *Id.* at 299.

At the same time, history teaches us that a democracy needs a certain level of distrust of its institutions by its citizens.²⁰⁷ “Because of distrust, we have a Bill of Rights; because of distrust, we have checks and balances; because of distrust, we are enjoined as citizens to be watchful.”²⁰⁸

In a complex world requiring some degree of distrust of institutions, specialization, and widespread citizen participation in the personal as well as the political realm, the informed citizen must be thought of as, in Michael Schudson’s words, the “monitorial citizen.”²⁰⁹ Monitorial citizens do not expect to be fully informed about the issues of the day.²¹⁰ Rather, they scan their environment, read newspapers, watch television, listen to radio or the sermons of the clergy, and observe discord and injustices facing them in their everyday lives.²¹¹ When they spot matters of grave concern to them, they read more and talk more about those subjects.²¹² When their interests, needs, and abilities demand, they act in those specialized aspects of their lives in which they can have the most impact.²¹³ A housewife or husband who is an active PTA participant works to improve schooling; a lawyer does pro bono work for the poor; a fishing enthusiast works for environmental causes; and a rape victim counsels the sexually abused.²¹⁴

In such a world, those accused of criminal activity have a special role to play as monitors of police abuse. Their incentive to challenge abuses—avoiding the stigma of criminal conviction and the resulting loss of liberty—is high. Moreover, because they were abused, they have knowledge of individual abuses that others lack. Furthermore, because even the indigent are constitutionally entitled to counsel, they have a special expertise, through their lawyers, to uncover official wrongdoing.²¹⁵ The suppression motion and the general public nature of suppression hearings enable them to challenge police misconduct in a very visible fashion.²¹⁶ When accusations of police abuses are credible and serious, information revealed at suppression hearings will make its way into the press.²¹⁷ After police officers obtain warrants, warrant

207. *Id.* at 301.

208. *Id.*

209. *Id.* at 310.

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* at 310-14 (elaborating on, and defending, the idea of the monitorial citizen and its connection to increasing citizen specialization).

214. *See id.* at 311-14.

215. *See* TASLITZ & PARIS, *supra* note 18, at 666 (explaining the right to counsel and the role of lawyers in the criminal justice process).

216. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 510-14 (2d ed. 1992) (describing how suppression motions work); RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES* 103 (2d ed. 1998) (stating that suppression hearings are ordinarily open to the public).

217. *See* SURETTE, *supra* note 212, at 64. This Article is not suggesting that the news media always accurately report police behavior. To the contrary, police control over much information about their own

affidavits come to light, and thus police know when applying for warrants to state credible reasons for their requested search or seizure that are persuasive enough to survive public scrutiny.²¹⁸

In this monitorial vision of the citizenry, therefore, no individual citizen can fairly be expected to be fully informed about every topic. But citizens with strong motivations to assert their rights in specialized areas do need to be informed about the content of their rights and when and how to exercise them. Furthermore, they must be given the tools to make them effective monitors of governmental abuses.

In the area of criminal justice and police behavior, criminal defendants have an incentive to understand and exercise their rights. A first step in that direction must, of course, be awareness of their rights. But, given the increasing complexity of the law, suspects' choices can never even come close to being fully informed without the advice of counsel.²¹⁹ Nor can individuals subjected to police dominance expect that they alone can be effective monitors of police wrongdoing.²²⁰ Once again, they need their lawyers to make monitoring effective.²²¹ Additionally, when there are abuses, lawyers can play a role in bringing public attention to the abuses.²²² With the assistance of the media, they can act as "social T-cells" to alert the wider citizenry of political infections requiring the body politic to mount an immune response.²²³ Awareness of the right to counsel thus becomes especially important. Furthermore, because suspect awareness of his rights is a minimally necessary condition for him to serve a monitorial role, a right to awareness of rights is

behavior and reporters' desire to have a steady police source of news about crime combine to establish selective media coverage of police abuses. *See id.* Nevertheless, the worst police abuses, especially tales of police crime and corruption, are often reported. *See id.* Moreover, in suppression hearings, the parties and the courts, not only the police, have some control over information about police behavior. *See id.* at 60-64. These independent sources of information about police misconduct will be dramatically strengthened if criminal discovery is significantly expanded. *Cf.* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 515-25 (1994) (describing dismissal of criminal charges against Rodney King after the media broadcast of a private citizen's videotape showing the police beating King).

218. *See, e.g.*, VA. CODE ANN. § 19.2-54 (1950) (noting that a search warrant affidavit ordinarily "shall at all times be subject to inspection by the public"). The reasons come to light, of course, in the suppression hearing and in the press. Laurence D. Finder, *Searched, Seized, Aggrieved*, 31 HOUS. L. REV. 24, 26-27 (1994) (noting search warrant affidavits in federal court and not under seal are available from the trial clerk's office).

219. *See Political Factfinding, supra* note 160, at 1591, 1594-97, 1615-18 (discussing the central role of counsel as the citizen's voice in any criminal proceeding).

220. *See id.*

221. *Cf. Miranda v. Arizona*, 384 U.S. 436, 469-74 (1966) (creating a Fifth Amendment right to a lawyer during custodial interrogation—a right nowhere recited in that Amendment's constitutional text but deemed by the Court necessary to effectively protect the privilege against self-incrimination in the interrogation context).

222. *See Political Factfinding, supra* note 160, at 1591, 1594-97, 1615-18.

223. *See Taslitz, supra* note 31, at 288-90 (explaining the idea of social T-cells in a different context); *Political Factfinding, supra* note 160, at 1591, 1594-97, 1615-18 (discussing, albeit using other terminology, the social T-cell-like function of counsel).

necessary so that the lawyer can challenge police efforts to obscure the content and meaning of other rights from these citizens.²²⁴ When rights are provided but in circumstances that unduly discourage their being understood or exercised, lawyers can also challenge such obfuscation.²²⁵ If the judiciary embraces a generous vision of the necessary understanding of rights that suspects must have, police again have fewer incentives to distort citizens' comprehension of their rights.²²⁶ Criminal suspects thus, when teamed with their lawyer, can serve as an informed and monitorial citizen promoting real respect for constitutional rights.²²⁷

Evans is, therefore, wrong to bemoan citizen ignorance as spelling the death knell of deliberative democracy. An informed criminal suspect, conjoined with competent counsel, can do the job for other citizens, educating and alerting citizens to further action where necessary.

C. *Them-Us Thinking*

This Article argued earlier that bullshitting citizens about their rights promotes societal balkanization by fostering them-us thinking. But them-us thinking imposes additional costs as well: decreasing citizens' acceptance of police decisions and citizens' willingness to comply with the law in the future, subjecting some citizens to caste-based thinking, and increasing the risk of error, that is, of convicting the innocent. All these costs in turn magnify the problem of balkanization.

Remember that fitting or respectful treatment has two components: treating each person as unique and yet simultaneously treating him as an equal and valued member of a larger group, a person worthy of equal belonging. If rights-consciousness is, as Part II.B has explained, a central component of modern American identity, then the police failure to inform and explain constitutional rights to any citizen may at least be one indicator that he is not treated as a full member of the broader American community. If such failures disproportionately affect members of some racial and ethnic groups more than others, then rights-distortion or rights-veiling behaviors will mark members of that group as strangers or, at least, as less-than-full members of the national community.²²⁸ There is little doubt that policing generally, and thus police bullshitting about rights specifically, affects African-Americans and Hispanics

224. See *Political Factfinding*, *supra* note 160, at 1591, 1594-97, 1615-18.

225. See *id.*

226. See *id.*

227. See *id.*

228. See, e.g., GLENN C. LOURY, *THE ANATOMY OF RACIAL EQUALITY* 61-65 (2002) (arguing that racial profiling is both prompted by, and contributes to, racial stigma); TASLITZ & PARIS, *supra* note 18, at 443-45 (intentional racial profiling, though hard to prove, constitutes a denial of equal protection under current United States Supreme Court precedents).

more than whites.²²⁹ There is still less doubt that these racial minorities perceive such differences.²³⁰ Such perceptions stem from a wide variety of causes—personal experiences, vicarious experiences heard from others abused by the police, parental teachings, a history of poor community-police relations, and media images of policing.²³¹ These factors seem to be magnified in economically disadvantaged neighborhoods and among young males.²³² The expectations created by these factors also affect the lens through which police conduct is viewed.²³³ A single bad experience with the police is seen as confirming negative expectations.²³⁴ A single good experience is viewed as an exception.²³⁵ Only a pattern of positive experiences are likely to contribute significantly to altering racial group attitudes toward policing.²³⁶

Two major consequences flow from these realities and expectations. First, denial of procedural justice—the sense of being treated fairly in decisionmaking processes—under these circumstances can mark minority group members as belonging to a lower caste.²³⁷ As used herein, caste means a social status that offers inherent psychic rewards or penalties (depending upon whether your caste is high or low) and that affects the distribution of

229. See, e.g., U.S. COMMISSION ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY (2000), <http://www.usccr.gov/pubs/nypolice/ch5.htm>. The Commission summarized this state of affairs thus:

Although th[e] permissible use of race as an identifying characteristic [sometimes] serves as a necessary and efficient means for police to narrow their investigative efforts, police often lower their standards of investigation when a suspect has been described as a minority, thus intruding upon a greater number of individuals who meet the racial description than if the suspect had been described as white.

Id. (quoting *Developments in the Law—Race and the Criminal Process, Section III: Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 101 HARV. L. REV. 1472, 1505 (1988)).

230. See, e.g., Tracy Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 255 (1991) (“[P]olice encounters involving black men contain a combination of fear, distrust, anger and coercion that make these encounters unique and always potentially explosive.”).

231. See RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 18-19 (2006). Professor Katheryn Russell-Brown similarly notes:

The fact that Blackness is perceived as a threat to Whites as a group and to police officers as a group has paved the way for policing strategies that target and sanction potential minority offenders. In turn, these strategies support police practices that treat Blacks as representative of society’s deviance. This creates a dynamic relationship in which many Blacks are suspicious and fearful of the police and many Whites and law enforcement officials are fearful of African Americans. Malcolm Holmes describes the resulting relationship as a “climate of mutual threat.”

KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME, AND RELATED FIRES 67 (2004) (citation omitted).

232. See TYLER & HUO, *supra* note 86, at 146-48.

233. See *id.* at 141-48.

234. See *id.*

235. See *id.*

236. See WEITZER & TUCH, *supra* note 229, at 18-19. *But see* TYLER & HUO, *supra* note 86, at 133 (“But single experiences do influence . . . views [of the police], and that influence seems striking, especially with legitimacy: 30 percent of the variance in the overall index of legitimacy is linked to judgments about one’s recent personal experience.”).

237. See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 7-15 (1999).

group access to material and other scarce social resources.²³⁸ To the extent that such a caste system exists, it contradicts the ideal of equal belongingness rights for all members of the political community.²³⁹ Yet whites, blacks, and Hispanics alike probably understand the denial of procedural justice by the police as just such a caste-marker.²⁴⁰

The broader public probably has mixed feelings about this situation. On the one hand, the caste system seems to unsettle notions of equality at the core of the modern mythology of American democracy.²⁴¹ On the other hand, many (especially white) Americans see criminals as a dangerous class to be feared and suppressed.²⁴² At least at a subconscious level, race and class are often associated with criminality.²⁴³ Furthermore, generally high levels of trust in the police among whites may lead to a de facto presumption that those whom the police investigate are likely in fact criminals.²⁴⁴ On this view, many whites

238. See ROBERT J. COTTRILL, ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003). “It was a caste system that could allow quite intimate contact when a black person’s inferior status was unquestionable and yet preclude it when there might be even a hint that members of different races were meeting as equals.” *Id.* at 9. “Yet we use the term [“caste”] because it captures the rigid and separate nature of the distinctions that were imposed or attempted [by slavery and Jim Crow].” *Id.* See generally Clark D. Cunningham, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1296-98 (1999) (discussing how caste systems, including in America, alter the distribution of psychic and material resources among higher and lower-caste groups).

239. See Forbath, *supra* note 237 at 7-15 (1999) (surveying leading theories on caste and belonging).

240. See, e.g., Taslitz, *supra* note 155, at 126-30 (describing a process by which black citizens’ expectations of rights-denial by the police leads to such citizens’ hostile reactions to police stops or interrogations, a hostility viewed by the police as indicative of guilty, thus prompting ever-more-aggressive police tactics).

241. See, e.g., KARST, *supra* note 41, at 1-15, 43-62 (discussing Reconstruction-era constitutional amendments and the American commitment to equality); ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 37 (1999) (arguing that racism skeptics, while accepting the wisdom of the aspiration toward racial equality, maintain that as an empirical matter “individual racism is on the decline”). “What racism does persist is either so socially unacceptable as to manifest itself subtly and covertly or is institutional, the result of social processes that make it difficult to end racial disparities long after we have abandoned racial hatreds and stereotypes.” *Id.*

242. See, e.g., MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 1-19, 59-61 (2004) (discussing how moral panics coinciding with cycles of intolerance of deviance gave harsh criminal justice policies emotional force, rendering the public susceptible to appeals for repressive laws unconnected to the reality of the crime problem’s scope). A senior U.S. Justice Department official told criminologists Norval Morris and Michael Tonry, “People are either for victims or for criminals and . . . you’re for criminals.” *Id.* at 137. See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 1-12 (2007) (describing the historical process by which politicians were able to redefine the ordinary citizen as a crime victim to be protected from the criminal predator class, leading to a style of governing daily life in schools, families, workplaces, and residential communities through appeals to fear of crime and criminals).

243. See, e.g., MICHAEL K. BROWN ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 138, 153-60 (2003) (analyzing the interaction of race and class on crime rates and public perceptions of crime); Human Rights Watch, *Race and Drug Law Enforcement in the State of Georgia* 20 (1996) (“Contemporary racism in public institutions is often subtle, diffuse, and systemic, and less likely to be the result of the conscious prejudices of individual actors.”).

244. See, e.g., Ronald Weitzer & Steven Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQ. 494, 498-99 (1999) (finding that 65.8% of blacks in this study had only

may arguably see police reading and explaining rights to suspects as giving the guilty unfair tools with which to hide their wrongdoing. Suppressing evidence where police do not provide rights thus seems to allow evildoers to benefit from a technicality, leaving them free to prey on the rest of us yet again.²⁴⁵ Rephrased, there is reason to suspect that many whites see some persons (the “innocent”) as deserving of their rights and others (the “guilty”) as not so deserving.²⁴⁶ To the extent that presumed criminality is at least subconsciously linked to race, entire racial groups—at least class and geographic subsets thereof—become undeserving of rights notification and thus, constitute less-than-equal citizens to the larger group of the supposedly righteous among us. Indeed, evidence exists that whites often consciously embrace principles of racial equality but subconsciously reject them when faced with a particular racially-tinged situation.²⁴⁷

Second, apart from caste concerns, minorities’, like majorities’, perceptions of the denial of procedural justice affect the perceived legitimacy of police actions and the willingness to obey the law in the future.²⁴⁸ Yet, especially in high-crime, economically disadvantaged areas, racial minorities

some, little, or no confidence that their local police would treat blacks and whites equally; approximately five times as many blacks as whites reported experiencing mistreatment at the hands of the police; and a similar proportion believed that police racism was common); Steven A. Tuch & Ronald Weitzer, *Racial Differences in Attitudes Toward the Police*, 61 PUB. OPINION Q. 642, 642 (1997) (“African Americans [are] more likely than whites to express unfavorable attitudes toward various aspects of policing”).

245. See KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE* 102 (2004) (arguing that racial profiling “helps to align White people with the power structure by convincing them that the state protects them from people of color”); ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* (2006) (discussing the public’s “mere technicality” understanding of the Fourth Amendment).

246. See WILLIAMS, *supra* note 243, at 102-03 (arguing that modern public disorder is viewed as a problem of the lower classes, which are today linked in the public mind to race, resulting in disproportionately more resources going to combat black relative to white crime); Sheri Lynn Johnson, *Race and Capital Punishment*, in *AMERICA’S DEATH PENALTY: BEYOND REPAIR?* 121, 137 (Stephen P. Garvey ed., 2003) (“[E]vidence of good character [is] less likely to be credited because jurors attribute fewer positive traits to people of color; the majority group sees African Americans as less intelligent, less hard-working, less patriotic—less good . . . than white Americans.”); Karen F. Parker et al., *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 121 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (“In the minds of many whites, people of color are more likely to conform to a criminal stereotype and hence may be at risk of being arrested and convicted on weaker evidence than whites are.”); cf. DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* xiv (2003) (suggesting that constitutional criminal procedure doctrine must be drastically altered because current doctrine is “not punishing enough of the guilty, [or] exonerating enough of the innocent . . .”).

247. See LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* 17, 36-44 (2006) (explaining how situational factors can elicit unconscious racism, particularly in situations in which the actor can consciously blame his choices on readily available non-racist justifications); see also sources cited *supra* note 244 (describing presumed criminality linked to race and class).

248. See TYLER & HUO, *supra* note 86, at 153-64 (noting that the degree of the procedural justice effects can vary among minority racial and ethnic groups in subtle ways and under a variety of circumstances).

perceive police as both under protecting the neighborhood and over-denying its residents procedural justice.²⁴⁹

Regarding unwarranted stops-and-frisks, for example, blacks in economically impoverished, high-crime neighborhoods are significantly more likely than whites to see such stops as common.²⁵⁰ Blacks are also more inclined than whites to perceive racial disparities in their treatment by the police.²⁵¹ Much of blacks' and, to a lesser extent, Hispanics' dissatisfaction with the police stems not so much from disliking the outcome of the encounter (e.g., arrested or not) as rejecting the fairness of the procedures by which it came about.²⁵² Accordingly, they are less willing to defer to police decisions and less likely to trust police motives than whites.²⁵³

Interestingly, the caste and procedural fairness impacts may be interrelated.²⁵⁴ Social science research suggests that the more people closely identify themselves with the broader society, the greater impact procedural justice has in promoting their willingness to obey the law and their sense of its legitimacy.²⁵⁵ Furthermore, close identification with one's racial or ethnic group does not mitigate this effect.²⁵⁶ On the other hand, those who feel detached from the broader society—a detachment that caste-oppression amplifies—are less responsive in the short run to the benefits of procedural justice.²⁵⁷ In the long run, however, reduced caste prejudice should mean greater attachment of previously opposed groups to the broader society. Greater attachment returns these groups to the same level of procedural justice as those groups who always fully belonged.²⁵⁸ Yet, provision of procedural justice further enhances the sense of belonging to the whole.²⁵⁹

249. See TAsLITZ, *supra* note 243, at 9 (“Minority communities yearn for a police force that promotes community safety while valuing community rights.”); TYLER & HUO, *supra* note 86, at 142-43, 162-63 (noting racial minority incentives in high-crime areas both to avoid police intervention in their lives and to seek police protection); Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1726-27 (2006).

250. See WEITZER & TUCH, *supra* note 229, at 64 (discussing how experience, neighborhood crime, and media exposure all increase blacks' and Hispanics' greater beliefs, relative to whites, that police use of unwarranted stops is widespread, and blacks in neighborhoods of “concentrated disadvantage” are also for that reason alone more likely than others to mistrust police behavior, while, among whites, primarily only those whites personally victimized by such behavior share this mistrust).

251. See *id.* at 88 (“On almost every issue, blacks are much more inclined than whites to perceive racial disparities in policing, to disapprove of the disparities, and to say that they have personally experienced discriminatory treatment.”).

252. See TYLER & HUO, *supra* note 86, at 158.

253. See *id.* at 151.

254. See *id.* at 127.

255. See *id.*

256. See *id.* at 173-74.

257. See *id.* at 207; YUEN J. HUO & TOM R. TYLER, *HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY* viii-ix, 62-64 (2000).

258. See TYLER & HUO, *supra* note 86.

259. See *id.* at 126-28, 208-08.

In other words, making members of racial groups feel more like they belong equally to American society makes them respond more favorably to receiving procedural justice. Yet procedural justice consistently applied to many group members over time makes them feel more like fully belonging equals. The benefits of procedural justice in enhancing legitimacy, obedience to law, commitment to American ideals, and de facto equality should thus be reinforcing, particularly in the long run.²⁶⁰

Furthermore, blacks, whites, and Hispanics all consider the same sorts of factors as contributing to procedural justice, though there may be some differences in emphasis. All groups agree, at least at the principal level, that rights provision and explanation are crucial components of procedural justice, both generally and in the criminal justice system more specifically.²⁶¹

Thus, in one national poll “94 percent of Americans thought that officers should be required to inform persons they arrest of their constitutional rights.”²⁶² In another poll, 86 percent of Americans approved of the Court’s *Dickerson* decision affirming the *Miranda* rule.²⁶³ One major national social science study likewise found that roughly 91 percent of whites, blacks, and Hispanics endorsed *Miranda*, with the majority in each group doing so strongly.²⁶⁴

More broadly, in this same study—one of the most recent and most well-respected in the field of racial minority-police perceptions—about 90 percent of each of these groups thought it important for police to explain the reason for any stop.²⁶⁵ Indeed, the growing social science consensus is that citizens are more likely to be satisfied if officers treat them courteously and fairly and if

260. See *id.* at 126-28, 208-08; HUO & TYLER, *supra* note 256, at 63. Huo and Tyler note: Our findings suggest that the public debate should focus on engendering stronger attachments to American society rather than on the detrimental effects of strong ethnic identities. Authorities are best able to carry out their roles when community members feel that they share a common identity as members of American society. The large majority of respondents identified highly with their ethnic group *and* American society. Part of the fears associated with the rise of multiculturalism stems from the assumption that loyalty to America and loyalty to one’s ethnic group are negatively correlated. Much recent research in the behavioral sciences and our own findings support a different conclusion . . . people can be bicultural—attached to American society and to their ethnic groups at the same time. Moreover, people who adopt a bicultural orientation are as focused on the importance of fair treatment as are people who adopt a traditional assimilation orientation. The fear should lie in the consequences of disidentification with American society rather than strong identification with an ethnic group.

HUO & TYLER, *supra* note 256, at 63-64.

261. See TYLER & HUO, *supra* note 86, at 70, 80, 162, 207; HUO & TYLER, *supra* note 256, at viii-ix.

262. WEITZER & TUCH, *supra* note 229, at 144-45 (citing Gallup/CNN/USA Today poll, June 22-25, 2000, Lexis-Nexis Public Opinion Online).

263. *Id.* (citing National poll conducted for *Newsweek* by Princeton Survey Research Associates, fielded June 29-30, 2000, Lexis-Nexis Public Opinion Online); see *Dickerson v. United States*, 530 U.S. 428 (2000); *Miranda v. Arizona*, 384 U.S. 436 (1966).

264. See WEITZER & TUCH, *supra* note 229, at 144.

265. *Id.*

officers explain their rights and the reasons for police actions.²⁶⁶ This satisfaction likely stems from several features of procedural justice: giving citizens the information they need to understand and evaluate police actions, thus relatedly allowing them to state their case and to contribute to the correction of error; treating citizens honestly and equally; judging them with good motives; respecting their rights; and treating them with politeness and dignity.²⁶⁷

One final cost worth briefly noting is the cost imposed upon the innocent.²⁶⁸ If police's bullshitting minority citizens about their rights contributes to them-us thinking, it should amplify such thinking among the police themselves.²⁶⁹ Consciously or subconsciously, police may tend to see young, male blacks or Hispanics as more likely than others to be criminals and dangerous ones at that.²⁷⁰ Correspondingly, minorities treated disrespectfully are more likely to react to such encounters with irritation, surliness, or even anger.²⁷¹ But these reactions tend to convince police that the suspect is hiding something, thus more likely guilty.²⁷² Accordingly, the police increase the aggressiveness of their tactics.²⁷³ In the best case scenario, a young black male innocent of any wrongdoing is subjected to an abusive, humiliating stop, resulting in no evidence of a crime, so he eventually is allowed to walk away. But he walks away with his distrust of the police confirmed.²⁷⁴ In the worst case scenario, increasingly aggressive police tactics bear rotten fruit, causing an innocent person to confess, one friend to falsely accuse another, and police minds to close too early to alternative theories of who committed the crime.²⁷⁵

This exploration of procedural justice lays the groundwork for answering a related, yet very different, question: If giving citizens their rights in an effective manner generally improves obedience to the law overall—an assessment that includes the behavior of the majority of persons, namely those innocent of any substantial wrongdoing—will giving such rights improve, or at least not worsen, the compliance of the guilty to police requests or demands in individual cases? If the answer to this question is no—that rights provision

266. *Id.*

267. *See id.* at 129; TYLER & HUO, *supra* note 86, at 159, 183.

268. *See generally* Taslitz, *supra* note 155 (analyzing race and wrongful convictions).

269. *See id.* at 126-30.

270. *See id.*

271. *See id.* at 130-35.

272. *See id.* at 129 n. 26, 131-33.

273. *See id.* at 131-32; WANG, *supra* note 246, at 73-81 (applying a similar analysis to explain racially-skewed distribution of false confessions).

274. *See* TYLER & HUO, *supra* note 86, at 202 (discussing humiliation involved in seemingly race-biased stops and frisks).

275. *See* ROBERT M. BLOOM, RATting: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM (2002) (recounting a variety of stories in which police turn one friend or compatriot against another); WANG, *supra* note 246, at 73-81 (discussing false confessions); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 475 (2006).

reduces compliance by the guilty—then rights warnings may impose a substantial social cost—the increased probability that the guilty will escape justice.

This seems to be the only serious argument against rights provisions, and it is probably an argument that police embrace. Police often see their safety and effectiveness as turning on their ability to dominate a citizen in an encounter.²⁷⁶ Furthermore, an officer is usually “reluctant to reveal his reasons for stopping people because he sees his cues as private knowledge which, if it were generally known, would aid criminals and make his work even harder than it is.”²⁷⁷ The next question to be examined, therefore, is this: What are the costs of having truly informed citizens, or in short, are there benefits to bullshit?

III. THE BENEFITS OF BULLSHIT

The worry that warning citizens of their constitutional rights will mean more frequent exercises of those rights is a strange concern. It reflects the idea that rights are dangerous things, at least if placed in the wrong hands. Opposition to rights warnings vests in police officers the discretion to decide who is worthy of rights exercise. If no one is worthy, then no one should know their rights; thus, no one will exercise them. For practical purposes, rights will cease to exist. If only the police can decide worthiness, then this vests in them a degree of discretion that seems flatly inconsistent with the Constitution’s distrust of unbridled governmental discretion embodied in Bill of Rights’ criminal procedural protections like the Fourth and Fifth Amendments.²⁷⁸ Of course, one can redescribe matters, saying, for example, that all citizens have the right to refuse to consent to searches and to refuse to speak to the police, but only some citizens have a right to know their rights. This idea may seem less offensive, but it stills leaves police the power to decide who should make knowing choices and who should make ignorant ones. Nevertheless, all rights are subject to balancing against countervailing concerns.²⁷⁹ If providing warnings will reduce compliance with police search requests or efforts to obtain confessions, then that is a social cost that courts undoubtedly will take into account in crafting doctrine.

276. See TYLER & HUO, *supra* note 86, at 12, 22, 24. Correspondingly, procedural justice perceptions are higher when officers seek dominance in a less overt manner by appearing neutral and benevolent and by offering “status recognition,” defined as “the authority’s regard for the individual as a full member of the community.” See HUO & TYLER, *supra* note 256, at 56.

277. JONATHAN RUBENSTEIN, CITY POLICE 264 (1973); see also TASLITZ & PARIS, *supra* note 18, at 2-3, 4-5 (arguing that controlling police discretion is a pervasive theme in the law of constitutional criminal procedure rooted in Bill of Rights guarantees like those in the Fourth and Fifth Amendments); WEITZER & TUCH, *supra* note 229, at 129 (characterizing Rubenstein’s 1973 comment as still apt today).

278. See TASLITZ & PARIS, *supra* note 18, at 2-3, 4-5.

279. See *id.* at 23-25, 169-76, 671-77, 737-40 (discussing the pervasive role of interest balancing on constitutional criminal procedure, especially as illustrated in the Fourth and Fifth Amendment contexts).

Yet ignorance of the content of rights does not seem to be the primary, or even a particularly significant, reason why people comply with police requests. This conclusion admittedly involves some normative judgments and taking sides in some empirical debates. For example, there has long been a lively debate about how many confessions police would have otherwise obtained but instead lost because of *Miranda* warnings.²⁸⁰ But even the most generous estimates put the confessions lost at a mere 3.8%.²⁸¹ *Miranda* opponents consider this a huge social cost, especially because in absolute numbers it means, they maintain, that 107,000 confessions vanish each year.²⁸² That this is a true cost assumes that those who would have confessed, but did not, were largely the guilty, a matter of some dispute, and *Miranda* supporters persuasively argue that, “[f]or all practical purposes, *Miranda*’s empirically detectable net damage to law enforcement is [in fact] zero.”²⁸³ Yet even if *Miranda*’s critics are right, the flip side of the coin is that the vast majority of Mirandized suspects waive their rights and agree to talk to the police.²⁸⁴ The emerging scholarly consensus is that the percentage of confessions lost to *Miranda* is far lower than the critics suggest.²⁸⁵ But even if the critics are right, the numbers still favor the conclusion that the decision whether to confess is impacted by a variety of factors with more explanatory force than

280. See, e.g., THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 169-248 (1998) (collecting these debates).

281. See Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, in THE MIRANDA DEBATE, *supra* note 279, at 175, 183.

282. See *id.* at 185.

283. See Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Costs*, in THE MIRANDA DEBATE, *supra* note 279, at 191, 205. For a lively debate on the likely numbers of false confessions induced in post-*Miranda* America, compare Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL’Y 523, 526 (1999), arguing that false confessions are not prevalent, with Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 (1998), asserting that false confessions are a significant problem in America. See also WHITE, *supra* note 152, at 6 (describing Cassell’s guiding principle as being the number of voluntary—as opposed to proven true—confessions not obtained under *Miranda* that would have been obtained under the earlier due process voluntariness test).

284. See *id.* at 76-101 (reviewing the various highly effective police techniques used to prevent or circumvent *Miranda* rights invocation and the extraordinarily high percentage of suspects who waive *Miranda* and then confess).

285. See *id.* at 99-101 (describing the overall cost in lost confessions due to *Miranda* as “quite small” and the cost when effective techniques are used to prevent or circumvent *Miranda* rights invocations as “negligible”); Schulhofer, *supra* note 282, at 192 (estimating the percentage of confessions lost to *Miranda* as, “at most only 0.78 percent—a mere seventy-eight one-hundredths of 1 percent for the immediate post-*Miranda* period, and most likely even less today”).

whether police warned suspects of their right not to cooperate.²⁸⁶ This is true even if the sample is limited to likely guilty suspects.²⁸⁷

There is far less data on consent searches and warnings.²⁸⁸ Yet the available data similarly supports the conclusion that rights warnings do not increase noncooperation with the police.²⁸⁹ Sociologist Illya Lichtenberg, for example, in a study of the Maryland State Police and the Ohio State Highway Patrol, found that 88.5% to 96.5% of those asked to consent to automobile searches by police officers did so when no warnings were given.²⁹⁰ When the police gave warnings, however, there was no substantial decrease in the percentage of instances in which police consent-to-search requests were granted.²⁹¹ These statistics held across race, sex, and age.²⁹² Lichtenberg concluded from this data that “verbal warnings are an ineffective means of encouraging citizens to exercise freely their constitutional rights.”²⁹³ On the other hand, combining both the confessions data and the consent-to-search data, Lichtenberg explains:

Finally, for those who still fear that verbal warnings will render our criminal justice system ineffective and lead to marauding criminals on the street with no means to control them, these findings suggest that such fears are unfounded. The criminal justice system appears to operate quite effectively with verbal warnings in place. Research suggests that verbal warnings do not have any substantial impact on consent or confessions.²⁹⁴

Indeed, Lichtenberg found that 12.9% of those consenting to searches were found to be in possession of illegal narcotics.²⁹⁵ They consented anyway.²⁹⁶

286. WHITE, *supra* note 152, at 100. For example, explains Professor White, “[t]here are undoubtedly a core of suspects—professional criminals—who are not going to make statements under any circumstances [so that] . . . the presence or absence of *Miranda* warnings makes no difference.” *Id.* On the other hand, explains White, the vast majority of suspects outside this core can be induced to confess in a fashion that probably does not violate *Miranda* even though these suspects have indeed been warned of their rights. *See id.* at 76-101.

287. This is so because the various factors involved work for nearly all suspects outside the core of professional criminals who will never confess. *See supra* note 285 and accompanying text.

288. Because the debate about the numbers of lost convictions of the guilty due to *Miranda* is both an old and well-known one, this Article focuses more on the social and psychological forces leading to consent searches, about which there has been much less discussion.

289. *See* Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the “Voluntary” Waiver of Fourth Amendment Rights*, 44 HOW. L. J. 349, 364-65, 367-73 (2001).

290. *See id.*

291. *See id.*

292. *See id.* at 366-73; *see also* Illya Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the “Consensual” Police-Citizen Encounter* (unpublished doctoral dissertation, Florida State University) (on file with author) [hereinafter Lichtenberg, *Voluntary Consent*].

293. *See* Lichtenberg, *supra* note 288, at 374.

294. *Id.*

295. *See* Lichtenberg, *Voluntary Consent*, *supra* note 291, at 170.

296. *See id.*; Illya D. Lichtenberg & Alisa Smyth, *Testing the Effectiveness of Consent Searches as a Law Enforcement Tool*, 14 JUST. PROF. 95, 100 (2001). *But see* Steven L. Chanenson, *Get the Facts, Jack!*

What explains compliance in the face of warnings? One possible explanation is simple fear of the police. Lichtenberg found in a survey of some of those consenting to searches in Ohio (an admittedly small sample), “consented to search for one primary reason: fear of reprisal if they refused.”²⁹⁷ Other scholars have relied on older research on compliance to conclude that, at a minimum, suspects are likely to blindly obey authority, especially uniformed authority.²⁹⁸ Thus, in the well-known experiments of Professor Stanley Milgram, subjects purportedly involved in a study about learning patterns’ relationship to negative reinforcement were willing to give increasingly higher-voltage shocks to a “learner” when he made mistakes.²⁹⁹ This escalation in voltage continued upon the experimenter’s command, despite the learner’s at first modest, then vigorous, and finally painfully screaming, protests.³⁰⁰ As Professor Ric Simmons has pointed out, however, Milgram’s experiments involved obedience to orders, not requests, and did not turn on subjects’ ignorance about their legal rights or the authority figure’s intentions.³⁰¹

Scholars challenging the voluntariness of consent to search as illusory have also relied on Professor Leonard Bickman’s experiments involving authority figures wearing uniforms.³⁰² The experimenter dressed as a civilian, then a milkman, then a guard (police-type uniform but with no gun).³⁰³ In each pose, the experimenter ordered passersby to do one of three things: pick up a bag, give a dime to a person near a parking meter, or change locations.³⁰⁴ Compliance rates were much higher in the two uniformed than the one civilian situation and were particularly high—89%—when the guard uniform was

Empirical Research and the Changing Constitutional Landscape of Consent Searches, 71 TENN. L. REV. 399, 455-59 (2004) (cautioning against some aspects of Lichtenberg’s work that may limit the conclusions that can be drawn from it and recommending further research while acknowledging that Lichtenberg’s work is the best done so far).

297. See Lichtenberg, *Voluntary Consent*, *supra* note 291, at 250-51. But see Dorothy K. Kageliro, *Perceived Voluntariness of Consent to Warrantless Police Searches*, 18 J. APPLIED SOC. PSYCHOL. 38, 43 (1988) (only 6% of people in a survey said they consented because of fear of police).

298. See, e.g., Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 175-77 (2002) (noting that, despite differences between Milgram’s work and consensual bus sweeps, Milgram’s experiments supported the theory that the symbols of authority coerce people into complying with police consent to search requests when they would rather refuse); Daniel Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 187-89 (1991) (concluding that, despite the riskiness of extending the logic of Milgram’s work to consent searches, nevertheless “police authority” is the primary way to explain consent searches).

299. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 16-22 (1974).

300. See *id.* at 20-24. Milgram engaged in a number of variations on this central experiment, but all converge on the same conclusions summarized here. *Id.* at 60-61.

301. See Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L. J. 773, 807 (2005).

302. See Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47-51 (1974).

303. *Id.*

304. *Id.*

worn.³⁰⁵ Again, as with Milgram's experiments, orders, rather than requests, were involved, and rights awareness versus rights ignorance was not tested, making the experimental circumstances very different from those involved in consent searches or in interrogations.³⁰⁶ Nevertheless, these studies suggest that the reasons for citizen obedience to the police are far more complex than fear or a knee-jerk obedience to authority, even if those forces do play some role and perhaps under certain circumstances an important role.³⁰⁷

Research psychologist Tom Tyler recently conducted a series of studies and a literature review of when and why Americans obey government agents, including the police and the courts. Tyler found at least two important psychological processes to be at work: a sense of personal responsibility to defer to legitimate government authorities and a desire to empower government to solve social problems, particularly in the face of a perceived crisis.³⁰⁸

Concerning the sense of obligation to obey authorities, Tyler found that 82% of participants agreed that, in general, "[p]eople should obey the law even if it goes against what they think is right" and, more specifically, that those surveyed always try to follow the law even if they think that it is wrong.³⁰⁹ Almost as high a percentage agreed that "[d]isobeying the law is seldom justified," and 69% agreed that "[i]t is difficult to break the law and keep one's self-respect."³¹⁰ A full 84% of participants affirmed that "[i]f a person is doing something and a police officer tells them to stop, they should stop even if they feel that what they are doing is legal."³¹¹ These feelings of obligation to obey the law were roughly the same among whites and African-Americans.³¹²

305. See *id.* at 49-52; see also Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 238 (2002) (arguing that Bickman's experiments show that uniforms have a compelling effect on people); Adrian J. Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 240 (1997).

306. See Simmons, *supra* note 300, at 808-10 (analyzing applicability of Bickman's experiments to the consent search situation); Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPLIED SOC. PSYCHOL. 501, 502-06 (1984) (conducting a later experiment confirming many of Bickman's results despite variations from Bickman's original experiment).

307. See John R.P. French, Jr. & Bertram Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* 150, 165 (Dorwin Cartwright ed., 1959) (breaking social power into six categories, including coercive power—fostering the fear that disobedience will be punished); Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, 29 J. APPLIED SOC. PSYCHOL. 955, 962 (1999) (finding the French and Raven system a helpful way to understand the obedience to authority experiments); Simmons, *supra* note 300, at 811-17 (applying the French and Raven system to consent searches).

308. See Tom R. Tyler, *A Deference-Based Perspective on Duty: Empowering Government to Define Duties to Oneself and to Others*, in *THE PSYCHOLOGY OF RIGHTS AND DUTIES: EMPIRICAL CONTRIBUTIONS AND NORMATIVE COMMENTARIES* 137, 137-41 (Norman J. Finkel & Fathali M. Moghaddam eds., 2005).

309. See *id.* at 141 Table 6.1 (citing survey results from TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 45 (1990)).

310. See *id.*

311. *Id.*

312. *Id.* at 142.

Moreover, other studies revealed that the sense of responsibility and obligation to legitimate legal authorities does indeed affect behavior, not just expressed attitudes, and influences people's willingness to obey the law in their everyday lives.³¹³ In other words, Americans see obeying the law and legal authorities as the right thing to do, a binding moral obligation and a matter of personal responsibility that is independent of any fear of being caught or punished for violations.³¹⁴ Tyler concludes:

These findings suggest that people feel a considerable sense of personal responsibility to curb personal freedoms when those freedoms conflict with social rules. In this sense, Americans seem like a group of people who are generally willing to restrict their personal freedom to act as they wish when required to do so by social rules.³¹⁵

Tyler also found Americans' desire to empower government to solve problems, thus mandating deference to governmental authorities, to stem in part from free-rider concerns.³¹⁶ If the government does not act, reliance on volunteers will mean an unfair distribution of burdens, allowing non-volunteers to reap unfair advantages.³¹⁷ In the case of criminal justice, for example, if only some people refrain from theft or assault but others do not, then the non-compliers unfairly gain money and the psychic satisfaction of wreaking physical vengeance on others.³¹⁸ Supporting government's ability to enforce the criminal law equally (including by encouraging citizens to refrain from violating it) and to punish free-riders—criminals—who take advantage of other citizens' compliance with the law gives the state more resources with which to do its job. In other words, obeying the police and the law is a way to free up resources for the government to track down and punish the real, but hopefully now few, legal deviants.³¹⁹

Correspondingly, individuals may be uncertain about the nature and extent of some of their obligations to others. Compliance with legal authorities eliminates difficult moral ambiguities about what to do. Such compliance also

313. *See id.*

314. *See id.* at 138.

315. *Id.* at 142.

316. *See id.* at 139-40; *see also* Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free-Riders: The Community's Dilemma When Representing Non-Democratic Client Organizations*, 31 *FORDHAM URB. L.J.* 481, 505-06 (2004) (discussing the meaning of "free rider").

317. *See* Tyler, *supra* note 307, at 139-40.

318. *See id.* This reasoning is analogous to that articulated by the debt-to-society retributivist thinkers' justification for criminal punishment. *See* ELLEN PODGOR ET AL., *CRIMINAL LAW: CONCEPTS AND PRACTICE* 5-6 (2005).

319. *Cf.* BERNARD HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 22-24 (2007) (arguing that in a world of limited resources, policing via racial profiling will actually raise total crime in society as white crime rises upon police efforts shifting primarily to black crime).

frees individuals from fretting over how much to do.³²⁰ According to Tyler, “If they follow the law, people are entitled to feel that they have ‘done their duty’ and they are free to use their resources to pursue their own self-interest (although, of course, they can give even more to others).”³²¹

Tyler found this government empowerment motivation to be particularly powerful in times of perceived crisis.³²² This observation might suggest that the more government is successful in fostering a sense of crisis in a particular area of policing, the higher the citizen compliance rates will be. The declaration of a “war on crime” can perhaps be understood in these terms: the sense of crisis created by the mere declaration itself creates a more law-compliant populace.³²³

Furthermore, Tyler’s study did not specifically examine police-citizen interaction during crises but did explore the willingness of Americans to obey United States Supreme Court interpretations of the Constitution on socially divisive issues.³²⁴ Within certain broad limits, Americans were quite willing to do so even when strongly disagreeing with the Court’s decisions.³²⁵ Again, this willingness turned on the perceived legitimacy of these decisions.³²⁶ To the extent that police are seen as implementing such decisions, Americans can be expected to react similarly. Furthermore, Tyler sees the logic of his and other researchers’ efforts in this area as extending well beyond the specific situations being studied to an understanding of why Americans obey legal authorities generally, and he has in related, though not identical, work specifically examined attitudes and behavior toward the police.³²⁷

The important qualification to Tyler’s conclusions is their limitation to instances where governmental action effectively dons the “mantle of legitimacy.”³²⁸ Procedural justice is the most important factor in bestowing that mantle.³²⁹ Such justice requires affected persons’ participation in the rule-crafting or implementing process.³³⁰ Additionally, “[t]he neutrality of decision makers, the trustworthiness of their intentions, and their recognition of citizen rights are all-important elements of procedural justice.”³³¹

The willingness to obey the police from a sense of moral obligation to aid and a desire to empower legitimate government actions seem like perfectly

320. See Tyler, *supra* note 307, at 140.

321. *Id.*

322. See *id.* at 149.

323. See SIMON, *supra* note 240, at 22-31 (discussing the war on crime and its role in creating a more compliant population).

324. See Tyler, *supra* note 307, at 151-52.

325. See *id.* at 151-56.

326. See *id.*

327. See *id.*; see also TYLER & HUO, *supra* note 86; HUO & TYLER, *supra* note 256.

328. See Tyler, *supra* note 307, at 153.

329. See *id.*

330. See *id.*

331. *Id.* at 154.

appropriate reasons for citizen compliance. Less appropriate reasons arguably involve, however, a variety of means of governmental and situational compulsion. One commentator has convincingly argued, however, that here too rights warnings might play an important role.³³² This commentator reaches his conclusions by relying on sociologists J.R.P. French, Jr. and B. Raven's categories of social power which can be exercised in any situation in which one individual exerts some influence over another.³³³ These six categories are as follows:

1. Reward Power is exerted when the authority induces a belief in the subject that his obedience will be rewarded.
2. Coercive Power is exerted when the authority induces a belief in the subject that his non-compliance will result in his punishment.
3. Obligatory Power is exerted when the subject complies because he believes that the authority has the legal or social right to command obedience.
4. Referent Power is exerted when the subject complies because he identifies with, and wishes to be like, the authority figure.
5. Expert Power is exerted when the subject complies from a belief that the authority possesses specialized knowledge in the area in which he issues a command.
6. Informational Power is exerted when the subject complies because new information given to him by the authority figure changes the subject's beliefs in a way that also alters his behavior. Unlike the first five types of power, which are rooted in who the authority figure is, this last type of power is rooted in the content of the information he dispenses.³³⁴

Social psychologists have seen this scheme as helpful to understanding the results of compliance experiments.³³⁵ Law Professor Ric Simmons, building on the work of these social psychologists, argues that in the context of consent searches some degree of compulsion is unavoidable.³³⁶ The question is how much of each type of social power may the police use to obtain consent.³³⁷ Thus, argues Simmons, police exercise of referent power—citizens identifying with and trusting the police—or of informational power—citizens complying because they are persuaded by officers' provision of new and accurate information—is normatively desirable, for citizens then assist police because

332. See Simmons, *supra* note 300, at 811-12.

333. See *id.* (citing French & Raven, *supra* note 306, at 50-67).

334. See *id.*

335. See Blass, *supra* note 306, at 962.

336. See Simmons, *supra* note 300, at 811-15.

337. See *id.*

they believe it is the right thing to do, perhaps concluding that they are aiding in preventing or punishing crime.³³⁸ On the other hand, persuasion “based on coercive or obligatory social power is inappropriate, though some amount of it is no doubt unavoidable, and should be discouraged by the legal system.”³³⁹ “Obligatory power” in this context means that the subject bows to police authority:

[B]ecause she perceives that the law enforcement officer has a *legitimate* right to force her to consent. Because by definition the law enforcement officer does *not* have such a right in the context of consent searches, the use of obligatory social power is an abuse of the policeman’s authority; it essentially tricks the subject into believing that the police officer has legal power that he does not in fact possess.³⁴⁰

Rights warnings, Simmons further explains, help to reduce law enforcement’s exercise of obligatory social power, the inaccurate belief that the subject is legally compelled to comply, yet would do little, if any, harm.³⁴¹ Indeed, maintains Simmons, warnings might increase the officer’s desirable exercise of referential or informational power.³⁴² Thus, Simmons again writes,

As was the case with custodial interrogations, law enforcement officials forced to give a notification will no doubt learn to rely on other techniques to gain consent, and if the notification is properly given, it will be difficult for these other techniques to rely upon obligatory social power. If the warning has no effect in diminishing the use of obligatory social power, it is hard to see how it would have any effect at all; in other words, requiring a notification could not possibly do harm. The truth is probably somewhere in the middle. For some subjects, the notifications will have absolutely no effect; for others, it will completely eliminate the improper use of obligatory social [power]; while for most, it will diminish, at least to some extent, the improper use of that power and thus force police to rely upon other, more acceptable forms of persuasion.³⁴³

Restated somewhat in the terms used in this Article, rights warnings will not likely end the police bullshitting citizens. Warnings, however, will create a real chance of at least somewhat reducing one kind of bullshit—the kind that relies upon citizen rights ignorance to compel obedience. That form of bullshit is particularly reprehensible for the reasons expressed in Parts I and II of this Article. Yet ending it will likely impose little in the way of the social cost of

338. *See id.* at 817.

339. *Id.*

340. *Id.* at 816 (emphasis added).

341. *See id.* at 819.

342. *See id.*

343. *Id.* at 820.

reducing consensual searches and confessions. Indeed, the available empirical data, as well as psychological theory, suggest that the guilty as well as the innocent will generally not be less compliant simply because they are made aware of their rights.³⁴⁴ To be sure, many of the guilty will not consent to searches or interrogations.³⁴⁵ Strong personalities, experience with the system, self-interest, and criminal sophistication are more likely explanations for such reticence, however, than rights awareness.³⁴⁶

It is an open question whether, without other forms of bullshit, any consensual searches or voluntary confessions of the guilty would occur. If it turns out to be true that few would occur, then the relative benefits and costs of these alternative forms of bullshit must be weighed, as must their seriousness and intensity. A bullshit-free world of policing may be unattainable, perhaps undesirable. Nevertheless, forms of bullshit in which rights warnings are given but in a hurried, garbled, or aggressive manner that prevents them either from being understood or believed cuts too close to the kind of disrespect for the person and the polity that the rights warnings themselves are meant to avoid.³⁴⁷ Such rights-belittling forms of bullshit should be discouraged absent strong evidence that their absence frees too many of the guilty, and perhaps not even then. Rights warnings that are mere forms of words are not meaningless, for their symbolism alone has value in expressing respect.³⁴⁸ But warnings that are empty rituals will still do far less in obtaining the positive benefits outlined here than will warnings of real substance. Discouraging this more subtle form of police rights deception likely requires remedies far beyond simply mandating the police mouthing of the appropriate words. Videotaping the entire consent search and interrogation processes, whenever practicable, is one example.³⁴⁹ The bottom line is that the costs of the state bullshitting its citizens are rarely articulated with any

344. See *supra* text accompanying notes 277-331. In addition to the factors identified above, Professor Nadler has argued that actor-observer bias (observers, including police officers, tend grossly to overestimate the voluntariness of others' actions), social validation from following the same course of action chosen by others, politeness rules for expressing and understanding commands stated as requests in certain social contexts, the coercive effect of narrowing personal space, deference to status, reduced deliberation under time pressure, and a corresponding rise in stereotyped and scripted judgments and behaviors all may contribute to citizen compliance with police "requests" to search. See Nadler, *supra* note 297, at 168-72, 179-97. Given these coercive factors, Nadler emphasizes the substantial social cost arising from the fact that the "vast majority of people subjected to consent searches are innocent." *Id.* at 208-213 (analyzing the innocence problem and the risk that lasting widespread negative attitudes toward the police by the law-abiding may result); cf. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1269-70 (1983) (arguing Fourth Amendment doctrine must consider the perspective of and costs to the innocent).

345. See WHITE, *supra* note 152, at 100-01.

346. See *id.*

347. See *id.* at 79-99 (summarizing techniques to render *Miranda* warnings meaningless); *supra* Part II.A.1 (discussing disrespect for the person).

348. See *supra* Part II.A.1.

349. See American Bar Association, *supra* note 152, at 11-22; THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 75-85 (2005).

specificity, while the costs of prohibiting, or at least reducing, such bullshit are too often simply assumed rather than proven. In practice, current law therefore effectively and wrongly places the burden of justifying the reduction of police bullshit on the defendant. At least concerning bullshit about rights, the burden should be shifted back to where it belongs—the state. At the same time, some humility about how much rights warnings can accomplish in promoting a healthy citizenry is required. Achieving that goal requires action by a wide array of institutions, such as the schools and the media, in addition to the police. The final task that this Article seeks to accomplish is to elaborate briefly upon this caution to be humble. Humility rests in understanding what it means to be a good citizen.

IV. THE GOOD CITIZEN: CHARACTER AND IGNORANCE

The ideology of the informed citizen has deep roots in British and colonial political thinking.³⁵⁰ This ideology viewed ignorance as opening the way to tyranny.³⁵¹ In the words of William Livingston, a mid-eighteenth century New York author, “the Strength of a People . . . [has] always been the Consequence[]f of the Improvement and Cultivation of their Minds.”³⁵² But this cultivation, said Livingston, served political purposes, for when men know their rights, “they will at all Hazards defend them, as well against the insidious Designs of domestic Politicians, as the undisguised Attacks of a foreign Enemy”³⁵³ This strain of thought—that the minds of even the lower ranks must play a prominent role in political thought—was then unconventional.³⁵⁴

350. See RICHARD D. BROWN, *THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA 1650-1870* (1996). This discussion articulates an ideology, not whether in practice the people were adequately informed. While the ideology has changed over time, not all have agreed about the meaning and purpose of being informed, though “[f]or at least two centuries, Americans have believed in the idea that citizens should be informed in order to be able to exercise their civic responsibilities wisely.” *Id.* at xiii. Indeed, the ideology that was widely proclaimed by notable leaders at the republic’s birth quickly became a central theme in American political life and by the Civil War era, “had grown into an article of national faith.” *Id.* Here, the Article paints with a broad brush, emphasizing dominant themes that helped to define this ideology without exploring all the variations on its meaning throughout history, a task already ably performed by Professor Brown and one unnecessary for this Article. This discussion simply gives a sense of the ideology’s meaning.

351. See *id.* at 1-84.

352. William Livingston et al., *The Advantages of Education, with the Necessity of Instituting Grammar Schools for the Instruction of Youth, Preparatory to Their Admission into Our Intended College*, in *THE INDEPENDENT REFLECTOR; OR, WEEKLY ESSAYS ON SUNDRY IMPORTANT SUBJECTS MORE PARTICULARLY ADAPTED TO THE PROVINCE OF NEW YORK* 419 (Milton M. Klein ed., 1963).

353. *Id.* On the other hand, said Livingston, when men have been uninformed, “triumphant Ignorance . . . [opens] its Sluices, and the Country . . . [overflows] with Tyranny, Barbarism, ecclesiastical Domination, Superstition, Enthusiasm, corrupt Manners, and an irresistible confederate Host of Evils, to its utter Ruin and Destruction.” *Id.* at 419-20.

354. See BROWN, *supra* note 349, at 39-40. The implicit assumption at the time, however, was that women, African Americans, and Native Americans were excluded from the active political community and, thus, not in need of being informed. See *id.* For white women, unlike African Americans and Native Americans, there were possibilities in education, albeit ones focused on competing in the marriage market

But the informed citizen ideology gained ground in the colonies between 1763 and 1775 when self-styled colonial gentlemen sought to resist a series of British Parliamentary acts and administrative policies.³⁵⁵ These gentlemen included planters, merchants, and almost everyone with a college degree, as well as master tradesmen, like shipbuilders, printers, and iron masters.³⁵⁶ These gentlemen discovered that mobilizing broad-based opposition among the citizenry by legislative resolutions, public meetings, newspapers, and pamphlets was a powerful political tool in resisting royal administrations.³⁵⁷

But the intellectual elites among these gentlemen also saw theoretical value in creating informed citizens, for “they would always know their rights and not fall prey to the machinations of tyrants.”³⁵⁸ Before Independence, John Adams and Thomas Paine were the leading exponents of this view.³⁵⁹

There is a long and fascinating history of the development of this informed citizen ideology from the Revolutionary period onward that this Article will not trace. Moreover, there were important differences among the Founders and their intellectual progeny in emphasis and in understanding of the purposes of fostering informed citizens.³⁶⁰ No point would be served by recounting and critiquing those various views. Rather, this Article will focus in particular on the views of one Founder—Thomas Jefferson. This is not because I agree with all that Jefferson says on the subject but because exploring aspects of his thinking in this area illustrates the narrow point sought to be made here: just telling people their rights is not enough. They must truly understand them, a feat requiring copious and continuing background knowledge, and they must live their rights. These assertions stem from recognizing that some knowledge is tacit, working at the subconscious level in often rapid, even habitual fashion, and some knowledge is experiential.³⁶¹ This last point is simple but important. Just as telling others how to ride a bike does not mean they can do it—they also need practice—telling others their rights does not mean they can inhabit them. Rights must be exercised or they are mere words, without life. Moreover, such exercise both forms and reflects the kind of strong, robust character needed if republican citizens are to

and on household management. *See id.* At the same time, the perceived ignorance of these groups was often seen as justifying their exclusion from and subordination by the active political community. *See id.* at 43-44.

355. *See id.* at 52-54.

356. *See id.*

357. *See id.*

358. *Id.* at 54.

359. *See id.* at 54-66.

360. *See id.*

361. *See* Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 168-70 (1991) (discussing tacit and experiential knowledge in the legal profession); Taslitz, *supra* note 26, at 390-91 (analyzing the unconscious nature of much human thought); *see generally* DONALD SCHON, *THE REFLECTIVE PRACTITIONER* (1989) (discussing tacit and experiential knowledge in the professions generally).

forestall tyrannies, both large and small. Civic education must be not merely of the mind, but of the heart, the soul, and the character.

Jefferson, more than any other Founder, saw development of this “civic virtue” as primarily a bottom-up affair, bubbling up from the people, though the statesmen or “natural aristocracy” at the top also required additional sorts of virtues.³⁶² Civic virtue required “spiritedness,” which must be “woven into the American character’ through education.”³⁶³ Only a properly educated citizen body actively participating in local affairs will be capable of selecting the “best men” to represent them.³⁶⁴

The great danger to a republic, said Jefferson, was lethargy among the people, entailing “the death of public liberty.”³⁶⁵ Civic lethargy arises when people no longer pay attention to public affairs, becoming too involved in their private concerns.³⁶⁶ A lethargic people cannot guard against the tendency of unwatched leaders to put their own self-interest above the people’s.³⁶⁷ Spiritedness is the cure for lethargy. Spiritedness, as one Jefferson scholar describes it, requires “a jealous insistence on one’s rights . . . and a willingness to resist . . . every encroachment, real or imagined, on these rights.”³⁶⁸ Spiritedness’s close cousin is occasional turbulence among the people, for such turbulence “nourishes a general attention to the public affairs” and warns rulers that “‘the people preserve the spirit of resistance’ to their government.”³⁶⁹ Although this spirit might sometimes require armed resistance in extreme circumstances, Jefferson, especially later in life, embraced less radical forms of struggle through outspokenness, civic involvement, and electoral combat.³⁷⁰

Spiritedness requires education to enable citizens to understand and respectively exercise and fulfill their rights and duties.³⁷¹ For the mass of the people, at least several years of universal formal education is required, an education including the expressly political purpose of encouraging the spirit of resistance to governmental abuses of power and the judgment to elect

362. See JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* 103 (1998).

363. *Id.* at 103.

364. *See id.* at 105.

365. *Id.* at 107.

366. *See id.*

367. *See id.*

368. *Id.* at 104, 114; see also ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 43 (1996) (“Indeed, it was a specifically Jeffersonian tenet that democracy would work only to the extent that it activated the great mass of the people.”).

369. See KOCH, *supra* note 368, at 45 (“Jefferson, having weighed democratic turbulence against the oppressions of monarchy, stoutly maintains that ‘it becomes nothing.’ He even hoped such events might be productive of good in focusing attention on public affairs.”); YARBROUGH, *supra* note 362, at 114.

370. See YARBROUGH, *supra* note 362, at 115-25.

371. See *id.* at 125-26; GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2006) (“None of the other major founding fathers was as optimistic and confident of the people as Jefferson was.”).

virtuous representatives.³⁷² Only such education to “illuminate, as far as is practicable, the minds of the people” can ward off civic degeneracy.³⁷³ Accordingly, “[f]or Jefferson the first task of universal public education is not job training or the encouragement of the artistic imagination and creativity, but the formation of citizens who understand their rights and duties to themselves, their neighbors, and their country.”³⁷⁴

Such understanding does not flow, however, from formal education alone. Jefferson expected civic education to be a lifelong affair.³⁷⁵ Ordinary Americans should be trained in a thirst for political knowledge, one quenched only by continual reading of newspapers, purchases of books, and visits to libraries.³⁷⁶ Good citizens need freedom to pursue happiness by their own lights and the economic independence to resist the sway of demagogues.³⁷⁷ Politics and the quest for politically relevant knowledge must thus not consume average citizens, but must nevertheless be an important part of their lives.³⁷⁸

Maintaining this proper balance between the public and the private required some mechanism to ensure active citizen involvement, at least at the

372. See YARBROUGH, *supra* note 362 at 125-26.

373. *Id.* at 125.

374. *Id.* at 127.

375. *See id.*

376. *See id.* at 127. Ordinary Americans in the early period of our nation’s history did, indeed, act as if they were heeding Jefferson’s entreaties, with the number of newspapers and their active readership blossoming, newspapers decidedly focused on the political issues of the day. *See* SUSAN DUNN, JEFFERSON’S SECOND REVOLUTION: THE ELECTION OF 1800 AND THE TRIUMPH OF REPUBLICANISM 137-48 (2004).

377. *See* YARBROUGH, *supra* note 362, at 125-27 (noting that among the purposes of universal education are supplying “the people with the knowledge of those subjects that will ensure their future ‘freedom and happiness’” and teaching them “the virtues of independence, industry, and self-reliance.”). Historian Joyce Appleby saw Jefferson’s thinking on matters of citizen independence as rooted in aspects of American reality:

The democratization of American society in the early nineteenth century is no exception [to the rule that no one individual can be credited for momentous social changes]. From the beginning of European settlement on the North American continent, it had been difficult to transplant government authority, social formalities, and economic regulations. American men, just because they had access to land, voted in larger numbers than anywhere else. The economic base of family farms and owner-run plantations nurtured independent ways. American prosperity promoted personal confidence and easy communication across class lines—the raw material for participatory politics. To these foundations for a democratic society Jefferson added rhetorical inspiration, political wisdom, and upper-class connections. As an insider, he saw the obstacles that elite prejudices and pretensions placed in the way of democratic practices. A highly ingenious leader, he was able to lay a route around them.

JOYCE APPLEBY, THOMAS JEFFERSON 4 (2003). Of course, Jefferson’s vision was blind to including women, African Americans, and Native Americans, but that should be no bar to taking the best of Jefferson’s informed, activist-citizen ideology to craft a more inclusive vision for today. *See id.* at 3-4. *See generally* GARY HART, RESTORATION OF THE REPUBLIC: THE JEFFERSONIAN IDEAL IN 21ST-CENTURY AMERICA (2002) (incorporating a book-length effort to craft just such a vision).

378. *See* YARBROUGH, *supra* note 362, at 102-03 (explaining that, for Jefferson, in a “liberal republic, the most important virtues, both moral and intellectual, flourish outside the political arena,” yet virtue also required citizen participation both in elections and in more direct means of involvement in government).

local level.³⁷⁹ Only such involvement could properly continually educate the people's character in the way required by a sound republic.³⁸⁰ Jefferson's proposed mechanism was the creation of local wards below the level of the counties.³⁸¹ At this small, local level citizens would approach or achieve the direct action and citizen involvement that a republic demands.³⁸² Citizens could manage for themselves a variety of tasks, including running schools, organizing the militia, maintaining roads, and supervising the police.³⁸³ Each ward "would thus be a small republic within itself, and each man in the State would thus become an acting member of the common government, transacting in person a great portion of . . . [his] rights and duties"³⁸⁴

Some measure of direct citizen involvement at the local level has many benefits, fostering the habits of self-government and spiritedness required in a republican people.³⁸⁵ Jefferson did believe that the best men, the natural aristocracy, needed more formal education than the common man. Universities would help to serve that function by educating these elites in law, government, and republican principles and theories.³⁸⁶ Universities would thus aid in raising republican statesmen, cultivating their virtue too, and educating them in the skills and information needed to serve their public role.³⁸⁷ Yet even such well-trained elites could not be trusted to be worthy representatives if not monitored by a vigilant people.³⁸⁸ The wards would educate the people in the republican virtues while enabling them to resist governmental corruption.³⁸⁹ The wards would draw people out of their entirely private concerns to public ones too.³⁹⁰ The mere act of local deliberation, even if self-interested concerns motivated citizens to become politically involved in the

379. *See id.* at 133.

380. *See id.*

381. *See id.*

382. *See id.* at 133-34; HART, *supra* note 377, at 116 ("Thus, the ward republic is the means by which classic republican virtue can be reconciled with the liberal value of nondomination by the state. Only through direct citizen participation in the *polis* and control of local governmental affairs can individual liberty be reconciled with civic duty.").

383. *See* YARBROUGH, *supra* note 362, at 134.

384. *Id.* at 134. Jefferson said that "making every citizen an acting member of the government, and in the offices nearest and most interesting to him" is central to the life of the free citizen. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in 15 THE WRITINGS OF THOMAS JEFFERSON 32-44 (Thomas Jefferson Memorial Association ed. 1907).

385. *See* YARBROUGH, *supra* note 362, at 135.

386. *See id.* at 137 ("Jefferson never imagines that the 'debased' passion for equality may lead the people to try to tear down those who are naturally better. Conversely, Jefferson assumes that the natural aristocracy is well disposed toward the people."); *id.* at 141-44 (noting that, nevertheless, a proper university education is necessary to train the best men in the knowledge and virtues required of republican statesmen).

387. *See id.* at 141-43.

388. *See* HART, *supra* note 377, at 116 (noting that, for Jefferson, "civic virtue and the duties of citizenship are the best protectors of these rights."); WOOD, *supra* note 371, at 108 (noting that Jefferson "always thought that the people, if undisturbed by demagogues or Federalist monarchists, would eventually set matters right").

389. *See* YARBROUGH, *supra* note 362, at 135.

390. *See id.*

first place, would teach them the habits of considering other people's interests, of putting themselves in their fellows' places, and of seeing the connection between self-interest and the common interest.³⁹¹ These traits, in turn, would better enable the people to spot local and national abuses and organize to resist them.³⁹² As Jefferson explained:

Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.³⁹³

Jefferson's logic, and even more clearly, the logic of modern Jeffersonians like Gary Hart should extend to the little Caesars who aim to subjugate individuals in their daily lives, including, for example, those police more interested in conveying the "power image of the beat officer"³⁹⁴ than in solving crimes and respecting rights-bearing citizens or, in the words of one well-known commentator, in the "petit apartheid" of racial profiling and the more subtle instances of racial "micro-aggressions"—insults—too often occurring in street-policing.³⁹⁵ Perhaps these are modern illustrations of why Jefferson saw universal public education and involvement in the wards as the twin political "hooks" on which republicanism depends.³⁹⁶

The bottom line is a simple one: Police informing searchees and arrestees of their rights serves important political goals at likely relatively little social cost. But, despite these net benefits, telling people their constitutional rights

391. *See id.* at 138-41, 151-52.

392. *See id.* at 135-36 (defending this understanding of Jefferson's views while conceding that he unduly minimized the dangers of majority factions); *see id.* at 137 ("What worries Jefferson is that if the people do not remain vigilant, if the link between the people and their representatives becomes too tenuous, not even the most wise and virtuous can be trusted to remain faithful to their duty."); *see id.* at 138 (noting that the wards will train citizens in the habits needed for vigilant monitoring of the state); *see id.* at 139 (noting that encouraging resistance to government without debilitating it is a "tension [that] can also be minimized by sustained political participation, the dissemination of information, and civic education, so that the healthy distrust of political power contributes to responsible government").

393. Letter from Thomas Jefferson to Joseph C. Cabell (February 2, 1816) in 14 WRITINGS OF THOMAS JEFFERSON, *supra* note 384, at 417-23.

394. *Terry v. Ohio*, 392 U.S. 1, 15 n.11 (1968).

395. *See* Katheryn K. Russell, *Toward Developing a Theoretical Paradigm and Typology for Petit Apartheid*, in *PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM* 3, 3-13 (Dragan Milovanovic & Katheryn K. Russell eds., 2001) (defining, and explaining the significance of, "petit apartheid"); Douglas E. Thompkins, *The Presence and Effect of Micro/Macro-aggressions and Petit Apartheid*, in *PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM*, *supra*, at 21-26 (defining, and explaining the significance of "micro-aggressions"). *See generally* Hart, *supra* note 377 at 196-226 (suggesting a variety of modern methods for realizing Jefferson's goal of individual and collective citizen nondomination by anti-republican forces, both large and small).

396. *See* YARBROUGH, *supra* note 362, at 133.

in the occasional highly stressful encounter with the primary representatives of the state authorized to use force (the police) cannot even begin properly to educate the citizenry in its rights in any truly meaningful way. Far wider social changes are required. Too much should not, therefore, be expected from the rights warnings defended here. They are but a small piece in a much larger and more complex political puzzle.

V. CONCLUSION

The idea of political bullshit clarifies the ways in which police efforts to hide, minimize, or distort citizen information about constitutional rights undermines respect for equal human worth and wounds the polity. Such bullshit insults individuals and even entire racial or ethnic groups, fosters social divisiveness, and damages public and private deliberation. Political bullshit of this type also undermines the law's legitimacy by reducing procedural justice. Simultaneously, the costs of ending such bullshit by providing rights warnings are likely small, for the vast majority of people will still cooperate with police investigations. Those who will not cooperate probably would not have done so without the warnings anyway. The balance of social costs and benefits thus tips in favor of rights warnings. At the same time, however, humility is required. Rights warnings will do something to improve the health of our republic. But creating or maintaining an informed vigilant people requires much, much more.