

What Would MLK Do?: A Civil Rights Model of “Good Citizenship” in Criminal Procedure

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Date : September 9, 2020

I. Bennett Capers, [Criminal Procedure and the Good Citizen](#), 118 **Colum. L. Rev.** 653 (2018).

Good citizenship and eager participation in police investigations would seem to fit hand-in-glove. The good citizen helps to enforce the criminal law, particularly if the physical safety of the citizenry is thought to be at risk. But as Bennett Capers argues in his essay, *Criminal Procedure and the Good Citizen*, this version of the good citizen—crafted and propagated by our nation’s highest court—falls into direct tension with the activist principles animating the Civil Rights Movement. For instance, Martin Luther King, Jr., insisted that the citizen not suffer from a cultural condition Capers describes as “too much respect for majoritarian law.” (P. 704.) The Movement, led by persons we now consider some of the greatest citizens in our nation’s history, rejected the notion of reflexive deference to majoritarian law and its enforcement.

During the Civil Rights Movement, the good “civil rights” citizen was inclined to assert her rights and to fight to extend them. After accounting for instances in which the Supreme Court, in its Fourth Amendment cases, admonished citizens to forgo their civil rights in the interest of effective police investigation, Capers poses a philosophical question. In the distinctive space of police-administered criminal procedure, what is the good citizen’s civic duty?

Capers details how, over the past several decades, the Court has pushed a narrative of good citizenship that is based upon deference to police, even—and perhaps especially—when the police officer formally requests that the citizen relinquish her civil rights. Among several examples, Capers discusses [U.S. v. Drayton](#), a Supreme Court case addressing whether the defendant’s consent to a police search represented a voluntary (rather than coerced) waiver of his Fourth Amendment rights.¹ The search in *Drayton* took place on a coach bus scheduled to travel from Ft. Lauderdale, Florida, to Detroit, Michigan. As three police officers entered the bus, the bus driver immediately exited the vehicle (“yielding his custody of the bus,” according to a dissenting Justice Souter).² One officer knelt on the driver’s seat; another walked to the back of the bus and faced forward. A third walked from the front of the bus to the back, speaking with each passenger about possession of drugs and weapons. When the questioning officer reached Clifton Brown, Jr., Drayton’s travel partner, he asked Brown if Brown had baggage on the bus. The officer then asked to search Brown’s baggage. Finding no contraband, the officer asked, finally, if he could pat down both Brown and Drayton. Both ostensibly consented and the officer found cocaine taped “between their shorts.”³ In explaining that the investigating police had not created a coercive atmosphere on the bus, Justice Kennedy, writing for the majority, offered the following: “[B]us passengers answer officers’ questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.”⁴

Capers takes a moment to imagine himself, an African American man, as a passenger under scrutiny on the *Drayton* bus. He questions whether he would have permitted police search of his belongings and his person, waiving his Fourth Amendment right against “unreasonable” search and seizure. An African American passenger might choose to obstruct the bus investigation for a dozen reasons, not the least of which would likely be the privacy and dignity the police institution has casually stolen from African

Americans since the institution's inception. Recognition of this history would seem to demand an alternative conception of good citizenship, but one that comes with the risk of heightened police scrutiny. Contemplating such risk, Capers asks, "[A]m I the suspect on the bus being asked if I would mind consenting to a search, or am I one of the 'good citizens' around him...who were disciplined into opening their bags by example and who deployed the Court-endorsed psychology of group pressure, 'encouraging consent'?"⁵

From the Court's vantage point, there seems to be no meaningful value in playing the role of conscientious objector to a warrantless police search. The often-arbitrary quality of police searches and, relatedly, their targeting of racial minorities, has not chastened the Court in its imagining of civic duty in criminal procedure. Capers does not beat around the bush in clarifying the implications of the Court's remarkably shallow conception of civic responsibility: "[T]here is something deeply problematic about citizenship talk that encourages citizens to surrender to constitutional protections and to serve as willing posse comitatus to a criminal justice system known for overcriminalization, overincarceration, and unequal policing." (P. 670.) Capers observes that given the Court's race-blind conception of good citizenship in criminal procedure it is no wonder that police view rights assertion in response to a police request for rights waiver with incredulity and suspicion. (P. 679.)

After dissecting the expressive quality of the Court's "citizenship talk," Capers proposes a normative project: the formulation of a model of good citizenship in criminal procedure that is informed by the African American experience. However, the project bumps up against sympathetic portrayals in recent scholarship of elite law enforcement actors—minorities, no less—who claim a "civil rights" approach to criminal procedure in their implementation of rights-ambivalent policing policies. In the book chapter, "What Would Martin Luther King, Jr., Say?" James Forman reports that in a speech on MLK's birthday, then Attorney General for the District of Columbia, Eric Holder, announced a stop-and-search policy that he would soon implement via the city's traffic code. This policy, part of a larger effort to "break our young people's fascination with guns," was a civil rights project that openly disregarded African American civil rights.⁶

Forman treads lightly in expressing the shortcomings of Holder's racial profiling fiasco. He characterizes Holder's stop-and-search policy as misguided, but in a practical sense given that the policy's benefits were inevitably coupled with tangible costs, namely elevated rates of African American arrest, conviction, and incarceration.⁷ But this sort of cost-benefit analysis lets Holder off the hook. It sets aside his brazen attempt to turn the ethos of the Civil Rights Movement on its head. In identifying and sharply criticizing the Court's attempt to pit regard for civil rights against notions of good citizenship, Capers essay should be read as a sorely needed rebuttal.

Even in this moment of national soul searching regarding the appropriate role of police in society, the notion of a healthy and enduring skepticism of the police institution may strike many readers as plainly radical. *What of community policing, and normative modeling of police-community relations?* Such projects certainly have their place. However, their consideration should be steeped in consideration of the national public's historical skepticism toward police, and insulated from the police infatuation evidenced in American culture over the past several decades. For much of American history, the national public understood skepticism of the police institution—irrespective of penal outcomes—to be a necessary bulwark against government power run amok.⁸ Here, we might consider the modern libertarian's skepticism toward the Internal Revenue Service as a helpful analog, while also bearing in mind that this line of state scrutiny has been subject to far less criticism.

Given the nation's rich history of skepticism toward the police institution and its ongoing love affair with freedom, one is left to wonder how and why Americans became police enthusiasts. How did a nation philosophically centered on the principle of liberty come to adore the lone government agency holding a

monopoly on the legitimate use of force?

1. 536 U.S. 194 (2002).
2. *Id.*
3. *Id.*
4. *Id.* at 205.
5. *Id.*
6. **James Forman, Locking Up Our Own** (2017).
7. *Id.* at 213.
8. Warren E. Burger, *Who Will Watch the Watchman*, 14 **Am. U. L. Rev.** (1964-5); Adam H. Kurkland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 **Emory L.J.**, 21-22 (1996). Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 **Yale L. J.** (1969); Alice Ristroph, *The Constitution of Police Violence*, 64 **UCLA L. Rev.**, 1182, 1187 (2017).

Cite as: Trevor Gardner, *What Would MLK Do?: A Civil Rights Model of "Good Citizenship" in Criminal Procedure*, JOTWELL (September 9, 2020) (reviewing I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 **Colum. L. Rev.** 653 (2018)), <https://crim.jotwell.com/what-would-mlk-do-a-civil-rights-model-of-good-citizenship-in-criminal-procedure/>.