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# Video, Popular Culture, and Police Excessive Force: The Elusive Narrative of Over-Policing

Susan A. Bandes<sup>†</sup>

## ABSTRACT

*Allegations of police brutality are generally credibility contests between the officer and the accuser, and thus their resolution hinges on pre-existing assumptions about what stories are credible. As long as aggressive policing is considered an aberration or a deserved response, legal accounts of unprovoked police violence will be considered incredible. This article explores the difficulties of overcoming the dominant story about policing and conveying the experience of living in an over-policed community. It considers the successes and failures of video evidence (body cam, dash cam, and cell phone) in conveying this experience, and also the possibilities and limits of popular cultural representations—and specifically HBO's *The Wire*.*

*I begin by examining the promise and limits of raw video footage as a counter-narrative. Video evidence has helped galvanize public outrage, but at the same time the failures of video evidence to persuade legal decision makers have been striking. I then turn to *The Wire*, and to the question of media's potential to bridge the vast divide between police-saturated neighborhoods and the broader public view of police-civilian interactions. Though I do not revise my previous assessment that *The Wire* was "the greatest television series ever made," I argue that *The Wire*, for all its immersive attention to West Baltimore, did not really capture the experience of living in a police-occupied neighborhood in which one's every innocuous move can lead to a confrontation with police. *The Wire* was strong on the problem of under-policing, but it did not do justice to the problem of over-policing, or the experience of living with it. I conclude with thoughts about the role of data analytics, media, and storytelling in bridging these experiential divides.*

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<sup>†</sup> Centennial Distinguished Professor of Law Emeritus, DePaul University College of Law. Many thanks to Richard McAdams, Tom Miles, and the students of the *University of Chicago Legal Forum* for organizing this extraordinary conference, and to the conference participants for illuminating discussion. I also owe great thanks to Phillip Atiba Goff, Kim Shayo Buchanan and my other research group colleagues at the Center for Policing Equity for their insightful comments on an earlier draft.

## INTRODUCTION: POLICING: THE DOMINANT STORY

In 2015, a familiar scenario played out in a Chicago courtroom: a credibility contest between a police officer and his alleged victim, with no other witnesses to the encounter. According to South Side resident Rickey Williams, Police Commander Glenn Evans approached him unprovoked, chased him into an abandoned building, shoved his gun down his throat, pressed a stun gun to his groin, and threatened to kill him.<sup>1</sup> Williams' DNA was found on the barrel of Evans' gun.<sup>2</sup> According to Evans, however, Williams approached him unprovoked and tried to grab his gun from its holster, thus placing his DNA on it.<sup>3</sup> Judge Diane Cannon resolved the credibility contest in favor of Commander Evans, finding his the more plausible account.<sup>4</sup> She found that Williams' testimony "taxed the gullibility of the credulous."<sup>5</sup> It was "improbable and contrary to human experience."<sup>6</sup>

It is easy to believe that unprovoked police violence was contrary to Judge Cannon's experience. The ubiquity and aggressiveness of the police presence in many communities on the South or West sides of Chicago, in West Baltimore, in the Bronx, in South Central Los Angeles and elsewhere is contrary to the human experience of judges, legislators, reporters, and most people with power and influence. Stories like the one Williams told in a Chicago courtroom may sound implausible to them. This implausibility, this vast divide in how we experience the police and policing,<sup>7</sup> is one of the major forces that enable police brutality to survive and thrive—not only on the streets, but in the courtrooms.

For Judge Cannon, it would be incredible to believe that a police commander would shove his revolver down a man's throat unprovoked. There is a powerful dominant narrative about policing. In this narrative, a claim of unprovoked police violence must be one of three things: an aberration, a lie, or a reasonable response to provocation. Where there is evidence of such incidents, the assumption is that they are the

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<sup>1</sup> See John Garcia, *Chicago Police Commander Glenn Evans Sued by Alleged Victim*, ABC7 CHICAGO (Sept. 9, 2014), <http://abc7chicago.com/news/chicago-police-commander-glenn-evans-sued-by-alleged-victim-/301604/> [<https://perma.cc/C563-DRGC>].

<sup>2</sup> *Id.*

<sup>3</sup> See Mitch Smith & Ryan Schuessler, *Chicago Police Commander Acquitted in Gun-in-Mouth Case*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/us/chicago-police-commander-alleged-of-putting-gun-in-mans-mouth-is-acquitted.html> (last visited Jan. 22, 2018).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> As Jeffrey Fagan and Elliott Ash point out, much of the research on the disparate use of aggressive enforcement tactics against minorities has focused on large, geographically segregated cities, but racially disparate enforcement tactics are not limited to such places. Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 34 (2017).

victim's fault: Eric Garner shouldn't have been selling cigarettes;<sup>8</sup> Sandra Bland should have signaled a lane change;<sup>9</sup> Walter Scott shouldn't have run when he was pulled over for a burned-out brake light.<sup>10</sup> If the police action seems clearly wrong, then the cop must have been a lone actor—in the way, for example, that Commander John Burge has now become the sole face of Chicago's decades-long police torture scandal.<sup>11</sup>

The dominant story about policing powerfully shapes the way police conduct is seen, understood, and evaluated. The story is generally told from the police perspective, not that of the suspect. It assumes the good faith of police, but often questions the motives or credibility of suspects. It views police officers as individual, autonomous agents and ignores structural forces and constraints. It views policing as an exercise in crime-fighting and peace-keeping, rather than a means of social control. The story is so deeply ingrained in both culture and law that it is hard to imagine what sorts of evidence could challenge or disrupt it. Cop shows have been deeply implicated in creating and reinforcing

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<sup>8</sup> Garner often sold "loosies" (cigarettes that are sold individually). See, e.g., John Kass, *Seller of 'Loosies' Died for Siphoning from Government*, CHI. TRIB. (Dec. 5, 2014), <http://www.chicagotribune.com/news/columnists/kass/ct-eric-garner-kass-met-1205-20141205-column.html>. But see MATT TAIBBI, *I CAN'T BREATHE: A KILLING ON BAY STREET* 113–15 (2017) (explaining the "loosies" trade, and reporting that although Garner had sold loose cigarettes on other occasions, at the time of the arrest that led to his death he was not selling cigarettes at all).

<sup>9</sup> Or should have put out her cigarette immediately when asked, or should have stepped out of the car immediately when asked, or should have had family and friends who could post bail. See, e.g., James Queally, *What Happened to Sandra Bland Before She Died in a Texas Jail?*, L.A. TIMES (July 28, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-sandra-bland-2015-0728-htmstory.html> [<https://perma.cc/FG8V-44ES>].

<sup>10</sup> See, e.g., Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> (last visited Jan. 23, 2018). Apart from the question of whether motorists should be stopped for minor infractions of this nature, there is another problem in this particular case: a single burned out brake light is not a violation of South Carolina law, which requires only a single operating brake light. See SC Code § 56-5-4730 (2012); see also Cristian Farias, *Ignorance of the Law*, SLATE (April 14, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/04/why\\_michael\\_slager\\_pulled\\_over\\_walter\\_scott\\_cops\\_who\\_don\\_t\\_know\\_the\\_law.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/why_michael_slager_pulled_over_walter_scott_cops_who_don_t_know_the_law.html) [<https://perma.cc/L63Q-V8TN>] (making the point that Michael Slager's stated ground for stopping Walter Scott was an insufficient reason for a stop).

<sup>11</sup> Well over 100 black and Latino men were tortured by Chicago police during more than a decade of interrogation sessions that involved dozens of officers, both rank-and-file and supervisory. See Noah Berlatsky, *When Chicago Tortured*, ATLANTIC (December 17, 2014), <https://www.theatlantic.com/national/archive/2014/12/chicago-police-torture-jon-burge/383839/> [<https://perma.cc/MN6S-K4DD>] (stating that from 1972 to 1981, Burge and his men used torture to elicit confessions from more than 110 African-American men). In recent years, special prosecutors have investigated 148 cases and found that Burge "was guilty of abusing persons with impunity" and had empowered his subordinates to do so as well, and millions of dollars in settlements have been paid to torture victims. Thirty men who argued that they were tortured into confessing by Burge and his men remain incarcerated. See Marie Cohen, *Untangling Truth*, INJUSTICE WATCH (Dec. 12, 2017), <https://www.injusticewatch.org/features/demond-weston-burge> [<https://perma.cc/8S7R-QTDM>]. Nevertheless, no state criminal charges were brought against any officers. Burge was the sole officer to pay a penalty; he was convicted of federal perjury and obstruction of justice. *Id.*

these narratives. Can popular culture play a role in challenging them instead of perpetuating them? And did *The Wire* play such a role? When I last wrote about *The Wire* I called it “a dazzling literary achievement; the greatest television series ever made.”<sup>12</sup> But I’m grateful for this chance to revisit *The Wire* and consider the question: did it disrupt the conventional narrative about police brutality? And the larger question: what would it take to do so?

This retrospective is more than just an opportunity to revisit *The Wire*. It is also a chance to take stock of what the intervening years have taught us—both about policing and about the role of the media in reflecting, shaping, and critiquing policing narratives. *The Wire* debuted in 2002 and ended in 2008.<sup>13</sup> There is an argument to be made that in the years since *The Wire* premiered, the dominant policing narrative has run into its strongest challenge ever. In 2002, the cell phone camera was introduced. In 2007, the iPhone was introduced. By the time the last episode of *The Wire* aired ten years ago, almost everyone had a phone camera. Dashcams and body-cams were increasingly common. We have access to raw footage of police encounters now—from passersby (as in the Eric Garner and Walter Scott cases),<sup>14</sup> from family members in close proximity to police violence (as in the Philando Castile case),<sup>15</sup> from the dashboard of the cop car (as in the *Scott v. Harris* case and the Terence Crutcher case),<sup>16</sup> from officers’ bodycams (as in the Philando Castile case<sup>17</sup> and the Stephon Clark case<sup>18</sup>) and from police helicopters (as in the Stephon Clark case and the Terence Crutcher case<sup>19</sup>). These photos have an immediacy that is powerful. They have sparked

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<sup>12</sup> Susan A. Bandes, *And All the Pieces Matter: Thoughts on “The Wire” and the Criminal Justice System*, 8 OHIO ST. J. CRIM. L. 433, 445 (2011). I still maintain this is an accurate assessment.

<sup>13</sup> Rob Sheffield, *100 Greatest Shows of All Time*, ROLLING STONE (Sept. 21, 2016), <https://www.rollingstone.com/tv/lists/100-greatest-tv-shows-of-all-time-w439520/the-wire-w439640> [https://perma.cc/M5MP-QVSA].

<sup>14</sup> See Kass, *supra* note 8; Schmidt & Appuzzo, *supra* note 10.

<sup>15</sup> See, e.g., Matt Furber, *After Philando Castile’s Killing, Obama Calls Police Shootings “an American Issue”*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> (last visited Jan. 22, 2018).

<sup>16</sup> *Scott v. Harris*, 550 U.S. 372 (2007). Terence Crutcher, an unarmed black man, was shot on the highway after he exited his stalled vehicle to seek help. See Liam Stack, *Video Released in Terence Crutcher’s Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), <https://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html> (last visited Apr. 26, 2018).

<sup>17</sup> See, e.g., Furber, *supra* note 15.

<sup>18</sup> Clark, an unarmed black man, was fatally shot by Sacramento police, who stated they believed he was armed and advancing toward them. Clark was in fact holding a cell phone. An autopsy determined that he was shot eight times, primarily in the back. See Frances Robles and Jose A. Del Real, *Stephon Clark Was Shot 8 Times Primarily in His Back, Family-Ordered Autopsy Finds*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/us/stephon-clark-independent-autopsy.html> (last visited Apr. 26, 2018).

<sup>19</sup> See *id.*; Stack, *supra* note 16.

outrage and galvanized the movement to combat police brutality. For a while it seemed that video footage (“the C-Span of the streets”)<sup>20</sup> would finally bridge the experiential divide on policing. It seemed reasonable to hope that video footage would make accounts of police brutality more plausible and credible to those who haven’t observed or experienced it directly. As powerful as these videos are, there is no clear verdict yet on whether the outrage they elicit will lead to deeper understanding or lasting reform.

In this article, I will begin by examining the promise and limits of raw video footage. I will then turn to *The Wire*, and, specifically, to the question of media’s potential to bridge the vast divide between police-saturated neighborhoods and the broader public view of police-civilian interactions. I will argue that *The Wire*, for all its immersive attention to West Baltimore, did not really capture the experience of living in a police-occupied neighborhood in which one’s every innocuous move can lead to a confrontation—even a fatal confrontation—with police. *The Wire* was strong on the problem of under-policing, but it didn’t do justice to the problem of over-policing, or the experience of living with it.

## I. THE PROMISE OF VIDEO—AND SOME OF ITS LIMITS

A recently released study concluded that being videotaped doesn’t really change the behavior of police.<sup>21</sup> This is not really surprising: videotape has little chance of changing police behavior if police believe they are behaving properly (or that they are behaving as they’ve been implicitly asked to behave, or in a way that will be rewarded). Police behavior will change when expectations for police behavior change.<sup>22</sup>

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<sup>20</sup> The phrase was coined by Paul Butler. See *PoliceVideo*, “C-Span of the Streets” Seen Eroding Confidence in Officers, CRIME REP. (July 31, 2015), <https://thecrimereport.org/2015/07/31/2015-07-police-video-feature-nyt/> [<https://perma.cc/5YNG-B3BD>]. See also NEAL FEIGENSON & CHRISTINA SPEISEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 26 (2009) (discussing the “democratization of meaning-making”).

<sup>21</sup> A large study of police in Washington, DC found that the cameras had no discernible effect on use of force or citizen complaints. See David Yokum, Anita Ravishankar & Alexander Coppock, *Evaluating the Effects of Police Body-Worn Cameras: A Randomized Controlled Trial*, THE LAB @ DC, Working Paper (Oct. 20, 2017); Nell Greenfieldboyce, *Body Cam Study Shows No Effect on Police Use of Force or Citizen Complaints*, NPR (Oct. 20, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/20/558832090/body-cam-study-shows-no-effect-on-police-use-of-force-or-citizen-complaints> (last visited Jan. 19, 2018). But see Barak Ariel, et al., ‘Contagious Accountability’: A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens’ Complaints Against the Police, 44 CRIM. JUST. & BEHAVIOR 293, 302 (2017) (finding an effect in situations where the camera recorded continuously and the officer was aware the camera was recording).

<sup>22</sup> Conversely, when police are aware that they are behaving improperly, they may disable their dashcams. See, e.g., Bryant Jackson-Green, *Report: Dashcam Equipment in Chicago Police Vehicles ‘Intentionally’ Destroyed*, IL. POL. (Jan. 28, 2016), <https://www.illinoispolicy.org/report-dashcam-equipment-in-chicago-police-vehicles-intentionally-destroyed/> [<https://perma.cc/UXN7-79R4>] (Illinois report finding that dashcams were deliberately disabled on repeated occasions).

But in evaluating the role of video, its impact on the police themselves is only part of the equation. What about the tapes' powerful emotional impact on the viewer? There is no question that video footage has proved its capacity to shock, educate, and motivate people. Footage like the passerby video of Walter Scott, who was pulled over for a burned-out tail light and then fatally shot in the back eight times as he was running away. Or the dashcam video of the fatal shooting of unarmed motorist Samuel DuBose during a traffic stop for a missing front license plate. Or the livestreamed iPhone and dashcam video of the last moments of the life of Philando Castile, who was fatally shot during a traffic stop. All these videos elicited widespread outrage. And so it has been fascinating—and deeply disheartening—to watch the prevailing narrative continue to shape perceptions, even in the face of video footage that contradicts it.

My point is not that videos necessarily provide a full, reliable account of “what really happened.”<sup>23</sup> Like any evidence, videos vary in probative value and must be evaluated. Videos are taken from particular perspectives;<sup>24</sup> they may have gaps, they may be too narrow in scope to capture all relevant details, and their quality varies, to name a few of their limitations. Videos cannot simply be accepted as determinative records of contested events, and any discussion of the seeming disconnect between videos and legal results must acknowledge this caveat.

It's also important to acknowledge that videos have had a positive influence on police accountability in a number of situations. Video footage has changed some legal outcomes. Recently, bodycam footage of police officers planting evidence led to the dismissal of dozens of criminal cases in West Baltimore.<sup>25</sup> Prosecutors have on occasion brought charges because of discrepancies between police accounts and video; charges that would not have been brought absent the release of the

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<sup>23</sup> See, e.g., discussion of the Supreme Court's opinion in *Scott v. Harris*, below at text accompanying notes 50–54, for an example of the tendency to regard video evidence as self-evident. See also Susan A. Bandes and Jessica E. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1017–25 (2014) (discussing the attitudes courts take toward photographic representations) and *id.* at 1040–44 (discussing judicial reactions to video evidence).

<sup>24</sup> Dashcam videos are taken from the perspective of the police vehicle, at a distance from the police-citizen encounter. Bodycams are also taken from a police perspective, but a more immediate one. See, e.g., *Patient at Center of Utah Nurse's High-Profile Arrest Over Blood Draw Dies*, NBC NEWS (Sept. 26, 2017), <https://www.nbcnews.com/news/us-news/patient-center-utah-nurse-s-high-profile-arrest-over-blood-n805051> [<https://perma.cc/8EDG-QR68>] (the widely watched bodycam footage of a police officer wrongfully arresting a Salt Lake City nurse, which provides a visceral, disturbing close-up view of the encounter, including her distress).

<sup>25</sup> See Kevin Rector, Catherine Rentz & Tim Prudente, *Arrests Undone: Suspects Freed as Prosecutors Drop Cases Due to Body Camera Video*, BALT. SUN (Aug. 8, 2017), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-ci-dropped-cases-20170808-story.html> (last visited Jan. 26, 2018).

video footage. The case of Laquan McDonald, a 17 year old resident of Chicago's South Side who was shot in the back multiple times while retreating from the police, provides a prominent example of a case in which the footage led to both internal discipline and a criminal conviction.<sup>26</sup> In that case, the discrepancies between the official accounts and the video were stark and shocking: there was a reason so many officials went to such great lengths to keep the video under wraps. The case of motorist Walter Scott, in which Officer Michael Slager received a twenty-year prison sentence for shooting Scott in the back and planting a knife by his side, provides another example.<sup>27</sup>

Even so, the failures of video evidence to persuade legal decision makers have been striking. A grand jury failed to indict Officer Daniel Pantaleo for the death of Eric Garner, despite video showing the unresisting Garner dying in a police chokehold.<sup>28</sup> Two juries failed to convict Officer Ray Tenser in the Samuel DuBose case. The prosecutor has announced that he will not try Tenser a third time, because he doubts he can find a jury willing to convict a cop.<sup>29</sup> A judge failed to convict Officer Jeronimo Yanez in the Philando Castile case.<sup>30</sup> It appears that the dominant narrative is so powerful it makes jurors disbelieve their own eyes.

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<sup>26</sup> Jason Van Dyke, shown on dashcam shooting McDonald, was convicted by a jury of second-degree murder and 16 counts of aggravated battery with a firearm. Mark Guarino & Mark Berman, Chicago police officer Jason Van Dyke convicted of second-degree murder for killing Laquan McDonald, *THE WASHINGTON POST* (Oct. 5, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/10/05/chicago-police-officer-jason-van-dyke-convicted-of-second-degree-murder-for-killing-laquan-mcdonald/?noredirect=on&utm\\_term=.90a15ed7f5a5](https://www.washingtonpost.com/news/post-nation/wp/2018/10/05/chicago-police-officer-jason-van-dyke-convicted-of-second-degree-murder-for-killing-laquan-mcdonald/?noredirect=on&utm_term=.90a15ed7f5a5) (last visited Oct 8, 2018). Three other current and former police officers have been charged with conspiracy, official misconduct, and obstruction of justice. A special prosecutor recently declined to bring charges against other officers who were at the scene and filed police reports that were contradicted by the visual evidence. Nausheen Husain, *Data: Laquan McDonald Timeline: The Shooting, the Video, the Fallout*, *CHI. TRIB.* (Oct. 20, 2017), <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> (last visited Jan. 26, 2018).

<sup>27</sup> See Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, *N.Y. TIMES* (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html> (last visited Jan. 26, 2018). See also the criminal conviction of Officer Marco Proano for excessive force, based largely on dashcam video showing him firing sixteen times into a moving vehicle filled with teens. See Jason Meisner, *Chicago Cop Given 5 Years in Prison for Shooting at Car, Wounding Two Teens*, *CHI. TRIB.* (Nov. 21, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-met-chicago-cop-shooting-sentencing-20171120-story.html> [<https://perma.cc/U7MA-43EN>].

<sup>28</sup> See, e.g., Ray Sanchez & Shimon Prokupecz, *Protests After N.Y. Cop Not Indicted in Chokehold Death; Feds Reviewing Case*, *CNN* (Dec. 4, 2014), <http://www.cnn.com/2014/12/03/justice/new-york-grand-jury-chokehold/index.html> [<https://perma.cc/9LSW-QLCY>].

<sup>29</sup> See Elliott C. McLaughlin, *Ex-police Officer Ray Tensing Will Not Be Tried Again in Fatal Shooting*, *CNN* (July 18, 2017), <http://www.cnn.com/2017/07/18/us/ray-tenzing-will-not-be-tried-again/index.html> [<https://perma.cc/Z3HS-Z4NJ>]. A jury also acquitted Officer Betty Shelby for the fatal shooting of Terence Crutcher in Tulsa. Video showed that the unarmed Crutcher had his hands up throughout most of the brief encounter, although the view was obstructed in the moments just prior to the shooting. See Stack, *supra* note 16.

<sup>30</sup> See, e.g., Mark Berman, *Minn. Officer Acquitted in Shooting of Philando Castile During Traffic Stop, Dismissed from Police Force*, *WASH. POST* (June 17, 2017), <https://>

Video, no matter how compelling, is often no match for our preconceptions about policing. Indeed, as Adam Benforado has argued, the presence of video might actually let “judges and jurors off the hook” by giving them the mistaken impression that “they could not possibly have brought any bias to watching the videotape because there is no room for ‘interpretation.’”<sup>31</sup>

In the case of Commander Glen Evans, mentioned above, there was no video record of the encounter. Would such a video have affected the credibility determination? Fast forward to the acquittal of Jason Stockley in St Louis in September 2017 for shooting black motorist Anthony Lamar Smith.<sup>32</sup> Stockley claims Smith was reaching into his car to grab a gun; prosecutors argued Stockley had planted the gun.<sup>33</sup> Both audio and video recordings existed; both seemed consistent with the gun-planting hypothesis. On audio during the car chase, Officer Stockley was heard to say: “we’re killing this motherfucker, don’t you know.”<sup>34</sup> Video showed Stockley returning to his police vehicle after he approached Smith’s car, going through a duffel bag, and then returning to the vehicle of Smith (who was now dead).<sup>35</sup> The only DNA on the gun belonged to Stockley. But despite the wealth of evidence consistent with the prosecution’s claim of excessive force, the judge drew on his own view of how the world works, stating that the “Court observes, based on its nearly thirty years on the bench, that an urban heroin dealer not in possession of a firearm would be an anomaly.”<sup>36</sup> It is fair to wonder whether any amount of evidence could have changed the judge’s assumptions about what must have occurred.

### A. Cop Shows and Other Cultural Influences

We “see” the world by shaping it into narratives that make sense to us.<sup>37</sup> Whose perspective matters? Who or what is believable? What motivations jibe with our experience and cultural knowledge?<sup>38</sup> Cop

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[www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm\\_term=.0a92ec43fc54](http://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm_term=.0a92ec43fc54)  
[<https://perma.cc/UD82-58XQ>].

<sup>31</sup> Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1371–73 (2010).

<sup>32</sup> *Missouri v. Stockley*, 1622 CR 02213-01 (Mo. 22nd Cir. Ct. Sept. 15, 2017); Amy B. Wang, *Ex-Officer Acquitted in St. Louis Slaying: “I Did Nothing Wrong”*, WASH. POST (Sept. 16, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/09/16/ex-officer-acquitted-in-st-louis-slaying-i-did-nothing-wrong/?utm\\_term=.0428493eb289](https://www.washingtonpost.com/news/post-nation/wp/2017/09/16/ex-officer-acquitted-in-st-louis-slaying-i-did-nothing-wrong/?utm_term=.0428493eb289) [<https://perma.cc/BES4-UGQM>].

<sup>33</sup> *Stockley*, 1622 CR 02213-01, at 4.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.* at 26.

<sup>37</sup> See generally JOHN BERGER, *WAYS OF SEEING* (1972).

<sup>38</sup> And when does a story begin and end? For example, in assessing whether the officer who

shows have played an influential role in shaping our national consciousness about police and policing. The police reform literature commonly refers to concepts like the “Dirty Harry” syndrome.<sup>39</sup> Trial lawyers commonly refer to the “CSI effect.”<sup>40</sup> Tropes about cops and perps and the nature of crime permeate popular discourse, including discourse about law (consider, for example, how cop shows have helped shape—and distort—expectations about the *Miranda* warnings).<sup>41</sup> Although cop shows do not always portray all police officers as upstanding people,<sup>42</sup> cop shows by definition take the police perspective. And (with the notable exception of *The Wire*) they tend to treat each officer as an individual rather than as part of a culture or a system.

The genre of the police procedural also influences legal norms. The CSI effect refers to a very specific example of the effect of culture on law: the idea that shows like CSI have led juries to develop unwarranted faith in the power and importance of forensic evidence, and that these expectations affect their legal decisions (and, in a logical response, the strategic decisions of lawyers about what evidence to present).<sup>43</sup> But it is not only juries—lay decision-makers—who are influenced by popular conceptions of policing; it is also judges and other legal actors.

As the *Scott v. Harris* case illustrates, the influence of popular culture extends to the highest reaches of the legal system. *Scott v. Harris* required the Court to determine whether police had behaved unreasonably during a high-speed vehicle chase which rendered a motorist a paraplegic.<sup>44</sup> The Court viewed dashcam footage of the chase.<sup>45</sup> In the

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shot Tamir Rice used excessive force, should the story begin when the officer decided to drive his car into such close proximity to Rice that the officer then felt threatened, or should the story begin (as current use of force doctrine prescribes) at the point at which the officer decides to use force, regardless of whether he wrongly placed himself in that situation? See *infra* note 63.

<sup>39</sup> See JAMES SKOLNICK & JAMES FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 107 (1993). Based on the 1971 film *Dirty Harry*, the phrase has come to connote an end-justifies-the-means mentality, in which police must ignore legal technicalities in order to fight crime effectively.

<sup>40</sup> See Katie L. Dysart, *Managing the CSI Effect in Jurors*, ABA J. (May 28, 2012), <https://apps.americanbar.org/litigation/committees/trialevidence/articles/winterspring2012-0512-csi-effect-jurors.html> [<https://perma.cc/3S3P-WS7V>] (defining the CSI Effect as “the phenomenon whereby high-tech, forensic science dramatized in television crime dramas such as CSI . . . theoretically promotes unrealistic expectations among jurors . . . about the clarity and definitiveness of forensic evidence). See also Donald Shelton, *The “CSI Effect”: Does It Really Exist?*, 259 NAT’L INST. JUST. J. 1, 5 (2008).

<sup>41</sup> See Susan Bandes & Jack Beermann, *Lawyering Up*, 2 GREEN BAG 4, 5 (1998) (discussing the portrayal of *Miranda* in the television show *NYPD Blue*).

<sup>42</sup> Examples of problematic cops in popular series include Detective Vic Mackey in *The Shield* and Detective Norman Buntz in *Hill Street Blues*.

<sup>43</sup> Whether the effect actually changes verdicts is a matter of debate. See Shelton, *supra* note 40, at 5.

<sup>44</sup> See *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>45</sup> The Court found this video so valuable that it took the unprecedented step of posting it on the official Supreme Court website. See *Media Resources*, U.S. SUPREME COURT (Apr. 30, 2007),

Court's majority opinion, Justice Scalia characterized what he saw on the video as "closely resembling a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."<sup>46</sup> During the preceding oral argument, Justice Scalia shed light on his frame of reference, likening the chase to the movie *The French Connection*, in which the good guy cops chase the bad guy drug dealers, and there is no moral ambiguity about who is to blame.<sup>47</sup> The Court's 8-1 decision in favor of the police has been widely criticized<sup>48</sup> for accepting the bodycam video as definitive evidence<sup>49</sup> that made "the reality of the case perfectly clear."<sup>50</sup> As Justice Stevens pointed out in dissent, the video was susceptible to more than one reasonable interpretation, and moreover, any conclusions about the legal import of the vehicle must take into account the larger context in which the video took place (e.g. a wide four-lane highway and the presence of police sirens alerting bystanders to get out of the way).<sup>51</sup> *Scott v. Harris* helps illustrate the influence of culture on the interpretation of law. At the same time, and in ways that cannot be easily disentangled, it provides an example of the law's formal adoption of perspectives and assumptions that hinder police accountability.

## B. Perspective-Taking and Excessive Force Doctrine

One example of the law's formal adoption of the police perspective—likely the most consequential one—is the law of excessive force. The Supreme Court's legal test for determining whether a police officer used excessive force specifies that we take the point of view of the officer, not the suspect.<sup>52</sup> This choice is frequently outcome determinative.

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<https://www.supremecourt.gov/media/media.aspx> [https://perma.cc/7XCL-KR3J].

<sup>46</sup> *Harris*, 550 U.S. at 379.

<sup>47</sup> See FEIGENSON & SPEISEL, *supra* note 20, at 41–42 (citing *The French Connection*).

<sup>48</sup> See *id.* at 36–49. Dan Kahan, David Hoffman, and Donald Braman studied the impact of the viewer's cognitive biases on interpretation of the event. See Kahan et al., *Whose Eyes Are You Going to Believe? An Empirical (and Normative) Assessment of Scott v. Harris*, 122 HARV. L. REV. 837, 866 (2009). Adam Benforado emphasizes that not only the viewer's internal attitudes, but exterior situational factors, trigger implicit associations and influence interpretation (for example the fact that the speeding took place in a high crime neighborhood may contribute to triggering implicit associations of race and crime). Benforado, *supra* note 31, at 1369–70.

<sup>49</sup> See FEIGENSON & SPEISEL, *supra* note 20, at 42. (Justice Scalia, in *Scott v. Harris*, 550 U.S. at 378 n.5, posted the video on the Supreme Court website, saying "[w]e are happy to let the video speak for itself.") See note 45, *supra*.

<sup>50</sup> FEIGENSON & SPEISEL, *supra* note 20, at 40. As Feigenson and Speisel discuss, there are numerous problems with this assumption. For example, not only does the dashcam take the police perspective; in addition, the video was evidently taken with a camera with Steadicam features, which rendered the camera stable (and thus both less reflective of the actual conditions and more authoritative in appearance).

<sup>51</sup> *Scott*, 550 U.S. at 390–91 (2007) (Stevens, J., dissenting).

<sup>52</sup> See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); see also David Dagan, *The Baltimore Cops*

Excessive force doctrine discounts the point of view of the suspect. It doesn't inquire into how a suspect's perspective might have influenced her behavior. It does not consider, for example, how an objectively reasonable suspect would react to being approached by a police officer in an aggressively policed neighborhood where mistrust of police is rampant.<sup>53</sup>

The excessive force test is, in theory at least, an objective test. It asks not just about what the particular officer believed, but about what an objective, reasonable officer would have believed.<sup>54</sup> The objective test ought to impose some limits, but it rarely does.<sup>55</sup> In application, it illustrates the powerful influence of background assumptions on legal decision-making in cases involving police accountability. In numerous cases, videos of cops shooting suspects who seem to be complying, who are not resisting, who are running away, fail to convince triers of fact that the police conduct was unreasonable.<sup>56</sup> The officers, however unreasonably, may well have *actually* feared for their own lives.<sup>57</sup> And jurors in excessive force cases reported that, videos or no videos, "they had been swayed most of all by officers' [own] assertions that they feared for their lives."<sup>58</sup> In jurors' view, if the police officers say they felt

*Studying Plato and James Baldwin*, ATLANTIC (Nov. 25, 2017), <https://www.theatlantic.com/policies/archive/2017/11/the-baltimore-cops-studying-plato-and-james-baldwin/546485> [<https://perma.cc/5VUX-M8UR>] (Police officers "are rarely given tools to imagine the circumstances of the person in the driver's seat.")

<sup>53</sup> See Benforado, *supra* note 31, at 1372.

<sup>54</sup> See FEIGENSON & SPEISEL, *supra* note 20, at 95–96 (referring to the test as, in practice, a hybrid of the objective and the subjective).

<sup>55</sup> See, e.g., Seth Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 856 (2014) (arguing that courts too often uncritically accept and defer to the notion that police constantly make last minute decisions in a context of imminent danger).

<sup>56</sup> See, e.g., Chelsea Bailey, *Terence Crutcher Shooting by Tulsa Police Tragic but Justified: Jury Foreman*, NBCNEWS (May 20, 2017), <https://www.nbcnews.com/news/us-news/terence-crutcher-shooting-tulsa-police-was-tragic-justified-jury-foreman-n762566> [<https://perma.cc/93MB-S9L9>] (in which Officer Betty Shelby was acquitted after shooting the unarmed Terence Crutcher on the highway).

<sup>57</sup> See the astonishing Seattle case involving a police officer's evidently quite unreasonable suspicion that a man on the street using a golf club as a walking stick is threatening her with the club as she drives by in her police vehicle. The officer informs the suspect that the encounter is being captured on video. Elahe Izadi, *Video Shows Police Officer Arresting an Elderly Black Man Carrying a Golf Club*, WASH. POST (Jan. 29, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/01/29/video-shows-seattle-police-officer-arresting-an-elderly-black-man-carrying-a-golf-club/?utm\\_term=.2119cebc7a9f](https://www.washingtonpost.com/news/morning-mix/wp/2015/01/29/video-shows-seattle-police-officer-arresting-an-elderly-black-man-carrying-a-golf-club/?utm_term=.2119cebc7a9f) [<https://perma.cc/PQ5K-CN73>] ("You swung that golf club at me. It's a weapon. Set it down. You are on audio and video right now."). This is a cop who appears to be absolutely sure the video will back her up that the civilian standing on the corner swung his golf club at her and that this threatened her safety. She never does change her mind about that, even after seeing the video. See also *Cop Confident He'll Be Exonerated By Clear Video Evidence of Him Shooting Defenseless Black Man*, ONION (Sept. 29, 2017), <http://www.theonion.com/article/cop-confident-hell-be-exonerated-clear-video-evide-57078> [<https://perma.cc/E7Q8-D8NV>].

<sup>58</sup> See Julie Bosman, Mitch Smith, & Michael Wines, *Jurors Find Video Isn't Providing 20/20 Vision in Police Shootings*, N.Y. TIMES (June 25, 2017), <https://www.nytimes.com/2017/06/25/us/police-shootings-trials-video-body-cam.html> (last visited Jan. 23, 2018).

threatened, they felt threatened. If they felt threatened, their actions must have been reasonable.

### C. Legal Doctrine: Individualizing Police; Aggregating Suspects

It's hard to tell a good, coherent story about systemic harm. Fault is often widely distributed; it's hard to draw a clear line from a single wrongdoer to the harm; the problem is too often inaction rather than action. *The Wire* demonstrated that it can be done—that there is nothing inherent in the medium of television that prevents the telling of such stories.<sup>59</sup> But nevertheless, popular culture and other media show a strong preference for stories about individual police officers. They tend to portray each such story as standing on its own; each such officer as an autonomous agent.<sup>60</sup>

In various ways, the law encourages the view that every police officer is an individual agent, not part of a larger culture.<sup>61</sup> It deems that each incident should be evaluated on its own merits without regard to the officer's past behavior (see, for example, the multiple barriers, legal, contractual and otherwise, to introducing an officer's past disciplinary records),<sup>62</sup> without regard to the behavior that got him into the current situation (excessive force doctrine requires evaluating the officer's conduct *at the time of the confrontation*, without consideration of his conduct leading to the confrontation),<sup>63</sup> and even, in many respects, without regard to prior law on the issue (illegal police conduct may be

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<sup>59</sup> See Bandes, *supra* note 12, at 435 (making this argument); see also Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 586 (2004) (prior to the advent of *The Wire*, questioning whether the problem was inherent in the nature of the medium).

<sup>60</sup> Except, of course, for his partner. The relationship between partners occupies its own iconic place in popular culture.

<sup>61</sup> For example, it has become increasingly difficult to proceed on a claim that police acted in accordance with an unconstitutional custom or policy, and nearly impossible to bring a colorable claim of policy-level failure to train, discipline, or supervise. See *Connick v. Thompson*, 563 U.S. 51, 52 (2011). See also Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715 (2011).

<sup>62</sup> See, e.g., Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1228–32 (2017) (A police officer's disciplinary record is often excluded, for reasons ranging from interpretation of evidentiary rules to the terms of the police contract); see also Graham Rayman, *Legal Aid Society Continues Push for NYPD to Release Cops' Disciplinary Records*, N.Y. DAILY NEWS (Oct. 6, 2017), <http://www.nydailynews.com/new-york/legal-aid-continues-push-public-nypd-disciplinary-records-article-1.3545617> (last visited Jan. 19, 2017) (showing the struggle to change New York's stringent rules on exclusion of police disciplinary records).

<sup>63</sup> In the Tamir Rice case, for example, the legal framework excluded consideration of whether the police officer put himself in harm's way in violation of departmental policy, creating the proximity and the fear that led to his shooting a 12-year-old boy. See *Graham v. Connor*, 490 U.S. 386, 398 (1989); but see *County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1549 (2017) (last term's decision on proximate cause in § 1983 cases, which remanded an excessive force case and left open the possibility that an officer's earlier illegal actions were relevant to the evaluation of his later use of excessive force).

immunized in both criminal and civil cases).<sup>64</sup> In various ways, legal rules and norms enforce the assumption that police are acting as public servants, and that their motives should be assumed to align with the public interest rather than personal concerns, ambitions, or biases. Assumptions to the contrary are often regarded as disqualifying for jurors, and even judges.<sup>65</sup>

In contrast to the individualized treatment of law enforcement agents, victims and complainants are readily aggregated; their group characteristics frequently assumed. They are assigned a shared history, based on explicit assumptions about gang membership<sup>66</sup> or other markers of criminality, and by implicit and sometimes explicit assumptions about the connections between race, ethnicity, and criminal behavior.<sup>67</sup>

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<sup>64</sup> See *Heien v. North Carolina*, 135 S.Ct. 530, 539 (2014) (in which the Court carved out an exception to the exclusionary rule, holding illegally obtained evidence admissible when police acted according to a reasonable mistake about what the law is). In the civil rights context, qualified immunity doctrine has been particularly effective at insulating police in civil right suits. Even when a police action violates the law, the officer is entitled to immunity from civil damages if the law in question was not clearly established at the time of the violation. Because each Fourth Amendment case has slightly different facts, courts have been inclined to find that where there is a small change in facts, there is no clearly established law on the subject. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), in which the Court found that Officer Kisela was entitled to qualified immunity for the fatal shooting of Amy Hughes while Hughes was standing outside her home, six feet from her roommate and nowhere near the officer and his partner, holding a knife at her side with the blade facing away. The Court emphasized that “specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” *But see id.* at 1158 (Sotomayor, J., dissenting) (emphasizing that the “court has long rejected the notion that ‘an official action is protected by qualified immunity unless the very action in question has previously been held unlawful’”) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>65</sup> See *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1996) (“It would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion.”); see also Susan A. Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1332 n.356 (1999) (discussing exclusion of jurors who express skepticism toward the assumed veracity of police).

<sup>66</sup> See, e.g., Jeanne Kuang, *Chicago Police Admission Casts Doubt on Validity of Gang Database*, INJUSTICE WATCH (Dec. 6, 2017), <https://www.injusticewatch.org/news/2017/chicago-police-admits-it-cannot-verify-immigrant-gang-database> [<https://perma.cc/Q6XA-EUK2>] (citing admission by police that casts doubt on the accuracy of its methods of determining gang affiliation); see also Tamar Manasseh, *To the Chicago Police, any Black Kid is in a Gang*, N.Y. TIMES (Dec. 25, 2017), <https://www.nytimes.com/2017/12/25/opinion/chicago-police-black-kids-gangs.html> (last visited Jan. 26, 2018) (The Chicago gang crimes database sweeps in young people who are “likely offenders.” 90% of those in the database are black or Latino.).

<sup>67</sup> See Philip Bump, *The Facts About Stop-and-Frisk in New York City*, WASH. POST (Sept. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/21/it-looks-like-rudy-giuliani-convinced-donald-trump-that-stop-and-frisk-actually-works/> (last visited Jan. 26, 2018) (reporting that former New York mayor Michael Bloomberg, when asked whether the controversial stop-and-frisk program unfairly targeted blacks and Latinos, responded that crime was more of a problem with young nonwhite men, and that “I think we disproportionately stop whites too much and minorities too little”).

They are even assigned shared responsibility for the violence that surrounds them. Neighborhood matters<sup>68</sup>—living in a “high crime area” is a legal factor in determining how suspicious one’s actions are.<sup>69</sup> Their claims are often viewed as self-serving, both in criminal and civil cases. Friends, family, and other corroborating witnesses may have outstanding warrants, arrest records, family members in prison, or other experiences that allow their testimony to be viewed as less credible. And while police officers generally appear in court cleansed of their past misdeeds, a suspect’s own history of criminality<sup>70</sup> or mental illness<sup>71</sup> sometimes is claimed to render fear reasonable even if police didn’t know about it at the time of the encounter.

The legal system anecdotalizes systemic conduct in another way that bears directly on the problem of aggressive, racially disparate policing. As Tracey Meares recently discussed, the constitutional framework for regulating stop-and-frisk and other police-civilian encounters treats each such encounter as a separate incident.<sup>72</sup> Yet the stark racial disparities in the deployment of stop-and-frisk, broken windows policing, and other such law enforcement strategies do not result from an accretion of individual decisions; they occur on a “programmatically level.” The decisions are “carried out by a police force *en masse* as a program.”<sup>73</sup> New York City’s stop-and-frisk program and Ferguson, Missouri’s use of the criminal justice system as a municipal piggybank, for example,

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<sup>68</sup> See, e.g., Kimberly Barsamian Kahn & Paul G. Davies, *What Influences Shooter Bias? The Effects of Suspect, Race, Neighborhood, and Clothing on Decisions to Shoot*, 73 J. SOC. ISSUES, 723, 732 (2017) (finding evidence that the perceived “threatening” character of a neighborhood affects police decisions to shoot).

<sup>69</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 122 (2000).

<sup>70</sup> See, e.g., Susannah Cullinane, *Breaking Down the Michael Brown Video—and What It Reveals*, CNN (Mar. 14, 2017), <http://www.cnn.com/2017/03/14/us/michael-brown-ferguson-video-claims/index.html> [<https://perma.cc/EG54-JJWB>]. In Michael Brown’s case, the police had no knowledge of his conduct at the time of the encounter but used his alleged prior conduct in a candy store to justify subsequent police conduct toward him on the street.

<sup>71</sup> See, e.g., the fatal shooting of Quintonio LeGrier (and his neighbor Bettie Jones) on the South Side of Chicago. LeGrier was holding a baseball bat when Officer Robert Rialmo shot him, and Rialmo later claimed that the shooting was justified, in part because of LeGrier’s mental health issues, although the responding officers were not aware of these issues at the time of the shooting. Although the Chicago police disciplinary authority recently ruled the shooting unjustified, finding that LeGrier had not wielded his bat and that Rialmo had not been in close enough proximity to justify using his weapon, (See Dan Hinkel, *Cop’s Fatal Shooting of 2 Ruled Unjustified*, CHI. TRIB. (Dec. 29, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-met-legrier-jones-shooting-unjustified-20171228-story.html> (last visited Jan. 26, 2018)), Superintendent Eddie Johnson overruled their recommendation to fire Rialmo. See Dan Hinkel, *Chicago Top Cop Rejects Watchdog Agency Recommendation that He Fire Officer in 2015 Fatal Shooting*, CHI. TRIB. (Mar. 28, 2018), <http://www.chicagotribune.com/news/local/breaking/ct-met-robert-rialmo-cop-police-decision-20180323-story.html> [<https://perma.cc/6ZBP-83TH>].

<sup>72</sup> Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 159 (2015).

<sup>73</sup> *Id.*

were the fruits of high-level administrative decisions. Under these decisions, law enforcement stopped, searched, or arrested people in low income, minority neighborhoods for conduct that elicits little if any police attention elsewhere.

For example, The Ferguson Report<sup>74</sup> describes a city whose black residents, in vast disproportion to their numbers, suffer legal consequences for how they walk (indeed, “manner of walking” was the offense that spurred Officer Darren Wilson to approach Mike Brown), how they mow their lawns, and similar innocuous acts. Similarly, a recent study of Jacksonville, Florida’s enforcement of pedestrian rules such as jaywalking, “failing to cross a street at a right angle,” and “not walking on the left side of a road when there are no sidewalks,” found that black pedestrians were almost three times as likely as white pedestrians to be ticketed for a pedestrian violation, and that “residents of the city’s three poorest zip codes were about six times as likely to receive a pedestrian citation as those living in the city’s other, more affluent zip codes.”<sup>75</sup> The federal decision declaring New York City’s stop-and-frisk program unconstitutional<sup>76</sup> describes whole neighborhoods where residents were repeatedly stopped and frisked based on vague criteria such as loitering or “furtive” appearance.<sup>77</sup> New York City police conducted 4.4 million stops between 2004 and 2012, and 83% of those stopped were black or Latino, though only half the population was black or Latino.<sup>78</sup> These stops could not be justified by the incidence of crime, as the *Floyd* decision found.<sup>79</sup> But nor could they be explained as 4.4 million individual decisions by street-level officers.<sup>80</sup> Judge Scheindlin found that the NYPD, as an institution, had a custom or policy of disproportionately targeting black and Hispanic residents and the neighborhoods in which they were most highly concentrated.<sup>81</sup>

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<sup>74</sup> U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/954G-WSRQ>] [hereinafter FERGUSON REPORT].

<sup>75</sup> Tophers Sanders et al., *Walking While Black*, PROPUBLICA (Nov. 16, 2017), <https://features.propublica.org/walking-while-black/jacksonville-pedestrian-violations-racial-profiling/> [<https://perma.cc/K5GL-37KP>].

<sup>76</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658–67 (S.D.N.Y. 2013).

<sup>77</sup> *Id.* at 580 n.153 (noting that “furtive behavior absent additional indicia of suspicion generally does not suffice to establish reasonable suspicion.”) (internal citations and quotations omitted).

<sup>78</sup> *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html> (last visited Jan. 26, 2018).

<sup>79</sup> *Floyd*, 959 F. Supp. 2d at 575.

<sup>80</sup> *Id.* at 659–60.

<sup>81</sup> *Id.* at 660–65.

Cop shows tend to portray each police officer as an autonomous actor who goes where the crime is, rather than an employee subject to systemic guidance, demands and constraints. The legal system, in many important respects, adopts the same fiction.

## II. REVISITING *THE WIRE*

The ambition to reveal systemic dysfunction is at the very heart of *The Wire*. The show succeeds brilliantly at making systemic problems concrete and visible and revealing why they are so resistant to change. It depicts the diffusion of blame, the complexity of motive, the harm of inaction.

### A. Underpolicing

One of the threads that runs through all five seasons is a passionate critique of under-policing. Indeed, *The Wire* may be the only cop show that makes allocation of resources a central plot point.<sup>82</sup>

In the 2015 book *Ghettoside*, Jill Loevy described the LAPD's persistent underfunding of homicide investigations in South Central Los Angeles.<sup>83</sup> Her point had been colorfully made a decade earlier by *The Wire*'s Sergeant Jay Landsman, who said about a murder victim whom he (erroneously) believed was an innocent bystander rather than a gang member, "she's still dead in a zip code that doesn't fucking matter."<sup>84</sup> *The Wire* constantly came back to the question: how could the ragtag group of police officers who had been shunted to the boiler room get anyone to care about solving the murders of West Baltimore? Where could they find the resources to solve those? And more to the point, why wouldn't the top brass let them follow the money trail that would lead them to the root of the criminal enterprise, so the bodies wouldn't keep piling up?

### B. Overpolicing

In short, *The Wire* is a powerful depiction of the problem of under-policing: what it looks like, why it occurs, the toll it exacts on individuals and neighborhoods. But *The Wire* is not so strong on the problem of

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<sup>82</sup> See *The Wire: Ebb Tide* (HBO television broadcast June 1, 2003) (Season Two, Episode One). *The Wire* is surely the only show in which a major character pushes a "floater" (a floating dead body) into someone else's maritime jurisdiction so he won't have to deal with it. See also generally, Season Five in which McNulty and Bunk devise an elaborate ruse to obtain the resources they need to investigate a long string of murders.

<sup>83</sup> See generally JILL LOEVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015).

<sup>84</sup> *The Wire: Dead Soldiers* (HBO television broadcast Oct. 3, 2004) (Season Two, Episode Three).

over-policing. Seven years after *The Wire* concluded, the Ferguson Report<sup>85</sup> depicted the effects of over-policing in chilling detail (all the more powerful for its careful, lawyerlike presentation of the facts underlying its conclusions). The Ferguson Report vividly detailed the experience of living in an occupied territory<sup>86</sup> in which police exercise a vise-like social control that would not be tolerated in other neighborhoods. It depicted the innocuous behaviors that led to crushing fines and even arrests. It described the policy-level decision-making that incentivized the police to behave this way. *The Wire* does not depict such a world. It does not depict the experience of living in an aggressively policed community like West Baltimore or the South Bronx.

To be sure, *The Wire* captures in heartbreaking detail the dearth of options for the citizens of West Baltimore: the difficulty of breaking out of the cycle of criminality. D'Angelo Barksdale notes that drug dealing is his family's trade; what he was raised to do, and probably what he is fated to do until he dies. His mother later proves his point, trading his freedom<sup>87</sup> (and ultimately his life)<sup>88</sup> for the survival of the family's illicit business. We watch as D'Angelo, Wallace, and others vow to leave the game, and as Cutty, once released from prison, vows not to return to it,<sup>89</sup> but few succeed in overcoming the formidable hurdles that face them.

The show portrays many of those in the drug trade as complex and often sympathetic characters. But they are, in fact, drug dealers (and sometimes also murderers). And in "the game," as *The Wire* portrays it, the police go after drug dealers. They go where the crime is. The police hassle the corner boys (as they call themselves).<sup>90</sup> *The Wire*, despite its multiple story lines and its richly textured depiction of West Baltimore over the course of five seasons, contains no major or recurring characters who are law-abiding residents of West Baltimore, and who nevertheless live under the constant threat of being hassled, disrespected, frisked or subjected to unwarranted violence at the hands of the police.

The police in *The Wire* do not observe the legal niceties of stop-and-frisk very often, but the salient point is that they *are* hassling the corner

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<sup>85</sup> See FERGUSON REPORT, *supra* note 74.

<sup>86</sup> See James Baldwin, *A Report from an Occupied Territory*, NATION (July 11, 1966), <https://www.thenation.com/article/report-occupied-territory> [<https://perma.cc/K2F9-YMHP>].

<sup>87</sup> *The Wire: Sentencing* (HBO television broadcast Sept. 8, 2002) (Season One, Episode Thirteen).

<sup>88</sup> *The Wire: All Prologue* (HBO television broadcast July 6, 2003) (Season Two, Episode Six).

<sup>89</sup> *The Wire: Time After Time* (HBO television broadcast Sept. 19, 2004) (Season Three, Episode One).

<sup>90</sup> *The Wire: Corner Boys* (HBO television broadcast Nov. 5, 2006) (Season Four, Episode Eight).

boys, who are, in fact, dealing drugs.<sup>91</sup> McNulty, Bunk and their crew are intensely frustrated by rules that keep them focused on the pawns in the game. They would like to go for the king-pins. They would much rather make quality arrests than easy, counterproductive “hand-to-hands.”<sup>92</sup> But in either event, the game they are playing is investigating crime, not broken windows policing or aggressive social control. They are not hassling the innocent “civilians” who are out for an evening stroll.

The police officers portrayed in *The Wire* are complex characters. The show rarely falls into the trap of creating one-dimensional heroes and villains. But there is a moral center to the show’s portrayal of law enforcement: the ideal of being “real police” or “good police.”<sup>93</sup> The worst sin of bureaucratic rules is the burden they place on good policing. CompStat<sup>94</sup> interferes with the ability to be good police because it creates problematic incentives and disincentives. For example, by rewarding arrests, it perversely encourages the avoidance of investigations that might lead to open (“red”) cases. Arrest incentives discourage police officers and executives from seeking less punitive solutions, and they encourage low-level searches and seizures even when they jeopardize complex investigations of more serious criminality.

But these critiques of CompStat don’t get to the larger programmatic question: *why are so many police officers deployed in West Baltimore?* Since the show is laser-focused on West Baltimore, we are simply left to assume that the more affluent precincts (which Kima’s friend and confidential informant Bubs memorably refers to as “heaven”<sup>95</sup>) have a much smaller police presence. But since we don’t see the West Baltimore police blanketing the neighborhood and stopping scores of civilians for innocuous or nonexistent reasons, the implication is that the police are concentrated in West Baltimore because that is where the crimes are occurring.

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<sup>91</sup> In my previous article on *The Wire*, I argue that in some respects (particularly its treatment of the warrant process and the exclusionary rule), the show does tend to take Fourth Amendment requirements quite seriously and treat them with respect; a rarity for a cop show. Bandes, *supra* note 12, at 441. Arguably, it does not treat the rules governing *Terry* stops with the same respect.

<sup>92</sup> *The Wire: The Hunt* (HBO television broadcast Aug. 18, 2002) (Season One, Episode Eleven).

<sup>93</sup> See, e.g., Ryan Brooks, *The Narrative Production of “Real Police”*, in *THE WIRE: URBAN DECAY AND AMERICAN TELEVISION* 64, 66 (Tiffany Potter and C.W. Marshall eds., 2009) (noting that “the characterization of different officers is the most immediate way the show privileges certain forms of policing—‘good police’ do ‘good police work’ . . . all the rest is garbage”).

<sup>94</sup> CompStat is a policing management system that tracks and analyzes crime statistics.

<sup>95</sup> When taken to McNulty’s son’s soccer game on a pastoral field, Bubs observes that “there is a thin line between heaven and here.” *The Wire: Old Cases* (HBO television broadcast June 23, 2002) (Season One, Episode Four).

The show portrayed the bureaucratic response to Hamsterdam<sup>96</sup> as an example of systemic dysfunction—a failure of bureaucratic imagination or courage. This may be the case. But Hamsterdam is also an indication of the show’s assumption that West Baltimore police are focused only on serious crime. Indeed, the underlying philosophy of Hamsterdam seems to be that the police know who the law-abiding citizens are, can distinguish the law-abiding from the criminal element, and have no interest in hassling the law-abiding citizens. *The Wire* does not show how one might rack up crushing debt from outstanding warrants for minor infractions,<sup>97</sup> get pulled over forty-nine times for minor traffic violations,<sup>98</sup> or end up with a criminal record without ever committing a crime.<sup>99</sup> It does not show how someone like Freddie Gray could end up mortally injured in a police van because he made eye contact with three police officers in a high crime neighborhood and then ran in the other direction.<sup>100</sup>

### C. “Good Police” and Excessive Force

*The Wire* humanized and complicated cops, and showed some of their institutional constraints, but its view of the use of excessive force is not unproblematic. “A man must have a code” is the refrain echoed by, among others, Officer Bunk Moreland and Omar Little, two of *The Wire*’s most beloved characters.<sup>101</sup> That code does not permit all police violence, but it includes some of it. In one memorable scene, Officer Roland Pryzbylewski (Prez) commits an unprovoked and brutal assault on a young man in the Project Towers. Although his commander and others initially cover for Prez, there is no ambiguity about the fact that, in the eyes of all those who matter, Prez has violated the code. He is not “good police.”<sup>102</sup> Ultimately Prez leaves the job, and it becomes clear that he was meant to be a math teacher, not a cop.

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<sup>96</sup> Major Bunny Colvin’s brainchild: a geographical area in which drugs are informally decriminalized. *The Wire: Hamsterdam* (HBO television broadcast Oct. 10, 2004) (Season Three, Episode Four).

<sup>97</sup> See FERGUSON REPORT, *supra* note 74.

<sup>98</sup> As Philando Castile did.

<sup>99</sup> See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/EAQ8-2KQF>].

<sup>100</sup> Six officers were charged with crimes ranging from second degree murder to misconduct in office, but no convictions resulted. See Sarah Almukhtar et al., *Police Board Clears Driver in Freddie Gray Case; No Officers Have Been Convicted*, N.Y. TIMES (Nov. 7, 2017).

<sup>101</sup> For example, as Paul Butler reminded us during his presentation, Omar is former President Obama’s favorite character.

<sup>102</sup> See Brooks, *supra* note 93; *The Wire: The Detail* (HBO television broadcast June 9, 2002) (Season One, Episode Two). This is not the only time Prez demonstrates his unfitness for the job; just the most harmful to the welfare of others.

The character Bird, who sets off much of the action of Season One by murdering a security guard who has testified against him, helps illustrate the boundaries of the code. Bird's murder of the guard, a civilian who is not in the game, violates the code. This violation permits others (Bubs, Omar) to turn against Bird, even when it means aligning with the police. But Bird's conduct also illustrates the boundaries of the police code. When Bird is in the interrogation room spewing hateful words at Detective Kima Greggs, the message is clear: he asked for and deserves the beating he is about to receive. The beating is administered by supervisors (Daniels, Landsman) as well as detectives, while Bird sits handcuffed to the table. Omar, who is sitting in the hall listening to the sounds of the beating, states the message explicitly: "Bird sure do bring it out of people, don't he?"<sup>103</sup> And when the suspect who is wanted for killing Officer Dozerman is caught in the Eastern, Bunk and McNulty have a coy, approving conversation about how he somehow was taken on a detour through the Western, where the officers must have mistaken him for a piñata.<sup>104</sup> Part of *The Wire's* code is that in cases where cops are killed or injured or mistreated, payback is tolerated.

### III. ALTERNATIVE NARRATIVES

One critique of *The Wire* charged that David Simon allowed himself the luxury of pessimism; a luxury that the people of West Baltimore can't afford to indulge in.<sup>105</sup> For all its focus on connecting the dots, it tended to portray occasional individual saviors, but did not touch on the organized movement to combat police use of excessive force. To be fair, that movement has gained substantial momentum and visibility since *The Wire* aired. Nevertheless, the grassroots organizations that have been working "for years to fight poverty, end street violence, and challenge police brutality" in Baltimore were not visible in *The Wire*.<sup>106</sup> This is another fraught subject: how does the legal system perceive reform

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<sup>103</sup> *The Wire: One Arrest* (HBO Television broadcast July 21, 2002) (Season One, Episode Seven).

<sup>104</sup> *The Wire: Dead Soldiers* (HBO television broadcast Oct. 3, 2004) (Season Three, Episode Three). This is the kind of extra-judicial punishment Freddie Gray was likely subjected to in the Western.

<sup>105</sup> See Dave Zirin, *The Game Done Changed: Reconsidering "The Wire" Amidst the Baltimore Uprising*, NATION (May 4, 2015), <https://www.thenation.com/article/game-done-changed-reconsidering-wire-amidst-baltimore-uprising> [https://perma.cc/8ADL-596M].

<sup>106</sup> See *id.* (arguing that the show failed to depict the student organizers, urban debaters, teacher activists, black trade unionists, legalization activists and others who had been organizing for years. Zirin argues that *The Wire* was "incredibly dismissive of people's ability to organize for real change.").

movements,<sup>107</sup> and how do media portrayals influence these perceptions? And how can the power of media be used not just to reflect injustice, but to mobilize against it?

As one commentator recently observed in another topical context:

Advocates of a cause can push for a long time with little apparent effect. Then, in a historical blink, what seemed incredible becomes inevitable. . . . A type of inclusion that initially appeared radical and frightening became an obvious form of fairness to a majority of Americans. . . . An ethical light switch was flipped. Moral outrage—the appropriate response—now seems obvious.<sup>108</sup>

In the fight against police brutality, it is far too early to claim that “an ethical light switch” has been flipped.<sup>109</sup> Nevertheless, there are signs of progress. Consider two legal decisions about the import of a fleeing suspect. In 1996, federal judge Harold Baer wrote an opinion in which he refused to find probable cause based on a civilian’s flight from the police. Judge Baer had just served on the Mollen Commission,<sup>110</sup> which had found rampant lawlessness, corruption, and brutality among police<sup>111</sup> in that same neighborhood—the Washington Heights section of the Bronx. Judge Baer wrote that flight from the police in that neighborhood was a reasonable reaction; not necessarily evidence of criminal activity. He was nearly impeached. In response to enormous pressure, both public and governmental, he ultimately reversed his ruling and removed the offending language from the opinion.<sup>112</sup> Twenty years later, in 2016, the Massachusetts Supreme Judicial Court held that flight was not necessarily probative of a guilty state of mind or criminal activity. Referring to “the reality for black males in the city of Boston,”

<sup>107</sup> Note that the DOJ recently shifted its focus from police accountability, and at the same time identified “extreme black activism” as a type of terrorism. See Sam Levin, *FBI Terrorism Unit Says “Black Identity Extremists” Pose a Violent Threat*, THE GUARDIAN (Oct. 7, 2017), <https://www.theguardian.com/us-news/2017/oct/06/fbi-black-identity-extremists-racial-profiling> [<https://perma.cc/E5PZ-HRU2>].

<sup>108</sup> The context was the increase in receptivity to stories of sexual harassment and assault. See Michael Gerson, *The Religious Right’s Scary, Judgmental Old Men*, WASH. POST (Nov. 23, 2017), [https://www.washingtonpost.com/opinions/no-country-for-scary-judgmental-old-men/2017/11/23/4faa93de-cfb2-11e7-81bc-c55a220c8cbe\\_story.html?utm\\_term=.d867cfabbe7f](https://www.washingtonpost.com/opinions/no-country-for-scary-judgmental-old-men/2017/11/23/4faa93de-cfb2-11e7-81bc-c55a220c8cbe_story.html?utm_term=.d867cfabbe7f) [<https://perma.cc/MPT6-D3KF>].

<sup>109</sup> I should add that it is also premature to declare decisive victory in the war against sexual harassment.

<sup>110</sup> The Mollen Commission was formally known as “The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department.”

<sup>111</sup> See Bandes, *supra* note 65, at 1279 n.17.

<sup>112</sup> *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y. 1996); vacated, 921 F. Supp. 211 (S.D.N.Y. 1996), discussed in Bandes, *supra* note 12, at 1323–24.

it observed that “such an individual . . . might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.”<sup>113</sup> Although the Boston Police Commissioner denounced the study, the kind of reaction Baer’s opinion elicited twenty years earlier is nowhere in evidence.

What explains the difference in reception? Certainly not the law on the books. Four years after Judge Baer’s decision, the Supreme Court confirmed that flight in a high crime area could provide reasonable suspicion for a seizure. Nor was the difference a matter of supporting data. The Massachusetts court in 2016 relied on an ACLU study; Judge Baer in 1996 had drawn from the extensive findings of an independent commission.

To be sure data, and data analytics, matter enormously. Data supplies a context for the stories. The viewer may wonder whether a video of a shooting or a beating, no matter how shocking, is evidence of a larger problem—and both culture and law reinforce the assumption that each such video is a deviation from the norm. One hurdle to police reform has been a failure to track crucial data that would help supply answers to such questions, including data about police-involved shootings.<sup>114</sup> A judge considering the reasonableness of running from the police may simply defer to her own experience—and conclude that there is no good explanation for such conduct. The Ferguson Report<sup>115</sup> and the Floyd stop-and-frisk opinions<sup>116</sup> provide powerful counter-narratives grounded in data. Here again, the failure to track data on vehicle and pedestrian stops (including demographic data), has posed a significant hurdle to understanding the nature and scope of the problem.

Recently, in an opinion expanding police discretion to conduct stop-and-frisks, the Supreme Court found that the conduct was isolated; that there was “no indication that . . . [the] unlawful stop was part of any systemic or recurrent police misconduct.”<sup>117</sup> In a passionate dissent, drawing in part on her own observations and experience, Justice Sotomayor supplied data from numerous sources demonstrating the widespread and racially inequitable use of unlawful stops.

But as Justice Sotomayor recognized, the problem is not merely a lack of relevant data. For years, data about police brutality has fallen

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<sup>113</sup> Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016).

<sup>114</sup> There are no mandatory national governmental reporting standards on police-involved shootings. Matt Vasilogambros, *The Justice Department’s New Police Shooting Database*, ATLANTIC (Oct. 13, 2016), <https://www.theatlantic.com/news/archive/2016/10/justice-department-police-shooting/504116> [<https://perma.cc/MPT6-D3KF>].

<sup>115</sup> See *supra* note 74 and accompanying text.

<sup>116</sup> *E.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

<sup>117</sup> Utah v. Strieff, 136 S.Ct. 2056, 2063 (2016).

on deaf ears<sup>118</sup>—change is about more than just data. Data plays a crucial role, but to change minds, it must tell a compelling story. And sadly, even a compelling, empirically based story of injustice is often not enough, even for the legal system.<sup>119</sup> We also need a cultural shift that allows perceptions to change. Persuasion is not just a question of a powerful story; it is also a question of the receptivity of the audience. A story may seem to lack verisimilitude when it contradicts deeply held beliefs about how the world works.

Nearly twenty years ago, I wrote that police brutality

is often implicitly approved by majority residents of stratified, segregated societies who value law and order, who want the boundaries between black and white neighborhoods policed, and who will put up with the infliction of a substantial amount of brutality on others as long as it is not made impossible to ignore.<sup>120</sup>

In important ways, police brutality has become harder to ignore in the intervening years.

The mixed success of video footage illustrates both the power and the limitations of media to help effect reform. Video footage helped make long-dismissed accounts more plausible, evoked moral outrage, and helped kick the movement for police accountability into a higher gear. It has even changed some legal outcomes. But it is no panacea. Like any storytelling device—or any type of evidence—it is subject to interpretation. Conversely, it might be tempting to dismiss the influence of fictional treatments like *The Wire* on the real world of police reform, but policing has long had a symbiotic relationship with popular culture. *The Wire*, with its complex, multi-dimensional characters, has offered an important corrective to the simplistic view of cops and perps that characterizes *Dirty Harry*, *The French Connection*, and far too much legal jurisprudence.

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<sup>118</sup> *Id.* at 2071 (Sotomayor, J., dissenting) (“We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’”).

<sup>119</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (in which a constitutional challenge based on a statistical pattern of racially discriminatory decisions in capital cases was dismissed because plaintiffs could not show that *this* particular capital defendant had been sentenced to death *because* of his race); see also *Bandes*, *supra* note 12, at 1320, 1330.

<sup>120</sup> *Bandes*, *supra* note 65, at 1340–41.

