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Criminal Procedure, the Police, and *The Wire* as Dissent

Bennett Capers[†]

The Wire is rich with metaphors. There is the physical wire in the opening credits, a metaphor for surveillance more generally. There is the metaphor of the wire in the sense of a modern tightrope—another filmic work, *Man on a Wire*,¹ comes to mind—where any minute one can lose one’s balance. There is even the metaphor of the wire in the sense that the criminal justice system is all connected or networked.² Indeed, thinking about our criminal justice system as a complex network allows us to see that many of the perceived flaws in the criminal justice system—racial disparities in charging³ and sentencing,⁴ and

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¹ See generally *MAN ON A WIRE* (Magnolia Pictures 2008) (documentary about Phillipe Petit’s successful attempt, on August 7, 1974, to walk on a wire suspended between the towers of the World Trade Center; his act would later be described as the “artistic crime of the century”).

² See Bennett Capers, *Crime, Legitimacy, Our Criminal Network and The Wire*, 8 OHIO ST. J. CRIM. L. 459, 467–70 (2011); see also Susan A. Bandes, *And All the Pieces Matter: Thoughts on The Wire and the Criminal Justice System*, 8 OHIO ST. J. CRIM. L. 435, 436 (2011) (“Although the show begins as a description of an actual wiretap, the series soon turns out to be about a series of interlocking systems, wired for dysfunction. . . . [It dramatizes] the criminal justice system *as a system*.”).

³ See, e.g., BESI KI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, *VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN* 3 (2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/race-and-prosecution-in-manhattan/legacy_downloads/race-and-prosecution-manhattan-summary.pdf [<https://perma.cc/TXQ2-WUB2>] (finding race to be a statistically significant factor in case outcomes); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16–17 (1998) (discussing how prosecutorial discretion is a cause of racial inequality).

⁴ See U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 108 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf#page=55 [<https://perma.cc/9X89-B3LP>] (reporting that black male offenders received sentences nearly twenty percent longer than white male offenders for the same crime in the *Gall* period); see also Joe Palazzolo, *Racial Gaps in Men’s Sentencing*, WALL ST. J. (Feb. 14, 2013, 5:36 PM), <http://www.wsj.com/articles/SB10001424127887324432004578304463789858002> [<https://perma.cc/4QDB-7ZKY>].

over-incarceration,⁵ to name a few—are not flaws but features.⁶ It is another example of how we govern through crime.⁷

Again, these metaphors are rich, even generative, and when I set out to write an essay as part of this symposium on the 10th Anniversary of *The Wire*—in a sense a follow-up to an essay I contributed years ago to an *Ohio State Journal of Criminal Law* symposium that I guest-edited⁸—I thought these metaphors would be my focus. But something curious happened as I began to re-watch *The Wire*. Of course, I was moved by how good the show still is. There is the acting, to be sure, but there is also the storytelling. What starts off as a narrative about cops and drug dealers expands to include unions and the school system and politicians and the media, becoming Dickensian in scope⁹—indeed, the main character becomes the city of Baltimore itself. It is no surprise that Professor Susan Bandes calls *The Wire* “a dazzling literary achievement, a riveting show: the greatest television series ever made.”¹⁰ Or that the literary theorist Walter Benn Michaels calls it “the most serious and ambitious fictional narrative of the twenty-first century so far.”¹¹ To be sure, I found plenty of scenes to support my argument about metaphors. But as I re-watched the series, I also found myself drawn to something else: the disconnect between how the series depicts police officers in reality, and how the Supreme Court seems to depict officers in criminal procedure decisions. It was almost as if the officers in *The Wire* are closer to reality, while the officers the Court imagines are closer to fiction.¹²

⁵ For interesting discussions of the rise in incarceration in the United States, see generally, e.g., JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (arguing that changes in prosecutor behavior and the fragmentation of the criminal justice system are the main drivers of mass incarceration); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that the criminal justice system serves as a new system of racial control).

⁶ Paul Butler makes a similar argument. See generally Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

⁷ See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

⁸ See generally Symposium, *The HBO Series The Wire*, 8 OHIO ST. J. CRIM. L. 431 (2011).

⁹ As David Simon puts it in his audio commentary on the first very episode, “It seems to be a cop show, blue lights flashing . . . [but it’s] really about the American city and about how we try to live together.” DVD: *The Wire: The Target* (HBO 2002) (Season One, Episode One) (audio commentary); see also Jacob Weisberg, *The Wire on Fire*, SLATE (Sept. 13, 2006, 5:44 PM), http://www.slate.com/articles/news_and_politics/the_big_idea/2006/09/the_wire_on_fire.html [https://perma.cc/Q6XU-BM93] (describing *The Wire* as portraying “the social, political, and economic life of an American city with the scope, observational precision, and moral vision of great literature”).

¹⁰ Bandes, *supra* note 2, at 445.

¹¹ Quoted in SHERRYL VINT, *THE WIRE* 1 (2013).

¹² That my attention was especially drawn to the depiction of police officers during this viewing, and the disconnect with the depiction of officers in criminal procedure jurisprudence, likely has much to do with my recent interest in how the Court participates in the social construction of

It is this disconnect between the Court's fiction and *The Wire*'s reality that is the focus of this brief essay. Some elaboration may already be in order. For starters, it may seem odd to talk about *The Wire*'s reality, or more specifically its reality when it comes to the depiction of officers. After all, the television series is fictional. It contains no voice-over announcing that it is based on true events. It is fiction, entertaining fiction. But as law and literature scholars have long recognized, it is often through fictional tellings and retellings that we get closest to the truth. Certainly, *The Wire* aspires to something akin to truth.

Consider the filmic choices that suggest realism. Its creators set *The Wire* in neither a fictional place nor somewhere that could be anywhere. It is set in Baltimore, filmed in Baltimore, and often used locals with local Baltimore accents, such as Felicia Pearson, who played a character named Felicia "Snoop" Pearson.¹³ As one scholar has written, the series strives visually for social realism and "insist[s] that these stories take place in a real city, that the fictional Baltimore echoes and haunts the material city."¹⁴

There are also substantive parallels to real life. The series is based on real crime and reflects the real problems that exist in the city. It uses almost exclusively diegetic music. And it is widely assumed that the fictional Mayor Carcetti was based on Martin O'Malley, who once served as Baltimore's mayor, later served as Maryland's governor, and sought the Democratic Presidential nomination in 2015, competing as a sort of third wheel against Bernie Sanders and Hillary Clinton.¹⁵ Even the fairly recent death of Freddie Gray while in the custody of police in Baltimore¹⁶ seems like it could have been taken from the cutting room floor of the writers' room in *The Wire*. The same can be said about the acquittal of the officers.¹⁷ All of

citizens vis-à-vis the police. See generally Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018). It makes sense that now my attention is drawn to the police.

¹³ The accents are so specific, and the slang so local, that this viewer often watched the show with subtitles. For a discussion of the significance of the use of local actors and residents, as well as actual locations in Baltimore, see VINT, *supra* note 11, at 83-87.

¹⁴ VINT, *supra* note 11, at 21.

¹⁵ See Seth Millstein, *Martin O'Malley & The Wire Have a Bizarrely Awful History That Isn't Just Made for Hollywood*, BUSTLE (Oct. 12, 2015), <https://www.bustle.com/articles/116324-martin-omalley-the-wire-have-a-bizarrely-awful-history-that-isnt-just-made-for-hollywood> [<https://perma.cc/55TY-AJ7M>].

¹⁶ See Lindsey Bever & Abby Ohlheiser, *Baltimore Police: Freddie Gray Died from a 'Tragic Injury to His Spinal Cord'*, WASH. POST (Apr. 20, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/20/baltimore-police-freddie-gray-arrested-without-force-or-incident-be-fatal-injury/> [<https://perma.cc/33ZW-PGZH>].

¹⁷ See Paulina Dedaj, *Six Officers Acquitted in Freddie Gray Case Now Back at Work*, FOXNEWS.COM (Dec. 1, 2017), <http://www.foxnews.com/us/2017/12/01/six-officers-acquitted-in->

this brings to mind the ending of Season One, which ends with “a vision of business-as-usual continuing.”¹⁸ This is more than verisimilitude or mimesis. This is something closer to fiction-as-reality. Or as one scholar has observed, “*The Wire* is not a thriller about a crime but a quasi-journalistic analysis of crime as a social phenomenon.”¹⁹

Similarly, it may be odd to suggest that the Court, in its criminal procedure opinions, depicts officers in an almost fictional way. But this is precisely what the Court does. It certainly relies on an imaginary world where all police officers are good, or at least presumptively good. An imaginary world in which police officers have a singular expertise that entitles them to deference from citizens, and also from the courts. An imaginary world where police officers are all trying to do the right thing. But a close reading of Supreme Court cases shows this is exactly the world the Court imagines.

This disconnect between how *The Wire* depicts officers, and how the Court depicts officers, is the initial focus of this essay. It begins, in Part One, by making the case that much of the Supreme Court’s criminal procedure jurisprudence is predicated on the assumption that officers are good. Indeed, not only does the Supreme Court typically imagine a good cop—an Officer Friendly, if you will—but the Court’s jurisprudence also plays a crucial role in encouraging citizens to think of police officers as good. In this sense, the Court participates in the social construction of the “good cop.”

Part Two returns the focus to *The Wire* and argues that, in contrast to the fiction the Court revels in, the series seems “truer” in depicting the reality of policing and the reality of police officers. The officers depicted—not just some of them, but all of them—are far more complicated, three-dimensional, and self-interested than what the Court imagines. Far from being good in an unadulterated way, the officers are not that different from the people they police.

Although the disconnect between the Supreme Court’s criminal procedure jurisprudence and policing in reality is the initial focus of this Article, the heart of this Article is in Part III. Part III argues that much of the power of *The Wire*—and one reason it is so popular among criminal justice scholars—lies in the fact that it offers a much needed counter-narrative to the world the Court imagines. It challenges the “official,” Court-promulgated thinking about criminal justice. In a very real sense, *The Wire* places the audience as jury, and functions as its

freddie-gray-case-now-back-at-work.html [<https://perma.cc/GY7Z-FJ76>]. For an interesting discussion of the almost insurmountable procedural hurdles that advantage officers under investigation of use of excessive force, see generally Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016).

¹⁸ VINT, *supra* note 11, at 3.

¹⁹ VINT, *supra* note 11, at 6.

own exhibit. And to the Court and its criminal procedure jurisprudence, *The Wire* offers itself as a cogent and passionate dissent. Part III explores this aspect of *The Wire*, and argues we need more shows that offer “dissents.”

PART I: THE SUPREME COURT AND THE GOOD COP

In a very real sense, *The Wire* can be read as offering a much needed “dissent” to the Supreme Court’s criminal procedure jurisprudence. To make this argument clear, it makes sense to begin with how the Supreme Court imagines policing, i.e., the Supreme Court’s “majority” opinions. This first part accordingly focuses on a troubling aspect of the Court’s criminal procedure jurisprudence: in interpreting what limits the Fourth, Fifth, and Sixth Amendments place on the police in their interactions with “the people,” the Court tends to imagine a perfectly good cop.²⁰ The good cop is courteous, cares solely about getting the bad guy off the street and bringing him to justice, is law-abiding, does not engage in racialized policing, and is certainly inclined to adhere to any constraints placed on him by the Court. To a large extent, the Court imagines an Officer Friendly.

Consider *Terry v. Ohio*,²¹ the case in which the Court gave its blessing to forcible police stops of individuals even in the absence of probable cause,²² which prior to *Terry* had been the minimum requirement of a search and seizure.²³ To accommodate the police, the Court re-read the Fourth Amendment to focus on its reasonableness clause, and to downplay its clause requiring probable cause. As I have written previously, out of “this judicial legerdemain,”²⁴ the Court fashioned from whole cloth a standard less than probable cause: so long as an officer could articulate reasonable suspicion to believe that “criminal activity may be afoot,”²⁵ the officer could conduct a forcible limited detention, or, in common parlance, a *Terry* stop. The Court coupled this with another assist to law enforcement: expressing concern for officer safety, the Court also ruled that if the officer has reasonable sus-

²⁰ The “good cop” paradigm that the Court adopts has not gone completely unnoticed. For a discussion of the paradigm, see generally Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994).

²¹ 392 U.S. 1 (1968).

²² See *Terry v. Ohio*, 392 U.S. 1, 31 (1968).

²³ See *id.* at 20–22.

²⁴ See Bennett Capers, *Race, Policing, and Technology*, 85 N.C. L. REV. 1241, 1260 (2017).

²⁵ See *Terry*, 392 U.S. at 30.

picion that the detainee is armed or dangerous, the officer could add a pat-down for weapons, or, in common parlance, a *Terry* frisk.²⁶

While all of this is familiar to students of criminal procedure, any understanding of the Court's decision is incomplete without also recognizing the assumption about police officers that undergirds the Court's decision: that they are good (both morally and in their judgment). For starters, the Court assumed that officers would not exploit what I refer to as "*Terry's* loophole"; although the decision ostensibly requires officers to develop reasonable articulable suspicion prior to conducting a stop or frisk, rather than after the fact, in fact *Terry* offers no external checks to ensure an ex ante decision. In fact, the process is such that an officer is not normally required to articulate his basis for reasonable suspicion until a complaint is later drafted, or still later in response to a suppression motion—in other words, decidedly ex post.²⁷ Notwithstanding this loophole, the Court assumes that officers will develop reasonable articulable suspicion before engaging in a forcible stop or frisk, rather than exploit the decision's loophole and stop first, then justify the stop later. In short, the Court assumed cops will be good. More troubling, the Court made this assumption while likely aware of a long history of officers exploiting loopholes in its rulings or otherwise circumventing them.²⁸

And this is only one of the ways the *Terry* Court assumed a good cop.²⁹ Also undergirding its decision is the assumption that officers are good in the sense that they will normally reach the right judgment and thus are entitled to discretion in their determinations, which, in turn, are entitled to deference.³⁰ After all, this is the basis for allowing

²⁶ See *id.* at 27.

²⁷ It seems unlikely that the absence of any check to insure an ex ante determination of reasonable suspicion escaped the Court's attention. After all, it was the Court itself that set a standard of *articulable* suspicion, not *articulated* suspicion.

²⁸ For example, the Court was likely aware that many police officers responded to its decision a few years earlier extending the exclusionary rule to states in *Mapp v. Ohio*, 367 U.S. 643 (1961), not just by criticizing it, but also by circumventing it. "All of a sudden, there were more 'dropsy' cases. Instead of the evidence being found on the suspect, it had been dropped by the suspect, and hence abandoned, making it admissible notwithstanding *Mapp*." Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 868 (2008). For more on the rise in dropsy cases following the Court's *Mapp v. Ohio* decision, see, e.g., Michael J. Juviler, *A Prosecutor's Perspective*, 72 ST. JOHN'S L. REV. 741, 742–43 (1998); Note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 94–96 (1968); Irving Younger, *The Perjury Routine*, NATION, May 9, 1967, at 596–97. The Court also downplayed the possibility that officers would conduct stops without justification. See *Terry*, 392 U.S. at 13–15.

²⁹ None of this is to suggest that the Court *entirely* ignored the possibility of a bad cop. Rather, the Court reduces the possibility to a rarity, something worthy of a footnote.

³⁰ Other scholars have also noted the Court's willingness, as well as the willingness of lower courts, to defer to officers. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1883 (2015) (observing that courts "all too readily defer" to the judgments of police officers); Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*,

the officer—again, the “good cop”—to decide in the first instance whether there is justification to engage in a stop and frisk. Prior to *Terry*, there had long existed a preference for neutral and detached magistrates to make decisions, via warrants, about whether there was sufficient basis for a search or an arrest. The reasoning for this neutral intervention was perhaps best articulated in *Johnson v. United States*:³¹

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.³²

In *Terry*, the Court not only abandoned its preference for probable cause, substituting the amorphous and less rigorous standard of reasonable suspicion in its place. The Court also shifted the “decider” from a neutral and detached magistrate to the police officer himself, at least on the front end.³³ This shift only makes sense if the Court assumes officers have the expertise and neutrality to justify this deference.³⁴ But even here, the Court seemed to be out of touch with reality, even the reality of the case before it. Consider the detective’s expertise

103 J. CRIM. L. & CRIMINOLOGY 407, 408–09 (2013) (citing numerous Supreme Court cases in which the Court chose to defer to the officers); Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 149 (2002) (“Courts regularly presume that apprehending officers operate solely out of good motives and the desire to achieve fairness; however, evidence shows that in high-crime areas, this presumption is often false.”). Robin Magee is another such scholar. Here, her observation about the interplay between deference and discretion bears repeating:

Deference and discretionary authority in Fourth Amendment jurisprudence sometimes intersect and overlap. The Court’s deference may lead the Court by intent or by effect to allow greater discretionary authority. The Court’s allowance of discretionary authority may necessarily involve a level of deference. . . . An effect of the interplay between discretion and deference is entrenchment of the good cop paradigm.

Magee, *supra* note 20, at 173.

³¹ 333 U.S. 10 (1948).

³² *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

³³ Of course, for the few *Terry* stops that progress into arrests, a magistrate would decide if probable cause existed for the arrest, and a later suppression hearing might focus on whether reasonable suspicion existed to justify the initial stop, but these determinations are likely to be weighted in favor of the police given hindsight bias, and, again, the ease with which officers can articulate reasonable suspicion after the fact. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1614 (2012) (discussing ex-post bias).

³⁴ For an interesting discussion of “the presumption of police expertise from its origin outside the courtroom to its long march through the justice system,” see generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1999 (2017).

in *Terry*. The following colloquy was elicited by the trial judge during the suppression hearing:

Q. In your thirty-nine years of experience as an officer . . . [h]ave you ever had any experience in observing the activities of individuals in casing a place?

A. To be truthful with you, no.

Q. You never observed anybody casing a place?

A. No. . . .

Q. During your tenure as a police officer, during your 39 years as a police officer, how many men have you had occasion to arrest when you had observed them and felt as though they might pull a stick-up?

A. To my recollection, I wouldn't know, I don't know if I had—I don't remember any.³⁵

And yet none of this colloquy is included in the *Terry* opinion itself. Had the Court done so, it would have had to wrestle with balancing the needs of law enforcement officers against the intrusions to all of the individuals in cases the officer was wrong. Instead, the Court conveniently treats Detective McFadden, and indeed all officers, as having the experience and expertise to get it right and accurately determine when “criminal activity may be afoot.”³⁶

Finally, and perhaps most importantly, the Court conveniently assumed that officers are fundamentally good and fundamentally committed to doing the right thing. The Court certainly assumed that officers would, for the most part, exercise their unilateral authority to stop and frisk individuals in a manner that is race-neutral. But even here, the Court seemed again to have an imaginary view of police officers. To be clear, the Court noted in passing that its decision could have a disproportionate effect on minority communities.³⁷ But for the most part, the Court downplayed the possibility that there could be wholesale race-based policing. Even in the facts before them, they likely imagined Detective McFadden to be better than he was. During the suppression hearing, Detective McFadden was asked what drew his

³⁵ Defendants' Bill of Exceptions, *State v. Terry* and *State v. Chilton* (Nos. 79,491 & 79,432), reprinted in Appendix B, *State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, 1420, 1477 (1998) [hereinafter *Transcript*].

³⁶ *Terry*, 392 U.S. at 30.

³⁷ See *Terry*, 392 U.S. at 14 & n.11.

attention to Terry and his companion. His answer is revealing. “Well, to be truthful with you, I didn’t like them. I was just attracted to them.”³⁸ Later, when pressed again, he answered that “they didn’t look right to me at the time.”³⁹ Certainly the Court must have known that the thing that very likely drew Detective McFadden’s attention to the men was their race. They were two black men in a city that was segregated by race, and they were in the part of the city that was largely white.⁴⁰ And certainly the Court must have realized that, had Terry and his companion been white, it is very likely Detective McFadden would not have noticed them at all. The Court sidestepped this issue by assuming a good police officer, one who is for the most part color-blind. Again, never mind reality.

Although the focus so far has been on the Court’s decision in *Terry v. Ohio*, this is not to suggest *Terry* stands alone. In fact, the Supreme Court’s criminal procedure jurisprudence is replete with cases in which the Court relies on an imaginary world where all police officers are good, or at least presumptively good. This imaginary “good cop” world is the backdrop for the automobile exception⁴¹ announced in *Carroll v. United States*,⁴² which assumes officers can be trusted with making probable cause determinations to justify the search of automobiles.⁴³ Indeed, the Court’s esteem for police and their decision-making perhaps explains why, nearly a century after the automobile exception was announced, the Court continues to allow the exception. After all, the original rationale for the exception was that, because of their very mobility, securing a warrant to search a vehicle would be difficult.⁴⁴ This rationale made sense when only cars were mobile but makes little sense today when telephones are mobile too, where smartphones have become the new normal, and when securing a telephonic warrant can be accomplished in seconds.⁴⁵ But then again, the

³⁸ *Transcript*, *supra* note 35, at 1456.

³⁹ *Id.*

⁴⁰ See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 460 n.17 (2000) (noting that the detective’s “‘professional judgment’ concerning Terry was based on the racial incongruity of Terry being observed outside a storefront in a commercial district far from the area of Cleveland where most African Americans lived.”). For an analysis of the Court’s decision to elide race in *Terry*, see Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1013 (1999).

⁴¹ See *Carroll v. United States*, 267 U.S. 132, 153, 155–57 (1925).

⁴² 267 U.S. 132 (1925).

⁴³ Professor Magee makes a similar observation: the Court “has equated police decisions to magistrate’s decisions, or has otherwise ruled that police deliberations are tantamount to a magistrate’s deliberations.” Magee, *supra* note 20, at 182.

⁴⁴ See *Carroll*, 267 U.S. at 153.

⁴⁵ For more on this point, see generally Bennett Capers, *Policing, Technology, and Doctrinal Assists*, 69 FLA. L. REV. 723 (2017).

continued availability of the automobile exception does make sense if one assumes, as the Court does, the basic goodness of officers, who will decide which cars to search on probable cause alone, untainted by biases. In short, if one assumes a “good cop.”

Add to the list *Pennsylvania v. Mimms*⁴⁶ and *Maryland v. Wilson*,⁴⁷ which gave officers carte blanche to order a driver out of a vehicle following a traffic stop,⁴⁸ and to order the driver’s passengers out as well,⁴⁹ if the officer so chooses, in order to protect the officer’s safety. What undergirds these decisions is the Court’s assumption that officers will not abuse this discretion. What undergirds these decisions, too, is the Court’s assumption that officers need to be protected from civilians, and not the other way around.⁵⁰

One could add *California v. Hodari D.*,⁵¹ which held that a command to stop, without voluntary submission or a physical apprehension, does not constitute a seizure within the meaning of the Fourth Amendment.⁵² But in so holding, the Court adds something else: “[C]ompliance with police orders to stop should . . . be encouraged. Only a few of those orders, we must presume, will be without adequate basis.”⁵³ In other words, the Court presumes officers will issue orders to stop only for good cause, untainted by whim, caprice, or bias. There is *Rhode Island v. Innis*,⁵⁴ in which the Court assumed that two officers discussing all the reasons why the defendant they were transporting should tell them where he hid the murder weapon—a defendant who had invoked his *Miranda v. Arizona*⁵⁵ rights—were not engaged in *interrogation*,⁵⁶ because of course that would mean the officers were circumventing *Miranda*, and officers would not engage in such trickery, the officers were good officers, concerned only with public safety.⁵⁷

⁴⁶ 434 U.S. 106 (1977) (per curiam).

⁴⁷ 519 U.S. 408 (1997).

⁴⁸ See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam).

⁴⁹ See *Maryland v. Wilson*, 519 U.S. 408, 414–415 (1997).

⁵⁰ Cf. *id.* at 414 (concluding that passengers create additional danger for officers making traffic stops); *Mimms*, 434 U.S. at 110 (describing the risks to officer safety involved in traffic stops).

⁵¹ 499 U.S. 621 (1991).

⁵² See *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

⁵³ *Id.* at 627.

⁵⁴ 446 U.S. 291 (1980).

⁵⁵ 384 U.S. 436 (1966).

⁵⁶ See *Rhode Island v. Innis*, 446 U.S. 291, 295, 300–02 (1980).

⁵⁷ That the Court assumed officers would not have ulterior motives or engage in such trickery seems particularly disingenuous since the Court has routinely permitted officers to engage in trickery during interrogations. For a discussion of the Court’s endorsement of trickery during confessions, see generally Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979)

There is *United States v. Drayton*,⁵⁸ a case resulting from a dragnet-like bus sweep of passengers, which held that a person has not been seized within the meaning of the Fourth Amendment if a “reasonable person” would have felt free to “leav[e] . . . or otherwise terminat[e] the encounter.”⁵⁹ In adopting this test, the Court took the officer at his word that any passenger who declined consent to answer a few questions “would have been allowed to do so without argument.”⁶⁰ The Court also took the officer at his word that some passengers “go so far as to commend the police for their efforts to ensure the safety of their travel.”⁶¹

Again, the list continues. There is *Schneckloth v. Bustamonte*,⁶² the case that solidified the consent exception to the Fourth Amendment,⁶³ since underlying the Court’s decision is the assumption that officers really will ask for consent rather than insist on it.⁶⁴ Indeed, the assumption that cops are good even underlies the Court’s recent decision in *Utah v. Strieff*,⁶⁵ in which it extended the doctrine of attenuation to hold that even when a police stop is completely unjustified, evidence discovered during the stop—in *Strieff*, evidence that the suspect had an outstanding warrant—may still be admissible.⁶⁶ After all, the Court assumed that the officers could be trusted to exercise restraint and would not use the Court’s decision as carte blanche to en-

(detailing the prevalence of trickery).

⁵⁸ 536 U.S. 194 (2002).

⁵⁹ See *United States v. Drayton*, 536 U.S. 194, 195 (2002).

⁶⁰ See *id.* at 198.

⁶¹ See *id.*

⁶² 412 U.S. 218 (1973).

⁶³ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227–28 (1973) (holding that “whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances”).

⁶⁴ This is not to suggest the Court ignored the possibility that some officers may coerce consent. Rather, the main point here is the Court deferred almost entirely to the police in determining how to obtain consent so long as coercion is absent. This is free rein indeed. It is telling that police manuals train officers in how to psychologically position individuals so that they feel obligated to grant consent. It is telling too that studies show the overwhelming majority of individuals who grant consent do not view their consent as truly voluntary. For more on this point, see Bennett Capers, *Policing, Technology, and Doctrinal Assists*, 69 FLA. L. REV. 723, 746–47 (2017).

⁶⁵ 136 S.Ct. 2056 (2016).

⁶⁶ The Court based its holding by claiming that discovery of the warrant was an “intervening circumstance” that was “entirely unconnected to the stop,” and by assuming—again, assuming a good cop—that the officer who made the unjustified stop was “at most negligent.” In the words of Orin Kerr, the case “goes a long way toward creating an exception to the exclusionary rule for searches of persons who have outstanding warrants (which turns out to be a lot of people.” See Orin Kerr, *Opinion Analysis: The Exclusionary Rules is Weakened, But Still Lies*, SCOTUS BLOG.COM, June 20, 2016. For additional critique of this reasoning in *Strieff*, see Julian A. Cook III, *The Wrong Decision at the Wrong Time: Utah v. Strieff in the Era of Aggressive Policing*, 70 SMU L. REV. 293 (2017).

gage in wholesale stops without reasonable suspicion,⁶⁷ even in jurisdictions where “policing through bench warrants”⁶⁸ is an accepted police practice.⁶⁹ And, in a certain respect, this juridical belief in the “good cop” is evident in the rationale for the Fourth Amendment’s exclusionary rule and its corollaries under the Fifth Amendment and Sixth Amendment.⁷⁰ After all, the exclusionary rule assumes a good cop who ultimately is committed to justice, to ensuring that the innocent go free and the guilty are punished. It certainly does not imagine an officer whose sole interest is in receiving a stat for an arrest and who is indifferent to how the case proceeds after the arrest has been made—especially since, absent patently egregious behavior, neither his salary nor advancement is likely to turn on whether evidence in a case was later suppressed on a “technicality”⁷¹ or not. Or, in the words of Justice Cardozo, that “the criminal is to go free because the constable has blundered.”⁷²

So, little of Officer Friendly squares with reality, at least not from where I am positioned. As such, is it any wonder that it makes sense to think of the Supreme Court’s criminal procedure jurisprudence as predicated on a fiction? The Part below elaborates upon this and, by turning to the “fictional” series *The Wire*, adds a dose of reality.

PART II: *THE WIRE* AND REAL COPS

If the prototypical law enforcement officer the Supreme Court imagines when it decides criminal procedure cases is the quintessential good cop, an Officer Friendly in everything but name, the cops who populate *The Wire* are far more complex. *The Wire* is less inter-

⁶⁷ Cf. *Utah v. Strieff*, 136 S.Ct. 2056, 2064 (2016) (“[Respondent] argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability.”).

⁶⁸ See Bennett Capers, *Techno-Policing*, 15 OHIO ST. J. CRIM. L. 465, 501.

⁶⁹ For example, as recently as two years ago, New York City had about 1.4 million open warrants for citizens stemming from quality of life offenses like walking a dog without a leash and being in a park after closing hours. See *How NYC Is Tackling 1.4 Million Open Warrants for ‘Quality-of-Life’ Crimes*, PBS NEWSHOUR (Jan. 16, 2016, 4:29 PM), <http://www.pbs.org/news/hour/bb/how-nyc-is-tackling-1-4-million-open-arrest-warrants-for-quality-of-life-crimes/> [https://perma.cc/U6SC-D4VD].

⁷⁰ For a lengthier discussion of this point, see Magee, *supra* note 20, at 161–67 (arguing, among other things, that the Court’s rejection of remedies other than exclusion also suggests “either that the Court did not contemplate cops not being motivated by law enforcement interests or that the Court believed bad cops comprised only a small insignificant minority of cops.”) (internal citations omitted).

⁷¹ See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

⁷² See *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

ested in “good, if sometimes imperfect”⁷³ cops and more interested what real cops and detectives are like in reality. Or to put it more accurately, fiction narrative in *The Wire* is instrumental: it is deployed to reveal a deeper truth.⁷⁴ It subverts the trope of the standard police procedural⁷⁵ by complicating both the supposed “good guys” and supposed “bad guys” until the adjectives good and bad become meaningless. In short, “*The Wire* is a different kind of television.”⁷⁶

None of the officers in *The Wire* could be categorized as “good, if sometimes imperfect.” This is not to suggest that the cops depicted in *The Wire* are “bad.” Far from it. They are simply real. They are complicated. They are compromised. They are true. The show reveals law enforcement officers for what they often are: self-interested bit players in a system that is larger than they are. This is true even of the putative hero,⁷⁷ Detective McNulty, who at first comes across as good, if sometimes imperfect—he drinks too much, was a poor husband and father, sleeps with the prosecutor on the case,⁷⁸ and suborns perjury.⁷⁹ He always believes he’s the smartest person in the room and therefore must be right. By Season Five, Detective McNulty is so driven by ego and assured in his judgment that he misappropriates police funds and compromises other homicide investigations and, indeed, lets dozens of other homicides become cold, unsolved and all but unsolvable.⁸⁰ In a lesser drama, the viewer might come to see Detective McNulty as an

⁷³ See Bandes, *supra* note 2, at 435.

⁷⁴ See, e.g., J.M. Tyree, *Review of The Wire: The Complete Fourth Season*, 61 FILM Q. 32, 38 (2008) (“*The Wire* is in the business of telling America truths about itself that would be unbearable even if it were interesting in hearing them.”); VINT, *supra* note 11, at 83 (“*The Wire*’s claim to significance is based on its commitment to social realism and its willingness to tell a ‘truth’ about crime and justice that is obscured by both other popular culture and mainstream discourses about crime.”). David Simon, the creator of *The Wire*, has described the series as “non-fiction truth-telling.” See David Simon, *A Final Thank You to The Wire Fans*, HBO.COM (Mar. 10, 2008), <https://www.hbo.com/the-wire/a-final-thank-you-to-the-wire-fans> [<https://perma.cc/R8Z8-P4HH>].

⁷⁵ As Susan Bandes has written, the standard police procedural “adheres to time-honored conventions. It focuses on good, if sometimes imperfect, cops trying to find the real bad guys—the perpetrators—and bring them to justice.” See Bandes, *supra* note 2, at 435.

⁷⁶ See Bandes, *supra* note 2, at 435.

⁷⁷ Although *The Wire* seems anchored around Detective McNulty, apparently this was done as a concession to HBO Marketing, which thought it would be easier to market the series by having a white protagonist at its center. See VINT, *supra* note 11, at 16.

⁷⁸ Perhaps needless to say, the relationship between the prosecutor and Detective McNulty presents a conflict of interest, curable only through disclosure. For more on this issue, see generally Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463 (2017).

⁷⁹ As Alafair Burke points out, Detective McNulty essentially suborns perjury when he permits Omar Little to testify in a murder trial in Season One. See Alafair S. Burke, *I Got the Shotgun: Reflections on The Wire, Prosecutors, and Omar Little*, 8 OHIO ST. J. CRIM. L. 447, 450–52 (2011).

⁸⁰ See *The Wire: Clarifications* (HBO television broadcast Feb. 24, 2008) (Season Five, Episode Eight).

anti-hero. But not in *The Wire*. In *The Wire*, Detective McNulty is actually similar to all of the other cops: complicated, compromised, and true.

Indeed, one of the striking things about *The Wire* is how it uses parallels and juxtapositions to complicate the depiction of police officers.⁸¹ Consider Season One. On its surface and at its most basic, Season One could be viewed as following a traditional cop show script. On one side is the cop pursuing justice, and on the other side is the criminal hoping to evade justice. But as noted earlier, *The Wire* takes this premise and expands upon it while at the same time subverting it. Rather than having at its center one “good, if sometimes imperfect” cop and one “bad guy,” Season One has at its center two organizations: On one side is the Baltimore Police Department and a subunit task force headed by Lieutenant Daniels but in effect run by Detective McNulty. On the other side is Barksdale’s Crew, which is headed by Avon Barksdale but in effect run by Stringer Bell. Rather than adhering to the typical police procedural by depicting good against bad, *The Wire* uses parallels and juxtapositions to show the similarities between both organizations and their members.

For starters, Season One of *The Wire* routinely intercuts scenes of the cops of the Baltimore Police Department with scenes of the members of Barksdale’s crew to suggest parallels. Indeed, one of the opening scenes depicts Detective McNulty sitting in the gallery of a courtroom as D’Angelo Barksdale is tried for homicide.⁸² In the well of the courtroom, the prosecutor is on one side while the defense lawyer is on the other. In the gallery, Detective McNulty sits on one side, while a handsome black man sits on the other. Although the viewer doesn’t yet know it, the black man is Stringer Bell, Barksdale’s second-in-command. McNulty and Bell eye each other. Both men are dressed in nearly identical suits. Only gradually does the viewer sense that Bell is McNulty’s counterpart, his dopplegänger—in a way, they are each the “brains” in their respective operations. And each eventually fails in part because of hubris. In the courtroom, and in reality, all that really separates them is the aisle.

⁸¹ See, e.g., VINT, *supra* note 11, at 15 (“*The Wire* is careful to add as much complexity to its criminal characters as it provides for the police, stressing the parallels between individuals trying to accommodate themselves to the institutions they must serve rather than highlighting their differences as people on opposite sides of the law.”); Burke, *supra* note 79, at 449 (“One way in which *The Wire* subtly calls into question the legitimacy of supposedly legitimate enterprises is by drawing narrative parallels between the drug game on the street . . . and recognized institutions and bureaucracies.”).

⁸² See *The Wire: The Target* (HBO television broadcast June 2, 2002) (Season One, Episode One).

This is just one of the parallels between the drug organization and the police department. Indeed, as I noted in a prior essay, one of the most telling scenes in Season One is when Omar (a gangster) and a homicide detective realize they were in high school together.⁸³ Another parallel: both organizations have individuals who seem “expert” at what they do—again, Detective McNulty of the Police Department and Stringer Bell of Barksdale’s Crew. But both organizations also have individuals who are slackers, who cut corners, and who are decidedly inexperienced—think Officers Herc and Pryzbylowski of the Police Department and Poot and Bodie of Barksdale’s Crew.⁸⁴

The parallels also reveal how self-interest and conflicts influence characters in both organizations.⁸⁵ A scene showing Barksdale’s organization trying to determine whether workers are skimming money or drugs⁸⁶ follows a scene in which police detectives skim from taxpayers by falsely claiming overtime, exaggerate injuries to claim early pensions, and even plot how to stage injuries.⁸⁷ A scene in which members of Barksdale’s organization engage in casual sexism and racism and homophobia is soon followed by a scene in which members of the police department engage in the same.⁸⁸ Perhaps most importantly, the parallels reveal that the use of violence is not limited to criminals. To be sure, members of Barksdale’s organization engage in gra-

⁸³ See *The Wire: One Arrest* (HBO television broadcast July 21, 2002) (Season One, Episode Seven).

⁸⁴ Even here, the creators of *The Wire* refuse to pigeon hole characters. Officer Pryzbylowski comes across as incompetent, and yet is the officer who figures out how members of Barksdale’s Crew are using pagers and phone booths to send messages. See *The Wire: The Pager* (HBO television broadcast June 30, 2002) (Season One, Episode Five). For his part, when Barksdale’s stash house is robbed, Bodie proves an astute observer; he notes that he heard the name Omar and saw a white van. See *The Wire: The Buys* (HBO television broadcast June 16, 2002) (Season One, Episode Three). Building on the chess metaphor, Vint observes that Bodie establishes himself as a “smart-ass pawn.” VINT, *supra* note 11, at 26.

⁸⁵ Vint makes a similar observation:

The first season constructs parallels between the drug enterprise and the police department, often through intercut scenes, demonstrating that in each those lower in the hierarchy must find ways to accommodate the at-times capricious demands of those above and reinforcing a sense that the drug enterprise is, from the point of view of many involved, merely employment. In each site, numbers drive goals, seemingly a reasonable expectation for a sales enterprise like the drug trade but one that hinders legitimate investigative work when applied to the police department.

VINT, *supra* note 11, at 65.

⁸⁶ See *The Wire: The Pager*, *supra* note 84 (Season One, Episode Five).

⁸⁷ See *The Wire: Old Cases* (HBO television broadcast June 23, 2002) (Season One, Episode Four).

⁸⁸ Compare, for example, Episode Two and Episode Three, in which officers casually use the “n_” word and refer to a suspect as a “monkey,” with Episode Four, in which Avon Barksdale’s crew doubles the bounty on Omar after learning he is “all faggot.” See *The Wire: The Detail* (HBO television broadcast June 9, 2002) (Season One, Episode 2); *The Wire: The Buys*, *supra* note 84 (Season One, Episode 3); *The Wire: Old Cases*, *supra* note 87 (Season One, Episode 4).

tuitous violence. But so do those charged with upholding the law. They may not engage in outright homicides, but they certainly engage in beat downs.

Since the violence Barksdale's Crew engages in is already part of the standard trope when it comes to drug dealers—so much so that there exists an “assumed premise that drugs cause violence,”⁸⁹ so much so that the courts have essentially given officers an automatic right to frisk drug suspects for weapons⁹⁰—I will not rehearse their violence here. But consider the violence by police officers. In one of the earliest scenes involving a police raid on a drug spot, Bodie resists arrest by punching an officer, who quickly falls to the ground but is otherwise unhurt. Other officers respond by tackling Bodie and giving him a proper beat down. The camera pans to Detective Kima Greggs. The viewer expects Greggs, described as “the moral compass” of the show,⁹¹ to try to stop the police use of excessive force. Instead, she pushes herself through the scrum so that she can land some punches on Bodie herself. After all, police officers must stand together.⁹²

In another scene, Officers Herc, Pryzbylewski, and Carver, after a night of drinking, decide to drive to the Towers to show the residents that they (the police) run things. As Herc puts it, “Let's show these motherfuckers who [we] are.”⁹³ The officers approach the first two teenagers they see and engage in the very type of stop that the Court in *Terry* assumed would be rare because cops would be good—a stop not based on reasonable articulable suspicion or even getting the “bad” guys but rather a stop to show control. Or, to borrow from Professor Frank Rudy Cooper, to show “Who's the Man.”⁹⁴ The officers force the two teenagers to drop their pants and lie spread-eagle on the ground, a practice Professor Paul Butler rightly describes as sexual “torture-lite.”⁹⁵ Carver and Herc also yell to onlookers, “[We] own these towers

⁸⁹ See generally Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015) (exploring the assumption and showing its lack of empirical support).

⁹⁰ See, e.g., *United States v. Ceballos*, 719 F. Supp. 119, 126 (E.D.N.Y. 1989) (“[T]he need to frisk those suspected of committing a narcotics offense in the course of a street encounter is obvious.”); *United States v. Vasquez*, 634 F.2d 41, 43 (2d Cir. 1980) (“[T]he detectives were justified in making a protective frisk . . . particularly in view of the violent nature of narcotics crime.”); *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977) (describing firearms as the “tools of the trade” of narcotics dealers); *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir. 1987) (describing concealed weapons as “part and parcel for the drug trade”); *State v. Evans*, 618 N.E.2d 162, 169 (Ohio 1993) (“The right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed.”).

⁹¹ Bandes, *supra* note 2, at 442.

⁹² See *The Wire: The Buys*, *supra* note 84 (Season One, Episode Three).

⁹³ See *The Wire: The Detail*, *supra* note 88 (Season One, Episode Two).

⁹⁴ See generally Frank Rudy Cooper, “Who's the Man?": *Masculinities Studies*, *Terry Stops*, and *Police Training*, 18 COLUM. J. GENDER & L. 671 (2009).

⁹⁵ See Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*,

[and we're] sick of this shit!" Apparently hoping to one-up his colleagues, Officer Pryzbylewski approaches a third teenager and yells, "Move, shitbird!" When the youth points out that he's not breaking the law, Officer Pryzbylewski uses the butt of his pistol to hit the youth in his eye, blinding him.

And these scenes, from Season One, are just some of the acts of police violence. There is another parallel worth noting here: Just as members of Barksdale's Crew come up with a story to secure the acquittal of D'Angelo Barksdale in the first episode,⁹⁶ members of the Baltimore Police Department come up with a story to preserve and protect the Police Department from charges of excessive force. After Officer Pryzbylewski blinds the youth at the Towers, the three officers try explaining to Lieutenant Daniels what happened:

Carver: They jumped us, boss.

Daniels: Who?

Carver: Fucking project niggers.

Daniels: What are you doing here at two in the morning?

Carver: Field interviews, police work.

Daniels: Police work? I got a fourteen-year-old in critical but stable condition at university and two witnesses who say one of you princes coldcocked him with a pistol.⁹⁷

Lieutenant Daniels makes his displeasure known, but then instructs them to lie to Internal Affairs:

Daniels: [Internal Affairs] is going to be on all three of you by afternoon and if you don't get a story straight by then you're going to have a file thick enough to see the light of a trial board. Now tell me. Who coldcocked the kid?

[Silence. Finally Officer Pryzbylewski acknowledges his act of assault.]

12 OHIO ST. J. CRIM. L. 57, 58 (2015); see also Paul Butler, *Stop and Frisk: Sex, Torture, and Control*, in LAW AS PUNISHMENT, LAW AS REGULATION 166 (Austin Sarat et al. eds., 2011); Kristen Gwynne, *How 'Stop and Frisk' is Too Often a Sexual Assault by Cops on Teenagers in Targeted NYC Neighborhoods*, ALTERNET.ORG (Jan. 21, 2013, 2:01 PM), available at <http://www.alternet.org/civil-liberties/how-stop-and-frisk-too-often-sexual-assault-cops-teenagers-targeted-nyc> [<https://perma.cc/6AFA-DQZQ>].

⁹⁶ See *The Wire: The Target*, *supra* note 82 (Season One: Episode One).

⁹⁷ *The Wire: The Detail*, *supra* note 88 (Season One, Episode Two).

Daniels: Why?

Prez: He pissed me off.

Daniels: No, Officer Pryzbylewski. He did not piss you off. He made you fear for your safety and that of your fellow officers. I'm guessing now, but *maybe* he was seen to pick up a bottle and menace Officers Herc and Carver, both of whom had already sustained injury from flying projectiles. Rather than use deadly force in such a situation, *maybe* you elected to approach the youth, ordering him to drop the bottle. *Maybe* when he raised the bottle in a threatening manner, you used a Kel light, not the handle of your service weapon, to incapacitate the suspect. Go practice.⁹⁸

Far from being the prototypical cop that the Court imagines in its criminal procedure jurisprudence—presumptively good, committed to getting the bad guy, adhering to the law, entitled to discretion, and deserving of deference—*The Wire* again shows officers in a way that seems truer to the real world: complicated and compromised, self-interested, and not presumptively good at all.⁹⁹

Although the focus of this part has been the many parallels and juxtapositions that *The Wire* uses to depict the reality of policing and the reality of police officers, I want to end this part by turning to how the show uses metaphor, especially in one of the most oft-quoted scenes from *The Wire*: the chess scene early in Season One. In the scene, D'Angelo Barksdale, who is Avon Barksdale's nephew and a lieutenant in the drug organization, teaches two of his street level workers (Wallace and Bodie) how to play chess:

D'Angelo Barksdale: Now look, check it, it's simple, it's simple. See this? This the kingpin, a'ight? And he the man. You get the other dude's king, you got the game. But he trying to get your king too, so you gotta protect it. Now, the king, he move one space any direction he damn choose, 'cause he's the king. Like this, this, this, a'ight? But he ain't got no hustle. But the

⁹⁸ *Id.*

⁹⁹ David Sklansky makes a similar point, noting that what *The Wire* gets right, and makes it beloved by law professors who teach criminal procedure and criminal law, is not “detailed accuracy about institutional failures, or the drug trade, or post-9/11 Baltimore, but something at once bigger and more basic: the dimensions of human and moral complexity that criminal justice work, in pretty much any time or place, will inevitably bring to the surface.” See David Alan Sklansky, *Confined, Crimes, and Inextricable: What The Wire Gets Right*, 8 OHIO ST. J. CRIM. L. 473, 473 (2011).

rest of these motherfuckers on the team, they got his back. And they run so deep, he really ain't gotta do shit.

Bodie: Like your uncle.

D'Angelo Barksdale: Yeah, like my uncle. You see this? This the queen. She smart, she fast. She move any way she want, as far as she want. And she is the go-get-shit-done piece.

Wallace: Remind me of Stringer.

D'Angelo Barksdale: And this over here is the castle. Like the stash. It can move like this, and like this.

Wallace: Dog, stash don't move, man.

D'Angelo Barksdale: C'mon, yo, think. How many time we move the stash house this week? Right? And every time we move the stash, we gotta move a little muscle with it, right? To protect it.

Bodie: True, true, you right. All right, what about them little baldheaded bitches right there?

D'Angelo Barksdale: These right here, these are the pawns. They like the soldiers. They move like this, one space forward only. Except when they fight, then it's like this. And they like the front lines, they be out in the field.

Wallace: So how do you get to be the king?

D'Angelo Barksdale: It ain't like that. See, the king stay the king, a'ight? Everything stay who he is. Except for the pawns. Now, if the pawn make it all the way down to the other dude's side, he get to be queen. And like I said, the queen ain't no bitch. She got all the moves.

Bodie: A'ight, so if I make it to the other end, I win.

D'Angelo Barksdale: If you catch the other dude's king and trap it, then you win.

Bodie: A'ight, but if I make it to the end, I'm top dog.

D'Angelo Barksdale: Nah, yo, it ain't like that. Look, the pawns, man, in the game, they get capped quick. They be out the game early.

Bodie: Unless they some smart-ass pawns.¹⁰⁰

To be sure, the chess game serves as a perfect metaphor for Barksdale's drug organization—the expendable pawns, the ambition to be queen, and every player's goal of protecting the king—but that is not the only work this scene does. Pull back the lens, and the metaphor of the chess game is equally applicable to the Baltimore Police Department, with its own expendable rank and file officers who still aspire to rise through the ranks and to one day be Commissioner, the metaphorical king. Because, in both cases, the king isn't Barksdale or a particular police commissioner. The king is the institution itself. The game. That is what must be protected. And perhaps this is the most important point.

Even the institution itself—the Police Department—does not have the primary goal that the Court assumes. The police department fights crime and purports to get the bad guys off the street, but only some of the time. As one of the characters makes clear, many people have the fate of dying “in a zip code that does not fucking matter” to the police department.¹⁰¹ As the show makes clear, and as comports with reality, “[a]ims like making the street safe . . . are consistently subordinated.”¹⁰² There is always a more important goal: protecting the police department itself.¹⁰³ And as Bodie comes to recognize shortly before his death four seasons in, for people at the bottom, whether they are police officers or drug sellers: “This game is rigged. We be like the little bitches on the chessboard.”¹⁰⁴

PART III: *THE WIRE* AS DISSENT

At bottom, the preceding parts have made two arguments. One, that much of the Court's criminal procedure jurisprudence is predicated on the assumption that the prototypical cop is good, adheres to the law, is committed only to getting the bad guys off the street, can be

¹⁰⁰ *The Wire: The Buys*, *supra* note 84 (Season One, Episode Three).

¹⁰¹ See *The Wire: Dead Soldiers* (HBO television broadcast Oct. 3, 2004) (Season Three, Episode Three). I have previously written about the unequal resources brought to bear on crimes depending on the economic and racial status of the victim. See, e.g., Capers, Race, Policing, and Technology, *supra* note 24, at 1252–4. This under-enforcement was brought to the Court's attention in *McCleskey v. Kemp*, 481 U.S. 279 (1987), a capital case showing that, all other factors being equal, prosecutors were more likely to pursue capital punishment in cases involving white victims than in cases involving black victims. For a seminal discussion of this aspect of the case, see Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

¹⁰² See *The Wire: Dead Soldiers*, *supra* note 101 (Season Three, Episode Three).

¹⁰³ Bandes makes a similar point. See Bandes, *supra* note 2, at 438.

¹⁰⁴ *The Wire: Final Grades* (HBO television broadcast Dec. 10, 2006) (Season Four, Episode Thirteen).

trusted with discretionary decisions, and is deserving of deference because of his particular expertise. Two, that *The Wire* stands in opposition to this view through its “non-fiction, truth-telling.”¹⁰⁵ Ultimately, the argument I have been attempting to make is that *The Wire* engages in something that I have in previous work described as “de-shadowing,” or bringing into the open how the criminal justice system really works.¹⁰⁶ If one thinks of the Court’s opinions in several criminal procedure cases as “majority” opinions, *The Wire* seems to offer a much needed dissent. It does so by taking the majority to task for assuming officers are good, and fashioning pro-law enforcement jurisprudence accordingly. It does so by showing the reality of policing on the ground. Officer Friendly, *The Wire* says, is the real fiction.¹⁰⁷ That is the thrust of my argument. But to make this argument is to beg the questions: What are the implications of such an argument? What does it matter that *The Wire* speaks truth to power?

In this final part of this essay, I want to make the argument that *The Wire* speaking truth to power can mean everything. Real change, after all, often begins with popular culture. If Harriet Beecher Stowe’s *Uncle Tom’s Cabin* could start a great war, if Sinclair Lewis’s *The Jungle* could motivate the public to agitate for food-safety regulations, if George Orwell’s *1984* still prompts us to be vigilant against government control of how we think and speak, if the film *Philadelphia* could change the way Americans think about gay men with AIDS, what might the show *The Wire*, and other shows like it, do? I come to this question not only as a law professor who writes and thinks about criminal justice. I also come to this as a law professor deeply committed to writing and thinking about the power of culture—literature, television, music—to effect real change.

Regarding the power of culture, allow me to cite one example where the legal landscape in the last thirty years has changed dramatically: gay rights and marriage equality. We have gone from the Court’s decision in *Bowers v. Hardwick*,¹⁰⁸ a case in which the Court made it clear that if a state wanted to criminalize same-sex sex in the privacy of a bedroom, the state had every right to do so,¹⁰⁹ to the

¹⁰⁵ See Simon, *supra* note 74.

¹⁰⁶ See Bennett Capers, *Notes on Minority Report*, 42 SUFFOLK U. L. REV. 795, 796-98 (2009).

¹⁰⁷ Or perhaps as the Urban Dictionary puts it, Officer Friendly “is the name of the police officer who unjustly beat, arrested, or even killed someone.” See EVC, *Officer Friendly*, URBAN DICTIONARY (June 5, 2007), https://www.urbandictionary.com/define.php?term=officer%20friendly&utm_source=search-action [<https://perma.cc/U7MJ-TNSQ>].

¹⁰⁸ 478 U.S. 186 (1986).

¹⁰⁹ See *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), abrogated by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

Court's decision in *Lawrence v. Texas*,¹¹⁰ which held that the criminalization of same-sex sex conducted in private was a denial of liberty under the Due Process Clause.¹¹¹ And we have come to *Obergefell v. Hodges*,¹¹² the case holding that bans on same-sex marriage—or what my friends prefer to call the denial of marriage equality—were unconstitutional, violating both substantive due process and the right to equal protection guaranteed by the Fourteenth Amendment.¹¹³ This sea change in legal rights, however, would have been impossible but for the change in culture.¹¹⁴ To be sure, we should celebrate the lawyers and advocates who played crucial roles in these victories. But these victories may have been impossible without popular culture leading the way through television shows featuring LGBT characters, from *Ellen* to *Buffy the Vampire Slayer* to *Will and Grace* to *Modern Family*.¹¹⁵ And of course, to *The Wire* and its depiction of Omar Little. Omar Little, a favorite character on the show, is not only the epitome of cool, and one of the few characters with an ethical “code.”¹¹⁶ He is also both unapologetically black and unapologetically gay. It is commonly assumed that when President Barack Obama publicly announced his support of gay marriage, it did much to move African-Americans on the issue.¹¹⁷ But it is also likely that the depiction of Omar Little, mythic and heroic, played a role as well.¹¹⁸ Perhaps it is

¹¹⁰ 539 U.S. 558 (2003).

¹¹¹ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹¹² 135 S.Ct. 2584 (2015).

¹¹³ See *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604–05 (2015).

¹¹⁴ Cf. *id.* at 2598 (“The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”).

¹¹⁵ See, e.g., Matt Wilstein, *President Obama Credits Ellen DeGeneres With Turning the Tide on LGBT Equality*, THE DAILY BEAST.COM (Feb. 12, 2016, 1:14 PM), <https://www.thedailybeast.com/president-obama-credits-ellen-degeneres-with-turning-the-tide-on-lgbt-equality> [https://perma.cc/4KMP-6JJG]; Alan Sepinwall, *How Pedro, ‘Ellen,’ ‘Will & Grace’ and Other Gay TV Icons Helped Pave the Way for Gay Marriage*, UPROXX.COM (June 26, 2015), <http://uproxx.com/sepinwall/how-pedro-ellen-will-grace-and-other-gay-tv-icons-helped-pave-the-way-for-gay-marriage/> [https://perma.cc/CT3K-5RLM]; James Kim & Michelle Lanz, *How TV Shows like ‘Modern Family’ Helped Shape Perceptions of Same-Sex Marriage*, SCPR.ORG (June 26, 2015), <http://www.scpr.org/programs/the-frame/2015/06/26/43442/how-tv-shows-like-modern-family-helped-shape-perce/> [https://perma.cc/VX9G-UWVM].

¹¹⁶ For more on Omar Little’s code, see Keith Reid-Cleveland, ‘It’s All in the Game’: Remembering Omar’s Code on ‘The Wire,’ UPROXX.COM, July 31, 2015, <https://uproxx.com/tv/omar-the-wire-quotes/>.

¹¹⁷ See Brett LoGiurato, *There’s Been an Unprecedented Shift in Attitudes about Gay Marriage*, BUSINESSINSIDER.COM (Feb. 24, 2013, 10:57 AM), <http://www.businessinsider.com/polls-obama-gay-marriage-brief-prop-8-supreme-court-2013-2> [https://perma.cc/U3RP-VGFP].

¹¹⁸ The actor who played Omar has made this point as well. See Elizabeth Gettelman, *All in the Game*, MOTHERJONES.COM (Oct. 2011), <https://www.motherjones.com/media/2011/09/omar->

not coincidental that Omar was Obama's favorite character on *The Wire*.¹¹⁹

If television shows and movies moved the country on marriage equality and equal citizenship for the LGBT community, might shows like *The Wire* do something similar with respect to criminal justice? Might they play a role in opening people's eyes to the fact that all is not well, and there is still much work to do? Not work to "make America great again," whatever that means, but to "make America what America must become"¹²⁰—"fair, egalitarian, responsive to the needs of all of its citizens, and truly democratic in all respects, including its policing?"¹²¹ The cultural theorist Stuart Hall has argued that police dramas in particular can contribute to shaping attitudes about criminality and state power.¹²² Might *The Wire*, even more than the seemingly ubiquitous videos of blue-on-black violence, even more than the Black Lives Matter movement, open people's eyes to possibility that cops, too, manipulate evidence, tell untruths, and use excessive force? Might shows like *The Wire*, to the extent they influence the culture and move the needle, even "help change constitutional meaning?"¹²³

I hope so. But even here, if I am honest, I know perhaps I am being overly optimistic. After all, part of the brilliance of *The Wire* is that it resists a single interpretation and resists, too, my effort to conscript it into an argument about policing and criminal justice, or even about the mythology the Court subscribes to in imagining police officers. At the end of the day, the cops in *The Wire*—even the ones who seem incompetent (e.g., Officer Pryzbylewski), who engage in unlawful force (e.g., Detective Kima Greggs), who lie or encourage others to do so (e.g., Lieutenant Daniels)—are not evil. We identify with them and understand them, even when we cannot root for them. Some, like Officer Pryzbylewski, even emerge by the end as heroes—small letter "h" heroes—of sorts. The officers are three-dimensional—compromised

michael-kenneth-williams-interview/ [https://perma.cc/YF48-K95C].

¹¹⁹ See Caitlin McDevitt, *Omar Gets Props from President Obama*, POLITICO.COM (Mar. 1, 2012 1:47 PM), <https://www.politico.com/blogs/click/2012/03/omar-gets-props-from-president-obama-116102> [https://perma.cc/M56L-4JPX].

¹²⁰ See JAMES BALDWIN, *THE FIRE NEXT TIME* 9 (Modern Library ed. 1995) (1963) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

¹²¹ See Capers, *Crime, Legitimacy, and Testilying*, *supra* note 28, at 880.

¹²² See generally STUART HALL, *POLICING THE CRISIS* (1978).

¹²³ See Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 425 (2016).

and conflicted, facing competing interests including self-interest, and ultimately pawns of a much bigger system. But then, maybe this is the larger, ultimate point. Because, if nothing else, *The Wire* shows that the police are human, just like everyone else. No better, no worse. Maybe that is a start. Maybe that, too, is oppositional.