

ARTICLES

SCREWS, KOON, AND ROUTINE ABERRATIONS: THE USE OF FICTIONAL NARRATIVES IN FEDERAL POLICE BRUTALITY PROSECUTIONS

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Despite periodic outcries in response to particular outrages, it remains notoriously difficult to prosecute police brutality. In this form-shattering Article, Professor Troutt attributes much of this difficulty to the overwhelming power of the stories mainstream American culture tells about the encounters leading to police violence. In this piece, Professor Troutt lays bare these authority narratives—particularly their racialized dimension—and demonstrates how they have been used to defeat, if not silence, the counternarratives related by victims and their representatives.

*Professor Troutt focuses on the limited, though important, role that fictional counterstories can have in challenging the epistemological apparatus by which police brutality is supported. To illustrate this point, he offers a fictionalized narration of the events leading up to one of the most significant police brutality prosecutions of this century, *Screws v. United States*. Using his story as a starting point, Professor Troutt moves on to two broader discussions: First, he compares his account with the dominant narratives of the *Screws* case, adopted either explicitly or implicitly by almost all of the legal and jurisprudential actors who participated in that case. Second, he examines the theoretical justifications many of his colleagues offer for the use of storytelling in legal writing, highlighting the ways in which his narrative illustrates the possibilities for such storytelling and identifying several additional benefits not emphasized in the existing literature. He concludes with a discussion of the most famous police brutality case of recent times, the *Rodney King beating case*, *Koon v. United States*. In his discussion of *Koon*, Professor Troutt demonstrates the persistence of prevailing cultural narratives of police brutality cases, in part by drawing attention to the similarities in the ways in which the *Screws* and *Koon* cases were portrayed by the government and perceived by the public. In the end, through both argument and demonstration, Professor Troutt makes a strong case for the importance of literary fiction as a tool for challenging the core of dominant beliefs about race, crime, and social hierarchy implicit in reigning authority narratives.*

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INTRODUCTION

The history should not require retelling. But old and established freedoms vanish when history is forgotten.¹

What I'm saying is, under certain conditions they would *all* do it. And under the same circumstances we would not. So it doesn't matter that some of them *haven't* done it. I listen. I read. And now I know that they know it too. They know they are unnatural. Their writers and artists have been saying it for years. Telling them they are unnatural, telling them they are depraved. They call it tragedy. In the movies they call it adventure. It's just depravity that they try to make glorious, natural. But it ain't. The disease they have is in their blood, in the structure of their chromosomes.²

The tale of hurt that began with the brutal murder of Robert Hall by a small town Georgia sheriff and his deputies in January 1943 has taken many forms, most of them legal, none—except this one—fictional. That episode of police misconduct became a test prosecution by a revamped Justice Department which used two Reconstruction-era statutes, 18 U.S.C. §§ 241 and 242,³ to obtain convictions of the

¹ *Screws v. United States*, 325 U.S. 91, 120 (1945) (Rutledge, J., concurring).

² Toni Morrison, *Song of Solomon* 157 (1977) (depicting Guitar explaining to Milkman innate capacity of white people to kill black people for fun and sport).

³ The text of these statutes reads as follows. Section 241 provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C.A. § 241 (West Supp. 1998).

Section 242 provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section . . . shall be fined under this title or imprisoned not more than ten years, or both; and if death results . . . shall be fined . . . or imprisoned for any term of years or for life, or both, or may be sentenced to death.

three police defendants accused of acting under color of legal authority to violate Hall's due process rights. Those convictions were set aside by a divided Supreme Court in a landmark 1945 decision, *Screws v. United States*.⁴ The justices recounted Hall's death several times in four opinions dedicated primarily to the question of section 242's requirement of willfulness. Stories of willful civil rights deprivations in federal criminal prosecutions of official (typically police) misconduct have been retold innumerable times since *Screws*, as the Justice Department has brought more cases to trial (often, as in *Screws*, where state prosecutors refused or were unable to act). It is a story we keep telling, the timelessness of which was revealed in the troubled section 242 prosecution of the Los Angeles police officers charged in the videotaped beating of motorist Rodney Glen King.⁵ Although the two cases share as many dissimilarities as commonalities, they are alike in illustrating the profound and persistent difficulties in criminally prosecuting police brutality and, more specifically, reveal the overwhelming power of what I shall call "authority narratives"⁶ to defeat, if not silence, counternarratives by victims or their representatives.

18 U.S.C.A. § 242 (West Supp. 1998).

⁴ 325 U.S. 91 (1945).

⁵ See *infra* Part IV.B.

⁶ An authority narrative refers to the conventions repeated in the rationales for decisionmaking stories told by or on behalf of dominant legal and political institutions. Thus, the narrative consists of not just its content, but its method and perspective—its normative assumptions, level of abstraction, and inclusions and omissions. An authority narrative is not evil or discriminatory per se, even where it is merely expedient. Authority narratives are frequently used by lawyers, including legal aid lawyers, in a fashion that translates clients' stories into unrecognizable claims and positions that fully exclude the client and may alienate him from his own case, yet permit needed access to courts of redress. See Anthony V. Alfieri, *Welfare Stories*, in *Law Stories* 31, 36-39 (Gary Bellow & Martha Minow eds., 1996) (explaining how conventional advocacy strategies on behalf of indigent clients often silence powerful client narratives).

Depending on the context, however, authority narratives may express and reinforce hierarchical relationships and thereby perpetuate inequality. This is the primary view of authority narratives discussed in this Article. I have declined to adopt another description of these narrative constructions, "master narratives," because of reservations I have about the implied users of that term. Authority narratives may be invoked by people of relatively little authority, who identify with possessors of power or, more often, by people who, like individual police officers, seek refuge under a normative framework that systematically disadvantages their accuser/victim or a beneficiary of a program they disfavor. African American opponents of diversity and affirmative action programs, such as Ward Connerly, current Member of the Board of Regents at the University of California, frequently invoke narratives of fairness and colorblindness. See Excerpts from Round Table with Opponents of Racial Preferences, *N.Y. Times*, Dec. 22, 1997, at A24 (noting that moving forward on issue of race is hampered by perception that "there are preferences that are being given to people simply because they check a box and then benefits are conferred on the basis of checking that box"). By themselves, such stories belong to neither authority positionholders nor masters. But argued in the social and political context of persistent educational disparities and a lack of access to opportunity, the stories take on the character of

This Article is primarily concerned with the connection between fictional storytelling and the prosecution of police brutality, especially cases in which the violence may be motivated by racial animus. I argue that the apparently intractable problem of police use of excessive force and its relative immunity from federal (or state) criminal prosecution is made possible largely by an enduring mythology that influences normative conceptions of police behavior as well as legal treatment of such cases. Familiar accounts by state and federal prosecutors that police brutality is nearly impossible—and therefore futile—to prosecute reflect a range of experience in expensive and unsuccessful investigations, grand jury proceedings, trial outcomes and, if they get that far, punishments.⁷ This, I argue, results from the powerful influence of myths in our culture, often communicated through authority narratives (e.g., by police union officials, defense lawyers, and judges), many of which are offered and received through the medium of unconscious racism.

These myths are flexibly adapted plots and storylines of cognitive near-certainties which many of us simply regard as normal: that, for example, desperate, often hardened criminals inhabit the poorest sections of our cities and make law enforcement difficult and dangerous; that most people stopped or arrested by the police are young black

authority narratives perpetuating a status quo of disadvantage and racial hierarchy. Because such views (at least in some contexts) fairly may be said to promote an enduring set of master narratives premised on white supremacy, I believe the term authority narrative is a more accurate and helpful description.

For an interesting account of master narratives in the context of housing segregation and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1994), see Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 Wm. & Mary L. Rev. 69 (1995). Professor Robinson argues that master narratives sustain white notions of black inferiority on one hand and reinforce the necessity of segregation on the other. See *id.* at 155. The myths undergirding this narrative in the housing realm include dominant white imagery used by the real estate industry and notions that black successes in housing integration necessarily mean white losses. See *id.* at 81, 91, 116-17. At its worst, the master narrative in housing leads to physical and symbolic acts of violence against blacks in white neighborhoods. Robinson further argues that "[t]he Fair Housing Act [Title VIII] cannot effectively redress housing segregation until it recognizes the impact of the relationship between the master narrative of black inferiority, dominant white images, and the violence of neighborhood purity." *Id.* at 84.

⁷ See, e.g., Lynette Holloway, *Juries Back Police in Cases Like S.I. Death, Experts Say*, N.Y. Times, Dec. 11, 1994, at 54, in which Randolph Scott-McLaughlin, vice president of the Center for Constitutional Rights, stated:

Cops have a better chance of being struck by lightning than they do of being indicted and convicted on brutality charges. The prosecutors who present the cases must rely on police officers to investigate other cases that they prosecute. In effect, prosecuting a police officer for them is like going against a family member.

For data on prosecutions, see *infra* notes 324-29 and accompanying text.

men with little education and uncontrolled impulses living unstructured lives; that criminal suspects in custody frequently resist arrest; and that police officers protect us from random harm. Some of these notions are partially true, so that is not what makes them myths. Myths are constructed out of the epistemological reflex to assume that these and other ideas govern virtually all situations between the police and civilians, especially low-income black male civilians.

It is the sometimes unconscious manipulation of these real life observations into cognitive certainties that makes them dangerous with respect to the rights of suspects in custody. These myths work to dehumanize the subject, and even, as the caselaw demonstrates, to desubjectivize him. What happens to the victim of police brutality occurs beyond his own voice and outside his vision; the victim's account, where one exists, is frequently not sought, or it is ignored or forgotten. The stories of police brutality become articulated and understood primarily as authority narratives, not merely by desk sergeants to complainants⁸ or by police chiefs to the public,⁹ but, most importantly for these purposes, by courts to the popular culture.

The focus of this Article is on the limited, though important, role that fictional counterstories can have in challenging the epistemological apparatus by which police brutality is supported. It begins with an "easy case"—the more or less familiar backdrop of deep South bigotry in the era of Jim Crow. *Screws*, as we will see, turned on the question of willfulness, an issue relevant to both the question of the statute's constitutionality as well as the sufficiency of the jury's findings.¹⁰ This is the same hurdle that currently distinguishes federal criminal civil rights prosecutions from state criminal charges against violent police officers. My analysis then winds to a contemporary and arguably more famous case, *Koon v. United States*,¹¹ which shocked millions who watched the videotape of Rodney King being beaten

⁸ See *infra* note 14 (discussing complaint filing procedures).

⁹ One example of an authority narrative is the almost reflexive tendency among police chiefs and commissioners to refer to acts of police violence as "aberrations." See *infra* note 299. However, authority narratives can be far more vulgar. Commenting on the Los Angeles Police Department's use of a restraint maneuver (the "chokehold") that caused the asphyxiation of a number of black people in custody, then-Chief of Police Daryl F. Gates once explained that "the veins or arteries [of African Americans] do not open up as fast as they do in normal people." *Indep. Comm'n on the Los Angeles Police Dep't, Report of the Independent Commission on the Los Angeles Police Department 203* (1991) [hereinafter *Christopher Commission Report*].

¹⁰ See *Screws v. United States*, 325 U.S. 91, 101, 107 (1945); see also *infra* text accompanying notes 130-63 (discussing interpretations of willfulness requirement in *Screws*).

¹¹ 518 U.S. 81 (1996).

mercilessly for eighty-one seconds.¹² Both cases seemed "easy" to a Department of Justice otherwise loathe to bring such difficult prosecutions; these cases appeared to contain facts egregious enough to enable a jury to overcome contrary authority narratives and find strong evidence of willfulness. That is, these cases represented to prosecutors *special* stories of police willfulness, stories they believed could not be untold by a narrative of justifiable force. As a culture and a legal system, however, we have failed to grasp these stories and frequently show an unwillingness even to hear them.¹³ As a result, the problem of police abuse of force goes largely unprosecuted.¹⁴

Part I presents my fictional (re)telling of the *Screws* story. This particular tale of hurt belongs to a larger project in which I use a variety of fictional narrative formats to present for reconsideration the facts and doctrines of cases involving blacks and the American legal system.¹⁵ In this narrative format, however, the storyteller offers a conclusion as to why the *Screws* defendants were ultimately acquitted:

¹² Part of the shock and revulsion of the King beating (especially for those less familiar with the contemporary incidence of police violence) was its outdated character. However, this may help to link its meanings with those of routine beatings in the past. As Kimberlé Crenshaw and Gary Peller have written:

[T]he King beating bore the familiar markings of the 1950s and 1960s—rather than being encased carefully in definitions of merit and neutrality, old-time white supremacy was boldly and crudely inscribed on the body of King. You don't need any fancy theory to figure out what went on between the L.A. police and Rodney King.

Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, in *Reading Rodney King/Reading Urban Uprising* 56, 57 (Robert Gooding-Williams ed., 1993) [hereinafter *Reading Rodney King*]; see also Houston A. Baker, *Scene . . . Not Heard*, in *Reading Rodney King*, supra, at 38, 40-43 (comparing Rodney King to presentation of slaves by white slaveowners and abolitionists, spoken for but never allowed to speak).

¹³ As a general proposition, it is doubtful that ours is a culture willing to focus on stories of acknowledged pain and suffering, particularly when those stories illustrate oppressive hierarchical relationships. "The more painful, dramatic, and overwhelming the narrative, the more tense, wary, and self-protective is the audience, the quicker the instinct to withdraw." Lawrence L. Langer, *Holocaust Testimonies: The Ruins of Memory* 20 (1991), quoted in Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 Va. J. Soc. Pol'y & L. 479, 479 (1997).

¹⁴ For example, in New York, much of the relevant public regards the filing of complaints of police abuse ineffectual, and is critical of procedural barriers, delays, and complaint undercounting by the responsible agency, the Civilian Complaint Review Board (CCRB). See Michael Cooper, *New York Undercounted Civilian Complaints About Police*, N.Y. Times, Dec. 11, 1997, at B1. Even when the CCRB does act, it only has the power to refer cases to the commissioner of police for action by his office. See David N. Dinkins, *Guiliani Time*, The Village Voice, Aug. 26, 1997, at 34. In the first six months of 1996, for example, the CCRB referred 159 "substantiated" cases of excessive force to the commissioner; however, charges were filed against only one officer. See *id.*

¹⁵ The story included in this Article appears in a collection of ten stories fictionalizing the actual experiences of African Americans in the law. See David Dante Troutt, *The Monkey Suit and Other Short Fiction on African Americans and Justice* (1998).

"the sickness." Whatever the sickness is exactly, it is surely a matter of racism, conscious or unconscious, and its particular relationship to state authority. This is the sickness of which Toni Morrison's character speaks,¹⁶ just as it is the undefinable something that black communities (and others) have had such difficulty articulating persuasively to judges and juries from Newton, Georgia to Simi Valley, California. The story is provided as grist for the argument that a literary approach to certain kinds of legal conflicts can assist analysis where traditional tools have proved inadequate.

Part II explores the law applied by the *Screws* court in an effort to understand, from some historical and jurisprudential distance, the legal framework in which the justices were operating. First, I will discuss briefly the source and path of the Justice Department's criminal civil rights prosecutions during the early 1940s in light of section 242's legislative history. This discussion sets the stage for comparing the opinions in *Screws* with the fictional account. My emphasis is on meanings, intended and unintended, manifest and latent, which support the mythology which I argue condemns so many police brutality prosecutions to futility. Accepting *Screws* as precedent, I conclude, symbolically undervalues police brutality as a civil rights crime and demeans, in particular, black lives and black bodies.

Part III broadens the discussion to the current uses of storytelling in the law and situates the story of *Screws* in that theoretical discourse. The majority of legal scholars writing on the subject of storytelling have come broadly from two schools: critical legal theorists (race, feminist, and gay and lesbian theorists) and law and literature. Although I believe these two schools share abundant common ground, little has so far been discovered. Some of the differences concern terminology, some ideology. However, writers who might associate themselves with either theoretical field tend to share three claims that are relevant here. First, there is a tremendous need for telling undisclosed stories, particularly about the experiences that underlie legal analysis, and most urgently by those whose stories have been systematically excluded. Second, there is an equally great need for different kinds of stories, including narrative forms that have been undervalued in legal analysis, because of benefits that inhere in the forms themselves. In addition to calls for new authors and types of narratives, a third claim is that stories are especially important for lawyers and the law because their persuasive power lies in the distinctly nonlegal, though no less considered, way that we receive stories. These are all claims I endorse here. However, with few

¹⁶ See *supra* text accompanying note 2.

exceptions, scholars have shied from advocating two additional dimensions to storytelling: the use of *fictional* literary narratives and the need for legal prescriptions. By the latter, I suggest that the introduction of literary approaches in legal analysis can and should be used to affect legal outcomes. The section ends with my consideration of three anticipated criticisms of storytelling: the lack of rationality, the problem of typicality, and the tendency toward overselectivity.

The final Part of this Article attempts to advance, even by small steps, the difficult project of using fictional narratives in the practice of law by applying to the real problem of present-day police brutality the insights gleaned from my fictional approach to *Screws* and other legal writers' approaches to storytelling. I focus on the beating of Rodney King¹⁷ and the federal decisions¹⁸ culminating in the Supreme Court's opinion in *Koon v. United States* to show the persistence of authority narratives and the unconscious racism they reflect. I emphasize federal criminal prosecutions under section 242 rather than state criminal or administrative proceedings, civilian review, training and rehabilitation, or even federal civil actions under 42 U.S.C. § 1983.¹⁹

¹⁷ Examination of the King beating is also worthwhile because a large portion of the general public actually "saw" it on videotape. An unspoken premise of the power of narrative is its ability to make real for nonparticipants what happened when they were not present. Hence, what we know of the killing of Robert Hall by Claude Screws is based largely on the recital of facts provided by the Court in *Screws*. In contrast, King is "known" to many of us, enabling us to create our own at least partial narratives about the meaning of what happened. However, King's beating and the acquittal of his alleged assailants in the first trial, see *infra* note 18, offer us further insights about the power of narrative generally, authority narratives in particular, and the great need for counternarratives like the fictional account of *Screws* provided here. As Judith Butler has written of the King prosecution:

[W]hat the trial and its horrific conclusions teach us is that there is no simple recourse to the visible, to visual evidence, that it still and always calls to be read, that it is already a reading, and that in order to establish the injury on the basis of the visual evidence, an aggressive reading of the evidence is necessary.

Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in *Reading Rodney King*, *supra* note 12, at 15, 17.

¹⁸ The four officers charged with King's beating were first tried in state court and acquitted. See *People v. Powell*, No. BA 035498 (Super. Ct. L.A. County 1991). Subsequently, federal criminal civil rights charges were brought against the same defendants, and two were convicted. The district judge's sentencing memorandum may be found at *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993) [*Koon I*]. The sentence, a substantial downward departure from the Federal Sentencing Guidelines, was challenged by both parties on appeal to the Ninth Circuit, which vacated in part and affirmed in part. See *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994) [*Koon II*]. Defendants then petitioned the Supreme Court in an effort to reinstate the trial court's sentence, and the Court complied. See *Koon v. United States*, 518 U.S. 81 (1996) [*Koon III*]; see also discussion *infra* text accompanying notes 355-377.

¹⁹ 42 U.S.C. § 1983 (1994). I disagree with arguments suggesting that federal civil lawsuits under section 1983 actually do more to subjectivize the victim of police brutality than criminal prosecutions brought in the name of the state. Although it is generally true that bringing and prevailing in an action against an abusive police officer can be individually

All of these approaches are necessary in addressing the breadth of problems created by police abuse of force. Yet within the constraints of a single article, emphasis on only federal criminal prosecutions keeps two important interests at the fore. First, police brutality against persons detained or in custody represents a profound and sometimes irreparable violation of their civil rights. The government's interest in protecting those rights reaches well beyond the individual and deep into the fabric of society. Second, police use of excessive force should be viewed first in criminal terms,²⁰ even if it is unpopular to do so.²¹ Thus, regarded as a threat to important state interests in the freedom of persons, and carrying the weight of severe criminal sanctions, the federal government's means and message of enforcement may provide a national framework of deterrence.

Prescriptions, however, are more difficult than critiques. After all, the difficulty of infusing narratives into the law—fictional or not—is not that their appropriateness is questioned. Police brutality prosecutions have long been a battleground of competing stories.²² The

empowering, the practical and financial difficulties of obtaining legal representation often preclude this remedy. More importantly, there is strong evidence from many urban police departments that plaintiff awards in civil cases create little deterrence. See, e.g., Deborah Sontag & Dan Barry, *Police Complaints Settled, Rarely Resolved*, N.Y. Times, Sept. 17, 1997, at A1 (discussing New York City's settlement practices for police brutality claims that typically entail neither formal investigation into accusations nor scrutiny or punishment of officers' behavior); see also Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. Cal. L. Rev. 1453, 1504-14 (1993) (describing limitations on private section 1983 damage suits and arguing that even if revised and strengthened, civil remedies are not sufficient to achieve police accountability and prevent police abuse). However, for a contrary view from a sitting federal judge, see Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 453 (1978) (concluding that "the section 1983 damage suit has potential as an effective deterrent and compensatory remedy but must be substantially restructured").

²⁰ See generally Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 Hastings L.J. 677, 710-16 (1996) (discussing "collective condemnation" and important expressive function that result from treating police brutality as a crime).

²¹ See *id.* at 726 n.177 (explaining juries' reluctance to convict police officers); see also *infra* note 329 and accompanying text.

The public anticrime attitudes that cripple federal criminal prosecutions of police brutality are also reflected in the limited role that the federal government has assigned itself in such cases. This Article argues that the government's role can and should be strengthened, but I do not focus on the peculiar resistance shown by the Justice Department to prosecute section 242 cases against the police. For a thorough and lengthy discussion of that history, particularly with respect to Los Angeles during the Reagan and Bush administrations, see Hoffman, *supra* note 19, at 1488-1501.

²² A recent (and horrific) instance of competing cop/victim narratives in anticipation of trial arose from the alleged assault, torture, and sexual molestation of Abner Louima, a Haitian immigrant, by at least four police officers from Brooklyn, New York's 70th precinct. According to press accounts, Louima was among a late-night crowd at a nightclub

problem is in establishing criteria by which decisionmakers can reject the poor ones. Clearly, all narratives are neither created equal nor delivered with equal force. Poor narratives are broadly those which fail adequately to contextualize the conflict and which desubjectivize the actor-victim, thereby preventing a full consideration of that person's rights to bodily integrity and the safeguards of due process. Good narratives rely on a broad factual basis, demonstrate clear regard for interpersonal complexities, emphasize the psychological apparatus and intentional states of mind of actors, and acknowledge the narrator's biases. This Article concludes by recommending the expanded use of literary fiction about police brutality targeted primarily to legal professionals and law students as well as to law enforcement personnel and the public.

I THE STORY²³

It wasn't just the war, the organization, his child or that gun which brought Bobby Hall to the end.

on August 9, 1997, when a scuffle involving police broke out. See John Kifner, *Investigators Looking at New Allegations in Brutality Case*, N.Y. Times, Aug. 21, 1997, at B1. Although the specifics of Louima's initial involvement in the altercation are unclear, police officers arrested him and allegedly beat him once or twice on the way to the precinct house. At the police station, Louima was stripped and taken to a bathroom where at least two officers allegedly rammed a toilet plunger into his rectum, tearing his colon, then forced the plunger into Louima's mouth, breaking a front tooth. See *id.* Bleeding, Louima went without medical treatment for nearly two and a half hours after the assault. Numerous breaches of police procedure both at the station house and at the hospital where Louima was finally admitted were included in indictments handed down by a Brooklyn grand jury. See *id.* However, for the purpose of narrative analysis, it is critical to note that the story police reported to both the press and the hospital staff alleged that Louima's rectum was injured as a result of homosexual sex at a gay nightclub. See *id.* Citing evidence of wider involvement among police officers of varying rank, the United States Attorney for the Eastern District of New York brought indictments against four police officers and one sergeant under section 242 on February 26, 1998. See Joseph P. Fried, *U.S. Takes Over the Louima Case; 5th Suspect, a Sergeant, Is Indicted*, N.Y. Times, Feb. 27, 1998, at A1.

²³ I have chosen to include some citations to the trial transcript, Transcript of Record, *Screws v. United States*, 325 U.S. 91 (1945) (No. 42), throughout the story. Although I use many sources for the story, I rely heavily on the trial transcript. I also exercise considerable license with the facts (e.g., names are changed, feelings and dialogue are attributed to actual or fictitious characters for which there is not factual support, and details of the setting are enhanced). However, the transcript references are provided in order to enable readers to review my judgments and to make their own, or simply to gauge for themselves the "truth" of critical literary facts and descriptions. In citing to the trial transcript, I have used the term "compare" to refer to the testimony in the trial transcript that generally corresponds to the events, people, places, and dialogue in the narrative. The absence of this term indicates that a name, object, place, or statement directly conforms to the cited text of the transcript. For a more thorough explanatory note regarding my use of case records in fictionalization, see Troutt, *supra* note 15, at 311-17.

But it indeed started with the war. A war so large it refitted every tool, swallowed all belief, threatened to change the tomorrow of a continent or the yesterday of a country. Georgia gave its men. Not including Bobby Hall. His brother Lemuel got called, but not Bobby. Selective Service denied most colored men the chance to fight. Rather than join all a man's grit with all the world's muscle, Bobby stayed home with his young wife Annie Pearl²⁴ and their baby; rather than be swept up by the truth of America's guns of freedom, he stayed near his father Willy²⁵ to read the letters from Lemuel and cheer a negro in uniform when he returned home on leave. Otherwise he fixed Newton's cars and led the organization.

It was the organization. The few colored soldiers that served were left on the fringe, sent to Quartermaster Corps and Overhead where they hardly saw combat. Most never left the South. It was hard enough that angry rednecks commanded their hours with spit and vulgarity, but townfolk tried to keep them in their place, too. Then the military itself might cheat their families or not allow enlisted men to look in after wives, children, or sickly parents left behind in the fields. When they'd come home dressed in their brilliant green, trouble would start. Whitefolks did not much appreciate the sight. Trouble wouldn't end until some time later, after the soldiers had left, when a business would dry up suddenly, or farmers couldn't fetch a fair price for the same crops as the year before, or the tax levies seemed askew. So, some who remained started an organization, the Negro Betterment Society, to make claims on behalf of the negroes in Newton and across Baker County. Bobby, not even a farmer himself or a soldier's wife, led the way.

"How you doin', suh?" Reverend Clark might ask him. The reverend called him sir. Or Jimmy Keys, a carpenter. Or one of the farmers, Gilbert Rhoades. Men nearly his father's age.

"I'm handy 'til I break," Bobby might tell them in his peculiar hushed tone voice. "Handy 'til I break." But everybody knew Bobby wasn't about to break.

I also wish to note explicitly for readers that this story—for whatever it does in articulating a counterpoint to the Court's authority narrative and in promoting an analytic methodology—is still a work of fiction. As such, it is taken here out of its more natural context (a collection of short fiction) and presented to the reader in the body of a law review article. Not only might this seem incongruous, but, ironically, it may diminish the force of later arguments I make about readers' receipt of arguments through fiction. See discussion *infra* text accompanying notes 255-65. Hopefully, readers will suspend concerns about this quandary in order to explore them later in comparison to nonfiction texts.

²⁴ Transcript of Record at 58, *Screws* (No. 42).

²⁵ *Id.* at 35; compare *id.* at 38.

Bobby's father, Willy Hall, never liked being cheated, and even as an old man wondered how the whitefolks of his small town could jeer and taunt a colored boy defending his country. But he wanted Bobby to stop making demands on the sheriff. "Quit standing under this cat's tree," he warned. "There's shade enough to go 'round."

Willy was wrong, and Bobby tried to explain it. "The only reason he's in the tree is to keep the peace. It's only right he keep some or climb down out of it."

It was the child. Annie Pearl wanted to name him New. He was born in the summer of 1942. Bobby thought he was perfect and started looking for a name in the bible. He struggled over the names of disciples, Paul, Matthew, Luke. He switched to kings.

"I change," she said one August night on the porch, Bobby in the flat chair, Willy snoring on the stoop.

"Better not, please."

"Jes think how I do, Bobby." Annie Pearl swayed gently in the rocker, the baby boy at her breast. Bobby leaned his wiry brown arms on his big knees and listened, admiring every copper pound of her softness. He liked to love the irregular beauty of his bride's auburn lips spread out like a permanent butterfly kiss. He waited for the words to rearrange her cheekbones and thicken her coal black eyebrows. "I don't know if I'm gonna be the same girl next year as I is today. I cain't hardly remember who I was last year, and I don't truly miss her." She expected him to say something, but he kept listening. "Let's name this baby New."

Which they did. New went into town and New went to meetings. Except in Bobby's auto repair shop, the child, like his mother, was a small fixture beside a square hulk of a man. Everywhere he liked to go they liked to go with him.

At that time Annie Pearl was the kind of woman split between the tenderness from which she'd come and the glory she seemed headed for. Just twenty-one, she was a spunky sidekick to the man who believed you stand for something. Her airs begot jealousy among those who were young enough to want the same. Older colored folks' eyes tried to speak for white folks' minds and cast weary looks at the spectacle they made. Stop flaunting it, said their faces. But Bobby and Annie Pearl had time, New, her cotton dresses, his business and, so it seemed, color on their side.

It was the gun. Bobby had a pearl handle automatic²⁶ that for a while he carried in his waistband. Bobby liked how the cool blue steel felt against his palm when he held it, the precise lines flowing up and

²⁶ Id. at 37.

down the thickness like something crafted in a different time and place. Most men liked the creamy, marble-colored handle the best. Bobby only let them hold it away from Annie Pearl, who didn't like having it around at all.

"Where'd you git it?" Manley Poteat²⁷ asked him.

"That's not a fit question, Manley," Manley's father Walter²⁸ said. They lived in Albany where Walter ran a negro mortuary with his boy and came down to Newton for meetings. "Don't be askin Bobby to give up his goods."

Bobby had no problem being asked. "Lemuel bought it off an Indian in Savannah."

"It's army issue?" Manley asked.

"No," Bobby laughed. "I think he said it's German. I don't rightly know."

The Germans had little to do with Bobby's pearl handle pistol. He had the gun because it was the thing that says I am. His brother stood ready to die to protect freedom abroad. He himself would serve in a minute. Bobby and Lemuel had decided together, many times over meals, it takes freedom before anything that works can last. You had to die to protect something that precious. If you can bear arms against the enemy in Europe, you can protect yourself against your enemy anywhere. For the colored man, to serve was to serve. He had a child, a wife and a business. With responsibilities came certain dangers, which he would stand against. Where freedoms were at stake in Newton, like the right to be left alone, Bobby would be ready. He didn't invent these rules. The president himself announced them for the world to know. White folks had lived by them for years. The rules seemed clearer to him now, as though he had finally discovered something that *they* had been trying to teach. No, Bobby saw no wrong in owning the thing.

For Sheriff Claude Screws, this was nothing but biggety reasoning possessed of nonsense. When the world came to Newton, it had better climb the stairs up the courthouse steps and ask his permission. Otherwise, it was just words on a newspaper.

Screws was a man in his late forties with no significant property. He lived in a rural county yet knew little about farming, harvesting instead the courtesies of farmers and the control that came with his badge. He and Deputy Frank Jones kept order. Frank was a big dumb kid of a man, with a build drawn up like a "V". The shorter Screws hung just the opposite way, wide at the bottom with a small

²⁷ Id. at 109.

²⁸ Id. at 112.

head. He wore thick glasses in black frames above his premature jowls, and a flap of flesh had developed on his throat from years of tugging at it. They allowed no drunks or Hitlers to invade the good sense of Newton, swiftly hauling them to one of the jail cells behind the office. When Bobby Hall, representing the Negro Betterment Society, came to the sheriff's office and asked him to arrest the men who were harassing black soldiers on leave, Screws threatened to lock *him* up.

By the new year 1943, Screws was convinced that the negro man in arms posed more than a nuisance to real soldiers in the field. Too many of them thought a uniform made them better, as if the suit could change the flesh it covered. He heard of rallies by negroes up north in cities like Chicago and New York where they demanded Double Victory: freedom abroad and freedom at home. For a long time he blamed their false hopes on Roosevelt, until that January when he read in the papers about the 'Murder on the Mainline.' A young blonde newlywed traveling by train to California with her husband, had been viciously murdered in her sleeping bunk, her throat slashed and the life bled out of her. She was the bride of a navy ensign. The murderer was a colored navy cook. It was more than the President, but their own nature at work. After that, Sheriff Screws decided to take away the guns from negroes in Newton.

"Sheriff, I don't need me no warrant, if'n you jes say so," Frank Jones told him, sitting boots up in the chair. "What's the boy gon say, anyway?"

"That really ain't a matter of your concern now, Frank, is it?" Screws said, looking up from the black Royal typewriter he liked to pluck at. His light blue eyes could shoot razor looks sharp from the tight lines around them. To Screws, presenting a warrant, even a false one,²⁹ spared him the trouble of explaining the new law. The warrant was like an official seal around the words and made the law legal.

"This boy thinks he's got just about every damn thing figgered out. He's a right cunning bastard, and we gonna put a halt to this today. You hear me, Frank? You take this here piece a paper, tell Bobby this is from the justice of the peace on account of the new ordinance just passed, ain't allowin' concealed guns and weapons carried on the person—or anywhere about him. Y'understand what to say? Tell 'im it's a warrant."

"All right, I will."

"Good. And you bring that pistol straight back here to me."

²⁹ Compare *id.* at 191, 193.

Frank was a child beguiled by his own size and duty. He needed to be led. Putting his great weight on somebody in the name of the law was job enough, and he could do it over and over all day. But he worked better when he was led to it. Sheriff Screws was a leader. His unspoken love for the town and its families was passionate and strict. Screws served with such purpose, and it was the purpose for which he served.

Though the January air is mild, its rain has soaked Newton's red soil. Frank nearly slips on his way down the courthouse stairs into the square where the cruiser is parked. The drive out to Butler's garage³⁰ where Bobby usually worked alone took ten minutes in good weather, but twenty on muddy roads. As he drives up, Frank can see Bobby under the grill of Bruce Jenkins' Chrysler.

"Come out from under that auto, boy. Wanna have a word with you," Frank tells him. He cocks his head sideways to view the thick body half under the grill. Frank is also doing a little something with his tongue against his teeth, like he had snuff in his gums, but it's just attitude and a fondness for these moments.

Bobby recognizes the boots and cannot deny the voice, much as he'd like to. "How ya holdin' up under all this rain, Frank?" he asks, coming up for air. He and Frank are about the same age.

"Enough of all that, Bobby. I got quick business with you." Frank holds the paper across his chest, other hand on his hip next to his holster. "Says here you betta gimme that pistol you been carryin' around."

Bobby wipes the sweat from his greasy brow with his forearm, then pulls a rag from his grimy pocket and starts cleaning oil from his fingers. Keeping a safe distance from the nervous deputy, Bobby says, "That some kind of a warrant?" Frank just nods. Bobby squints. "Don't spose you let me take a look at it?"

"You've seen everything you need to see, Bobby. Now don't waste my time. Where's your gun?"

Butler's garage is just big enough for two small trucks side by side, with a work space lit up by a single light bulb. Outhouse out back, space in front for several more cars. Right now there's only the Chrysler, the lightbulb, Bobby and Frank, separated by about ten feet and that piece of paper.

Bobby scratches the back of his head hard, as if something there really itched, and squints again. "Why come I gotta give up my gun all of a sudden, officer Frank? How's it against the law me havin' a gun around here?"

³⁰ Id. at 44.

Frank relaxes his teeth and remembers what the sheriff said. "Been a new law passed, ord'nance, says cain't be concealin' weapons no more. This here warrant is for your gun, boy. So lemme have it, and you can go on back to work."

Bobby weighs in his head exactly what he wants to say. Finally, he chooses. "Ord'nance only applies to niggas?"

This becomes Frank Jones's unfinished dream, the one he keeps having for days afterward, wondering why he didn't lay Bobby flat with his fist, pistol whip him, shoot him right there, how the adrenaline nearly blinded him, but his hands forgot to move. Instead, heat wells up on his forehead and races down to the hard curve of his mouth. "That's the last thing you gonna say to me now, boy, ya hear me? Where you keep the goddamn gun?"

Bobby walks slowly toward the wide opening of the garage and points to his Chevy parked outside next to the road. Frank motions to him to walk to the car and follows close behind him, hand firmly around his holster. When Bobby reaches the passenger side, he steps back, points to the map compartment, and lets Frank have his way. Bobby starts shaking his head slightly. A little ice chills in his veins. Frank opens the compartment, smiles at the gun, motions Bobby to head back into the garage. Then he captures the blue steel pistol and takes it back in the rain toward Newton and the sheriff.

That was supposed to be the end of the gun incident, but it wasn't. Bobby had dreams, too. They were war dreams, made from the details of Lemuel's letters. Bobby imagined men in their green fatigues running over hillsides, machine guns in their arms, pistols in their waistbands. The hills were Newton's hills with magnolias rising in between them, but the enemy was German, white like Newton's whitefolks, but foreign in their talk and all wearing spectacles, like in the newsreels. Bombs exploded everywhere and dirt and shrapnel rained. Lemuel's combat drills turned to real combat in the dreams. The sergeants and company commanders were white men from Baker County, men you'd see in town, now fighting as one, negro and white. They yelled to the soldiers to hold a position and fire, and the soldiers, Lemuel and the negro battalion, would hold and fire. But they didn't spray their machine guns, they shot the Germans' eyes out with their pistols, always with their pistols. They opened their chests and they ripped off their limbs, but always with pearl handle pistols.

"I gotta get my gun back, Annie," Bobby said suddenly waking in the middle of the night.

"Careful, Bobby, you gon crush the baby!" New slept between them on the bed. "You already got a gun," she added trying to get back to sleep.

"What gun?"

"Shotgun." She pointed in the darkness to the shotgun behind the bed.

"No, no, baby. This is important. The man had no right to be takin my pistol offa me." Bobby put his hand against New's bare side and felt his sleeping heart beats. Without thinking, he stuck his nose down and took a deep breath of his skin. "I'ma git it back."

He was surprised to look up and see Annie Pearl fully awake and staring at him. "You got betta to think on," she said and slid New's body up to where it was right in their faces. In the morning, they were all a tangle puzzle of bodies locked in slumber. But Bobby still carried a vivid memory of the dream.

So, he decided to ask his father to have a talk with Sheriff Screws and try to get the gun back that way. Willy Hall grew up with Screws.³¹ They had years of polite understandings between them.

Sheriff Screws's confiscation of Bobby Hall's pistol lacked the power of B-29s over Berlin, but it did him proud. It had none of the majesty of a hundred thousand troops ready to do battle on the ground in France or gunships ablaze over the sea. But it was good enough for Newton. In a way, he liked to think he held the homefront. He held the ground out by the town square and protected the homes that faced the well in front of the courthouse and the stores there. These were his streets, threatened not by jackbooted brown-shirts, but Hitler's unintended soldiers, negroes in arms.

Around six every evening, Mavis Bailey, old and widowed, invited passersby for a neighborly moment to chat on her porch overlooking the square. Sheriff Screws's talk with her had been about other things, like the unusually warm weather, until Joe Ledbetter came up with his wife, Elizabeth.³² Sheriff Screws mentioned the pistol then.

"Matter of fact, I just wrestled a pistol offa that Hall nigger durin the storm today." He spoke almost under his breath, which mixed with the clean, moist evening breeze that followed the rain. Mavis Bailey and the Ledbetters let the breeze linger in their noses awhile before acknowledging what he said.

"Willy Hall, sherf?" Mavis asked.

"Nah," he laughed, one leg up on her porch step, one big arm leaning down on it. "Old Will's all right. Talkin 'bout his uppity son, Bobby, the cowboy."

³¹ Compare *id.* at 36.

³² Compare *id.* at 83.

Minutes passed and dimmed the sky a little. "Reckon the darkies are startin to carry guns on 'em, sherf?" Joe Ledbetter asked, turning a skeptical glance toward him.

"I know it to be so. Young ones," he said, low key. "Ain't legal to conceal a weapon."

Edward Ellis and his daughter Alma³³ made their way over to Mavis Bailey's porch from their own house three doors away. Elizabeth started talk of the war, as someone always does. They trade imperfect information, and leave the questions in the air. Alma, looking younger than her sixteen years, sat alone in the rope chair, blonde, cherub cheeked, listening to talk of guns and calibers. Screws turned things back to the enemy in town.

"Say you found the gun on 'im?" Ed asked. "That boy's got my Packard in there."

The sheriff looked off into the square. "Nah, not on 'im," he laughed, raising up to light a Chesterfield he pulled from his shirt pocket. "He carries the damn thing around in his car. Ed, you've seen that boy rollin' around town in that big Chevy."

Mavis Bailey started to hum quietly from a corner of the porch.

"That ain't exactly concealin' to me, sherf," said Joe.

The exchange began to rile him, but he was out of words. 'Some o'm would kill us all if they could,' he wanted to say. "Trust me," Screws told them and walked on into the night.

When Willy Hall climbed the courthouse stairs the next day to ask Sheriff Screws if he would return his son's pistol, Screws flat told him no.³⁴

"Likes to hep yeh, Willy, you know I would. You and me go way back an' all. But your son carryin' guns around and incitin' nigras, well, then it becomes just me and my bi'ness. Cain't gi'yeh no gun back."

Words were harder to find there in the pale fluorescence of the jailhouse, as he stood cap in hand beside the sheriff's desk. Willy wanted to reason with him, but he knew the sheriff would take offense if he could tell that Willy was being reasonable with him.

"Sherf, Bobby ain't plannin' on usin' no gun."

"What's he carryin' it around for then, Willy? Pheasant? He want to stop by the side of the road and kill him some pheasant with a six shooter, I guess. That it, Willy?"

"Don't want to take up too much o'ya time, sherf, but lastly I was just wondrin' could I be the one responsible for the gun and makin'

³³ Id. at 98.

³⁴ Compare id. at 37.

sure that Bobby don't never carry it in his car or on 'im, ceptin' mebbe jes keep it in his own home?"

Sheriff Screws leaned back, but didn't laugh this time. He tied his lips up to one side skeptically, but kept his thumbs rotating in his lap like he was considering the suggestion. "Nope. Cain't do that for ya, boy. Sorry. 'Sall there is to it. Now let me get on back to work."

Lemuel Hall's all-negro battalion was sent to Liberia some time in late 1942—they didn't know exactly when because the letter which arrived in mid-January did not specify. He was in Africa, he wrote. As far as he knew, he was among the first colored troops to serve anywhere alongside white soldiers. The white soldiers were all officers in command. He wrote a little about the bush and said he hadn't seen any jungles yet, but had heard tell of it and couldn't wait to go. Lemuel found it odd that such a modern war, a war that produced the aircraft that flew him and hundreds more such a distance, a war that made the whole world small, made him feel like nothing changed. Except for the way the women and little children dressed, the Africans looked just like him. They spoke English at pointed angles like the British, but they looked the same as he.

News of his brother fighting alongside white men in Africa was enough for Bobby. When Willy told him what Sheriff Screws said about the gun, Bobby tore into a rage right there on his porch. "This cain't stand, pop!" he yelled. Annie Pearl looked up at him with the baby in her arms, hoping to restrain him some. "The man cain't swoop down on me and take what's mine," Bobby bellowed, looking back at his wife. "If he can take my protection, he can have anything he wants. No, sir. I'll take it up to Albany. I'll ask the whosie-callit, the attorney general to see about this ord'nance."

"Don't ask the snake nothin, boy," Willy said, twisting his cap in his hands. "The rattle only tells you what the bite already knows."

"Well let the cracker rattle away then! I ain't gettin bit. I got no cause to get bit. I ain't broke no law, daddy. I ain't done nobody wrong. This man is foul, thas all." He knew if his voice reached a certain pitch the baby would start crying. Bobby paced and tried to think it through calmly. "He don't wanna round up no rednecks callin' names on hardworkin colored folks. He won't protect colored soldiers who gone and pledged to protect all *they* have, layin' lives on the line. Lemuel's in Africa, you know. *Africa*. No, sir, there's got to be a point where it's clear even in *they* eyes. He just plain wrong on this. We ain't no goddamn animals."

"Shhh in front of the baby!" Annie Pearl snapped.

"This is *for* the baby, whatchoo talkin' bout?"

Annie Pearl rocked for a minute and stood up suddenly. She stepped in front of Bobby and handed him the bundle. "Hold im." Bobby looked at her like she was crazy. "Hold im!" Bobby took New.

"Where you goin'?"

She sat down again. "I be right here wit your daddy on the other side of sense. When you figger it out, come on over here wit us." Bobby started to talk, but she interrupted him. "Nuh uh. Right ain't always right, Bobby. You the one like to preach that. Makin these men mad at you only gonna put all us in a world a danger, Bobby. You *know* that. You do." She held him in a fierce stare, until he looked away and pulled the baby closer. "They don't need no reason, but you wanna give 'em one anyway."

"They might sure want to beat my brains in, babygirl, 'cept they don't believe I got none," he laughed.

Bobby declined to live what he called the hell of fear. It made no sense to give in to the sheriff's whim. He wasn't asking for something beyond his due. It wasn't a question of gaining some white privilege or access to their things, their homes, their businesses. Bobby's demand fit nicely inside what was regular and hardly pushed a boundary. What's mine is mine. And if my blood can stand and fight for this country, if my brother, my kin, should leave on this nation's ships and planes, lay down his life and perhaps never come back, then at least preserve for me the honor of my private bounty. So, Bobby had to seek out the grand jury in Albany.³⁵ He had to.

Bobby waited until sun up before returning to Newton from the grand jury. The twenty mile drive is perfect in the early hours, the sun shining in the tiny branches of naked trees along the highway, and safer too for a colored man traveling alone. He spent the night with the Poteats, above their funeral parlor. Fresh with some of Mrs. Poteat's good eggs and grits in his stomach, Bobby drove with all of the events of yesterday still turning in his head. Every now and then, he'd glance off into the thick woods that flanked the highway. He wondered why Lemuel was so eager to get to the jungles, and now he remembered why. They enchanted the eye, drawing him deeper into the thickness where light couldn't reach. Occasionally, he'd check the windshields of oncoming cars, looking for Sheriff Screws approaching from the opposite direction. Sheriff Screws didn't always take the police car and sometimes used his own car on police business. Bobby knew the sheriff had police business before the grand jury that day in Albany.

³⁵ Compare *id.* at 40-42.

Grandest thing about this jury to Bobby was that they made him wait all day to see it. He'd paced the marble floor of the courthouse most of the morning, twisting sweat into his cap, practicing what he might say to all those white men in there. A bailiff said the grand jury had a lot of business on Tuesdays and Wednesdays, because it didn't convene on Mondays or Fridays and only half days on Thursdays. Head prosecutor for the state that day couldn't be bothered with a negro trying to challenge a sheriff to get his gun back. But the head prosecutor had indeed reviewed the complaint Bobby signed that morning. Around four o'clock, the bailiff told Bobby that the prosecutor was explaining the law about concealed weapons to the men on the jury, and that he should get ready to come in and say whatever he had to say with a quickness. A few minutes later, he did.

It was easier than any time he'd ever been before a pack of white men in Albany. Other times he'd gone up on business for the Negro Betterment Society, the county people were always urgent and hostile. It was the same assortment of spectacles and suspenders. But this time the white men looked sleepy, and he saw one with his leg hanging out of the jury box. He was wearing jeans, not trousers, like he was taking a break from his yard to come hear Bobby's dispute with Sheriff Screws.

When Sheriff Screws arrived the next day, it was a whole different picture. Screws occupied a large brown leather chair in the center opposite the twenty-odd men in the box. The prosecutor was Maston O'Neal,³⁶ the solicitor general himself, dirty blond and red-mustached, medium-sized but built with a slight hunch. He walked in comfortable little circles while he spoke, mostly so the jurors could hear him. He seemed to know them all.

Screws knew O'Neal and knew some of these men too. Sleepy would be familiar, and Screws would have liked that. But in the room with the high ceilings and a long day ahead, that's not what Screws found.

Explain to us the precise manner in which the negro carried the pearl handle pistol on his person, Claude. Who witnessed this? What justified the issuance of the warrant? Claude, we called your deputy and still couldn't find no record of the warrant, you happen to fetch a copy with you today?

Each question burned a little deeper red into Sheriff Screws's face, until all hope for the familiar turned to flames behind his eyes. The anger filled all the thickness of his cheeks, planning its escape. They sounded like they didn't trust him. They sounded like they were

³⁶ *Id.* at 41.

no longer on the same side of the law. "You gentlemen startin' to wear me out with all this talk about some Negro's rights to pack a pistol in my jurisdiction, an' I just about listened to as much as I care to hear today."

"Claude, now you know we have to resolve this thing. Man come up here asking for his gun back."

"There ain't nuthin' to resolve that ain't already, Maston. You fellas are jes wastin' your goddamn time and mine over this triflin' nigger bi'ness." A court stenographer tried to catch the heat on paper, but it started moving too fast for her. The more Sheriff Screws cussed in front of the young woman, the more anxious the expressions on the jurors' faces. "Who y'all think you in here tryin' to protect? When our boys left for Germ'ny, ya think they asked me could I please leave armed coloreds in charge of they wives and kin? No, sir, you are mistaken. I'll take the guns off the niggers, and I'll do it alone. Somebody try to make me give that damn nigger back his gun betta be ready to take it out ma hand."³⁷ Sheriff Screws stood up and put his hat back on his head. "S'all there is to it, men. See ya when I see ya."

The grand jury is not so grand after all, Bobby learned on Friday. Just because they decided Bobby wasn't unlawfully carrying his pearl handle pistol didn't mean he got the right to retrieve it from the sheriff.³⁸ It takes a justice of the peace to sign that order, and the one presiding in Albany, Judge Carl Crowe,³⁹ was in and out that week. Maybe he'd sign it, maybe he wouldn't. It takes Maston O'Neal to write up the request. Neither man did it. The justice of the peace over Newton was T.A. Riley.⁴⁰ That old man was a rubber stamp for Screws, if it wasn't Screws that signs all his papers anyway.

Willy Hall found it hard to believe that the grand jury had sided with a colored man over a sheriff. But Bobby didn't stop to take much joy from it. He wanted his gun back. More than anything in the world. He faced the familiar chorus on the porch, Annie Pearl's flammable disbelief and Willy's wizened old fear.

"What's this thing to you, Bobby?" Annie Pearl asked him. "Which sun won't rise, which dog won't bark, which meat won't cut if you don't get your pretty little gun back?"

Bobby smiled first because he loved the rich bottom of her voice, and also because he didn't know what to tell her. His own mind was a jumble, but it was clear. The jumble had an army uniform in it, Selec-

³⁷ Compare *id.* at 40-41.

³⁸ Compare *id.* at 40, 42.

³⁹ *Id.* at 190.

⁴⁰ *Id.* at 64-65.

tive Service not selecting him, Liberia, faces black as rubber, white faces jeering at Lemuel, wanting so much to fight, folks getting ripped off, prices suddenly rising, America. The clarity had something to do with a new day coming. After all, the grand jury sided with him. "I'm just trying to make somethin' outta nuthin', baby."

"Son, if you ask me," Willy said from the stoop, "the fish that gets away oughtta be thankful to the hook and git."

Bobby chuckled and patted his dad on the shoulder. "Mebbe so, but remember: I ain't no fish. Seems to me the only thing a man needs to thank a hook for is supper."

So, on Tuesday Bobby took the road to Camilla to see a lawyer named Robert Culpepper.⁴¹ Culpepper once represented a merchant farmer named Vincent, who owned one of the largest acreages in the southern half of the state. Bobby remembered him as the only fair lawyer up against the Negro Betterment Society when it was demanding an accounting from Vincent last spring. But the first day Bobby showed up, Culpepper had disappeared. Bobby grew impatient and decided to come back on Thursday. He wanted his gun back, and he wanted a justice of the peace to sign the paper making Screws give it back. He started seeing that moment, the fresh ink on the paper, the presentation to Screws, who would doubt it, turn red studying it, and finally have to end the matter by returning the pistol.

Culpepper was in. He was a gold watch and suspenders man, the very picture of a lawyer in Bobby's mind. Spectacles in a hip pocket he pulled out from time to time. Grey suit. Coins shaking around in his pockets. Venetian blinds in his office and a pretty white girl at the desk in front.

"Came to see Mr. Culpepper, ma'am," he said without first ascertaining what business he might have walked in on. Luckily, nobody was doing a thing, not the woman, not Culpepper. She took his name back to Culpepper's office. Bobby turned the hat in his hands, wanting to sit down. Instead, he stood and waited.

The ten-mile drive from Newton didn't take as long, but Culpepper finally came out. The woman sat down at her desk to do nothing again. Culpepper approached with his hands on his waistband. His square face was crowded by salt and pepper locks of thick hair, and his large brown eyes fixed so powerfully that Bobby took a step back. "How are ya, boy? Name's Hall ain't it? Think we've met. What is it you want me to do for you?"

⁴¹ *Id.* at 43.

He tossed a finger toward a bench by the door for Bobby to sit on. Bobby looked at the bench, then at Culpepper. "Won't we be needin' some privacy, sir?"

Culpepper cut a broad grin, which relieved Bobby a little to see. "Miss Jackson's my assistant. Not to worry. Only my clients meet in the rear, and, well, you're not a client as yet."

So, Bobby told it in a whisper. When the outrage bubbled up, he thought of his wife and settled down. Culpepper kept staring hard at him, like his words and Culpepper's eyes weren't connected by the same purpose.

"Well, I can start by writin' Sheriff Screws a letter, lettin' him know you've retained me and that we're interested in the return of the gun, based on the grand jury and all." Bobby stopped to savor the sound of that 'we' and how lawyersome it was. In all that he heard, he didn't hear no. Culpepper sighed. "It'll cost you \$50 for me to start this ball rollin' for you, son. Twenty-five right now if you want me to start today, other twenty-five middle of next month. I can dictate your letter right now and get it out tomorruh. Whaddya say?" Culpepper extended a stubby hand. Bobby stepped forward and shook it.

"Thank yeh, sir. That'd be just fine," Bobby said.

Robert Culpepper kept his word. He wrote the letter to Sheriff Screws and sent it by courier Friday afternoon.⁴² It was short and crisp in lawyer words that marched off the page like little black soldiers. With reference to regaining possession of said automatic pistol. Be advised. Presume your intent. Rightful owner. Meet in person. At once.⁴³

That day, the state of Georgia switched to official war time.⁴⁴ The clocks were reset.

When Sheriff Screws read Culpepper's words Friday evening, he decided he was going to get Bobby Hall that night. It took a while for him to know what getting meant; the lawyer words both riled and arrested his thinking. It was a kind of blasphemy of trust, how another white man, a man of the law like Culpepper, dared from his position on high to side against the meek lives below. Invasions start like that. So, getting just had to be something sure and powerful, if not final. Right then he only knew he had to get Bobby Hall good.

Like the man of action he always wanted to be, Screws started at the typewriter in his office, still holding Culpepper's letter in his fist.

⁴² Compare id. at 43-44.

⁴³ Compare id. at 194-95.

⁴⁴ Compare id. at 45.

He shuffled around the desk for T.A. Riley's ledger and found the heavy red book. Then he pulled a form of warrant from a drawer and rolled it into the Royal. Back and forth, Sheriff Screws made careful work filling out the ledger in fountain ink and then copying the information on the typewritten form. It was for the arrest of Bobby Hall. The charge was tire theft. He typed that. Complaint made out by Mr. George Durham this 28th day of January, 1943. George wouldn't mind. Where it said "sworn to" he squiggled a line with a hill here and there where the consonants might be. Over on the ledger, at the usual place, he wrote "so ordered: T.A. Riley" and dated that too.⁴⁵ When he noticed the heavy sound of his own breath against the black keys, he sat back to examine his work. Done, he ripped the sheet of paper from the typewriter and leaned an arm against the armrest.

Frank Jones accidentally walked straight into his gaze, and the deputy was forced to slow up and grin nervously. "Howdy, sherf."

Frank was accompanied by another fellow, Jim Bob Kelley, a lean man with shirt hangers for shoulders visible through his plaid jacket, bead-like eyes and worry cliffs on his cheekbones that looked calloused by the sun. Jim Bob waved to the sheriff and kind of smiled nicely. He was there to get Screws's consent to testify to certain facts that would get Jim Bob title to a piece of property near his farm. So, he came with extra courtesies.

Sheriff Screws saluted both men with his chin. "C'mere, Frank. Somethin' I wanna show you." Frank stepped carefully over to the desk. "This come today by post from Camilla. Says we got some work to do tonight, boys. We bringin' in one smart nigger. Bobby Hall." The sheriff's voice dropped suddenly, and his eyes went cold. "Bobby Hall. The boy got hisself a *law-yuh*, and this here's a letter from 'im tellin' me I bettuh give that darkie back his pistol. Can you 'magine that! Gonna sick the law after the law! Who that boy think he is, Frank?"

Frank sat against the edge of a desk with a dumb grin across his cheeks and couldn't answer.

"Fellas," said the sheriff, "you know this here is *my* town. Been that way for quite some time." Both men nodded. "Might be war everywhere else, but there's peace round here. Now this biggety nonsense gone on just about too goddamn long, and we 'bout to put things back to order, see."⁴⁶ That's the moment when Sheriff Screws convinced himself how he was going to get Bobby Hall. "Wanna be a dep'ty tonight, Jim Bob?"

⁴⁵ Compare *id.* at 148-50, 169, 195.

⁴⁶ Compare *id.* at 177.

The day wears slowly, dragged by the weight of expectation. The three men have an early supper in the courthouse, discussing plans, then Nazis. The beef is fresh, the steak delicious. Sheriff Screws instructs Frank and Jim Bob to meet him out at Mamie Wrights' filling station⁴⁷ later that evening. Along the way, be prepared to round up some more deputies, he says. He wants to see a mob out by Bobby's house that night.

Alone, resolved and wondering how to put the finishing edges on time, Sheriff Screws reaches once more into a desk drawer and pulls out a fifth of whiskey. His blackjack hangs from a hook on the side of the desk, and he grabs that too. He pulls a .38 special from his holster and makes sure it's loaded before heading for the police car parked out back. The sheriff gets in, takes a long swig from the bottle and drives away with the hot vapor still washing down his insides. He hums quietly to himself as he sets out for the intersection just out of town where Butler's garage sits on one side of the highway and the Wrights' filling station and drink stand on the other. There's a dip between the roads there like a shallow ditch, and he turns in there. From his vantage, he can look out and see both businesses. At Butler's across the way, to the right and under the light bulb is Bobby Hall, working on a truck.⁴⁸ Screws stares, he drinks; he stares, he drinks, until the bottle is empty and his upper body is full of heat. Bobby's sporadic movements in the shop provide a guessing game theater, growing blurry with alcohol. He wonders about Bobby's arms and legs, sees him twisting heavy metal and banging against a two-ton truck's resistance. Bobby's young; he shows no respect. Fear occurs to Screws, so he burns it with whiskey.

Around seven-thirty, eight, Bobby closes up the shop, turns out the light and climbs into his Chevy. Sheriff Screws cranes his neck to see him drive away. Once his taillights are out of sight, Sheriff Screws opens the door and lifts himself awkwardly out of the car. The steak supper and whiskey still settling in his stomach, he walks over to the Wrights' filling station and goes inside. Mamie Wright is in there along with her husband and a couple of other men finishing dinner.⁴⁹

"Evenin', folks. I'm lookin' for Joe Whitlock.⁵⁰ Any a y'all seen 'im lately? Mamie?"

The sheriff holds the doorway for support, his face bright red and his shirt halfway sticking out of his pants on one side.⁵¹ Mamie turns a

⁴⁷ Id. at 44.

⁴⁸ Compare id. at 45.

⁴⁹ Compare id. at 46.

⁵⁰ Id.

⁵¹ Compare id. at 47.

hollow, tight face toward him and looks concerned. "No, sheriff. Why?"

"Don't matter none," he says with fresh authority. "I need me some men tonight. Any you men got guts enough to come wit us to-night?⁵² Gonna round us up a black s'ombitch and kill 'im. This one done lived too long already.⁵³ Whose wit me, eh?"

By ten o'clock, the sheriff's posse remains Frank Jones and Jim Bob Kelley, and they are back together buying wine at Johnny West's place.⁵⁴ A small crowd of white planters fills the front room where Johnny is serving behind a counter. The three men head for the empty room in the back. Johnny's got a juke box there, and Frank wants to dance. Along in the doorway come the Mintners, Velma and Jack,⁵⁵ with Josephine Price,⁵⁶ the women dressed in bright colors for a Friday night of fun.

Bobby's tired when he gets home to Annie Pearl. His arms are caked with grease, and his fingernails are black. With just a single lamp on, Annie Pearl heats the buckets of water for Bobby's bath. New lies in a makeshift day crib that he is almost too big for. Bobby stands naked over him going ga-ga, while Annie Pearl draws the tub water.

She walks over and guides him over to the bath with her hand on his buttock. "Git in. Wash up. We eatin' soon." Then she fixes a piece of fish for their supper.

At Johnny's, Josephine Price shows Frank Jones new dance moves she says are the rage of Atlanta these days. Smiles turn to glaze as the drinks go down. Sheriff Screws reaches for his gun sitting on the table. Aimlessly, he spins the chamber against his palm.

"You comin' wid us, Jack?" Jim Bob asks.

"Cain't tonight, boys. You know I work nigras." Jim Bob nods and drinks. Sheriff Screws keeps a hard look trained on the gun he's holding in both hands. Jack Mintner finishes his bottle and adds proudly, "I don't rightly go with arrestin' officers."⁵⁷

Suddenly, the gun goes off in Sheriff Screws hands.⁵⁸ Josephine jumps into Frank's arms, and everybody twitches. The bullet lodges in the thick wooden floor near Jim Bob's feet.⁵⁹ He examines the hot

⁵² Compare *id.* at 50.

⁵³ Compare *id.* at 46.

⁵⁴ Compare *id.* at 50.

⁵⁵ Compare *id.* at 52.

⁵⁶ *Id.* at 53.

⁵⁷ Compare *id.* at 50.

⁵⁸ Compare *id.* at 52.

⁵⁹ Compare *id.* at 57.

lump while the others watch. Then he runs his fingertips over it, pretends the heat makes him snap them back and kisses them. "Hoo-wee, sherf! Reckon yer gun's sure clean!" And everybody gives up a great laugh.

Bobby sits at the table in just his britches, Annie Pearl in her night dress. They eat while the baby sleeps at last in a makeshift crib beside the bed.

"Why you didn't go to the dance tonight over at the school?" she asks.⁶⁰

He bites into the cornbread in his hand. "Tired. You the onliest one I wanna dance wif, and I sho don't feel like standin' around wid all them old guys talkin' feed."

"Like yo daddy?"

"Pretty much." He smiles across the way at her. Puts his big toe on her calf and strokes her skin. She giggles slightly and pulls a bone out of the fish on her plate.

"On top o'dat I seen Sheriff Screws watchin' me out at Butler's tonight." Annie Pearl stops chewing. "Probably best to stay off the roads." He looks up and Annie Pearl's studying his face. "You done cooked the devil outa dis meal, baby."

Johnny West comes running to the back.

"Who's dead?" he asks from the doorway.

"Nobody yet," Frank tells him.

Sheriff Screws asks Johnny if he wants to come along. "We fittin' to round up a s'ombitch nigger. Why don't choo come along, Johnny? Make yeh a dep'ty."

"What'd he do?"

Sheriff Screws looks a little surprised by the question. "He disobeyed the law, Johnny," he says, turning up his eyes at him. "Wants to make a career of it, too."

"No, Sherf, I cain't go wit y'all tonight. Why don't y'all wait until tomorrow?"⁶¹

"No thanks for the advice, Johnny," says the sheriff, grabbing his hat and fitting it back on his head. "We ain't lettin' this bastard get away."

Frank convinces the others to make one more stop at Loreat Hatcher's place to buy beer.⁶² Thirty minutes later, beer in their veins, they pack into the sheriff's personal car.⁶³ It's nearly eleven

⁶⁰ Compare id. at 56.

⁶¹ Compare id. at 53.

⁶² Compare id. at 56.

⁶³ Compare id. at 56, 60, 97, 176.

o'clock, and the roads are barren black.⁶⁴ Only the first few minutes draw conversation, and only that between Frank and Jim Bob. The sheriff quietly smokes a cigarette as he drives them closer to Bobby Hall's house. About a half mile away, the conversation stops, and the loud motor of the sheriff's late-model Ford fills the air. Despite the chilly temperature, each man wears a light coat of sweat on his brow.

The headlights flood the dark yard with sudden light. Chickens scamper and squawk. Sheriff Screws turns to face his deputies; he mutters and they huddle. Then Jim Bob gets out his side, pulls his gun from his waistband and leans on top of the car. Frank walks up to the house and bangs his heavy fist on the door.⁶⁵

Inside Bobby stirs first. He unwraps Annie Pearl's sleeping arms and reaches for the shotgun beneath the bed. Crouching near the floor, he sets the gun upright against the wall beside him and moves toward the door.

"Who's that?" he calls. Annie Pearl wakes with a fright at the sound of Bobby's voice. Just the absence of his body next to hers starts her heart beating wildly in her chest.

"Frank Jones, Bobby."

"Whatchoo want now?"

"Want to talk witcha, boy."

Bobby thinks of the shotgun sitting ready. Before he can decide, Annie Pearl lights the lamp beside the bed. Their eyes meet and freeze. She sees in him a fear she never knew he was capable of. He sees a fear in her equal to a great longing. She reaches for his arm. He reaches for the dirt brown pants at the foot of the bed. There's a new knock at the door.

"Hurry up, Bobby."

Bobby goes to the door, opens it and steps back. The headlights pointed at the porch blind him.⁶⁶ Frank Jones's silhouette steps forward into the little house. Annie Pearl grabs the blanket and covers herself. With the white man in the room, standing armed and anxious, a forever distance seems to open between her and Bobby. New begins to cry. She cannot comfort him without exposing herself, and she cannot expose herself.

"What's the matter, Mr. Jones? What y'all need with my husband this time o' night?"

"Takin' him in, Annie Pearl. Got a warrant for you, boy, on account o' you stealin' a spare tire."⁶⁷

⁶⁴ Compare *id.* at 56.

⁶⁵ *Id.* at 59.

⁶⁶ *Id.* at 60.

⁶⁷ *Id.* at 59, 62.

Annie Pearl gasps and covers her mouth. From his stance in the doorway, Frank reaches for Bobby's arm. "Well, I declare, Mr. Jones, I haven't stole no tire."⁶⁸

"No damn short talk about it!"⁶⁹ Frank commands, and New's cries turn to wails. Bobby wants to go to him. "Git yer clothes on, boy, and let's go."

Bobby puts on a faded yellow shirt, and turns to Annie Pearl. His eyes caught unprepared between a look of fear and the pain of wonder, he takes leave of her and walks ahead of Frank out the door.

Frank sees the shotgun just as he's turning to leave.⁷⁰ "Hey, boy, whas that over there?" Frank steps over toward the bed, throws a suspicious glance at Annie Pearl and suddenly jerks the shotgun to him. He holds the long gun up near Annie's thigh and cocks the handle. The gun spits a red shell out of its side, which falls to the floor.⁷¹ "This here's comin' wit me." New's unattended lungs tear into the height of screams. Frank closes the door behind them.

Annie Pearl rushes to the window. On the stoop, Frank pulls handcuffs from his waistband and slaps them around Bobby's wrist.⁷² Annie Pearl watches Bobby's body lurch in discomfort as the cuffs close. Words are exchanged but she can't hear them over the motor. Frank pushes Bobby into the backseat. The deputies get back in. Annie Pearl leaps toward the baby and snatches him up in her arms. She kisses him, squeezes him too harshly, desperately, and props him on the bed while she dresses in a panic. As she hears the car turning onto the road, she grabs New and dashes out the back of the house and down the road 100 yards to Willy's house. The sheriff's car heads over a hill and disappears.

"What'd somebody say I done, Sherf?" Bobby asks from beside Frank in the backseat. He tries to keep his voice from trembling, tries to ignore the thick smell of alcohol, hopes to reason through a misunderstanding.

"Shut up, yeh black s'ombitch!" the sheriff says, staring at the road. "Smart nigger like you always wants to know somethin'. Teach 'im a little somethin' teh keep 'im quiet, will yeh, Frank?"

Bobby feels a brief space open up between his body and Frank's arm. A large shape hovers in the dark periphery, then suddenly a loud whomp! Frank smashes his elbow into the side of Bobby's head and knocks him against the other side of the car.

⁶⁸ Id. at 59.

⁶⁹ Id.

⁷⁰ Compare id. at 59.

⁷¹ Compare id. at 59.

⁷² Compare id. at 60-61, 102, 105, 171.

All the men are quiet. Sheriff Screws smokes another cigarette. Jim Bob smokes one too. Bobby, hands shackled behind him, leans forward and stares down at the floorboard. He asks for clarity in his thoughts and begins to pray.

At half past one in the morning, Newton is asleep.⁷³ The sheriff drives down Main Street to the square. He parks the car a few feet from the well that sits near the courthouse steps. Once the sheriff turns the motor off, Jim Bob gets out and comes around to Bobby's side of the car. Using the barrel of Bobby's shotgun as a cane, Sheriff Screws turns to face Bobby. "I'm about to finish you up, nigger."

The sheriff is inches from his face. "You're wrong, sherf," Bobby says. "I ain't took nobody's tire."

At the sound of the words, Sheriff Screws's eyes squint to an angry boiling point while his hands grapple madly to pull the blackjack from his belt. Staring deep into Bobby's eyes, Sheriff Screws blasts him in the face with the blackjack.

The hard rubber crushes a bone in Bobby's cheek; the heavy steel inside the rubber seems to lodge in the flesh under his eye. Then again and again, until his face feels wet and Bobby loses all sense of who's striking him. When he tries to move away, somebody kicks him back. When he tries to put his arms up, the blows rain from an unprotected side. They're figuring out how to kill him as they go.

"Hep 'im up, Jim Bob. Git 'im out where I can get a betta lick on 'im. Don't let this nigguh bleed all over ma car."

They drag Bobby around to the front of the car, catching his body in the space between the fender and the stone sides of the well. Under the street lamp, he can barely make out Jim Bob to his left, Sheriff Screws carrying the shotgun upside down, and Frank to the right wrapping his own blackjack tighter in his grip. The sheriff is panting, maybe smiling. Bobby can't see him. "Open 'im up, boys," the sheriff spits. Jim Bob and Frank hold Bobby steady. The sheriff raises the butt of the shotgun into the light.

"Nuh!" Bobby tries to yell and turns his head in vain.

The butt crashes through his skull and the blood escapes in all directions. The two men at Bobby's sides tear at him with fists, passing his body off to each other, against the side of the car, into each other's blows and against the well.

"C'mon! Git 'im good!" The sheriff yells, tired, blood on his fists, blood escaping into the square. "Hit 'im again! Hit 'im again!"⁷⁴

⁷³ Compare *id.* at 85, 89, 94.

⁷⁴ Compare *id.* at 80, 84, 86-87, 90, 94.

Bobby can't feel the blows anymore. He loses sight, hope, smell, touch. Only sound remains. Each blow of the blackjack against his head and neck, each kick in his groin and back as they stomp him comes together in a chaotic rhythm of thuds. Nothing can protect him. The Lord's back is turned. Thuds keep coming through the night. The fury of blows from one side rests momentarily while the other heats up. Then a new side takes over. Then another. And again.

After about forty minutes, the beating stops. Bobby lies in a pool of blood about a half inch deep. The street light exposes the redness of his flesh. Twisted arms facing west, legs caught running east, Bobby's body is still, heavy yet weightless, exhausted but tranquil. The three men carefully record the image in their minds like souvenirs. They stand over their work, proud and tired, catching their breath. Sheriff Screws crosses his arms atop his great stomach and stares into Bobby's open eyes. On his toes, he rocks in and out of their distant focus. Finally, Screws turns and Jim Bob and Frank grab Bobby by his feet and follow him up the stairs.⁷⁵ Bobby's chest, then his head, scrape the ground, then each step, bouncing against the hard edge of cold stone, leaving a trail of blood back down to the well.⁷⁶ Inside the courthouse, they drop Bobby's body in a small dark cell in the back.⁷⁷ An ambulance arrived from the negro hospital in Albany, but Bobby died before the doctors saw him.⁷⁸

When Annie Pearl reached Willy's house with the baby, she met all caution. He held her, waited for her to control her crying, then questioned her.

"Say dey was in Sheriff Screws's personal car? Dey was three o'm? Put de cuffs on 'im? Say Frank had alcohol on 'is breaf? No, baby girl. We ain't gon to de jail jes now. We go at sun up."

And that's what they did. At sun up on the morning of January 30, Willy Hall, Annie Pearl, and New drove into Newton and headed to the square.⁷⁹ There they saw Bobby's sock, pieces of his yellow shirt, a shoe and the dry lake of maroon blood that leaked from him and trailed up the courthouse stairs.⁸⁰

The road to Albany proved too long for Annie Pearl. New couldn't distract her. Hope couldn't fool her. Willy couldn't even save himself, except with silence. How could he be dead? she

⁷⁵ Compare id. at 86, 92, 111, 113-14.

⁷⁶ Compare id. at 62, 92.

⁷⁷ Compare id. at 105.

⁷⁸ Compare id. at 107, 110-11.

⁷⁹ Compare id. at 61.

⁸⁰ Compare id. at 62, 86, 92, 95, 107.

screamed at him. Why would they have to kill him? How is it fair? she wanted to know. But no question comes all the way past her lips before another more terrible question jumps it, and as its horrid answer takes shape, it is cut off by the blind swipe of another. All the way to Albany.

Annie Pearl waited in the car while Willy rang the bell at Walter Poteat's funeral parlor. She watched to see if Walter was expecting them; she hopes that the stop will be brief on their way to the hospital. Walter will be surprised to see Willy. The two will laugh goodbye and slap each other on the back. They will be two old black colored men with living sons promising each other a better meal than the other can make. New rocked on his mother's knee bouncing anxiously. She whispered chants of nothing into the baby's delicate curls. She squinted from the road as the door opened. Walter Poteat steps out and holds Willy by the shoulder. She sees Willy's head look up as the first words were exchanged, then down quickly, down and not up again. Walter is severe. He is sorry. Bobby is inside.⁸¹ From her window, Annie Pearl screamed and New joins her in earnest.

The way you get a white killer masquerading as a law man is to show up all the sickness in him. Claude Screws didn't know that, and in the end it didn't matter. If you'd asked Claude Screws what should happen now that he beat Bobby Hall's brains all over the square, he'd say what any white killer who masquerades as something else will tell you: Nothing. Which is almost what happened. Everybody in the houses out on that square knew somebody was getting lynched that night.⁸² They *liked* Bobby Hall. They liked his daddy, they liked Lemuel, and many of the Hall family. But they took Screws's word and Frank's word and even Jim Bob's word, even though Jim Bob got his property out of it. Screws said the nigger took the tire, the nigger was a thief.⁸³ Screws said the nigger pulled a shotgun, the nigger had to die.⁸⁴ If it took 40 minutes to do it, well some niggers' lives take longer to snuff. Especially how they fight back.⁸⁵

There never was an inquiry into the sickness in the man. Beyond the obvious, nobody questioned how a man like Screws goes on about his business in peace after dashing a young man to bits. They never asked how you could drag a dying body up the stairs in the name of justice. They never asked why Screws wouldn't protect colored soldiers from angry rednecks. They never asked him what the pearl

⁸¹ Compare *id.* at 61, 112.

⁸² Compare *id.* at 80, 83-90, 94-97.

⁸³ Compare *id.* at 169.

⁸⁴ Compare *id.* at 171.

⁸⁵ Compare *id.*

handle pistol meant to *him*. If you want to know what's in a man's state of mind, you have to find out what he's thinking.

Spring returned to Newton. The magnolias bloomed and Claude Screws again walked merrily among the jasmine and crape myrtles of a generous earth. He satisfied himself with righteousness. He restored order to his delinquent soul.

What surprised him was the FBI's interest all of a sudden. The agents who came to Newton investigating the death of Bobby Hall seemed to be doing the work of the Negro Betterment Society. But they weren't. They weren't because they represented the same federal government that had sent Lemuel to Liberia and was bombing Dresden and claiming triumph on the globe. They weren't because they didn't once ask about the sickness.

At Sheriff Screws's trial for the deprivation of Bobby Hall's constitutional rights, many in Newton stepped to the witness stand. They were asked and they answered about what Sheriff Screws and his posse intended to do to Bobby on the night of January 29, 1943. That's where the problem got away from them. Not because Screws would win there. He didn't. A Georgia jury convicted him, Frank Jones, and Jim Bob Kelley for conspiring to take Bobby's rights away along with his life that night. But the facts they wanted and the ones they got only told about visiting the grand jury in Albany and what was said there;⁸⁶ about being drunk and rounding up men to catch a negro thief; about shooting into the floorboards at Johnny West's; about words overheard from the ruckus by the well that night; and about waking up on Saturday to hear the three talk of the rough night before.⁸⁷

The conviction—just a couple of years and a fine—was appealed all the way to the U.S. Supreme Court, where the justices had quite a battle over it. All beside the point, all of it. Not a single solitary word having to do with what killed Bobby Hall and why. They sent the case back down for a new trial to see if Screws and his men did indeed “willfully” take Bobby's rights away. By then it was too late. The new jury was probably tired of all the interference by the federal government in the affairs of a small town. So, Screws and the rest were acquitted.

But once it killed Bobby, the sickness became his family's life. The first thing that happened to Annie Pearl, even before she could see it through her grief, was she and New became poor. From then on, she would always be poor or nearly poor. Eventually, anger trans-

⁸⁶ *Id.* at 40-42.

⁸⁷ Compare *id.* at 48-49, 118-19.

formed the scrappy sweetness of Bobby's copper sidekick with the butterfly lips, and she all but quit smiling. She became a survivor because she was the one left alive in the house that night. After the acquittal, Annie Pearl found her shoes and left Newton to complete her bitterness in New York City where she hoped it would be different. It was that. There Newtons appeared block upon block; the town's black sections teemed in highrise projects, locked into the sky. It was not freedom. Every time she'd hear of another death, down the street, across the country, her whole body would wince. The brutality of memory made it impossible to accept whites, and Annie Pearl lived a palpable legacy of distance and mistrust. She made do.

And New inherited his father's lynching. He marked the growth of his own body against the image of Bobby's officially desecrated flesh. Muscled squares and squares at torn angles. More than what his mother said or his grandfather or anyone else let slip, his own body reminded him of what he was too young to remember. No one would explain to him exactly what happened; no one really tried. Just for his body, he had to assume the rage, his own, his father's and Screws's. Just for the body, New could never forget. He wondered how to sustain it, where to put it, how to honor it. How was he his father? Was New's strong-willed mind like his daddy's, the tilt in his stride, or the gestures he made? Would New some day share his bludgeoned head, his tortured body? So, New wore him in a certain sullenness. He maintained the daily demands of cool detachment. Like battle fatigues, a hard, mournful style obscured the quiet passions coursing through him. He was good with his hands. And as soon as he could, New carried guns, somehow, he figured, to avenge him.

II

THE *SCREWS* OPINIONS AND THEIR LEGACY

Although the factual record from which I borrowed so heavily in retelling *Screws* gives no indication of what really happened to Annie Pearl, the Hall family, or the black community in Newton, Georgia, all three defendants were indeed acquitted on retrial.⁸⁸ It is not clear why. Sheriff Claude Screws eventually ran for state office and served two years in the Georgia Senate from 1959 to 1960.⁸⁹ None of this was probably of great moment to U.S. Attorney General Francis Biddle, who, following the lead of one of his predecessors, Frank Murphy

⁸⁸ See Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 Tul. L. Rev. 2113, 2186 n.329 (1993) (discussing acquittal).

⁸⁹ See Georgia's Official Register 1959-1960, at 344-45 (compiled by Mary Givens Bryan).

(who started the Civil Rights Section of the Justice Department in 1939), continued the Justice Department's crusading and often novel use of Reconstruction-era legislation to challenge civil rights abuses by state actors against blacks in the South. Biddle took personal satisfaction in both the district court conviction of the three *Screws* defendants and the Fifth Circuit's affirmance.⁹⁰ He publicly expressed great confidence that his Department's theory of section 242 regarding the meaning of color of law and willfulness would prevail.⁹¹

For the most part, Biddle's confidence was well placed. The Court rejected the defendants' appeal (along with claims of vagueness), but set aside the convictions on the ground that the trial court's jury instructions inadequately described the threshold for willfulness.⁹² However, it was the Court's rapt attention to seemingly innocuous details and its wholesale disregard for other aspects of the prosecution which I hope the story exposes and which I argue greatly contributed to a pattern of authority narration that favors violent cops over their victims. Before comparing the fictional narrative with the *Screws* decision, it will be helpful first to put the latter into its legal context.

⁹⁰ *Screws v. United States*, 140 F.2d 662 (5th Cir. 1944); see Francis Biddle, *Civil Rights and the Federal Law*, in *Safeguarding Civil Liberty Today: The Edward L. Bernays Lectures of 1944*, at 109, 143 (1945) [hereinafter Biddle, *Civil Rights and the Federal Law*] (discussing with approval lower courts' convictions of *Screws* defendants for "acts of horrible brutality"). Biddle also viewed the convictions as a vindication of democratic values while the country was engaged in a conflict with fascism. See Francis Biddle, *Democracy and Racial Minorities*, Address Before the Jewish Theological Seminary of America 10 (Nov. 11, 1943) (on file with the *New York University Law Review*) ("Race intolerance is no longer a matter merely of domestic concern. For it undermines our moral authority as a nation which apparently can profess but cannot practice democracy.").

⁹¹ For example, Biddle explained that the application of criminal sanctions to the protection of civil rights was restricted mainly to cases in which state officials misused their power, or to situations involving rights granted directly to individuals and guaranteed against infringement by the federal Constitution or laws. See Biddle, *Democracy and Racial Minorities*, *supra* note 90, at 12-13. The newly created Civil Rights Section relied on just two statutes in the criminal code, 18 U.S.C. §§ 51 (now 241) and 52 (now 242), although some actions were brought under the Peonage Abolition Act, ch. 187, 14 Stat. 546 (current version at 18 U.S.C.A. § 1581 (West Supp. 1998)). See Biddle, *Democracy and Racial Minorities*, *supra* note 90, at 12-13. The Justice Department decided to exploit the fragmentary and confusing state of the laws through test prosecutions such as *Screws*, with some success in the courts. See *id.*

⁹² See *infra* text accompanying notes 130-163 (describing willfulness component of section 242 prosecution in *Screws*).

*A. The Justice Department and the Reconstruction Statutes
Under Fire*

Sections 241 and 242⁹³ were among the lonely survivors of Reconstruction legislation that provided federal protection to freedmen and southern unionists following an evisceration of such statutes by congressional repeal, judicial backlash in the late 1870s and 1880s, and administrative reluctance in light of these actions by the Court and Congress.⁹⁴ The problems that preoccupied the *Screws* Court, federalism and vagueness, were evident when the Thirteenth Amendment was passed in 1865, and became full blown during debate over passage of the Civil Rights Act of 1866.⁹⁵ As violence against southern blacks grew more vehement and organized in the South, each subsequent piece of civil rights legislation involved a further expansion of federal criminal authority over common law crimes.⁹⁶ Struggles over questions of federalism and vagueness were inevitable.

The two issues characterized the first major crisis between Congress and President Andrew Johnson concerning the Civil Rights Act of 1866, whose provisions contained the precursor to section 242.⁹⁷ Although its legislative history is scant, historians attribute much of the congressional consensus about the 1866 Act to reaction against Black Codes,⁹⁸ newly enacted laws in southern states that replaced

⁹³ For the complete text of these sections, see *supra* note 3.

⁹⁴ See Robert K. Carr, *Federal Protection of Civil Rights: Quest for a Sword* 41 (1947) (summarizing causes of retreat).

⁹⁵ Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (current version at 42 U.S.C §§ 1981-1983 (1994)); see also Lawrence, *supra* note 88, at 2128 (explaining development of "federalism" and "vagueness" problems with civil rights legislation).

⁹⁶ See Lawrence, *supra* note 88, at 2133-46 (discussing violent atmosphere in postwar-South as prompting Congress to enact federal legislation with increasingly extensive criminal provisions).

⁹⁷ At that time the statute read:

That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1983 (1994)).

⁹⁸ For a detailed account of the Black Codes and reaction to their passage, see *The Civil Rights Record: Black Americans and the Law, 1849-1970*, at 35-41, 45-46 (Richard Bardolph ed., 1970); see also Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 199-201 (1988).

slave-master relationships with peonage and other restrictions on the economic mobility of black people.⁹⁹ Under authority of the Thirteenth Amendment, the 1866 Act criminalized state interference with freedmen's rights to citizenship. Opponents viewed its provisions as an unwarranted encroachment on principles of federalism and attacked the vagueness of terms such as "under color of law" and "any right secured by the Constitution or laws of the United States." President Johnson vetoed the Act as an unconstitutional infringement on states' rights.¹⁰⁰

Widespread southern resistance to the 1866 Act and escalating mob violence—often with the cooperation and participation of local police—led to the Enforcement Act of 1870,¹⁰¹ which contains the roots of section 241 and which reenacted section 2 of the 1866 Act under the authority of the Fourteenth Amendment, passed in 1868. Federal concern about interference with blacks' right to vote led to provisions in the 1870 Act¹⁰² as well as the Ku Klux Klan (Anti-Lynching) Act of 1871.¹⁰³ Both acts were challenged on federalism and vagueness grounds in Congress¹⁰⁴ as well as in the courts.¹⁰⁵

By the time Congress passed the Civil Rights Act of 1875,¹⁰⁶ attitudes favoring the federal protection of civil rights for freedmen had steadily eroded. The 1875 Act itself was perhaps the most sweeping of the Reconstruction legislation, conferring both political and social equality on blacks by prohibiting racial discrimination in public accommodations.¹⁰⁷ By 1875, however, civil rights enforcement had proved too costly and difficult. The Justice Department had begun a

⁹⁹ See Foner, *supra* note 98, at 199-201 (describing economic restrictions imposed by Black Codes).

¹⁰⁰ See *The Civil Rights Record: Black Americans and the Law, 1849-1970*, *supra* note 98, at 45 (noting federalism concerns in President Johnson's veto message).

¹⁰¹ Enforcement Act of 1870, ch. 114, 16 Stat. 140 (repealed 1875).

¹⁰² *Id.* (stating that "race, color, or previous condition of servitude" does not affect right to vote).

¹⁰³ Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13, 13-14 (1871) (prohibiting forceful prevention of any citizen entitled to vote from "giving his support or advocacy in a lawful manner toward or in favor of the election of any lawfully qualified person").

¹⁰⁴ See Lawrence, *supra* note 88, at 2139-40 & n.94 (noting vagueness criticisms launched by Senator Bayard against Enforcement Act's broad language).

¹⁰⁵ See, e.g., *Baldwin v. Franks*, 120 U.S. 678, 685-86 (1887) (holding criminal provisions of Ku Klux Klan Act unconstitutional on federalism grounds); *United States v. Harris*, 106 U.S. 629, 644 (1882) (same).

¹⁰⁶ Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335 (1875) (current version at 42 U.S.C. §§ 1981-1983 (1994)).

¹⁰⁷ The Act states that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement." *Id.* at 336.

general policy of threatening violators rather than bringing criminal prosecutions.¹⁰⁸ And Congress would not pass another significant piece of civil rights legislation for more than five decades.

Moreover, Supreme Court decisions nullified most of the statutes—or at least their criminal provisions—on narrow, legalistic grounds, frequently anticipating the federalist and vagueness arguments of *Screws*. Three cases in particular set the course. The *Slaughter-House Cases*¹⁰⁹ involved claims brought on Thirteenth and Fourteenth Amendment grounds, but had nothing to do with race.¹¹⁰ In dictum, the Court bifurcated citizenship into two types, state and national.¹¹¹ By the terms of the Fourteenth Amendment, the privileges and immunities applicable to the former were not subject to control by the latter.¹¹² *Slaughter-House* is also relevant as one of the Court's first discussions of racial animus, in which the Court indicated that the petitioning white butchers could not avail themselves of a cause of action designed to protect former slaves.¹¹³

A year later, events during "the single most violent episode of the Reconstruction period"¹¹⁴ provided the Court with its first opportunity to apply *Slaughter-House* to the criminal civil rights provisions in

¹⁰⁸ See Lawrence, *supra* note 88, at 2152. Professor Lawrence characterizes the Justice Department's enforcement efforts with respect to the Acts of 1870 and 1871 as frustrated by both politics and resources:

Enforcement Act cases, involving numerous witnesses, many of whom needed protection from marshals or other legal officers, were unusually complex for federal criminal cases of that time. Enforcement Act cases required resources well in excess of those available to local United States Attorneys. Requests for additional funds had to be made to an increasingly skeptical Congress.

Id. at 2146 n.115.

¹⁰⁹ 83 U.S. (16 Wall.) 36 (1873).

¹¹⁰ Petitioner butchers claimed that Louisiana's enactment of a slaughterhouse monopoly created involuntary servitude and a denial of equal protection. See *id.* at 50, 56.

¹¹¹ See *id.* at 73-74.

¹¹² See *id.* at 74 (stating that while privileges and immunities of national citizenship are protected by Constitution, privileges and immunities of state citizenship are not additionally protected by Fourteenth Amendment).

¹¹³ See *id.* at 69-72 (discussing purpose of Thirteenth, Fourteenth, and Fifteenth Amendments as protecting freedom of African Americans and remedying grievances of former slaves); see also Lawrence, *supra* note 88, at 2148 (characterizing *Slaughter-House* as motivated by Court's reading of Reconstruction amendments as "designed primarily to aid the newly freed slaves").

¹¹⁴ Lawrence, *supra* note 88, at 2151; see also Foner, *supra* note 98, at 530 (characterizing event as "the bloodiest single act of carnage in all of Reconstruction"); Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*, at 175 (1985) ("The circumstances . . . involved a level of violence tantamount to a localized civil war in what was perhaps the bloodiest racial conflict in Louisiana history."). The prosecuting United States Attorney in New Orleans, James R. Beckwith, called the incident "revolting and horrible in the details of its perpetration and so burdened with atrocity and barbarity." *Id.* at 176.

the Enforcement Act of 1870. The case, *United States v. Cruikshank*,¹¹⁵ involved the convictions under sections 6 and 7 of the Act of three of ninety-seven defendants accused of the massacre of at least sixty blacks in Grant Parish, Louisiana.¹¹⁶ The victims were black Republicans, massacred in a courthouse on Easter Sunday, 1873, by conservative Democrats and Ku Klux Klansmen. The murders followed a closely contested state election in which both Democrats and Republicans claimed victory and began installing their respective appointees in Grant Parish.¹¹⁷ The Court dismissed each count of the indictments on grounds of either federalism or vagueness.¹¹⁸

As a matter of narrative, the *Cruikshank* opinion by Chief Justice Waite, like three of the four *Screws* opinions,¹¹⁹ is remarkable more for what it does not say than for what it does. None of the facts that give rise to the convictions appear anywhere in the opinion. Given that one of the Court's criticisms of the indictments was the failure adequately to allege racial motivation, its unwillingness to read beyond the identification of the victims' race into the obvious character of the racial violence involved is stunning. Instead, *Cruikshank* begins with a nod to the dual citizenship principle (state and national) announced in the *Slaughter-House Cases*.¹²⁰ On that basis, the Court found defective all of the counts alleging deprivation of the rights to

¹¹⁵ 92 U.S. 542 (1875).

¹¹⁶ See Kaczorowski, *supra* note 114, at 175-76, 178. There were a total of 16 counts in the first trial. They alleged violations of the victims' rights to assembly, bear arms, protection against deprivation of life, liberty, and property without due process, equal protection of the laws, and voting. See *Cruikshank*, 92 U.S. at 552-57. The allegations of intent varied, as did statements identifying the victims' citizenship, state or federal or both, following the *Slaughter-House* distinction. See *id.* at 549, 552-57; see also Kaczorowski, *supra* note 114, at 177 ("Beckwith seemed to be experimenting with the language of specific counts, perhaps because of the uncertain impact of *Slaughterhouse* on national civil rights authority."). For a complete history of the episode and the case, see *id.* at 173-93.

¹¹⁷ See Kaczorowski, *supra* note 114, at 175. Kaczorowski describes a singular event of racial hatred and control:

Conflicting accounts of what transpired prevent a complete narrative of the fighting, but federal investigators sent from New Orleans reported that the Conservative white forces had committed shocking atrocities. At least 60 freedmen were killed after they had surrendered, and their bodies were mutilated and left to rot in the parching sun. . . . Federal investigators reported that the Conservatives viewed the conflict over the local political offices as a "test of white supremacy," and they were joined by men from surrounding parishes in a determined effort to restore white rule.

Id.

¹¹⁸ See *Cruikshank*, 92 U.S. at 552-56, 559.

¹¹⁹ See discussion *infra* text accompanying notes 137-57, 164-73 (describing *Screws* plurality opinion, concurrence by Justice Rutledge, and dissent attributed to Justice Frankfurter, and discussing absences and omissions).

¹²⁰ "The people of the United States resident within any State are subject to two governments: one State, and the other National The powers which one possesses, the other

assemble, to bear arms, or to life, because no federal interest was stated.¹²¹ As to the counts alleging interference with the victims' right to vote, the Court referred to the logic of another opinion decided the same day, *United States v. Reese*,¹²² to support its determination that, in the absence of a claim of racial animus on the part of the defendants, the Fifteenth Amendment had not been violated.¹²³ Furthermore, the Court found no allegation of state action, holding that the acts of the *Cruikshank* defendants did not implicate the state, nor, for that reason, any constitutional provision.¹²⁴

The Supreme Court's restrictive view of the federalism and vagueness problems was again the basis for invalidating federal criminal civil rights legislation in the *Civil Rights Cases*.¹²⁵ The Court held that section 2 of the Civil Rights Act of 1875, which, under the Thirteenth and Fourteenth Amendments, made it a penal offense for any person to deny blacks equal treatment in public accommodations, was

does not. They are established for different purposes, and have separate jurisdictions." *Cruikshank*, 92 U.S. at 550.

¹²¹ See *id.* at 551-54.

¹²² 92 U.S. 214 (1876). In *Reese*, the Court held sections 3 and 4 of the 1870 Act unconstitutional on the grounds that the statutory language "does not confine their operation to unlawful discrimination on account of race," and therefore exceeded congressional power. *Id.* at 220-21.

¹²³ Again, the Court's blindness to factual context is alarming. According to Chief Justice Waite:

Inasmuch . . . as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the [C]onstitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offen[s]e, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

Cruikshank, 92 U.S. at 556.

¹²⁴ See *id.* at 554-55. *Reese* held that the Fifteenth Amendment grants only a negative liberty—the right to be free from discrimination *by the state* on the basis of race or color in exercising the franchise; only states can grant the affirmative right to vote. See *Reese*, 92 U.S. at 217-18. Concluding with a brief vagueness argument, the *Cruikshank* Court rejected the remainder of the counts on the ground that they failed to specifically state which rights among the many conferred by "the [C]onstitution or laws of the United States" the defendants were alleged to have violated. *Cruikshank*, 92 U.S. at 557 (quoting Enforcement Act of 1870, ch. 114, 16 Stat. 140, as amended by Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (repealed 1875)).

¹²⁵ 109 U.S. 3 (1883). Petitioners had challenged charges of violating sections 1 and 2 of the Civil Rights Act of 1875. In one case, defendants denied black patrons accommodations in a hotel. See *id.* at 4. Two other cases stemmed from a refusal to admit a black patron to a theater in San Francisco and a refusal to admit a person of unknown race to an opera in San Francisco. See *id.* The last case challenged the conviction of a conductor in Tennessee who barred a black woman from a railroad car. See *id.* at 4-5.

an unconstitutional infringement on state legislative powers.¹²⁶ The Court thus reemphasized its strict state action requirements as applicable to Fourteenth Amendment prohibitions.

But the Court's reasoning also signaled its growing impatience with federal criminal protections of black people's civil rights. The 1875 Act, by encompassing private action, had exceeded Congress's power to demand corrective action under the Fourteenth Amendment. Such "primary and direct" legislation encroached upon the power of state governments to legislate on subjects of public life.¹²⁷ By contrast, the Court affirmed that the Thirteenth Amendment's prohibitions against slavery and its badges and incidents authorized Congress to enact primary and direct legislation. Nevertheless, "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination . . ."¹²⁸ More important for present purposes is Justice Bradley's unequivocal pronouncement that the federal machinery had by then made too much of the freedmen:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.¹²⁹

The impatience with federal efforts on behalf of African Americans illustrated in *Slaughter-House*, *Cruikshank*, and the *Civil Rights Cases* as well as in the corresponding congressional and administrative retreat reflected a national mood evident at the local level. It is not surprising, then, that the Court's opinions regarding matters of tremendous social and political upheaval and involving facts of unspeakable terror and bloodshed omit context from consideration. Instead, the impatience (and, perhaps for some, frustration and despair) with race-related fissures in the national community was couched entirely in the abstract language of federalism and vagueness. Although not entirely without constitutional merit, such doctrinal concerns helped

¹²⁶ According to Justice Bradley, the Fourteenth Amendment does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

Id. at 11.

¹²⁷ See id. at 19. The Court referred to these as "the *social* rights of men and races in the community" Id. at 22 (emphasis added).

¹²⁸ Id. at 24.

¹²⁹ Id. at 25.

to mask deeper cultural entanglements at the level of belief, such as the quality and value of African-American lives. Sixty years after the *Civil Rights Cases*, when the Department of Justice revived sections 241 and 242 of the 1866 Act to sanction local police brutality, the *Screws* Court would redeploy these arguments to effect a dehumanization that still resonates.

B. *Screws v. United States and Mens Rea*

After seven months of deliberations, the *Screws* Court managed only a plurality decision which came about when, for the sake of disposition, Justice Rutledge decided to join four other justices who favored reversing the convictions on the ground that the trial court failed to adequately instruct the jury on the willfulness requirement.¹³⁰ This element of section 242¹³¹ had been added in 1909 by a little-explained amendment in order to make the statute "less severe."¹³² The plurality reasoned that the requirement that a section 242 violation be made "willfully" preserved the statute's constitutionality by removing concerns about the indefiniteness of its proscriptions.¹³³ The willfulness objection, however, had not been made at trial nor argued to the Court. Instead, it was raised in Circuit Judge Sibley's dissent.¹³⁴ Although it may have provided a slender reed upon which disposition could be achieved, the Court remained deeply divided over issues old and somewhat new to Reconstruction jurisprudence. On one hand, the old issues of federalism and vagueness were revived with virulent force in dissent.¹³⁵ On the other hand, the concurrence

¹³⁰ See Robert K. Carr, *Screws v. United States: The Georgia Police Brutality Case*, 31 Cornell L. Rev. 48, 58 (1945) (analyzing Rutledge opinion and suggesting underlying motive of aiding disposition).

¹³¹ In 1940, the relevant text of section 242 read as follows:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$ 1,000, or imprisoned not more than one year, or both.

18 U.S.C. § 52 (1940) (current version at 18 U.S.C.A. § 242 (West Supp. 1998)).

¹³² *Screws v. United States*, 325 U.S. 91, 100 (1945); see also *infra* note 138 (discussing lack of legislative history surrounding "willfulness" addition).

¹³³ See *Screws*, 325 U.S. at 103.

¹³⁴ See *Screws v. United States*, 140 F.2d 662, 666-67 (5th Cir. 1944) (Sibley, J., dissenting).

¹³⁵ See *Screws*, 325 U.S. at 142, 150 (Frankfurter, J., dissenting). This opinion is formally listed as a joint dissenting opinion by three justices, but a scholarly consensus exists that Justice Frankfurter was its author. See, e.g., Carr, *supra* note 94, at 111 n.46 ("There is

by Justice Rutledge and the scathing dissent by Justice Murphy introduced to the Supreme Court's first section 242 police brutality case at least minimal attention to context and a special impatience with narrow legalisms. Although a thorough review of the substantive arguments made in the *Screws* battle is not appropriate here,¹³⁶ it is necessary to describe briefly the positions taken by the justices before comparing the effect of these narratives to the story. The opinions clearly express the Court's profound fissures over federalism and vagueness, which the justices chose to interpret in *Screws* to the exclusion of other issues. The legacy is both symbolic and practical. I argue that these interpretive choices are demonstrative of themes and analytic approaches in judicial authority narratives which affect prosecutions of police brutality today: decontextualization, deracialization, and desubjectivization.

The plurality decision by Justice Douglas focused on two issues: section 242's constitutionality in light of the willfulness requirement and the meaning of "under color of law" as applied to cases such as this one.¹³⁷ Justice Douglas noted that the addition of the term "willfully" in 1909¹³⁸ supported the statute's constitutionality by making definite the specific intent necessary before conduct could be found culpable. "[T]he specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the

common agreement among those who followed the case that Justice Frankfurter was chiefly responsible for this dissenting opinion.").

¹³⁶ Interested readers should see Lawrence, *supra* note 88, at 2179-99 (discussing *Screws* opinions and analyzing failure to resolve federalism and vagueness problems); see also Carr, *supra* note 130, at 53-63 (outlining and analyzing *Screws* opinions).

¹³⁷ See *Screws*, 325 U.S. at 101-11. As a factual matter, the defendants must have acted under color of their authority as state police officers, since they claimed to have only used the force necessary for a valid arrest against a resisting suspect. See *id.* at 107-08 ("[Petitioners] were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping . . . [so as] to make the arrest effective."). Note, however, that the justices assumed that *Screws* and the other defendants clearly violated Georgia law and, by their demurrer to the federal charges, the defendants admitted as much. In his concurrence, Justice Rutledge, however, emphasized the defendants' claim that Hall died as a result of their justifiable use of force when he purportedly resisted a lawful arrest and reached for a shotgun. See *id.* at 118 (Rutledge, J., concurring). Some commentators dwelt on this point. See, e.g., Julius Cohen, *The Screws Case: Federal Protection of Negro Rights*, 46 *Colum. L. Rev.* 94, 102 (1946) (noting that defendants urged that Hall's death was incidental to performance of their official duties).

¹³⁸ See *Screws*, 325 U.S. at 100. The legislative history of this amendment is negligible. When the federal criminal code was revised in 1909, only a single remark explaining the change was recorded. See Lawrence, *supra* note 88, at 2180 n.306. According to one Senator, "Section 5510 [a predecessor codification of section 242] is . . . change[d] . . . by the insertion of the word 'willfully,' thus making it less severe." 43 *Cong. Rec.* S3599 (daily ed. Mar. 2, 1909) (statement of Sen. Daniel).

express terms of the Constitution or laws of the United States,"¹³⁹ a narrow reading that Douglas felt "preserve[d] the traditional balance between the States and the national government in law enforcement"¹⁴⁰ The first issue was thus resolved when the defendants were charged with willfully beating and killing a suspect in custody, thereby clearly depriving him of rights expressly contained in the Fourteenth Amendment—the rights to due process and to life itself.

The second issue, federalism, was resolved for the four justices by the finding that Screws, Kelly, and Jones had acted under color of law. Only four years earlier, the Court had reaffirmed a misuse of power definition of "under color of law" in *United States v. Classic*.¹⁴¹ *Classic* involved the conviction under section 242 of election officials who defrauded black voters in Louisiana. The defendants acted in their official capacities and under the authority of the state,¹⁴² as had the law enforcement officers in *Screws*. Hence, the fact that the murder of Robert Hall may have also constituted a violation of Georgia law did not remove federal jurisdiction over the crime.

Justice Rutledge's concurrence, balancing the factions among the justices as well as his own inclinations about what controlled the decision in such a case, revealed much about the struggle *Screws* provoked. For Justice Rutledge, there was no question that section 242 had been violated, and, because the jury had found excessive force, there was no need to retry the defendants on the issue of willfulness.¹⁴³ Among the four opinions, his includes the most extensive statement of facts to show "overwhelming[]" evidence of Claude Screws's conduct and motives in preparing for and ultimately killing Robert Hall.¹⁴⁴ Justice Rutledge expressed tempered outrage with the defendants. Connecting common law murder and federal civil rights, Rutledge eloquently stated:

No act could be more final or complete, to denude the victim of rights secured by the [Fourteenth] Amendment's very terms. Those rights so destroyed cannot be restored. . . . There was in this case abuse of state power, which for the Amendment's great purposes

¹³⁹ *Screws*, 325 U.S. at 104.

¹⁴⁰ *Id.* at 105.

¹⁴¹ 313 U.S. 299, 325-26 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."). This explication merely reaffirmed the essence of the Court's holding sixty years earlier in *Ex parte Virginia*, 100 U.S. 339, 347 (1879) ("Whoever, by virtue of public position under a state government, . . . acts in the name and for the State, and is clothed with the State's power, his act is that of the State.").

¹⁴² See *Classic*, 313 U.S. at 325-26.

¹⁴³ See *Screws*, 325 U.S. at 117 (Rutledge, J., concurring).

¹⁴⁴ See *id.* at 113 & n.1 (Rutledge, J., concurring) (citing lower court's opinion for "evidence which overwhelmingly supports the verdict of guilt").

was state action, final in the last degree, depriving the victim of his liberty and his life without due process of law.¹⁴⁵

Justice Rutledge also indicated a mild impatience with the Frankfurter dissenters' federalism and vagueness objections. Justice Frankfurter's dissent is lengthy and at times strident.¹⁴⁶ Both its substantive focus and narrative character are illustrated in a passage from one of its early paragraphs:

Of course the petitioners are punishable. The only issue is whether Georgia alone has the power and duty to punish, or whether this patently local crime be can made the basis of a federal prosecution. The practical question is whether the States should be relieved from responsibility to bring their law officers to book for homicide, by allowing prosecutions in the federal courts for a relatively minor offense carrying a short sentence. The legal question is whether, for the purpose of accomplishing this relaxation of State responsibility, hitherto settled principles for the protection of civil liberties shall be bent and tortured.¹⁴⁷

These dissenters would have resolved the federalism issue by removing such crimes from federal purview altogether and declaring the statute unconstitutional. In support for such a position, they examined the sparse legislative history of section 242 and uncovered no intention—even during the “vengeful” and “feverish” Reconstruction era—to enact “a revolutionary break with the past overnight.”¹⁴⁸ The under color of law provision could have only referred to actions taken pursuant to and justified by explicit state authority. However, the dissenters' interest in the practical question of state prosecutions may

¹⁴⁵ Id. at 117 (Rutledge, J., concurring).

¹⁴⁶ One commentator described the dissent as follows: “The opening paragraphs of this opinion bristle with strongly-worded phrases that reveal a complete and thoroughgoing distaste for the majority position.” Carr, *supra* note 130, at 61.

¹⁴⁷ *Screws*, 325 U.S. at 139 (Frankfurter, J., dissenting).

¹⁴⁸ Id. at 140, 142, 144 (Frankfurter, J., dissenting). Commentators have taken up the challenge of legislative intent and found clear counter indications of what preoccupied the Reconstruction Congresses. For example, during deliberations on the Civil Rights Act of 1871 (a year after section 242 was reenacted in the Act of 1870), Representative Lowe stated:

I understand the argument to be that inasmuch as the alleged lawless acts sought to be corrected by the bill are not done in pursuance of any law or act of the States, that as there is no State authority or laws impeding the citizens in the enjoyment of their rights, . . . [the proposed law would] not apply. It is said that the States are not doing the objectionable acts. This argument is more specious than real. . . . All you have to do, therefore, under this view, to drive every obnoxious man from a State, or slay him with impunity, is to have the law all right on the statute book, but quietly permit rapine and violence to take their way, without the hindrance of local authorities. Such a position . . . defeats itself by its own absurdities.

Cong. Globe, 42d Cong., 1st Sess. 375 (1871) (statement of Rep. Lowe).

have been only rhetorical, since the opinion spends no time on the issue and, oddly, ignores the clear implications of contrary evidence cited within it suggesting the impracticability of such a strategy.¹⁴⁹

It was presumably concern for the civil liberties of accused state officials that motivated the Frankfurter dissenters' attack on section 242's indefiniteness. The scope of potentially violative conduct under the statute covered thorny issues of the reach and meaning of Fourteenth Amendment protections about which the Court as well as the lower courts voiced significant uncertainty.¹⁵⁰ "Criminal statutes must have more or less specific contours," the dissenters stated. "This has none."¹⁵¹ Clearly if the Frankfurter dissenters' views had prevailed, the federal interest in prosecuting police brutality would have been greatly curtailed or even nonexistent. Any efforts to criminalize such misconduct at the local level would have been similarly diminished.

Despite his expressed impatience for the dissenters' position, Justice Rutledge felt compelled to respond in intriguing detail. Not only did he provide an exhaustive precedential rebuttal to the claim that the statute threatens the balance of federalism, citing twenty cases in which the dissenters' argument had been rejected.¹⁵² Justice Rutledge also resorted to sometimes impassioned pleas to historical context to defeat the dissenters' claims of 242's ambiguity. Resurrecting the Civil War, Justice Rutledge chided the dissenters for their attempt to "nullify what four years of civil strife secured and eighty years have verified."¹⁵³ "[T]his history cannot be ignored,"¹⁵⁴ he stated, invoking discrimination against blacks as the "original purpose" of both sections 241 and 242.¹⁵⁵

Having repossessed the meaning of the historical past as well as legal precedent, Justice Rutledge then turned the breadth of the statute's coverage—its alleged vagueness—into its central and necessary

¹⁴⁹ In fact, the dissenters' opinion concludes with a lengthy quotation from the County Solicitor General in Georgia, who testified about his reliance on local sheriffs and police in order to investigate and prosecute crimes. See *Screws*, 325 U.S. at 160 (Frankfurter, J., dissenting). The practical difficulties associated with state prosecutions of local police was raised in each of the three other opinions of the Court. See *id.* at 111-12, 132, 138. The Frankfurter dissenters merely dismiss the point. "If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility." *Id.* at 160 (Frankfurter, J., dissenting).

¹⁵⁰ See *id.* at 157 (Frankfurter, J., dissenting) (noting "the vast, undisclosed range of the Fourteenth Amendment"). The lack of clarity in this area included the ambiguous constitutional status of many of the rights at issue. See *id.* at 152 (Frankfurter, J., dissenting).

¹⁵¹ *Id.* at 150 (Frankfurter, J., dissenting).

¹⁵² See *id.* at 114-15 & 115 n.6 (Rutledge, J., concurring).

¹⁵³ *Id.* at 116 (Rutledge, J., concurring).

¹⁵⁴ *Id.* at 118 (Rutledge, J., concurring).

¹⁵⁵ *Id.* at 120 (Rutledge, J., concurring).

virtue. The variety of protected rights “are generalities circumscribed by history and appropriate to the largeness of the problems of government with which they [are] concerned.”¹⁵⁶ Finally, bringing home the nexus between murder and the federal interest in protecting life, Rutledge argued that there is no reason to question the clarity of the proscription at issue: Policemen should know that murder is unconstitutional.¹⁵⁷ Thus, Justice Rutledge’s legal and historical arguments, together with a tone that simultaneously communicated impatience and pedagogical concern, provide an important counterweight to Justice Douglas’s cautious expediency and Justice Frankfurter’s angry academic tirade.

But the anger naturally associated with the violent act—the actors’ or the victims’—is given no vent, except by Justice Murphy in his brief yet furious dissent. Although some commentators praised the straightforwardness of the former Attorney General’s approach in 1945,¹⁵⁸ it has not attracted careful analysis. After all, Justice Murphy did not cite a single authority other than the Fourteenth Amendment’s Due Process Clause. Like Justice Rutledge, Murphy saw no basis for questioning the convictions under section 242. Idle “speculat[ion],”¹⁵⁹ “disregard [for] reality,”¹⁶⁰ misuse of principle, and judicial indulgence of “illusion”¹⁶¹ had manufactured a “grave constitutional issue”¹⁶² where none properly existed. Rather, Murphy states:

Our attention here is directed solely to three state officials who, in the course of their official duties, have unjustifiably beaten and crushed the body of a human being, thereby depriving him of trial by jury and of life itself. The only pertinent inquiry is whether § [242], by its reference to the Fourteenth Amendment guarantee that no state shall deprive any person of life without due process of law, gives fair warning to state officials that they are criminally liable for violating this right to life.

Common sense gives an affirmative answer to that problem.¹⁶³

¹⁵⁶ *Id.* at 123 (Rutledge, J., concurring) (quoting *Malinski v. New York*, 324 U.S. 401, 413 (1945) (Frankfurter, J., concurring)).

¹⁵⁷ See *id.* at 129 (Rutledge, J., concurring) (“Generally state officials know something of the individual’s basic legal rights. If they do not, they should, for they assume that duty when they assume their office.”).

¹⁵⁸ See, e.g., Carr, *supra* note 130, at 60 (describing Murphy’s dissent as “short, straightforward and elegant”).

¹⁵⁹ *Screws*, 325 U.S. at 136 (Murphy, J., dissenting).

¹⁶⁰ *Id.* at 138 (Murphy, J., dissenting).

¹⁶¹ *Id.* at 137 (Murphy, J., dissenting).

¹⁶² *Id.* at 135 (Murphy, J., dissenting).

¹⁶³ *Id.* at 136 (Murphy, J., dissenting).

Only Justice Murphy conveys such palpable contempt for the unchecked brutality of police officers. As a legal matter, his refusal to consider the potential vagueness argument with respect to the prosecution of state officials under section 242 implies a strict view of the federal interest at issue. Thus, for constitutional purposes, murderous police, like the fraudulent election commissioners in *Classic*,¹⁶⁴ occupy a unique and uncomplicated position under the Act. As a matter of narrative response to the tragic death of Robert Hall and the social phenomenon of which it is a part, Murphy's opinion introduces a level of personal feeling missing from the other three opinions as well as from judicial narratives generally.

Finally, Murphy is also the only justice to make an explicit, though brief, issue of the racial dynamic on the face of the crime. The case turned on constitutional issues that could have been argued in direct racial terms, but were not.¹⁶⁵ The majority opinion refers to Robert Hall as "a young negro" and "a citizen,"¹⁶⁶ yet makes no mention of the defendants' race.¹⁶⁷ More surprising is the Court's failure

¹⁶⁴ For a brief discussion of the facts in *Classic*, see *supra* text accompanying notes 141-142.

¹⁶⁵ By its terms, section 242 includes a second route to prosecution, the "different punishment[] . . . by reason of his color, or race," path. 18 U.S.C. § 242 (1994); see *United States v. Classic*, 313 U.S. 299, 327 (1941) (describing two different offenses of section 242: "[O]ne is willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; the other is willfully subjecting any inhabitant to different punishments on account of his alienage, color or race than are prescribed for the punishment of citizens"). However, the Justice Department deliberately chose not to pursue that strategy. According to Victor Rotnem, Chief of the Civil Rights Section at the time:

When a community has consistently permitted its law enforcement officers to deny the protection of the laws to certain groups, the same methods will assuredly be used against members of other groups who happen to offend the officials. . . . It would be very hard in a trial based on denial of equal protection of the laws to find an officer who could not demonstrate that at some time in his official career he had used towards white men the same methods which he customarily uses towards Negroes.

Victor Rotnem, Address Before the National Bar Association, Chicago, Ill. (Dec. 4, 1944), quoted in Carr, *supra* note 94, at 109 n.42. On appeal from the Fifth Circuit, one Justice stated his belief that section 242 was an antidiscrimination statute and should be analyzed accordingly. See *Screws*, 325 U.S. at 120 (Rutledge, J., concurring).

¹⁶⁶ *Screws*, 325 U.S. at 92.

¹⁶⁷ Although the facts suggest otherwise, Justice Douglas apparently did not believe that race was a factor in the consideration of this or similar cases. The opinion makes quick use of the word "Negroes" in referring to the origins of section 242, see *id.* at 98, and to the facts of *Ex parte Virginia*, see *id.* at 110. But in describing the *Classic* decision on which so much in *Screws* relied, Douglas fails to mention that the willful deprivation of voting rights at issue there specifically targeted black voters. See *id.* at 106. Douglas goes so far as to summarize the Scottsboro Boys case, *Powell v. Alabama*, 287 U.S. 45, 65 (1932) (holding denial of counsel in criminal proceedings against black youth violation of due process), as "the denial of the assistance of counsel in certain types of cases." *Id.* at 97 (emphasis added).

to refer to evidence in the trial record of Screws's racial hostility during its discussion of willfulness.¹⁶⁸ Justice Rutledge's opinion is similarly silent. The Frankfurter dissent at one point refers to the victim as "the Negro"¹⁶⁹ but makes no other references to issues of race other than those included in the cited legislative history.¹⁷⁰ By comparison, Justice Murphy's reference is indeed bold:

The significant question . . . is whether law enforcement officers and those entrusted with authority shall be allowed to violate with impunity the clear constitutional rights of the inarticulate and the friendless. Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority.¹⁷¹

The deracialization of *Screws* by nearly all of the justices was deliberate. Such an exclusion eliminated from consideration pivotal matters, such as the statute's embodiment of a continuing federal interest in protecting blacks (especially in the South) from unchecked local violence, and precluded a discussion of how evidence of official racism might constitute a proxy for willfulness. For all that the *Screws* case contributes to federal criminal jurisprudence, it is unmistakably a "race case" despite the Court's conspicuous denials.¹⁷² Whatever the motive, the Justices' willingness to blind themselves to the most obvious racial dynamics of both the crime and the prosecution indulged

¹⁶⁸ With the benefit of historical hindsight, it is easy to argue that the evidence of racial motivation was so great in *Screws* that this alone could have supported the conviction for a willful violation. There was uncontradicted evidence at trial that a drunken Claude Screws set out to punish or "get" Robert Hall that night. See Transcript of Record at 46, 50, *Screws v. United States*, 325 U.S. 91 (1945) (No. 42).

However, Justice Douglas's opinion suggests that the justices considered this a close question. Despite evidence that there were no legitimate grounds for arresting Robert Hall that night and that the warrant was fraudulently made out by Screws himself, Douglas wrote:

We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority *only* in the sense that they used excessive force in making the arrest effective.

Screws, 325 U.S. at 111 (emphasis added).

It is difficult to see the majority's basis for crediting this aspect of Screws's defense. More than mere understatement, this conception of the essential crime in *Screws* contributes greatly to the legacy of judicial undervaluing of black lives.

¹⁶⁹ *Screws*, 325 U.S. at 139 (Frankfurter, J., dissenting).

¹⁷⁰ See *id.* at 143 (Frankfurter, J., dissenting).

¹⁷¹ *Id.* at 138 (Murphy, J., dissenting).

¹⁷² The racial character of the case was not lost on legal commentators at the time. See, e.g., Note, Federal Prosecution of State Law Enforcement Officers Under the Civil Rights Act, 55 Yale L.J. 576, 576, 583 (1946) (noting Hall's race and possible role of "local prejudices" in *Screws*); Note, Federal Protection of Constitutional Rights, 40 Ill. L. Rev. 263, 264 (1946) (noting Hall's race).

the myth that race did not figure into a determination of the controversy. The racial concerns of the Reconstruction Congress, the expressed policies of the Justice Department and of President Roosevelt,¹⁷³ and, most importantly, the racist hostility expressed by Sheriff Claude Screws himself—all were deemed irrelevant in evaluating either the convictions or the constitutionality of section 242.

Although the general failure of the Court to take race into account is an important and continuing source of difficulty in prosecuting police brutality, there is more specific mythmaking to it.¹⁷⁴ The primary myth indulged by the *Screws* Court was that the defendants acted without awareness of the racially determined consequences of their actions. Claude Screws may have felt himself immune from any type of penalty for the harsh treatment of prisoners, black or white. But more specifically, he held himself immune from sanction because he was a white Southern sheriff responsible for the violent murder of a young black man. The evidence, amplified in the story, strongly indicates that Screws felt just such a racially determined immunity. Later, we will see this belief manifest among contemporary law enforcement officers, who disproportionately injure and kill African Americans.¹⁷⁵ To buy into the myth that police officers act without awareness of this racialized context is, I believe, to suspend rational judgment, or worse, to permit a subtle racism—conscious or unconscious—to artificially deny the role that race can play in affecting outcomes. By comparison, the story of *Screws* squarely presents the racial issue, and the question becomes whether that focus in a narrative format sheds light on federal criminal prosecutions of police brutality.

C. *Comparing the Story*

At some point, Claude Screws and Bobby Hall must have known that theirs was the beginning of a racial matter. The narrator clearly assumes as much by presenting their conflict as, among other things, a duel of convictions—Hall's to affirm certain rights for blacks (includ-

¹⁷³ According to Professor Lawrence, President Roosevelt increasingly pressured the Justice Department to find suitable Southern cases through which to prosecute racial violence in the South, with emphasis on the investigation of mob killings. See Lawrence, *supra* note 88, at 2173.

¹⁷⁴ The seminal myth with which we should be concerned is frequently conflated with the question of whether the white perpetrator in a case of police violence is himself a racist. The commonly held belief is that only racists should be punished for such official crimes. But the question of whether a specific officer is a racist is hardly relevant to the decision of whether to prosecute.

¹⁷⁵ See *infra* note 293 (discussing studies indicative of significant racial disparities in police shootings). For examples of black suspects who lost their lives at the hands of police officers, see *infra* notes 294-97.

ing specifically the right to bear arms) and Screws's to restore a racial hierarchy threatened by armed black soldiers and civilians. That the characters in the story understand the racial context of the action and that the story itself revolves around the interior lives of its antagonists begin the long list of important distinctions between the story and the *Screws* opinions. This section aims to do three things: explore what the story does, ask how it does it, and consider how this approach assists us in better understanding *Screws* and police brutality.¹⁷⁶

The story first attempts to create for the reader a highly racialized social context, in which a conflict is about to occur, and which focuses on a web of personal relationships. We may be able to generalize about the personal convictions of the two main characters as metaphors for, or representatives of, their historical place, but those convictions are also inescapably tied up with specific individuals. It is certainly possible that Claude Screws harbored a general resentment for black status mobility, but it was Robert Hall's outspokenness and defiance that provided a concrete target. Other characters, such as Annie Pearl and Frank Jones, are portrayed as acting within the motivational orbit of the central antagonists. Thus, at the most basic level of interpretation, the story describes a motivational dynamic dependent upon social context (very small town, rural Georgia during a world war that has touched the lives of many local households); personal and power relationships (at least two generations of familiarity and close proximity, law enforcement and civilians, black and white in the Jim Crow era); and unpredictable events that may have been catalysts to specific actions (a nationally publicized murder with clear racial overtones, news that Hall's brother might see combat).

What the story also gives us is some insight into the characters' emotional state—not just their states of mind, but also their psychic apparatuses. This helps us “know” them to some degree, permitting us to understand and to make predictions about behavioral styles that belong to them distinctly.¹⁷⁷ For example, we understand Hall to be

¹⁷⁶ This section is *not* intended as a literary critique of work I myself have authored, despite sometimes sounding that way. My intent is to expose and compare functional elements of the story and the opinions, without intoning about substance. Nevertheless, this discussion sometimes entails references to substance, and those descriptions cannot be unbiased. Thus, to the extent I am unable to escape fully from literary self-criticism, I beg the reader's indulgence.

¹⁷⁷ That is not to say that this objective was always accomplished well. My portrayal of Screws and some of the white townspeople is not without stereotype. Writing primarily from the victim's neglected perspective, I struggled (sometimes poorly) to humanize his antagonists. The choice of narrative voice greatly contributes to a story's empathic content and contextual depth, too. Here, my narrator may be guilty of oversimplifying not only white characters, but some black ones as well. This is a line of demarcation between good and poor literary fiction, as well as a continuing signal to readers of any narrative. Omit-

proud, capable, and determined to the point of bullheadedness. In contrast to Justice Murphy's somewhat paternalistic characterization of "the inarticulate and the friendless" Negro,¹⁷⁸ the narrator presents Hall as unusually articulate and quite popular among blacks and whites in Newton. More importantly, the story helps us realize that Hall's determination rests on a fundamental belief in and idealization of the possibility for change. He is in love with his family and perhaps his community, but dismissive of their judgment. Further, he is in love with the pistol.

Screws is also obsessed with the pistol. But he is presented as authoritarian, conservative, and yet concerned with the appearance of legality even when he is forging warrants. Hall's commitment to change frightens and threatens Screws who, like Hall, responds with macho instincts to confront the threat. He displaces the threat onto the community over which he is the official protector. This act of displacement empowers Screws to act on his rage; he sees himself as responsible for preserving a larger order. In any event, Screws gets mad. More than a mere "grudge,"¹⁷⁹ Screws experiences vengefulness toward Hall and Hall's defiance (leading local blacks, questioning the ordinance, taking legal action twice to retrieve his gun) against the racial hierarchy with which Screws and Hall's father grew up. The story then gives us premeditation and inexorability, the tragic event long foreshadowed, with the narrator's conclusion the only remaining twist.

Although it may seem obvious to some, it is important to note a more global function of the fictional narrative's focus on context and psychology. By grounding the personal and the ordinary, the story expects the reader's compassion. The medium itself is designed to engage our curiosity, scrutiny, sympathy, even empathy. Knowing we are safely outside the action, we, the readers, are encouraged to freely imagine how the characters must feel and think within their circumstances. We anticipate, criticize, judge, and sympathize. If the form is successful, we may even imagine ourselves for a moment surrounded by what is happening to distant others.

sions, exaggerations, and unexplored depths alert readers to a story's subjective positioning. Where those lines are clear enough, I contend that the reader is not unfairly misled and the narrative remains useful. For discussion of potential criticisms of specific narratives and readers' role in evaluating the persuasive weight of particular stories, see *infra* Part III.D.

¹⁷⁸ *Screws v. United States*, 325 U.S. 91, 138 (1945) (Murphy, J., dissenting).

¹⁷⁹ See *id.* at 93 (characterizing evidence as suggesting that "Screws held a grudge against Hall").

It is next worth asking how the story accomplishes these effects. On one level the narrator is presenting a rather conventional form of storytelling: introduction of conflict, development of plot and characters, descriptions of mood and scene, and heavy use of dialogue to convey both thought and action. However, on another level (though just as obvious) the narrator is presenting an argument.¹⁸⁰ Most of the story is devoid of argumentative tone and, although clearly told from "Bobby's" perspective, even attempts a degree of balance. Once Hall is dead, however, the reader understands that the narrative format has been a "set up" preceding a full-blown argument about the real issue: the "sickness." In the end, the narrator returns to convey a brief epilogue about the effect of the sickness on the victim's family. One deliberate effect of this device is to confront the reader with a broader scope of injury than the tragic death of a single person. The story does not neatly end in death. Rather, Hall's family and community are transformed by this unpunished loss, the resulting sense of powerlessness, and a rage, which, the narrator implies, is transmitted to new generations, relationships, and communities.

Finally, it is important to consider whether the story—what it conveys and its narrative form—is helpful in better understanding *Screws* and police brutality. For this, we do not have to resolve exactly what the narrator means by "the sickness."¹⁸¹ We only have to acknowledge that the question, along with many questions of our own, remains open. This also entails a comparison with the "stories" told by the justices in *Screws*.

Although the Court was concerned with willfulness—not limited to a question of fact in the case but going to preserving section 242's constitutionality—none of its stories teach us much about how to detect a willful intent to deprive someone of their due process rights. All of the opinions (including Justice Murphy's) ignore racial hierarchy as the foundational element of the social environment. None find any relevance in the relationships among the parties, beyond the suggestion that a "grudge" existed. And there is precious little guidance about either the *scope* of the injury from such crimes on which the federal interest in future prosecutions rests—for example, whether the rights deprivation is limited to an individual or extends to a community's loss of public trust—or the corresponding *reach* of the remedy

¹⁸⁰ This is the only story (out of ten) in Troutt, *supra* note 15, in which a third person narrator slips "out of character" and directly argues a point of view. For the broader project of putting literature to prescriptive use in the law, it is interesting to consider the effect of such a quasi "brief writing" approach versus other methods.

¹⁸¹ Indeed, we may leave that task to readers who are only interested in stories as literature.

by which the Government's use of the statute is finally justified. It is easy to say that the victim, Robert Hall, was excluded from the Court's consideration. But it is just as accurate to say that the defendants, the power they possessed, the motivations they manifested, and the social structure in which they operated simply were not cognizable by the justices. The Court (and by implication, we, its readers) could not have kept itself farther from those people at that time and in that place.

These absences, of course, had a powerful symbolic impact on then-existing law and culture as well as a continuing legacy. It matters little whether any or all of the justices were consciously aware of these implications at the time. As the history of Reconstruction suggests, the federal government's prosecution of civil rights crimes was designed to vindicate individual harms that had notably broader, national implications. Those implications are largely cultural, such as the exploitation of state authority to further entrench white supremacist motivations. There is evidence that at the time of the *Screws* prosecution, the Justice Department was aware of such implications and deliberately utilized sections 241 and 242 to combat them.¹⁸² Yet, symbolically, the *Screws* Court chose not to recognize these broader implications nor to acknowledge them as a meaningful aspect of the defendants' willful purpose.¹⁸³ The justices present actors functioning outside of any discernible social context. Moreover, they treat Robert Hall as dead and always dead, with no precipitating relationship with the defendants, no independent characteristics of his own, no voice, no agency, and no legacy. Without these, however, it is hard to imagine the content or scope of a constitutional deprivation based on rights such as liberty or due process.¹⁸⁴ It is also hard to bring successful prosecutions, because a theory of racialized mens rea is deemed beyond the bounds of legal argument, even where it resonates profoundly with empirical realities.

¹⁸² See *supra* note 90 and accompanying text (discussing U.S. Attorney General Francis Biddle's publicly expressed view of *Screws*'s conviction as vindication of democratic values).

¹⁸³ As I will show *infra* Part IV, communities care deeply about the broader aspects of the racial dynamics of police brutality; indeed, what joins individual acts of police violence in public consciousness is often a sense that a powerful state machinery is regularly activated to impose racial order by making examples of faceless, nameless, voiceless residents of targeted neighborhoods.

¹⁸⁴ One might detect in this argument a burden upon the government in section 242 cases either to present voluminous evidence of both a victim's and police defendant's "contextual" background, or risk losing. The point here, however, is more limited to the responsibility of the Supreme Court and other reviewing courts to consider these dimensions of the trial record before setting important precedent.

The story, I argue, is critically helpful in unearthing forgotten factual aspects of such a seminal case and exposing dynamics that remain characteristic of excessive force encounters between abusive law enforcement officers and suspects, many—but by no means all—of whom are black. The story reminds us that *Screws* is indeed a race case where the willfulness of the police murderers was evident in their organized plan of attack, their premeditated exploitation of their official status, and their explicit racial animus. The story further suggests that the racialized meaning of the case is not limited to the willfulness of the defendants. The defendants also knowingly relied upon their racially determined credibility with state law enforcement and local witnesses.¹⁸⁵ The Supreme Court declined to consider *any* of the racially specific elements of the case despite their obvious relevance, a glaring omission which arguably defines the meaning of the *Screws* precedent as much as what is contained in the text. That is, what we mean by precedent should include a decision's symbolic impact—how it directs us to analyze similar conflicts in the future. The story therefore acts upon the *Screws* case as a critical counternarrative through which questions crying out of both the facts and the law finally are given vent.¹⁸⁶

D. *The Story as Precedent*

The broader inquiry is whether we should view the *Screws* case—facts and decision—as a typical episode in the jurisprudence of police brutality. This, too, relates to mythmaking. A case whose significant precedential value determines the prosecutorial approach to such crimes deserves stories by which to understand it. If *Screws* is typical,

¹⁸⁵ Despite the presumed shock *Screws* and the others must have felt in being prosecuted by the federal government for a small town murder, they, like many police defendants in more contemporary cases, were ultimately acquitted. See *supra* text accompanying note 88.

¹⁸⁶ Such questions necessarily affected Justice Department attorneys at the time, as well as their counterparts on the defense bar, particularly since the *Screws* prosecution was deliberately chosen for its egregious facts and its bearing on violent social relations in the South and other parts of the United States. See Biddle, *Civil Rights and the Federal Law*, *supra* note 90, at 143 (noting, in context of *Screws* litigation, “the care which has been used in refusing to bring cases where the evidence was not convincing or the offense serious”). Questions about how willfulness would be regarded under the standard undoubtedly affected subsequent prosecutions under section 242 and other federal statutes.

I have learned, however, that many of the larger issues omitted from the Court's disposition of the case are regular sources of frustration, if not alienation, for a great many law students, especially law students of color, who perceive a routine judicial willingness to artificially exclude racial context from cases with obvious racial components. My own seminar students, for example, were openly thankful to Justice Murphy for considering the outrageous character of the *Screws* facts and responding accordingly. It was as though he had done something forbidden.

then stories about it should inform us about how to structure imaginative approaches for combating such incidents.

At first blush, *Screws* is no longer typical. Its Southern, overtly bigoted vintage seems almost stereotypical and outdated. The close character of the relationships at its core contradict the overwhelming sense of randomness we observe in fatal encounters between, say, inner-city youths and nonresident policemen. What happened in Newton, Georgia appears small and exceptional in hindsight, too particular to serve as a model from which to generalize.

But viewed differently, *Screws* is highly typical. Aside from the centrality of a gun and the incorrigible machismo of the antagonists,¹⁸⁷ the power dynamics, including the perception of a threat and the subsequent demand for obedience, are endemic to excessive force situations.¹⁸⁸ More specifically, *Screws* exemplifies the situation of a young, presumably capable black man who pushed the perceived boundaries of authority with the brazenness of someone acting out of right (hence Claude Screws's reference to Hall's being "biggety"¹⁸⁹). Such demonstrations of disrespect are viewed by many police as inviting a community to further disobedience (and a personal threat to manhood), and therefore must be put down in the most emphatic, often violent way.¹⁹⁰ Indeed, the nature and perceived enormity of the threat accounts for the seemingly disproportionate response. It is not an exact law of sociological physics I am describing (e.g., sometimes the provocation is quite real, sometimes the response is much smaller), but it is a pattern of relations between law enforcement authorities and subordinate groups, especially blacks, whose mythological roots go back at least to slavery,¹⁹¹ and whose manifestations are found at the origins of both urban riots and daily confrontations.¹⁹² The "story" of each encounter ends with society's unwillingness to pe-

¹⁸⁷ Several readers (including former students) have expressed anger and frustration with what they perceive as Bobby's suicidal behavior. They fault him for his gun-obsessed zeal and chest-pounding rationales, which rendered him less sympathetic. A few have gone so far as to accuse him of a death wish at Screws's hands with inevitable consequences (almost sadistically imposed) for his wife and baby. In this interpretation, the story has social precedence for irresponsible behavior on the part of spouses and parents.

¹⁸⁸ For varying attempts to generalize the features common to excessive force encounters, see discussion *infra* note 289 and accompanying text.

¹⁸⁹ Transcript of Record at 177, *Screws v. United States*, 325 U.S. 91 (1945) (No. 42).

¹⁹⁰ See, e.g., Deborah Sontag & Dan Barry, *Disrespect as Catalyst for Brutality*, N.Y. Times, Nov. 19, 1997, at A1 (describing patterns of incidents in which police perceptions of even minor acts of disrespect or challenges to police authority provoked violent responses).

¹⁹¹ See Baker, *supra* note 12, at 38 (tracing violence against blacks to slavery and its "scene of violence"); cf. Jacqueline Jones, *Labor of Love, Labor of Sorrow* 20-21 (1985) (discussing violence and cruelty as "a basic premise of the slave system itself").

¹⁹² See discussion *infra* Part IV.

nalize the representative of its authority. At its essence, then, such an encounter is a miniature battle between the individual group member's right to self-assertion and the necessity of maintaining obedience to hierarchy through physical degradation.¹⁹³ Society need not condone the actions of its officials in every case, of course. It is merely sufficient that the encounter is viewed as a hazard of the official's job and therefore unproblematic (if not justified at times). Alternatively, the episode is regarded as aberrational.¹⁹⁴ From either perspective, the full import of each reported encounter is ignored and, by such silence, condoned. If this description is accurate, the *Screws* facts, case, and result *are* quite typical.

I might argue that the *Screws* story is an accurate description of the dynamics that typically underlie excessive force encounters. However, complete accuracy is not the point here. The point is that because authority narratives mask social and factual realities, the nature of police brutality is extremely difficult to perceive, reflect upon, and debate without the assistance of a literary perspective. I take up the broader questions about how a literary approach can or cannot offer such help in the Part that follows.

III

FICTIONAL KNOWING: INTERSECTIONS BETWEEN CRITICAL THEORY AND LAW AND LITERATURE APPROACHES

A variety of legal storytelling scholarship over more than a decade has argued the benefits to both writer and reader of untraditional narratives, and this section attempts to situate my fictionalization of the *Screws* case in that broader theoretical context. The field is, of course, too broad to summarize usefully here, but we may focus on three claims that scholars frequently make: (1) that storytelling narratives introduce and even resurrect previously unrepresented voices in legal and political history, thereby redrawing the interpretive landscape by including and affirming the experiences of outsiders; (2) that

¹⁹³ This, arguably, goes to the heart of what the story's narrator calls, without explanation, "the sickness."

¹⁹⁴ This is an especially common postmodern police narrative. For a fuller discussion of the tendency of police chiefs to dismiss instances of officers' excessive force as aberrational, see *infra* note 299 and accompanying text.

Occasionally, the press reflects on its role in uncritically empowering authority narratives in police abuse cases. See, e.g., David Shaw, *Story of King Beating Put L.A. Media in Spotlight; Reporting: The Times Emphasized the Political Aspects, The Daily News Stressed the Pattern of Force*, L.A. Times, May 27, 1992, at A1 (describing differences in reporting by national newspapers and discussing media's role in constructing public perceptions of King incident).

the unconventional types and formats of the narratives themselves can be critically important to the interpretive enterprise by providing new templates or counterstories against which mindsets can be revealed and transformed; and (3) that, epistemologically, readers receive non-traditional narratives differently and in unique ways that enable them to pursue legal analysis and decisionmaking more effectively.

I endorse all of these claims here, although I accept that there are important limitations to these views in certain legal situations, and argue only that the use of literary fictional storytelling is an especially helpful supplement in conventional legal approaches to the problem of federal criminal prosecutions of police brutality.¹⁹⁵ By "literary," I mean storytelling whose dominant purpose is to create literature, rather than make an argument or advocate a moral direction. Although fictional storytelling may take diverse forms, what distinguishes a literary approach from a nonliterary one is the former's primary concern with aesthetics, with showing as much as telling. The author's only clear intent is an unconditional engagement with the reader's imagination, or what Martha Nussbaum calls "fancy."¹⁹⁶ For our purposes, literary storytelling asks the reader to understand that much of what she reads has been created by the storyteller, a fact that she should recall when listening to the story's implied moral direction and argument.

Finally, it is also important to keep in mind the reflexive dynamic at work in the varied storytelling approaches. That is, some work most effectively in affirming the author's voice, while others have their most profound effect on the reader's perception. This section discusses each of the three claims in light of illustrative scholarship, relying primarily on the work of Charles Lawrence, Kendall Thomas, Derrick Bell, Steven Winter, Richard Delgado, and Martha Nussbaum. After examining how my fictionalized narrative promotes or ignores these broader claims of storytelling, I turn to some of the anticipated criticisms. These critiques fall into three main categories: irrationality, peculiarity, and selectivity.

¹⁹⁵ I do not mean to imply that fictional storytelling is irrelevant to the many kinds of legal dilemmas identified by its proponents. However, its limitations are many and too numerous to catalogue in a single article devoted to a narrower purpose. As a general matter, fictional storytelling is probably most useful on issues where majoritarian interests and prejudices have dictated the myths that inform public decisionmaking.

¹⁹⁶ Martha C. Nussbaum, *Poetic Justice* (1995). This engagement induces a suspension of literal meanings and a commitment to symbolic understandings. "Fancy is the novel's name for the ability to see one thing as another, to see one thing in another. We might therefore also call it the metaphorical imagination." *Id.*

A. *Storytelling as Introducing New or Resurrected Voices*

A seminal claim of storytelling, asserted primarily by critical legal theorists, invokes its affirmation of the excluded self—usually the inclusion of the experiences of the “Other” or the outsider—in the scope of relevant legal inquiry. It is a claim of personal, institutional, and pedagogical necessity, in that the affirmation of outsider voices in legal analysis transforms the traditional objects of the law into subjects, redefines what is relevant in conventional legal decisionmaking, and brings into academia perspectives that, until somewhat recently, paced the lonely margins of legal scholarship. Not surprisingly, such challenges to the balance of legal power have been made with respect to conflicts over racist speech¹⁹⁷ and faculty hiring,¹⁹⁸ and more recently have expanded to issues such as judicial decisionmaking in rape cases¹⁹⁹ and efforts to overturn the military’s gay and lesbian exclusion.²⁰⁰ It is not a project that resides exclusively with “outsiders”²⁰¹

¹⁹⁷ See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 Mich. L. Rev. 2320, 2335-41 (1989) (advocating use of actual stories from victims of racism as way to demonstrate physiological and emotional stress in fight against racist speech).

¹⁹⁸ See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2434-36 (1989) (offering stories of faculty hiring decisions to advocate storytelling as form of psychic self-preservation and lessening of subordination).

¹⁹⁹ See Lisa A. Binder, “With More than Admiration He Admired”: Images of Beauty and Defilement in Judicial Narrative of Rape, 18 Harv. Women’s L.J. 265, 266 (1995) (using “literary anthropology” to challenge descriptions of rape victims in appellate narratives); see also Kevin Brown, *The Social Construction of a Rape Victim: Stories of African American Males About the Rape of Desiree Washington*, 1992 U. Ill. L. Rev. 997, 1000 (using barbershop narratives to demonstrate marginalization of rape victim); Katherine Lusby, *Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell a New War Story*, 25 U. Tol. L. Rev. 911, 912-15 (1995) (using storytelling to uncover and explore experiences of rape victims kept invisible by traditional legal analysis).

²⁰⁰ See William N. Eskridge, Jr., *Gaylegal Narratives*, 46 Stan. L. Rev. 607, 626 (1994) (arguing that storytelling is catalyst for destroying repressive policies and aggressively upsetting stereotypes).

²⁰¹ Many legal scholars have argued generally for the need to infuse legal analysis with voices of human experience. See, e.g., 1 Paul Ricoeur, *Time and Narrative* 75 (Kathleen McLaughlin & David Pellauer trans., University of Chicago Press 1984) (1983) (“We tell stories because in the last analysis human lives need and merit being narrated. . . . The whole history of suffering cries out for vengeance and calls for narrative.”); see also Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107, 2119 (1991) (arguing that in poverty law advocacy setting clients’ narratives should not be displaced by lawyer’s interpretations); Julius G. Getman, *Voices*, 66 Tex. L. Rev. 577, 582 (1988) (advocating increased use of “human voice” in legal education); Paul Gewirtz, *Aeschylus’ Law*, 101 Harv. L. Rev. 1043, 1050 (1988) (discussing importance of literature in developing rich and complex legal minds); Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 Wake Forest L. Rev. 323, 337-38 (1995) (discussing value of narrative in helping law students recognize their own biases); Martha I. Morgan, *Founding Mothers: Women’s Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. Rev. 1, 3 (1990) (insisting that narratives

or the "jurisprudence of color,"²⁰² nor has the challenge itself been limited to legal academia.²⁰³ My discussion emphasizes two illustrative works by Charles Lawrence and Kendall Thomas.

In *The Word and the River: Pedagogy as Scholarship as Struggle*, Charles Lawrence sets forth the central idea of resurrecting the forgotten narrative voice through the liberation construct of the Word, which he describes as "an articulation and validation of [African Americans'] common experience[,] . . . a vocation of struggle against dehumanization, a practice of raising questions about reasons for oppression, an inheritance of passion and hope" ²⁰⁴ Although Professor Lawrence's approach unequivocally embraces storytelling (a medium he says is an important part of the traditions of African peoples²⁰⁵), the paradigm of the Word is applicable to (and necessary for) a broad range of scholarly purposes. It begins with an embrace of subjectivity as a "gift of identity."²⁰⁶

Subjectivity here assumes three forms. First, there is subjectivity as "positioned perspective" by which the assertions of objectivity and universality in traditional legal discourse are "made explicit and challenged."²⁰⁷ Moreover, the perspective is one of conscious "[h]istorical revisionism."²⁰⁸ Second, the subjectivity of the Word does not pre-

function not just to refer to particularized views and concerns but as "metaphors to emphasize the importance of valuing personal experience and interaction in the construction of knowledge"); Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 Harv. C.R.-C.L. L. Rev. 353, 356 (1996) ("Narrative provides a link between the daily reality of violence in which the law traffics and the normative ideal 'justice' to which law aspires."); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 Stan. L. Rev. 39, 79-80 (1994) (arguing that affirmative postmodern storytelling is important method of defining truth and justice); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753, 1756 (1996) (exploring how attention to symbols might generate "thicker" response to Equal Protection analysis than that attempted under conventional doctrinal framework); cf. Rhonda M. Williams, *Accumulation as Evisceration: Urban Rebellion and the New Growth Dynamics*, in *Reading Rodney King*, supra note 12, at 82, 90-91 (calling for more contextualized explanations to counter dominant academic narratives of causality in urban economics).

²⁰² Matsuda, supra note 197, at 2324.

²⁰³ Indeed, the "western culture" debates on college campuses during the 1980s reflected conflicts over the extent to which courses on the canon of western thought should incorporate the primary writings of authors of color and secondary sources about the experiences of marginalized groups. See, e.g., James Atlas, *On Campus: The Battle of the Books*, N.Y. Times, June 5, 1988, § 6, at 24; Joseph Berger, *U.S. Literature: Canon Under Siege*, N.Y. Times, Jan. 6, 1988, at B6.

²⁰⁴ Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. Cal. L. Rev. 2231, 2238 (1992).

²⁰⁵ See id. at 2278.

²⁰⁶ Id. at 2252.

²⁰⁷ Id. at 2255.

²⁰⁸ Id. at 2256.

tend to "value neutrality."²⁰⁹ Third, by employing language such as "I" and "we" to express existential subjectivity, practitioners of the Word literally assume the position of subject and thereby reassert agency.²¹⁰ Without such insistence on self-description, the outsider remains in the position of the object.²¹¹ The connection between Professor Lawrence's paradigm of the Word and the function of a fictional retelling is already lurking in the embrace of subjectivity, because what the *Screws* story recalls is past, personal, and, by a combination of deliberate and accidental factors, forgotten. Accepting and extolling subjectivity as a norm demands that forgotten experience be brought into contemporary relevance.

The Word's emphatic embrace of storytelling, of course, makes the connection between the paradigm and the story even clearer. Professor Lawrence describes storytelling as a "gift" as well as a methodology for contextualization, but first it must serve the procreative function of making invisible beings reappear. People of color "remain invisible and unheard in the literature that is the evidentiary database for legal discourse, and when we are seen, in stories told by others, our images are severely distorted by the lenses of fear, bias, and misunderstanding."²¹²

The Supreme Court's representation of Robert Hall rendered him no less visible than appellate courts regularly make victims or, for that matter, parties. What is special and oppressive about the Court's treatment of Hall as an object is its repercussive effect in the jurisprudence of excessive police force, particularly and importantly against people of color.²¹³ The complete omission of Hall's "voice" (or representations of his person made by the Government or in witness testimony) together with the denial of the racial character of the violence committed against him reestablishes a set of prevailing, though unarticulated, judicial norms that forget the black victim. According to the Word, the first thing a story can do is to bring him back.

Such "remembrance" is the soul of Kendall Thomas's project, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*.²¹⁴ Professor Thomas revisits the Supreme

²⁰⁹ Id. at 2259.

²¹⁰ See id. at 2265 ("[A]s practitioners of the Word we must endeavor to place ourselves in the linguistic position of 'subject' rather than 'object.'").

²¹¹ See id. at 2270.

²¹² Id. at 2279.

²¹³ See discussion *infra* Part IV.

²¹⁴ 65 S. Cal. L. Rev. 2599, 2603 (1992) (describing article as "offer[ing] a 'remembrance' of the case in the form of a cultural history of the political events that led to the Court's first response to the case").

Court's 1937 landmark civil liberties decision, *Herndon v. Lowry*,²¹⁵ in an effort to revive a forgotten "popular constitutional memory": Angelo Herndon's own expression of his beliefs and experience as recounted in his autobiography.²¹⁶ Further Professor Thomas challenges the failure of legal scholars using traditional constitutional analysis to explore the Court's related, though less triumphant, decisions in Herndon's ordeal²¹⁷ and its unwillingness, as in *Screws*, to wrestle with issues of race and class that were raised at trial. One of Thomas's central claims is that, contrary to "institutionalist" analyses, *Herndon* cannot be fully understood without "reckoning the constitutional meanings into the cultural record left by the historically dispossessed"²¹⁸ This means retrieving the "'buried' and 'subjugated' knowledges bequeathed to us by Americans who lived out their lives at the bottom of our constitutional order."²¹⁹

However, Professor Thomas's revival of Herndon's authentic voice is not only for the benefit of allowing the unrepresented to speak for themselves, what I have classified as the first benefit of storytelling scholarship and what Professor Lawrence refers to as "self-description."²²⁰ Thomas argues further that the introduction of Herndon's own voice is what unlocks a fuller, richer perspective on the legal issues in the case. "It . . . represents an effort 'to broaden the basis of history, to enlarge its subject matter, make use of new raw materials and offer new maps of knowledge.'"²²¹ Thus, rather than merely according the silenced object a speaking role, the emergence of that person's voice as an active subject may transform the context, action, and meaning of the entire play. The effect, then, extends far beyond the speaker and those who identify with him on some basis or another. It has the potential to reach a much broader audience—in this case, students and practitioners of civil liberties jurisprudence.

²¹⁵ 301 U.S. 242 (1937). *Herndon* involved the conviction of Eugene Angelo Braxton Herndon, an African American member of the Communist Party, for attempting to incite insurrection against the state of Georgia in violation of a state statute. See *id.* at 245-46. The Court ruled the statute an unconstitutional intrusion on Herndon's rights to freedom of speech and assembly, holding that the statutory standard of guilt was impermissibly vague. See *id.* at 261-64.

²¹⁶ Angelo Herndon, *Let Me Live* (1937).

²¹⁷ See *Herndon v. Georgia*, 295 U.S. 441, 446 (1935) (refusing to grant appellate jurisdiction); see also *Herndon v. Georgia*, 296 U.S. 661, 661 (1935) (denying petition for rehearing).

²¹⁸ Thomas, *supra* note 214, at 2666.

²¹⁹ *Id.* (quoting Michel Foucault, *Two Lectures*, in *Power/Knowledge* 78, 81-82 (Colin Gordon ed. & Colin Gordon et al. trans., 1980)).

²²⁰ Lawrence, *supra* note 204, at 2265.

²²¹ *Id.* at 2607 (quoting Raphael Samuel, *People's History*, in *People's History and Socialist Theory* xvi, xxi (Raphael Samuel ed., 1981)).

But neither Lawrence, Thomas, nor most other proponents of this first benefit of storytelling, the reclaimed voice, is writing about literary fiction.²²² The problem for fiction is that the voice (other than the author's) cannot be an authentic representation of any participant in the experience being conveyed.²²³ The attributes of voice that make it different than other kinds of legal narrative and that service what Professor Delgado calls "psychic self-preservation"²²⁴ are absent. Instead, the reader receives the fiction writer's version of his characters' experiences, and there is simply no way for that rendering to approach authenticity. It is fiction.

Such "inauthenticity" would appear to be particularly problematic for a project designed to elevate the subject. But I don't think it is fatal. Robert Hall is not objectified simply because he cannot directly speak for himself. Nor is Claude Screws, even if I have miscast him. As I will discuss later,²²⁵ in order for the fictional narrative to function effectively for legal analysis, it must engender a feast for the reader's imagination. The voices that it projects to readers must resonate from some independent psychic bearing or we cannot hear them. This is part of the problem of verisimilitude—the notion that readers accept the reality of the text—and it can be especially acute for literary storytelling. But verisimilitude may be achieved primarily by laying context through narrative description, characters in dialogue, and access to their intentions. However, it is also made possible in this story by a candid embrace of Lawrence's principles of subjectivity.

The story's narrator demonstrates the first principle of subjectivity at the very outset by enumerating the reasons—except one—why Hall would be killed (i.e., "the war, the organization, his child [and] that gun," with the sickness unstated until the end). This approach is historical and revisionist, certainly in contrast to the Supreme Court's official record of the case. I am not arguing that the justices should have speculated about the confluence of all the social, historical, and

²²² Professor Lawrence does, however, openly acknowledge the power and possibilities that poetry and literature offer legal analysis. In *The Word and the River*, he introduces his discussion of the Law and Literature movement with the following comment: "Through stories, poems, and dreams we are able to explore inarticulate feeling and experience and give them name and form. Imagination is the key to our deepest insights and sympathies." Lawrence, *supra* note 204, at 2285. Nevertheless, Lawrence fails to apply the Word paradigm to any specific piece of fiction.

²²³ This is potentially an even greater problem in stories like the one in this Article, since a third person narrator speaks for all of the characters and thus declares no singular psychological union with anyone.

²²⁴ Delgado, *supra* note 198, at 2436.

²²⁵ See *infra* Part III.D (proposing four criteria to evaluate stories).

psychological factors that may have contributed to Hall's death,²²⁶ but rather asserting that that is the business of fictional narrative. Similarly, the narrator fulfills Lawrence's second principle by taking Hall's side (even against Hall's family). The claim that the sickness is ultimately to blame, not only for Screws's misconduct but for the actions of townspeople and the survivors, is hardly value neutral. Finally, the narrator stands from time to time in the position of Hall, the main subject, especially in the moment of death and tries, however imperfectly, to experience the barrage of blows.²²⁷

The point is not that the voice with which we are presented speaks the truth, but that, from the standpoint of the reader, we are given the raw material to question the meanings for ourselves. The fact that the material comes in fictional form should liberate, rather than constrain, the inquiries we make about the relevant law. Professor Thomas, by presenting Angelo Herndon's own views of his ordeal, still cannot claim complete, objective authenticity because that authentic voice has been translated through Thomas and included in a set of arguments that distinctly reflect Thomas's subjective position as a scholar. Nevertheless, we as readers, are challenged by the receipt of a new base of relevant knowledge that contradicts established interpretations of the *Herndon* case. Like Professor Thomas, I have gone to a subaltern record (primarily the trial transcript and periodical accounts) in order to create a broader context against which the conventional meanings of the Court's opinion can be reread. That should fulfill one objective of the first benefit of storytelling. The other, affirming the existence of a forgotten life, I hope is also met.

B. The Transformative Effects of New Types of Narratives on Mindset

Related to the first claim, but more general in nature, is a second claim offered for storytelling in legal analysis: that storytelling, depending on its form, has the power to transform majoritarian or dominant mindsets, again by presenting counternarratives that challenge unexplored premises. This is a position closely associated with Critical Race Theorists such as Richard Delgado and Derrick Bell, whose arguments I examine first, as well as scholars such as Steven Winter,

²²⁶ However, I have argued that the justices' failure to acknowledge any relevance of these factors has lasting symbolic impact. See *supra* Part II.C. Indeed, one could fault them for omitting any discussion of their assumptions about the preeminence of vagueness and federalism to the exclusion of all other considerations.

²²⁷ The narrator also attempts to subjectivize the experience of other characters at critical points in their story, such as Screws's reaction to the letter from Hall's lawyer and Annie Pearl's frustration with her husband's dangerous obstinance.

who take an explicitly cognitive approach. The central idea is that conventional legal analysis is comprised of oft-repeated “stock stories” whose presumed verities are unshakable until challenged in a radically different narrative format. According to Professor Delgado, a stock story often contains apparent attributes of neutrality, emphasizing procedure over facts, and thereby has the coercive effect of maintaining the status quo, often without explicitly acknowledging that objective.²²⁸

Counterstories in nontraditional formats operate to subvert the mindset of which the stock story is an expression.²²⁹ For Professor Delgado, mindset is “the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”²³⁰ Reliance upon stock stories to advance the dominant mindset is merely the efficient means by which social reality is constructed, legitimating certain norms and excluding others. Counterstories therefore can serve a “destructive function” by showing “what we believe is ridiculous, self-serving, or cruel. . . . They can help us understand when it is time to reallocate power. They are the other half—the destructive half—of the creative dialectic.”²³¹

The trick for oppositional storytellers, Professor Delgado cautions, is to appear noncoercive.²³² This, I argue, requires persuading the reader by *compelling*, rather than coercing, her. Compulsion is a very problematic constraint for nontraditional narratives precisely because they cannot rely on the implicitly coercive effects of convention. Readers of appellate opinions, for example, are immediately struck by (and accommodate themselves to) the powerful conventions of the law’s most formidable authority narratives. Such dominant narratives need not concern themselves with alienating readers, for readers must concern themselves with following *them*. Counterstories in nontraditional formats have no such automatic pull. They must invent it as they go and gain credibility with their readers by refraining from overly contrived, didactic, or polemical assertions of the way things ought to be.

²²⁸ See Delgado, *supra* note 198, at 2421-22 (discussing characteristics of stock story as “an account that justifies the world as it is”); see also Gerald P. López, Lay Lawyering, 32 UCLA L. Rev. 1, 5 (1984) (discussing and defining stock stories as “knowledge of events, people, objects, and their characteristic relationships organized and represented by a variety of ‘stock structures’”).

²²⁹ See Delgado, *supra* note 198, at 2413 (discussing subversive purpose that storytelling serves for marginalized groups).

²³⁰ *Id.*

²³¹ *Id.* at 2415.

²³² See *id.* (arguing that, to be effective, counterstories “must be or must appear to be noncoercive”).

The choice of creative format, therefore, is critical if it is to transform social reality. This is so not only because counterstories must reject the desubjectivizing conventions they seek to counter (a function squarely within the first benefit of storytelling) and resist alienating modes of expression. They must also offer the audience an alternative mindset.²³³ Providing alternative mindsets through narrative is reminiscent of Jerome Bruner's ideas about the function of selecting narrative genre. Professor Bruner states that the choice of genre may constitute an "invitation[] to a particular style of epistemology[.]" and thereby possesses the dual power of shaping *modes* of thought in addition to creating realities out of plot.²³⁴

In several articles, Professor Delgado has chosen two kinds of chronicles to serve as counterstories that challenge dominant mindsets through both form and content. In his earlier work, Delgado compared varying accounts of a law school faculty's decision not to hire a black teaching candidate.²³⁵ The presentation is compelling because the reader is challenged to assimilate competing versions of the same events that are expressed in entirely different forms. (Indeed, one of the contributions of the article is that it demands the examination of multiple forms as it simultaneously promotes a new form or genre.) In later writings, Delgado developed the Rodrigo Chronicles in which regular characters—a law professor and an aspiring one—appear in a series of law review articles to discuss subjects of meta dimension, such as essentialism and theories of social reform.²³⁶ Dialogue is the primary instrument of this form of chronicle, and to the extent that it works, it may provide a wider scope of readers with access to emotionally and intellectually difficult ideas.²³⁷

²³³ Note that this approach refuses to argue on the same terms as conventional discourse and therefore amounts to much more than alternative interpretations of, for example, legal doctrine. However, Delgado's call for narratives does not reject certain shared norms of language altogether, nor does it completely reject common assumptions about logical reasoning common to legal academia. See *id.* at 2415 n.22. Thus, it rejects certain tenets of the rule of law without going so far as to interpose a distinct linguistic normative structure.

²³⁴ Jerome Bruner, *The Narrative Construction of Reality*, 18 *Critical Inquiry* 1, 15 (1991).

²³⁵ See Delgado, *supra* note 198.

²³⁶ See, e.g., Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 *N.Y.U. L. Rev.* 639 (1993).

²³⁷ This must be qualified by the criticism that the liberating qualities of Delgado's format will be limited to readers who can, without blinking, read dialogue such as, "In a way, it's a particularly powerful and persuasive version of the antinomialist argument." *Id.* at 642.

Professor Derrick Bell's chronicles—also of two varieties—rely upon narrative devices similar to Delgado's,²³⁸ but offer varying transformative effects. While Bell's civil rights chronicles and the Rodrigo chronicles operate on the reader at the level of artfully packaged argument, our empathy, wonderment, and absorption in context is not consistently compelled. Rather, those types of chronicles invoke our logical capacity and legal intellect; after all, we are reading another form of law review argument.

In contrast, Professor Bell's stories in *Faces At the Bottom of the Well*²³⁹ rest more on a fictional foundation approaching literary creation, and consequently induce a different effect on mindset. Like literary fiction, these are more effective at suspending readers' sense of reality and providing opportunities for emotion to figure into reasoning. For example, in "The Afrolantica Awakening," Bell tells the story of a newly emerged continent whose beauteous and bountiful resources can be enjoyed only by a single, physically qualified group, African Americans.²⁴⁰ Using pure fictional themes such as paradise and exodus, Bell invites the reader to receive many distinctly nonfictional messages. Promoters of migration marshal historical precedent, which opponents then counter. Reviving the historical context of back-to-Africa movements, Bell provides the reader with grist for considering the experience of separate black communities, issues of expulsion and escape, claims to belonging and the feeling of trespass, and, indeed, the notion of community itself. The story device presents the reader with a literary conflict large enough to sustain informed consideration of the difficult and provocative social, political, and legal subissues that constitute it.²⁴¹

How are these forms of narrative working on the reader to transform mindset? What are they actually doing that is different from conventional argument and reinterpretation? Using precepts of experientialist cognitive psychology, Professor Steven Winter provides an answer that expands upon Delgado's notion of the "stock story."²⁴² A narrative, like a mindset, is made up of constituent parts, such as stock stories. In Winter's conception, these parts are labeled idealized

²³⁸ See Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 42-50 (1987) (chronicling discussions between civil rights attorney Geneva Crenshaw and law professor narrator). These chronicles were the precursors to Delgado's dialogues.

²³⁹ Derrick Bell, *Faces At the Bottom of the Well* (1992).

²⁴⁰ See *id.* at 32-46.

²⁴¹ Professor Bell himself describes the overarching goal of his chosen device as the integration of experience and imagination in an examination of "racial themes." *Id.* at 12-13.

²⁴² See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225 (1989).

cognitive models (ICMs) because of the way they function to organize rationality.²⁴³ They come in many forms, such as scenarios or scripts (e.g., ordering food at a restaurant), metaphors (e.g., marketplace of ideas), or, especially pertinent here, “a related group of propositions grounded in a physical or cultural experience”²⁴⁴ (e.g., motherhood or stop-and-frisk). According to Winter, all ICMs share at least the following four features:

- (1) ICMs are grounded in or draw upon direct physical or cultural knowledge; (2) they are highly generalized in order to capture and relate together a broad range of particularized fact situations; (3) they are unconscious structures of thought that are invoked automatically and unreflexively to make sense of new information; and (4) they are not determinate, objective characterizations of reality, but rather idealized structures that effectively characterize some but not all of the varied situations that humans confront in their daily interactions with their physical and social environment.²⁴⁵

Two of these features bear special emphasis. Because ICMs are grounded in cultural knowledge, the first point above, the power of any narrative to construct an entirely new reality is necessarily limited by a reader’s pregiven cultural understandings.²⁴⁶ As Winter’s third point suggests, the organization of rationality by which readers make sense of narratives through known ICMs occurs at a largely unconscious, automatic level. It is the combination of these two features that makes so many legal stock stories *seem* or *feel* legitimate to members of the same culture even when they cannot explain why.²⁴⁷ Thus, an ICM is “an experiential gestalt identified by a culture because it is a useful but not objective way to organize experience.”²⁴⁸

Of course, there will be many legal ICMs that a large portion of the culture will not regard as legitimate or “typical,” and this allows space for the transformative effect of counter-storytelling. The offering of alternative ICMs through different narrative formats has the potential, first, to reveal aspects of unconscious mindset and second, to encourage the acceptance of new understandings that may, with

²⁴³ See *id.* at 2233 & n.27 (noting similarity between ICMs and “stock stories” as means by which diverse inputs of daily life are organized and given meaning); cf. Jody David Armour, *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America* 81 (1997) (describing critical role of narrative terms in defining social reality and constituting identity).

²⁴⁴ Winter, *supra* note 242, at 2234.

²⁴⁵ *Id.*

²⁴⁶ See *id.* at 2245 (“[O]ur very ability to construct a world is already constrained by the cultural structures in which we are enmeshed.”).

²⁴⁷ Cf. *id.* at 2257 (“[T]he law functions because it ‘feels’ right a good deal of the time; there is a sense in which certain outcomes *seem* more legitimate than others.”).

²⁴⁸ *Id.* at 2267.

time, find wider cultural acceptance. Professor Delgado illustrates this dynamic in the faculty hiring chronicle by first exposing the ICMs at work in the institutional stock story of the underqualified black candidate and then offering alternative ICMs through the narratives of the angry student speaker and an anonymous leaflet.²⁴⁹ Similarly, Professor Bell's "Afrolantica" story trades upon the culture's migration-to-paradise ICMs, beginning the story with the discovery of a new world of tremendous resources sought by those who have historically exploited such "finds" as promised lands, here Americans of European descent.²⁵⁰ The alternate ICM is presented in the story's subversion of paradise into something only Americans of African descent can enjoy. This unexpected twist in the stock story provides unfamiliar readers with an opportunity to identify with the experience of exodus and escape *from* a promised land, America, an ICM that makes little sense in the dominant normative framework. The effect of format works through subversion, then introduction.²⁵¹

How, then, could the fictionalized story of *Screws* affect a transformation of mindset? This is partly a question about the specific merits of a conspicuously literary approach. The focus here is on the form of the narrative, not the reader. I believe that fictionalization of actual stories in the law may transform mindset in at least two ways:

²⁴⁹ See Delgado, *supra* note 198, at 2418-21, 2429-34.

²⁵⁰ See Bell, *supra* note 239, at 33.

²⁵¹ This dynamic of subversion and introduction was at work in the now infamous arguments during the trial of O.J. Simpson. Among the ICMs used by the prosecution to organize the case for the jury was the experience of the uncontrollable wife batterer who, despite his affable public persona, is capable of shocking violence, even murder, in private. Los Angeles county prosecutors believed that emphasis on such ICMs in the guilt narrative they sought to prove would resonate especially with a predominantly black female jury. See Jeffrey Toobin, *The Marcia Clark Verdict*, *The New Yorker*, Sept. 9, 1996, at 58, 71 ("Marcia Clark had her own narrative of murder for the jury—one that featured a remorseless, relentless defendant moving inexorably from domestic violence to homicide. Clark's theory was that black women would respond to this story.").

However, the prosecution as well as perhaps a majority of white trial watchers were surprised by the defendant's effective use of an alternate ICM that apparently resonated even more deeply in the cultural worlds from which the jurors came: the claim that racist white police officers had fabricated evidence to ensnare a black male defendant. The popular media pejoratively dismissed this defense argument as "playing the race card," which presumably recast the argument as part of a string of unjustifiable claims of racial discrimination by blacks in a culture that has now moved beyond such realities. Thus, both sides viewed the situation through aggregations of radically opposed ICMs which operated through different narrative formats simultaneously (cross examination, courthouse interviews, talk shows, news reports, editorials, closing arguments, and popular memoirs).

What both sides demonstrated in their use of a series of ICMs to construct opposing narratives is also representative of a concept Professor Bruner describes as "narrative accrual." Bruner, *supra* note 234, at 18. Through narrative accrual, often repeated, related stories are cobbled together to constitute what we know as "history" or "tradition." See *id.*

by offering alternative *legal* ICMs and by revealing contrasting *social* ICMs.

As we have seen, the dominant legal ICMs defining the *Screws* opinions proceed along the well-known structure of Supreme Court decisionmaking, replete with decontextualized, deracialized analysis of abstract questions. Through the application of precedent and logical reasoning, the Court came to a conclusion that, if socially controversial, appears legally legitimate. The decision is especially important in clarifying the law's *mens rea* ICM, specifically willfulness. Less obvious are the legal norms at work, which we may also call ICMs: neutrality and colorblindness. The story offers alternative ICMs through its use of rules that govern literary narratives: detail, interpersonal context, racial and gender identity, narrative time, and, most importantly, intentional states of mind. As the narrative structure focuses the reader on these, rather than doctrinal, aspects of the same happenings, the legal ICMs by which *Screws* is known—the constitutionality of section 242's under color of law provision and the willfulness requirement's safeguard against vagueness—are revealed and challenged.

The revelation of contrasting social ICMs was evident when I taught the story alongside the *Screws* opinions.²⁵² Although students of all backgrounds willingly accepted my contention that the story concerned, among other things, police brutality, they were less willing to accede that the same was true of the *Screws* case as presented in the justices' narratives. The tone and intellectual focus of the opinions revealed to them clear legal ICMs with little obvious connection to ICMs that some students regarded as strictly social in nature, such as disobedience to authority, public humiliation for disobedience, and the fabrication of probable cause. These aspects of typical police brutality narratives with which many of them are (unfortunately) familiar appeared so at odds with the Supreme Court's narrative as to have no legal relationship to the case. In fact, some students, abandoning the connection to criminal prosecution entirely, directed their frustration at *Robert Hall's* character for what they regarded—through the lens of alternative ICMs—as suicidal folly and a quest for martyrdom deemed selfish in light of his family's needs. Thus, the story's construction of reality provoked starkly different reactions from students whose own cultural understandings accord with legal ICMs of private property rights and due process on one hand, and socially framed

²⁵² The course I reference is Law and Humanities, a first-year elective I taught at Rutgers Law School-Newark during the spring semester of 1997.

ICMs of predictable police lawlessness and self-preservation on the other.

The transformation of mindset that may result from such exchanges cannot be considered an exclusive or even direct effect of the author's choice of narrative format. It is an important contributing factor whose ultimate effectiveness has something to do with the quality of the narrative itself and the reader's disposition—the triggering of learned ICMs in a particular reader's cognitive experience. The possibility of “changing minds” where minds are made up of unconsciously engrained assumptions about people and social relationships is therefore a matter of *how readers read* certain narratives as much as what authors do. The first two beneficial claims of nontraditional legal narratives are concerned primarily with authorial perspectives—the affirmation of neglected voice in the first, the mode of presentation in the second. These certainly impact the reader, sometimes powerfully, but narratives must also be reader-centered to be persuasive.

C. *The Reader's Receipt of Legal Fictions*

The epistemological claim that readers process nontraditional narratives differently than conventional legal texts has been a favorite assertion of law and literature scholars for a long time.²⁵³ In some ways it is a simple corollary to the earlier assertion that such narratives speak differently; in other ways it is a claim about the very nature of literature. In my analysis of the first two claims, I suggested that nonliterary, nontraditional narratives, though valuable and helpful, must overcome a built-in tendency to coerce and alienate readers rather than compel them. Such stories do not enjoy the presumption of credibility and authority associated with conventional accounts and therefore must struggle to sustain their persuasive power.²⁵⁴ Although each of these narrative approaches is vital and necessary, I argue here that fictional storytelling of a literary character finds a more willing reader and offers a potentially greater ability to transform the mindset that currently frustrates so many criminal prosecutions of violent cops. In this vein, I rely heavily on the work of

²⁵³ See, e.g., Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. Rev. 145, 203-11 (1985) (arguing that literary readings of legal texts yield richer understandings than those derived from pure philosophical or political analysis).

²⁵⁴ Note that this may be a weakness of my particular story about *Screws* as well. The favorable regard shown Hall and the contempt shown *Screws* and the other law enforcement officers reveal the narrator's bias. The lack of balance throughout, in addition to the explicit opinionmaking at the end, could easily alienate unsympathetic readers and diminish the story's persuasive power.

Professor Martha Nussbaum whose exploration of the reader's "literary attitude of sympathetic imagining"²⁵⁵ gives rise to the notion of the judicious spectator-literary judge.

In *Poetic Justice: The Literary Imagination and Public Life*, Professor Nussbaum argues that readers of literary works, specifically realist novels, engage in a process of perception that is emotionally acute, empathetic, appropriately detached, and yet egalitarian in its judgments.²⁵⁶ She recommends such a disposition for both citizens and judges in making determinations about matters of public life and law.²⁵⁷ Nussbaum first invokes the economist Adam Smith's concept of the judicious spectator as a model of rationality for citizens and readers. This spectator's reasoning, according to Smith, is necessarily informed by emotions, albeit "appropriate" ones.²⁵⁸ Appropriate emotions must themselves be informed by the facts of a situation, and they must remain those of the spectator rather than a participant; the self, in a nod to principles of neutrality, must stay out of the action.²⁵⁹ Nussbaum borrows attributes of the judicious spectator in creating the literary judge. The literary judge is again capable of a degree of detachment and neutrality, yet is committed to developing a comprehensive understanding of the relevant social and historical facts of a case, the situations of the groups or individuals involved, the meaning and implications of suffering,²⁶⁰ and a "sense of what was really experienced" by the participants.²⁶¹

These are literary understandings, which means they arise from the special interaction readers have with literary works. Professor Nussbaum therefore argues that it is the novel's interest in the ordinary and its vision of human behavior—"democratic, compassionate, committed to complexity, choice, and qualitative differences"²⁶²—that

²⁵⁵ Nussbaum, *supra* note 196, at 92.

²⁵⁶ Professor Nussbaum's approach fully emphasizes the notion that readers of novels are unskeptically engaged in a process of judging:

[Some] judgments are not always available within the empathetic viewpoint, so the novel-reader, like a tragic spectator, must alternate between identification and a more external sort of sympathy. What the ancient pity tradition claims for epic and tragedy might now be claimed for the novel: that this complex cast of mind is essential in order to take the full measure of the adversity and suffering of others, and that this appraisal is necessary for full social rationality.

Id. at 66.

²⁵⁷ See *id.* at 72 (suggesting that adoption of such literary mindset is necessary for political judgments to embody "a full and fully human voice").

²⁵⁸ See *id.* at 74.

²⁵⁹ See *id.* (explaining that role of judicious spectator requires filtering out self-interested responses of fear and anger when making reflective assessments).

²⁶⁰ See *id.* at 89-90.

²⁶¹ *Id.* at 91-92.

²⁶² *Id.* at 36.

empowers the reader's "fancy" toward "an evaluative humanistic form of practical reasoning."²⁶³ Although I disagree that the novel is the only kind of literary work that can so engage us, I agree with Nussbaum's suggestion that, in order for this capacity to take hold in the reader, the work must give us sufficient depth and scope of the imagined lives. Once such a connection to a work of fiction is made, an evaluative dynamic is launched that has the potential to transform predisposed judgments:

[I]f we follow the story with eager attention, succumbing to its invitations and being moved by its people, then we are, in the process, making judgments[.] . . . confident in the process that some reasons are indeed stronger than others, that some ways of treating human beings are themselves better than others and can be justified as better by the giving of such reasons.²⁶⁴

If readers approach a literary work such as my fictionalization of *Screws* with a "judicious-spectator/literary-judge" cast of mind, they are more likely to wonder about the omission of race, context, patterns of personal hostilities, and the quality of misery during the adjudication of such acts. They may be more likely to view the acts as criminal and to characterize the losses as deprivations of protected civil rights. Considering the social and historical context in which such acts occur, they may more readily acknowledge the practical constraints on local criminal prosecution and accept—even expect—a federal role.

Professor Nussbaum takes my conclusions a step farther. She suggests that "[l]iterary understanding . . . promotes habits of mind that lead toward social equality in that they contribute to the dismantling of the stereotypes that support group hatred."²⁶⁵ If this is true, it is welcome, though not critical to this project. Readers do not have to be predisposed through fictional storytelling to side with Robert Hall, his family, and the Justice Department's desire to punish police brutality. They must simply be put in a position—by virtue of the story itself and how they, as readers, approach a literary work—to struggle over the meaning of experiences it presents. This is a struggle the Supreme Court narratives neither joined nor posed. Unable to quickly dispense with the complexities of place, race, culture, and power relationships with doctrinal flicks of the wrist, the reader-as-literary-judge must remain (hands clasped) and evaluate a broader array of possible consid-

²⁶³ Id. at 82.

²⁶⁴ Id. at 83.

²⁶⁵ Id. at 92. Professor Winter makes a similar point about the politically transformative possibilities of narrative in favor of the disempowered. See Winter, *supra* note 242, at 2271-79.

erations, making distinctions about relevance and good reason along the way. This they must do *even* if they are predisposed to see such acts as deserved, accidental, local, or aberrational. As Professor Winter has put it, “[t]ransformative communication is possible, but there are no guarantees.”²⁶⁶

D. Criticisms: Irrationality, Typicality, and Selectivity

Before proceeding to explore the contemporary need for fictional storytelling as an aid to federal police brutality prosecutions, it is worth pausing here to consider some of the theoretical limitations of such narratives in light of anticipated criticisms. I view these criticisms as questions about rationality, typicality, and selectivity. Specifically, I ask: How is the infusion of emotional factors appropriate to adjudications involving the rights of criminal defendants? How is the use of fictionalized stories justified in police brutality cases generally when the very premise of each story is that its details and peculiar interpersonal dynamics are regularly overlooked? Why isn't the call to stories an invitation to deluge the adjudication process with competing (and often self-serving) stories that at best cancel each other out and, at worst, favor some narratives over others?

The criticism that the legal storytelling movement rejects rational argument began chiefly with articles by Professors Daniel Farber and Suzanna Sherry,²⁶⁷ but has been leveled by others.²⁶⁸ Although the debate about the relationship between storytelling and reasoning can be endless, I find compelling evidence for the proposition that “storytelling provides a means of interrogating the reasoning process.”²⁶⁹ Storytelling does not replace rational analysis entirely, but complements it. Emotions play a decisive role in helping us to distinguish among value-laden alternatives,²⁷⁰ where each may be logical, yet nonetheless irreconcilable. An over-emphasis on rational processes exclusive of emotional content inevitably works to legitimate the

²⁶⁶ Winter, *supra* note 242, at 2277.

²⁶⁷ See Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, in *Law's Stories: Narrative and Rhetoric in the Law* 37, 42-43 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter *Law's Stories*]; Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *Stan. L. Rev.* 807, 854 (1993).

²⁶⁸ See, e.g., Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *Buffalo L. Rev.* 141 (1997); Jane B. Baron, *Resistance to Stories*, 67 *S. Cal. L. Rev.* 255 (1994).

²⁶⁹ Harlon L. Dalton, *Storytelling on Its Own Terms*, in *Law's Stories*, *supra* note 267, at 57, 58.

²⁷⁰ See Nussbaum, *supra* note 196, at 60-72 (claiming that not only are emotion-inflected judgments sounder than those based solely on detached analysis, but also that emotional response is necessary component of abstract or formal approach).

desubjectivization of actors such as that perpetuated by the justices in the *Screws* opinions. It is for just such disputes that storytelling's attention to emotional detail and engagement with the readers' empathy is most critical: where matters of unconscious racism, cultural presupposition, and institutionalized relationships collude against common sense and ethical judgment. There are probably legal controversies for which *fictional* storytelling is less appropriate, but criminal prosecutions of police abuse of force, particularly against people of color, is not one of them.

The thrust of the rationality argument, however, really goes to the assertion that stories provide no principled grounds of deduction, and offer nothing from which to generalize. Such a contention takes us into the question of typicality. If stories compel us to differentiate between individual lives and to fasten carefully upon nuance and human detail, then the meanings we discern in such close examinations cannot be applicable across situations, even similar ones. This observation is made by many of storytelling's proponents. Professor Martha Minow, for example, considers this "limitation" of storytelling a "resistance to generalization" and a benefit.²⁷¹ Stories convey the human complications that are irreducible to single principles.

But that's not all stories do, which is why Professor Minow's argument gives away too much. Just because the story of *Screws* is not reducible to a single principle from which we may generalize about legal policy, and just because we may disagree about which principles it announces, does not mean that we cannot reach conclusions of universal application from its meanings. For example, most readers will agree that the story recounts general principles of violent abuse of authority, that it even portrays the elements of a typical police brutality case ending in death. Beyond that, the agreement may end, and only some readers may understand it to reinforce the principle—known to so many African Americans—that there are definite and predictable physical costs associated with challenging white authority.²⁷² Proponents of this view will assert it with the certainty attributed to a law of physics and may go on to cite multiple examples of

²⁷¹ Martha Minow, *Stories in Law*, in *Law's Stories*, supra note 267, at 24, 35-36. According to Minow:

Storytelling offers a worthy challenge to [traditional modes of explanation and social science reasoning]. Stories disrupt these rationalizing, generalizing modes of analysis with a reminder of human beings and their feelings, quirky developments, and textured vitality. Stories are weak against the imperializing modes of analysis that seek general and universal applications, but their very weakness is a virtue to be emulated.

Id. at 36.

²⁷² This is another way of stating the mother-wit principle, "If you're black, stay back."

the principle in history. Others may think otherwise, or may see alternative principles at work instead. But the point is that the story will find broad application, first at the level of generality (e.g., police brutality), then at sublevels of experience (e.g., particular dynamics in brutality cases, legal responses, typical outcomes, etc.). To perhaps a lesser but nonetheless substantial extent, variation regularly occurs in legal interpretations of the principles for which cases stand, but we do not regard these differences as evidence that the cases cannot guide analogous situations.²⁷³

Therefore, the problem of typicality—the quandary between the general versus the particular—suggests precisely what stories should demand of readers. As readers, we should ask ourselves if a story is typical or somehow elemental and, if so, how so and to what degree. We should attempt to decipher unusual, controlling, and distinctive features of stories in order to more fully understand them and to distinguish them from others. The whole interpretive undertaking encourages the reader to explore typicality in ways that promote rational and careful judgment.²⁷⁴

The selectivity critique, however, counters that even if stories engage our rational decisionmaking capacity, and even if we could discern sufficient typicality from which to inform legal choices, we remain at the mercy of the story or stories presented to us with no way of knowing which is better, more human, more accurate, or, for that matter, more typical. This is especially critical in a context understood to have excluded many types of stories and storytellers in the past. By what criteria do we know a useful story? By its aesthetic literary appeal? The ideological investment contained in code language it uses or rejects? The author's credentials? What if storytellers use fiction to tell more formidable lies?

Much of the earlier literature on legal storytelling has proposed storytelling as counternarratives to prevailing conventions,²⁷⁵ but that assumes a certain permanence to outsider perspectives. If we assume

²⁷³ Where, as in *Screws*, those cases announce principles based on an incomplete comprehension of the problem, the principles are suspect. Or, as Professor Catharine MacKinnon states: "[I]f the whole story has not been told before, the principles that have been predicated on the assumption that the story *was* whole cannot be unbiased principles." Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, in *Law's Stories*, supra note 267, at 232, 234.

²⁷⁴ The great difficulty in generalizing is overselectivity. One may fault police brutality prosecutions for favoring authority narratives in which, rather than particularize circumstances and thereby admit the possibility that a cop may have acted wrongfully, (black) suspects are presumed to belong to a class of wrongdoers. We cannot then reverse the generalization and simply presume the (racist) inhumanity of policemen. Instead, we have to seek individuality and particularity across the board.

²⁷⁵ See discussion supra Part III.B.

instead that storytelling is basic, instructive, and utilitarian in legal discourse, then we must adopt norms by which to evaluate the stories of anyone who tells them.²⁷⁶ As expected, the problem has given rise to First Amendment-oriented responses, with some authors arguing for more competition and others denouncing some types of stories as illegitimate. Professor Minow, for example, believes that “[t]he biggest check on selectivity problems in storytelling lies in the availability of another story, perhaps told by someone else.”²⁷⁷ Yet, in the context of racist speech, Professor Matsuda has argued persuasively that the unconscious cues contained in such speech can defeat a marketplace of ideas and should be curbed outright.²⁷⁸

The approach that I advocate for fiction about police brutality falls somewhere in between. The primary flaw of judicial narratives about official violence is the desubjectivization of the parties, especially the victim, and the decontextualization of what happened. Such narratives offer a dominant construction of reality that favors authority narratives in which police discretion is overvalued and police accounts of incredible conduct by suspects are regularly accepted.²⁷⁹ To argue that these demeaning and destructive stories somehow should not qualify not only impermissibly defeats First Amendment goals (and is impractical on those grounds alone), but also would fail to show the utter cruelty and insubstantiality of such narratives that, I believe, is part of what produces such brutality in the first place. As I discuss in Part IV, these narratives of justification have survived in a primitive state because they have not been sufficiently challenged both *on their own terms* as well as on new ones. However, it is new narrative terms that, like the arguments made against hate speech, will work to focus decisionmakers on criteria intuitively more helpful to understanding a case. Therefore, the “politics of content” or selectivity problem may be partially resolved by demanding stories that at least do the following:

²⁷⁶ This is particularly important in the police brutality context, where cases are frequently a battle of stories, with those carrying the culturally ingrained weight of authority narratives usually prevailing. See discussion *infra* text accompanying notes 321-22, 326 (discussing extent to which law enforcement agents control stories and terminology through which police violence is conveyed and relative lack of voice and credibility of victims).

²⁷⁷ Minow, *supra* note 271, at 31.

²⁷⁸ See Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 15, 136 (1993) (arguing for antisubordination interpretation of First Amendment); cf. Catharine A. MacKinnon, *Only Words* 30-31 (1993) (characterizing pornography as exercise of power that perpetuates and normalizes gender inequality).

²⁷⁹ For examples of this dynamic, see discussion *infra* notes 294-97 and accompanying text.

- 1) rely upon a broad factual basis;
- 2) demonstrate clear regard for interpersonal complexities;
- 3) emphasize the psychological apparatus and intentional states of mind of the participants; and
- 4) acknowledge the narrator's bias.

The need for such assistance in federal prosecutions of contemporary police brutality cases and brief recommendations about how it might be applied are the focus of the final section.

IV

OVERCOMING HISTORY: THE *KOON* CASE AND THE PERSISTENCE OF AUTHORITY STORIES ABOUT POLICE MISCONDUCT

"Dominant narratives are not called stories," observes Professor Catharine MacKinnon. "They are called reality."²⁸⁰ In Part II, I compared the opinions in *Screws* to my fictionalized story in order to demonstrate how the Court's decisionmaking approach works to perpetuate destructive authority narratives. These narratives, in contrast to fiction, are characterized by their decontextualization of salient features of the social and political environment; their deracialization of the interpersonal relationships among the parties in spite of clear evidence of racial animus; and their desubjectivization of the actors themselves, beginning with the victim. I argued that such absences impede full decisionmaking because, under section 242, the prosecution must prove willfulness, an element that inherently requires examining a broad range of environmental factors in which intentional actions are taken under color of law. In Part III, I discussed theoretical benefits of storytelling, emphasizing three common claims that may be summarized as resurrected voice, the effect of format on readers' thinking, and the enhanced judgment readers bring to certain kinds of works. I interposed literary works, in contrast to other kinds of storytelling, and argued that a special role exists for these narratives. The benefits of storytelling generally, and fictional storytelling specifically, ultimately involve revealing the authority narratives that make police brutality cases so hard to prosecute, and offering alternative mindsets.

This final Part deals with patterns and prescriptions. Since the Supreme Court's 1945 decision in *Screws*, police brutality has continued to structure and define relationships between entire communities and institutions of authority, to exact devastating psychic and physical injury to individuals and their families, and to defy prosecution.

²⁸⁰ MacKinnon, *supra* note 273, at 235.

Although police brutality is conduct remediable by the rule of law, its legacy and persistence demonstrate either a powerful resistance to reasoned analysis or, as *Screws* and subsequent decisions such as *Koon* suggest, its deft manipulation in order to reach unreasonable outcomes. Police brutality offends rudimentary notions of simple justice, represents a flagrant perversion of constitutional norms, and perpetuates reckless inefficiencies in the allocation of public resources.²⁸¹ Its psychic toll is immeasurable, and yet such brutality persists largely because of its unexamined psychological premises. To the extent that traditional legal tools need a hand in reaching these quarters of public decisionmaking, fiction is a prescription.

I begin with a brief overview of the incidence of police brutality with emphasis on the perceptual divide—usually along racial and ethnic lines—between proponents and opponents of authority narratives. I then discuss the Rodney King beating in light of the approaches taken by the Justice Department, the federal district court, and the Supreme Court in *United States v. Koon*.²⁸² I argue that, although the legal context has shifted somewhat, the authority narrative that prevailed in *Koon* bears the markings of the Court's approach to *Screws*. Although *Koon* was a section 242 prosecution, my emphasis here is not so much on the elements of the statute as it is on the issue that divided the federal courts: the district judge's radical downward departure from the mandatory sentencing guidelines for the police defendants.

Rodney King's beating is worth continued scrutiny not only because it represents the most famous contemporary instance of federal intervention in the problem of police brutality. It is valuable also for

²⁸¹ Although it is difficult to quantify inefficiencies related to the lost time from work and earnings capacity of police brutality victims and their families, there is readily available information about the amount of money municipalities pay police brutality plaintiffs in civil suits every year. The figures are substantial. In 1991, for example, the Police Foundation received reports of total damages awards from 72 city police departments across the country. That year those departments paid a total of \$44,670,776 across 79 cases. The mean award per case was \$565,453. See 2 Antony M. Pate & Lorie A. Fridell, *Police Use of Force: Official Reports, Citizen Complaints, and Legal Consequences* tbl. B-40.1 (1993).

New York City pays out substantial sums each year in settlements, and, while the number of cases actually filed has not significantly changed, the amounts are beginning to increase. According to an analysis conducted by the New York Times, New York City paid \$19.9 million in settlement awards in 1995, a year in which 2,083 civil cases were filed against the city. In 1996, the total was \$19.5 million, with 2,198 cases filed. In the first three quarters of 1997, however, New York City paid \$27.3 million in settlements; 2,219 cases were filed. See Sontag & Barry, *supra* note 19, at A1.

²⁸² 883 F. Supp. 769 (C.D. Cal. 1993), *aff'd* in part, vacated in part, 34 F.3d 1416 (9th Cir. 1994), *aff'd* in part, *rev'd* in part, 518 U.S. 81 (1996).

the historical fact of the civil unrest²⁸³ it produced.²⁸⁴ The enormous, violent, and extraordinary response to the first verdict acquitting all four police defendants²⁸⁵ represented both literally and symbolically the epistemological clash of those on either side of police misconduct. From the sense of powerlessness among those who know to fear violent police to the empowered rage of those who rebelled against the verdict, legal institutions were met with a shocking illustration of the disconnection between legal realities and social ones, how justice works versus how people feel. The mayhem produced a defining historical moment during which three levels of the federal machinery were given the opportunity to invent justice.²⁸⁶ The resulting failure is now history.²⁸⁷ This section ends with my prescriptions about how fictional understandings can play a role in future prosecutions.

A. *Prevalence and Perceptions of Police Brutality*

Acts of police brutality usually occur under conditions of split-second antagonism, intense emotion, and the specter of criminality (whether actual or suspected), and with few witnesses present.²⁸⁸ They are, therefore, uniquely prone to narrative distortion and dilution. Nevertheless, most reported incidents of police violence tend to coalesce around similar "plot" situations. One review of the empirical literature describes the typical excessive force occurrence as involving (1) an encounter initiated by police, (2) with more than one police officer present, (3) where the responding officers are from a department known for regarding abuse of physical force as a minor to mid-

²⁸³ I use the term "civil unrest" rather than "riot" or "uprising" as a deliberate attempt to sidestep the political and journalistic debate—not fully relevant here—over the accuracy of one term versus the others. However, in a different context, I have referred to the violent events in Los Angeles as an uprising. See David Dante Troutt, *Fires Cleared South L.A.—Now Residents Can Redefine It*, L.A. Times, May 15, 1992, at T3.

²⁸⁴ See Tom Mathews et al., *The Siege of L.A.*, Newsweek, May 11, 1992, at 30, 30 (describing events that claimed 44 human lives and produced one billion dollars in property damage).

²⁸⁵ See *infra* note 333 and accompanying text.

²⁸⁶ See *Koon I*, 883 F. Supp. 769 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, 518 U.S. 81 (1996).

²⁸⁷ Although two of the four police officers charged with section 242 violations in *Koon* were convicted, I regard the outcome as failed. The district court's sentence and its supporting rationale severely undermined the jury's verdict, reinforcing the justifications for police use of force against certain suspects—except in "aberrant" cases—through the continued vitality of authority narratives.

²⁸⁸ Cf. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (noting that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation").

level offense, and (4) where the suspect demonstrates a lack of deference toward the cops.²⁸⁹

Such summary constitutes an idealized cognitive model (ICM) or stock story, usually provided by official police sources²⁹⁰ and communicated to the public from time to time. The typology happens accurately to describe the beating of Rodney King by a group of Los Angeles Police Department officers in 1991.²⁹¹ The police were alerted to King's reckless driving by their own observation; several officers from a notoriously violent police department²⁹² arrived on the scene, and King displayed open contempt for them. However, some of the most egregious acts of police brutality follow different, though nonetheless distinct, patterns that come to characterize community-wide fear of police and inform less known ICMs. The vast majority of such ICMs involve white policemen and men of color, especially blacks, a racialized description that is often accurate.²⁹³ For example,

²⁸⁹ See Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in *Police Violence: Understanding and Controlling Police Abuse of Force* 129, 144 (William A. Geller & Hans Toch eds., 1996) [hereinafter *Police Violence*]. Compare the following description of typical police shooting situations:

The most common type of incident in which police and civilians shoot one another in urban America involves an on-duty, uniformed, white, male officer and an armed, black, male civilian between the ages of 17 and 30 and occurs at night, in a public location in a high-crime precinct, in connection with a suspected armed robbery or a "man with a gun" call.

William A. Geller & Michael Scott, *Deadly Force: What We Know, A Practitioner's Desk Reference on Police-Involved Shootings* 143 (1992).

Other factors have been identified as contributing to the statistical risk that excessive force will be used, including low socioeconomic status of the civilian, alcohol use by the civilian or officer, relative youthfulness of the civilian or officer, relative inexperience of the officer, geographic neighborhood, and time of day. See Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, in *Police Violence*, supra, at 52, 60 (discussing risk factors for excessive force suggested in research literature).

²⁹⁰ But see discussion *infra* notes 300-02 and accompanying text (noting inadequacy and inaccuracy of police records on excessive force).

²⁹¹ For a description of the beating, see *infra* notes 337-343 and accompanying text.

²⁹² See Christopher Commission Report, supra note 9, at xi (noting 83 civil lawsuits between 1986 and 1990 alleging excessive or improper force by LAPD officers). For a more detailed discussion of patterns of abuse by LAPD officers in Los Angeles in the 1980s, see Hoffman, supra note 19, at 1471-82.

²⁹³ William Geller and Michael Scott provide a useful summary of studies showing the racial distribution of civilians shot by police relative to their respective numbers in the total population of select U.S. cities. See Geller & Scott, supra note 289, at 149-50. Although few of the studies are current, they all point to the same disparity. For example, a 1980 Los Angeles study by Marshall Meyer showed that blacks (mostly men) were 55% of police shooting victims yet only 17% of that city's population; Latinos were 22% of shooting victims yet 28% of the population; the percentages for whites were 22% and 62%. See *id.* at 149. A 1991 Chicago study of fatal and nonfatal shootings by police found that blacks comprised 70% of those shot yet only 39% of the city's overall population; the corresponding figures for Latinos and whites were 19%/20% and 11%/38%, respectively. See *id.* at 150. Nationally, a 1979 study by Cynthia Sultan and Phillip Cooper found that blacks rep-

there are brutality ICMs about black men driving expensive cars in predominantly white, especially suburban, neighborhoods;²⁹⁴ the fleeing suspect of color, often a teenager, who is shot in the back;²⁹⁵ the suspect "accidentally" killed as a result of officers' efforts to restrain him;²⁹⁶ and the person of diminished capacity whose behavior is mis-

resent half the victims of police shootings yet only 11% of the country's population. See *id.* at 149. The Dallas Police Department reported that, notwithstanding statistical fluctuation from year to year, the ratio of police shootings of blacks compared to whites averaged 2.1:1 from 1970 to 1991. See *id.* at 506 tbl.E-7.

²⁹⁴ For example, on October 12, 1995, Jonny Gammage, a 31 year-old African American, died of asphyxiation because of compression to his chest and neck following a traffic stop in suburban Pittsburgh. See Jim McKinnon, *Cops Charged in Death of Black Motorist in Pa.*, *Newsday* (Long Island), Nov. 28, 1995, at A18. Five white policemen witnessed or engaged in a struggle with the victim, who was stopped while driving a Jaguar belonging to his cousin, a professional football player. See *id.* The officers claimed that Gammage attacked them. See *id.* Gammage's mother said, "I think they were mad with rage and evil and they kept on until they caused his death." *Id.*

²⁹⁵ For example, on April 6, 1997, Kevin Cedeno, a 16 year-old Trinidadian American, was shot through the back by a white New York City police officer, Anthony Pellegrini, as Cedeno was being chased by a group of youths. Cedeno, a father of an infant and on probation for robbery, was trapped between two groups of pursuing officers when he was shot. A long knife was concealed in his sleeve, but the weapon was never drawn. See Alice McQuillan et al., *Machete Teen Shot in Back: Facts Disputed; Safir, Morgy Launch Probes*, *Daily News* (New York), Apr. 8, 1997, at 5. The *Daily News* consistently referred to Cedeno in its headlines as "Machete Teen." The *New York Post* referred to Cedeno as "machete thug." See Tracy Connor, *Off the Hook: Cop Cleared in Slaying of Machete Thug*, *N.Y. Post*, July 2, 1997, at 1. Weeks after the shooting, Officer Pellegrini was named "officer of the month" by the police "precinct club" in the station house where he worked. See Dan Barry, *Officer Who Shot a Youth Is Honored by His Peers*, *N.Y. Times*, May 28, 1997, at B1.

On July 4, 1996, Nathaniel Levi Gaines, a 25 year-old African-American Gulf War veteran, was shot in the back and killed on a subway platform by a white New York City police officer, Paolo Colecchia. See Leonard Levitt, *Cop to Testify in Bronx Slay*, *Newsday*, May 28, 1997, at A25. The policeman pulled Gaines, unarmed, off a train in order to question him about possibly stalking a female rider. Once the train pulled out of the station, a witness described the detention as turning into a scuffle. See *id.* Colecchia fired his gun twice at Gaines at point blank range, grazing him. As Gaines fled, Colecchia fired a fatal shot into his back. See *id.* Although at trial for excessive force Colecchia testified to a "life-and-death struggle," he was convicted and sentenced to one-and-a-half to four-and-a-half years in prison, the judge calling the policeman's story "fiction." *Convicted Police Officer Is Free Pending Appeal*, *N.Y. Times*, July 23, 1997, at B4.

²⁹⁶ For example, on December 22, 1994, Anthony Baez, a 29 year-old asthmatic Latino, died of asphyxiation when a white police officer, Francis X. Livoti, argued with Baez, then attempted to subdue him with a choking restraint. Livoti was angered when the football Baez and his relatives were playing with in front of their mother's apartment hit his patrol car twice. See Clifford Krauss, *Officer Is Indicted in Man's Death During Confrontation in Bronx*, *N.Y. Times*, Mar. 22, 1995, at B1. Despite an indictment for criminally negligent homicide, these charges against Livoti were dismissed following a clerical error by the Bronx district attorney's office. See Matthew Purdy, *Judge Rules Clerical Error Voids Officer's Homicide Charges*, *N.Y. Times*, Sept. 6, 1995, at B1. Livoti was ultimately acquitted on state criminal charges of manslaughter, but convicted in a subsequent police trial and dismissed from the New York Police Department. See David Kocieniewski, *Safir Dismisses Officer in Case of Illegal Use of Choke Hold*, *N.Y. Times*, Feb. 22, 1997, at A23.

interpreted as a threat by officers who then kill him or her.²⁹⁷ This is but a partial list of ICMs frequently repeated in stories without an official voice.²⁹⁸

The public import of these stories (and the resonance of ICMs they contain) is mediated by a number of factors, including whether a suspect was armed, evidence of wrongdoing by the suspect (including a criminal record), the strength of witness testimony critical of officers' conduct, the time and place of the incident, and, of course, our own intuitions about the circumstances. If an incident somehow emerges in public consciousness—i.e., if it is egregious enough to warrant official reporting beyond the immediate neighborhood in which it occurred—it is often reconstructed in authority narratives as justifiable force or as an “aberration.”²⁹⁹ The status of these events as

In 1983, Michael Stewart, a 25 year-old African American graffiti writer, died as a result of a beating by as many as eleven or as few as six transit police officers, following an arrest in a subway station for writing on the station walls, according to 40 eyewitnesses. The police spokesman said Stewart died of a heart attack. See Albert Scardino & Alan Finder, *Transit Officers Are Indicted in Stewart Death*, N.Y. Times, Feb. 24, 1985, at E6. Although six police officers were ultimately acquitted of criminal charges, the Stewart family won a \$1.7 million damages settlement from New York City in 1990. See William G. Blair, *Family Gets \$1.7 Million for Stewart's Death*, N.Y. Times, Aug. 29, 1990, at B1.

²⁹⁷ For example, in November 1984, Eleanor Bumpurs, a 66 year-old African American with a heart ailment and arthritis, was shot to death by police officers wielding restraining equipment. The officers claimed that she menaced them with a kitchen knife when they entered her apartment to evict her. Two shots were fired from a pump action shotgun. The first bullet severed Bumpurs's fingers and the second struck her in the chest. See Alan Finder & Katherine Roberts, *Autopsy Raises New Questions*, N.Y. Times, Dec. 2, 1984, at E6. Police Officer Stephen Sullivan, who claimed that he had to fire in defense of a fellow officer, was charged with second-degree manslaughter and criminally negligent homicide, but was ultimately acquitted of all charges connected with Bumpurs's death. See Mary Connelly & Carlyle C. Douglas, *Bumpurs Trial Ends in Acquittal and Anger*, N.Y. Times, Mar. 1, 1987, at E6.

²⁹⁸ In a popular 1974 recorded performance called “Niggers vs. Police,” comedian Richard Pryor described the clash of brutality ICMs between blacks and whites as follows:

Cops put a hurting on your ass, man. You know, they really degrade you. White folks don't believe that []. “Oh c'mon, those beatings, those people were resisting arrest. I'm tired of this harassment of police officers.” ‘Cause the police live in your neighborhood, see. And you be knowin' 'em as Officer Timson. “Hello, Officer Timson. Going bowling tonight? Yes, uh, nice Pinto you have, huh, huh, huh.”

Niggers don't know 'em like that. See white folks get a ticket, they pull over, “Ay, Officer, yes glad to be of help to you.” Nigger got to be talking about, “I AM REACHING INTO MY POCKET FOR MY LICENSE. ‘Cause I don't want to be no . . . accident.” Police degrade you . . . it's awful, you wonder why a nigger don't go completely mad.

Richard Pryor, *Niggers vs. Police*, on *That Nigger's Crazy* (Reprise Records 1974).

²⁹⁹ Former Los Angeles Police Chief Daryl F. Gates, forced to acknowledge the ruthlessness of the Rodney King incident because of the release of the videotape, characterized the beating as an “aberration.” See Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. Times, Mar. 7, 1991, at A18. More recently, New York City

either anecdotal folklore or official aberration is partly a function of the way community knowledge is shared, and partly a matter of now legendary statistical indeterminacy.

A search of the literature on the meaning and prevalence of police brutality immediately founders on impenetrable caveats of inherent unreliability.³⁰⁰ Why is the problem and prevalence of police brutality subject to such imprecision? Definitions of police brutality are multiple and sometimes contradictory, and statistics are rarely standardized.³⁰¹ In fact, most data on police brutality, including that found in "uniform" reports compiled by the FBI, comes voluntarily from law enforcement agencies themselves.³⁰² Common disclaimers include unrealistically small sample sizes, reliance on internal police reporting, analysis of different variables, and incongruent time periods.³⁰³ Analysts frequently caution that, given the vagaries of police work and the circumstances under which force is used, contextual factors such as neighborhood crime rates may be better predictors of violent activity than, say, race.³⁰⁴

Police Commissioner Howard Safir immediately characterized the allegations of beating and sexual abuse against Abner Louima, see *supra* note 22, as an "aberration." Dan Barry, *Leaders of Precinct Are Swept Out in Torture Inquiry*, N.Y. Times, Aug. 15, 1997, at A1.

³⁰⁰ A major contributing problem is the failure of police departments (which generally enjoy the power to police themselves) to keep adequate records of complaints and discipline. See, e.g., Adams, *supra* note 289, at 83 ("Many police departments do not routinely collect statistics on citizen injuries or on the circumstances of police-citizen violence."); see also *Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 179 (1991) [hereinafter *Hearings*], in which Yale law professor Drew S. Days, III, reported:

We had observed that departments with poor records with respect to police misconduct were most often those that had no procedures for the lodging of citizen complaints, (or actively discouraged such complaints), did not investigate seriously these complaints and almost never, if ever, disciplined officers for misconduct, even in the most egregious cases.

³⁰¹ See William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, in *Police Violence*, *supra* note 289, at 292, 298 (urging necessity of national reporting system to gather reliable data on police use of force); 1 Pate & Fridell, *supra* note 281, at 24 (discussing difficulty of obtaining valid and statistically accurate data regarding police use of force).

³⁰² See Geller & Scott, *supra* note 289, at 32-34. In fact, some researchers have sought out public health records instead. See *id.* at 37. Some reporting occurs through mandatory law enforcement agency policy on certain kinds of use-of-force incidents, especially pursuant to arrests. Most data, however, comes from citizen complaints, which in the majority of circumstances are lodged with law enforcement agencies for recording and action. See Adams, *supra* note 289, at 63 (discussing research on citizen complaint data).

³⁰³ See Geller & Scott, *supra* note 289, at 22-25; 1 Pate & Fridell, *supra* note 281, at 24.

³⁰⁴ See Geller & Scott, *supra* note 289, at 155 (cautioning against overreliance on race as category of analysis and highlighting importance of information such as deployment strategies, neighborhood crime rates, characteristics of area, housing density, and economic and cultural factors); Locke, *supra* note 289, at 135-36 (discussing research linking deadly force rates to factors other than race).

Although there are some obvious practical constraints on uniform record keeping, imprecision powerfully supports official labeling of incidents as aberrations. Moreover, once caught inside the trap of quantitative unreliability, the lack of persuasive data one way or the other tends to dissolve the matter of reliability altogether. If incidents of police brutality cannot be quantified, then the claims of those without independent possession of the data sources may be dismissed as either exaggerated or misinformed, then subordinated to authority narratives that pretend to know better—or claims may simply languish.³⁰⁵

Measuring prevalence begins with defining what brutality is, a task dependent upon the socially constructed judgments of researchers, legislatures, and courts as to what constitutes abuse under a given circumstance.³⁰⁶ As a result, academic and legal definitions vary considerably.³⁰⁷ Nevertheless, police brutality is generally understood to be force that crosses the line of objective reasonableness, becoming “excessive.” The Supreme Court standardized the definition in *Graham v. Connor*³⁰⁸ where it held that use of force is excessive if it is not objectively reasonable in view of all “the facts and circumstances

³⁰⁵ An example of this tendency to dismiss criticism of the police due to the lack of reliable information occurred during an exchange between New York City Police Commissioner Howard Safir and a member of the city council during hearings to discuss police brutality in the wake of the Abner Louima assault, see *supra* note 22. After the Commissioner and the Councilman argued back and forth over the availability of reliable information about complaints in a particular precinct, the Commissioner responded to a vague accusation that maybe disciplinary action had been called for previously: “[M]aybe yes and maybe no leaves a very wide range” City Council of New York City, Transcript of the Minutes of the Committee on Public Safety 58-60 (Sept. 11, 1997) (transcript available in New York City Clerk’s office).

³⁰⁶ See Adams, *supra* note 289, at 52 (noting ephemeral nature of “widespread consensus” of what constitutes “excessive” force).

³⁰⁷ Geller and Toch provide a nuanced and comprehensive definition of excessive force that is highly contextual. They view excessive force as involving a series of subproblems, some overlapping and coextensive. They are as follows:

- any force when *none* is needed;
- *more* force than is needed;
- any force or a *level* of force continuing after the necessity for it has ended;
- knowingly wrongful uses of force;
- well-intentioned mistakes that result in undesired uses of force;
- departmental constraints that needlessly put officers in the position of using more force—and/or using it more often—than otherwise would occur (e.g., problems with training, supervision, deployment, assignment practices, equipment, procedures, and policies precluding use of certain tactics or tools); and
- frequent use of force by particular officers, particular units or departments, even if each instance seems justifiable.

Geller & Toch, *supra* note 301, at 292-93 (emphasis in original) (footnotes omitted).

³⁰⁸ 490 U.S. 386 (1989).

of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”³⁰⁹

Under this broad definition, various studies have reported disturbing data on the incidence of excessive force. For example, a 1986 New York City Police Department study found that an average of ten excessive force complaints per 100 officers are filed each year.³¹⁰ Observational data from field studies has shown that approximately three percent of suspects experience excessive force in encounters with police.³¹¹ And 1991 national survey data indicates that five percent of all respondents and nine percent of nonwhite respondents claim to have been physically abused or mistreated by police at some time in their lives.³¹²

One of the most interesting themes to emerge from nonpolice data on the incidence of physical violence is the *cumulative effect* of nonviolent, institutionalized antagonisms between police and the civilians most at risk of being brutalized.³¹³ Black and Latino men not only report higher rates of victimization at the hands of police officers, but, relative to whites, they also experience disproportionately harsher treatment in other aspects of the criminal justice system. The data indicates that these men of color experience a higher probability of being arrested,³¹⁴ higher rate of unfounded arrests,³¹⁵ the imposition of higher bail amounts,³¹⁶ longer periods of pre-trial incarceration.

³⁰⁹ Id. at 396.

³¹⁰ See Adams, *supra* note 289, at 63.

³¹¹ See *id.* This statistic is based on the experiences of *all* criminal suspects; were the scope narrowed to suspects against whom force is used, the rate of excessive force would be considerably higher. See *id.*

³¹² See *id.*

³¹³ See *The Real War On Crime: The Report of the National Criminal Justice Commission 108-09* (Steven R. Donziger ed., 1996) (discussing harsher treatment of African Americans than whites in criminal justice process).

³¹⁴ See *id.* at 109 (“Most studies reveal what most police officers will casually admit: that race is used as a factor when the police decide to follow, detain, search, or arrest.”).

³¹⁵ See *id.* A California study of unfounded arrests—those in which the suspect was innocent, the search was illegal, or evidence was inadequate—found that such incidents were four times more likely for African Americans than whites and more than twice as likely for Hispanics. See *id.*

³¹⁶ See *id.* at 111 (describing Connecticut study finding that average bail of African Americans and Hispanics was twice that paid by whites accused of same offense).

tion,³¹⁷ longer sentences,³¹⁸ and less success in plea negotiations.³¹⁹ Police violence may or may not accompany the encounters described in these documented experiences, but in all probability it is a feature of some of them. It is even more likely that verbal abuse of suspects—some of a clearly racist character—occurs in a significant number of such encounters.³²⁰ Thus, the institutionalized antagonisms between the police and citizens at risk of being stopped, detained, and arrested further complicates the statistical portrait of physical violence and contributes to the distorted quality of narratives offered to explain such brutality.

For police, explanations become standardized. For example, according to the FBI, the three major reasons supporting the “justifiable killing” of felony suspects nationally are “felon” attacked police officer (44%), “felon” killed in commission of a crime (30%), and “felon” resisted arrest (12%).³²¹ A standardized explanation may simply reflect commonly occurring categories of occupational conduct. However, such standardization may also disguise misconduct in reliable authority narratives. The justifiable killing statistics and accompanying explanations concern dead victims. The nomenclature tells us they are “felons,” but unless that label refers to past criminal history, the victims cannot occupy that status until tried and convicted of the felony allegedly underway at or near the time deadly force was used against them. We know further that many of these killings occur outside the presence of reliable testifying witnesses.³²² Hence, 86% of “justifiable” police killings reports rely on myths of authority on the one hand and unproven criminality on the other, with the glaring possibility that many illegal acts of lethal brutality are sanitized by sheer repetition of justificatory narratives.

³¹⁷ See *id.* (citing Florida Department of Corrections study finding that young unemployed African American men were three times more likely than unemployed whites to be jailed for public order offenses and seven times more likely to be locked up than employed white arrestees).

³¹⁸ See *id.* at 113 (citing study by Florida state legislature finding that African Americans consistently received longer sentences than whites despite identical criminal conduct and history).

³¹⁹ See *id.* at 112 (citing 1991 California study of 700,000 criminal cases showing white defendants far more successful than African Americans and Hispanics in negotiating to drop charges, avoid extra charges, avoid harsher punishment, and clear records).

³²⁰ See Hoffman, *supra* note 19, at 1502 (citing verbal abuse, including racial slurs, as among the “widespread abuses” engaged in by police officers).

³²¹ See Geller & Scott, *supra* note 289, at 520 tbl.E-18. The sample was based on data provided voluntarily by law enforcement agencies to the FBI’s Uniform Crime Reporting program and includes unpublished supplementary homicide report filings. See *id.*

³²² See Hearings, *supra* note 300, at 171-72 (statement of Drew S. Days, III, Professor of Law, Yale University) (discussing difficulty of substantiation in many cases).

B. *Koon v. United States, Downward Sentencing Departures, and the Rearticulation of Judicial Authority Narratives*

Despite the horrific appearance of an "easy case" on video tape, the successive state and federal criminal prosecutions of the four Los Angeles police officers charged in the beating of Rodney King illustrated many of the difficulties inherent in such prosecutions. In general, the "beyond a reasonable doubt" burden of proof may constitute a higher practical obstacle in police misconduct cases than it does in other criminal prosecutions.³²³ The number of civil suits brought against police departments and municipalities dwarfs the number of criminal cases brought by state district attorneys,³²⁴ and criminal conviction rates for both state and federal prosecutors are considerably lower than for other cases they try.³²⁵ In federal court, the addition of section 242's willfulness requirement adds a difficult element of proof. But much of the explanation for low success rates goes back to the matter of who tells the stories that account for the misconduct, what they say, and how they are heard. Many victims and witnesses of police brutality lack credibility in the eyes of juries because they are people of color, poor, or have criminal records.³²⁶ On the other hand, police officers are generally unwilling to testify against each other³²⁷ and are known to commit perjury on the witness stand.³²⁸ Even when

³²³ See *id.* (noting that reasonable doubt is "built into the record" in many cases); see also discussion *supra* notes 7-9 and accompanying text (identifying inherent difficulties associated with police brutality cases).

³²⁴ Survey data of city police forces shows that in 1991, 1,886 civil suits alleging excessive force were filed compared to only 100 criminal suits brought on the same charges. See 2 Pate & Fridell, *supra* note 281, at tbl.B-37.

³²⁵ Overall, survey data on city police departments in 1991 shows that of 59 criminal cases of excessive force against police officers (186 agencies responding), the police defendants obtained favorable outcomes (favorable verdicts or settlements) in about 60%, while 22% of cases were still pending. See *id.* at tbl.B-41.1.

According to an unpublished report of the Department of Justice, Summary of Criminal Section Activities, the overall success rate for criminal prosecutions (defined as a finding of guilt either by plea or conviction) compared to the rate of success in law enforcement cases for the years 1990 through 1994 were as follows: 94% versus 78% (1990); 89% versus 81% (1991); 85% versus 62% (1992); 74% versus 59% (1993); and 90% versus 79% (through Oct. 24, 1994). See Freeman, *supra* note 20, at 723 n.163. These findings are consistent with information provided anonymously from interviews with criminal section, civil rights division attorneys (notes on file with author).

³²⁶ See Hearings, *supra* note 300, at 172 (statement of Drew S. Days, III, Professor of Law, Yale University) (discussing difficulty of obtaining convictions in cases of police misconduct due to race, sexual orientation, poverty, or criminal records of most victims).

³²⁷ This practice is often referred to as the "blue wall of silence." See, e.g., Dan Barry, Officers' Silence Still Thwarting Torture Inquiry, *N.Y. Times*, Sept. 5, 1997, at A1.

³²⁸ See Christopher Commission Report, *supra* note 9, at 167 (noting "willful untruthfulness" by police officers); Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 *U. Colo. L. Rev.* 75, 107-08 (1992) (discussing prevalence of officers' perjury in suppression hearings); see also Alison

the evidence against a police officer is strong, public attitudes about crime and support for the police may provoke jury nullification.³²⁹

These factors begin to explain why a case supported by video tape evidence of brutality provoking near unanimous condemnations³³⁰ proved far from easy. How could the jury in the state prosecution have found the use of force against a prone and unarmed Rodney King justified? How could the district court judge in the federal prosecution exhaust the bounds of discretion to reduce the mandated sentences of the two defendants convicted of violating King's civil rights? By telling stories. The stories primarily traded on the stock elements, or ICMs, of authority narratives, with the effect of dehumanizing the victim. Again, the victim's race and the racist verbal references made by some of the defendants planted the case squarely in the context of both conscious and unconscious racism reminiscent of *Screws*. However, the stories justifying the counterintuitive outcome have changed somewhat. Like *Screws*, the prosecutions of the *Koon* defendants were characterized by overt deracialization, desubjectivization of the victim, and decontextualization of larger sociopolitical factors at work at the time of King's beating. But the state trial saw the introduction of two additional elements, disaggregation and empathy, which are mainly relevant to this discussion because they were adopted, to varying degrees, by all three federal courts that ruled in *Koon*. These two elements would also appear to be similar to the notions of particularization and empathy that legal storytelling scholars have identified³³¹ as important means of fostering a "literary attitude of sympathetic imagining."³³² This section thus explores how authority narratives may even exploit the tools of counternarratives to sustain status quo inequalities.

L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Detering Police Brutality*, 44 *Hastings L.J.* 753, 764 & nn.65-66 (1993) (arguing that officers often perjure themselves or misstate facts rather than speak out against colleagues); Joe Sexton, *New York Police Officers Often Lie Under Oath, Report Says*, *N.Y. Times*, Apr. 22, 1994, at A1 (reporting on widespread perjury or "testilying" by New York City police as uncovered by mayoral commission).

³²⁹ See Hearings, *supra* note 300, at 172 (statement of Drew S. Days, III, Professor of Law, Yale University) (observing that "[j]urors simply would not convict police officers"); Hoffman, *supra* note 19, at 1486 (suggesting that societal conceptions of police as "thin blue line" between "them" and "us" may explain many brutality acquittals).

³³⁰ President Bush, for example, denounced the beating, saying that it made him "sick." Jorge Casuso, *Drive to Recall L.A. Police Chief Begins*, *Chi. Trib.*, Mar. 22, 1991, at 3.

³³¹ See discussion *supra* notes 255-65 and accompanying text.

³³² Nussbaum, *supra* note 196, at 92.

1. Verdict in the State Trial.

The four King defendants, LAPD officers Timothy Wind, Theodore Briseno, Laurence Powell, and Sergeant Stacey Koon, were acquitted of state criminal charges of excessive force and assault by a Simi Valley jury in April 1992.³³³ The change of venue had prompted criticism of Judge Stanley Weisberg, who had decided to move the case from downtown Los Angeles to the predominately white, suburban Ventura County.³³⁴ The resulting jury included no African Americans.³³⁵

The case was tried primarily on the strength of the now famous videotape filmed by George Holliday. Rodney King himself never testified at the first trial. The efforts at narrative persuasion therefore were focused upon a scene that, by the time of trial, most people had seen and interpreted for themselves. Nevertheless, what the defense successfully told the jury was a story of justifiable force, even self-defense. Oral testimony alone would have to establish what occurred just prior to the eighty-one second beating visible on the tape.³³⁶ After King struggled to get out of his car, misunderstood the policemen's orders (lowering to his knees with hands raised rather than lying face down on the asphalt), and resisted the pain-compliance maneuver officers used while attempting to handcuff him, Sergeant Koon fired two electric darts into his body and King collapsed to the ground.³³⁷ Then the tape begins. It includes Powell striking King in the face with a baton at least a dozen times, splitting King's face open and fracturing it in fifteen places.³³⁸ When King tried to move away from the blows or block them with his arms outstretched, he was beaten.³³⁹ When King tried to run, Powell and Wind struck him about the torso and

³³³ See Richard A. Serrano & Tracy Wilkinson, All 4 in King Beating Acquitted, L.A. Times, Apr. 30, 1992, at A1. The jury hung on the count of assault under color of authority against defendant Powell. See *id.*

³³⁴ See Martin Berg, D.A.'s Actions on King Venue Are Questioned, L.A. Daily J., May 7, 1992, at 1; see also David Margolik, Switching Case to White Suburb May Have Decided Outcome, N.Y. Times, May 1, 1992, at A20 (noting that Ventura County is overwhelmingly white, conservative, and home to many police officers who serve in Los Angeles County).

³³⁵ Of seven men and five women, ten were white, one was Latina, and one Asian American. See Richard A. Serrano & Carlos V. Lozano, Jury Picked for King Trial; No Blacks Chosen, L.A. Times, Mar. 3, 1992, at A1.

³³⁶ For a thorough and carefully researched account of the Rodney King beating, see Laurie L. Levinson, The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial, 41 UCLA L. Rev. 509, 516-23 (1994).

³³⁷ See Christopher Commission Report, *supra* note 9, at 5-6.

³³⁸ See Jim Newton, CHP Officer Weeps in Recount of Beating, L.A. Times, Mar. 27, 1993, at B1.

³³⁹ See Levinson, *supra* note 336, at 520.

legs with batons in an effort to break his bones.³⁴⁰ Even as he lay on his back, Powell struck him in the chest with his baton.³⁴¹ King was surrounded not only by the four officers, but by twenty others standing, arms folded, some feet away.³⁴² Though King lay motionless on the ground for ten seconds, Briseno stomped on King's neck, and moments later, Powell struck King five or six more times with his baton while Wind kicked and struck King as well.³⁴³

The defense claimed that the beating was justified by King's aggressive and combative conduct, a claim demonstrated by the frame-by-frame testimony of two police use-of-force experts.³⁴⁴ Jurors heard the witnesses describe King's failure to lie down or to lie still against a sanitized backdrop of still frames, separated and enlarged from the eighty-one second tape. These disobedient acts by King, they explained, together with images of King reaching up with open palms, should be interpreted as threatening behavior.³⁴⁵ Moreover, without the benefit of the "chokehold," a restraint whose use had been banned in Los Angeles following challenges on behalf of victims who had died from it,³⁴⁶ the police were forced to use batons to subdue him. It was the police, according to the defense narrative, who were vulnerable.

The power of the narrative relied on familiar aspects of police brutality authority narratives, as well as disaggregation and empathy. First, the scene was deracialized. Relying on a videotape taken from an apartment some distance away precluded direct evidence of the racist language used by police during the beating.³⁴⁷ Next, King was

³⁴⁰ See *id.*

³⁴¹ See *id.*

³⁴² See *id.* In all, 23 LAPD officers and 13 LAPD units (including one helicopter unit) responded to the scene. See Christopher Commission Report, *supra* note 9, at 11.

³⁴³ See *Koon I*, 833 F. Supp. 769, 777 (C.D. Cal. 1993).

³⁴⁴ See Jim Newton, All Baton Blows King Received Were Necessary, Expert Testifies, *L.A. Times*, Mar. 20, 1993, at B1 (citing testimony of LAPD use-of-force expert, Charles Duke); see also Levinson, *supra* note 336, at 526 & n.91.

³⁴⁵ See Levinson, *supra* note 336, at 526 & n.91.

³⁴⁶ The "chokehold" was a restraint-submission technique used by police officers against criminal suspects in cities across the United States for many years. Its use by Los Angeles police became legendary due to the number of black and Latino suspects asphyxiated by its use. The LAPD has since banned its officers from applying chokeholds. See Matt Lait, Controversial Police Restraint to Be Banned, *L.A. Times*, July 4, 1997, at B1.

³⁴⁷ The use of racist invectives by the police during the beating of Rodney King has long remained murky, in part because of the distance of George Holliday's camera from the scene. Although it remains unresolved whether the police told King to "run, nigger," as King once claimed, there was ample evidence of racially derogatory remarks and messages made by police officers before and after the actual beating, including one defendant's infamous remark about "gorillas in the mist." See Richard A. Serrano, LAPD Officers Reportedly Taunted King in Hospital, *L.A. Times*, Apr. 23, 1991, at A1.

desubjectivized. Not only does he appear as the object of a group beating on the tape, a black stumbling figure contrasted against many white men standing in uniforms, but he never spoke to the jury. His silence prevented the intrusion of actual human identity through his independent voice upon the scene of violence.³⁴⁸ Stuck in symbol, King himself was never forced upon the jurors' consciousness. Third, the context was miniaturized by reliance on the eighty-one second tape, and recontextualized by the experts' dissection of it. These aspects of the authority narrative in defense of police brutality were evident in *Screws*.³⁴⁹

What the *Koon* decisions add are the disaggregation³⁵⁰ and empathy components within the narrative. Visually, disaggregation occurs through the frame-by-frame suspension of violent motion. Blows do not land, time loses sequence, and the intensity and brutality of the policemen's actions are interrupted, softened, and mediated. Psychologically, disaggregation restrains our perception of horror, short-circuiting the natural anticipation of severe injury and instead making room for "reasonable" reinterpretations of the primordial spectacle before us. As Professors Kimberlé Crenshaw and Gary Peller wrote of the first trial:

Once the video was broken up like this, each still picture could then be reweaved into a different narrative about the restraint of King, one in which each blow to King represented, not beating one of the 'gorillas in the mist,' but a police-approved technique of restraint complete with technical names for each baton strike (or 'stroke').³⁵¹

Therein lies much of the transformative power of the defense narrative. By taking the beating apart and renaming it through the words of police experts with all their attendant official police nomenclature, the resulting story transformed a beating into an authority narrative jurors could endorse: *This* is what the police are *supposed* to do.

However, to be persuasive, the defense narrative required more. The jury had to empathize with the police appearing in the disaggregated imagery before them. Jurors had to imagine themselves in the position of those several officers and conclude that the *entire* beating was justifiable based on the perception of a continuing threat posed by the prone victim. This is a complicated cognitive undertaking, and it

³⁴⁸ See Baker, *supra* note 12, at 43 ("King was always already *silent*.").

³⁴⁹ See *supra* Part II.B.

³⁵⁰ See Crenshaw & Peller, *supra* note 12, at 59-64. For a rich discussion of disaggregation in the context of the Supreme Court's opinion in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), see Thomas Ross, *The Richmond Narratives*, 68 *Tex. L. Rev.* 381, 396-413 (1989).

³⁵¹ Crenshaw & Peller, *supra* note 12, at 59.

was not a story the defense dared to tell overtly. It had to be “read” by jurors. This reading occurs at both a conscious and unconscious level through the application of socially constructed ICMs evoked by the situation.³⁵² Here it occurred “within a racially saturated field of visibility.”³⁵³ Rodney King, as object, had to represent something beyond his behavior on the videotape. What meanings the viewer attributes to his objectified presence may account for her perceptions of King’s very intentions. This is why in *Screws* the inducement of empathy is such a powerful tool of counterstorytelling. If we allow ourselves to be guided by the story, we are invited to read Robert Hall’s intentions as proud, righteous, stubborn, and human against *Screws*’s, which seem spiteful, oppressive, vengeful, and thoughtless. However, the defense narrative in *Koon* deploys empathy, too, only this time inviting receptive viewers to read Rodney King through the eyes of the defendants as an object of danger, capable of violence at any time, a threat even when prone, broken, and bloodied. Professor Judith Butler centers Rodney King, the black male object of racialized fear of crime, in the middle of a paranoid white racist schema where the meanings of each action in the beating can be inverted:

The fear is that some physical distance will be crossed, and the virgin sanctity of whiteness will be endangered by that proximity. The police are thus structurally placed to protect whiteness against violence, where violence is the imminent action of that black male body. And because within this imaginary schema, the police protect whiteness, their own violence cannot be read as violence; because the black male body, prior to any video, is the site and source of danger, a threat, the police effort to subdue this body, even if in advance, is justified regardless of the circumstances. Or rather, the conviction of that justification rearranges and orders the circumstances to fit that conclusion.³⁵⁴

Whether this is a manifestation of a paranoid racist schema or just the successful manipulation of empathy upon racially receptive “readers,” it is a triumph for authority narratives and a problem for storytelling. Moreover, the use of these devices reemerged in an entirely different context, the judicial narrative, under different theories of culpability in the federal criminal prosecution of the four Los Angeles police defendants.

³⁵² Professor Ross develops this point in his observations of Justice Scalia’s rhetorical omissions in *Croson*. See Ross, *supra* note 350, at 390-91, 409-13 (arguing that by setting forth abstract principles rather than speaking concretely about specific facts and cases, Scalia “told stories inviting his audience to provide their own imaginings and narratives”).

³⁵³ Butler, *supra* note 17, at 15.

³⁵⁴ *Id.* at 18.

2. *Downward Sentencing in the Federal Prosecution.*

On April 17, 1993, the jury in the federal prosecution acquitted defendants Wind and Briseno, but found Koon and Powell guilty of willfully depriving Rodney King of his civil rights. Despite the necessary finding of willfulness, and although the Federal Sentencing Guidelines mandated sentences of between seventy and eighty-seven months,³⁵⁵ district court Judge John Davies departed downward and sentenced each to thirty months instead.³⁵⁶ Such a considerable departure constituted an unusual exercise of discretion, requiring Judge Davies to find, as a threshold matter, that the case was an atypical deprivation of rights under color of authority—that is, the facts were outside the “heartland” of federal police brutality prosecutions.³⁵⁷ Under the Guidelines, a trial court may depart from the prescribed sentence where it finds that the Sentencing Commission failed to consider the circumstances relevant to a particular case when it adopted the Guidelines.³⁵⁸ Although on appeal the Ninth Circuit reversed Judge Davies in part and affirmed in part,³⁵⁹ this discussion focuses on Davies’s grounds for departure and the Supreme Court’s affirmance to show the persistence of the state court trial’s authority narratives in the context of the federal courts.

The district court trial followed the state trial’s heavy reliance on Holliday’s videotape, and included another frame-by-frame dissection of the beating subsequently memorialized by Judge Davies’s opinion. Rather than particularizing the evidence of aggravated assault and willfulness on the part of the defendants, Davies’s argument follows the familiar pattern of disaggregation. Not only is the scene of violence interrupted and its force and brutality visually diminished, but conceptually, the technical break-up permits the introduction of superficially reasonable considerations that, through repetition and analysis, assume unmerited importance. Moreover, each contrived

³⁵⁵ See *Koon I*, 833 F. Supp. 769, 785 (C.D. Cal. 1993).

³⁵⁶ See *id.* at 792.

³⁵⁷ See Federal Sentencing Guidelines Manual Ch. 1, Pt. A, 4(b) (1995). Under the topic of “[d]epartures,” this introductory commentary states:

The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

Id.

³⁵⁸ If the sentencing court “finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C.A. § 3553(b) (West Supp. 1998).

³⁵⁹ See *Koon II*, 34 F.3d 1416 (9th Cir. 1994); see also discussion *infra* note 367.

stage in the beating becomes the analytical site of Davies's empathy for the baton-swinging officers. The story that Davies weaves is a blow-by-blow projection of fault onto Rodney King for having provoked the policemen into a violent situation. The authority narrative is told exclusively from the perspective of law enforcement in its struggle against criminal disobedience. The legal story which justifies the officers' behavior must strain to fit within the standard in the Guidelines.

The strategy of Judge Davies's legal narrative is an extended inquiry into the question: At what point did Koon and Powell's conduct become culpable under section 242? Davies's second-by-second review of the video permits findings of fact as to the officer's state of mind as he delivers a blow. Davies finds "telling evidence" that certain blows to King's head were unintentional based on the fact that "Officer Powell never clearly applied force to Mr. King's head again, although he had ample opportunity to do so."³⁶⁰ Certain common, but here totally unsubstantiated, police justifications were credited rather than challenged.³⁶¹ Surrounded by angry police officers yelling at him, shocked by a taser, bones broken, and bloodied on the ground, King's hand motion across his chest may still be viewed by the reasonable police officer as King's attempt to retrieve a weapon from his waistband.³⁶²

Further, Judge Davies drew a sharp line of intentionality sixty-seven seconds into the eighty-one second tape³⁶³ on one side of which willful deprivations of King's civil rights reside and on the other lawful responses to King's provocation. Judge Davies's ability to bifurcate the emergence of willfulness so absolutely seems particularly curious given his acknowledgment of "the rapidly shifting nature of the situation."³⁶⁴ Nevertheless, this framework permitted Judge Davies to find that most of the injuries to King occurred during the period before willful intent had been aroused. The chain of causation in Davies's story is as follows: The injuries resulting from King's unlawful unwillingness to submit were "serious"; the injuries deemed "relevant" to culpability were not.³⁶⁵

³⁶⁰ *Koon I*, 833 F. Supp. 769, 778 (C.D. Cal. 1993).

³⁶¹ See *id.* at 777 (crediting Koon's testimony that King's profuse sweating and erratic behavior suggested he was high on PCP).

³⁶² See *id.* at 777-78.

³⁶³ See *id.* at 777. When Powell strikes King in the legs enough times to fracture the fibula at 43 seconds into the tape, "the Court cannot find that Officer Powell intended to use excessive force." *Id.* at 778.

³⁶⁴ *Id.* at 778.

³⁶⁵ See *id.* at 783.

As for the actual sentence, Judge Davies decided that a downward departure of eight levels was warranted, with five levels resulting from King's conduct "significantly . . . provoking" the cops' behavior³⁶⁶ and three levels attributable to three other factors.³⁶⁷ Judge Davies viewed King's provocation as so substantial that it took the case out of the "heartland" of aggravated assault under color of law cases. King's wrongful conduct consisted of his speeding, driving while intoxicated, failing to stop for the police, failing to exit his car upon command or remain prone, resisting the pain compliance ma-

³⁶⁶ See *id.* at 785.

³⁶⁷ These three factors were (1) Davies's belief that the defendants would suffer "additional punishment" since the national media coverage of the case coupled with the defendants' status as police officers made them unusually vulnerable to abuse in prison and loss of employment; (2) the low likelihood that the defendants pose a danger to the public or would commit crimes in the future; and (3) the "specter of unfairness" created by successive state and federal prosecutions. See *id.* at 785-86, 792.

The Ninth Circuit reversed on most of these factors. As to additional punishments, the appellate court held such a consideration within the scope of factors that the Guidelines expressly disfavor because they speak to the socioeconomic status of the defendant. See *Koon II*, 34 F.3d 1416, 1454 (9th Cir. 1994). Moreover, the possibility of punishment in the form of embarrassment, lack of status in the community, or collateral employment consequences is not only expected but endorsed in criminal sentencing generally. See *id.* Further, the district court's vulnerability to the prison abuse factor was rejected for failing to allege physical impairments that might have put the defendants at special risk. See *id.* at 1455. To the extent that it is understandable that the defendants' criminal acts brought them heightened hostility from other prisoners, to lessen their sentences on that basis would be to reward such acts. See *id.* at 1455-56. The second factor, absence of future threat to the public, was already factored in during the trial court's preliminary calculation of the defendants' criminal histories. See *id.* at 1456-57. Finally, as to the double jeopardy factor, the Ninth Circuit held such a consideration totally irrelevant to and in direct conflict with the purpose of the Guidelines. See *id.* at 1457.

The Supreme Court held that despite the goal of eliminating disparities in federal criminal sentencing, see 18 U.S.C. § 3553(a)(6) (1994), the Guidelines had not removed all discretion from the district judge. See *Koon III*, 518 U.S. 81, 92 (1996). The Court then divided departure factors into two groups: those which the Sentencing Commission encouraged and those it discouraged. Encouraged factors are within a district court's discretion in deciding to depart from the Guidelines if the court determines that such factors have not already been taken into account. See *id.* at 94-96. However, the Court agreed with the Ninth Circuit that the district court abused its discretion with respect to the first factor, additional punishments. See *id.* at 110. The Court also affirmed the court of appeals's rejection of the low likelihood of recidivism factor, see *id.* at 111, but found that the district court had properly considered abuse in prison and the burden of successive state and federal prosecutions. See *id.* at 111-12.

Critics of the Supreme Court's decision with respect to police brutality have combed *Koon III* for inconsistencies. See, e.g., Freeman, *supra* note 20, at 756-65 (criticizing Court's decision on several grounds). Several aspects of the Court's endorsement of the district court's unwarranted concern for the socioeconomic and community status of the defendants are relevant to this discussion of the normative frameworks consciously and unconsciously informing judges and juries. However, I have chosen to limit the scope of my discussion to the issue of provocation, which accounted for the bulk of Judge Davies's departure decision and which adequately presents the conflict over authority narratives.

neuver, and eventually trying to run away.³⁶⁸ Judge Davies's but-for conception of causation strains to satisfy the Guidelines standard for departure:³⁶⁹

Significantly, defendants Koon and Powell, along with the other LAPD, CHP, and School District officers at the scene of Mr. King's arrest, were present only by happenstance. Had Mr. King pulled over, and not caused the CHP officers to pursue him for up to eight miles, Koon, Powell and the other LAPD officers would not have been summoned. Messrs. Koon and Powell did not seek out a victim; rather, their very presence at the scene was a consequence of Mr. King's wrongful conduct.³⁷⁰

The district court's provocation analysis presents severe problems for federal prosecutions of police brutality for two primary reasons. First, provocation as either unlawful conduct or disobedience is a common feature of police encounters with suspects.³⁷¹ Second, the fact that detection of provocation is inherently dependent upon normative cues invites biased empathy. The Ninth Circuit recognized the first problem and reversed the district court.³⁷² Noting that but-for causation stated generally is not the same as provocation under the Sentencing Guidelines,³⁷³ the court of appeals found that victim misconduct is closer to the rule than the exception in excessive force cases.³⁷⁴

³⁶⁸ See Freeman, *supra* note 20, at 754-60 (analyzing King's conduct and court's treatment of that behavior).

³⁶⁹ According to section 5K2.10 of the Guidelines, "If the victim's wrongful conduct contributed significantly to provoking the offensive behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." Federal Sentencing Guidelines Manual § 5K2.10 (1995). Factors for consideration include the size and strength of the victim; the persistence of the victim's conduct; the danger reasonably perceived by the defendant; the danger actually presented to the defendant by the victim; and any other relevant conduct by the victim. See *id.* § 5K2.10(a)-(e).

³⁷⁰ *Koon I*, 833 F. Supp. at 786-87. The court then goes on to describe Rodney King's physical characteristics—6'3" and 225 pounds—presumably as further justification under the Guidelines for the police officers' perceptions of threat. See *id.* at 787. In fact, Davies cites *United States v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989), another case in which the victim's conduct was used as a mitigating factor in reducing a sentence. See *Koon I*, 833 F. Supp. at 786. In *Yellow Earrings*, however, the victim was a man six to eight inches taller than the defendant, a woman. The defendant pushed the victim when she refused his request for sexual intercourse. *Yellow Earrings*, 891 F.2d at 651, 654. The situation in *Koon* is hardly analogous given, *inter alia*, the fact that multiple armed law enforcement officers surrounded King in an open area. See *Koon I*, 833 F. Supp. at 775-76.

³⁷¹ See discussion of excessive force typology, *supra* note 289 and accompanying text.

³⁷² See *Koon II*, 34 F.3d at 1459-61.

³⁷³ See *id.* at 1458.

³⁷⁴ See *id.* at 1460-61 ("The [district] court isolated as unusual a factor which is at the very heart of excessive force jurisprudence.").

However, the Supreme Court agreed with the district court. Reviewing Judge Davies' provocation analysis in light of the Guidelines, the Court classified victim misconduct as an "encouraged factor" for departures and affirmed the district court's exercise of discretion.³⁷⁵ Justice Kennedy's analysis suggests that the heartland for aggravated assault cases involving police officers only includes those cases in which the officer is not provoked. Provocation broadly defined takes the case beyond the typical scenario and works to mitigate the severity of the officers' conduct.

There are several problems with this conclusion. The reference in the Guidelines to a heartland assumes the existence of a body of typical cases to which decisionmakers can turn.³⁷⁶ Since the Guidelines are silent as to what constitutes the heartland aggravated assault case, the Court directs us back to the discretion of the trial court because trial courts have greater familiarity with such cases than do appellate courts.³⁷⁷ But Judge Davies cited only a single case of provocation, whose facts were clearly inapposite.³⁷⁸ We are therefore left without a clear basis for determining why a provoked aggravated assault lies outside the heartland of such cases of police brutality.³⁷⁹ More importantly, we are left with the broadest definition of provocation. None of the courts even reached the question of what constitutes *adequate* provocation.

These are not simply problems of equitable federal sentencing. The broad discretion to find provocation and use it as a basis for substantially undercutting the penalties attached to willful violations of civilians' rights is a core reason why criminal prosecutions of violent police officers are so difficult to win—even in the apparently "easy" cases. The use of authority narratives to invoke ICMs of black male dangerousness and criminality maintains a status quo in which victims

³⁷⁵ See *Koon III*, 518 U.S. 81, 94 (1996).

³⁷⁶ See Federal Sentencing Guidelines Manual Ch. 1, Pt. A, 4(b) (1995).

³⁷⁷ See *Koon III*, 518 U.S. at 98 ("District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.").

³⁷⁸ See *Koon I*, 833 F. Supp. 769, 786 (C.D. Cal. 1993). In *Yellow Earrings*, the appellate court affirmed the district court's departure below the range specified in the Sentencing Guidelines, noting the victim's provocation. Both intoxicated, Darla June Yellow Earrings and Chris Struder were already kissing when Struder wanted to have intercourse with Yellow Earrings. See *Yellow Earrings*, 891 F.2d at 651. After she refused, Struder "pushed Yellow Earrings, verbally abused her and attempted to publicly humiliate her." *Id.* at 653. Yellow Earrings fled the room but returned with a bread knife and stabbed Struder in the chest, a wound from which he recovered. See *id.* at 651.

³⁷⁹ See Freeman, *supra* note 20, at 758 ("The Court does not adequately explain how it came to define the heartland of police brutality as unprovoked aggravated assault—it simply repeats this claim as though repetition makes it true.").

of color are easily objectified, dehumanized, and physically and verbally violated. In both trials, the stories of police conduct were filtered through presumptions of Rodney King as an object impervious to physical pain, incapable of reasoning (even for the purpose of self-preservation), and untouched by the emotional trauma of name calling, taunts, and racist ridicule. The Rodney King cases stand as horrific testimony to the power of authority narratives to subvert the meaning of a flagrant abuse of force, first in the jurors' response to a racially coded inversion of the videotape evidence, and second by federal judges' resounding imprimatur upon that story, authority narrative on top of authority narrative, communicated through the story of provocation. Exploiting some of the best attributes of storytelling, but mediated through racist ICMs, these authority narratives legitimate a climate of unfettered control and subordination in which police violence persists.

C. Literary Prescriptions

We—as a culture generally and the legal profession specifically—need counternarratives of literary content. What was taken from Rodney King, Robert Hall, or any victim of physical abuse by police cannot be measured and can never be replaced. The experience of helplessness, placelessness, and lack of physical boundaries that accompanies the intrusion of official force upon one's body is terrifying, disorienting, and transforming beyond the time human bodies take to heal. The collective experiences of communities in which such abuse is regularly imposed and seldom penalized are transmitted generation by generation, shaping the attitudinal landscape toward institutions of authority, and constituting what is known to a great many of us as "truth."³⁸⁰ Furthering the cultural divide is the staunch resistance to and delegitimation of such experiences when they are publicly conveyed. It is not simply indifference or exclusion, but hostility and an-

³⁸⁰ Contrary to the condescending view of community perspectives on police brutality communicated through common authority narratives, those who live in neighborhoods where brutality is prevalent often express sophisticated, though cynical, insight on the legal treatment of official misconduct. For example, a resident of Washington Heights, the neighborhood in New York City where a teenager was shot in the back, see *supra* note 295, explained the failure to indict the police officer in the following terms:

A grand jury's duty is only to find if there is probable cause to believe a crime occurred. They have found ways of indicting people with much less evidence than they had in this case. He was shot in the back. They should have put it to a jury, at least for reckless endangerment if not for criminally negligent homicide.

Michael Cooper, *Anger but Little Surprise at Failure to Indict Officer*, N.Y. Times, July 2, 1997, at B2.

tagonism from law enforcement, voters, governmental bodies, and courts that sustain a social environment in which police brutality persists and eludes punishment. Because the exercise of excessive force by police has traditionally and disproportionately occurred against people of color in economically and politically weaker communities, it reflects upon a much wider array of social relations. Each abusive application of force by law enforcement officers reinforces structural disparities between dominant institutions and their members and subordinate communities and theirs. Far from aberrations, acts of police brutality characterize complex social and political hierarchies in our culture. By themselves, traditional legal and administrative remedies are therefore ill-equipped to comprehend the scope of issues at work.

In this Article, I have proposed that literary storytelling about cases of police brutality can be a critical supplement to traditional rule-of-law approaches to such crimes. My principal recommendation for applying this approach is to inspire more literary fictionalizations of important cases of police brutality. In Part III, I recounted three claims of legal storytelling scholars. Here, in the more contemporary context of the *Koon* cases, I will reiterate their uses.

First, until his “can we all get along?” press conference which followed the devastating unrest in Los Angeles,³⁸¹ Rodney King’s voice had never been heard in public. That is, King, as the person who actually experienced the violence, was never permitted the independence and human agency that comes with being a subject, rather than an object (black victim, hero/black criminal, threat). Storytelling scholars have sought to affirm the voice of the forgotten subject by resurrecting that voice.³⁸² Some, like Professor Thomas, claim that resorting to the subaltern record of experiences also better informs us as readers in our understanding of the conflict.³⁸³ This claim has been sometimes characterized as writing back or counterstorytelling.³⁸⁴

One problem I have tried to emphasize, however, is that even the implied rules of counterstorytelling may be co-opted to tell destructive

³⁸¹ For the full text of Rodney King’s public statement, in which he called for an end to the Los Angeles rioting, see Richard A. Serrano, King: “Truth Will Come Out,” L.A. Times, May 2, 1992, at A2.

³⁸² See *supra* Part III.A.

³⁸³ See Thomas, *supra* note 214, at 2607 (discussing ways in which use of subaltern offers broader and reinvigorated historical readings).

³⁸⁴ See generally Critical Race Theory: The Cutting Edge (Richard Delgado ed., 1995) (introducing scholarly examples of need for and use of counterstorytelling); Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* (1997) (exploring use of motivating stories, doctrinal stories, neglected stories, and ways of retelling historical events and documentation).

stories. Distinguishing between helpful stories and subordinating ones is difficult when, for example, both make thorough use of context or empathy. This is one of storytelling's risks. I have endeavored to outline factors to assist in distinguishing productive stories from destructive ones,³⁸⁵ but it remains a risk nonetheless. Moreover, not every surviving victim of police brutality can comfortably speak through a fictional voice. The story of Rodney King, or of Anthony Baez,³⁸⁶ or Michael Stewart,³⁸⁷ must strive then to reflect the depth and complexity of the human beings involved.

Second, fictionalized stories of police brutality cases will challenge us because of their format alone.³⁸⁸ As Professors Bell and Delgado demonstrate by their use of chronicles,³⁸⁹ stories speak differently to us, and we respond accordingly. They bypass conventional argument where the strictures of form allow at most only reinterpretation, and instead offer the prospect of perceptual transformation. This redefinition is critically important for federal criminal prosecutions under section 242 and its requirement of willfulness. Police brutality cases frequently contain facts rife with racial and racist dynamics, yet, as we have seen, the landmark prosecutions have gone out of their way to deracialize them. However, the black victim of a police beating on whom police repeatedly hurl racial epithets knows that racial degradation is a part of the punishment exacted upon him. His *experience* of the beating and his interpretation of what it is supposed to convey to him is very different given the addition of the racist invective. Why? Because now he is not necessarily being beaten as a "bad guy" (which he can contest), but because he is despised as a person of color (which he cannot change). These are difficult arguments to make to a jury, provided a court will even admit the relevant evidence. But because they are experiential and go to the discovery of new epistemic sources, alternative ICMs, or stock stories lived by others, they are susceptible to the fictional form.

Third, storytelling scholars claim that readers look upon literary forms more carefully, sympathetically, even dispassionately.³⁹⁰

³⁸⁵ Specifically, I suggested the following "rules": Constructive narratives rely on a broad factual basis, demonstrate clear regard for interpersonal complexities, emphasize the psychological apparatus and intentional states of mind of actors, and acknowledge the narrator's biases. See *supra* Part III.D.

³⁸⁶ Anthony Baez was killed by a New York City police officer in 1994. See *supra* note 296.

³⁸⁷ Michael Stewart was killed by New York City transit police in 1983. See *supra* note 296.

³⁸⁸ See *supra* Part III.B.

³⁸⁹ See *supra* notes 198, 236, 238, 239 and accompanying text.

³⁹⁰ See *supra* Part III.C.

Professor Nussbaum refers to this cast of mind as the judicious-spectator/literary judge.³⁹¹ And as anyone who has ever struggled through cataclysmic discussions of racial dynamics can attest, this kind of cool is a good thing.

Thus, my principal recommendation is that fiction writers—be they legally trained or not—tell carefully rendered stories about important police brutality caselaw, statutes, and sentencing decisions as an aid to better understanding the crisis of underenforcement. Once written, the question quickly becomes, who should read them and to what purpose should they be put? My answer is that these stories should be read by legal professionals, law students, law enforcement personnel, and the public.

Legal professionals, especially those who practice in areas of the law connected to police brutality, constitute the first audience for such fiction because their biases, preconceptions, and mindsets toward criminal behavior by the police frankly dictate whether cases go forward and how they proceed. This category certainly includes the federal judiciary, and, very importantly, federal law clerks. As the frontline, their entrenched notions about police brutality cases should be challenged and broadened by the insights they glean from fictionalizations of exactly the cases with which they are most familiar. With due deference to Professor Nussbaum, these insights do not magically lift off the page, nor is intimate familiarity available to all through life experiences. Rather, such insights more often result from collegial discourse about the fictional stories.

The effect on law students of reading case fictionalizations, I have learned, can be profound. Legal education has both a practical and an ethical obligation to deepen the orientation of lawyers to the most difficult kinds of cases. This is particularly true with respect to authority narratives, since legal education for most students first entails the articulation and assimilation of such narratives to nonlawyers. Hence, the discourse engendered through reading fictionalizations may inform the basis upon which future federal prosecutors litigate section 242 cases.³⁹²

Outside of the legal profession, it is difficult to be as optimistic or to imagine the reach of legal fiction. However, I am hopeful that law

³⁹¹ See Nussbaum, *supra* note 196, at 72-78.

³⁹² But see Richard A. Posner, *Law and Literature: A Misunderstood Relation* (1988). Posner disagrees with this proposition, although he has not examined the specific use of fictionalizations. See *id.* at 19 (explaining that fictional writing by lawyers will not be explored in book). However, he does acknowledge the benefits to law students of classes in law and literature, particularly in “providing perspective by viewing [the] law from the outside as well as from the inside” *Id.* at 18.

enforcement officers, particularly those training in academies or in undergraduate institutions, will read and debate literary stories about excessive force by police. It is likely that many policemen who ultimately commit acts of unwarranted violence originally came to law enforcement with strong moral commitments to protecting civilians before becoming disillusioned as officers and contemptuous of members of the public. Indeed, as police forces become more socioeconomically and ethnically integrated, increasing numbers of officers come from neighborhoods in which expectations of police brutality are routine. Literary stories that record the experiences of people living ordinary lives in those situations can contribute to a sensitivity and a working perspective that should round out a professional mindset otherwise cast in authority narratives.

Finally, the public can benefit from reading stories about experiences that are often portrayed as the protests of criminals or the hysteria of radicals.³⁹³ Fictionalizations are increasingly popular forms of both literary and visual entertainment.³⁹⁴ The fictionalizations of legal cases that do exist assist to varying degrees our understanding of those cases.³⁹⁵ Literary fictionalizations about police brutality may help inform potential jurors about the destructive effects of authority narratives in court.

CONCLUSION

I have endeavored to show how literary fiction as a distinct type of legal storytelling can influence the psychic and cultural predispositions through which federal (and most state) criminal prosecutions are viewed. I began with a fictional counterstory to the most important authority narrative we have concerning police brutality, the Supreme Court's opinions in *Screws v. United States*. Comparing the story with the opinions, I argued that salient features of the Court's approach to a flagrant case of racist official violence helped to institutionalize still prevailing legal approaches to such crimes. In particular, these features were decontextualization, deracialization, and desubjectivization of the people involved, including the crime victim. I then tried to

³⁹³ See, e.g., *supra* note 295 (describing New York Post headline of July 2, 1997 and labeling of teenager shot in back by police as "machete thug"). The perspective of literary judging is an appropriate antidote to racially coded messages and us-them political rhetoric.

³⁹⁴ For example, *Law & Order*, a popular fictional "cop and courtroom" television program, often fictionalizes headlining crimes and other issues.

³⁹⁵ See, e.g., Albert French, *Billy* (1993); Melton A. McLaurin, *Celia, a Slave* (1991); Herman Melville, *Benito Cereno*, in *Billy Budd, Sailor and Other Stories* by Herman Melville 131 (Bantam Books 1981) (1856); cf. Julia Alvarez, *In the Time of the Butterflies* (1994).

show how my fictional approach furthers three of the primary claims made for legal storytelling by scholars of both critical legal theory and law and literature. From that theoretical discussion, I examined contemporary manifestations of authority narratives used to justify or mitigate police brutality, focusing in particular on the federal sentencing decisions in *Koon v. United States*. Finally, I asserted that what was traditionally destructive about authority narratives in the specific context of federal police brutality prosecutions remains destructive, despite the addition of narrative elements espoused by storytelling scholars. My proposal, to encourage more literary fiction about important cases, statutes, and sentencing decisions involving police brutality, is clearly offered as a supplement to more traditional rule-of-law solutions. But in the realm of police brutality prosecutions, authority narratives reflect the core of dominant beliefs about race, crime, and social hierarchy so profoundly that legal change is unlikely until we write back and read anew.