

## POLICE STORIES

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### INTRODUCTION

Most fact statements in judicial opinions do not read like a novel, but there is the occasional exception. In *Pennsylvania v. Dunlap*,<sup>1</sup> Chief Justice Roberts opened his dissent from denial of certiorari as follows:

North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood.

Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.<sup>2</sup>

This dissent, a flamboyant example of how judges present a police narrative,<sup>3</sup> garnered a lot of attention for its novelistic flair.<sup>4</sup> Chief Justice Roberts used his hard-boiled detective narrative to support the argument that there was probable cause to arrest the defendant.<sup>5</sup> Usually such judicial narratives are presented in more mundane language, but with a similar

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<sup>1</sup> 555 U.S. 964 (2008) (denying petition for a writ of certiorari) [<https://perma.cc/7JRB-W3F6>].

<sup>2</sup> *Id.* at 964 (Roberts, C.J., dissenting from denial of writ of certiorari).

<sup>3</sup> "Police narrative" is actually a term of art and refers to the officer's written report. Guides exist on how to write these police narratives, with advice to avoid jargon and use plain English. *See, e.g.*, MICHAEL BIGGS, JUST THE FACTS: INVESTIGATIVE REPORT WRITING (4th ed. 2012); A.S. MICHAEL, THE BEST POLICE REPORT WRITING BOOK (2008); *How to Write a Police Report*, WIKIHOW, <http://www.wikihow.com/Write-a-Police-Report> (last visited July 8, 2016) [<https://perma.cc/V8KS-4EJ2>]. Here, I use the term more broadly to mean the story told by or for police about a police-citizen encounter.

<sup>4</sup> *See, e.g.*, *From the Chief Justice, A Novel Dissent*, WASH. POST (Oct. 15, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101402818.html> [<https://perma.cc/CN9L-M69W>]; Bill Mears, *Chief Justice Roberts Shows His Writing Chops*, CNN, <http://www.cnn.com/2008/CRIME/10/14/roberts.mystery.writer/index.html?iref=24hours> (last updated Oct. 14, 2008, 4:19 PM) [<https://perma.cc/6D84-52M2>]; Martha Neil, *Chief Justice Roberts Depicts a Hard-Boiled Detective in 'Three-Dollar Steak' Hood*, A.B.A. J. (Oct. 14, 2008, 8:57 PM), [http://www.abajournal.com/news/article/chief\\_justice\\_roberts\\_depicts\\_a\\_hard\\_boiled\\_detective\\_in\\_the\\_three\\_dollar\\_steak/](http://www.abajournal.com/news/article/chief_justice_roberts_depicts_a_hard_boiled_detective_in_the_three_dollar_steak/) [<https://perma.cc/9RPX-FC36>].

<sup>5</sup> *Dunlap*, 555 U.S. at 964.

purpose: to justify police action.<sup>6</sup>

Tellingly, Chief Justice Roberts employs a genre from a bygone era, a genre that depicted white law enforcement and white (albeit perhaps not Anglo-Saxon) criminals, to tell a story about modern North Philadelphia, an area with a predominantly minority population.<sup>7</sup> While the court decisions in this case do not mention Dunlap's race, there is a very good chance that he is not white. To the extent the Chief Justice is supporting police discretion in policing minority neighborhoods, he camouflages that support with his white Sam Spade story.

The *Dunlap* dissent is perhaps the most obvious expression of the link between popular culture and the narratives in judicial opinions. But the less literary police narratives found in appellate opinions also tap into prevalent cultural stories about the police—stories of hardworking, embattled officers. Judicial writers use a variety of techniques to tell this police narrative, including police language and “copspeak” (the vague and wordy jargon we see in much police testimony).<sup>8</sup> These stories also employ the standard techniques of point of view, selective detail, quotes, and emphasis to support the police version of events. The police narrative so dominates the fact sections of judicial opinions in criminal cases that we have difficulty imagining or crediting counter-narratives.

As lawyers and judges know, the facts, and the stories created with those facts, make the law: “[A] case well stated is more than half argued.”<sup>9</sup> The police narrative is one of the most common narratives in legal writing, simply because there are so many criminal cases, as well as numerous civil cases, involving police. For the most part, these narratives tell the familiar

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<sup>6</sup> For an example of more typical, mundane language, *see, e.g.*, *Commonwealth v. Thompson*, 985 A.2d 928, 930 (Pa. 2009):

Officer Ortiz knew the neighborhood as a high crime area in which narcotics, and specifically heroin, regularly were sold. The area was designated by the Philadelphia Police Department as an “Operation Safe Streets” neighborhood. Officer Ortiz, a nine-year veteran of the police force, and his partner, Officer Correa, were in plainclothes and driving an unmarked vehicle. Officer Ortiz saw a car parked by the sidewalk and observed Appellant standing in the street by the driver’s side door. Officer Ortiz watched Appellant hand the male driver some money and saw the driver give Appellant a small object in return. Based on what he saw on the street and what he knew, including the fact that he had made several hundred narcotics arrests of this very type, Officer Ortiz believed the men were engaged in a drug transaction.

<sup>7</sup> Based on 2010 Census numbers, the North Broad Street corridor area of North Philadelphia was seventy-three percent African-American and twenty-one percent Hispanic. PHILA. RESEARCH INITIATIVE, PEW CHARITABLE TRUSTS, *A CITY TRANSFORMED: THE RACIAL AND ETHNIC CHANGES IN PHILADELPHIA OVER THE LAST 20 YEARS* 7 (2011), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/philadelphia\\_research\\_initiative/philadelphiapopulationethnicchangespdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/philadelphia_research_initiative/philadelphiapopulationethnicchangespdf.pdf) [https://perma.cc/5U3P-UAB8]; *see also* Kate Kilpatrick, *On Drug-Infested North Philly Corners, Hope and Good Luck Come in Bags*, ALJAZEERA AM. (Feb. 17, 2016, 5:00 AM), <http://america.aljazeera.com/articles/2016/2/17/on-drug-infested-north-philly-corners-hope-and-good-luck-come-in-a-bag.html> (discussing long-standing drug problems in this high-poverty neighborhood of mostly Puerto Rican residents) [https://perma.cc/9QHR-FTQF].

<sup>8</sup> *See* Gibbons, *infra* note 39.

<sup>9</sup> BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* 524 (3d ed. 2014) (quoting Floyd E. Thompson, *in* *SUCCESS IN COURT* 267, 278 (Francis L. Wellman ed., 1941)).

story of the hardworking, careful police officer in a challenging situation with dangerous criminals. These narratives do much of the work of an appellate argument, just as Chief Justice Robert's story about Officer Devlin makes the case that an experienced officer's conclusion that he has just seen a drug transaction deserves the Court's deference. The story drives the law.

Should we therefore be suspicious of these police narratives? No more than we should read any legal narrative carefully, alert to what is being emphasized and what is left out. But especially when a narrative taps into common cultural stories, it can be difficult to imagine a different version, let alone a different ending. The general shocked reaction of many white Americans to the 2014 and 2015 videos of police shootings<sup>10</sup> of unarmed black men illustrates the strength of these cultural narratives, and the need to question them. The videos suggested and gave credence to a counter-narrative, in a way that verbal eyewitness testimony could not. What is true for the public at large is also true for legal writers and readers.

Recent video recordings of police encounters with the public are not the only reason to consider the power of the police narrative in judicial writing. The exonerations of numerous wrongly convicted people over the past several decades have also revealed the fallibility of the justice system, and the danger of relying too readily upon police stories. As of this writing, over 1,859 people have been exonerated since 1989.<sup>11</sup> In many of these cases, police accounts of the events turned out to be incomplete or even untruthful.<sup>12</sup>

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<sup>10</sup> See Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN, <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes> (last updated Apr. 21, 2015, 7:26 AM) (discussing how videos of police shootings are changing attitudes of citizens who might otherwise have tended to believe police accounts) [https://perma.cc/CAD2-GFJ9]. In recent weeks, videos have surfaced of police shootings of unarmed black men in Baton Rouge and Minneapolis. See The Associated Press, *A Look at Players in Philando Castile Police Shooting Case*, N.Y. TIMES (July 13, 2016), <http://www.nytimes.com/aponline/2016/07/13/us/ap-us-police-shooting-minnesota-whos-who.html> [https://perma.cc/5TD9-BN3B]; Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Department Investigation*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html> [https://perma.cc/6S2W-ZGQ7]. These deaths sparked protests against police brutality and were followed by the targeted killing of police officers in Dallas and Baton Rouge. Richard Fausset et al., *Online Trail Illuminates Baton Rouge Gunman's Path to Violence*, N.Y. TIMES (July 18, 2016), <http://www.nytimes.com/2016/07/19/us/baton-rouge-shooting.html> [https://perma.cc/J6DZ-NLVQ]; Patrick McGee et al., *Snipers Kill 5 Dallas Officers at Protest Against Police Shootings*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/dallas-police-officers-killed.html> [https://perma.cc/K7DQ-FVKQ]. It remains to be seen how these recent shootings will further affect the general public's views.

<sup>11</sup> *The National Registry of Exonerations*, UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06-4b326208baf8}&SortField=Exonerated&SortDir=Desc> (last visited Aug. 6, 2016) [https://perma.cc/5TXB-VD2P]. 342 persons have been exonerated through DNA testing since 1989. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited July 10, 2016) [https://perma.cc/ZTT2-LSFE].

<sup>12</sup> See *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/government-misconduct> (last visited July 10, 2016) (discussing types of governmental and police misconduct revealed during exonerations) [https://perma.cc/A3GA-4RDF]; see also Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*,

The lesson from the videos and exonerations is not that police are always wrong or that their stories should not be credited. Instead, the lesson is that judges and law clerks should be aware of the power of the story, and should seriously consider counter-narratives when they are presented. It is important to understand that the fact section of an opinion is a story, and that legal writers have a choice about whether and how to present the police story.<sup>13</sup>

To be clear, in discussing writers' choices in appellate fact statements, I am not here challenging established standards of review or deference to the finder of fact.<sup>14</sup> Instead, I am examining how, even within these constraints, stories can be told. Generally, appellate courts must defer to trial court findings of credibility and what events occurred. Such deference, however, does not fully constrain how those events are presented.

My purpose in this essay, then, is to show how particular police narratives are retold in appellate decisions, and to demonstrate also the less common alternative narratives. The essay proceeds as follows: I will first describe briefly the police narrative we are familiar with from popular culture—in particular, television dramas. Next, I will examine the police narrative in appellate opinions. My review is anecdotal—I make no attempt to quantify or exhaustively survey all opinions involving police. Finally, I discuss examples of counter-narratives in judicial opinions, where people who come in contact with police are humanized or where additional context is introduced. I conclude that there is nothing wrong with telling the police story, but trouble results when the telling is automatic or not justified. Understanding the dominance of the popular heroic police narrative can perhaps weaken its grip on the writer and reader's imagination, and make us less likely to automatically fit new facts into familiar patterns.

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2005 WIS. L. REV. 35, 95–97 (2005) (discussing police perjury and evidence fabrication as a contributor to wrongful convictions).

<sup>13</sup> The role of storytelling in legal argument has been discussed by many scholars. See, e.g., Helen A. Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. APP. PRAC. & PROCESS 1, 9–15 (2010) (citing changing legal storytelling scholarship) [<https://perma.cc/EBV2-8U3B>]; Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 130–31 (2008) (arguing for the importance of integrating the client's story into a brief instead of writing in a completely logical, legal manner) [<https://perma.cc/T3XS-8A2V>]; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 53 (2008) (“[S]torytelling lies at the heart of what lawyers do.”) [<https://perma.cc/LNV5-3X6Y>].

<sup>14</sup> “Murky though the distinction between ‘fact’ and ‘law’ may be, there is general agreement that somewhere along the fact-law spectrum lies a point beyond which appellate courts ought not venture. Past it exist questions of ‘historical fact,’ the ‘who, when, what, and where’ series of questions that we have deemed only juries or trial judges to be capable of answering.” Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 438–39 (2004) (footnotes omitted) [<https://perma.cc/2Z9R-27UM>]. Oldfather presents a persuasive challenge to the convention of factual deference.

## I. THE POLICE NARRATIVE: HARD-DRINKING HEROES AND SHREWD DETECTIVES IN POPULAR CULTURE

*“Police work is portrayed on television more often than any other profession. It has been that way since the cowboys rode off into the television sunset.”*<sup>15</sup>

Television and movies may reflect collective shared narratives, rather than cause them. But whether cause or effect, the popular narratives seen in television and film are echoed in judicial fact statements and suggest a trove of common stories that judicial writers tap into.

Books, movies, and television shows about police and crime-solving have been popular for some time. The list of fictional detectives and police officers is extensive. Arthur Conan Doyle, Agatha Christie, Raymond Chandler, and others wrote popular fictional accounts of murder detectives who were usually private citizens and gifted amateurs. More recently, television series such as *Blue Bloods*,<sup>16</sup> *Law and Order*,<sup>17</sup> and *CSI*<sup>18</sup> portray the daily life of police officers.<sup>19</sup> Whether these officers are “flawed” due to excessive drinking,<sup>20</sup> suffer from mental illness,<sup>21</sup> or are unable to sustain intimate relationships—or whether they are solid family men and women<sup>22</sup>—the heroes of these shows are almost always dedicated workaholics with good hearts and sound instincts. They are frequently frustrated by the legal limitations on their authority to detain, search, and question. The shows narrate sympathetically from the police point of view, and the viewers cannot help but support the officers’ clever manipulation of suspects who are trying to invoke their right to silence or an attorney.<sup>23</sup>

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<sup>15</sup> Bill Carter, *Police Dramas on TV Were Always Popular; Now They’re Real*, N.Y. TIMES (Oct. 17, 1990), <http://www.nytimes.com/1990/10/17/arts/police-dramas-on-tv-were-always-popular-now-they-re-real.html> [<https://perma.cc/DBW6-G8KF>].

<sup>16</sup> (CBS).

<sup>17</sup> (NBC).

<sup>18</sup> (CBS).

<sup>19</sup> For an alphabetical list of television police dramas, see *List of Police Television Dramas*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_police\\_television\\_dramas](https://en.wikipedia.org/wiki/List_of_police_television_dramas) (last visited July 7, 2016) [<https://perma.cc/3W5X-6G6G>]. The popularity of police procedurals has even given rise to fear on the part of prosecutors that jurors would have unrealistic expectations of real police crime labs and investigations, although others dispute the basis for that fear of the “CSI effect.” See, e.g., Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1342 (2009) (arguing evidence does not support the phenomenon) [<https://perma.cc/H9A3-RSM6>]; Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1052–53 (2006) (arguing that the “CSI effect” has not been established by objective fact despite the phenomenon’s popularity in the press) [<https://perma.cc/UJ82-KHX6>].

<sup>20</sup> Examples abound of the hard-drinking detective, including Detective Andy Sipowicz of *NYPD Blue* (ABC), Detectives Jimmy McNulty and Bunk Moreland on *The Wire* (HBO), or Detectives Marty Hart and Rust Cohle on the first season of *True Detective* (HBO 2014).

<sup>21</sup> The series *Monk* (USA Network) features a detective with obsessive-compulsive disorder, and *Homeland*’s (Showtime) CIA agent Carrie Mathison has bipolar disorder.

<sup>22</sup> The series *Blue Bloods* (CBS) is about a tight-knit Irish-American family of New York police.

<sup>23</sup> Obviously, the shows range in quality and depth. Some have greater character development, as well as moral and legal nuance. Yet even the most critically acclaimed crime dramas share the police officer’s view of police–citizen encounters. Shows such as *The Wire* (HBO), or its predecessor

Although much of the crime depicted is frightening, the inevitable police victories are reassuring. There is the occasional story about the “bad cop,” but in the television series, at least, these bad apples are ultimately found and dealt with.<sup>24</sup> These stories about the bad cop are the exceptions that prove the rule. We are steeped in these images and stories. It is not surprising, then, that these stories make their way into legal writing, including appellate opinions.<sup>25</sup>

This is not to say that courts are deliberately inserting these popular narratives into opinions. Rather, it is that judicial writers, like all of us, tend to organize information into recognizable stories.<sup>26</sup> A stock story, learned either through experience or vicariously, “resolves ambiguity and complements ‘given’ information with much ‘assumed’ information.”<sup>27</sup> We use known stories to make sense of a set of facts, filling in any gaps (or even overriding discordant facts) with the stories.<sup>28</sup> We make narrative sense of known facts by fitting them to a story that seems plausible.

What “could” happen is determined, not by the decision makers’ undertaking an empirical assessment of actual events, but rather by their looking to a store of background knowledge about these kinds of narratives—to a set of stock stories. The narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it “really happened.”<sup>29</sup>

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*Homicide: Life on the Street* (NBC), still celebrate the line policemen and detectives and their battle against crime, although they present a more complicated picture. For critical raves of *The Wire*, see Tim Goodman, “Yes, HBO’s ‘Wire’ is Challenging. It’s Also a Masterpiece,” SFGATE (Sept. 6, 2006), <http://www.sfgate.com/entertainment/article/Yes-HBO-s-Wire-is-challenging-It-s-also-a-2553074.php> (arguing that *The Wire* is a masterpiece because of, and not in spite of, its dense narrative style) [<https://perma.cc/D9KW-FB2N>]; Lorrie Moore, *In the Life of “The Wire,”* N.Y. REV. OF BOOKS (Oct. 14, 2010), <http://www.nybooks.com/articles/2010/10/14/life-wire/> (praising *The Wire*’s novel-like qualities as a “new art form”) [<https://perma.cc/2Z9J-V5X6>].

<sup>24</sup> Only in the movies do the bad cops win or the good guys find themselves stymied by institutional forces. See, e.g., SERPICO (Artists Entm’ts Complex, Inc. 1973); TRAINING DAY (Vill. Roadshow Pictures 2001). Television depictions may be changing, however. See also Lisa Kern Griffin, Opinion, “Making a Murderer” is About Justice, Not Truth, N.Y. TIMES (Jan. 12, 2016), [http://www.nytimes.com/2016/01/12/opinion/making-a-murderer-is-about-justice-not-truth.html?\\_r=0](http://www.nytimes.com/2016/01/12/opinion/making-a-murderer-is-about-justice-not-truth.html?_r=0) (discussing the Netflix series about a wrongful conviction as part of “popular culture’s” changing “portrayal of the criminal justice system”) [<https://perma.cc/MA5G-MP9X>].

<sup>25</sup> Of course there are also shows and stories that celebrate criminals; the bandit hero has always existed. THE GODFATHER movies (Paramount Pictures 1972, 1974, 1990), *Boardwalk Empire* (HBO), *The Sopranos* (HBO), *Breaking Bad* (AMC), and other shows and movies are also popular. But although we may root for the rule-breakers in these shows, we do not see them as innocent victims of police misbehavior. Thus, these shows do not really disturb the police narrative to the extent it depicts police as generally in the right in police–citizen encounters.

<sup>26</sup> JEROME BRUNER, ACTS OF MEANING 45 (1990) (setting out a thesis that humans have an innate “readiness” to organize experience into a narrative form).

<sup>27</sup> Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 6 (1984) (citing RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 29 (1980)).

<sup>28</sup> Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 266 (2009) (“Storytelling is said to be central to our ability to make sense out of a series of chronological events otherwise lacking in coherence and consistency . . .”) (footnotes omitted) [<https://perma.cc/Q8V3-G8AT>].

<sup>29</sup> Rideout, *supra* note 13, at 67.

In addition, the fact that the police are usually found to be correct, and defendants usually found to be guilty, creates a bias to seize on the “likely” story.<sup>30</sup> Thus, for example, in *every* search and seizure criminal case, the stock police story is all the more appealing because the ending is already known: the defendant was discovered to have contraband—the officer was right!

The strength of these popular narratives is evidenced by the shocked reaction to recent videos showing police shooting unarmed African-American men.<sup>31</sup> These videos were jarring, discordant, and qualified as news precisely because they did not fit many white Americans’ ideas about police behavior.<sup>32</sup> What’s more, in most cases, there was an official police account that the subsequent video belied—in other words, the actual police narrative was revealed to be a fabrication.<sup>33</sup> These videos will probably not usher in a new era of judicial skepticism of police stories, but they have introduced a counter-narrative of police aggression towards minorities—a

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<sup>30</sup> López, *supra* note 27, at 15 (“He judges frequency, probability and causality on the basis of the most easily generated information.”) (footnote omitted). Indeed, it is our lightning-quick tendency to fill in the facts with a stock story that is responsible for much of the problems caused by implicit bias—we fill in a (biased) story to fit a character we have learned is African-American or Hispanic. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 961–62 (2006) (discussing the concept and scientific basis for the theory of implicit bias) [<https://perma.cc/E4ND-45NV>].

<sup>31</sup> See *supra* note 10 and accompanying text.

<sup>32</sup> My predominantly white 2015 criminal law students, although not a cross-section of the public, were very shocked by the videos released that year. Reactions of the public at large may be divided along racial lines. For example, some polls show whites believe the media over-hypes police shootings of black men. See *Most Voters Think Media Wrong on Race Shootings, Put Police at Risk*, RASMUSSEN REPORTS (Mar. 18, 2015), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/march\\_2015/most\\_voters\\_think\\_media\\_wrong\\_on\\_race\\_shootings\\_put\\_police\\_at\\_risk](http://www.rasmussenreports.com/public_content/politics/general_politics/march_2015/most_voters_think_media_wrong_on_race_shootings_put_police_at_risk) (“Eighty-two percent (82%) of black voters think most black Americans receive unfair treatment from the police. White voters by a 56% to 30% margin don’t believe that’s true.”) [<https://perma.cc/Y4U6-XMEA>]. But more recent polls show that the videos surfacing in the past year have caused many whites, too, to believe police mistreat minorities. See Ray Jablonski, *Polls Find One Year after Ferguson Shooting, Race Relations Are Deteriorating*, CLEVELAND.COM, [http://www.cleveland.com/nation/index.ssf/2015/08/polls\\_find\\_one\\_year\\_after\\_ferg.html](http://www.cleveland.com/nation/index.ssf/2015/08/polls_find_one_year_after_ferg.html) (last updated Aug. 9, 2015, 9:55 AM) (summarizing recent national polls on race and criminal justice) [<https://perma.cc/A7FX-LAA4>].

<sup>33</sup> See, e.g., The Associated Press, *Cleveland Boy Tamir Rice Wasn’t Reaching for Pellet Gun: Report*, NBC NEWS (Dec. 5, 2015), <http://www.nbcnews.com/news/us-news/cleveland-boy-tamir-rices-hands-were-pocket-when-shot-report-n474906> (presenting expert analyses of video that contradicts officers’ statements that shots were in self-defense) [<https://perma.cc/4ZG5-U3FW>]; Monica Davey, *Officers’ Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), [http://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html?\\_r=1](http://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html?_r=1) (discussing how video contradicted officer accounts of police shooting) [<https://perma.cc/CJ7J-342R>]; Richard Pérez-Peña, *Ohio: Report Says Killing by Officer Was Preventable*, N.Y. TIMES (Sept. 11, 2015), <http://www.nytimes.com/2015/09/12/us/ohio-report-says-killing-by-officer-was-preventable.html> (discussing contradictions between officer’s body camera footage and the officer’s statements about a shooting during a traffic stop) [<https://perma.cc/B98U-98VG>]; Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> (reporting how newly released video contradicted police officer’s statement that he shot in self-defense) [<https://perma.cc/B573-AV4D>].

counter-narrative that police now contend with in the media, if not in court.<sup>34</sup>

The recent videos also force us to confront squarely the issue of race in the police stories. The early twentieth century fictional depictions of police and criminals—the hard-boiled detective narrative that Chief Justice Roberts tapped into in *Dunlap*—depicted white cops and robbers.<sup>35</sup> More recent television dramas and movies might be somewhat more integrated, but African-American criminals are now familiar characters. Tests of implicit bias show the continuing strength of an unconscious association of criminality with blackness.<sup>36</sup> The videos of police shootings underscore that association and its consequences, as well as the existence of explicit bias.

Some officers have been charged as a result of video-recorded incidents.<sup>37</sup> But regardless of the ultimate outcome in these cases, the videos, and the actual episodes they depict, show us a very different narrative than we are accustomed to seeing in television dramas or court decisions. The videos show actions that otherwise would seem implausible

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<sup>34</sup> See Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 339–40 (2015) (recounting the 2014 “extensive media coverage of police killings of unarmed Black men and boys, including Eric Garner, Michael Brown, John Crawford, Tamir Rice, and Levar Jones”) (footnote omitted). It may be that the counter-narrative is gaining on the default narrative of the brave, conscientious officer: “The release last month of ‘Making a Murderer,’ a 10-part documentary from Netflix, capped a year in which popular culture’s portrayal of the criminal justice system seems to have shifted. Out with the old tropes about truth-seeking investigators and tidy resolutions; in with the disquieting, dysfunctional reality of many courtrooms and police stations.” Griffin, *supra* note 24.

<sup>35</sup> For examples of the hard-boiled detective genre, see RAYMOND CHANDLER, *THE LONG GOODBYE* (1953); DASHIELL HAMMETT, *THE MALTESE FALCON* (1930). Such stories often included ethnicities such as Irish- or Italian-American, ethnicities that today we consider simply white. Gangster movies of the early twentieth century are good examples: *THE PUBLIC ENEMY* (Warner Bros. 1931) includes Irish-American characters, as does *ANGELS WITH DIRTY FACES* (Warner Bros. 1938). *SCARFACE* (The Caddo Co. 1932) is about an Italian-American gangster. Famous gangsters from this period include Al Capone and Charles “Lucky” Luciano, Italian-Americans.

<sup>36</sup> See generally R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1182–83 (2006) (discussing the Implicit Association Test research revealing unconscious associations between race and positive or negative attributes) [https://perma.cc/DM37-LV5P]; Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. OF PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (investigating the influence of stereotypic associations on visual processing in five studies, concluding “some associations between social groups and concepts are bidirectional and operate as visual tuning devices”) [https://perma.cc/D9A5-VDDQ]; Katherine N. Hallinan, *A Deadly Response: Unconscious Racism and California’s Provocative Act Doctrine*, 7 HASTINGS RACE & POVERTY L.J. 71, 86–87 (2010) (discussing African-American criminal stereotypes).

<sup>37</sup> Conor Friedersdorf, *The Number of Cops Indicted for Murder Spikes Upward*, *THE ATLANTIC* (Aug. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-shocking-number-of-cops-recently-indicted-for-murder/401732/> (noting indictments of officers in Cincinnati, South Carolina, Baltimore, and elsewhere) [https://perma.cc/59XE-C7AW]. *The New York Times* has compiled an account of the legal outcomes to date for the publicized police shootings of unarmed black men caught on video over the past several years. Haeyoun Park & Jasmine C. Lee, *Looking for Accountability in Police-Involved Deaths of Blacks*, N.Y. TIMES, <http://www.nytimes.com/interactive/2016/07/12/us/looking-for-accountability-in-police-involved-deaths-of-blacks.html> (last updated July 27, 2016) (including information about professional ramifications, like firing and being put on leave, civil rights investigations, and settlement amounts in each case) [https://perma.cc/QDH7-WPGU].

to most nonminority citizens.<sup>38</sup> The police narratives we are accustomed to generally create a sense of the implausibility of police misconduct. This is done in a variety of ways, as discussed below.

## II. THE POLICE NARRATIVE IN APPELLATE OPINIONS

Although their stories may echo what we see in popular films and television shows, appellate courts tell the facts of a case in words, not video. They present the police narrative through choices about language, perspective, selective details, and context. This section explores some of the more common techniques.

One interesting way in which the police narrative makes its way into appellate opinions is in the use of police language. Police language is marked by at least two features, somewhat in tension: police slang and overly formal—yet vague—official “copspeak.”<sup>39</sup>

The opacity of copspeak is frustrating to some judges. More than thirty years ago, a judge commented with irritation on the way officers testified:

The agents involved speak an almost impenetrable jargon. They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars, they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveille. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. A person does not say something; he indicates. They do not listen to a telephone conversation; they monitor it. People telephoning to each other do not say “hello;” they exchange greetings. An agent does not hand money to an informer to make a buy; he advances previously recorded official government funds. To an agent, a list of serial numbers does not list serial numbers, it depicts Federal Reserve Notes. An agent does not say what an exhibit is; he says that it purports to be. The agents preface answers to simple and direct questions with “to my knowledge.”<sup>40</sup>

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<sup>38</sup> Gallup poll data from 2011 to 2014 showed that “Blacks in the U.S. have a significantly lower level of confidence in the police as an institution than do whites,” noting that thirty-seven percent of black adults have “a great deal” or “quite a lot” of confidence in the police, compared to fifty-nine percent of the white adults. Frank Newport, *Gallup Review: Black and White Attitudes Toward Police*, GALLUP (Aug. 20, 2014), <http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx> [<https://perma.cc/5GPF-2AUQ>].

<sup>39</sup> See JOHN GIBBONS, *FORENSIC LINGUISTICS: AN INTRODUCTION TO LANGUAGE IN THE JUSTICE SYSTEM* 85–87 (2003) (discussing overly formal language and elaboration as a feature of copspeak); Gwyneth Fox, *A Comparison of ‘Policespeak’ and ‘Normalspeak’: A Preliminary Study*, in *TECHNIQUES OF DESCRIPTION: SPOKEN AND WRITTEN DISCOURSE* 183, 194 (John M. Sinclair et al. eds., 1993) (“The prevailing tone of many police statements is pomposity, caused by too high a level of formality.”).

<sup>40</sup> *United States v. Marshall*, 488 F.2d 1169, 1171 n.1 (9th Cir. 1973) [<https://perma.cc/P2DP-9T28>]. The footnote continues: “They cannot describe a conversation by saying ‘he said’ and ‘I said;’ they speak in conclusions. Sometimes it takes the combined efforts of counsel and the judge to get them to state who said what. Under cross-examination, they seem unable to give a direct answer to a

Unlike this “almost impenetrable” copspeak, police slang can be colorful and direct. The public becomes familiar (or believes it is familiar) with some forms of police slang through police procedurals. Slang changes over time, and may be peculiar to a geographic area, but there are compilations of police slang.<sup>41</sup> Police slang—as opposed to official jargon—is not common in judicial opinions, although there is the occasional quote.<sup>42</sup> For example, Justice Scalia wrote in *Scott v. Harris*,<sup>43</sup> describing a police chase:

Following respondent’s shopping center maneuvering, which resulted in slight damage to Scott’s police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a “Precision Intervention Technique (‘PIT’) maneuver, which causes the fleeing vehicle to spin to a stop.” Having radioed his supervisor for permission, Scott was told to “[g]o ahead and take him out.” Instead, Scott applied his push bumper to the rear of respondent’s vehicle. As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.<sup>44</sup>

The quoted, “[g]o ahead and take him out,” is vivid slang that contrasts strongly with the bland copspeak of the rest of the paragraph. Phrases such as “precision intervention technique,” “terminate the episode,” and “lead pursuit vehicle” conceal the exact action, and yet serve to identify the writer and reader with the police, who presumably reported the story with this language.<sup>45</sup>

While police slang appears occasionally in opinions, copspeak such as that used in *Scott v. Harris* is fairly common in the fact sections of criminal opinions. It is especially thick in unpublished decisions. In part, that may be due to court caseloads and the fact that fairly inexperienced law clerks are drafting a significant portion of unpublished opinions. It may also be due to an uncritical adoption of the police and prosecutor’s version of events.

A typical example:

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question; they either spout conclusions or do not understand. This often gives the prosecutor, under the guise of an objection, an opportunity to suggest an answer, which is then obligingly given.” *Id.*

<sup>41</sup> See, e.g., GIBBONS, *supra* note 39, at 50–51; *Law Enforcement Jargon*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Law\\_enforcement\\_jargon#United\\_States](https://en.wikipedia.org/wiki/Law_enforcement_jargon#United_States) (last visited July 7, 2016) (listing police initialisms, acronyms, and abbreviations) [<https://perma.cc/37UV-SMST>].

<sup>42</sup> A search for “police jargon” in Westlaw retrieves numerous cases that give examples of police slang terms. *E.g.*, *Commonwealth v. James*, 69 A.3d 180, 191 (Pa. 2013) (“[T]he phrase ‘trash pull’ is accepted police jargon, recognized by Pennsylvania jurisprudence as describing the investigation of discarded trash.”) (emphasis omitted) [<https://perma.cc/L5AB-VLLN>].

<sup>43</sup> 550 U.S. 372, 375 (2007) [<https://perma.cc/5FES-ELD4>].

<sup>44</sup> *Id.* (footnote and citations omitted).

<sup>45</sup> In addition, the final sentence of this quoted paragraph helps tell the police story by distancing the reader from the gruesome consequences of police action. In contrast to the vivid immediacy of the preceding sentence, this sentence uses the detached term “rendered” and the general term “injured.” *Id.*

Eighteen months prior to trial, in connection with the investigation of Marcellino's murder, Detective Rosario, of the New York City Police Department, interviewed an individual named Ray Jerez who was, at the time, incarcerated. In that interview Jerez stated that, immediately after the shooting, Mitchell told him that the shooter was an individual named Nano.<sup>46</sup>

Another example:

An arrest and altercation ensued between the defendant and the officer, after defendant had been stopped on the highway for operating his automobile with defective equipment. At some point in the altercation, the police officer received cuts on his hand.<sup>47</sup>

What makes this copspeak is the use of "individual named Ray Jerez" instead of simply "Ray Jerez," and "who was, at the time, incarcerated" instead of "in prison [or jail]." Copspeak is formal and precise-sounding, yet often actually vague. Words such as "altercation" obscure whether there was a verbal argument, fistfight, or fight with weapons. "Authorization" obscures whether the officer received verbal permission, from whom, and what exactly was said, or whether there was a written order. "Determined" masks how the officer figured something out.

Copspeak is easily mocked, even by police themselves.<sup>48</sup> The fault for this speech may not lie entirely with the police. Scholars have noted how search and seizure law has developed in such a way as to encourage police to use certain vague phrases to fit those used in the case law: phrases such as "[f]urtive [m]ovements," "high-crime area," "training and experience."<sup>49</sup> But much copspeak seems intended to insulate police from criticism, or to heighten impressions of police expertise and specialization. Thus, for example, police do not shoot a person, they "discharge[] [their] weapon, striking [an] individual."<sup>50</sup>

Even when opinions are not written entirely in stilted copspeak (and most of them are not), they may use details and phrases that clearly identify the story as a police narrative. For example, the precise time and terms such as "controlled purchase" and "on his person" in the following excerpt suggest a police report:

About 2:50 p.m. on April 25, 2007, Senior Deputy Sheriff Victor Fazio of the Ventura County Sheriff's Department witnessed defendant Gregory Diaz

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<sup>46</sup> *Hernandez v. Burge*, 137 F. App'x 411, 413 (2d Cir. 2005).

<sup>47</sup> *State v. Allen*, 427 A.2d 373, 373 (Vt. 1981) [<https://perma.cc/64PQ-GMXM>].

<sup>48</sup> One officer offered a linguistics student the following example as parody: "He was hit by a projectile from a high powered weapon, numerous times until his bodily functions ceased," meaning he was shot dead. GIBBONS, *supra* note 39, at 86.

<sup>49</sup> Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 505 (2015) (alteration in original) (footnotes omitted) [<https://perma.cc/X98J-J69K>].

<sup>50</sup> Peter Cox & Matt Sepic, *Autopsy: Gunshot to Head Killed Jamar Clark in Mpls. Police Shooting*, MINN. PUB. RADIO NEWS (Nov. 17, 2015), <http://www.mprnews.org/story/2015/11/17/51-arrested-in-shooting-protest-that-blocked-i94> (quoting a Minnesota Bureau of Criminal Apprehension statement about the death of Jamar Clark) [<https://perma.cc/XAL8-N3UL>].

participating in a police informant's controlled purchase of Ecstasy. Defendant drove the Ecstasy's seller to the location of the sale, which then took place in the backseat of the car defendant was driving. Immediately after the sale, Fazio, who had listened in on the transaction through a wireless transmitter the informant was wearing, stopped the car defendant was driving and arrested defendant for being a coconspirator in the sale of drugs. Six tabs of Ecstasy were seized in connection with the arrest, and a small amount of marijuana was found in defendant's pocket. Defendant had a cell phone on his person.<sup>51</sup>

Copspeak has made its way into ordinary speech, in part thanks to television police dramas as well as crime news.<sup>52</sup> Journalists in a hurry often report news in the copspeak given to them by police departments, speaking of “alleged suspect[s]” and “active shooter[s].”<sup>53</sup>

But the police narrative is not dependent on copspeak or police slang. Accomplished writers are able to present the police narrative in straightforward, even compelling, language. Here, Chief Justice Roberts describes a traffic stop:

Two men were in the car: Maynor Javier Vasquez sat behind the wheel, and petitioner Nicholas Brady Heien lay across the rear seat. Sergeant Darisse explained to Vasquez that as long as his license and registration checked out, he would receive only a warning ticket for the broken brake light. A records check revealed no problems with the documents, and Darisse gave Vasquez the warning ticket. But Darisse had become suspicious during the course of the stop—Vasquez appeared nervous, Heien remained lying down the entire time, and the two gave inconsistent answers about their destination. Darisse asked Vasquez if he would be willing to answer some questions. Vasquez assented, and Darisse asked whether the men were transporting various types of contraband. Told no, Darisse asked whether he could search the Escort. Vasquez said he had no objection, but told Darisse he should ask Heien, because Heien owned the car. Heien gave his consent, and Darisse, aided by a fellow officer who had since arrived, began a thorough search of the vehicle. In the side compartment of a duffle bag, Darisse found a sandwich bag containing cocaine. The officers arrested both men.<sup>54</sup>

The absence of police jargon words such as “Hispanic male individual” and the use of simple verbs such as “sat,” “lay,” and “owned” make the story seem simple and straightforward. It is nevertheless a story from the police point of view—the police narrative of events—that invites us to identify with the officer. Thus it is the choice of details, point of view,

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<sup>51</sup> *People v. Diaz*, 244 P.3d 501, 502 (Cal. 2011) [<https://perma.cc/LV72-QWRY>].

<sup>52</sup> E.J. Dionne Jr., *Best Way to Learn ‘Copspeak’ Is to Go on a ‘Ridealong’: We Love It, But Do We Know What It Means?*, NAT’L POST, May 22, 1999 (on file with author) (crediting the increased use of copspeak to television dramas, newscasts, movies, and novels focused on crime).

<sup>53</sup> See the list of overused copspeak phrases in the news noted by Dick Hilker, *Opinion, Hilker: A Scourge of Cop-Speak Copycats*, DENVER POST, <http://www.denverpost.com/2015/12/31/hilker-a-scourge-of-cop-speak-copycats/> (last updated Apr. 19, 2016, 4:59 PM) [<https://perma.cc/X3X3-BQPH>].

<sup>54</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (citing the trial court opinion, 737 S.E.2d 351, 352–53 (2012)) [<https://perma.cc/BY7M-EFTM>].

and choice of emphasis, rather than police jargon or copspeak, that conveys the police narrative in this account.

### III. COUNTER-NARRATIVES: THE SUSPECTS' STORIES

What might a counter-narrative of police conduct look like? Counter-narratives generally work by humanizing the persons who come into contact with police, encouraging the reader to identify with them rather than the police officers. More rarely, a counter-narrative might include facts about police–community relations that can put an encounter in a very different light. This additional context can radically change the story—just as the dissemination of videos showing unprovoked police shootings can radically change the context in which we assess police accounts of events. This section explores these two aspects of a counter-narrative: humanizing nonpolice subjects in police encounters and including context about police–community relations.

An example of humanizing the suspects in a police encounter occurs in *Rodriguez v. United States*,<sup>55</sup> involving a traffic stop. In this search and seizure case, the counter-narrative must overcome the inevitable ending in which the officer is correct in his or her suspicions. This is the defense challenge in all Fourth Amendment cases—to get the reader to see the public interest in protecting a criminal suspect’s constitutional rights. In *Rodriguez*, Justice Ginsburg meets this challenge by telling a story that suggests an officer went too far in detaining the defendant during the stop. She does this by inviting the reader to identify with the driver and passenger, who are stopped only because an Officer Struble “observed a Mercury Mountaineer veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds and then jerk back onto the road.”<sup>56</sup>

Struble approached the Mountaineer on the passenger’s side. After Rodriguez [the driver] identified himself, Struble asked him why he had driven onto the shoulder. Rodriguez replied that he had swerved to avoid a pothole. Struble then gathered Rodriguez’s license, registration, and proof of insurance, and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble answered that he was not. Rodriguez decided to wait in his own vehicle.

After running a records check on Rodriguez, Struble returned to the Mountaineer. Struble asked passenger Pollman for his driver’s license and began to question him about where the two men were coming from and where they were going. Pollman replied that they had traveled to Omaha, Nebraska, to look at a Ford Mustang that was for sale and that they were returning to Norfolk, Nebraska. Struble returned again to his patrol car, where he completed a records check on Pollman, and called for a second

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<sup>55</sup> 135 S. Ct. 1609 (2015) [<https://perma.cc/939R-DLK2>].

<sup>56</sup> *Id.* at 1612.

officer. Struble then began writing a warning ticket for Rodriguez for driving on the shoulder of the road.

Struble returned to Rodriguez's vehicle a third time to issue the written warning. By 12:27 or 12:28 a.m., Struble had finished explaining the warning to Rodriguez, and had given back to Rodriguez and Pollman the documents obtained from them. As Struble later testified, at that point, Rodriguez and Pollman "had all their documents back and a copy of the written warning. I got all the reason[s] for the stop out of the way[,] . . . took care of all the business."

Nevertheless, Struble did not consider Rodriguez "free to leave." Although justification for the traffic stop was "out of the way," Struble asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no. Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied. At 12:33 a.m., a deputy sheriff arrived. Struble retrieved his dog and led him twice around the Mountaineer. The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.<sup>57</sup>

Although, like all search and seizure cases, the end of the story proves the officer's suspicions were correct, the story is told in a way that invites the reader to identify with the driver and passenger—until the end. No clues are given about why the officer detained the men longer than the stop justified or why he ran a check on the passenger's identification, so that the officer simply appears to be overreaching. The quotations in the last paragraph (the justification for the stop was "out of the way") indicate that the officer knew he was going beyond the scope of a lawful search. The opinion's fact section is thus really two stories told at once: a counter-narrative of a police officer stopping ordinary drivers for no good reason and a traditional story of a police officer successfully following his gut. The second story, however, is suspended during most of this account.

Section 1983<sup>58</sup> lawsuits, where the plaintiff sues government actors for a violation of civil rights, may also provide counter-narratives of police conduct. In these cases, where the plaintiff is often shown to be innocent of any criminal activity, the officer is not vindicated by the results of the search or detention of the plaintiff. Thus, a story of ordinary people and police aggression can be more easily told. In § 1983 cases, the issue often boils down to qualified immunity, which requires a determination of whether the officer violated clearly established constitutional rights.<sup>59</sup> A

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<sup>57</sup> *Id.* at 1613 (alterations in original) (citations omitted).

<sup>58</sup> 42 U.S.C. § 1983 (2012) [<https://perma.cc/C7V7-APAU>].

<sup>59</sup> "Governmental actors are 'shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" "[T]he salient question . . . is whether the state of the law' at the time of an incident provided 'fair

recent U.S. Supreme Court § 1983 decision tells a story of excessive force, and possibly biased policing, where an officer assumes that a young man and his parents are lying to him.<sup>60</sup>

The story took place at 2:00 a.m. in Bellaire, Texas.<sup>61</sup> Officer Edwards saw a black Nissan SUV park in front of a house and two men get out.<sup>62</sup> The officer incorrectly typed the license plate number into his computer and the incorrect number matched a stolen vehicle of the same make and model.<sup>63</sup> The officer decided to confront the two men:

Edwards exited his cruiser, drew his service pistol and ordered Tolan and Cooper to the ground. He accused Tolan and Cooper of having stolen the car. Cooper responded, “That’s not true.” And Tolan explained, “That’s my car.” Tolan then complied with the officer’s demand to lie face-down on the home’s front porch.

As it turned out, Tolan and Cooper were at the home where Tolan lived with his parents. Hearing the commotion, Tolan’s parents exited the front door in their pajamas. In an attempt to keep the misunderstanding from escalating into something more, Tolan’s father instructed Cooper to lie down, and instructed Tolan and Cooper to say nothing. Tolan and Cooper then remained facedown.

Edwards told Tolan’s parents that he believed Tolan and Cooper had stolen the vehicle. In response, Tolan’s father identified Tolan as his son, and Tolan’s mother explained that the vehicle belonged to the family and that no crime had been committed. Tolan’s father explained, with his hands in the air, “[T]his is my nephew. This is my son. We live here. This is my house.” Tolan’s mother similarly offered, “[S]ir this is a big mistake. This car is not stolen. . . . That’s our car.”<sup>64</sup>

The parents’ pleas are ignored, however, and the story continues:

While Tolan and Cooper continued to lie on the ground in silence, Edwards radioed for assistance. Shortly thereafter, Sergeant Jeffrey Cotton arrived on the scene and drew his pistol. Edwards told Cotton that Cooper and Tolan had exited a stolen vehicle. Tolan’s mother reiterated that she and her husband owned both the car Tolan had been driving and the home where these events were unfolding. Cotton then ordered her to stand against the family’s garage door. In response to Cotton’s order, Tolan’s mother asked, “[A]re you kidding me? We’ve lived her[e] 15 years. We’ve never had anything like this happen before.”

The parties disagree as to what happened next. . . .

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warning’ to the defendants ‘that their alleged [conduct] was unconstitutional.’” *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) (alterations in original) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002)) (citations omitted) [<https://perma.cc/6UC6-64L4>].

<sup>60</sup> *Id.* at 1863–64.

<sup>61</sup> *Id.* at 1863.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1863 (alterations in original) (citations omitted).

....

Both parties agree [however] that Tolan then exclaimed, from roughly 15 to 20 feet away, “[G]et your fucking hands off my mom.” The parties also agree that Cotton then drew his pistol and fired three shots at Tolan. Tolan and his mother testified that these shots came with no verbal warning. One of the bullets entered Tolan’s chest, collapsing his right lung and piercing his liver. While Tolan survived, he suffered a life-altering injury that disrupted his budding professional baseball career and causes him to experience pain on a daily basis.<sup>65</sup>

This story is one of an ordinary family surprised by an officer’s incorrect accusation, made at the point of a gun, and the officer’s obtuse refusal to hear their explanation. Certain details humanize the family, such as the image of the parents in their pajamas—the father with his hands in the air—while it is the police who appear dangerous and out of control.

A very different version of these events, one favorable to police, was told by the court of appeals in this same case:

Officer Edwards exited his cruiser, drew his service pistol and flashlight, identified himself as a police officer, and ordered Robbie Tolan and Cooper to “come here”. When Robbie Tolan and Cooper cursed Officer Edwards and refused to comply, Officer Edwards stated to them his belief the black Nissan was stolen and ordered them onto the ground.

Shortly thereafter, Robbie Tolan’s parents, Bobby and Marian Tolan, exited the house through the front door. Again, Officer Edwards stated his belief that Robbie Tolan and Cooper had stolen the Nissan; Robbie Tolan and Cooper complied with Officer Edwards’ ordering them onto the ground only after Marian and Bobby Tolan ordered them to do so. . . . Bobby Tolan yelled at Cooper and Robbie Tolan to stay down; and Marian Tolan walked repeatedly in front of Officer Edwards’ drawn pistol, insisting no crime had been committed. Dealing with four people in a chaotic and confusing scene, Officer Edwards radioed for expedited assistance. Sergeant Cotton responded and, hearing the tension in Officer Edwards’ voice, believed him to be in danger.<sup>66</sup>

This version of the story thus sets the stage for an aggressive police response:

Upon his arrival, Sergeant Cotton observed: Officer Edwards with pistol drawn; Bobby Tolan standing to Officer Edwards’ left, next to a sport-utility vehicle parked in the Tolans’ driveway, where Officer Edwards had ordered him to stand; Marian Tolan “moving around” in an agitated state in front of Officer Edwards; and Cooper lying prone. Sergeant Cotton drew his pistol and moved in to assist. . . .

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<sup>65</sup> *Tolan*, 134 S. Ct. at 1863–64 (alterations in original) (citations omitted). Compare the details of Tolan’s injuries depicted in the last two sentences with the terse statement in *Scott v. Harris*, 550 U.S. 372, 375 (2007) (“Respondent was badly injured and was rendered a quadriplegic.”).

<sup>66</sup> *Tolan v. Cotton*, 713 F.3d 299, 302 (5th Cir. 2013).

....

Sergeant Cotton recognized the immediate need to handcuff and search the felony suspects, but Marian Tolan’s movement and demeanor frustrated the Officers’ doing so; . . .

....

Sergeant Cotton’s method of handling Marian Tolan angered Robbie Tolan; upon seeing his mother pushed into the garage door and hearing a metallic impact, Robbie Tolan yelled “get your fucking hands off my mom!”, pulled his outstretched arms to his torso, and began getting up and turning toward Sergeant Cotton. Fearing Robbie Tolan was reaching towards his waistband for a weapon, Sergeant Cotton drew his pistol and fired three rounds at Robbie Tolan, striking him once in the chest and causing serious internal injury.<sup>67</sup>

The difference between the two versions is not merely the court of appeals’ emphasis on what the officer saw and experienced (the two young men initially cursed and refused to obey orders to get on the ground, and the parents were arguing with police), but also the way in which the Tolans are portrayed. In the Supreme Court version, the Tolans are humanized. We are made very aware of the presence of the parents vouching for their son. The anger of the young men and the parents is downplayed, while the fact that they have been stopped just outside their own home only because the officer decided to run their plates, and did so ineptly, is emphasized. In the court of appeals version, the Tolans are presented as unreasonably angry and uncooperative, and therefore potentially dangerous.

Yet although they present very different stories, both narratives, like most judicial police narratives, give us limited context. The popular police narrative is that police are always facing danger, and that everyone can be a threat. Similarly, in opinions, we are often told that encounters take place in “high crime areas,” with racial implications about the residents.<sup>68</sup> In the *Tolan* case, for example, the court of appeals tells us there had been many car burglaries in the area.<sup>69</sup> But we learn no additional context that might give meaning to the reactions of the people they stop.<sup>70</sup> Even in the Supreme Court account of the Tolan shooting, above, there is no indication why the young men might have been so angry: Were the police known to

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<sup>67</sup> *Id.* at 302–03.

<sup>68</sup> “African Americans and Hispanics tend to populate poor, inner city neighborhoods, which are commonly known to be high crime areas.” Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 386 (2001) (footnote omitted).

<sup>69</sup> 713 F.3d 229, 305 (5th Cir. 2013).

<sup>70</sup> Although race is not mentioned in the *Tolan* opinions, The NAACP filed an amicus brief in the Supreme Court, referring to the role of implicit bias resulting in “unjustified use of lethal force against young African-American men” and asserting that the victim of the police shooting was African-American. Motion of the NAACP Legal Defense & Educational Fund, Inc., for Leave to File Brief Amicus Curiae in Support of Petitioner, *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (No. 13-551) [<https://perma.cc/V3UU-EFXD>].

harass people in that neighborhood? Did they routinely run plates for no reasons? Had the men been stopped for no reason before?

A case from the Washington Supreme Court provides an illustration of how additional context can change a story significantly. A seventeen-year-old boy was charged and convicted of obstruction of a police officer for his conduct while police were dealing with his intoxicated sister, “R.”<sup>71</sup> The lower appellate court told the story as follows:

According to Officer Jenkins, “just as things kind of started to settle,” E.J.J., R.’s 17-year-old brother, stepped outside of the home and approached R. and the officers. Officer Jenkins informed E.J.J. that the officers were “in the middle of an active investigation” and asked him to go back inside the house and close the door. Although the officer repeated this request “four or five times,” E.J.J. refused to comply. Indeed, E.J.J. became “hostile” when the officer made this request. According to Officer Barreto, E.J.J.’s presence made it “very difficult” to calm his sister, and, as a result of his presence, the scene “escalated very quickly into a very hostile situation.” Officer Jenkins similarly testified that, although R. had become calm, she “began to escalate” when E.J.J. came outside. Officer Jenkins described E.J.J. as “irate” during this exchange, calling the officers names, yelling, and using profanity. E.J.J. was advised by the officers that he could be “arrested for obstructing” if he refused to comply with their orders.

Eventually, Officer Jenkins, without touching E.J.J., escorted him back to the house. The officer then asked E.J.J. multiple times to close the door to the house, and E.J.J. repeatedly refused. Several times, Officer Jenkins closed the door, and E.J.J. reopened it. The home had two doors, an outer “wrought iron door” that someone inside the home could see through and an inner “solid door.” Officer Jenkins wanted E.J.J. to close the solid door because, when only the wrought iron door was closed, E.J.J. “was still able to see what we were doing.” This concerned the officer because if E.J.J. “chose to harm us, he’d have the ability to do so without us knowing.”<sup>72</sup>

The account relies heavily on the officer’s testimony, liberally quoted. There is some copspeak or jargon: “hostile situation,” “active investigation,” “began to escalate.” But, most importantly, the account focuses on the officers’ fear of what the boy might do, based on what seems to be the boy’s inexplicable rage and rudeness. This court upheld the conviction.

The Washington Supreme Court reversed the intermediate court. The majority told the story in this way:

The police . . . escort[ed] R.J. out of the house 10 to 15 feet away from the front door, where the officers attempted to calm her down. E.J.J. grew concerned when he saw an officer reach for what he perceived to be a nightstick. E.J.J. exited the house and stood on the porch, telling the officers

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<sup>71</sup> State v. E.J.J., No. 67726-8-1, 2013 WL 815921, at \*1 (Wash. Ct. App. Mar. 4, 2013).

<sup>72</sup> *Id.* at \*1–2.

that R.J. was his sister and that they should not use the nightstick. The officers advised him that they were in the middle of their investigation and instructed him multiple times to leave the scene and return to the house. Initially, E.J.J. did not comply, questioning why he had to return to the house. When, eventually, he did return to his home, he stood in the open doorway and continued his verbal interaction with the officers. . . . The officers directed E.J.J. multiple times to close the solid wood door and to withdraw further into the home, but E.J.J. refused, stating that he wanted to supervise the scene from the doorway (10 to 15 feet away from the other officers and R.J.) to make sure that R.J. was not harmed. E.J.J. continued to stand behind the closed wrought iron door. Multiple times, an officer reached into the home to close the solid door. E.J.J. would immediately reopen it. At this point, E.J.J. was irate, yelling profanities and calling the officers abusive names. An officer warned E.J.J. that he could be arrested for obstruction. After E.J.J. continued to reopen the solid door, an officer put him under arrest for obstruction of a law enforcement officer. The entire interaction lasted approximately 10 to 15 minutes.<sup>73</sup>

This account gives us more from the boy's perspective. We learn the important fact that he saw the officer reach for his nightstick, and that he was trying to make sure the officers did not hurt his sister. The fact that the boy used profanity is downplayed through its placement near the end of the paragraph. This story provides some humanity to E.J.J., rather than presenting him simply as disrespectful, angry, and a potential threat.

But it is the concurring opinion of Justice González that provides the most radical retelling of the story. Justice González brings in facts about the police department and national events<sup>74</sup> that could help explain, and even justify, the boy's actions.

On February 14, 2011, E.J.J.'s mother called the police to assist her family in crisis. E.J.J.'s younger sister was intoxicated and breaking windows. The police responded and intervened. E.J.J., 17 years old at the time, saw one officer raise his nightstick as the police tried to subdue his sister. E.J.J. was concerned for his sister's welfare and let the police know he was watching. E.J.J. and one officer called each other names. An officer ordered E.J.J. to retreat to his house. At first E.J.J. refused, but ultimately he acceded. Once inside, E.J.J. asserted his right to watch the police from inside his own home. He refused an unlawful order to close his own door. He refused to turn away. For this, he was arrested, charged, and convicted. (If this is typical of the cases for which King County wants to build a new youth jail, perhaps the community opposition is understandable.)

. . . [T]his case is about Liberty in context. The real context is not subsequent events in Missouri or New York. The context is that E.J.J. is a

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<sup>73</sup> State v. E.J.J., 354 P.3d 815, 816–17 (Wash. 2015) (footnotes omitted).

<sup>74</sup> Chief Justice Madsen also discussed this context, but used it to argue for a new common law requirement for an obstruction conviction to prevent its application when a police officer's conduct "substantially contributed to the escalation" of the events leading to arrest. *Id.* at 821 (Madsen, C.J., concurring). She would have upheld the trial court's findings of fact about E.J.J.'s conduct. *Id.* at 824.

young black man in a city where the police have been found by the United States Department of Justice (DOJ) to use excessive force against nonviolent black youth, especially when intoxication or mental health issues are involved, and that the charge of obstruction is used against black defendants disproportionately. Even if the officers who responded to E.J.J.'s family that night are unfairly painted by the DOJ's brush, E.J.J. had cause to be concerned for his sister and a right to observe, especially from inside his own home.<sup>75</sup>

In footnotes, Justice González described the police killings of unarmed black men that had been in the news, as well as the local community opposition to the city's plans to build additional juvenile detention space, opposition based on a sense that too many children of color were being funneled into the justice system.<sup>76</sup> He also noted a recent federal investigation of the Seattle Police Department's use of force:

In its exhaustive investigation of the Seattle Police Department (SPD), the DOJ found that “among the 76 ‘obstruction only’ charges [filed in 2008], 51% involved Black individuals.” Though this alone should be cause for grave concern given that African Americans make up about 7 percent of Seattle's population, it is especially alarming when coupled with the fact that more than half of all incidents involving excessive or unreasonable uses of force by the SPD involved nonwhite subjects.<sup>77</sup>

Many readers may find this to be too much context. They may object that these additional facts about controversies national and local should not affect the evaluation of the boy's conduct or that of these police officers. They might fear that such an approach to the facts of criminal cases could excuse all kinds of bad behavior, and that no matter what might be going on in the world, individuals should obey police orders. Certainly this kind of “context” is not what we are used to in appellate fact statements.

Yet, it is common to see other kinds of context in judicial opinions: that the area where the incident occurred is a high-crime area, for example, or that weapons are common, or other general facts about suspected criminals that officers have learned through “training and experience.” This context that supports the police narrative is rarely questioned.

This other context, however—the facts that citizens know or have heard about the police—is as relevant as the facts that police know or have heard about the citizens whom they are policing. The relevance of what citizens know about police in a particular neighborhood can also come up

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<sup>75</sup> *Id.* at 830–31 (González, J., concurring) (footnotes omitted). Justice González concluded: “I acknowledge that E.J.J.'s behavior was, in some ways, typically juvenile. It must have made it harder for the police officers to do their jobs; verbally challenging officers ‘operates, of course, to impair the working efficiency of government agents.’ But free speech often ‘demands some sacrifice of efficiency.’ We should not criminalize and pathologize typical juvenile behavior.” *Id.* at 831 (citations omitted) (quoting *City of Houston v. Hill*, 482 U.S. 451, 463 n.12 (1987)).

<sup>76</sup> *Id.* at 830 n.4–5.

<sup>77</sup> *E.J.J.*, 354 P.3d at 831 n.6 (alteration in original) (citations omitted).

in the context of search and seizure law. In *Illinois v. Wardlow*,<sup>78</sup> the majority held in 2000 that a defendant's flight, in a high-crime Chicago neighborhood, upon seeing police, could justify an investigative stop leading to arrest.<sup>79</sup> Dissenting in part, Justice Stevens noted that among those residing in high crime areas, "there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.'"<sup>80</sup> Writing well before the videos of recent years that showed unprovoked police shootings, or the revelations about police torture of minority men in Chicago,<sup>81</sup> Justice Stevens stated, "evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive."<sup>82</sup>

Because this context does not fit easily into the police narrative that we are accustomed to, it may feel wrong, or at least surprising. But just as the videos of police shootings of unarmed civilians require white viewers to rethink their assumptions about police conduct, additional context about community-police relations can encourage courts to hesitate before imposing the default police narrative upon the facts of a case.

#### CONCLUSION

The police narrative, favoring the police perspective, is prevalent in appellate court decisions. The stories are formed by decisions about language, point of view, detail, and context. Such stories are not necessarily false or misleading, but legal writers and readers should be aware that they are a kind of narrative argument. We should recognize the possibility of alternative narratives, from different points of view and with different context. The purpose of this essay has been to highlight some of the key features of the police narrative as well as the occasional counter-narrative. In an age when police stories are under increasing scrutiny outside the courtroom, legal writers and readers need to be aware of the power of these narratives and to understand their choices in presenting a narrative of the facts.

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<sup>78</sup> 528 U.S. 119 (2000) [<https://perma.cc/ME38-VYHV>].

<sup>79</sup> *Id.* at 124–26.

<sup>80</sup> *Id.* at 132–33 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

<sup>81</sup> See, e.g., Fran Spielman, *Chicago Pays \$5.5M in Reparations to 57 Burge Torture Victims*, CHI. SUN TIMES (Jan. 4, 2016), <http://chicago.suntimes.com/news/7/71/1225907/chicago-pays-5-5-million-reparations-57-burge-torture-victims> [<https://perma.cc/M43P-5T8A>].

<sup>82</sup> *Wardlow*, 528 U.S. at 134 (Stevens, J., concurring in part and dissenting in part). In footnotes seven through ten, Justice Stevens cited numerous studies and reports in support. *Id.* at 132–33 nn.7–10.