

# Crime, Legitimacy, *Our Criminal Network*, and *The Wire*

Bennett Capers\*

## I. THE SCENE: TAKE ONE

So the task the group of us set for ourselves over drinks was to each select a scene from *The Wire* to use as the basis for a discussion. This, it turned out, was easier said than done. To get ideas, I looked at a message board on the show's website that invited viewers to select their favorite scenes. The scenes viewers selected are funny and telling. But I think one viewer put it best. He wrote on the message board, "The whole fucking thing."

Looking back over the series, it occurs to me that one reason I had difficulty selecting just one scene is because the show complicates the politics of identification in interesting ways. Consider Season One, which invites identification on several levels. The season begins with Baltimore brass ordering Narcotics Lieutenant Cedric Daniels to organize a detail of narcotics and homicide cops to take down Avon Barksdale's drug crew, which runs the distribution of heroin in several of Baltimore's projects. Realizing that low-level "buy and busts" are getting them nowhere, the detail of cops, at the urging of Homicide Detective Jimmy McNulty, add visual and audio surveillance to their law enforcement tools. (Hence, the title: *The Wire*.) The set-up thus encourages a level of identification with the surveillance team. Just as the lead officers watch and listen in on Barksdale's crew to figure out how they operate, the television viewer watches and listens in too. Indeed, as one commentator puts it, even the title of the show "doubles as a metaphor for viewers' experience of listening in on [these] worlds."<sup>1</sup>

But then that identification becomes complicated. Any viewer who identifies with the putative hero of the show, Detective McNulty,<sup>2</sup> quickly realizes that he

---

\* Associate Professor of Law, Hofstra University School of Law. B.A., Princeton University; J.D., Columbia University School of Law.

<sup>1</sup> Lauren Mechling, *Inside The Wire*, WALL ST. J., Dec. 29, 2007, at W4.

<sup>2</sup> Of course, describing anyone as the nominal hero or protagonist of *The Wire*, which boasts a cast of over 70 characters, has its own difficulties. Detective McNulty is clearly the "star" of the show, and yet he is almost entirely absent from Season Four. Commenting on this difficulty, English Professor Caroline Levine suggests that the main characters in *The Wire* are the institutions themselves—the police department, the school system, the unions, the media, City Hall—rather than any of the individuals. As she puts it, "*The Wire* allows institutions to do the great bulk of the work traditionally done by characters: they take action, organize the social world, come into conflict, propel the plot, and perhaps most surprisingly, they provoke and produce intense feeling." Caroline

has a less than admirable personal life. (He's a heavy drinker. He's a reckless father. He's secretly sleeping with the prosecutor on the case. He recklessly, if not knowingly, suborns perjury.<sup>3</sup>) Any viewer who identifies with Narcotics Detective Shakima "Kima" Greggs, the putative heroine, soon realizes that she's not above engaging in excessive force when it suits her: twice in the first eight episodes.<sup>4</sup> Any identification with the lead prosecutor is also problematic: again, she's sleeping with the lead detective on the case, who's also the affiant on the wiretap affidavits.

And then there are the drug dealers, and the way race does and does not matter. The cops, prosecutors, and defense attorneys are mostly white, as is the one judge that has a recurring role, while Avon Barksdale's crew is all black. What are the politics of identification here? Or for that matter, what are the politics of identification when one senses that the smartest person on the show is Avon Barksdale's lieutenant in the drug organization, Stringer Bell, who attends business school at night, tries to explain microeconomics to his subordinates, and occasionally invokes Robert's Rules of Order to keep drug consortium meetings organized?

And how is identification further complicated by the many similarities between the cops and the drug dealers? Both groups share an obsession with the chain of command and getting paid. Both groups are plagued by nepotism and internal corruption. One quickly realizes the drug dealers have a code of ethics and a sense of retribution and deterrence as strong as the cops have, indeed stronger. For too many of the cops, making arrests is simply going through the motions. Drug dealers think about why they punish. Other similarities abound. One of the most telling moments in Season One is when Omar, my favorite character (black, gay, and a gangster) and a homicide detective realize they were in high school together.<sup>5</sup> (On a side note, if we could eliminate the "gangster" in Omar, he and I would have an almost perfect fit of identification.) And as any fan of *The Wire* knows, this is only Season One. The remaining seasons add layer upon layer to the narrative until what emerges is no longer solely a narrative about cops and drug dealers, but also about unions and city politicians and the school system and the media. By the end of the series, the viewer realizes that what

---

Levine, Artful Accuracy and the Problem of Form: Why *The Wire* Feels Real 6 (unpublished manuscript) (on file with author).

<sup>3</sup> Detective McNulty's subornation of perjury is at the heart of Alafair Burke's wonderful contribution to this mini-symposium. See Alafair Burke, "I Got the Shotgun": Reflections on *The Wire*, *Prosecutors*, and *Omar Little*, 8 OHIO ST. J. CRIM. L. 435 (2011).

<sup>4</sup> See *The Wire: The Buys* (HBO television broadcast June 16, 2002); *The Wire: One Arrest* (HBO television broadcast July 21, 2002).

<sup>5</sup> See *The Wire: One Arrest* (HBO television broadcast July 21, 2002).

started as a cops and drug dealers story has metastasized into a story about the city of Baltimore, Dickensian in scope, and yet decidedly contemporary.<sup>6</sup>

Selecting one scene from this? This was my difficulty.

## II. THE SCENE: TAKE TWO

Still, I agreed to focus on a particular scene. The scene I ultimately settled on is not necessarily my favorite scene from *The Wire*. For that, I would have to pick one of the scenes featuring the brilliant teenage actors of Season Four,<sup>7</sup> or a scene featuring the heroin addict turned informant Bubbles, movingly played by actor Andre Royo.<sup>8</sup> But the scene I selected is one that gets to me. It gets to me every time.

The scene begins with three officers, Herc, Carver, and Pryzbylweski (“Prez”), stoked on beer, deciding to put in an appearance at the Towers housing project to show them who runs things.<sup>9</sup> As Herc puts it, “You got to let these motherfuckers know who you are.”

The scene then cuts to the officers pulling into the Towers.<sup>10</sup> Certain that they have an audience of on-lookers from the windows in the Towers, the officers approach the first two men they see and publicly humiliate them, rough them up, then force them to drop their pants and lie spread eagle on the ground. Satisfied with this show of force, Carver and Herc yell up to the residents of the Towers watching from their windows, “[We] own these towers [and we’re] sick of this shit!”

But the real action begins as the three officers are returning to their car. Seeing a teenager leaning against their car, Officer Prez yells, “Move, shitbird!” When the youth protests, “I ain’t doing nothing,” Office Prez responds, “I got nothing for you,” and punches the youth in the eye using the butt of his pistol.

The Tower residents, having seen enough, begin hurling bottles and televisions from their windows onto the officers. While Officers Herc and Carver

<sup>6</sup> As David Simon puts it in his audio commentary on the first very episode, “It seems to be a cop show, blue lights flashing . . . [but it’s] really about the American city and about how we try to live together.” DVD: *The Wire: The Target* (audio commentary) (*The Wire: The Complete First Season* 2002).

<sup>7</sup> Luckily, David Alan Sklansky picked one of these scenes in his moving essay. See David Alan Sklansky, *Confined, Crammed, and Inextricable: What The Wire Gets Right*, 8 OHIO ST. J. CRIM. L. 471 (2011).

<sup>8</sup> Luckily, Alafair Burke discusses one of the scenes featuring Bubbles. See Burke, *supra* note 3, at 453-54.

<sup>9</sup> *The Wire: The Detail* (HBO television broadcast June 9, 2002).

<sup>10</sup> Interestingly, once the officers exit the vehicle, the camera work shifts to eye level and pulls alongside them. The result is more than verisimilitude. The use of the camera puts the TV viewer in the position of a hypothetical fourth officer, again complicating the politics of identification.

cover behind their vehicle and radio for police back-up, shouting “shots fired,” Officer Prez responds by firing blindly into the Tower windows.

After a brief cut, the scene jumps to a few hours later. Officers Herc and Carver are sitting in the back of a police vehicle, while Officer Prez stands nearby. Meanwhile, their police vehicle has been burned almost beyond recognition. Other officers have secured the area. Lieutenant Daniels arrives and confronts the three officers. The officers are full of denials, and Lieutenant Daniels makes it clear he doesn’t believe them.

**Carver:** They jumped us, boss.

**Daniels:** Who?

**Carver:** Fucking project niggers.

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

**Carver:** Field interviews, police work.

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

Lieutenant Daniels continues to berate the officers, but then ends by instructing them to lie.

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

[Silence. Finally Prez admits that he coldcocked the kid.]

**Daniels:** Why?

**Prez:** He pissed me off.

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

The scene ends. Later, we learn that, as a result of Officer Prez’s action, the kid is now blind in one eye.<sup>11</sup>

---

<sup>11</sup> *The Wire: The Detail* (HBO television broadcast June 9, 2002).

## III. LEGITIMACY

Viewed in isolation, the scene is a straightforward depiction of the police's use of excessive force. Indeed, it even fits the assumed paradigm: a white officer brutalizing a black youth. But nothing in *The Wire* is straightforward, or for that matter merely black or white. Although Officer "Prez" is white, his cohort Carver, who describes their "assailants" as "fucking project niggers," is black. Lieutenant Daniels, who coaches the officers on how to cover up their wrongdoing, is also black. And this is only one way *The Wire* complicates things. By Season Four, Officer Prez has quit the force, and is teaching Tower kids very much like the ones he once policed. In short, by Season Four Officer Prez is doing more to change Baltimore for the better than perhaps anyone else in the show. As for the architect of the cover-up, Lieutenant Daniels, the series makes clear that at bottom he believes he's doing "the right thing." In short, in *The Wire*, everyone is flawed.

The reason I chose this scene is only partly because of the way it de-shadows<sup>12</sup> the use of excessive force.<sup>13</sup> After all, numerous television shows depict the use of excessive force, although usually against one-dimensional individuals, often nameless, who are clearly marked as the bad guys. In these other shows (for example, *The Shield*), even when the force is clearly excessive and unlawful, it still seems deserved. And while the depiction of the cover-up, and the soon to follow "testilying," influenced my selection of this scene, it wasn't the predominant factor. The predominant factor was the way the scene captures the community's reaction.

Thanks largely to the work of social psychologist Tom Tyler, we know that normative factors, including perceptions of legitimacy, play an integral role in influencing compliance with the law.<sup>14</sup> The more an individual regards legal authorities as exercising legitimate authority, the more likely it is that such individual will voluntarily obey the law. Indeed, in his research, Tyler has found that the relationship between legitimacy and compliance is linear: "as legitimacy increases, so does compliance."<sup>15</sup> This remains true even when regression analysis is used to control for other factors.<sup>16</sup> As other scholars and I have noted,

---

<sup>12</sup> On the de-shadowing effect of "law and order" shows, see I. Bennett Capers, *Notes on Minority Report*, 42 SUFFOLK U. L. REV. 795, 796 (2009).

<sup>13</sup> There is evidence that a majority of Americans do not consider police brutality to be a pervasive problem. For example, a poll released by the Joint Center for Political and Economic Studies found that 43% of blacks believe police brutality and harassment are serious problems. Among the general public, the figure agreeing with this belief was only 13%. Michael A. Fletcher, *Study Tracks Blacks' Crime Concerns: African Americans Show Less Confidence in System, Favor Stiff Penalties*, WASH. POST, Apr. 21, 1996, at A11.

<sup>14</sup> TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 57 (1990).

<sup>15</sup> *Id.* at 57-58.

<sup>16</sup> *Id.* at 59.

legitimacy theory has particular consequences when it comes to minorities, given the disproportionate incarceration rates of blacks and Hispanics.<sup>17</sup> This becomes all the more true when we factor in the converse: that perceptions of illegitimacy appear to increase an individual's willingness to violate the law.<sup>18</sup>

What I like about this scene is that it is not just the television viewer who witnesses Officer Prez's use of excessive force. His actions are also witnessed by the residents of the Tower. (Indeed the camerawork encourages multiple and conflicting points of identification, repeatedly shifting from the officers' perspective to the perspective of the Tower residents.) The immediate consequences to the community perceiving this illegitimacy are obvious. The on-lookers react by attacking the officers, tossing trash at them, then bottles, even hurling a television set at them from one of the Tower windows. By morning, the officers' abandoned police vehicle will be set on fire and burned to a charred shell. But there are other, long-term consequences that are even more significant. The individual on-lookers, as a result of Officer Prez's actions, become a *community* of on-lookers, united in their hostility against the officers. And the officers, as a result of the community's response, become united in opposition. Don't get me wrong. Because of race, class, and privilege, the battle lines are already drawn. However, this incident reinforces the line, creating on both sides a sense of "us against them." None of this is good for crime control. As I have argued elsewhere, communities that perceive the police to be illegitimate are less likely to assist the police by providing information about a crime.<sup>19</sup> They are less likely to credit officers who testify in court, and less likely to convict a defendant based on police testimony.<sup>20</sup> They may even vote to acquit a defendant they believe to be guilty in order to send a message about police practices.<sup>21</sup> And they are less likely to voluntarily comply with the law themselves.<sup>22</sup>

Consider the real life shooting of Amadou Diallo, an unarmed immigrant from Guinea, in New York in 1999. At the time that the four white plain-clothes officers fired forty-one rounds into Diallo, apparently mistaking Diallo's wallet for a firearm, crime in New York City was on the decline.<sup>23</sup> After the shooting death, there was a month-long spike in crime.<sup>24</sup> The spike then reversed itself after the

---

<sup>17</sup> See I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835 (2008); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

<sup>18</sup> Capers, *supra* note 17, at 840-42.

<sup>19</sup> *Id.* at 865.

<sup>20</sup> *See id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 862-66.

<sup>23</sup> *Id.* at 865.

<sup>24</sup> *Id.*

officers were indicted on murder charges.<sup>25</sup> The acquittal of the officers in February 2000 is also interesting. Again, another spike in crime, this time lasting several months.<sup>26</sup> While there may be many explanations for this pattern, certainly one possibility is that there is a correlation between the perception of legitimacy and levels of crime.

*The Wire* even brings this correlation to the fore, at least in the case of the teenage victim. A few episodes after the scene I've described, the teenager that Officer Prez has blinded is arrested on unrelated charges, and is offered the opportunity to reduce his criminal exposure by cooperating with Lieutenant Daniels's team.<sup>27</sup> The teenager takes one look at Officer Prez, and rejects the opportunity.<sup>28</sup>

#### IV. 609'D

There is something else about this police brutality scene and its subsequent cover-up that merits discussion. To be sure, there is the ease with which Lieutenant Daniels coaches Officer Prez and his cohorts to lie to Internal Affairs. And in a subsequent scene, there is the casualness with which Lieutenant Daniels's supervisors give their imprimatur to the cover up. There is even the confidence Lieutenant Daniels exudes in explaining that this incident, while raising the ire of the Towers community, will soon be forgotten. And this is in fact how *The Wire* depicts Officer Prez's use of excessive force. It is a minor and temporary subplot in a few episodes, but is otherwise inconsequential. Brutality happens. Then is forgotten. Perceptions of illegitimacy may increase, but life goes on. As does the cycle of crime.

As someone who has written about the failure of prosecutors to prosecute officers who commit perjury or engage in excessive force, this narrative arc is familiar. But *The Wire*, I think, hints at another problem that I have not previously addressed. It does this by allowing a question to hang over this scene. Dozens of Tower residents witness Officer Prez assault the youth. Given the sheer number of witnesses, how is it possible that Officer Prez's act will go unpunished? How is it that the officers' version of events will be recorded as true? Let me put this differently. One stated explanation for the paucity of prosecutions for perjury or excessive force is that such cases are difficult to prove. But given the number of witnesses, how is that possible?

One problem is that, notwithstanding standard voir dire instructions that testimony of police witnesses is entitled to no special deference, the simple fact is

---

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (discussing crime levels following the Diallo shooting).

<sup>27</sup> *The Wire: One Arrest* (HBO television broadcast July 21, 2002).

<sup>28</sup> *Id.*

that society as a whole still tends to credit police testimony over other testimony.<sup>29</sup> This credit imbalance only increases when race is added to the equation.<sup>30</sup> Thus, in a he said/he said contest between a white cop and a black youth, or for that matter a white cop and black witnesses, the scales are already weighted, and the outcome is often a foregone conclusion.

But there is another problem that too often slips under the radar, and that is determinative in far too many cases, criminal and civil. I am referring here to Rule 609 of the Federal Rules of Evidence, and its state cognates. Rule 609, after all, allows witnesses, in both civil cases and criminal cases, to be impeached with evidence of a prior felony conviction to show the witness's untruthful character, subject to the court's discretion under Rule 403.<sup>31</sup> Moreover, any prior conviction, be it felony or misdemeanor, that involves dishonesty or a false statement, is automatically admissible; admissibility is not subject to the trial court's discretion.<sup>32</sup> What does this have to do with prosecutions based on the use of excessive force in poor, minority communities, or civil suits seeking damages against such officers? Quite a bit if we consider felony and misdemeanor rates in such communities.<sup>33</sup> (The reason for incredibly high felony and misdemeanor rates is another issue. One simple but problematic answer is that poor minorities are more likely to commit crimes. Another simple but problematic answer is that poor minorities are more likely to be targeted by the police (a safe assumption if we consider racial profiling data)).<sup>34</sup> Simply by virtue of Rule 609, many of the witnesses to the use of police brutality, including the victim, will themselves be

---

<sup>29</sup> Carol Steiker, *Contemporary Challenges to the Criminal Justice System*, 43 N.Y.L. SCH. L. REV. 79, 86 (1999) (observing that white jurors in particular "tend to credit police officers' testimony"); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306, 1313 (1998) (same); Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, BERKELEY J. CRIM. L. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1534132](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534132) (making a similar observation and citing studies with respect to judges crediting police testimony).

<sup>30</sup> I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1377-79 (2010).

<sup>31</sup> See FED. R. EVID. 609(a)(1). Although Rule 609 requires a more stringent balancing test when the witness is the accused, the balancing test often weighs in favor of admitting a prior conviction as a tool of impeachment.

<sup>32</sup> See FED. R. EVID. 609(a)(2). See also *United States v. Tracy*, 36 F.3d 187, 192 (1st Cir. 1994) (describing admissibility of a crime involving a dishonest or false statement as non-discretionary); *Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992) (similar).

<sup>33</sup> As Michelle Alexander recently observed, "in major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives." MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2010).

<sup>34</sup> See, e.g., I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. (forthcoming 2011).



marked as tainted witnesses, as less credible witnesses.<sup>35</sup> The scales are now further weighted.<sup>36</sup>

In *The Wire*, there is no need for a follow-up scene showing the officers being questioned by the police department's internal affairs bureau, or the result of such investigation. Nor is there any need for a follow-up scene showing the Assistant District Attorney mulling over the case or presenting the case to a grand jury. And there is no need for a scene depicting a civil rights suit. The police department and the residents of the Towers, with their respective "pools of knowledge,"<sup>37</sup> already know how this will all end. And this itself contributes to the legitimacy problem. From the point of view of the police, an incident involving excessive force is successfully neutralized as unproved. In the minds of the larger public, the use of excessive force remains a rare occurrence, limited to "bad apples" like Justin Volpe, the officer who sodomized Abner Louima in New York, or the few "rogue" New Orleans officers who are now under indictment for committing murder in the aftermath of Hurricane Katrina. But from the point of view of the community that has witnessed the use of excessive force, this evidences another example of a system of justice that is structurally unfair.

## VI. OUR CRIMINAL NETWORK

Thanks to English Professor Caroline Levine of University of Wisconsin, I have been thinking a lot recently about crime and the work we do as criminal law and procedure scholars.<sup>38</sup> I doubt this was her intent. But since literary theorists have long recognized that authorial intent is irrelevant—as Roland Barthes

---

<sup>35</sup> The number of excessive force actions in which courts have allowed plaintiffs and other witnesses to be impeached with prior convictions is quite large. See, e.g., *Simpson v. Thomas*, 528 F.3d 685 (9th Cir. 2008); *Loehr v. Walton*, 242 F.3d 834 (8th Cir. 2001); *Wilson v. Groaning*, 25 F.3d 581 (7th Cir. 1994); *Patterson v. County of Wayne*, 259 F.R.D. 286 (E.D. Mich. 2009); *Saunders v. City of Chicago*, 320 F.Supp.2d 735 (N.D. Ill. 2004); *Daniels v. Loizzo*, 986 F.Supp. 245 (S.D.N.Y. 1997). For more on the racial impact of Rule 609, see Montré D. Carodine, "The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Rule, 84 IND. L.J. 521 (2009).

<sup>36</sup> To make matters worse, police officers often enjoy a presumption of credibility buttressed by other Rules of Evidence that are largely discretionary in their application. For example, in *United States v. Whitmore*, 359 F.3d 609 (D.C. Cir. 2004), the court read Rule 608(a) narrowly to bar the introduction of reputation and opinion testimony that would have impeached the credibility of a police officer. See *id.* at 616–18.

<sup>37</sup> See David R. Maines, *Information Pools and Racialized Narrative Structures*, 40 SOC. Q. 317 (1999) (noting that information is often race-based, with blacks being privy to certain information that is largely unknown by whites, and vice versa).

<sup>38</sup> Several of the contributors to this mini-symposium were also taken by Caroline Levine's provocative essay.

famously put it, the author is dead<sup>39</sup>—I’m sure Professor Levine will not mind that her exegesis of *The Wire* got me thinking about *our* criminal network.

In her article on *The Wire*, Professor Levine turns to a new crop of theorists who focus on “complex bargaining and coordinating relationships between interest groups, public agencies, or nations.”<sup>40</sup> These patterns of connection—think of the synchronic form of graphs, or even the complex system of telephone wires and cables in the opening sequence of each episode of *The Wire*—in turn help explain the outcomes of encounters between institutions. Instead of focusing on sequential narrative and the idea of individual agents making conscious choices, these “network institutionalists” seek to reveal the role complex networks play—as they “encounter, collide, and reroute one another”<sup>41</sup>—in shaping and determining outcomes.

Further complicating things, networks may have multiple hubs and the networks themselves overlap. Individuals can belong to more than one network, and some individuals mediate and are mediated between networks.<sup>42</sup> For example, in *The Wire*, Detective McNulty is both a part of the Baltimore police network and someone who at various points becomes an unofficial point of interface between the police and the FBI, the police and state’s attorney’s office, the police and the judge who oversees the wiretap, and the police and the drug world.

Putting theory to practice, Professor Levine persuasively argues that *The Wire* exemplifies network theory in its insistence “that experience is structured and also rendered radically unpredictable by the dense overlapping of many institutions. . . . [T]he many plots of *The Wire* emerge precisely out of encounters among discrete and incommensurate institutions.”<sup>43</sup> She observes:

[T]he narrative first emerges out of the police investigation of the drug trade, as law enforcement tries to capture Avon Barksdale by proving that he is the hub of a network of linked corners and dealers. In order to succeed, the law enforcement side must gain access to the dealers’ principles of interconnectedness, and they do so through the wiretap, which itself both emerges from and exposes new links: it first brings together the Baltimore police, the FBI, the District Attorney, and the

---

<sup>39</sup> ROLAND BARTHES, *The Death of the Author*, in IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., 1977) (1977).

<sup>40</sup> Levine, *supra* note 2, at 18.

<sup>41</sup> See *id.* at 21. Professor Levine further elaborates on the difference between narratives and networks: “where narratives are organized around diachronic unfoldings, networks are composed of constant crisscrossings among nodes in a system, conventionally represented by synchronic forms like charts and maps.” *Id.* at 18.

<sup>42</sup> *Id.* at 20–21.

<sup>43</sup> *Id.* at 19.

courts, and it then allows them to piece together the structure of the Barksdale drug dealing hierarchy, which then links up to local politics and the real estate market; later, when the wire takes in the evidence of dockworkers, it also reveals global economic trading patterns that link urban poverty to unions and local politics to transnational criminal traffic. Thus the networking technology of the wiretap is itself a point of contact among other networks. The whole social world then emerges, in *The Wire*, not as a set of discrete hierarchies and institutions, but as the sum of the sites where they intersect.<sup>44</sup>

Taking this a step further, although the outcomes may superficially appear to be determined by the acts of individual characters, in fact they are largely determined by the interplay of various institutions. The individuals who hold positions, after all, are fungible, as the series repeatedly reminds us. Drug dealers are replaced, and so are cops. By contrast, the institutions have permanence. What matters to Detective McNulty, or Lieutenant Daniels, or Police Commissioner Burrell, is actually less important than what matters to the Police Department itself. But whether the Police Department can actually carry out its agenda depends on the actions and re-actions of an array of other institutions, including other law enforcement institutions (notably the FBI, the local prosecutors, the federal prosecutors, and the court system); the drug organizations; religious organizations; the unions; the bureaucracy of city government; the school system; redevelopment projects; even our social safety net. In short, the outcome depends not on the strategy of any one institution, but rather upon the chain reaction that may or may not occur when that institution encounters, collides with, intersects, and/or reroutes other institutions.

All of this brings me back to our criminal network, or rather, the work we do as criminal law and procedure scholars. So much of our work as scholars centers around improving discrete components of one particular institution. We cocoon ourselves in our offices and cubicles, and emerge months later with articles and essays and books that conclude with proposals for reform. We hope, through our normative musings, to improve criminal law as we know it, or improve criminal procedure as we know it, or at least our understandings of those disciplines. But where we fall short, I am beginning to think, is in recognizing and accounting for how our proposals to improve one institution, say the criminal justice system, may or may not depend on how that institution interacts with, transforms, and is transformed by other institutions. If it is true, as Levine suggests, that “institutions have a kind of causal power that overwhelms individual human agency,” and that such institutions have their own “logics,”<sup>45</sup> how should we incorporate these logics

---

<sup>44</sup> *Id.* at 21–22.

<sup>45</sup> *Id.* at 7–8.

in thinking through legal reform? What happens when we think of institutions as comprised of “complex and uneven overlappings of norms and practices that work against each other as often as they work together”<sup>46</sup>

Recently, I have been thinking and writing about rape law, especially how it is applied or not applied when the rape victim is male.<sup>47</sup> I have made proposals for reform. But however well-thought-out or well-intentioned my proposals, the fact remains that I have not attended to how the efficacy of my proposals is contingent upon the ongoing interactions and reactions of innumerable institutions and networks—in my case, district attorney’s offices, police departments, prison officials, legislators, the media, gay rights groups, rape reform advocates, religious groups—that have their own internal logic, and their own agendas. In *The Wire*, individual and institutional efforts at reform are usually redirected if not thwarted because of resistance or modifications from other institutions. The same is true of our proposals. In short, I have not sufficiently attended to our criminal network. And here is the thing: I am not sure any of us has.

## VII. CONCLUSION

In the end, notwithstanding my concern about the resistance of institutions and our own impotence as advocates for reform, I find myself returning to the police brutality scene that prompted this essay. After all, it is not just the residents of the Towers who witness this use of excessive force, and in witnessing come together as a community in opposition to the police. We, the viewers, also witness the scene. We do so from the comfort of our living rooms or dens, knowing that it is only fiction. But we know too that it is real in many respects. We watch. What community do we become, other than a community of spectators? How do we react?

A few years back, David Simon, joined by other writers of *The Wire*, announced that if asked to serve on a jury in a drug case, they would vote to acquit regardless of what evidence was presented. They declared, “What the drugs themselves have not destroyed, the warfare against them has.”<sup>48</sup> Their decision brings to mind Paul Butler’s argument for racial jury nullification.<sup>49</sup> While I don’t go so far, in the end, I do think that *The Wire* demands a reaction. It demands this of all of its viewers, including its fan base of criminal law and procedure professors. However ineffective, however complicated by networks and institutional intransigence and interactions, some reaction is demanded. The task

---

<sup>46</sup> *Id.* at 11.

<sup>47</sup> See I. Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. (forthcoming 2011).

<sup>48</sup> Ed Burns et al., *Saving Cities, and Souls*, TIME, March 17, 2008, at 50.

<sup>49</sup> See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

now, for those of us who care about “mak[ing] America what America must become,”<sup>50</sup> is to take the complexity of *The Wire*, and of the world we live in, as a challenge. In short, the task now is to react.

---

<sup>50</sup> See JAMES BALDWIN, *THE FIRE NEXT TIME* 24 (15<sup>th</sup> prtg. 1963) (“[G]reat men have done great things here, and will again, and we can make America what America must become.”).

