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### Policing Narrative

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# POLICING NARRATIVE

Tal Kastner\*

## ABSTRACT

*Counter narrative, a story that calls attention to and rebuts the presumptions of a dominant narrative framework, functions as an essential tool to reshape the bounds of the law. It has the potential to shape the collective notion of what constitutes legal authority. Black Lives Matter offers a counter narrative that challenges the characterization of the shared public space, among other aspects of contemporary society, as the space of law. Using the concept of necropower—the mobilization and prioritization of the state’s power to kill—I analyze the contested physical and conceptual space of law exposed by the counter narrative of Black Lives Matter. In doing so, this article suggests a need for legal doctrines to create space for otherwise excluded subjects in the framework of constitutional protections, such as the Fourth Amendment right to be free from unreasonable searches and seizures. More fundamentally, it identifies the way narrative informs the parameters of legal authority and legal recognition.*

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## I. INTRODUCTION

A formative civil rights intervention of our day, the Movement for Black Lives (the Movement),<sup>1</sup> counters a prevailing normative framework in a way that strikes at the heart of the intersection of law and society. The Movement’s most familiar manifestation, Black Lives Matter, exposes the complex dynamic of law—on the books, as interpreted doctrinal principles, and as enforced statutes—and society. In doing so, the Movement challenges the bounds of what ought to be considered the space of law’s protections and the identity of its subject. In examining the space of law, I refer to the experience of a subject’s material body on the street. A subject may inhabit a space of protections of rights typically accorded citizens or, alternatively, be positioned in an area circumscribed by suspicion, and thus be subjected to exceptions determined by racial identity. In addition, I analyze the conceptual boundaries of the law, including the positioning of certain forms of authority and evidence beyond legal recognition. In doing so, this article examines how the demarcation of material and conceptual space through law threatens to restrict the space of protected rights and presumed innocence that legal subjects inhabit.

As a conceptual framework with its own boundaries, narrative offers a means to challenge the demarcation of norms. Scholarship has con-

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1. For the Platform of the Movement for Black Lives, of which the Black Lives Matter Network is a part, see *Platform, THE MOVEMENT FOR BLACK LIVES*, <https://policy.m4bl.org/platform> [<https://perma.cc/XXW4-GVV8>] (last visited Feb. 20, 2018); see also Niraj Chokshi, *How #BlackLivesMatter Came to Define a Movement*, N.Y. TIMES (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/us/how-blacklivesmatter-came-to-define-a-movement.html>; *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> (tracing the development of the response to the acquittal of George Zimmerman into a global movement). The discussion that follows aims to follow the spirit of the Movement to the extent that it recognizes both the struggle of people of color in its particularity and the wider problem of marginalized identities to include other groups with related and intersecting issues, not least economic justice. See Charles “Chip” P. Linscott, *All Lives (Don’t) Matter: The Internet Meets Afro-Pessimism and Black Optimism*, 8 BLACK CAMERA 104, 108 (2017) (“#BlackLivesMatter promotes feminism, trans\* issues, LGBTQ activism, immigration reform, economic justice, and so on. . . . In other words, #BlackLivesMatter is not only about racial justice and police violence, but such is the crux of the movement . . . #BlackLivesMatter works for something in excess of equal representation, rights discourses, and cultural recognition, although those are all important components of the movement.”).

fronted the question of when storytelling should be admitted into the realm of law, but in doing so, this approach imagines a legal domain with fixed boundaries.<sup>2</sup> As this article demonstrates, however, narrative also impacts the parameters of the law.

As one example, the narrative implicit in Black Lives Matter reframes the context in which people assess legal structures and policies.<sup>3</sup> As Ta-Nehisi Coates asserts, the “destruction of black bodies” by the “larger culture . . . require[s] a new story told through the lens of our struggle.”<sup>4</sup> This story, and its demand for recognition and empathy, implicate the legal system as a mediator of social existence. The legal system operates as the structure that, in Coates’ epigraph from Richard Wright, “thrust[s]” the violated body, or “the sooty details of the scene,” “between the world” and the individual.<sup>5</sup> The Black Lives counter narrative calls attention to a boundary, informed by legal standards, that precludes a black subject from enjoying freedom in the world.

Most recognizably, Black Lives Matter has begun to create a space that recognizes how the law places different subjects beyond or within certain margins. It does so through virtual collectives of communication,<sup>6</sup> as well as resistance in the streets.<sup>7</sup> In the process, it calls attention to the narrative frames granted authority in and beyond the law. Specifically, it exposes the privileging of the bodies and perspectives of white people to counter the implicit story of equality under the law. Black Lives Matter thereby reveals the ways in which the cherished notion that subjects are presumed innocent until proven guilty rings hollow when it is confined to the courtroom or the four corners of a charging document. Instead, the Movement demonstrates the need to expand the frame of this presumption so as to make a physical and conceptual space for people of color to enjoy the privileges of presumed innocence and freedom from unreasonable searches, among other rights.

The modern state manages and dispenses life and death to its subjects

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2. See Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1836–38 (2005) (offering a reading of Plato’s account of the relation of the “poet,” or the “belletristic discourse” of literature, on one hand, to the “city,” or the discourse of the state, on the other to propose a test of when narrative should be admitted into legal proceedings).

3. The contextual contingency of a narrative’s status is laid bare by the counter narrative that emerged in response to the movement implicit in the “All Lives Matter” formulation. See Chokshi, *supra* note 1 (outlining the development of the Movement and the responses it precipitated).

4. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 44 (2015).

5. *Id.* at 2.

6. Linscott, *supra* note 1, at 107 (discussing the role of social media “as a productive space for an undercommons—that is, a relatively untethered space for black life”).

7. George Yancy & Judith Butler, Opinion, *What’s Wrong with ‘All Lives Matter’?*, N.Y. TIMES: THE STONE (Jan. 12, 2015, 9:00 PM), <https://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/?mtref=www.google.com&gwh=12A5DD7431DA1AE5002DA34720547D6D&gwt=pay&assetType=opinion> (identifying public “assemblies, rallies and vigils [as] an open mourning for those whose lives were cut short and without cause,” Judith Butler points to “people assembl[ing] in the street, arriv[ing] at rallies or vigils, demonstrat[ing] with the aim of opposing this form of racist violence” as a convergence of “practices of public mourning and political demonstration.”).

through the workings of law.<sup>8</sup> Foucault famously identified the way in which the sovereign, from the late eighteenth century on, not only controls whether individuals live or die, but also regulates human existence generally.<sup>9</sup> Building on this conception, which Foucault termed “biopower,” scholars in recent years have called attention to the contemporary expression of sovereign power in the prioritizing of the state’s goal of killing its enemy.<sup>10</sup> In contemporary life, “the material destruction of human bodies and populations” has been recognized as a “central project” of the state.<sup>11</sup> This expression of state power is typically identified in the context of war or beyond the stable bounds of the recognized nation-state, such as the colony, in which state resources are directed at killing those deemed outside the state. Positing those beyond state bounds as the enemy, the sovereign or state creates a space in which “the controls and guarantees of judicial order can be suspended.”<sup>12</sup> Epitomizing this phenomenon, the colony becomes “the zone where the violence of the state of exception [to the rule of law] is deemed to operate in the service of ‘civilization.’”<sup>13</sup>

However, the Movement for Black Lives makes visible the space of this dynamic *within* the United States. It tells a counter story, challenging the idea that American law and justice operate against a backdrop of presumed innocence.<sup>14</sup> Of late, for example, the failure of people of color to enjoy a presumption of innocence in what has been called “white space”<sup>15</sup> has come to the fore. This phenomenon has garnered broader attention as a result of publicized incidents in which white bystanders summoned police to arrest innocent people of color, including men waiting to convene a business meeting at a Starbucks,<sup>16</sup> men using a gym,<sup>17</sup>

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8. See Michel Foucault, *17 March 1976*, in “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE, 1975-76, at 239, 241-43 (Mauro Bertani et al. eds., David Macey trans., Picador 2003) (1997) (discussing the sovereign’s “power to ‘make’ live and ‘let’ die” and emergence of a “new technology of power,” the “‘biopolitics’ of the human race”); see also Michael Hardt & Antonio Negri, *Biopolitical Production*, in BIO-POLITICS: A READER 215 (Timothy Campbell & Adam Sitze eds., 2013); GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

9. Foucault, *supra* note 8, at 242-43.

10. See Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 11-12 (Libby Meintjes trans., 2003) (suggesting that the idea of biopower is not sufficient to understand the process in which the state “makes the murder of the enemy its primary and absolute objective”).

11. *Id.* at 14.

12. *Id.* at 24.

13. *Id.*

14. The Platform of the Movement for Black Lives demands “an end to the war against Black people.” *Platform*, *supra* note 1, at ¶ 6.

15. See Elijah Anderson, “*The White Space*,” 1 SOC. RACE & ETHNICITY 10 (2014) (discussing perceptions by black people of neighborhoods previously occupied only by white people as “the white space,” in which black people are marginalized when present).

16. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html>.

17. Charisse Jones, *L.A. Fitness says employees accused of harassing two black men are no longer with company*, USA TODAY (Apr. 19, 2018), <https://www.usatoday.com/story/>

women renting an Airbnb,<sup>18</sup> a napping graduate student,<sup>19</sup> and people using their building's swimming pool,<sup>20</sup> among others going about their daily lives.

Thus, this article calls attention to the inclusion of a space of legal exception that exists within the boundaries of legal protection and undercuts the goals of the law.<sup>21</sup> In assessing the narratives made plain by the Movement for Black Lives, this article draws on the metaphor of the city as the space of law. In Kenji Yoshino's reading of Plato, he identifies the city as the place of law and the poet as the figure of "literature"—involving, among other things, narrative, rhetoric, emotion—who Plato's Socrates banishes from the city.<sup>22</sup> Adopting the framework suggested by Yoshino for the evaluation of narrative in legal practice and thinking, this article looks to whether a narrative operates in service of "core state function[s]" to assess its rightful place in relation to the workings of law.<sup>23</sup> As this article argues, sensitivity to the way a legal subject's space is bounded—that is, included or exceptionalized—may serve the law's ultimate goals. Moreover, as this article demonstrates, rather than operate either within or outside the structure of law, narrative also shapes the

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money/2018/04/19/1-fitness-fires-threetwo-black-men-accuse-local-la-fitness-racial-profile-three-employees-report/531865002/.

18. Daniel Victor, *A Woman Said She Saw Burglars. They were Just Black Airbnb Guests*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/us/airbnb-black-women-police.html>.

19. Christina Caron, *A Black Yale Student Was Napping and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html>. The failure to presume innocence extends to other marginalized groups beyond the black community, as suggested by another recent reported incident in which police were called when the presence of Native American teenagers on a college tour prompted suspicion. See Niraj Chokshi, *Native American Brothers Pulled From Campus Tour After Nervous Parent Calls Police*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/05/us/native-american-brothers-colorado.html>.

20. Sarah Mervosh, *A Black Man Wore Socks in the Pool. After Calling the Police on Him, a Manager Got Fired*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/memphis-pool-manager-fired-socks.html>.

21. See GIORGIO AGAMBEN, *STATE OF EXCEPTION 1* (Kevin Attell, trans., Univ. of Chicago Press 2005) (2003) (drawing on Carl Schmitt's definition of the "sovereign" as "he who decides the state of exception").

22. Yoshino, *supra* note 2, at 1841–59.

23. *Id.* at 1878–85 (arguing for the exclusion of victim impact statements and the inclusion of law-and-literature scholarship in legal academic discourse based on a "Platonic paradigm," which considers these concerns). The place of narrative with respect to law has been debated. See *id.* at 1836–37 (observing that although the "enterprise" of law-and-literature "has penetrated the legal academy . . . the field continues to be plagued by skepticism"). See also RICHARD A. POSNER, *LAW & LITERATURE* xv (3d ed. 2009) (expressing skepticism about the practical implications of literary theory for law). But see ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110 (2000) ("Law lives on narrative"); GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 201 (2000); Yoshino, *supra* note 2, at 1838–40 (identifying the "failed banishment" of literature by law as "a foundational anxiety that has itself become an archetypal story" and advocating for the inclusion of narratives that serve the ends of legal scholarship and practice); Guyora Binder, *The Poetics of the Pragmatic: What Literary Criticisms of Law Offers Posner*, 53 STAN. L. REV. 1509, 1512 (2001) (highlighting the pragmatic significance of recognizing "law" as "the art of composing society," through which normative legal argument operates as cultural criticism).

space of law. Thus, following the metaphor, narrative can redefine the space of the city.

This article proceeds as follows. Section II situates the Black Lives Matter movement as a counter narrative that challenges the characterization of the shared public space, among other aspects of contemporary society, as the space of law. As discussed, a counter narrative means a story that challenges a dominant narrative and the framework the dominant narrative presumes.<sup>24</sup> The concept of “necropower,” or the mobilization and prioritization of the state’s power to kill, is used to make plain the way the “sovereign”—the law on the books and its agents in practice—posits certain subjects as its enemy.

Section III identifies the place of the judge as the gatekeeper of the city within the necropolitical structure. To do this, this article looks back at a once-criticized set of judicial decisions that presciently rejected a normative framework presuming the guilt of people of color. Decisions by the late U.S. District Court Judge Harold Baer in the case of *Bayless v. United States*<sup>25</sup> illustrate an attempt to challenge a master narrative of the ordinary operation of law. Examining the *Bayless* decisions as one attempt to recognize the exclusion of a community of color, this article analyzes the way this effort became snared in a necropolitical landscape in the call for the judge’s impeachment. While Judge Baer struggled to cabin myths that subvert the goals of law, he was ultimately confounded by the social structure and by the complex relationship among myth, narrative, and dicta. As a result, he ultimately displaced his attempt to resist the systemic undermining of a presumption of innocence into dicta. Judge Baer’s attempt to assert a counter narrative presuming innocence in practice ends up in the margins of legal space as dicta, pleading for the preservation of defendants’ rights.<sup>26</sup>

Section IV demonstrates how the metaphorical poet (narrative, counter narrative, rhetoric, etc.) plays a role in shaping the bounds of the legal space on the ground, in respect to citizens, and in the discourse of law. Adopting the boundary-challenging and empathy-demanding strategies of Martin Luther King Jr.’s *Letter from a Birmingham Jail*, Justice Sonia Sotomayor’s dissenting opinion in *Utah v. Strieff* recognizes necropower in order to resist it.<sup>27</sup> Whereas King’s approach epitomizes the destabilizing challenge of the poet, Justice Sotomayor’s echo of his resistance retrospectively authorizes his narrative frame in the liminal space of a dissenting opinion.<sup>28</sup> Justice Sotomayor’s opinion highlights the way the space of law—the metaphoric and at times literal city—is already

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24. This notion of counter narrative remains value neutral and recognizes that counter narrative can also be mobilized to counter the goals of law.

25. See generally *Bayless v. United States*, 913 F. Supp. 232 (S.D.N.Y. 1996) [hereinafter *Bayless I*] (order granting motion to suppress); *Bayless v. United States*, 921 F. Supp. 211 (S.D.N.Y. 1996) [hereinafter *Bayless II*] (order denying motion to suppress).

26. See *Bayless II*, 921 F. Supp. 211, 217 (S.D.N.Y. 1996).

27. *Utah v. Strieff*, 136 S. Ct. 2056, 2064–67 (2016) (Sotomayor, J., dissenting).

28. See *id.* at 2059.

constituted as a place in which people are presumptively guilty. Acknowledging the critique that Justice Sotomayor's rhetorical posture may threaten to universalize the estrangement of particular communities,<sup>29</sup> the article nonetheless points to a historical language of resistance through empathy and solidarity that Justice Sotomayor includes. As Section IV demonstrates, narrative plays a crucial role in demarcating the law. A broader application of the presumption of innocence to inform judges' determinations of reasonable suspicion and admissibility of evidence could thereby serve to counter the exclusionary operation of legal structures, at trial and on the streets. In this way, Section V concludes, the counter narrative of Black Lives would shape the space of law to serve the law's goals.

## II. BLACK LIVES MATTER: A COUNTER NARRATIVE THAT REVEALS NECROPOLITICS

### A. NARRATIVE IN AND BEYOND THE BOUNDS OF THE LAW

Narrative has been long recognized as a fundamental mode of organizing human experience.<sup>30</sup> The stories we tell shape the way we understand our world and stories operate as particular powerful tools of persuasion.<sup>31</sup> Master narratives, or so-called "stock stories," influence the meaning of experiences for groups in society and guide how people judge and assess their experiences.<sup>32</sup> While stereotypes threaten to distort assessment and prediction,<sup>33</sup> narrative plays a significant role in expressing—and thereby revealing—values and perspectives that shape understandings of experience.<sup>34</sup>

The scholarly push in the last decades of the twentieth century for storytelling as a tool of social justice and legal intervention articulated a concern about the omission of certain stories.<sup>35</sup> Though the question of which stories warrant telling in the law persists, the structure of the American legal system embraces narrative as a means of assessing experi-

29. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017).

30. Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 4 (1991).

31. Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 25–26 (2014).

32. Peter Brooks, "Inevitable Discovery"—Law, Narrative, Retrospectivity, 15 YALE J.L. & HUMAN. 71, 100 (2003); Ralph, *supra* note 31, at 26 ("Stock stories can be considered cultural master stories or myths that give meaning to social experiences").

33. See DANIEL KAHNEMAN, THINKING FAST AND SLOW 123–24 (2011) (discussing how stereotypes preclude consideration of more relevant contextual factors).

34. *But see* Yoshino, *supra* note 2, at 1862–63 (rejecting the "ineradicability defense" of literature, which asserts that it cannot be "banished [from the "city" or space of law] because it is impossible to separate from other textual practices, including philosophy and law," and thereby ostensibly renders the argument for its banishment moot).

35. See BINDER & WEISBERG, *supra* note 23, at 201 (synthesizing recurring issues raised by proponents of narrative legal scholarship in the late 1980s).



ence in light of potentially competing values.<sup>36</sup> Counter narrative plays a fundamental role in the criminal trial process. Defendants have the right to confrontation plus cross-examination of witnesses under the Sixth Amendment.<sup>37</sup> A framework of evidentiary rules that establish a low presumptive threshold of admissibility further invites counter narrative.<sup>38</sup> Thus, the adversarial structure creates a space for mobilizing competing narratives in the course of counter claims about the meaning of facts.<sup>39</sup> Moreover, the recording of counter argument in the form of minority judicial opinions, notwithstanding their potential to weaken the rule of law,<sup>40</sup> further demonstrates the place granted counter narrative as a legal tool.

In addition to creating a place for counter argument, cross-examination and minority opinions invite lawyers and judges to mobilize stories in presenting facts, and the determination of their significance depends, “largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing what happened or how the world works.”<sup>41</sup> Arguments and decisions are impacted by “what does and doesn’t matter to a culture,” which itself “can be traced back through the culture’s stories, its genres, to its enduring myths.”<sup>42</sup> Thus, competing legal opinions cannot be extricated from social context. And these social contexts are ultimately shaped not only by scholarly interventions, but by popular narratives.<sup>43</sup>

Against the backdrop of master narratives that shape social existence

36. Cf. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 4, 14 (2003) (tracing development of adversary system in part to attempt by judges to correct for unreliable prosecutorial techniques).

37. U.S. CONST. amend. VI.

38. See FED. R. EVID. 401. Courts have referred to the “low threshold for evidence” under Rule 401; see, e.g., *United States v. Boros*, 668 F.3d 901, 907–08 (7th Cir. 2012) (holding that although testimony had only minimal relevance as background evidence, it satisfied “Rule 401’s low threshold for relevance”); *United States v. Colbert*, 828 F.3d 718, 727–28 (8th Cir. 2016) (acknowledging that “[t]he threshold for relevance is ‘quite minimal’”) (citation omitted).

39. See John Leubsdorf, *Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 448 (2001) (“[T]he interweaving of stories and voices constitutes the structure of a judicial opinion.”).

40. See MARK TUSHNET, *I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES* xii (2008).

41. AMSTERDAM & BRUNER, *supra* note 23, at 111.

42. *Id.*

43. As Lani Guinier asserts, “the arguments of movement elites, feminist intellectuals, and respected authorities may circulate slowly but can ultimately gain traction in popular culture.” Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 13–14 (2008). Perhaps most saliently of late, the legal traction that can result from an upsurge of narrative has been demonstrated by legal developments attributed to the #MeToo Movement. See, e.g., Yohana Desta, *Months After #MeToo Began, Harvey Weinstein Has Been Charged with Rape*, VANITY FAIR (May 25, 2018, 7:57 AM), <https://www.vanityfair.com/hollywood/2018/05/harvey-weinstein-surrender-police>; Graham Bowley & Jon Hurdle, *Bill Cosby Is Found Guilty of Sexual Assault*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/arts/television/bill-cosby-guilty-retrial.html> (describing the verdict as considered by many “a watershed moment” “in the aftermath of the #MeToo movement”).

and inform legal structures,<sup>44</sup> counter narratives—which reframe facts and evidence so as to challenge their purported significance—also bring to light stock stories impacting social and legal norms. Counter narratives can thereby influence the very bounds of what is accepted as the space of the law.

## B. BLACK LIVES MATTER AS COUNTER NARRATIVE

The Movement for Black Lives challenges the boundaries of law by calling attention to the master narrative and its impacts on legal subjects. The name “Black Lives Matter” serves as a response to the master narrative that thereby highlights prevailing assumptions.<sup>45</sup> The name itself offers a counter narrative—an alternative account that also questions the presumed narrative framework. While the master narrative presumes the effective workings of law, the name “Black Lives Matter” rebuts this presumption in light of the goals of the law. It points to the failure of the socio-legal structure to acknowledge that black people are not valued as lives.<sup>46</sup> In offering a counter narrative, it calls attention to the missing space of the black person in the “city” or the place of legal protection.<sup>47</sup> “Black Lives Matter” thereby brings to light how law circumscribes the physical space that a person of color occupies. In addition, it highlights how the legal structure shapes the place of that person in relation to legal norms.

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44. The mutually constituting dynamic of law and society has been explored by legal historians in various contexts. See, e.g., LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20 (1965) (arguing that American contract law developed “roughly coextensive with the free market”); Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 741 (2003) (describing “storytelling that was key to the development of anti-Mormon legal strategies”).

45. See Yancy & Butler, *supra* note 7 (George Yancy characterizing the name as “a mode of address” in Butler’s terms). Through a similar counter narrative move that exposes the presumptions and workings of the master narrative, Ta-Nehisi Coates’ *Between the World and Me* positions its “woke” account of life as a black American as a direct counter narrative to the master narrative of the American Dream. In urging the reader to consciousness of the “weight of the Dream,” it tells a story about the power granted to “White America” used to “dominate and control [black] bodies,” in which the social experience of people of color is shaped by pervasive legal structures, such as mob law, “lynching,” legislation “redlining,” and the exercise of police power exemplified by police shootings of black boys and men. COATES, *supra* note 4, at 42, 76–77, 119. Coates exposes the social impact of this last category in part through his account of his own processing of the death of a Howard University classmate shot and killed by police while driving in Virginia.

46. See Yancy & Butler, *supra* note 7 (arguing that the name “Black Lives Matter” exposes the fact that the lives of black people do not matter and suggesting that they are not recognized as human lives).

47. Discussing Aristotle’s view that the essence of narrative is the “plot,” Peter Brooks calls attention to the range of meanings of the word, including a demarcated space or “piece of ground, generally used for a specific purpose.” Peter Brooks, *Reading for the Plot*, in *ESSENTIALS OF THE THEORY OF FICTION* 201, 208 (Michael J. Hoffman & Patrick D. Murphy eds., 2005). The Movement for Black Lives calls attention to the relationship of bounded narratives and bounded space that otherwise “heterogeneous meanings” of “plot” imply. See *id.*

In conceptualizing the workings of the state, scholars have recognized the operation of “biopower”—the ways the state in its ordinary operation manages and dispenses life and death to its subjects.<sup>48</sup> Biopolitics involves the state’s prioritization of its power to kill and the way it posits those deemed outside the state as enemies.<sup>49</sup>

Using the colony and spaces of war as primary examples, political theorist Achille Mbembe has identified a particular way biopolitics operates as “necropolitics.”<sup>50</sup> In this framework, the so-called “state of exception,” involving enemies in war or in a colony, justifies a deviation from the norms of law.<sup>51</sup> The colony, like a war zone, epitomizes the space in which “sovereignty consists fundamentally in the exercise of a power outside the law.”<sup>52</sup> Thus, colonies and war zones are posited as conceptual and literal frontiers of the law, in which the inhabitants are not considered human or valued life, but rather the enemy. This in turn justifies the mobilization of state power against them.<sup>53</sup> Among other things, the creation of the “state of exception”<sup>54</sup> “involves the setting of boundaries and internal frontiers.”<sup>55</sup> The Movement for Black Lives calls attention to the creation of what might be called a literal and figurative “space of exception” within our cities and within the law.

Necropower and the creation of spaces of exception have typically been identified in sites beyond the stable bounds of the recognized nation-state.<sup>56</sup> The Movement for Black Lives calls attention to this dynamic and the space of exception it creates within the United States. Black Lives Matter highlights the existence of a space of exception by telling a story that rebuts the dominant narrative that American law and

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48. See Foucault, *supra* note 8, at 241–43 (discussing the sovereign’s “power to ‘make’ live and ‘let’ die” and emergence of a “new technology of power,” the “‘biopolitics’ of the human race”); see also AGAMBEN, *supra* note 8; Hardt & Negri, *supra* note 8, at 215.

49. Foucault, *supra* note 8, at 241–43; Mbembe, *supra* note 10, at 25–35.

50. Mbembe, *supra* note 10, at 25–35.

51. *Id.* at 16 (Power “continuously refers and appeals to exception, emergency, and a ?ctionalized notion of the enemy. It also labors to produce that same exception, emergency, and ?ctionalized enemy.”).

52. *Id.* at 23.

53. See *id.* at 25 (“Colonial occupation itself was a matter of seizing, delimiting, and asserting control over a physical geographical area—of writing on the ground a new set of social and spatial relations.”).

54. I use the term “state of exception,” developed by Giorgio Agamben and derived from the work of Carl Schmitt, to describe the way the state or sovereign itself “transcends” or excepts itself from the rule of law ostensibly for the good of the state. See AGAMBEN, *supra* note 21, at 1 (drawing on Schmitt’s definition of the “sovereign” as “he who decides the state of exception”). In terms of the implications of the phenomenon in contemporary life, the political-theoretical notion of the state of exception overlaps in meaningful ways with the socio-legal diagnosis of “legal estrangement” offered by Monica Bell, which recognizes that certain groups within the United States see themselves “as essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society.” See Bell, *supra* note 29, at 2056–57.

55. Mbembe, *supra* note 10, at 25–26.

56. But see CHRIS HAYES, A COLONY IN A NATION 32, 38 (2017) (arguing the American criminal justice system operates two racially distinct regimes, creating a “Colony” in which people, “overwhelmingly black and brown,” are subjected to policing characteristic of “an occupied land”).

justice operate in a context of presumed innocence.<sup>57</sup> In its demand to “End the War on Black People,”<sup>58</sup> the Movement for Black Lives underscores the positioning of people of color as subjects outside the space of the legal protections of the state. In this space of exception to the law, black lives are preemptively deemed the enemy, subject to the power of the state to kill. Calling attention to the conceptual and practical space of exception of the law (in communities of color or surrounding the black body, for example),<sup>59</sup> the Movement thereby resists the normalization of legal process and social structures at odds with the goals of law through counter narrative. Thus, for example, Judith Butler identifies common perceptions by police and others that people of color are threatening as “war zones of the mind that play out on the street.”<sup>60</sup> Mobilizing the metaphors and realities of sovereign borders, Butler demonstrates the impact in real space of an implicit necropolitical norm.<sup>61</sup>

Through this reframing and related action, the Movement also begins to make a space for the excluded citizen and her narrative. Not only does the name “Black Lives Matter” call attention to who is recognized as a human subject by society and law, but the mode of resistance challenges the physical bounding out of certain groups.<sup>62</sup> The Movement does so by seeking to reclaim public space. As Butler describes it, “when people assemble in the street, arrive at rallies or vigil, demonstrate with the aim of opposing this form of racist violence, they are ‘speaking back’ to this mode of address, insisting on what should be obvious but is not, namely that these lost lives are unacceptable losses.”<sup>63</sup> Because it is precisely in public spaces that certain people are subjected to state violence, the act of taking to the streets in opposing racism and violence “reverberates throughout the public sphere through various media.”<sup>64</sup> Indeed, the

57. The Platform of the Movement for Black Lives demands “an end to the war against Black people.” *Platform*, *supra* note 1, at ¶ 6.

58. *End the War on Black People*, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/> [<https://perma.cc/UYJ3-9SJK>] (last visited February 24, 2018).

59. See, e.g., Linscott, *supra* note 6, at 113 (“[T]he capacity to take life is the domain of the sovereign and is closely aligned with the power to consign the living to the realms of the *living dead* . . . Those without power are forbidden from taking life, yet their lives are always already in peril . . . Ghettoization, police brutality and murder, state terror, the criminal justice system, mass incarceration, fungibility, generational poverty, displacement, refusal of basic services (think Flint, Michigan’s lead-poisoned water) and the like are the sovereign’s tools. In America, black social death is necessary in order for white sovereignty to flourish—now, just as it ever was during slavery.”).

60. Yancy & Butler, *supra* note 7. Butler explains, “every time a grand jury or a police review board accepts this form of reasoning, they ratify the idea that blacks are a population against which society must be defended, and that the police defend themselves and (white) society, when they preemptively shoot unarmed black men in public space.”

61. *Id.*

62. Cf. Scott Skinner-Thompson, *The Right to the Public Square: Hoodies, Head Veils, & Bathrooms*, MUFTAH (Mar. 23, 2017), <https://muftah.org/right-public-square-hoodies-head-veils-bathrooms/> [<https://perma.cc/3QU5-6FSM>] (identifying the disenfranchising impact of seemingly disparate regulations of individuals’ existence in public space, such as dress and gender-based access to bathrooms, and the corresponding resistance).

63. Yancy & Butler, *supra* note 7.

64. *Id.*

Movement has made space for and thereby disseminated its message via hyperlink and the virtual space contemporary media enables.<sup>65</sup> Thus, highlighting the space of legal exception through affirmation of an excluded and thereby negated population,<sup>66</sup> this counter narrative has pushed for the physical space of the subject within the state.

In Section IV, this article examines how an empathetic counter narrative has created space to recognize necropower in the law. Before doing so, Section III analyzes an underexplored series of decisions that illustrate the challenge faced by a judge as the arbiter of the bounds of the literal city as the space of law and the role of narrative in shaping that space.

### III. FRAMING NARRATIVE AND POLICING MYTH: THE TRIALS OF THE GATEKEEPER

While the Movement for Black Lives challenges the master narrative of our society and the legal framework, the issue of criminal justice critically manifests the problem of exclusion.<sup>67</sup> The question of what evidence may be admitted in court makes literal the process of bounding the space of law (and its narrative elements). It also influences the way state actors, such as the police, are authorized and incentivized to except certain people from the otherwise presumptive protections of the Constitution. In particular, the laws governing the admissibility of evidence affect the right to be free from unreasonable searches and seizures under the Fourth Amendment.<sup>68</sup> Judges have some ability to shape the contours of the narratives that give meaning to evidence, policing authority and admissible evidence.<sup>69</sup> Judges may thereby affirm or resist the bounds of a broader social narrative. This process, however, remains embedded in competing narrative frames, which may implicate the legitimacy of the law. And this underscores the threat of narrative as a potent but mercurial tool to counter injustice.<sup>70</sup> Judges must recognize the potential for narrative to shape the space of the legal subject. In negotiating this dynamic, judges must also consider the goals of law, such as the presumed innocence of the subject, and the consequent presumptive inclusion in the space of the state.

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65. Linscott, *supra* note 6, at 115.

66. *Id.* at 114 (positioning “#BlackLivesMatter” “in the space between these two poles” of social death and “black life less captured by white sovereignty”).

67. Linscott, *supra* note 6, at 108 (describing the “racial justice and police violence” as “the crux” of a broader movement).

68. See U.S. CONST. amend. IV.

69. See AMSTERDAM & BRUNER, *supra* note 41, at 111 (“[I]ncreasingly we are coming to recognize that both the questions and the answers in such matters of ‘fact’ depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing what happened or how the world works.”); see also Brooks, *supra* note 32, 71–72 (2003) (expressing skepticism about the extent to which the role of narrative is acknowledged within the legal community).

70. See Yoshino, *supra* note 2, at 1841–42.

In this section, this article looks at a pair of decisions that together illustrate the ways that narrative—in the form of myth, politics, and dicta—contributes to the demarcation of the space of law, both in the courtroom and on the street. This article analyzes federal district court decisions that presciently struggle to create a space of inclusion. Analyzing how Judge Harold Baer sought to counter an implicitly biased master narrative that presumes the guilt of certain subjects, this article shows how he ultimately fell short of his goal. He did so not because of his ultimate concession to the designation of a neighborhood in Washington Heights as a space of exclusion, but in his fraught disavowal of dicta as essential to the law. By failing to acknowledge how narrative gives shape to the meaning of legal terms, he ceded some of the space of the counter narrative of presumed innocence, despite his ultimate appeal to this very principle.

#### A. *BAYLESS I*: COUNTERING MYTH, PRESUMING INNOCENCE

In the context of the admissibility of evidence, a pair of once-news-worthy<sup>71</sup> and prescient decisions illustrate how different forms of narrative influence the bounds of law, both to serve and to undermine the law's ultimate goals. U.S. District Court Judge Harold Baer's decisions in *Bayless I* and *Bayless II*<sup>72</sup> reveal the judge's role in framing a legal narrative in a necessarily social context. They demonstrate the challenge of ascribing meaning to evidence without engaging a "mythic" structure that undermines the goals of law.<sup>73</sup> Suppressing evidence of a drug crime for lack of reasonable suspicion to justify a brief investigatory or "Terry" stop,<sup>74</sup> Judge Baer's opinion regarding the first pre-trial hearing in *Bayless I* begins by quoting John F. Kennedy in an epigraph: "The great enemy of truth is very often not the lie—deliberate, contrived, and

71. One contemporaneous *New York Times* article referred to "an avalanche of criticism and calls for [Judge Baer's] ouster." Don Van Natta Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES (Apr. 2, 1996) [hereinafter Van Natta, *Federal Judge Reverses Decision*], <https://www.nytimes.com/1996/04/02/nyregion/under-pressure-federal-judge-reverses-decision-in-drug-case.html>; see also Don Van Natta Jr., *Not Suspicious to Flee Police, Judge Declares*, N.Y. TIMES (Jan. 25, 1996) [hereinafter Van Natta, *Not Suspicious to Flee Police*], <https://www.nytimes.com/1996/01/25/nyregion/not-suspicious-to-flee-police-judge-declares.html> (reporting holding in *Bayless I*); John M. Goshko, *Accusation of Coddling Criminals Aimed at Two Judges in New York*, WASH. POST (Mar. 14, 1996), [https://www.washingtonpost.com/archive/politics/1996/03/14/accusations-of-coddling-criminals-aimed-at-two-judges-in-new-york/89aef373-18aa-475f-a12b-d727563e6799/?noredirect=on&utm\\_term=.ffde7015c111](https://www.washingtonpost.com/archive/politics/1996/03/14/accusations-of-coddling-criminals-aimed-at-two-judges-in-new-york/89aef373-18aa-475f-a12b-d727563e6799/?noredirect=on&utm_term=.ffde7015c111).

72. See *Bayless I*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996); *Bayless II*, 921 F. Supp. 211, 211–12 (S.D.N.Y. 1996).

73. See ROLAND BARTHES, *Myth Today*, in MYTHOLOGIES 217, 234–40 (Richard Howard trans., Farrar, Straus & Giroux 2012) (1957) (identifying "myth" as a form of expression that "transforms history into nature," obscuring its intention so as to "appear[ ] both like a notification and like a statement of fact").

74. See *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (extending Fourth Amendment protections against "unreasonable searches and seizures" by the government to brief investigatory stops of persons or vehicles).

dishonest—but the myth—persistent, pervasive and realistic.”<sup>75</sup> In this way, the decision highlights a self-conscious engagement of narrative, if only in the end to struggle to contain it.

In *Bayless I*, Judge Baer granted a motion to suppress post-arrest statements, along with thirty-four kilograms of cocaine and two kilograms of heroin found in the trunk of the car of the defendant. The defendant, “a middle-aged black woman,” was observed around five in the morning driving in a rental car with Michigan license plates in Washington Heights, New York.<sup>76</sup> Judge Baer’s decision resists what he suggests is the “myth” implicit in the state’s framing of reasonable suspicion. His decision in *Bayless I* rejects the purported significance of certain signs as presented by the state, including the police observation of males approaching the car “in single file,” the sighting of a car with Michigan plates double parked in the early morning, and the claim that the same males later ran off upon sighting an unmarked police car, along with the police characterization of the neighborhood as a drug hub.<sup>77</sup> Judge Baer held that together, these details failed to meet the standard of articulable facts that give rise to a reasonable suspicion of criminal activity to justify the stop.<sup>78</sup>

Notably, in *Bayless I* Judge Baer self-consciously critiques the prevailing narrative. He does so in his approach to the question of reasonable suspicion. The requirement of reasonable suspicion to justify a legal stop establishes the bounds beyond which a person inhabits a world free of search and seizure by the police. Moreover, by breaking with convention to include a quote of John F. Kennedy in an epigraph to his decision, Judge Baer points to the implicit operation of myth. Speaking at Yale University Commencement in 1962, President Kennedy urged his generation to “disenthrall itself from . . . stereotypes” in an effort to confront the “real issues” such as “how [to] eradicate the barriers which separate substantial minorities of our citizens from access to education and employment on equal terms with the rest” to “provide . . . opportunity for all.”<sup>79</sup> The speech denounces myth as described by Roland Barthes: a totalizing framework that qualifies the meaning of the underlying signs and allows itself to be appropriated, distinct from a rigorous examination of data and meaning.<sup>80</sup> Thus, by making a place for allusion and intertextuality, Judge

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75. *Bayless I*, 913 F. Supp. at 234 (quoting President John F. Kennedy, Commencement Address at Yale University (June 11, 1962)). The invocation of “myth” calls to mind Roland Barthes’ conception of how myth “transforms history into nature”—making contingency, specific history, and intention appear natural and eternal. BARTHES, *supra* note 73, at 240, 254.

76. *Bayless I*, 913 F. Supp. at 234.

77. *Id.* at 240 (“The mere presence of an individual in a neighborhood known for its drug activity which here was characterized as from 155th Street to the end of Manhattan, fails to raise a reasonable suspicion that the person observed is there to purchase drugs”).

78. *Id.* at 238.

79. John F. Kennedy, Commencement Address at Yale University (June 11, 1962), available at <http://www.presidency.ucsb.edu/ws/?pid=29661> [<https://perma.cc/EG5N-CXFY>].

80. See BARTHES, *supra* note 73, at 227–29.

Baer aims in his decision to counter myth or, in this case, the master narrative that treats people of color with suspicion.

Foregrounding his impression of the defendant as having the more credible account,<sup>81</sup> Judge Baer polices the gates of the law and grants the motion to suppress. He excludes elements of a story to serve the law's goals—the protection of people from unreasonable search and seizure.<sup>82</sup> *Bayless I* thereby applies the standard articulated in *Terry v. Ohio* that a limited investigative stop “must be based on ‘a reasonable suspicion supported by articulable facts’ that criminal activity ‘may be afoot.’”<sup>83</sup>

The state asserts reasonable suspicion justifying a police stop on the basis of a sighting by the officers around five a.m. of a car with Michigan license plates “moving slowly along 176th Street” and pulling over to double park “[b]efore reaching the intersection of 176th Street and St. Nicholas Avenue.”<sup>84</sup> In the police account, four males emerged when the car stopped and “crossed the street walking single file” as the defendant pressed the trunk release.<sup>85</sup> One male then opened the trunk, others placed “large black duffel bag[s] in the trunk,” and another closed it.<sup>86</sup> During this time the police observed no conversation between the driver and these males.<sup>87</sup> As the driver continued on to the streetlight, the males noticed the officers’ unmarked car and “moved in different directions at a rapid gait. The individual that . . . [Officer Carroll] watched went to the corner of 176th and St. Nicholas, and as he reached the corner began to run northbound on St. Nicholas.”<sup>88</sup> “[S]hortly thereafter,” the light turned green and the car “proceeded at a normal rate of speed” with the police following, pulling the defendant over two blocks later.<sup>89</sup> As the decision notes, the officer attributed his decision to pull over the car to the out-of-state license plate; the actions of the four males, particularly the way they crossed the street in single file and did not speak with the driver of the car; the fact that the males ran once they noticed the officers; and the duffel bags the males placed in the trunk of the car.<sup>90</sup>

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81. Judge Baer characterizes the officer’s uncorroborated testimony as “gossamer” and calls attention to a recent prosecution of an anti-crime police officer for corruption as well as the community view of the local police as “corrupt, abusive and violent.” *Bayless I*, 913 F. Supp. at 239, 242. In contrast, the defendant’s statements implicating her son underscore her credibility to Judge Baer. *Id.* at 234.

82. See U.S. CONST. amend. IV.

83. *Bayless I*, 913 F. Supp. at 238 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). In doing so, Judge Baer invokes *Terry*’s two-part test for evaluating reasonableness, considering “[f]irst, whether the stop its self was based on a reasonable suspicion that the suspect ‘is, has been, or is about to be engaged in criminal activity’” and, if so, “whether the stop was reasonably related in scope” to the justifying circumstances. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

84. *Bayless I*, 913 F. Supp. at 235.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 235–36.

90. *Id.* at 236.



After recounting the defendant's videotaped statement,<sup>91</sup> in which some details differed from those in the police testimony,<sup>92</sup> and reviewing the standard of reasonable suspicion as an exception to the requirement of probable cause to arrest, Judge Baer's decision finds the facts collectively fail to meet the requisite standard.<sup>93</sup> The decision expresses skepticism about the police account, not least because of its lack of corroboration by the second officer on the scene and the defendant's statements against interest.<sup>94</sup> In *Bayless I*, Judge Baer also notes the discrepancies between the facts presented, including whether there was another person in the car.<sup>95</sup> Thus, *Bayless I* carefully articulates a counter narrative, which brings to the fore the defendant's presumed guilt that Judge Baer resists.

*Bayless I* begins by rejecting "the mere presence of an individual in a neighborhood known for its drug activity" as determining reasonable suspicion.<sup>96</sup> "Similarly," it rejects the implications of sighting a person in this space in this early time of day.<sup>97</sup> Instead, Judge Baer characterizes the sighting of the defendant by police in the early morning hours as "nothing unusual," considering that in "New York City, people travel to and from work at all hours of the day and night."<sup>98</sup> Establishing the context as a global tourist hub teeming with legitimate enterprise—rather than an inner-city drug zone—Judge Baer similarly counters an assessment by testifying Officer Carroll that it was "odd that a person is seen to drive a car with a Michigan license plate in Manhattan."<sup>99</sup> Instead, Judge Baer identifies New York as "a city that considers itself 'The Capital of the World,'" and notes that "it is certainly not odd for one to observe double parked cars on a Manhattan street"<sup>100</sup> as the police claim they did. Thus, Judge Baer doubts the state's characterization of the area as a "hub for the drug trade."<sup>101</sup> He gestures toward the necropolitical dynamic both in the space of northern Manhattan and that surrounds black bodies. He asserts, "[w]hat I find shattering is that in this day and age blacks in black neighborhoods and blacks in white neighborhoods can count on little security for their person."<sup>102</sup>

Distinguishing the facts at hand from cases involving "furtive conduct

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91. The decision notes that despite no promise of immunity or special consideration, her account included also "detailed her involvement in 20 other similar transactions." *Id.*

92. *Id.* at 236–37. Among other details, including the presence of another driver (with the defendant in the passenger seat), the defendant testified the men walked away; they did not run. *Id.*

93. *Id.* at 238–40.

94. *Id.* at 239–40.

95. *Id.*

96. *Id.* at 240.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.* at 240 n.12.

102. *Id.* at 240. To punctuate this, he then quotes Thomas Paine on the need for egalitarian government. *Id.*

and evasive behavior” by the defendant,<sup>103</sup> Judge Baer reframes the police account of males allegedly spotted running from the scene.<sup>104</sup> Though he remains skeptical of police testimony,<sup>105</sup> “even assuming that one or more of the males ran away from the corner” upon becoming aware of the police presence, Judge Baer refuses to “characterize this as evasive conduct.”<sup>106</sup> He notes that unmarked police vehicles “are easily recognized, particularly, in this area of Manhattan,”<sup>107</sup> and invokes residents’ tendency to “regard police officers as corrupt, abusive and violent,” even prior to a recent successful “prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood.”<sup>108</sup> In light of the nature of this place as a space of legal exception, to Judge Baer’s mind, “had the men not run when the cops began to stare at them, it would have been unusual.”<sup>109</sup> Through repeated recontextualization, Judge Baer’s account opens the evidence at hand to meaning in ways that continue to resonate today.<sup>110</sup>

Implicitly, Judge Baer confronts the power of myth to shape the specific historical and contextual significance of signs.<sup>111</sup> He exposes how myth can distort meaning in his concluding appraisal of the duffel bags found to contain a large quantity of illegal drugs. Judge Baer resists the pull of narrative cohesion that colors objects with overdetermined significance,<sup>112</sup> and reclaims the presumptive innocence of innocuous objects. He asserts, “[d]uffel bags are commonly and regularly used to transport

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103. *Id.* at 241.

104. Though the defendant observed all traffic regulations and did not drive erratically, “[w]hen pressed on the issue of evasive or furtive conduct” the testifying officer admitted that rather than the behavior of the defendant, the behavior of the four males at the scene, was evasive.

105. Judge Baer rejects the police account of the males at the scene running in light of the defendant’s competing testimony. *Id.*

106. *Id.* at 242.

107. *Id.*

108. *Id.*

109. *Id.* A footnote goes further, explaining that during a four year federal investigation and prosecution of corruption and unjustified arrests by officers assigned to Washington Heights’ anti-crime unit, U.S. attorneys uncovered evidence “that members of the anti-crime unit committed perjury or made false statements in connection with various arrests and the prosecution of both federal and state crimes.” *Id.* at 242 n.18.

110. In addition to the legal significance of fleeing or avoiding the police while black, discussed in Section IV, contemporary counter narratives invite reconsideration of the significance of a host of signs. See *infra* Section IV; Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1676–78 (2017) (analyzing ways in which the “hoodie” variously figures as evidence of crime or individual expression). For a discussion of pretext-stop strategies in the mid-1990s as a result of policies aimed at reducing gun crimes in poor neighborhoods in Washington D.C. and their contribution to disparities in the criminal justice system and beyond, see JAMES FORMAN, *LOCKING UP OUR OWN* 185–216 (2017).

111. See BARTHES, *supra* note 73, at 227–31.

112. As the celebrated late nineteenth-century Russian playwright and short story writer Anton Chekhov famously asserted, “Remove everything that has no relevance to the story. If you say in the first chapter that there is a rifle hanging on the wall, in the second or third chapter it absolutely must go off. If it’s not going to be fired, it shouldn’t be hanging there.” VALENTINE T. BILL, *Chekhov: The Silent Voice of Freedom* (1987).

things from clothing to equipment.”<sup>113</sup> “[P]eople placing duffle bags into the trunk of an out of state car in the early morning” is “far from suspicious,” but rather “consistent with a person leaving early in the morning on a long drive to return home to Michigan after visiting relatives in New York City.”<sup>114</sup> The failure of the state to offer evidence in support of the “characteriz[ation]” of this space as a “neighborhood . . . [of] drug activity . . . from 155th Street to the end of Manhattan”<sup>115</sup> enables Judge Baer to recast it as part of a benign landscape of the city—literally and metaphorically.

In this way, Judge Baer takes on the role of protecting the city from an untrustworthy “poet”—the myth that imbues potentially innocent objects and actions with racially motivated suspicion. In doing so, he extends the landscape to include the subject in the presumption of innocence. At the same time, he does not have adequate tools to challenge the narrative structures beyond the courtroom in light of the standard of proof in suppression hearings.<sup>116</sup> He lacks an explicit doctrinal tool to mobilize a presumption of innocence in policing the admissibility of evidence. As suggested by his acknowledgement of the tensions in the neighborhood with police, the socio-political backlash, and legal developments in this case, the necropolitical framework informs the way the bounds of law are demarcated in the social narrative. Without a doctrinal tool to acknowledge this, Judge Baer ultimately rejects his own initial effort to use dicta to broaden the landscape of inclusion, even though this is a tenable and arguably essential, goal of the law.

B. *BAYLESS II*: THE “CHARACTER OF THE NEIGHBORHOOD”  
AND THE BANISHMENT OF DICTA<sup>117</sup>

This could be the end of a story of counter narrative that emerged from social movements that penetrated the law and impacted the application of the reasonable suspicion standard in ways that continue to resonate

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113. *Bayless I*, 913 F. Supp. at 242.

114. *Id.*

115. *Id.* at 240.

116. Evidentiary doctrine favors the inclusion of evidence, relying on proof beyond a reasonable doubt, among other safeguards at trial to protect the rights of defendants. *See, e.g., Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (“The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State’s evidence include the Sixth Amendment rights to counsel, compulsory process, and confrontation plus cross-examination of witnesses. Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. Only when evidence ‘is so extremely unfair that its admission violates fundamental conceptions of justice,’ have we imposed a constraint tied to the Due Process Clause.”) (citations omitted). In refusing to require a judicial evaluation of the reliability of eye witness identification in the absence of improper state conduct, the Supreme Court in *Perry* tempered its recognition of unreliable evidence as a due process concern. *See id.* at 247.

117. *Bayless II*, 921 F. Supp. 211, 216 (S.D.N.Y. 1996).

today. However, the developments in this case make plain the challenge of resisting a necropolitical framework from within the law. At the same time, these developments underscore the role of dicta as one critical tool for negotiating the boundaries of law toward inclusion, notwithstanding Judge Baer's ambivalent reconsideration of his own.

The *Bayless I* decision faced a strong negative reaction in the political realm and the press. The public outcry made unusually plain the way doctrine and the judge are situated in a broader socio-political structure, including the existing trend toward increasing incarceration.<sup>118</sup> Characterized as "tortured reasoning,"<sup>119</sup> the *Bayless I* decision prompted an intense public reaction, including from New York City Mayor Rudolph Giuliani and Governor George Pataki (both Republicans) as well as President Bill Clinton (a Democrat).<sup>120</sup> Reflecting the prevailing acceptance of the primacy of confrontational policing to rid neighborhoods of crime, one *New York Times* editorial deemed the decision "judicial malpractice."<sup>121</sup> Calls for Judge Baer's impeachment from the national political stage further indicate the potency of the master narrative directed at ridding the landscape of an enemy.<sup>122</sup>

Against this backdrop, Judge Baer granted a motion for reconsideration and reargument in *Bayless II*.<sup>123</sup> He ultimately admitted the evidence and post-arrest statements.<sup>124</sup> His decision demonstrates the struggle to

118. See COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES (Jeremy Travis et al. eds., 2014). This trend was exacerbated by the Violent Crime Control and Law Enforcement Act of 1994 mandating life sentences for criminals convicted of a violent felony after two prior convictions, including drug crimes. See 18 U.S.C. § 3559(c) (2012).

119. Editorial, *Judge Baer's Tortured Reasoning*, N.Y. TIMES (Jan. 31, 1996) [hereinafter Editorial, *Judge Baer's Tortured Reasoning*], <https://www.nytimes.com/1996/01/31/opinion/judge-baer-s-tortured-reasoning.html>. Though it conceded that Judge Baer might have been "correct in observing that the corruption scandal" in the area "would have made it 'unusual' had the men not run away," it argues "that does not support a legal finding that flight is not a factor to be weighed" for a determination of reasonable suspicion. *Id.*; see also Editorial, *The Drug Judge*, WALL ST. J. (Jan. 26, 1996), reprinted in 142 CONG. REC. H2310 (daily ed. Mar. 14, 1996).

120. Clifford Krauss, *Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case*, N.Y. TIMES (Jan. 27, 1996), <https://www.nytimes.com/1996/01/27/nyregion/giuliani-and-bratton-assail-us-judge-s-ruling-in-drug-case.html>; Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES (Mar. 22, 1996), <https://www.nytimes.com/1996/03/22/nyregion/clinton-pressing-judge-to-relent.html>; Don Van Natta Jr., *Judge Baer Takes Himself off Drug Case*, N.Y. TIMES (May 17, 1996), <https://www.nytimes.com/1996/05/17/nyregion/judge-baer-takes-himself-off-drug-case.html>; Van Natta, *Federal Judge Reverses Decision*, *supra* note 71.

121. Editorial, *Judge Baer's Tortured Reasoning*, *supra* note 119 ("By far the most troubling aspect of the decision is the judge's superfluous finding that even if every detail of the account were true, it would still not justify the investigatory stop."). The editorial expresses concern, ultimately echoed by Judge Baer in *Bayless II*, for the "law-abiding citizens in minority neighborhoods" who may as a result suffer "a lower standard of policing." *Id.*

122. Congressional Republicans cited Judge Baer and his decision in challenging President Clinton's judicial appointees. Van Natta, *Judge Baer Takes Himself off Drug Case*, *supra* note 120.

123. *Bayless II*, 921 F. Supp. 211, 212 (S.D.N.Y. 1996).

124. *Id.*

demarcate the space of the law. The regret he expresses for his dicta and his ambivalent approach to the challenge of myth epitomize this struggle. Moreover, whether Judge Baer was ultimately guided by the evidence, the political climate and popular reaction, or, in the view of a legal realist, some combination of all, the decision nonetheless illustrates the contested role of narrative in influencing the space of law.

In *Bayless II*, Judge Baer comes to consider the defendant's testimony on the stand in light of corroborating police testimony and reports—the initial absence of which had contributed to his assessment of the police's lack of credibility.<sup>125</sup> This evidence, and the government affirmations describing drug trafficking activity in the area, persuaded Judge Baer that the police had a “reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot.’”<sup>126</sup> *Bayless II* accepts that the government demonstrated that it is more likely than not that the police had a “reasonable and articulable suspicion that the defendant was engaged in criminal activity” at the time of the stop.<sup>127</sup> Rather than require the government to bring proof beyond a reasonable doubt, the standard mandated for suppression hearings requires only proof by a preponderance of the credible evidence.<sup>128</sup>

In addition to the significance of this doctrinal demarcation of legal narrative and the facts allowed in the courtroom, this decision turns on the acceptance of the state's delineation of the site of the stop. In *Bayless II*, Judge Baer ultimately accepts the state's characterization of the neighborhood as a space of crime that invites the exception. In light of affirmations that “the area of Manhattan . . . in particular the portion of Washington Heights nearest to the George Washington Bridge, is known amongst law enforcement officers as a significant center of narcotics trafficking,”<sup>129</sup> Judge Baer accepted the circumscription of the area—or its exception from the New York City of travelers and tourists, whose goings and comings should prompt no suspicion. This spatial demarcation factor, among others, shapes the significance of the facts, leading Judge Baer to reverse his previous decision.

The doctrinal deference to suspicion in the “more likely than not” standard and the structural incorporation of drug crimes in minority neighborhoods as a site of exception challenge Judge Baer's ability to resist a master narrative of exclusion.<sup>130</sup> In addition, *Bayless II* struggles to delineate the places of narrative and myth. Though Judge Baer ultimately disavows the dicta in *Bayless I*, the inclusion of yet another quotation (this

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125. *Id.* at 216. In *Bayless I*, Judge Baer makes plain that he is persuaded by the credibility of the defendant—in light of the fact, among others, that she incriminated her own son, *Bayless I*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996), and cites the absence of the testifying officer's partner's testimony as a basis for doubt. *Id.* at 239.

126. *Bayless II*, 921 F. Supp. at 217.

127. *Id.* at 215.

128. *Id.*

129. *Id.* at 215 n.4.

130. *Id.* at 213.

time, of Thurgood Marshall) illustrates the roles of narrative in shaping the bounds of law and the struggle of the judge to police the framework from within the “city” or the place of the law.

In a final coda to *Bayless II*, labelled “Additional Thoughts,” the decision makes a special space for narrative to obliquely address the issue of bounding legal authority.<sup>131</sup> Judge Baer notes the distinction between a holding (“a proposition of law”) and dicta (“additional material which is included in most opinions but which does not relate directly to the holding”).<sup>132</sup> He explicitly abandons what he called “the hyperbole (dicta) in [his] initial decision,” but does so ambivalently in light of the special space accorded this discussion.<sup>133</sup> Echoing the title of the section, Judge Baer’s definition of dicta acknowledges that the “additional material . . . may color the holding of an opinion, [but] it by no means constitutes a legal or factual conclusion.”<sup>134</sup> In this space outside, but related to, the legal holding, Judge Baer expresses contrition for dicta in *Bayless I* that unfortunately not only obscured the true focus of the analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol the streets of our great city.<sup>135</sup>

Acknowledging the seeming porousness of the distinction between reasonable suspicion and an unlawful stop, Judge Baer notes that “the Government’s success did not come easily. The facts of this case have consistently danced the fine line between a valid search and seizure so essential to the Government’s criminal justice initiative and a trespass on citizens’ rights.”<sup>136</sup>

In this bracketed space of dicta related to legal authority but in its margin, Judge Baer rethinks his characterization of the officers. However, the dicta in *Bayless II* also veers back to the macro socio-legal problem that this case engages: “While it is clear that the Fourth Amendment operates to protect all members of our society from unreasonable searches and seizures, it is equally as unclear whether this protection exists to its fullest extent for people of color generally, and in inner-city neighborhoods in particular.”<sup>137</sup> Identifying the problem of a space of exception, *Bayless II* concludes by quoting Justice Thurgood Marshall’s dissenting opinion in *United States v. Sokolow*, which rejects stereotypes as the basis for reasonable suspicion.<sup>138</sup> Judge Baer reiterates Justice Marshall’s warning: “Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations . . . apply to

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131. *Id.* at 217.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* 490 U.S. 1, 11 (1989) (Marshall, J., dissenting).

the innocent and the guilty alike.”<sup>139</sup>

The struggle of the judge to manage the space of law in light of the persuasive and pervasive power of narrative thus becomes clear. In its effort to pursue the goals of law that includes all citizens in the constitutional right to be free from warrantless searches, *Bayless II* takes pains to contain the space of political critique. Judge Baer does so in a way that at first glance seems to demonstrate the fixed parameters of the law. However, viewed in light of *Bayless I* and the political and historical reality, his efforts prove less persuasive. This reality includes the macro-structural creation of spaces of exception in low income and minority communities<sup>140</sup> as well as the political pushback that threatens to oust Judge Baer from his own position within the legal framework.<sup>141</sup>

These decisions call attention to the dynamic by which narrative itself informs and challenges the city’s limits as a space of law on the ground and conceptually. It highlights the difficulties facing the judge as gatekeeper—even as he or she attempts to serve the goals of the law.

Substantively, Judge Baer’s decisions point to the interest in preserving a presumption of innocence, even as he struggles to find the space for this counter narrative perhaps, though not unequivocally, beyond the bounds of the law. This dynamic illuminates the significance of counter narrative and highlights the way Judge Sotomayor’s evocations of history in her dissenting opinion in *Strieff* makes legal space for Black Lives Matter.

#### IV. “DO NOT BE SOOTHED”: THE POET SURVEYS THE CITY

In the context of the counter narrative Black Lives Matter offers,<sup>142</sup> the power of the storyteller to negotiate the boundaries of the law, if incrementally, has become manifest in the headline-grabbing dissent penned by Justice Sotomayor in *Utah v. Strieff*.<sup>143</sup> This case involved an unlawful stop of Edward Strieff upon leaving a house in which drug dealing was suspected.<sup>144</sup> After learning of an outstanding traffic warrant and initiating a search, the police found methamphetamine and drug paraphernalia on Strieff, which the Supreme Court held to be admissible into evi-

139. *Bayless II*, 921 F. Supp. at 217 (quoting *Sokolow*, 490 U.S. at 11 (Marshall, J., dissenting)). Notably in the *Sokolow* dissenting opinion, Justice Marshall expressed concern about the reliance of law enforcement agents on profiling, which serves as an “imprecise stereotype” that threatens to “dull the officer’s ability and determination to make sensitive and fact-specific inferences.” *Sokolow*, 490 U.S. at 12, 13 (Marshall, J., dissenting).

140. The “war on drugs”—and the attendant criminalization of certain forms of drug use and distribution—is just one element in a broader socio-legal framework that has been charged with pushing communities to the margins. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>; see also FORMAN, *supra* note 110.

141. See Van Natta, *Federal Judge Reverses Decision*, *supra* note 71 (citing questions about the role of political pressure on the judge’s decision).

142. Barthes offers political speech, or speech that aims to transform reality—such as revolutionary language—as the counterpoint to myth. BARTHES, *supra* note 73, at 259.

143. See *Utah v. Strieff*, 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting).

144. *Id.* at 2060 (majority opinion).

dence.<sup>145</sup> The exclusionary rule—the exclusion of evidence uncovered through unconstitutional police conduct—serves as the primary judicial means to deter Fourth Amendment violations. It involves a cost-benefit analysis in which the rule does “not apply when the costs of exclusion outweigh its deterrent benefits.”<sup>146</sup>

In light of this balance, the Court held applicable in this case an exception to the exclusionary rule—the attenuation doctrine.<sup>147</sup> The majority of the Court considered the discovery of an intervening warrant and a search pursuant to the arrest as sufficiently attenuating the connection between the unlawful police stop and discovery.<sup>148</sup> As a result, the Court found the evidence not subject to the exclusionary rule.<sup>149</sup>

In her dissenting opinion, Justice Sotomayor rejects the Court’s view of the limited protection the Fourth Amendment affords individuals. In her view, the Fourth Amendment should prohibit an unlawful stop, warrant check, and subsequent search.<sup>150</sup> Her dissenting opinion characterizes the warrant search as “part and parcel” of the illegal search in light of the prevalence of outstanding warrants and thus the predictability of the officer uncovering one.<sup>151</sup>

Justice Sotomayor’s dissenting opinion seized attention for articulating the perspective of Black Lives Matter<sup>152</sup> and garnered criticism for its failure to confront the extent of the estrangement of black communities.<sup>153</sup> This article identifies another important feature—the significance of its implicit acknowledgment of the impact of necropower. A counter narrative mobilizing empathy enables the recognition of the space of exception to legal norms that exists within the metaphorical city—the space of law—as well as in the actual streets. By inviting the metaphorical poet

145. *Id.* at 2064 (Sotomayor, J., dissenting).

146. *Id.* at 2059 (majority opinion).

147. *Id.* at 2064 (Sotomayor, J., dissenting).

148. *Id.* at 2063 (majority opinion).

149. *Id.*

150. *Id.* at 2064 (Sotomayor, J., dissenting). Justice Sotomayor’s opinion was joined in part by Justice Ruth Bader Ginsburg, who also joined a dissenting opinion penned by Justice Elena Kagan. Justice Kagan’s dissenting opinion foregrounds the issue of balancing between the “competing considerations” of deterrence of unlawful police conduct and the costs of suppression of evidence. *Id.* at 2071 (Kagan, J., dissenting). Justice Kagan’s dissenting opinion takes up the three factors guiding “attenuation doctrine” analysis, but disputes the majority’s application to the facts. *Id.* at 2072–73 (Kagan, J., dissenting).

151. *Id.* at 2066 (Sotomayor, J., dissenting).

152. See Adam Liptak, *Supreme Court Says Police May Use Evidence Found After Illegal Stops*, N.Y. TIMES (June 20, 2016), <https://www.nytimes.com/2016/06/21/us/supreme-court-says-police-may-use-evidence-found-after-illegal-stops.html> (reporting on an assessment by law professor Justin Driver that Justice Sotomayor’s *Strieff* dissent is “the strongest indication we have yet that the Black Lives Matter movement has made a difference at the Supreme Court—at least with one justice”); see also Adam Liptak, *In Dissents, Sonia Sotomayor Takes on the Criminal Justice System*, N.Y. TIMES (July 4, 2016), <https://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html>.

153. See Bell, *supra* note 29, at 2066. Identifying the defendant’s race, Justice Sotomayor asserts, “The white defendant in this case shows that anyone’s dignity can be violated in this manner.” *Strieff*, 136 S. Ct. at 2070 (2016) (Sotomayor, J., dissenting).



into the city, Justice Sotomayor's dissenting opinion establishes the authority of the narrative of the Movement for Black Lives. She does so in part through rhetorical echoes of Martin Luther King, Jr.'s empathy-demanding articulation of resistance, his *Letter from Birmingham Jail*, discussed in the section below.

Thus, in the liminal space of dissent, the opinion demands empathy. It thereby makes room for an empathetic narrative to shape doctrine beyond the bounds of the specific evidentiary issue in *Strieff*. Echoing earlier expressions of resistance to a dominant narrative, Justice Sotomayor's dissenting opinion demonstrates how narrative, counter narrative, and rhetoric play roles in shaping the bounds of the legal space on the ground, with respect to its citizens, and in the discourse of law. Through empathy, Justice Sotomayor's dissent demonstrates the mobilization of narrative to serve the goals of law.

Before analyzing the operation of rhetoric and narrative in Justice Sotomayor's resonant dissenting opinion and the way it incorporates King's voice and others, this article discusses the way in which Martin Luther King, Jr.'s now canonical letter challenges the parameters of law and demands social inclusion through the mobilization of empathy.

A. "OUTSIDERS COMING IN" AND THE SPACE OF EMPATHY IN  
*LETTER FROM BIRMINGHAM JAIL*

Now integrated into the canon of great American writing and recognized as a model for legal argument,<sup>154</sup> Martin Luther King, Jr.'s *Letter from Birmingham Jail*<sup>155</sup> was prompted by his arrest and imprisonment for participating in a civil rights march in Birmingham, Alabama, in April 1963.<sup>156</sup> The *Letter* responded to a published letter penned by eight Alabama clergymen criticizing the civil rights demonstrations for being "unwise and untimely."<sup>157</sup> The *Letter* implicitly identified the necropolitical impact of legal actors. In doing so, it creates conceptual space to include those excluded from the protections of the law by rebutting and reframing categories and through the mobilization of empathy.

Taking up first the critique of the protesters as "outsiders coming in," King's *Letter* follows a rhetorical pattern that counters the claim on its own terms, but also redefines the categories so as to reposition himself as an insider.<sup>158</sup> Thus, King notes his role as president of the Southern Christian Leadership Conference (SCLC), with an affiliate in Birmingham, and the invitation it extended to King and his staff to "engage in a

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154. See, e.g., Mark DeForrest, *Introducing Persuasive Legal Argument via The Letter from a Birmingham City Jail*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 109, 110–11 (2009).

155. Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), reprinted in 26 U.C. DAVIS L. REV. 835 (1993).

156. Haig Bosmajian, *The Letter from Birmingham Jail*, in MARTIN LUTHER KING, JR.: A PROFILE 128, 128 (C. Eric Lincoln ed., 1984).

157. King, *supra* note 155, at 835.

158. *Id.*

nonviolent direct-action program if . . . deemed necessary.”<sup>159</sup>

Yet, in an additional rhetorical move, which the *Letter* repeatedly undertakes, King challenges the category that bounds him out. In this case, he argues that he is in Birmingham because of the presence of injustice, which “compel[s]” his “carry[ing] the gospel of freedom beyond [his] hometown.”<sup>160</sup> Likening himself to the Apostle Paul and noting the “interrelatedness of all communities and states,” he both places himself within the polity and reconfigures its boundaries: “caught in an inescapable network of mutuality, tied in a single garment of destiny . . . Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.”<sup>161</sup> Through protest and the letter’s counter argument, King thereby acknowledges the exclusion of certain communities from the space of law and reimagines the category to include them.

Along similar lines, King’s *Letter* follows this pattern, countering the clergymen’s concerns about the movement’s “willingness to break laws” and their charges of untimeliness and extremism.<sup>162</sup> For each, King provides counter evidence. For example, King points to SCLC’s “diligen[ce] in urg[ing] people to obey the Supreme Court’s decision of 1954 outlawing segregation in schools” to rebut charges of insensitivity to law, before challenging the category as a whole (“an unjust law is no law”).<sup>163</sup> King thereby claims access to a shared space. He posits new aspirational boundaries to re-inscribe the group within the parameters of American law. He repeats this move, countering charges of extremism (citing nonviolent approach) only to embrace the role of “extremist for love” modeled by Jesus, Amos, Paul, Martin Luther, John Bunyan, Abraham Lincoln, and Thomas Jefferson.<sup>164</sup> In this way, the *Letter* reconceives of a space of inclusion in which the resistance to socio-legal structures mobilize a shared perspective.

Yet in addition to countering and redefining the terms of exclusion, the *Letter* mobilizes a demand for empathy, voicing the experiences of those circumscribed by segregation and denied rights under law. King makes a rhetorical move that resonates in Justice Sotomayor’s dissent. He counters the charge of untimeliness through a direct address of the reader—the same move implicit in Black Lives Matter and echoed by Justice

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159. *Id.* at 835–36.

160. *Id.* at 836.

161. *Id.*

162. *Id.* at 840.

163. *Id.*

164. *Id.* at 843–45 (“Was not Jesus an extremist for love . . . Was not Amos an extremist for justice . . . Was not Paul an extremist for the Christian gospel . . . Was not Martin Luther an extremist . . . And Abraham Lincoln: ‘This nation cannot survive half slave and half free.’ And Thomas Jefferson: ‘We hold these truths to be self-evident, that all men are created equal . . .’ So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice?”) (citations omitted).

Sotomayor.<sup>165</sup> Responding to the clergymen's urging to "wait" for the proper time, the *Letter* follows the pattern, rebutting the claim on its own terms.<sup>166</sup> It also then reframes the question, in this case mobilizing a counter narrative to demand empathy and create a space of recognition of the excluded community.

The *Letter* speculates, "Perhaps it is easy for those who have never felt the stinging darts of segregation to say, 'Wait.'"<sup>167</sup> To remedy this, the *Letter* offers the perspective of the excluded group and invites the reader to imagine herself in this place. By using the direct address "you," the *Letter* demands empathy. In this way, it draws in the reader so as to establish the rightful place of law:

But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five-year-old son who is asking: "Daddy, why do white people treat colored people so mean?" . . . when you are forever fighting a degenerating sense of 'nobodiness'—then you will understand why we find it difficult to wait.<sup>168</sup>

Thus, drawing on the format of poetry,<sup>169</sup> a long paragraph recounts the harms of exclusion from civil society from the perspective of those suffering exclusion. It thereby demands recognition and thus empathy from King's critics. Through the contingent grammatical structure, the *Letter* emphasizes how this experience remains outside the white reality.<sup>170</sup> Through the mobilization of counter narrative, King thereby creates a space for "legitimate and unavoidable impatience"<sup>171</sup> that must be seen and acknowledged if not shared by the reader.

The *Letter* and the voice of King, if not his ultimate agenda, have come to be included in the space of American identity and history, even if the

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165. See Yancy & Butler, *supra* note 7 (George Yancy suggesting that "'Black Lives Matter' says something like: 'You—white police officers—recognize my/our humanity!'")

166. King, *supra* note 155, at 839 ("We have waited for more than 340 years for our constitutional and God-given rights").

167. *Id.* (citation omitted).

168. *Id.*

169. Among other literary devices, King draws on anaphora in the repetition of the phrase "when you" building toward the turn, or volta, marked by "—then . . ." *Id.*

170. I thank Beth Johnston for this insight.

171. *Id.* at 840.

charges of necropower still ring true. An examination of Justice Sotomayor's intervention to call attention to the ongoing creation of spaces of exclusion from the presumptions of law reveals the incorporation of the civil rights perspective through the rhetorical allusion to King's *Letter*. It also shows how Justice Sotomayor mobilizes King's argumentative strategy to challenge not only the boundaries of the law but its defining categories. In this way, though penning a dissenting opinion, Justice Sotomayor's embrace of the perspective and rhetorical underpinnings of Black Lives Matter might prove more successful than the efforts of Judge Baer in creating a space of recognition in and beyond the law. At the very least, they reflect the struggles of the judge to mediate the limits of the law as the poet in the city.

#### B. *STRIEFF* AND THE STATE OF EXCEPTION TO THE EXCLUSIONARY RULE

Of late, the impact of a counter narrative to the presumption that law enforcement operates untainted by racial or economic-status biases has been noticeable in judicial decisions. Drawing on an analogy between the poet's relation to the city to the place of literature in the "sphere of law," Yoshino evaluates Plato's casting out of the poet from the city as a "figure of misrule."<sup>172</sup> He identifies the potential for narrative to "transform the preexisting landscape" and thereby threaten or aid the legal process.<sup>173</sup> As the dissenting opinion of Justice Sotomayor indicates, counter narrative may impact doctrinal assessment (here, the "attenuation doctrine" allowing unlawfully obtained evidence to be excepted from the exclusionary rule). In addition, however, narrative does something more complicated than serve the goals of the law or remain extra-legal if it does not.<sup>174</sup> As this discussion demonstrates, narrative challenges the parameters of what constitutes legal authority.

Making headlines,<sup>175</sup> Justice Sotomayor's dissenting opinion in *Utah v. Strieff*<sup>176</sup> rejects the Court's position that discovery of a preexisting warrant for an individual's arrest attenuated the connection between a police

172. Yoshino, *supra* note 2, at 1841–42.

173. *Id.* at 1891.

174. *Cf. id.* at 1841–42 (invoking the Platonic model in which the boundaries of the city are fixed, if at times permeable to narrative).

175. See, e.g., Monica Akhtar, *Here's What Justice Sotomayor Said in Her Fiery Dissent*, WASH. POST (June 20, 2016), [https://www.washingtonpost.com/video/national/heres-what-justice-sotomayor-said-in-her-fiery-dissent/2016/06/20/3b83893e-3719-11e6-af02-1df55f0c77ff\\_video.html](https://www.washingtonpost.com/video/national/heres-what-justice-sotomayor-said-in-her-fiery-dissent/2016/06/20/3b83893e-3719-11e6-af02-1df55f0c77ff_video.html) (displaying quotes set to synthesized music); Matt Ford, *Justice Sotomayor's Ringing Dissent*, ATLANTIC (June 20, 2016), <https://www.theatlantic.com/politics/archive/2016/06/utah-strieff-sotomayor/487922/>; Tal Kopan, *Sotomayor in Fiery Dissent: Illegal Stops 'Corrode All Our Civil Liberties'*, CNN (June 21, 2016), <https://www.cnn.com/2016/06/20/politics/sotomayor-supreme-court-dissent-utah-strieff/index.html>; Liptak, *Police May Use Evidence*, *supra* note 152 (reporting on assessment by law Professor Justin Driver, that Justice Sotomayor's *Strieff* dissent is "the strongest indication we have yet that the Black Lives Matter movement has made a difference at the Supreme Court—at least with one justice"); see also Liptak, *In Dissents*, *supra* note 152.

176. 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting).

stop lacking reasonable suspicion in violation of the Fourth Amendment and the discovery of evidence, thereby making the evidence admissible in court.<sup>177</sup> Justice Clarence Thomas's majority opinion foregrounds the costs of excluding evidence in relation to the benefits of deterrence.<sup>178</sup> Weighing the temporal proximity of the search to the unlawful stop, the presence of intervening factors (the existence of a warrant), and the lack of flagrant misconduct, the majority of the Court held that the intervening warrant and "at most negligent" actions of the police officer rendered the evidence admissible.<sup>179</sup>

Justice Sotomayor's dissenting opinion<sup>180</sup> reframes the legal question of the admissibility of unlawfully discovered evidence. It does so by mobilizing counter narrative in pointed ways. The opinion calls attention to the creation of a space in which the subject is, as a functional matter, presumed guilty. In doing so, it seeks to reestablish the primacy of presumed innocence that underpins the constitutional right to be free of unlawful search and seizure.

Specifically, Justice Sotomayor underscores the role of the exclusionary rule as a tool to protect against "lawless invasions" of constitutional rights.<sup>181</sup> Ultimately, the opinion counters the majority opinion's analysis of the costs of exclusion of unlawfully obtained evidence versus the benefits of deterrence of unlawful police conduct.<sup>182</sup> In this way, the counter narrative serves not only as a rhetorical persuasive tool underpinning the legal argument but as a way to actualize the harm that must be considered in the weighing of the costs and benefits of the exclusionary rule.

Invoking the rhetorical approach of King's *Letter*, Justice Sotomayor imposes a perspectival shift and demands a conceptual one. Her dissenting opinion begins with a warning that addresses the reader directly:

Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into

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177. *Id.* at 2064.

178. *Id.* at 2059 (majority opinion).

179. *Id.* at 2062–63.

180. Dissents serve as potent sources for emerging counter narratives, as suggested by now "canonical" cases that achieved this status by virtue of what became persuasive dissenting opinions. See Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244–45 (1998).

181. *Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

182. Justice Thomas notes the "significant costs" of the exclusionary rule that have led the Court to apply it only "where its deterrence benefits outweigh its substantial social costs." See *Strieff*, 136 S. Ct. at 2061 (majority opinion) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). Writing for the majority in *Hudson*, Justice Scalia reestablished the Court's position, tracing back to *United States v. Leon*, 468 U.S. 897 (1984), of resisting the suppression of evidence. See *Hudson*, 547 U.S. at 591. The Court established in *Hudson* that a violation of the requirement that the police "knock-and-announce" their presence before entering a home does not mandate suppression of evidence obtained in circumstances in which the police had already procured a search warrant. *Id.* at 589–90.

evidence anything he happens to find by searching you after arresting you on the warrant.<sup>183</sup>

This move also echoes the implications of the direct address canonized by King in his *Letter*.<sup>184</sup> In this way, it gives voice to the claims of the civil rights movement and the history of exclusion underscored by the presumption of guilt in this particular space. Foregrounding a presumptively innocent citizen (rather than red-handed defendant) and positioning the reader in this role, the opinion also challenges the majority's characterization of its holding, which purports to apply rather than revise existing doctrine.<sup>185</sup> The cautionary narrative stance elicits empathy and perhaps fear. It thereby makes space for a counter narrative that becomes even more explicit in the last part of the opinion. Thus, the rhetorical stance of Justice Sotomayor's dissenting opinion makes room for the legal argument and calls attention to the threat to the goals of the law.<sup>186</sup>

Through counter narrative, the opinion calls attention to the creation of a space of exclusion that positions the subject as an enemy, or at the very least, renders her outside the boundaries of legal protection. The majority opinion's narrative begins from a vantage point of suspicion if not presumed guilt ("[t]his case began with an anonymous tip").<sup>187</sup> In contrast, the counter narrative mobilizes empathy by focusing on the defendant: minutes after Edward Strieff walked out of a South Salt Lake City home, an officer stopped him, questioned him, and took his identification to run it through a police database.<sup>188</sup>

As Justice Sotomayor's telling makes plain, the space the defendant inhabits marks him: "The officer did not suspect Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain 'drug activity,'" making the stop illegal.<sup>189</sup> Identifying the police officer's warrant check as "part and parcel of the officer's illegal 'expedition for evidence,'" the opinion points to the "over 180,000 misdemeanor warrants" listed in the Utah database and the "'backlog of outstanding warrants' so large that [Salt Lake County] faced the 'potential for civil liability.'"<sup>190</sup> In this way it rebuts the major-

183. *Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting).

184. For a criticism of this move as universalizing police proximity and threat to obscure the estrangement of particular communities, see Bell, *supra* note 29, at 2057–58.

185. *Strieff*, 136 S. Ct. at 2064 (Sotomayor, J., dissenting).

186. Justice Sotomayor critiques what she views as a misapplication of precedent by the majority. "*Wong Sun* explains why Strieff's drugs must be excluded." *Id.* at 2066 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

187. *Strieff*, 136 S. Ct. at 2059 (majority opinion).

188. *Id.* at 2064–65 (Sotomayor, J., dissenting). Social psychologists have demonstrated that the framing of stories and the way in which facts and events are revealed impact our understanding of causation and responsibility impact the way we make attributions of causation, responsibility, and blame. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984); see also Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1353–54 (2010) (applying this insight to visual frames and camera angles that implicate certain perspectives).

189. *Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting).

190. *Id.* at 2066.

ity's characterization of the officer's discovery of the warrant as "some intervening surprise that he could not have anticipated."<sup>191</sup>

Positioned as a foreseeable phenomenon rather than an "intervening circumstance" justifying inclusion under the law,<sup>192</sup> the warrant resonates beyond the singular encounter as a structural issue of legal significance. Justice Sotomayor refuses to accept the Court's characterization of the event as "isolated." The dissenting opinion makes plain the incorporation of a space of exception in the legal and physical landscape in which subjects may already be marked guilty.<sup>193</sup> Citing data revealing the "surprisingly common" (indeed "staggering") prevalence of "[o]utstanding warrants"—"the vast majority of which appear to be for minor offenses"—the opinion brings to light the operation of necropower "across the country."<sup>194</sup> The opinion calls attention to "astounding numbers of warrants [that] can be used by police to stop people without cause"<sup>195</sup> and the practice of searching for warrants as part of "institutionalized training procedures."<sup>196</sup> In doing so, it depicts a space of exception in which subjects come to be presumed guilty within the structures of the city and the law.

Manifesting the impact of the Court's holding on people's lived experience, Justice Sotomayor's counter narrative challenges the doctrinal cost-benefit analysis of the exclusionary rule underpinning the majority opinion. The counter narrative that exposes the costs and the presumed guilt of the subject bolsters Justice Sotomayor's claim that the majority opinion "misses the point" when it characterizes the warrant check in this case as a "'negligibly burdensome precautio[n]' taken for the officer's 'safety.'"<sup>197</sup> Instead, the dissenting opinion reestablishes the context that should frame police behavior. It reminds the reader of the uncontested fact that "the officer stopped Strieff without suspecting him of committing any crime."<sup>198</sup> Together, the admonishment, the particular narrative starting point, and the implication of the reader through direct address claim a substantively significant space for the defendant in a position of unlawfully challenged innocence.

### C. INSINUATING THE POET INTO THE CITY LIMITS

Justice Sotomayor's dissenting opinion reflects a sensitivity to the judge's involvement in the policing of the bounds of the law, including through the mobilization of narrative. The opinion identifies the role of the exclusionary rule in disincentivizing lawless searches by police and in

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191. *Id.*

192. *Id.*

193. In an analogue to the necropolitical framework, these people exist as so-called dead men walking.

194. *See id.* at 2068.

195. *Id.*

196. *Id.* at 2069.

197. *Id.* at 2067 (quoting *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015)).

198. *Id.*

keeping courts “from being ‘made party to lawless invasions of the constitutional rights of citizens.’”<sup>199</sup> Justice Sotomayor brackets the final section, asserting that she writes “only for [her]self . . . drawing on professional experiences.”<sup>200</sup> Nonetheless, this section also substantively counters the majority’s position that the costs of exclusion outweigh the benefits in this case.<sup>201</sup> It does so—in echoes of Judge Baer and of King—through the invocation of an array of literature traditionally deemed outside the official canon of legal authority—from W.E.B. Du Bois’ turn of the century ground-breaking sociological essays in *The Souls of Black Folk*, to James Baldwin’s essays on race, to Michelle Alexander’s socio-historical study, *The New Jim Crow*.<sup>202</sup> In addition, its rhetorical plea for empathy seeks to create a space for the excluded subject through recognition.

In the liminal space of the dissenting opinion, and armed with the counterpoint to myth of the momentum and literature of the Movement for Black Lives and its antecedents, Justice Sotomayor does not apologize for her mobilization of dicta. Instead, she grants authority to cultural forms ostensibly outside the law. The opinion highlights the socio-legal context that impacts the presumed balance of interests in the law. It subtly mobilizes the reframing of categories, such as the presumptive legal legitimacy of traffic warrants, echoing the rhetorical move of King’s *Letter*. It thereby invites a rethinking of the “substantial social costs” implicated in the application of the exclusionary rule.<sup>203</sup>

Most powerfully perhaps, the final part of the dissent echoes King’s insistence on making room for a counter narrative voice and mobilizing empathy as a means of recognition:

This Court has allowed an officer to stop you for whatever reason he wants . . . The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your “consent” to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand helpless, perhaps facing a wall with [your] hands raised. If the officer thinks you might be dangerous, he may then “frisk” you for weapons . . . . Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the “civil death” of discrimination by employers, landlords, and whoever else conducts a background check.”<sup>204</sup>

At the risk of universalizing the harm, the opinion also follows King’s model by insisting on the cost as one borne within the bounds of the metaphorical city, or shared collective space of law. By recognizing the structural circumscription of the protections of law, the opinion ulti-

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199. *Strieff*, 136 S. Ct. at 2065 (quoting *Terry v. Ohio*, 392 U.S. 1, 12 (1968)).

200. *Id.* at 2070.

201. *See id.* at 2061 (majority opinion).

202. *Id.* at 2069–70 (Sotomayor, J., dissenting).

203. *See id.* at 2061 (majority opinion).

204. *Id.* at 2070–71 (Sotomayor, J., dissenting) (internal quotation marks omitted).



mately insists on internalizing this harm. In doing so, it rejects the legitimacy of this application of law and tries to reclaim the space for those excluded. As the opinion concludes:

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.<sup>205</sup>

Straddling a liminal space of the dissenting opinion in the articulation of the law, Justice Sotomayor calls on the voice of the poet—both in citing literature as authority and through rhetorical allusion—attempting to shape the space of legal protection. In the case of *Strieff*, the counter narrative fails to impact the doctrine directly.

Still, it might prove more successful in affecting the specific boundaries of the space of law than the attempts by Judge Baer. Notably, and as an indication of the power of narrative to influence doctrine, the awareness of the necropolitical framework invoked in *Strieff* has shaped the judgement of some courts considering other legal questions. Thus, in a revisiting of the conundrum faced by Judge Baer, for example, the Massachusetts Supreme Judicial Court rejected flight from police on its own as a probative indication of guilt or state of mind to engender reasonable suspicion, citing reports on systemic bias in police stops.<sup>206</sup>

Acknowledging the operation of necropower within the law, the court asserted in *Massachusetts v. Warren*:

[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department . . . report documenting a pattern of racial profiling of black males in the city of Boston.<sup>207</sup>

Suppressing evidence of unlawful firearm possession in this case because of lack of reasonable suspicion for an investigatory stop, the court asserted the need to consider the context established by the report in “weighing flight as a factor” in assessing reasonable suspicion.<sup>208</sup> Moreover, it noted the “factual irony” of considering evasion of the police as a factor in determining reasonable suspicion in light of the freedom of citizens to choose not to speak to an officer absent reasonable suspicion.<sup>209</sup> As such, the opinion mobilizes Justice Sotomayor’s counter narrative of presumptive innocence, recognizing the implicit narrative of presumed

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205. *Id.* at 2071.

206. *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016); *see also* *Commonwealth v. Meneus*, 66 N.E.3d 1019, 1024 (Mass. 2017) (holding a suspect’s backing away from police to avoid an unconsented-to patfrisk permitted no inference of criminal activity in support of reasonable suspicion).

207. *Warren*, 58 N.E.3d at 342.

208. *Id.*

209. *Id.* at 341.

guilt as suggested by the reframing of the experiences of people of color in the notion of the “crime” of “walking while black.”<sup>210</sup> In this way, the counter narrative challenge to the necropolitical structure can be seen to impact the very bounds of the law.

## V. CONCLUSION

As the above discussion demonstrates, the policing of the literal space and disciplinary boundaries of law cannot be fully cordoned off from the socio-political framework. Society is, in turn, shaped by the narratives and myths that inform understandings of our world. This complicates the job of the judge who must also police the bounds of narratives in and impacting the law. Yet, the mandate to counter myth echoed by Judge Baer remains more relevant than ever. It can be taken up in doctrine that recognizes the significance of inclusion in the space of the law through a broadly imposed presumption of innocence. In light of the goals of the law, not least the right of people to be “secure in their persons,” the counter narrative of the Movement for Black Lives and its historical precursors point to the need to secure doctrinally and structurally the presumption of innocence even before a subject becomes a defendant in a courtroom. Currently, the doctrinal operation of reasonable doubt, for example, happens only within the courtroom. The Black Lives Matter counter narrative suggests the legal significance of policing narratives to establish an inclusive space of presumed innocence on the streets as well as at the gates of the courtroom. More broadly, it demonstrates the potential of narrative to shape parameters of law.

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210. I use the word “crime” here to point to the social implications and “law in action” rather than to the “law on the books.” See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12–15 (1910). The contextualization of the law by Justice Sotomayor and others, however, suggests the interdependence of these concepts.



## **Comments**

