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*Brandon Hasbrouck**

This Piece embraces a fictional narrative to illustrate deep flaws in our legal system. It borrows its basic structure and a few choice lines from George Orwell’s classic novel Nineteen Eighty-Four. Like Orwell’s novel, it is set in the not-too-distant future to comment on problems already emerging in the present. The footnotes largely provide examples of some of those problems and how courts have treated them in a constitutional law context. The title (itself quite close to Orwell’s own title) is a reference to our chief civil rights statute, while the story deals with a critical threat to that statute. While qualified immunity has long served to prevent recovery for abuses by government employees such as law enforcement, it would be unnecessary if the courts simply refused to acknowledge that the Constitution granted protection against those abuses in the first place. And so, imagine a world where the Constitution’s rights guarantees extended only so far as the most cynical originalist would say they do. It might not be too far from our own.

* Associate Professor of Law and Director, Frances Lewis Law Center, Washington and Lee University School of Law. With apologies to George Orwell, whose classic novel is significantly more optimistic than this Piece. With love for Derrick Bell, whose work *The Space Traders* remains the gold standard for legal academic fiction. Derrick Bell, *The Space Traders*, in *Faces at the Bottom of the Well: The Permanence of Racism* 158 (1992). I want to thank Deborah Archer, Devon Carbado, Scott Chamberlain, Daniel Harawa, Jillian Hasbrouck, Alexis Hoag, Alex Klein, Leah Litman, Melissa Murray, Vincent Southerland, and Julie Suk for their inspiration, guidance, and feedback. Thanks are also due to participants in the legal theory workshop at Fordham University School of Law and participants in the colloquium on race and inequality at New York University School of Law. I am grateful for the extraordinary support of the Frances Lewis Law Center at the Washington and Lee University School of Law. So much love to the amazing editors at the *Columbia Law Review*—specifically Godard Solomon—for superb editing and thoughtful comments that significantly advanced this Piece. For my daughters. Black Lives Matter.

It was a dull, gray morning in June, and the clocks were striking ten.¹ Ronald White, his umbrella tucked into the armpit of his white-and-blue-checked shirt in anticipation of the afternoon's rain, slipped quickly through the glass doors to the Foundation's lobby, but not quickly enough to prevent the shouts of the protestors on Second Street from entering along with him.

The final decisions of the term, always certain to provoke controversy, had drawn dueling demonstrations, confined to separate streets to minimize their opportunities for brawling.² Still, the throngs spilling forth from Union Station had taken the opportunity to antagonize each other on the way to their respective destinations, delaying Ronald's commute. The water cooler talk was unusually ebullient, his colleagues self-assured of the day's outcome. The long project was complete; the doctrine of qualified immunity could finally fall.³

The Foundation, of course, had publicly opposed this development. Their chief rivals at the Institute, meanwhile, had long voiced their public

1. See generally George Orwell, *Nineteen Eighty-Four* 3 (1949) (providing the overall structure and a few choice phrases—such as this opening line—for this Piece). Ronald is meant, like Orwell's Winston, to be an everyman figure and has thus been left largely ambiguous as to his race, religion, sexuality, social background (beyond not being a scion of great wealth), and so forth.

2. See, e.g., Alexander Sammon, *The Base of the Marble Stairs*, *Slate* (May 22, 2023), <https://slate.com/news-and-politics/2023/05/changing-protests-outside-one-first-street.html> [<https://perma.cc/4CPW-K95Z>] (“[F]or a little over a year, [a small plaza in front of the Supreme Court] has been one of the most important theaters of protest in America.”).

3. This Piece is premised on two ideas. First, that qualified immunity is ultimately a doomed doctrine. See Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 *Calif. L. Rev.* 201, 207 (2023) (arguing that the doctrine of qualified immunity is founded on a flawed historical premise due to an omission in the transcription of the statute eventually codified as 42 U.S.C. § 1983 when it was published by the Reviser of the Federal Statutes). Second, that the conservative legal project is prepared to accept the end of qualified immunity by rendering the doctrine unnecessary. For an example and discussion of the whittling away of constitutional rights, see *Vega v. Tekoh*, 142 S. Ct. 2095, 2106 (2022) (“[A] violation of *Miranda* does not necessarily constitute a violation of the Constitution, and therefore such a violation does not constitute ‘the deprivation of [a constitutional] right[]’” (quoting 42 U.S.C. § 1983 (2018)) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966))); Brandon Hasbrouck, *Big Police Energy Unleashed by Supreme Court a Sign of (Very Bad) Things to Come*, *Bos. Globe: Emancipator*, <https://www.bostonglobe.com/2022/06/27/opinion/big-police-energy-unleashed-by-supreme-court-sign-very-bad-things-come/> [<https://perma.cc/E5LJ-CGJG>] [hereinafter Hasbrouck, *Big Police Energy*] (last updated June 27, 2022) (arguing that the Court's ruling in *Tekoh* sets up a dangerous potential pattern for the Court to declare that other police abuses simply don't constitute violations of constitutional rights). As *Tekoh* demonstrates, § 1983 is only as powerful as the Court's willingness to recognize constitutional rights against harms by government agents. See *Tekoh*, 142 S. Ct. at 2106. The similarity between the core civil rights damages statute and Orwell's title inspired this Piece's title.

support.⁴ Ronald understood the Foundation's opposition to be something of a formality; the doctrine was functionally only important if the public could sue police officers, and the Court had nearly eliminated that option. Through a long and coordinated campaign, the Foundation and its fellow travelers had whittled away at the concept of constitutional protections against the government's agents.⁵ After all, how could the Founders have intended protections against technologies and tactics beyond their ken?⁶ The Constitution was amendable for a reason, and that was the sanctioned process for expanding the scope of its protection.⁷

Ronald's role as a junior archivist had little to do with the day's momentous events, but the mood among his colleagues turned the day into an extended run of coffee breaks, visitors, and other pleasantries. By half past three, the futility of beginning any further work became apparent, and Ronald accepted David MacIntosh's invitation to join some of the litigation team down at Jack's Pub.

MacIntosh was the most sociable of the Foundation's litigators and the only one who had shown any interest in Ronald's work. He'd introduced himself as something of a history buff and often had questions about old briefs and paraphernalia from the Foundation's early days. Some of the more senior archivists found this habit irritating and long ago directed MacIntosh's inquiries to Ronald. Somehow, Ronald always walked away from their conversations feeling like *he'd* learned more about the Foundation, even though it was MacIntosh who had the questions.

Some of the Institute's litigators had already pulled several tables together near the bar and greeted their counterparts from the Foundation

4. The two organizations are meant to represent the ostensibly competing philosophies among conservative think tanks that largely accept funding from closely aligned donors. See Jeff Stein & Yeganeh Torbati, Heritage Foundation, Former Powerhouse of GOP Policy, Adjusts in Face of New Competition From Trump Allies, Wash. Post (Feb. 7, 2022), <https://www.washingtonpost.com/us-policy/2022/02/07/heritage-foundation-trump-republicans/> (on file with the *Columbia Law Review*) (discussing rivalries among right-wing think tanks competing for donations from the same groups of funders).

5. See Joanna Schwartz, *Shielded: How the Police Became Untouchable* 54 (2023) (“[A]s the Supreme Court sorted out what precisely was protected by the Fourth Amendment, it repeatedly erred on the side of giving police officers leeway in the name of public safety.”).

6. See generally George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 *Notre Dame L. Rev.* 1451 (2005) (exploring an alternative history in which the Framers could have foreseen technological and social developments in policing and drafted a different version of the Fourth Amendment to account for these shifts).

7. See U.S. Const. art. V (requiring either two-thirds of both houses of Congress or two-thirds of state legislatures to initiate the amendment process and either legislatures or conventions in three-quarters of the states to ratify an amendment); Nikolas Bowie, *Antidemocracy*, 135 *Harv. L. Rev.* 160, 174–75 (2021) (“[W]hile the Supreme Court has the power to overrule any of its decisions by a majority vote, the rest of us can formally reverse its constitutional interpretations only by packing the Court, by disarming it, or by amending the most difficult-to-change national constitution of any self-described democracy . . .”).

warmly. MacIntosh led the group to a table across the room, where Ronald soon found a succession of fine whiskeys in tapered glasses placed before him.

As daylight faded, Ronald vaguely recognized that he had not bothered with anything but coffee and whiskey since breakfast. Before he could decide whether to rise to leave or summon the server to order dinner, though, one of the Institute's lawyers approached to invite the remnants of the Foundation's crowd to join theirs. MacIntosh accepted for them—after all, their operating budgets largely came from the same coterie of industrialist donors⁸—and soon all thought of food or departure fled Ronald's mind. The lawyers' spirit of camaraderie across organizational lines washed away their purported disagreement on the day's great issue.

One of the Institute's attorneys, mistaking Ronald for a fellow member of the bar, grinned, then said, "You guys put up a good fight, made it look honest. After all, the plebes need a good show. I've made a good career of sparring with you lot. But we both know it's just to give 'em two sides for the cable talk shows." He sipped his whiskey. "When we look back on this, it's gonna be like the Undertaker and Shawn Michaels. Absolute

8. Corporate money has an outsized influence in American politics. See, e.g., Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, *The Atlantic* (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/> (on file with the *Columbia Law Review*) ("Corporations now spend about \$2.6 billion a year on reported lobbying expenditures—more than the \$2 billion we spend to fund the House (\$1.18 billion) and Senate (\$860 million)."); Ciara Torres-Spelliscy, *20 Things We Learned About Money in Politics in 2020*, *Brennan Ctr. for Just.* (Dec. 8, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/20-things-we-learned-about-money-politics-2020> [<https://perma.cc/8NZ2-DVHV>] (arguing for the need to reform the role of money in U.S. politics). The phenomenon is particularly pronounced in the corporate funding networks behind far-right efforts to install authoritarian rule. See Andrew Perez, Andy Kroll & Justin Elliott, *How a Secretive Billionaire Handed His Fortune to the Architect of the Right-Wing Takeover of the Courts*, *ProPublica* (Aug. 22, 2022), <https://www.propublica.org/article/dark-money-leonard-leo-barre-seid> [<https://perma.cc/D3KM-48NK>] ("An elderly, ultra-secretive Chicago businessman has given the largest known donation to a political advocacy group in U.S. history—worth \$1.6 billion—and the recipient is one of the prime architects of conservatives' efforts to reshape the American judicial system, including the Supreme Court."); Michael Schaub, "Shadow Network" Offers a Lesson on the American Right's Mastery of Politics, *NPR* (Oct. 29, 2019), <https://www.npr.org/2019/10/29/774133071/shadow-network-offers-a-lesson-on-the-american-rights-mastery-of-politics> [<https://perma.cc/ER56-WSWD>] (reviewing Anne Nelson's book *Shadow Network*, which details the "outsized effect on the modern American political landscape" of certain right-wing advocacy groups); Kenneth P. Vogel, Shane Goldmacher & Ryan Mac, *Dissatisfied With Their Party, Wealthy Republican Donors Form Secret Coalitions*, *N.Y. Times* (Apr. 6, 2022), <https://www.nytimes.com/2022/04/06/us/politics/republican-donors-rockbridge-network-trump.html> (on file with the *Columbia Law Review*) ("The willingness of [conservative] donors to organize on their own underscores the migration of power and money away from the official organs of the respective parties, which are required to disclose their donors, to outside groups that often have few disclosure requirements.").

legends, and one of the greatest rivalries of all time. But outside of kayfabe, they were great friends. So here's to you!"

Ronald awoke the next day to an intolerable barrage of sunlight and traffic noise, rising just in time to reach the office without drawing notice. Whether the hangover was his alone or shared collectively about the office, Ronald found his work decidedly sedate compared to the previous day's. He cataloged ephemera from the Foundation's earliest days, much of it in purple ink unevenly soaked into rough paper. As the afternoon's steady rain obscured any sound beyond his immediate surroundings, Ronald came upon a decades-old memorandum marked "CONFIDENTIAL." The memo advocated for the adoption of a then-new legal theory in tandem with the Institute, complete with a push to advocate for the appointment of judges who would adhere to it.⁹

9. Movement conservatism largely owes its present shape to the Powell Memorandum, written by Lewis F. Powell, Jr., in the months before his appointment to the Supreme Court. See *Attack on American Free Enterprise System*, Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com. (Aug. 23, 1971), <https://www.greenpeace.org/usa/wp-content/uploads/2021/08/PowellMemorandumTypescript.pdf> [<https://perma.cc/J9K5-D2VF>] (describing the rise of leftist and revolutionary movements as an "assault on the enterprise system"); see also Nitish Pahwa, *Time to Fight*, *Slate* (Aug. 30, 2021), <https://slate.com/news-and-politics/2021/08/lewis-powell-memo-chamber-commerce.html> [<https://perma.cc/2JCM-88HU>] ("Powell—who would go on to serve as a Supreme Court justice for 16 years—helped lay the ideological groundwork for our current politics."). The Chamber of Commerce took Powell's recommendation to become more politically active, while right-wing organizations like the Heritage Foundation and the American Legislative Exchange Council launched to carry out Powell's recommendations. See, e.g., Pahwa, *supra* (describing the Powell Memorandum's effect on several relevant organizations, like the Chamber of Commerce and the American Legislative Exchange Council). Paul Weyrich, a founder of both organizations, was also a crucial figure in refocusing the Christian right movement from its initial focus of opposing segregation to its modern general support of probusiness causes under the banner of antiabortion crusading. See Paul Weyrich, *Empowering the Right*, NPR (Dec. 19, 2008), <https://www.npr.org/transcripts/98505916> [<https://perma.cc/3AWP-WZUK>] (transcript of Interview by Terry Gross, Host, *Fresh Air*, of Paul Weyrich, Cofounder, Heritage Found. (May 5, 1995)) (explaining Paul Weyrich's contribution to the social conservative movement, particularly in framing its anti-liberation efforts as pro-family). The Heritage Foundation found a receptive ear in President Ronald Reagan; Reagan distributed copies of the group's *Mandate for Leadership* to members of his cabinet, who then adopted many of its two thousand proposals for reforming the federal government within Reagan's first year in office. See *Heritage Foundation Releases 'Mandate for Leadership' and 'Solutions 2020'*, Heritage Found. (July 30, 2020), <https://www.heritage.org/press/heritage-foundation-releases-mandate-leadership-and-solutions-2020> [<https://perma.cc/TCE7-Z2CG>] (explaining the effect of Heritage Foundation literature on the Reagan Administration). The Reagan years proved disastrous for organized labor, the environment, criminal justice, race relations, LGBTQ+ rights, and marginalized communities generally—but the masters of the American economy prospered as income inequality soared and their tax rates plummeted. See Tim Fitzsimons, *LGBTQ History Month: The Early Days of America's AIDS Crisis*, NBC News (Oct. 15, 2018), <https://www.nbcnews.com/feature/nbc-out/lgbtq-history-month-early-days-america-s-aids-crisis-n919701> [<https://perma.cc/5Q59-QNM2>] (describing the Reagan Administration's callous responses to the AIDS epidemic); Jacob Goldstein, *When Reagan Broke the Unions*,

This theory was not so much a consistent method for analyzing objective facts as one for justifying preordained conclusions. It provided flawless cover for a judge to invoke external sources to discover the true meaning of statutes and constitutional provisions yet simultaneously rejected any serious exploration of those sources. An advocate could limit analysis to the narrow band of sources likely to produce the desired result, while a judge could examine them with a political eye and claim merely to call balls and strikes.¹⁰ It was the perfect tool for litigation as a means to political ends.¹¹

The memorandum was addressed from a summer intern who would eventually reach the Foundation's highest echelons to a junior attorney now recently retired from the federal appellate bench. Ronald had long written off liberal attacks on originalism as mere political bluster, but the cynicism of this memorandum harmonized with those criticisms. Ronald pondered how to describe it in the archives without drawing attention to the gravity of its contents before settling on "Memorandum Examining

NPR: Planet Money (Dec. 18, 2019), <https://www.npr.org/transcripts/788002965> [<https://perma.cc/H42M-QPER>] (describing the damage the Reagan Administration's opposition to the air traffic controller strike of 1981 caused to the labor movement); Joseph Thorndike, Reagan's Tax Cut Just Turned 40—And It's Still the Most Important Tax Reform Since World War II, *Forbes* (Sept. 3, 2021), <https://www.forbes.com/sites/taxnotes/2021/09/03/reagans-tax-cut-just-turned-40—and-its-still-the-most-important-tax-reform-since-world-war-ii/?sh=5cacd2f05d14> [<https://perma.cc/9KZY-GNQX>] (“[O]ne aspect of the [federal income tax] rate cuts proved very durable: Lawmakers never seriously reconsidered Reagan's drastic cuts at the top end of the income scale.”); Juan Williams, Opinion, Reagan, the South and Civil Rights, NPR (June 10, 2004), <https://www.npr.org/2004/06/10/1953700/reagan-the-south-and-civil-rights> [<https://perma.cc/5GCH-DGUD>] (describing the effect of Reagan's Administration on several marginalized groups); Louis Woodhill, The Mystery of Income Inequality Broken Down to One Simple Chart, *Forbes* (Mar. 28, 2013), <https://www.forbes.com/sites/louiswoodhill/2013/03/28/the-mystery-of-income-inequality-broken-down-to-one-simple-chart/?sh=1477b2e319ea> [<https://perma.cc/2W7Q-X6L8>] (describing how the Reagan Administration's supply-side economics kicked off almost two decades of rapid growth in inequality).

10. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.) (“I will remember that it's my job to call balls and strikes, and not to pitch or bat.”); see also Adam Benforado, *Color Commentators of the Bench*, 38 *Fla. St. U. L. Rev.* 451, 474 (2011) (“[E]ncouraging the myth that judges are capable of dispassionately and neutrally calling ‘balls and strikes’ is a great way to ensure that they will never actually do so.”); Jason Iuliano, *The Supreme Court's Noble Lie*, 51 *U.C. Davis L. Rev.* 911, 915–16 (2018) (“Why, when John Roberts likened his judicial philosophy to that of an umpire calling balls and strikes, was he lauded for promoting this unrealistic conception of judging?”).

11. See *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1–2 (S.D. Miss. Oct. 27, 2022) (contending that judges and clerks who moonlight as historians to discern the context and meaning of eighteenth-century language lack methodological consistency and frequently cherry-pick sources to support an ideologically preferred outcome). See generally Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism* (2022) (providing a comprehensive analysis of the failure of originalism as a purportedly neutral method).

Emerging Developments in Jurisprudence.” He characterized the author and audience merely by their position titles at the time. He had a duty to catalog every item that came before him, but such a document was potentially incendiary in the wrong hands. Ronald slipped the memorandum into an appropriately nondescript envelope, then entered his minimalist description into the Foundation’s database and shuffled the envelope into the appropriate filing cabinet for its year of composition. He resolved to mention it no further.

Saturday afternoon, he sat alone beneath a café awning, aimlessly working his way through a crossword puzzle and a large mug of mocha. The sun was still high enough for the awning to shade him, and he was far enough from the sights to enjoy the breeze without crowds or traffic interfering with noise and windbreaks. MacIntosh abruptly appeared, a paper cup in his hand.

“White, did you ever think about what we do? I mean, really think about it?”

The question was as unexpected as MacIntosh’s arrival. With a puzzled look, Ronald replied, “Are you talking about work, or is this some sort of cosmic coffee shop thing?”

“The Foundation, White. I’m asking if you’ve ever thought about the consequences of what we do, and who we do it for.”

“I don’t think I have, really.”

“I mean, it’s all such a damned game. We make this show of making conservative arguments in different directions, but every time, we know who’s supposed to win. It’s all about the bottom line for the big donors.¹² As long as they can keep control of the courts, they don’t have to win every election—and making control of the courts a political issue has proven quite lucrative.”

“What’s so bad about that? Isn’t choosing judges part of what we elect politicians to do?”

12. See Robert O’Harrow Jr. & Shawn Boburg, A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts, *Wash. Post* (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/> (on file with the *Columbia Law Review*) (documenting the interlocking web of nonprofits involved in funneling \$250 million of dark money to the conservative legal movement’s judicial and litigation projects). These projects have been wildly successful in accomplishing the goals of powerful business interests. See, e.g., *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021) (determining that a California statute granting union organizers access to farm properties constituted a per se physical taking); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempted a California law requiring class proceedings to be available to consumers); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

“Sure, and maybe once upon a time, those judges were chosen more for their ability than their likelihood to rule in favor of a particular set of policies. But we’ve got organizations to tell presidents who to select now, and those organizations keep their corner of the legal profession in line and groom law students to clerk for their judges.¹³ It adds up to something of an echo chamber, and that’s more effective than any sort of top-down control could ever be. And that highly effective echo chamber usually works to protect the wealthy, restrict any idea of rights that could threaten their power, and keep labor cheap and plentiful.”

“So why doesn’t anyone speak up and stop it?”

“That’s the beauty of it—people have been speaking up for years. Everybody who the courts hurt most already knows exactly what’s going on. But our donors have succeeded in convincing enough of the plebes to disdain those people that the response is either disbelief or glee at their suffering. It took a while, but now there are plenty of folks who are happy to see everyone’s rights limited so long as it means that the right people get hurt.”¹⁴ MacIntosh sipped his coffee, then continued. “Even the less vicious portion of the base doesn’t scream bloody murder when their own rights are eroded, because nobody wants to admit they’ve been conned. That reluctance gets reinforced through the peer pressure of everyone around you leaving things unsaid, because it looks like everyone else is still buying in too.¹⁵ And with everyone who does speak up associated with an out-group, it gets easier and easier to disregard them as the enemy. It’s taken a long time, but once it came together, the system practically maintains itself.”

“So if no one would believe it, why tell me?”

“Because you’re not one of the plebes. You’ve got the brains to understand what I’m talking about, to see that it’s true. That, and I wanted you to know why I’m handing in my resignation Monday.”

13. See Christopher Rhodes, Opinion, *The Federalist Society: Architects of the American Dystopia*, Al Jazeera (June 29, 2022), <https://www.aljazeera.com/opinions/2022/6/29/the-federalist-society-architects-of-the-american-dystopia> [https://perma.cc/FVU8-E2L9] (“[T]he organisation . . . claims that it . . . does not ‘lobby for legislation, take policy positions, or sponsor or endorse nominees and candidates for public service’. These claims are almost laughably absurd. . . . [T]he Federalist Society has become the single most powerful force influencing the American judiciary.”).

14. See, e.g., Zack Beauchamp, “He’s Not Hurting the People He Needs to Be”: A Trump Voter Says the Quiet Part Out Loud, Vox (Jan. 8, 2019), <https://www.vox.com/policy-and-politics/2019/1/8/18173678/trump-shutdown-voter-florida> [https://perma.cc/R2NF-TGHC] (“This is the dark heart of our political moment. Even people who are tremendously vulnerable themselves . . . support Trump because of his capacity to inflict pain on others they detest. The cruelty . . . is the point.”).

15. Many criminal scams similarly use their target’s desires for social conformity to negate doubts about the legitimacy of the fraudulent transactions. See Frank Stajano & Paul Wilson, *Understanding Scam Victims: Seven Principles for Systems Security*, *Comm’n ACM*, Mar. 2011, at 70, 72 (detailing the herd principle of scams).

“Where will you go?”

“I’ll figure that out when I get there. Don’t be a stranger.” And with that, he rose and left Ronald in uneasy silence. Ronald’s drink had cooled considerably while he spoke with MacIntosh, taking on a distinct bitterness.

Much of what MacIntosh had said disturbed him, both in terms of the picture it painted of the body politic and the implication for the fundamental rights he thought he understood everyone to agree that the Constitution guaranteed. Ronald had mostly adopted his father’s aspirational politics without much critical examination. It had just made sense that the Founders, most of whom were businessmen who had just engaged in a revolution, meant to protect the core activities of their public lives from government overreach. To Ronald, the Foundation had always seemed to embody such a principle of limited government, but MacIntosh had now called that into question.

More nagging was the distinction MacIntosh drew between themselves and the vast mass of citizens in the country. While he appreciated that MacIntosh held him in high enough esteem to think him capable of rejecting a manufactured narrative, he wasn’t keen on the idea that most people weren’t.

Monday morning’s humidity was oppressive, even for the District. The Metro car was packed full and unventilated, leaving Ronald’s shirt soaked through by the time he reached the Foundation. After what felt like half an hour of sitting upright to keep his back away from his chair, Ronald was dry enough to brave the break room for coffee. On his way back, he nearly ran into MacIntosh, with a security escort close behind. “So long, White,” MacIntosh said, briefly clasping his free hand as he passed.

It wasn’t until he returned to his desk that Ronald realized MacIntosh had slipped a business card into his pocket. The gesture seemed odd, until Ronald realized that MacIntosh had written “Call my cell” on the back. Ronald quietly slipped the card into his wallet for later, uneasily pouring himself into his work for the rest of the day.

A few days later, Ronald’s thoughts returned to the card, and he reached out to MacIntosh by text. After exchanging pleasantries, Ronald accepted MacIntosh’s invitation to stop by for a drink. MacIntosh’s townhouse in Georgetown was far from the Metro, so Ronald summoned a car for the journey. The logos on the cars parked on MacIntosh’s street flaunted the status this neighborhood required. MacIntosh had clearly done well for himself in law.

Atop the brick walkway, Ronald found that the only way to announce his arrival was a brass knocker, tarnished in all but the most natural places to grip it. MacIntosh answered promptly, greeting Ronald and asking him to cut off his phone and leave it in the foyer. They proceeded to a sitting room with several nondescript private bottlings of single malt along the

sideboard. For what felt like hours, MacIntosh limited the conversation to strictly aesthetic matters—the beverage selection, avant-garde jazz, the canon of Western movies, recent gallery shows. Eventually, he insisted on demonstrating his new speaker arrangement for Ronald, blasting the living room with a variety of high speed, intricate electronic music. He cut most of the lights, then beckoned Ronald to join him on a sectional sofa in the center of the room. The cacophony dulled to an entirely pleasant volume here.

“It took me weeks to perfect the phase cancellation¹⁶ and shadows, but I knew I’d be watched once I left the Foundation. If my home isn’t bugged, I’d be shocked. But I wanted to be able to talk to people without being monitored, you included. Do me a favor and just keep smiling and acting like we’re having a pleasant conversation.”

“Bugged? Who would bug your house?”

“Probably some three-letter agency did the dirty work, but it’s practically guaranteed they did it at the behest of your ultimate paymasters.¹⁷ I left the fold, and they’d want to know why, and if I’m a threat.”

“If they’re as capable of manipulating the public as you said last weekend, how could you actually threaten them?”

“Maybe I can’t. But the fact you answered my invitation may have gotten their attention. So as far as they’re concerned, this is two friends indulging in a few drinks and sharing a love of fine things. We’ll have to keep this brief, though—too long and it’ll be obvious we’re covering things up.” MacIntosh occasionally punctuated his comments with non

16. See generally Jared H., *What Is Phase Cancellation? Understand & Eliminate It in Your Audio*, LedgerNote (Dec. 19, 2019), <https://ledgernote.com/columns/mixing-mastering/phase-cancellation/> [<https://perma.cc/BD5C-LTZH>] (“Phase cancellation is when two or more audio wave forms clash with each other, resulting in deconstructive interference. This causes a reduction of volume in the specific frequencies where the problem is occurring. The opposite can occur as well, causing a boost in amplitude.”).

17. See Elizabeth Goitein, *How the CIA Is Acting Outside the Law to Spy on Americans*, Brennan Ctr. for Just. (Feb. 15, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/how-cia-acting-outside-law-spy-americans> [<https://perma.cc/2J5N-SEMK>] (“What stops the CIA from poring through the data looking for Americans’ information? Let’s be honest: nothing. The CIA’s internal rules from 2017 say the information sought must be ‘related to a duly authorized activity of the CIA,’ as determined by . . . the CIA.” (quoting The CIA’s Updated Executive Order 12333 Attorney General Guidelines 6 (2017), <https://www.cia.gov/static/100ea2eab2f739cab617eb40f98fac85/Detailed-Overview-CIA-AG-Guidelines.pdf> [<https://perma.cc/P3NN-T6R4>])); More About FBI Spying, ACLU (Jan. 22, 2013), <https://www.aclu.org/other/more-about-fbi-spying> [<https://perma.cc/L44D-CTPK>] (“The FBI has a long history of abusing its national security surveillance powers. . . . [I]ntrusive surveillance tools originally developed to target Soviet spies are increasingly being used against Americans.”); NSA Spying, Elec. Frontier Found., <https://www.eff.org/nsa-spying> [<https://perma.cc/2VLS-AEZL>] (last visited Oct. 21, 2023) (“The US government, with assistance from major telecommunications carriers including AT&T, has engaged in massive, illegal dragnet surveillance of the domestic communications and communications records of millions of ordinary Americans since at least 2001.”).

sequitur gestures and grins, which Ronald tried to disregard to avoid showing his confusion. The whole conversation struck Ronald as more than a little unusual. “They’re likely concerned that if I managed to reach too many of my former colleagues and rivals, I’d pose enough of a threat to disrupt a plan or two. And they’re very careful men, so they’d like to know about that before it happens.”

“Doesn’t it draw attention to you just by having me over?”

“Maybe, but I chose you specifically because you’re not on the legal team. They’ll see us having a conversation about mundane concerns and drinking some of my better Scotch. Maybe it throws them off the trail, maybe not, but it’s at least an apparent noise in their signal. You don’t have reason to know anything that could really threaten them.”

“Well, I guess that makes sense. All I’m really privy to is a bunch of old documents destined for the storage basement.”

“Actually, don’t sell yourself short there. Is there anything you’ve seen that might include bits of their history they’d rather not have out there?”

“I guess I saw a memo back before you resigned. I’m not certain, but I think it had a lot to say about the strategy behind pushing originalism.”

MacIntosh’s pleasant expression slipped for half a beat, then he shook his head in time to the music while smiling broadly. “That might be something, if anyone believed it was real. But you know it’d be shouted down as ‘fake news’ almost as soon as you told anyone beyond the cognoscenti. And the plebes would believe it was just another liberal deception. Feed them propaganda and they lap it up; show them the truth, and they deny it.”

Ronald checked his expression before it could twist into a grimace of frustration. “So what can I do?”

“I’ll introduce you to some of my friends soon. They’re working on it. Keep doing your crosswords on the weekends.” After another drink and a few more songs, they said their farewells, and Ronald took another car home, grateful not to be in the driver’s seat.

Weeks later, Ronald found himself at his usual table outside the café on a Saturday when even his cultivated posture of inactivity failed to keep the discomfort of afternoon sweat away. A voice behind him broke his fugue. “Twenty-three across is ‘Lotus Eaters.’” Ronald looked up into playful eyes and a kind smile. “I’m Regina, by the way. I think we have a mutual friend. He said I’d find you here.”

“I’m Ronald. If you like crosswords, pull up a chair and we can give this one a go together.”

For the next hour, they shared in the simple companionship of joint effort, laughing at anecdotes, praising each other’s cleverness, and exchanging knowing smiles. After their excuses for lingering beneath the awning had faded, Ronald proposed that they continue their afternoon

with a walk along the shaded streets. Regina smiled and nodded. After a few blocks, she linked her arm into his.

He asked, “So, just how do you know MacIntosh?”

“We were at Harvard together. Even just the law school is big enough that we didn’t see much of each other outside of a few clubs, but we kept running into each other socially a few years on at legal events and got to be friends.”

“So, are you in the litigation game with him?”

“Hardly. I mostly work in tax, and it takes a pretty big problem for a tax lawyer to wind up in litigation, let alone the appellate stuff he does.”

“Shows you how little I know, then. I figured you all liked to argue.” He looked her way to make sure his teasing hadn’t crossed the line. She met his eyes and grinned.

“Maybe not like that, but we can be just as bullheaded over in the transactional fields.”

“So, you’d call MacIntosh bullheaded?”

“In the courtroom? Sure. But outside of it, he’s far too cynical to dig in his heels about what he does. Even less so about what he believes.”

“Yeah, that checks out. I’ve definitely had a few conversations with him in which he came across as far more jaded than I’d have guessed he was.”

“Well, he does peddle some real bullshit for a living. Though, maybe not quite as much now that he’s gone over to the private sector.”

“It’s tough to imagine corporate litigation being less disingenuous than anything, but I guess MacIntosh’s old work qualifies.” They both laughed, and he realized they were likely sounding each other out at this point, waiting to see who would directly criticize the conservative legal project first. He decided to get on with it. “Look, there’s something I saw at work a while back that I think you might find pretty interesting. It’s a memo from the Foundation’s early days that basically lays bare that those guys all knew that originalism was a shell game to justify whatever political project the paymasters wanted the judiciary to take.”

“That’d be interesting—and probably incendiary. Do you still have access to it?”

“I think so. I archived it with a pretty nondescript entry, but I know where I put it.”

“Well, if you manage to find it, I might like to read a copy sometime. If you can do that sort of thing.”

“I’ll see. No promises, but if I get a copy, can I text you?”

“That’d be best.” She gave him her number. The conversation drifted on to other things before the walk became dinner, then dinner became

drinks back at his place. On her way out, they promised to meet up again the next weekend.

Monday and Tuesday were overwhelming days for Ronald. His email inbox was unrelenting, staff meetings stole odd hours, and he could barely keep up with even minimal archiving. Wednesday afternoon finally saw a lull, and he slipped into the archival storage room to see if he could get ahold of the memo. It wasn't in the box he expected to find it in, but he chalked that up to faulty memory almost two months on. He let the search slide for the afternoon, content to focus on his cataloging duties.

He finally found time to check the database on Friday afternoon, under the pretext of an audit. He carefully examined every entry he had made in June, checking that the item was in fact where the database predicted. Except the database had no entry corresponding to the memorandum. He tried a couple of searches to turn it up, but no record of the entry seemed to exist. He checked a few boxes adjacent to the one in which he believed he had archived it, but there was simply no trace of the memorandum. The only reasonable explanation was that someone else knew about it and had removed it, along with all records of its existence.¹⁸ Ronald resigned himself to never seeing it again.

That weekend, he had to let Regina down. She didn't seem too bothered by it, and their coffee once again led to a long walk, dinner, and stimulating conversation long into the night. They settled into a pattern of seeing each other every weekend, then gradually added some week-nights, and by the time the leaves began to turn, they had acknowledged that they were a serious couple.

One Tuesday night in late October, Regina asked, "Hey, remember that memo that disappeared?"

"I'm pretty sure it'd be more accurate to say it was removed without a trace, but yeah."

"You ever get to thinking about doing something about it?"

"What, like confront my supervisor about a missing document?"

"No, I mean about the whole capture of the courts for political gain."

"What did you have in mind?"

"I've got some friends; they're heading down to a meeting tomorrow night. Mostly they serve food for the encampments, organize volunteer shifts for mutual aid programs, and when there's a protest, show up with first aid kits, water, and snacks. It's a good group, and there's usually a lot

18. Cf. David Kopel, *The Missing 18 1/2 Minutes: Presidential Destruction of Incriminating Evidence*, Wash. Post: *Volokh Conspiracy* (June 16, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/16/the-missing-18-12-minutes-presidential-destruction-of-incriminating-evidence/> (on file with the *Columbia Law Review*) (recounting how a potentially damning record of a right-wing conspiracy—Watergate—disappeared, never to be found).

of conversation about how to do more. I think you could get some good ideas, there, even if it's only helping on the local level."

He agreed to come along and the next night found himself in the midst of a planning meeting for the next week's menus, food bank deliveries, and shipments of refurbished computer equipment to impoverished schoolchildren. Folks were friendly, though they were frequently prepared to argue about big ideas and had to be brought back to the task at hand. He left with a commitment to help serve food to unhoused people on Friday night and come back next week. Regina's company made the habit of volunteering easy to foster.

One night, Regina came by Ronald's apartment early before they left for the weekly planning meeting. She asked, "Have you seen the video yet?"

"No, what video?"

"It's the police again. Columbia this time. You've just got to see it." They watched in silence as yet another scene of police brutality against an elderly, unarmed Black man unfolded on the screen. The video's perspective was from a City of Columbia officer's body camera, showing half a dozen Richland County deputies responding to a traffic stop. When the Columbia officer reached the scene, the driver was outside the vehicle and obviously confused. Various deputies shouted conflicting commands at the driver before one of them slammed him into the back of his truck. Almost immediately, another deputy rushed in, tackling them both as a third deputy's Malinois rushed the driver's throat. As the dog locked down on the driver's jugular, the deputies stood back and laughed. The city officer walked away at that point, complaining that what he saw was unacceptable.¹⁹ The footage had come out after the state elected not to indict any of the officers for the driver's death.

"So what can we do? I mean, neither of us is in a position to really change what's happened."

"There will be protests. Let's go to the meeting and see what we can do to support them."

The meeting swelled with activity. Experienced members organized first aid teams, water and snack services, and legal observers. A middle-aged woman instructed white volunteers on how to participate and support Black community members without usurping their voices. Debates

19. The general shape of this police encounter is based on the traffic stop of seventy-seven-year-old Ralph Ennis in Front Royal, Virginia. See Jack Moore, *Bodycam Shows Virginia Deputies Slamming 77-Year-Old Man Into Truck*, WTOP News (May 5, 2022), <https://wtop.com/virginia/2022/05/bodycam-shows-virginia-deputies-slamming-77-year-old-man-into-truck/> [https://perma.cc/9TNJ-TBF9]. The details here are exaggerated into a more horrific incident that could potentially still inspire protests across the country in the more jaded world of this story. Ralph Ennis's death did not result in local or national protests.

raged over how far the protest should go in civil disobedience. Was marching enough? Shutting down a highway? Chaining themselves together? Violent confrontation? The last suggestion rapidly drew condemnation. Any violence would surely invite police reprisals, which would concentrate primarily on Black and other marginalized people.

The preparations were rendered moot by the announcement that the protests had already begun on their own without any attention to the niceties of permits. The meeting's participants scrambled to load support supplies into the few vehicles present, then set off to join the impromptu rally. Even a quarter of a mile from the protest, traffic was snarled. A few members of the caravan got out to run ahead and see where protest leaders were setting up support stations. Clumps of city police leaned on their cars and watched, hanging back from the protest and offering neither help nor obstruction. In about ten minutes, all the volunteers' cars were directed to convenient unloading spots.

The rally was in full throat as the sun painted the sky orange and purple. Ronald and Regina stood by the stacks of water bottles beside the first aid tent, listening to the speakers on the portable amplifier and shouting along with the chants. When the crowd went on the march, Ronald and Regina checked with a woman who was organizing the street medics for instructions. She suggested that the crowd intended to march in a circuit and that they would likely be of the greatest help staying behind at the tent. The marchers completed their first circuit as the last light of the day went out. As they completed their second circuit, the chants had grown angrier, and Ronald noticed that the police were now gathered in groups on the sidewalks of some of the streets the crowd wasn't using. Some wore helmets and aviator sunglasses. More of their compatriots joined the clusters in the crowd's absence.

A few minutes before he anticipated the crowd's return, Ronald heard shouts, whistles, and the sound of breaking glass from a few blocks away. The shouting rapidly grew louder, followed by dull popping sounds. Some of the street medics donned gas masks and hurriedly arranged supplies. One directed Ronald to assist him. Protesters began to carry in their screaming and crying comrades. Ronald heard another popping sound, then a hissing canister rolled into the first aid tent. His eyes teared up, and everything burned.²⁰ He coughed as someone dragged him along, then

20. Cf. *Quraishi v. St. Charles County*, 986 F.3d 831, 834 (8th Cir. 2021) (“Deputy Michael Anderson, an officer in the St. Charles County police department, deployed a tear-gas canister at [several reporters covering the protests after the police killing of Michael Brown in Ferguson, Missouri, in 2014] while they were preparing for a live broadcast.”); see also K.K. Rebecca Lai, Bill Marsh & Anjali Singhvi, *Here Are the 100 U.S. Cities Where Protesters Were Tear-Gassed*, N.Y. Times (June 18, 2020), <https://www.nytimes.com/interactive/2020/06/16/us/george-floyd-protests-police-tear-gas.html> (on file with the *Columbia Law Review*) (“At least 100 law enforcement agencies—many in large cities—used

held him still and poured liquid on his face. “Open your eyes and blink!” the stranger shouted.

As his vision returned, Ronald realized people were running all around him. He saw a line of police with riot shields and swinging clubs and turned to run too. As he ran, he realized many of those around him had blood on their faces, hands, and clothes. Suddenly, the crowd ahead of him stopped running. The police were on them immediately. Ronald wasn’t sure where the police had all managed to come from, but they shoved the crowd into the street with their riot shields. Then, the police backed off a few feet, and an officer with a bullhorn barked at the crowd to stay where they were.²¹ All around him, people were panting, coughing, and crying. Only then did he notice that the police’s riot shields were adorned with a black-and-white rendition of the American flag, run through with a single stripe of blue.²²

some form of tear gas against civilians protesting police brutality and racism in the recent weeks . . .”).

21. The practice of massed police hemming in a crowd is known as “kettling” and is meant to break a crowd’s will to continue with a protest. See *Laird v. City of St. Louis*, 564 F. Supp. 3d 788, 800 (E.D. Mo. 2021) (excluding claims based on kettling from a denial of qualified immunity in an excessive force case); Alice Speri, SITU Rsch. & Travis Mannon, *Ambushed by the Cops: When Police Deliberately Trap Peaceful Protesters*, *The Intercept* (June 2, 2021), <https://theintercept.com/2021/06/02/kettling-protests-charlotte-police/> (on file with the *Columbia Law Review*) (describing an ambush in Charlotte, North Carolina, in which police trapped protesters and then attacked them with pepper balls).

22. This “thin blue line” variation on the flag is often used as an ostensible expression of solidarity with and among police—against protests of their racist abuse of power. See Libor Jany, *LAPD Ban of “Thin Blue Line” Flags Is Latest Salvo in Culture War*, *L.A. Times* (Jan. 21, 2023), <https://www.latimes.com/california/story/2023-01-21/lapd-ban-of-thin-blue-line-flags-latest-salvo-in-culture-war> (on file with the *Columbia Law Review*) (“Police say the flag is a memorial to officers who have died in the line of duty. But some say the image is a tool of white supremacist groups to symbolize their support for police and opposition to racial justice.”); see also Thomas Breen & Paul Bass, *Police Chief Embraces “Thin Blue Line”*, *New Haven Indep.* (Apr. 26, 2021), https://www.newhavenindependent.org/article/policing_presser [<https://perma.cc/7S2G-LZ3G>] (“[T]he city’s acting police chief embraced and defended the cops displaying the ‘Thin Blue Line’ flag as representing pride, professionalism, and solidarity among law enforcement officers.”); Maurice Chammah & Cary Aspinwall, *The Short, Fraught History of the “Thin Blue Line” American Flag*, *Marshall Project* (June 8, 2020), <https://www.themarshallproject.org/2020/06/08/the-short-fraught-history-of-the-thin-blue-line-american-flag> [<https://perma.cc/TT8V-Q86N>] (“[A]s the images [containing thin blue line symbols] have multiplied, so have the meanings.”). Even courts have begun to recognize its potential as a white supremacist symbol. See *Smith v. State*, 281 A.3d 931, 935 (Md. 2022) (“Some view it as an expression of general support for law enforcement; others view it as a symbol of how police serve as a barrier between civilized society and criminals; and others view it as a racist symbol that expresses support for white supremacy and violence against African Americans.”). Given the historical connection between policing and white supremacy, this duality is hardly a contradiction. See Brandon Hasbrouck, *Abolishing Racist Policing With the Thirteenth Amendment*, 67 *UCLA L. Rev.* 1108, 1113–21 (2020) (exploring the legacy of policing as one of the badges and incidents of slavery); Patrik Jonsson, *Capitol Assault: Why Did Police Show Up on Both Sides of “Thin Blue Line”?*, *Christian Sci. Monitor* (Jan. 14, 2021), <https://www.csmonitor.com/USA/Politics/2021/0114/Capitol-assault-Why-did-police->

The crowd huddled together for what felt like an hour in nervous anticipation. Ronald couldn't tell how much time really passed—he'd left his phone behind, just like the experienced protesters had advised him to. People began crying out for the police to let them out to get water, use the bathroom, or go home. The lines of riot shields didn't budge. Soon, a cop with a bullhorn announced that the crowd had been declared an illegal assembly and that if they did not disperse, they would be arrested. Someone walked toward the line of riot shields with his arms raised above his head and said, "Alright, I'm going home." When he reached the line, the police clubbed him repeatedly and dragged him away.²³ The entire crowd tensed. Then, a cluster of young men rushed the police line. The entire police line surged in on the crowd, swinging wildly.

show-up-on-both-sides-of-thin-blue-line [https://perma.cc/5TYM-496W] ("Since 2000, more than two dozen states have unmasked police officers with connections to white supremacist groups. Hundreds of federal, state, and local law enforcement officials have been caught expressing racist, nativist, and sexist views on social media" (citing Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, Brennan Ctr. for Just. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [https://perma.cc/NV66-B47C])); Rage Against the Machine, *Killing in the Name*, *on Rage Against the Machine*, at 00:53 (Epic Records 1992) ("Some of those that work forces are the same that burn crosses."). As our courts embrace expanded police powers, police predictably turn those powers on Black and other marginalized people. See Paul Butler, *Chokehold: Policing Black Men* 56 (2017) ("U.S. police officers have super powers The police have been granted these powers [by] . . . the United States Supreme Court"); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479, 1485 (2016) ("[T]he disproportionate exposure African-Americans have to police violence derives in part from their disproportionate contact with the police.").

23. See Mark Berman & Emily Wax-Thibodeaux, *Police Keep Using Force Against Peaceful Protesters, Prompting Sustained Criticism About Tactics and Training*, *Wash. Post* (June 4, 2020), https://www.washingtonpost.com/national/police-keep-using-force-against-peaceful-protesters-prompting-sustained-criticism-about-tactics-and-training/2020/06/03/5d2f51d4-a5cf-11ea-bb20-ebf0921f3bbd_story.html (on file with the *Columbia Law Review*) ("While some incidents [from protests following the police killing of George Floyd] have led to discipline for officers involved, the wave of episodes has just as often gone unpunished and prompted still more criticism of law enforcement"); Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond With More Force*, *N.Y. Times* (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html> (on file with the *Columbia Law Review*) (last updated June 2, 2020) ("Videos showed police officers in recent nights using batons, tear gas, pepper spray and rubber bullets on protesters, bystanders and journalists, often without warning or seemingly unprovoked."); Bob Harrison, Richard H. Donohue, Jr., Pauline Moore & John S. Hollywood, *Protest Policing: When Do Tensions Escalate Between Protesters and Police?*, *Police1* (July 8, 2022), <https://www.police1.com/chiefs-sheriffs/articles/protest-policing-when-do-tensions-escalate-between-protesters-and-police-weEaXiTlx0smf6xP/> [https://perma.cc/D7F8-JFRB] ("[R]esearch shows the police are twice as likely to show up to anti-brutality protests and use heavy-handed responses, and especially unlikely to remain neutral in such contexts, regardless of their training." (citing Heidi Reynolds-Stenson, *Protesting the Police: Anti-Police Brutality Claims as a Predictor of Police Repression of Protest*, 17 *Soc. Movement Stud.* 48 (2018))).

Ronald felt a blow land across his forehead, spinning him around.²⁴ Something knocked him to the ground, then he felt a series of kicks to his ribs. He tried to open his eyes but found he couldn't see through the blood. He tried to wipe his eyes, but someone stepped on his arm. He shouted out in pain but couldn't even hear his own voice through the commotion. He vomited. Hands grabbed his ankles and dragged him. His head bumped against some irregularity in the street, but he couldn't tell if it was a curb or a pothole. Then he was on his stomach, his hands yanked behind his back painfully, his ribs screaming as he felt handcuffs on his wrists. Then he was lifted by his armpits and thrown onto a rough metal surface. Every breath was agony. When he had cried enough to clear some of the blood from his eyes, he realized that this must be the back of a police van. He passed out.

Ronald's first impression as he regained consciousness was the smell of blood and urine.²⁵ His right cheek was pressed against cold cement, and his ribs and head screamed in pain. The handcuffs still bound his wrists behind his back, biting into his skin and forcing his shoulders into unnatural angles. As he forced himself to turn his head to appraise his surroundings, he found he could barely open only one of his eyes.

A uniformed man barked out, "This one's awake!"

"Take him for interrogation, then," came the response. Someone hoisted Ronald to his feet, revealing more new kinds of pain, then pushed him along into a small cinder block room with an obvious two-way mirror along one wall. Someone pulled straps around his torso and legs, and he heard the bite of Velcro behind him.

A distorted, disembodied voice asked, "Why did you attack the police?"

24. See, e.g., *Ahmad v. City of St. Louis*, 995 F.3d 635, 639 (8th Cir. 2021) ("[O]fficers . . . beat . . . an undercover detective . . . Text messages between abusive officers revealed a plan to beat protesters and suggested that if they had beaten a real protester rather than an undercover detective, they would not be in any trouble."); *Felarca v. Birgenau*, 891 F.3d 809, 822 (9th Cir. 2018) (granting qualified immunity to officers who struck protesters in the torso and extremities with batons); *In re NYC. Policing During Summer 2020 Demonstrations*, 548 F. Supp. 3d 383, 394 (S.D.N.Y. 2021) ("[T]here has long been a widespread pattern and practice of police misconduct during First Amendment protected protests."); Manisha Krishnan, *Videos Show LAPD Beating and Shoving Protesters at Abortion Rights Rally*, *Vice News* (May 4, 2022), <https://www.vice.com/en/article/akvbj/lapd-abortion-rights-protesters> [<https://perma.cc/H569-SPTD>].

25. See *Florence v. Bd. of Chosen Freeholders of Burlington*, 566 U.S. 318, 333 (2012) (justifying intake searches because "[j]ails are often crowded, unsanitary, and dangerous places"); *Florio v. Canty*, 954 F. Supp. 2d 227, 235 (S.D.N.Y. 2013) (finding a claim of exposure to human waste for several hours insufficient to support an Eighth Amendment violation); *Desroche v. Strain*, 507 F. Supp. 2d 571, 578–79 (E.D. La. 2007) (declining to find a constitutional violation when the plaintiff was subjected to ten consecutive days of overcrowded holding cells, deprivation of a mattress, limited toilet and shower access, and generally unsanitary conditions).

“I didn’t—wait, I want a lawyer—” Ronald’s request was interrupted by a blast of hot water in his face.²⁶ The water was just shy of scalding, but its pressure was so great as to fill Ronald’s mouth and disrupt his ability to breathe. The spray ceased, and he was soaking wet. Someone reached over Ronald’s shoulder and pulled his soaked shirt over his face.

“Why did you attack the police?”

“What?” The spray resumed. Ronald couldn’t breathe at all while the spray continued. It stopped, and before he could catch his breath, someone kicked him in the ribs, knocking Ronald and the chair over backwards. The pain of both the blow and the fall knocked what little breath he’d managed back out of him. He gulped for more air before the question repeated, followed by the spray of water. He choked on water, felt it burning his throat, his nostrils, his lungs, his brain.²⁷ He strained against the straps and handcuffs; his only conscious thought was the need for air. The spray stopped; he convulsed, coughing and vomiting in turn.

“Why did you attack the police?”

Ronald lied, “To make them pay for what they’d done!” Water dripped on his cheeks. He launched into a blubbery frenzy of confession, desperately trying to tell his interrogators what they wanted to hear. As he did, the water moved slowly away from his nose and mouth until he heard a steady rhythm of drops on the concrete. Ronald imagined himself to have made a bargain whereby his continued confession would be rewarded at least by the forbearance of any further waterboarding.²⁸

26. Even outside of the context of a civil rights suit, the prophylactic *Miranda* rule is notoriously weak. See, e.g., *State v. Demesme*, 228 So. 3d 1206, 1207 (La. 2017) (Crichton, J., concurring in the denial of certiorari) (“[T]he defendant’s ambiguous and equivocal reference to a ‘lawyer dog’ does not constitute an invocation of counsel that warrants termination of the interview . . .”).

27. See Jessica Schulberg, *Here’s What Waterboarding Is Really Like, According to People Who Suffered Through It*, *Huffington Post* (May 9, 2018), https://www.huffpost.com/entry/what-waterboarding-is-really-like_n_5ab3b4bae4b008c9e5f4d6b5 [<https://perma.cc/AU9K-GUVJ>] (last updated May 10, 2018).

28. See Eric Weiner, *Waterboarding: A Tortured History*, *NPR* (Nov. 3, 2007), <https://www.npr.org/2007/11/03/15886834/waterboarding-a-tortured-history> [<https://perma.cc/9U5A-NC8R>] (“In 1983, Texas Sheriff James Parker was charged, along with three of his deputies, for handcuffing prisoners to chairs, placing towels over their faces, and pouring water on the cloth until they gave what the officers considered to be confessions.”).

Over the coming weeks, he was beaten,²⁹ deprived of sleep,³⁰ electrocuted,³¹ burned,³² and starved,³³ but he never again faced the hose. He lost

29. See *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (“[A] use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment.”). *Hudson v. McMillian* may have been decided in favor of the civil rights claimant, but the Court’s current composition leaves little room for security in that outcome. See James Romoser, John Roberts Is the Chief. But It’s Clarence Thomas’s Court, SCOTUSblog (Oct. 2, 2022), <https://www.scotusblog.com/2022/10/john-roberts-is-the-chief-but-its-clarence-thomass-court/> [https://perma.cc/H76W-NA2F]. Whether they carry the sanction of law or not, prison guards frequently beat inmates. See, e.g., Florida Prison Guards Charged With Murder in “Back Alley Justice” Beating of 60-Year-Old Inmate, CBS News (Apr. 29, 2022), <https://www.cbsnews.com/news/christopher-rolon-kirk-walton-ronald-connor-prison-guards-charged-murder-beating-inmate-ronald-ingram/> [https://perma.cc/YUK9-JZ7T]; John H. Glenn, ADOC Suspends Elmore Guard After Video of Prison Beating, Ala. Pol. Rep. (Sept. 19, 2022), <https://www.alreporter.com/2022/09/19/adoc-suspends-elmore-guard-after-video-of-prison-beating/> [https://perma.cc/PJ3D-Q9PC] (last updated Sept. 20, 2022); Shannon Heffernan, Trial Begins for Illinois Guards Accused of Beating a Prisoner So Severely, He Died, NPR (Apr. 13, 2022), <https://www.npr.org/2022/04/13/1092686732/trial-begins-for-illinois-guards-accused-of-beating-a-prisoner-so-severely-he-died> [https://perma.cc/3QT3-H8E5].

30. See *Rico v. Ducart*, 980 F.3d 1292, 1297–98 (9th Cir. 2020) (reversing the denial of qualified immunity for prison guards enacting a system of round-the-clock welfare checks that resulted in sleep deprivation for an incarcerated person); *Jacoby v. Baldwin County*, 835 F.3d 1338, 1346 (11th Cir. 2016) (declining to find that being forced to sleep on a mattress on the floor near the toilet violated any clearly established constitutional right); James R. Jolin, Correctional Sleep: Where Litigation Falls Short and Where Research, Policymaking Are Needed, Bill of Health (Jan. 25, 2022), <https://blog.petrieflom.law.harvard.edu/2022/01/25/correctional-sleep-litigation-research-policy/> [https://perma.cc/GAH2-AP7V] (“U.S. incarcerated populations have long dealt with chronic sleep deprivation, often with little to no reprieve.”).

31. See *Hudson*, 503 U.S. at 14 (Blackmun, J., concurring in the judgment) (warning that a narrower view of cruel and unusual punishment might permit “lashing prisoners with leather straps, whipping them with rubber hoses, . . . shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs”); *Rachel v. City of Mobile*, 112 F. Supp. 3d 1263, 1284 (S.D. Ala. 2015) (determining that police applying electric shocks to a domestic violence suspect with a taser did not violate a clearly established constitutional right); Peter Eisler, Jason Szep & Charles Levinson, Inmate Deaths Reveal “Torturous” Use of Tasers, Reuters (Dec. 6, 2017), <https://www.reuters.com/investigates/special-report/usa-taser-jails/> [https://perma.cc/N3BD-A425] (“Tasers have ‘high potential for abuse’ behind bars ‘When you inflict pain, serious pain, for the singular purpose of inflicting pain, not to accomplish a tactical objective, what is that? It meets the definition of the legal standard of excessive force, but it’s also torturous.’” (quoting DOJ consultant and former general counsel for the Texas Department of Corrections Steve Martin)).

32. See *Hope v. Pelzer*, 536 U.S. 730, 748–50 (2002) (Thomas, J., dissenting) (favoring qualified immunity for a prison guard who handcuffed an incarcerated person to a restraining bar, where he ultimately suffered severe sunburns); M.L. Nestel, Guards Cooked This Inmate to Death, Then the Evidence Was Burned, Daily Beast (Jan. 27, 2016), <https://www.thedailybeast.com/guards-cooked-this-inmate-to-death-then-the-evidence-was-burned> [https://perma.cc/DVS2-4L5K] (last updated Apr. 13, 2017) (discussing the story of Darren Rainey, an incarcerated person who was locked inside a scalding shower for two hours and suffered extreme burns that caused his skin to melt off and ultimately his death).

track of which stories were true and which were merely vivid imaginings. He invented plans to storm government offices, to bomb police stations, to assassinate judges. He implicated anyone his interrogators named, even Regina and MacIntosh. Finally, they asked him to dictate a confession and sign it.³⁴ He did so with relief.

The next morning, he was allowed a visitor. The guard led him to an interview room and sat him across a table from MacIntosh. “Good to see you again. I’ve been appointed to your defense.”

“But how?”

“I started taking some court-appointed work pro bono. Besides, with your signed confession, it’s really more a matter of negotiating a plea bargain. The prosecutors are ready to offer you time served and probation. The only condition they’re demanding is that you apologize to the police officers who were hurt during your arrest.”

“But what about you? They had me say you were involved in all of this.”

“Sure, but they also know it’s a lie. They knew exactly where I was the entire time, and I was never at any of those meetings you attended. They’d really rather just make this all go away quietly.”

“But what about what they did to me? Shouldn’t I sue them?”³⁵

“I’m sure you could. But you’d also find that the courts just don’t consider what you’ve been through to be a violation of your civil rights anymore.³⁶ You wouldn’t have any remedy. It’s their world now.”

33. See Emma Camp, *Florida Corrections Officers Paralyzed a Man, Then Left Him in Solitary Confinement*, Reason (Oct. 19, 2022), <https://reason.com/2022/10/19/florida-corrections-officers-paralyzed-a-man-then-left-him-in-solitary-confinement/> [https://perma.cc/6CHP-KQPV] (“Craig Ridley died in 2017 after corrections officers paralyzed him and left him in solitary confinement for days without access to food.”). Fortunately—if that’s even a fair word to use regarding the abuse of incarcerated people—starvation appears to be a bridge too far, and no court currently appears to give guards qualified immunity for depriving their wards of food. See, e.g., *Foster v. Runnels*, 554 F.3d 807, 809–10 (9th Cir. 2009) (reversing a trial court’s grant of summary judgment for a prison guard who deprived an incarcerated person of sixteen meals over twenty-three days).

34. The usual remedy for potentially involuntary statements is exclusion. But see *New York v. Quarles*, 467 U.S. 649, 655–57 (1984) (holding that a public safety exception applies to the exclusionary rule for un-Mirandized statements). Such a rule would be less useful to the defendant in a case resolved by a plea bargain.

35. See 42 U.S.C. § 1983 (2018) (“Every person who, under color of any [law] of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .”). The potential of that statutory protection—originally a part of the Ku Klux Klan Act—is greatly diminished today, leaving victims of police abuses with little hope of monetary recovery and even less hope of meaningful accountability. See generally Schwartz, *supra* note 5 (examining the history of § 1983 and the interlocking systems frustrating civil rights lawsuits against police today).

36. See Hasbrouck, *Big Police Energy*, *supra* note 3 (discussing the potential for a judicial end run around § 1983 by significantly limiting the scope of constitutional rights).

MacIntosh smiled, and Ronald knew that was the end of it. The work the Foundation and its allies had done foreclosed any chance of holding the police accountable for any of it. Within days, MacIntosh brought Ronald a plea agreement to sign confirming the terms they had discussed.³⁷ It was only a matter of a court appearance, then.

After the judge asked Ronald a series of questions about his understanding of the agreement and the prosecutor proffered the evidence, Ronald was given a chance to speak. At MacIntosh's nod, he gave the agreed apology. Then, MacIntosh asked him an unexpected question: "Why did you attack the police?" The cadence was entirely familiar, and Ronald saw something sinister in the gentle smile MacIntosh presented him. He sputtered that he had been upset and angry and confused, and lashed out in the moment, but was truly sorry for the hurt he'd caused. The court reiterated his terms of probation, and then he was free to go.

As he suspected, the Foundation wouldn't let him have his old job back, but MacIntosh found him work mopping floors.³⁸ Ronald walked through the numb progression of his new routine without ambition, haunted by the realization that all his interactions with MacIntosh since the moment he discovered the memo had led him to this moment. All of it had been choreographed, carefully preventing him from exposing the memorandum while ensuring that he would be discredited to the point no one would ever believe him if he did. Even his time with Regina had been part of the lie. He no longer had any understanding of where the state ended and the think tanks began. Their interests had become one, and the police their protectors.

As the months passed, he came to accept the drudgery of cleaning offices and schools five days a week. It wasn't so bad, after all; on the weekends, he could eat hot wings and drink light beer at the sports bar, cheering along with the other patrons. There was belonging in their shared entertainment.

But even there, he knew he couldn't quite be like them. His secret gnawed at him, leaving him empty. When he found, one Saturday, that the game broadcast was preempted by coverage of riots against police violence

37. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."); Todd A. Berger, *After Frye and Lafler: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 Am. J. Trial Advoc. 121, 125 (2014) ("Some researchers estimate between ninety and ninety-five percent of federal and state cases ending in guilty pleas have been resolved through the plea bargaining process.").

38. See Justin Staley, *People Leaving Prison Have a Hard Time Getting Jobs. The Pandemic Has Made Things Worse*, PBS News Hour (Mar. 31, 2021), <https://www.pbs.org/newshour/economy/people-leaving-prison-have-a-hard-time-getting-jobs-the-pandemic-has-made-things-worse> [<https://perma.cc/PH4A-EFBS>] ("In the best of economic times, formerly incarcerated people face an uphill battle to find full-time employment, facing administrative hurdles, social stigma and emotional health issues from their time in prison.").

in Buffalo, he grumbled along with the others. His grumbling was as much for the world he had thought he'd known and the place he might have had in it as it was for the game. Even that belonging had been hollow, in retrospect. He had never given enough of himself to the Foundation to truly belong there. He had betrayed that dream all too easily for a hint of excitement and a warm smile. He tried to fill the void with beer and contempt for the movement that led him so far astray.

He left the bar earlier than usual, grabbing a six-pack and walking the long way home. He rounded a corner and came face-to-face with a demonstration in solidarity with the one he'd seen on the television. Rage boiled in his throat; he had neither a place among the protestors nor means to oppose them. He saw police advancing with riot shields from across the crowd, wielding clubs and tasers for the coming fray. He smiled, knowing the police would put the traitors down. The long-hoped-for prongs bit into his back.³⁹ He fell, convulsing.

He gazed up at the flag. Forty years it had taken him to learn its true colors. The needless misunderstanding! The stubborn, self-imposed exile from its protection! As tears streamed down his cheeks, mingling with spilled beer, pulse after pulse came down the wires. He wet himself. But it was all right; everything was all right. The struggle was finished. He had won the victory over himself. He loved America.

39. This line—and most of the final paragraph—are patterned nearly in their entirety on Orwell's original. This is as good a point as any to admit that I lack the talent for fiction to write a better conclusion to the drama than Orwell himself did. It is also a fitting moment to note the bizarre conservative fascination with Orwell as something of a fetish against socialism. See, e.g., William H. Rehnquist, 1984, 102 Mich. L. Rev. 981, 985 (2004) (book review) ("Opponents of socialism also claimed that a state-planned economy, such as prevailed in Nazi Germany, Soviet Russia, and Fascist Italy, would likely bring with it the desire to control information and suppress dissent."). But Orwell himself was a socialist, choosing his own political leanings as the trappings of his villains to make clear that his criticism was of totalitarianism rather than any particular totalitarian regime's origins along the political spectrum. Cf. *id.* at 985–86 ("My recent novel is NOT intended as an attack on Socialism or on the British Labour Party (of which I am a supporter) but as a show-up of the perversions to which a centralised economy is liable . . . [T]otalitarianism, *if not fought against*, could triumph anywhere." (internal quotation marks omitted) (quoting George Orwell: *The Critical Heritage* 24 (Jeffrey Meyers ed., 1975))); Alasdair McKay, *Wrong About Orwell Being on the Right*, *E-Int'l Rels.* (Aug. 28, 2012), <https://www.e-ir.info/2012/08/28/wrong-about-orwell-being-on-the-right/> [<https://perma.cc/F92U-ZFFH>] ("Orwell urged the building of socialism, seeing the end of capitalism as the only solution to the economic misery facing Britain and the threat of Hitler and fascism from Europe."). While the notion of centralization conjures up government control of the economy, the threat of a government controlled *by* the economically powerful few under capitalism yields similar results. See Robert Reich, *What Does Oligarchy Mean?*, *Am. Prospect* (June 4, 2019), <https://prospect.org/economy/oligarchy-mean/> [<https://perma.cc/479N-FZY7>] ("Even a system that calls itself a democracy can become an oligarchy if power becomes concentrated in the hands of a few very wealthy people—a corporate and financial elite."). This pastiche takes such control as a central premise.

POSTSCRIPT

To the degree that there is hope in *Nineteen Eighty-Four*, it is in the concluding essay.⁴⁰ But I do not see as inevitable a future where our current Supreme Court's anti-civil-rights⁴¹ jurisprudence is, like Newspeak, to be discussed entirely in the past tense. That will require political will and the messy realities of applying power to enact change. Despite Georg Wilhelm Friedrich Hegel's and Karl Marx's wishes to the contrary, human thought and morality are not inexorably moving toward an ideal state.⁴² Action begets reaction, thesis begets antithesis and synthesis, cycling ever onward, but not merely upward. The moral arc of the universe only bends toward justice if decent people unite in solidarity to bend it. That destination is not a foregone conclusion.

We are in a position to see the beginnings of a potential slide into an authoritarian jurisprudence that minimizes the promise of constitutional rights. But we are also in a position to change that trajectory by reforming and expanding the courts. If antidemocracy wins the struggle, it will be, in part, because of the apathy of the comfortable. What democracy we still have will take great effort to preserve; an abolition democracy will take far greater effort to win.

40. See, e.g., Margaret Atwood, Orwell and Me, *The Guardian* (June 16, 2003), <https://www.theguardian.com/books/2003/jun/16/georgeorwell.artsfeatures> [<https://perma.cc/7WK3-HHYS>] (“[T]he essay on Newspeak is written in standard English, in the third person, and in the past tense, which can only mean that the regime has fallen, and that language and individuality have survived. For whoever has written the essay on Newspeak, the world of Nineteen Eighty-Four is over.”).

41. Excepting, of course, guns, property, and state support for Christianity. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (“The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (“Rather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude.”); Jeff Brumley, Christian Nationalism Links Gun Rights and ‘Christian Nation’ Ideals in Dangerous Mix, Tyler and Hollman Say, *Baptist News Glob.* (June 27, 2022), <https://baptistnews.com/article/christian-nationalism-links-gun-rights-and-christian-nation-ideals-in-dangerous-mix-tyler-and-hollman-say/> [<https://perma.cc/R9HN-YDDY>] (discussing the confluence of gun obsession, property rights, and Christian nationalism); Adam Laats, The Supreme Court Has Ushered in a New Era of Religion at School, *The Atlantic* (July 15, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-religion-schools-prayer-kennedy-carson/661365/> (on file with the *Columbia Law Review*) (“Religious conservatives have been fighting for years to get prayer back into America’s schools, and this year, the Supreme Court gave them what they wanted.” (citing *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2406 (2022); *Carson v. Makin*, 142 S. Ct. 1987 (2022))).

42. Cf. Hamid Alizadeh, In Defence of Hegel, *In Def. of Marxism* (Aug. 27, 2020), <https://www.marxist.com/in-defence-of-hegel.htm> [<https://perma.cc/C4VM-4Q6G>] (discussing Marx’s and Hegel’s views of philosophy and scientific thought progressing to ever-more-enlightened states).

George Orwell had cause to be optimistic that the world would not fall into eternal totalitarianism. Like Marx's and Hegel's ideal societies, neither can totalitarianism be a stable end of history. But an authoritarian society leaves a trail of broken and dead misfits in its wake. The optimism that such horrors will not be a permanent state of affairs is cold comfort for the marginalized people who may become authoritarianism's victims. I am left with only the lesser optimism that the fall of constitutional rights is not inevitable.