RACIST TORTURE AND THE CODE OF SILENCE

A Situational Analysis of Sidebar Secrecy and Legal Cynicism in the Trial of Jon Burge

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Abstract

We join Eduardo Bonilla-Silva's structural theory of the racialized U.S. social system with a situational methodology developed by Arthur L. Stinchcombe and Irving Goffman to analyze how law works as a mechanism that connects formal legal equality with legal cynicism. The data for this analysis come from the trial of a Chicago police detective, Jon Burge, who as leader of an infamous torture squad escaped criminal charges for more than thirty years. Burge was finally charged with perjury and obstruction of justice, charges that obscured and perpetuated the larger structural reality of a code of silence that enabled racist torture of more than a hundred Black men. This case study demonstrates how the non-transparency of courtroom sidebars plays an important role in perpetuating systemic features of American criminal injustice: a code of silence, racist discrimination, and legal cynicism.

Keywords: Race, Social Structure, Crime, Justice, Law, Code of Silence, Police Brutality, Racist Torture

> *Some even use it as a derogative verb, saying that someone they know was 'Burged'—tortured or brutalized by the police or another vigilante. Everyone in Chicago's Black neighborhoods, it seems, knows what the term means.*
>
> —Laurence Ralph, *The Torture Letters* (2020, p. 180)

Du Bois Review. 19:1 (2022) 31–60.

doi:10.1017/S1742058X21000151

INTRODUCTION

A growing literature on legal cynicism confirms its role as a versatile sociological concept that can increase our understanding of American race relations (see Hagan et al., 2020). Yet studies have neglected key mediating courtroom roles that judges and lawyers play in perpetuating legal cynicism. These include little studied judicial procedures, such as courtroom sidebars between judges and lawyers, which occur beyond the hearing of jurors and courtroom onlookers.

We address this issue through a situational analysis of the 2010 trial of an infamous Chicago police detective, Jon Burge, for perjury and obstruction of justice. This trial's significance derives from underlying and uncharged crimes involving a police code of silence that enabled racist torture of more than one hundred African American men. These crimes were obscured by the lesser charges of perjury and obstruction prosecuted thirty years after this torture began (Baer 2020; Conroy 2000; Ralph 2020; Taylor 2019).

These charges ignored the unique intersectional scale of the racist torture[1] of Black men in Chicago (Austen 2018; Ralph 2020; Rotella 2019). Legal cynicism in Chicago's Black neighborhoods intensified opposition to Mayors Richard J. and son Richard M. Daley (Koeneman 2013; Shedd 2015; Van Cleve 2016). This cynicism was a response to the Daleys' reliance on law-and-order politics and mass incarceration (Hagan et al., 2018). During Richard M. Daley's watch, Jon Burge's racist torture led to demands by activists for police accountability (City of Chicago 2016; United States Department of Justice 2017). In 2011, the year after the prosecution of Burge, a scandal plagued Richard M. Daley and he announced he would not seek another term as mayor.

We examine judicially guided courtroom sidebars as linking mechanisms in the perpetuation of structural racism. We analyze trial transcriptions to show how legal interpretations and decisions can be imposed in confidential sidebar conversations between judges and lawyers. These determined the course of the Burge trial, narrowing the prosecution's ability to expose how a code of silence enabled racist torture by Burge's "midnight crew" of police officers. We show that failure to expose and address racism and the police code of silence continues to allow systemic racial discrimination—for example, through police brutality and illegal investigation and interrogation practices.

The court neither named nor charged Burge for his leadership of this racist torture or the code of silence that allowed it. Instead, it convicted him of perjury and obstruction of justice for lying about his supervision of police torture. Our analysis of the courtroom transcripts reveals how this trial encouraged two contrasting cultural narratives.

The first of these narratives was of White legal equality—a formal legal narrative that excluded discussion of race and the code of silence in the Burge trial. In contrast, the second narrative perpetuated Black legal cynicism about racism and the code of silence. A half century after Jon Burge began his torture activities in Chicago, Laurence Ralph (2020) interviewed Chicagoans about the lasting effect of Burge's abuse. Black residents continued to use his name as a verb, referring to continued police brutality as "being Burged." The long history of police torture in Chicago under Burge was not forgotten, but instead memorialized in this shorthand linguistic expression of legal cynicism.

Explaining Legal Cynicism

Robert J. Sampson and Dawn Jeglum Bartusch (1998) originally used the concept of legal cynicism to explain how legal rules can lose their capacity to constrain non-normative behavior. David S. Kirk and Andrew V. Papachristos (2011; also Kirk and Matsuda, 2011) modified Sampson and Bartusch's approach by adding a cultural framing orientation that emphasized police ineffectiveness and unresponsiveness in preventing

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

crime or protecting people from it. Following Sampson's lead, Kirk and colleagues (2012) emphasized that people's sharing of these concerns contributed to cultural narratives of legal cynicism that operate at the neighborhood, as well as the personal, level.

Sampson (2012) underscored legal cynicism's origin in neighborhood structural conditions, drawing on two classic contributions. The first, William Julius Wilson's (1987) book, *The Truly Disadvantaged*, used a structural theory of economically driven and racially concentrated poverty to explain inner-city crime. The second, Douglas Massey and Nancy Denton's (1993) monograph, *American Apartheid*, offered a population-based structural theory that linked racial segregation to crime. Sampson (2012) observed that "both were important statements on neighborhood effects" (p. 43).

Consistent with Sampson's thesis, research indicates legal cynicism is positively associated with neighborhood economic disadvantage (Kirk and Papachristos, 2011; Sampson and Bartusch, 1998) and racial segregation (Hagan et al., 2018). More recently, Monica C. Bell (2017) emphasized how shared experiences further connect legal cynicism to "legal estrangement," which involves fear and avoidance of the police. She explained, "I introduce the concept of *legal estrangement* to capture both legal cynicism … and the objective structural conditions (including officer behaviors and substantive criminal law) that give birth to this subjective orientation" (2017, p. 2066).

The implication of these important contributions is that legal cynicism includes both the structural conditions and subjective experiences that are part of everyday life in segregated settings of concentrated disadvantage. We focus on the transmission of the consequences of these experiences in these settings. More specifically, we use the concept of legal cynicism to focus on the consequences of the linked courtroom roles that judges and lawyers play in mediating the lived objective and subjective experiences of racism in these settings.

The Social Structure of Formal Legality and Black Legal Cynicism

Eduardo Bonilla-Silva's (1997) conception of racialized social systems is our starting point for understanding how White economic and social privilege are structurally institutionalized—in Weberian terms—as formally legal (Mueller 2018). These include taken for granted law-based policies and practices that are implemented in the everyday work of courtroom judges and lawyers (Moore 2014). Bonilla-Silva (1997) argued that while racism and racial ideology originate in the social structure of race relations, they can acquire a relative autonomy that "provides the rules for perceiving and dealing with the 'other' in a racialized society" (p. 474). These rules form an "organizational map" that is unquestioned by racial actors—such as judges and lawyers—becoming "as real as the racial relations it organizes."

A result is a racial system that is generally taken for granted by White Americans as lawful and equally applied, whereas Black Americans see it—through the lens of legal cynicism—as socially unequal and imposed through the formal guise of White legal equality. A salient example involved the mid-twentieth century legal justification of the exclusive construction of public hi-rise housing projects in Chicago's South Side Black Belt. Richard Rothstein (2017) explained that in 1883 the U.S. Supreme Court reversed the interpretation of the 1866 Civil Rights Act. The Civil Rights Acts sought to prohibit practices associated with slavery such as housing discrimination. While the 1866 Civil Rights Act ostensibly made housing discrimination unconstitutional, the Supreme Court deemed this understanding null and void by pointing to the absence of a mechanism to enforce fair housing. It was only with the passage of the 1968 Fair

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

Housing Act that the prohibition of housing discrimination became more legally enforceable.

The lack of an effective housing act allowed federal agencies at mid-century to rationalize their support of Mayor Richard J. Daley's exclusive location of public housing in Chicago's Black neighborhoods. A year before Mayor Daley's death, the city's *de facto* discriminatory practices were defended before the Supreme Court by President Ford's Solicitor General, Robert Bork. Bork argued that placing high-rise projects in White neighborhoods would have "an enormous practical impact on innocent communities that will have to bear the burden of the housing" (Rothstein 2017, p. 35). Bork was in effect arguing that equal distribution of public housing across the city's neighborhoods would *un*equally punish residents in White neighborhoods. Thus, Bork defended Daley's housing policy as formally legal and nondiscriminatory in its protection of White neighborhoods.

Although the Supreme Court ultimately decided against Bork, Rothstein noted that the Court's decision did not change the structural reality of the segregated placement of Chicago's high-rise projects: Daley simply responded by halting construction of high-rise public housing, which Rothstein argued was a *de facto* form of discrimination. Massey and Denton (1993) used the 1980 decennial census to demonstrate just how structurally unequal the hyper-segregation of Chicago had become in its unevenness, isolation, clustering, centralization, and concentration of discriminatory housing.

Although this hyper-segregation was deemed lawful by Richard J. Daley and the federal housing agencies, Black Chicagoans, through a lens of legal cynicism, saw the structural reality of the exclusive location of the high-rise projects in their neighborhoods as highly discriminatory. The deteriorating structural reality of the high-rise projects was intensified by government refusals to maintain and repair them. The high-rise projects were subsequently demolished rather than repaired or replaced under Daley's son, Mayor Richard M. Daley, intensifying legal cynicism in Chicago's Black neighborhoods.

By the 1990s, high-rise public housing projects were disappearing from Chicago's skyline and many displaced residents were swept up in a rising tide of the second Mayor Daley's law-and-order, mass incarceration politics. As elsewhere in America (Tonry 1995; Western 2006), the focus in the Daley era of mass incarceration was on "gangs, guns, and drugs." Black incarceration rates escalated even as rates of crime and violence began a long historical decline in Chicago and beyond.

This was the same era in which Police Detective Jon Burge emerged as a feared and legally elusive figure in the torture of African American detainees on Chicago's South Side. Burge's most prized confessions were from suspects on whom judges imposed life sentences or the death penalty. The disproportionality of these sentences in Chicago and elsewhere was a growing structural reality of American life.

As Wendy L. Moore (2008) explained, these sentences were accepted as a rationalized expression of formal legal equality. The U.S. Supreme Court, in the face of compelling social science evidence of racial inequality and disproportionality in imposition of the death penalty, took the initiative in rationalizing its acceptance. The Supreme Court addressed the racial disparity in death penalty sentences in the 1987 Georgia case of *McCleskey v. Kemp* (1987). A respected law professor, David Baldus, analyzed Georgia's sentencing data to show its racist implementation. In turn, McCleskey's lawyers argued that disparities in Georgia's death sentences violated the 14th Amendment in a racially discriminatory way. The key empirical finding was that persons who murdered White victims were more likely to receive a death sentence than were persons who murdered Black victims. The Supreme Court conceded the disproportionality of this statistically demonstrated racial disparity.

Yet, as Moore (2014) explained, the Supreme Court rejected the claim that this disproportionality violated the legal right to equal protection. Instead, the court held McCleskey's lawyers had not proven that the Georgia judges had acted with discriminatory purpose. Extending its argument, the Court further insisted that McCleskey's lawyers had also failed to demonstrate that the Georgia Legislature had enacted and retained the death penalty statute for racially discriminatory purposes. The statistical evidence provided by Baldus was deemed irrelevant to the claim of racial inequality in imposition of the death penalty.

We will show, with the Burge case as an example, that the Court's endorsement of this conception of formal legal equality had a further long term chilling effect on the presentation of evidence about a code of silence in policing that continues to perpetuate racial bias in America's criminal courts.

Structural Mechanisms of Formal Legal Equality

We present a situational analysis of the trial of Jon Burge to show how Bonilla-Silva's (1997) structural theory of American racism operated through presumptive mechanisms of formal legal equality in the United States District Court for the Northern District of Illinois. Stinchcombe (1991) defined explanatory mechanisms as "bits of theory" that can operate at a different level than the main forces postulated in structural theories, thereby making the higher-level theory "more supple, more accurate, or more general" (p. 362). We use this approach to advance Bonilla-Silva's structural theory of White subordination of Blacks, highlighting as an explanatory mechanism courtroom sidebars that involve a private conversation between a judge and opposing lawyers. Our thesis is that these sidebars constitute a mechanism that helped perpetuate legal cynicism about a police code of silence that continues to support police torture and brutality in Chicago. As noted above, this is understood by its victims on the streets of Chicago as "being Burged." As Laurence Ralph (2020) noted, "Everyone in Chicago's Black neighborhoods, it seems, knows what the term means" (p. 179).

Stinchcombe (1991) used the criminal justice system to introduce his conception of mechanisms. He noted that this system is activated by reported crimes that proceed through several stages, among the most central of which is a trial. Our focus is on the role of sidebars in trials. Sidebars have received little attention from social scientists, but we contend that they can play a key role in fostering contradictions such as those between White understandings of formal legal equality and Black legal cynicism. As such, we regard this paper as a contribution to an "undone science" (Hess 2016) of racial inequality and legal cynicism.

Stinchcombe (1991) used the notion of "a situation" to describe how mechanisms operate:

> "… by a "situation" I mean a time and place in which there is continuing communication or interaction, such that the actions and communications of one person are facts to which the others respond, and such that some 'objective' features of the situation come to be defined in a common way by the people in the situation (p. 372).

Stinchcombe linked situational analysis to Goffman's (1963) classic monograph, *Behavior in Public Places*. Stinchcombe's lynchpin argument was that "what is crucial about a situation … is that the same people act differently if they are inside the temporal and spatial and communicative boundaries of the situation than if they are outside those boundaries" (1991, p. 373). That is, the situation produces a contextual effect.

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

In our case, the situation consists of the sidebar interactions between the judge and opposing lawyers. However, in contrast with Goffman's situational analyses in *Behavior in Public Places*, a trial sidebar is conducted in a quasi-public space, beyond the hearing of the jury and courtroom audience. Stinchcombe explained that what makes these situations so consequential is their potential to achieve a "causal unity" that is hidden from jurors and onlookers. He argued that, "the community of facts and the mutual accessibility makes the situation into a causal unity" and that "[s]uch causal unities are often useful places to locate mechanisms explaining larger (e.g., structural) processes" (1991, p. 373). The significance, for our purposes, is that the skepticism in the Black community about the justice American courts dispense can be intensified by the hiddenness of the sidebar process and the unified appearance of its results that Stinchcombe emphasized.

This unity is determined largely by the singular authority of the judge in her/his courtroom. Jurors and courtroom onlookers do not have the opportunity to hear and know how this authority emerges, at least until months or years later when sidebars may appear in trial transcripts; transcripts that take time to produce and that are typically expensive to acquire. Lawyers learn that, while they can present opposing arguments in courtroom sidebars, it is the judge who decides which argument will prevail; challenging a judical decision can be costly, for example, to success in the ongoing trial, or even in charges of contempt placed against an overly persistent and non-compliant lawyer.

Moore (2008) detailed the process by which law students learn the "how" of "how law fits" into the kind of "causal unity" Stinchcombe described (p. 48; see also Mertz 2007). She explained that students learn to "think like a lawyer" and enact "neutral" and "objective" viewpoints that can obscure how power—in this case, the singular authority of the judge in her/his court—shapes both their learning and the law.

Stinchcombe's situational mechanism helps explain the challenge that confronted Patrick Fitzgerald, the U.S. Attorney who, in 2008, took over after Illinois state prosecutors had failed to charge Jon Burge with any crime. As we demonstrate below, Stinchcombe's methodology offers a way to understand the route Fitzgerald and his lawyers chose for getting Jon Burge convicted and jailed for several years. In broader theoretical terms, the Burge case provides an example of how formal White legality can prevail, but in this context by presumptively refusing to punish a code of silence that enabled the racist torture of more than 100 African American men in Chicago and that continues to perpetuate police lawlessness.

We contend that the agreements reached in sidebars during the Burge trial represent a consensual concession to the "causal unities" presumptively imposed by the judge. These aligned with a structurally racist system of formal legal equality that ruled out presentation of racially dispositive evidence, leaving untouched a code of silence that was not only unchallenged, but unmentioned—that is, silent and invisible.

THE TRIAL OF JON BURGE

By 2008—more than three decades after Jon Burge began his work with the Chicago Police Department and his torture of Black suspects—Cook County and the State of Illinois still had not prosecuted him. The police department fired Burge in 1993, but he was not convicted of any crime. A thirty-year cover-up had allowed a five-year statute of limitations to "run out the clock" on several decades' worth of potential torture prosecutions.

Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois who had prosecuted Louis "Scooter" Libby for his role in the Valerie Plame affair, among other cases, finally took over the Burge Case in 2008. He had publicly speculated that earlier evidence uncovered by an Illinois special prosecutor who declined to recommend

prosecution of Burge could nonetheless "provide the pry bar needed to get new trials," that could "lead to federal prosecutions for civil rights violations, violations of the RICO statute, and possibly perjury" (see Conroy 2006a, b.

This reference to the RICO statute—with its focus on conspiracy, corruption, and racketeering—implied charging high-ranking officials in the State's Attorney and Mayor's offices. Fitzgerald could have pursued these charges as U.S. Attorney, and his early statements expressed optimism in the midst of legal cynicism among African Americans about the state's continuing refusal to charge Burge and higher-ranking public officials, including Mayor Richard M. Daley, with serious crimes.

However, Fitzgerald ultimately limited charges against Burge to perjury and obstruction of justice based on a 1989 civil suit seeking damages for alleged torture. These charges were for lying about torturing victims to extract confessions from a number of men including Anthony Holmes, Shadeed Mu'min, Gregory Banks, Melvin Jones, Jackie Wilson, and his brother Andrew Wilson, who had died several years earlier. The Wilson brothers had been convicted of the high profile killing of two Chicago police officers, which Mayor Daley and others described as a "heater case."

The perjury and obstruction charges required Fitzgerald to prove two things: the earlier occurrence of torture and Burge's later lies about it. The trial therefore began with torture victims' testimony, who the defense, at every opportunity, depicted as lying criminals. The defense alleged that the torture claims resulted from a conspiracy organized by a Chicago gang, the Black Gangster Disciples, while the defendants were serving prison terms. This made it important to have corroborating testimony for the victims' claims, ideally from justice system personnel who witnessed the events. This required breaching the code of silence that still pervades Chicago law enforcement. It also involved working around the judge's refusal, revealed in a sidebar, to allow explicit discussion of racial bias in the Burge case.

As we show below, the testimonies of two witnesses, detective Michael McDermott and court reporter Michael Hartnett, involved a code of silence in the State's Attorney office and in the station houses where Burge worked and tortured detainees over three decades. We first introduce the foundation of the prosecution's case.

Hearing from the Victims

Anthony Holmes was arrested in 1973. His case underlined the long history of police torture on the South Side and its enduring connection to legal cynicism in Chicago's African American neighborhoods. As a Black man, Holmes came closest to making the experience of racial bias in South Side policing explicit when he testified that, "maybe you kind of expect to get beat up by police, but you don't expect to get electrocuted" (Welecka and Musetti, 2010, p. 2). Harrowing accounts by Mu'min, Banks, and Jones followed, but the case most significantly unfolded around Andrew Wilson.

Wilson died in 2007, so a White FBI agent read his testimony from court transcripts. According to Wilson, Burge entered the room where he was being held and told the crew that if he were them, "he wouldn't leave marks on Wilson" (Walecka and Musetti, 2010, p. 8). Yet the prosecution presented photographs revealing Wilson's injuries at the hands of Burge's "midnight crew." Wilson's public defender, Dale Coventry, had presented the photos showing marks on Wilson's ears from alligator clips—the signature signs of electroshocks inflicted with Burge's "torture machine" (Taylor 2019).

Wilson's testimony included the role of Assistant State's Attorney Lawrence Hyman. Early in his interrogation Wilson was taken to Hyman to record a statement. Wilson reportedly thwarted this attempt by saying to Hyman, "You want me to make a

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

statement after they been torturin' me?" Hyman told the detective who brought Wilson to "get this jag-off out of here" (Walecka and Musetti, 2010, p. 10). This interaction anticipated testimony reported below from court reporter Michael Hartnett, who transcribed Wilson's confession later that day.

The testimony of Dr. John Raba (2010), director of the prison medical center, reinforced the physical evidence of Wilson's torture. He testified that the injuries he saw were consistent with Wilson's description of his mistreatment by officers at Chicago Police Area 2. Raba then wrote a letter insisting on an investigation of Wilson's apparent torture to police Superintendent Richard Brzeczek.

An Early Sidebar with the Judge

In the course of Dr. Raba's testimony, the prosecution asked Judge Joan Lefkow for a sidebar. This and other sidebar interactions were included in the court transcript but unheard by the jury. Indeed, they are usually unknown to the general public and even legal scholars because they are usually not available until long after a trial ends and because they are lengthy in major trials, expensive to acquire, and must then be read and parsed in detail. However, we demonstrate that they can provide a foundation for situational analyses. The prosecution's sidebar request involved Dr. Raba's letter and a phone call from the Cook County Board President, George Dunne. It provides an early example of efforts by the defense to block the presentation of evidence about high-ranking officials who attempted to preserve a code of silence surrounding Burge's torture. The prosecutor, Betsy Biffl, explained:

> Ms. Biffl: … After I ask him [Dr. Raba] about the letter, I'll ask if he got a response from the superintendent, and the answer is going to be no.
>
> However, he did get a call from the president of the Cook County Board [George Dunne] who said: Doc, what are you doing? Why did you send the letter?
>
> … I think it is relevant because it goes to the fact that there was this chilling effect on everybody who tried to address this issue … I think it is relevant to this case and the fact that so many people kept quiet and why they may have done that (Raba 2010, pp. 1378–1379).

The reference to "so many people kept quiet" was an early indication that the prosecution wanted to make the code of silence an issue in this case. Marc Martin, one of the defense lawyers, objected that the perjury and obstruction charges in this case were formally linked to Burge and no others. Martin stated:

> Judge, we object to George Dunn's statement on hearsay grounds. There's no conspiracy charged here. He's [Burge] not a member of a conspiracy (Raba 2010, p. 1379).

The judge overruled this objection, allowing introduction of the phone call from the Cook County Board President. However, the admission of this testimony was unique. Judge Lefkow would later deny the prosecution's request to introduce additional evidence demonstrating a code of silence with race-linked consequences. The judge would later rule that such evidence was "collateral" to the case and "prejudicial" to defendant Burge, precluding presentation of important information.

A structural theory of the case, consistent with Bonilla-Silva's theory, sees the latter kind of decision as part of a social reality that covered up Burge's torture regime—a

regime that exclusively victimized Black men through a code of silence that perpetuated legal cynicism. We argue that silencing evidence about what the prosecution above called a "chilling effect" concealed a key part of a White dominated system that protects racists like Burge. It does this by directly or indirectly adopting standards of formal legal equality like that applied in *McCleskey v. Kemp* (see earlier discussion and Moore 2014) to disqualify presentation of evidence of racially driven behavior.

Two African American Police Officers Begin Pulling Back the Curtain

The prosecution next called two African American police officers from Police Area 2: Doris Byrd and Sam Lacey. Byrd testified first about Burge's role in Area 2. She said he was in the office both days and nights and mostly worked on homicides and other highly publicized cases. This meant Burge worked predominately with "the A Team": "… a nickname that some of us had given a group of detectives who handled mostly all the homicides and heater cases, cases that had high publicity" (Byrd 2010, p. 86).

Speaking for the prosecution, David Weisman asked Officer Byrd to describe Burge's interactions with the A Team.

> A: Well, there seemed to be a camaraderie between them.
> Q: When you say, "there seemed to be a camaraderie," can you tell us what objective reasons or observations you made to reach that conclusion?
> A: Well you would hear conversations of them socializing after working hours when joining him on his boat (Byrd 2010, p. 1477).

Burge had named his boat the Vigilante, a term loaded with extra-legal implications.

Another Sidebar

The prosecutor, David Weisman, now asked for a sidebar in which he referred to Judge Lefkow's pre-trial warning about raising issues of racial bias. He anticipated that the defense was preparing to indirectly question Sergeant Byrd's competence in response to her reference to the "A Team." This was the first of a series of sidebar exchanges about the relevance and admissibility of testimony about the structural reality of the racial dynamics that pervaded Burge's supervision of the Area 2 station house. Weisman seemed to be probing for a way of introducing the issue of race relations in Area 2 without challenging the judge's warning not to raise issues of race.

> Mr. Weisman: Judge, in your pretrial you said no racial bias as far as in the workplace. Fair enough. Ms. Byrd has a lot to say about that. We didn't inquire. But if Mr. Gamboney [for the defense] is now going to get into the fact that she—so she didn't get homicide investigations assigned to her, then I don't think it is fair for us to have to sit there in our seats and not be able to draw out the fact that one, he [Burge] didn't assign blacks homicide investigations; and, two, when they went to a commander to complain, the commander reported it to Burge, and he chewed them out (Byrd 2010, p. 95).

Weisman seemed to realize that he would not get very far by noting that all members of the A Team were White, while their victims were Black, so he did not mention this fact. Patrick Fitzgerald's decision to charge Burge with perjury and this charge's narrow focus on lying, offered the judge a way of ruling out broader consideration of the "collateral" issue of race.

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

Instead, Weisman's strategy in the sidebar began to work around the pre-trial ban against raising questions of race by questioning the suspiciously high rates of confession that Burge's A Team obtained compared to Officer Byrd and others.

> Mr. Weisman: … here is a woman who didn't even get tough cases, and she barely got written confessions from people. And how are people committing murders getting written confessions? That's the inference we'll draw in closing (Byrd 2010, p. 1483).

Weisman was taking the opportunity to "front" for the judge a line of questioning that he would pursue with his next police witness, Sam Lacey, who was also African American.

Sam Lacey Implicitly Challenges the Code of Silence

Sam Lacey began work with the Chicago Police Department as a patrol officer, rising to detective before finishing a law degree and starting a private practice. He had the confidence of an experienced lawyer and was not intimidated by aggressive questions from defense counsel. Along with Doris Byrd, he had worked under the supervision of Jon Burge, beginning the year before Andrew Wilson's arrest.

Officer Lacey identified several participants in the "midnight crew"—John Yucaitis, Pete Dignan, and Jack Byrne—along with other members of the A Team. Lacey described Burge's role in Area 2 as "like the boss. He ran things" (Lacey 2010, p. 170). This characterization was reinforced when the prosecution asked Lacey to describe the investigation of the "heater crime" killing of Officers Fahey and O'Brian.

> A: Well, I— particularly one occasion I can recall, we were working on the Fahey and O'Brian homicides, and there was some suspects [the Wilson brothers] that had been taken in. And the commander, Commander Deas, and myself was ordered to go down to the Chief of detective's office while the investigation was—I mean, that —yeah, while the investigation was being taken care of (Lacey 2010, p. 1559).

Deas and Lacey were both Black and the implication was that Burge did not want them to witness the tortured interrogation of the Wilsons.

The prosecution then asked Officer Lacey about his own methods and success in investigating cases and how these compared to those of the A Team.

> Q: Did you obtain oral statements from some people?
> A: Yes, I did.
> Q: How many of those did you get?
> A: Several. I don't know—recall how many, but several.
> Q: All right. When you interviewed people, what interview techniques did you use to gain statements from people?
> A: I tried to make people feel guilty. I would try to make them feel sad and remorseful and give up some information …
> Q: Did you notice a trend as to who was obtaining written statements?
> A: Basically the guys that worked the A Team, they got a lot of written statements …
> Q: Did they get more than other detectives in Area 2?
> A: Yes, they did (Lacey 2010, pp. 1570–1572).

This pattern of A Team success in obtaining disproportionate numbers of written statements was consistent with use of torture, although this implication was left silent.

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

Nonetheless, the racial pattern of White (police) on Black (victim) torture implicit in the earlier sidebar now reemerged. Here, Richard Beuke, part of Burge's defense team, raised it in relation to Lacey's earlier report that Andrew Wilson did not look abused when he first saw him on the morning of his arrest, but that he looked seriously abused later that day.

> Q: … sir, you in your mind determined that something had obviously happened to Andrew Wilson at Area 2, correct? … And you immediately went to your supervisor, Commander Deas, and told him that you had seen Mr. Wilson at around 8:30 or 9:00 o'clock in the morning and he was fine, and then you saw him on the 10 o'clock news and he had a big bandage around his head, correct (Lacey 2010, p. 1570–1571)?

Anticipating where this line of questioning was likely headed, the prosecution immediately asked for another sidebar.

Sidebar about "Opening and Shutting Doors"

The prosecution now set out the implications of the question that it saw the defense initiating, despite the judge's pre-trial warning about introducing the issue of race.

> Mr. Weisman: Judge, look, he [Mr. Beuke] can ask those questions if he's trying to show some type of—you know, that he [Officer Lacey] failed to do something. But if he does, he's opening the door to what the court has asked us to keep out, which is that this witness, along with Ms. Byrd, complained about how they were being treated in Area 2. And when they did that, they went to the commander above them, about Mr. Burge, they did that, and then they were brought in by Burge, and, you know, that's going above them.
> And I think—it is fine if he wants to ask, but I think—I just want to warn that I think it is then relevant to say if he had reported it, he would have faced the same consequences … if he wants to pursue it, I will consider the door open (Lacey 2010, p. 1623–1625).

In response, defense counsel agreed to withdraw his question. The prosecution and the defense were essentially agreeing to disagree, and in doing so, choosing their battles. In this specific instance neither side probably thought they could win with Judge Lufkow. It was a recurring kind of example of what Stinchcombe called situationally induced "causal unity."

Both sides likely already realized that when this case was finished, the prosecution was going to win a conviction of Burge on perjury and obstruction, but the prosecution was not going to be able to expose the departmental code of silence that had allowed Burge to lead a racist torture squad. The effect of the charges and this exchange were that the door would remain closed on the prosecution making the point that the torture underlying this case was racially targeted in such an extreme way that all the torturers from the A Team were White, while their victims were Black.

A White Police Officer Involuntarily Breaks the Code of Silence

The prosecution ideally wanted a White officer to break the code of silence with eyewitness testimony about Jon Burge's responsibility for torturing Black suspects. In doing so, the prosecution wanted to indirectly make the point that powerfully racialized

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

pressures sustained the code of silence and allowed the unpunished use of racist torture to continue. Finding the right witness was predictably challenging. The prosecution wound up calling a former Chicago police officer, Michael McDermott, who worked in the State's Attorney office. Our analysis of this choice and its purpose requires following the sequence through several steps to its provocative conclusion.

Although McDermott was the prosecution's witness and had previously given testimony, the prosecution asked that the court treat him as a hostile witness for their case. April Perry, speaking for the prosecution, explained that McDermott's "testimony is different than he has said at grand jury …" (McDermott 2010, p. 15). This grand jury testimony was secret and therefore beyond the hearing of Jon Burge, with whom McDermott was now face-to-face in a courtroom that likely included Burge as well as other concerned police officers. The unusual circumstances quickly led to a sidebar.

Sidebar about a Checkered Past

Much that was at issue during McDermott's testimony followed from his responses to earlier subpoenas. These circumstances led the defense lawyer Richard Beuke to request a sidebar that revealed a reason McDermott needed immunity from prosecution.

> Mr. Beuke: Judge, it is our theory here that I don't know when this guy is telling the truth, when he's telling a lie. He's acknowledged that he had lied under oath on several different occasions.
> What I think it is crucial for this jury to understand is that when he made certain decisions to testify in front of the grand jury in 2008, that there were certain things in his own mind. One of the things that I think he knew was the fact that [an earlier lawyer] Mr. Roddy told him if you go in there and say you don't remember anything, you're going to get indicted …
> The Court: Response [?].
> Ms. Perry [for the prosecution]: Well, Judge, I think it is highly prejudicial, with the assertion going out is that we're going to indict people because they don't remember things (McDermott 2010, p. 79).

Perry was essentially expressing her resignation as an aside, another reflection of Stinchcombe's point about the courtroom situational context, with the judge acting as sole authority and producing "causal unity." The judge ended the sidebar by allowing this line of questioning—which involved McDermott reporting his fear that unless he was a cooperative witness for the prosecution he would not only to be indicted but also lose his job, health insurance, pension, and other benefits of his employment with the State's Attorney office.

An Officer in Distress

McDermott's lawyer now introduced the fact that his client had been granted immunity for his testimony. But McDermott himself insisted that he actually did not want immunity, because he understood this as requiring him to "talk" or go to jail:

> A: I wished to remain silent. I was ordered by the Chief Judge to talk. And if I didn't, I would have to go to jail. And the only way they could make me talk is to give me immunity. Nobody has ever told me what I need immunity for (McDermott 2010, p. 85).

Yet, it was McDermott who ultimately entered a request for immunity.

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Some additional drama, introduced to explain McDermott's distress, involved an interaction he had with U.S. Attorney Patrick Fitzgerald before his grand jury appearance in July 2008. McDermott explained:

> A: I was seated outside, and one of—the U.S. attorney approached me and introduced himself.
> Q: Who was that?
> A: Fitzgerald
> Q: Patrick Fitzgerald?
> A: Yes.
> Q: And did he introduce himself to you?
> A: To me, my lawyer. And then he walked away and stood by the door of the grand jury.
> Q: What happened after he stood by the door of the grand jury?
> A: Oh, there were other U.S. Attorneys there. I think an FBI agent. There is like four or five people.
> Q: What happened then?
> A: Well, I walked away from my attorney. And as I was walking in the door of the grand jury, they kind of stood around me, and the U.S. Attorney kind of made a comment. He came up behind me and made a comment …
> Q: What did he say to you?
> A: He said, oh, by the way, it is not just perjury. If I think you're holding back on anything, it is obstruction (McDermott 2010, pp. 87–88).

Fitzgerald then entered the grand jury room with McDermott, accompanied by the five assistant U.S. attorneys and the FBI agent.

The prosecution was calling McDermott with the goal of breaking the code of silence by corroborating the torture of Shadeed Mu'min. Burge had interrogated Mu'min in his office about a robbery. Mu'min testified early in the trial that Burge pulled a .44 Magnum gun from his desk and removed all the bullets except one; he then reportedly pointed the weapon at Mu'min's forehead and pulled the trigger three times.

McDermott previously testified to the grand jury that at least some of this occurred when he was standing in the doorway to Burge's office. He confirmed in this testimony that "I witnessed an abusive act by Jon Burge" (2010, p. 116). When Mu'min persisted in refusing to talk, Burge allegedly yanked a vinyl cover from a typewriter and pressed it against Mu'min's nose and mouth. Burge allegedly did this three times, with Burge reviving Mu'min twice by blowing air into his mouth (Walecka and Musetti, 2010).

However, between McDermott's grand jury appearance and the Burge trial, McDermott had a change of heart. On reflection, McDermott said he now doubted whether Burge had the requisite criminal intent to torture Mu'min. And he now claimed he had previously been pressured to testify otherwise under the threat of losing his job.

As McDermott's lengthy testimony finally moved toward its conclusion, one of the prosecutors, April Perry, clarified contradictions between McDermott's trial and grand jury testimonies about the criminal intent necessary to establish Burge's perjury. With Burge and others looking on, and with the judge answering objections, the prosecution asked:

> Q: … Sir, you know that Lieutenant Burge's goal was to coerce a confession, isn't that right?
> A: … I don't know what his intentions were. I felt when you talk to a suspect, it is to glean a confession. But it might have been something else … a three-minute

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

interview with a suspect is not my idea of a confession, trying to get a confession out of somebody … To this day, I don't know what his intentions were.
Q: Sir, when you were before the grand jury, were you asked these questions, and did you give these answers?:

Q: When you say you were surprised, you don't know why he was doing this in front of you.
A: Right.
Q: Would you have expected him to do it in his office if you weren't there?
A: I don't think I knew him that well to do something basically incriminating in front of me.
Q: And when you say incriminating, incriminating in what sense from your perspective?"
A: -- [silence]

The prosecutor now broke the silence by inferring "coercing a confession" and McDermott simply answered "yes" (McDermott 2010, pp. 134–135).

Ms. Perry, for the prosecution, then further addressed McDermott's revised characterization of Burge's criminal intent with regard to the charge that Burge held something over Mu'min's face and whether that interaction was a one-sided confrontation on Burge's part, or a two-sided "scuffle" between Burge and Mu'min.

Q: Now you said that and you continue to say that this was a scuffle. Is that correct?
A: Yes.
Q: In truth it was a confrontation, is that right?
Mr. Beuke: Objection, Judge. Argumentative.
The Court: Overruled.
By the Witness:
A: I know it was going back and forth between the two of them.
By Ms. Perry:
Q. Sir, isn't it true that this was one-sided?
A. Not entirely.
Q. Sir, isn't it true that there was no struggling or physical fight put up by Mr. Mu'min until he had something placed over his head?
A: There was nothing placed over his head. It was a scuffle, and it was like 20 seconds long, and it was 25 years ago.
Q: Sir, in the grand jury were you asked these questions, and did you give these answers?:

Q: As far as it being a confrontational situation, this was a one-sided confrontation, correct? This was Burge confronting Mu'min. Mu'min not resisting or confronting Burge in any way, correct?
A: He could have been, I don't know. I'm sure he wasn't cooperating fully with the interrogation if that's what you want to say is a confrontation.
Q: Well, would it be fair to say at most—
A: I would say it was one-sided.
Q: And would it be fair to say at most, maybe perhaps after this bag placed over his head, he might have struggled a little bit?
A: Yes.
Q: But not prior to that point?
A: That's correct.

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> Q: Did you give those—were you asked those questions, and did you give those answers?
> A: Yes (McDermott 2010, pp. 135–137).

The prosecution offered McDermott's testimony about the simulated suffocation as corroborating Mu'min's account of the actus reas (i.e., criminal act) and mens rea (i.e., criminal intent) of his torture by Burge.

The prosecution then made two further and somewhat theatrically delivered points that successfully elicited a provocative response. The first was a response to McDermott's suggestion that U.S. Attorney Fitzgerald placed undue pressure on him as he entered the grand jury by saying that he could be charged with obstruction of justice as well as perjury if he gave purposefully untruthful testimony. The prosecution's response was to ask McDermott whether, in offering his warning, Fitzgerald had used any inappropriate language, screamed at him, or physically touched him in any way. Then, drawing an obvious reference to alleged actions of Burge, the prosecution asked if Fitzgerald had pointed a gun in his direction or put a bag over his head. McDermott answered "no" to each question (2010, p. 137).

The final point was even more theatrical and consequential and it raised the prospect of another sidebar. McDermott repeatedly had said he was treated unfairly before the trial. In apparent anger, McDermott complained that he was not allowed to properly prepare for his testimony and that the court let offenders lie without consequences.

> McDermott: I knew it was—you were going to talk about 30 or 40 years of possible abuse. And I also knew that the vast majority of these offenders lie, and you guys aren't doing nothing about it.
> So, no, they didn't tell me any specific case that I worked on ahead of time so I could review my reports and so I could answer with some kind of a refreshed memory (2010, p. 142).

The prosecution would later remind McDermott that this approach to interviewing police witnesses was essentially the same as that used by police officers in interrogating suspects.

Provoking a Pre-empted Sidebar

First, however, the prosecution framed the issue in terms of Shadeed Mu'min. In doing so, it provoked another outburst.

> Q: So certainly no one told you that the government was interested in hearing about Shadeed Mu'min, did they?
> A: I know it was listed. I know I went down to OPS [Office of Professional Standards]. I know it was brought up at the police board. This was all public record decades ago, and your office did nothing about it. So I knew that you would ask me about Shadeed Mu'min because that is the only case I went down to OPS on that had anything to do with any kind of abuse.
> Q: Are you finished?
> A: I'm answering your question ma'am.
> Q: No, sir. My question was: Did anyone tell you the government was going to be asking about Shadeed Mu'min?
> A: You didn't tell me what you were going to ask me.

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> Q: And, sir, you have mentioned that this should have been brought earlier, is that right?
> Mr. Beuke: Objection, Judge. This is all irrelevant, at least in terms of—
> The Court: Overruled.
> By Ms. Perry:
> Q: Sir, isn't it true the reason that these cases were not brought earlier is because people like yourself didn't come forward earlier?
> Mr. Beuke: Objection, Judge, can we have a sidebar?
> The Court: [pre-empting the sidebar] I'll sustain (McDermott 2010, pp. 142–143).

It seemed clear that the prosecutor knew her question would provoke an objection and that she had anticipated that she could make her point rhetorically about the code of silence—"people like yourself didn't come forward earlier"—without receiving an answer from McDermott. The prosecutor's unanswered question summarized the perspective on the trial that the prosecution now sought permission to develop in several sidebars. Namely, that the central elements of this case were racially targeted episodes of torture that were covered up by a code of silence. For the prosecution, this was central to the case, and it is a point that we revisit again, next with Jon Burge himself.

John Burge as the Businessman's Policeman

Chicago Mayor Jane Byrne met Jon Burge on the night of the shootings of officers Fahey and O'Brien in 1982. She described Burge as more like "a businessman rather than a policeman" (Byrne 2006, p. 1). There was a likely explanation: Burge's mother was an advice columnist (Baer 2020) and wrote a book titled *This Business of Dressing for Business*. In the company of outsiders, Burge was well spoken, usually dressed in a suit and tie, and respectful in manner and demeanor. When asked in court about his treatment of alleged victims of torture, his denials were typically calm and unwavering. He had received numerous departmental commendations and it was easy to see why the police department and State's Attorney office valued his work.

Burge (2010) politely insisted he had never actually seen a suspect's right's violated in Area 2. The prosecution therefore asked:

> Q: Sir, can you explain to the ladies and gentlemen of the jury why after Andrew Wilson was arrested and being taken back to Area 2 you had to tell someone to handle him with kid gloves? Can you tell us why you ever had that concern if you had never seen anything of the sort before?
> A: I didn't have to tell anybody that. I said that to preclude any possibility. There are subtle ways where you can do something to a prisoner, and I wanted to make sure that Mr. Wilson was treated in the nicest possible way so as to not jeopardize our case.

For good measure, Burge added "that was my choice, Counselor" (2010, pp. 170–171).

Nevertheless, there were flashes in Burge's testimony that his views about policing were unorthodox. For example, when Burge was asked to evaluate the significance of injuries of the kind Wilson received, Burge's answers were startling:

> Q: Sir, isn't it true that when you first became aware that Andrew Wilson had injuries, you laughed at it and made light of it?
> A: Yes.
> Q: You became aware that he had injuries, isn't that right?

A: You said significant injuries, counselor. He never had significant injuries; they were superficial injuries.
Q: And you don't believe second degree burns are significant injuries?
A: No, sir.
Q: You don't believe burns to the chest are significant injuries?
A: I don't believe he had any burns to the chest. But they would not be significant injuries. No, they are superficial.
Q: You don't believe a laceration to the back of the head that requires stiches is significant?
A: No (2010, p. 196).

The prosecution also received a surprising response when it probed Burge about an exchange earlier in the trial during the testimony of Michael McDermott involving the interrogation of Shadeed Mu'min:

Q: Is there anything you did with Shadeed Mu'min that Michael—that someone, a reasonable person, could have misconstrued as you putting plastic over his face?
A: I don't believe so. But I did have the ability to observe his testimony, and I have known Mike for a long time, and I have a very high opinion of him, and he appeared —appeared to me to be terribly distraught and under great pressure at the time he testified.
Q: And that's because there is a big code of silence within the Chicago Police Department, isn't there?
A: Not to my knowledge, sir.
Q: You have heard of that term, correct?
Mr. Beuke: Objection, Judge.
The Court: Overruled.
By the Witness:
A: Yeah, I have heard it from a bottom-feeding lawyer (Burge 2010, pp. 246–247).

Probably sensing his lapse of etiquette, Burge quickly added "No inference to you, sir" (p. 247).

Undeterred, the prosecution reframed its earlier question, "Have you ever reported any Chicago police officer for abusing someone's rights?" Burge again insisted: "I have never had the occasion arise." The prosecution then asked, "Sir, are you familiar with Detective Frank Laverty?" As we explain below, the name of Frank Laverty was a lightning rod in the modern history of Chicago Policing. The prosecution continued, "Detective Laverty created a problem at Area 2, isn't that correct?" Defense counsel jumped to his feet: "Your honor, objection. We're going to need a sidebar" (Burge 2010, pp. 247–248).

A Sidebar about Street Files and the Code of Silence

The mention of Frank Laverty caused a stir in the courtroom, and the judge stopped the sidebar to admonish the onlookers: "Just a Minute … Ladies and Gentlemen, there will be no talking in the courtroom" (Burge 2010, p. 248). It seems likely that some onlookers knew of Frank Laverty and his potential significance.

Detective Laverty had clashed with Burge in a widely known case that revealed the police kept secret "street files" with evidence that they did not pass on to the State's Attorney office and opposing defense counsel. It was a "double-filing system" in which "witness statements that strengthened the case against the defendant went into the official report," and "statements that might hurt the case … went no further than the street file" (Bogira 2005, p. 157). Realizing the contentiousness of these issues, and that it

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

was late on a Friday afternoon, the judge decided to dismiss the jury for the weekend. She then began the sidebar discussion.

The Laverty case had involved an African American police officer's son, George Jones, who had been accused and convicted of rape (Meisner 2016). In the course of his investigation, Detective Laverty uncovered exculpatory evidence that he reported and assumed would lead to dismissal of the case. He was therefore shocked to discover—on the day that the sentencing of George Jones was to occur—that the case had resulted in a conviction. Laverty contacted the defense lawyers and rushed to the courtroom where the sentencing hearing was taking place. Laverty was called to the stand and delivered his exculpatory testimony. The result was not only the dismissal of the case but also the revelation that Laverty's letter had remained in a "street file" that had never been given to the State's Attorney office or defense counsel.

Two detectives, James Houtsma and Victor Tosello, had earlier confronted Laverty and accused him of "messing up their case." Laverty had warned that if the case went to trial, he might testify for the defense. According to Laverty, Tosello responded by threatening to "blow him away" (Meisner 2016).

A subsequent investigation revealed filing cabinets full of other street files that the police had similarly withheld. This ultimately resulted in an appellate court decision that this practice was unconstitutional. In a sworn deposition, Laverty reported he had told Jon Burge that the case was "screwed up" and that he therefore had to let Jones' attorneys know this. Burge responded by informing Laverty that "…You're working afternoons and…nobody is going to work with you and the state's attorneys aren't going to approve charges on your cases, and you're going to be dumped as a detective" (Meisner 2016). Laverty was then transferred from the detective division to an administrative division. The prosecution explained that they also had sworn testimony from Officer Byrd (presented below) that Burge openly humiliated Laverty at Area 2 as punishment for breaking the code of silence (see also Taylor 2019).

The judge appeared to be coming to a conclusion after hearing a similar sidebar synopsis of the Laverty case. The prosecutors—Betsy Biffl, April Perry, and David Weisman—sought to stave off an adverse decision by making their final plea.

> Ms. Biffl: This witness [Burge] has personal information that goes to the atmosphere in Area 2. He [Burge] is the one that volunteered—he wanted to run his mouth about McDermott and feeling the pressure. This is relevant to that comment.
> The Court: Well, there is—
> Ms. Perry: It is a classic opening the door (Burge 2010, p. 259).

The defense counsel (William Gamboney and Marc Martin) argued in response that it was a door that should be left *un*opened, and the judge seemed to be agreeing.

> Mr. Martin: It is opening the door—we objected to the question.
> The Court: Is this a door we want to open?
> Mr. Gamboney: And then we're going to—I suspect Jon Burge is going to deny that he ever did anything like that … I mean, it is just inflaming the issue …
> The Court: Well, he's under pressure, too.
> Mr. Weisman: And that is true, your honor …
> Mr. Martin: And that is impeachment on a collateral matter, Judge.
> Ms. Perry: It is not collateral. This guy had a stranglehold over Area 2 and what people were allowed to say and what they weren't and what he was allowed to say and what he felt like he should—

> Mr. Martin: What did Laverty have to do with it?
> Ms. Perry: Which is what this entire trial is all about.
> Mr. Martin: He wasn't—he wasn't even a lieutenant at that time—at the time.
> Mr. Weisman: His conduct, and Burge didn't like it.
> The Court: I want to step back from this and think it through myself so we'll take a five-minute break (Burge 2010, pp. 259–260).

When the sidebar reconvened, the judge had reached her tentative conclusion about what she conceded was a "close question"—a discretionary judgement as to whether this was a "collateral matter" and therefore not directly relevant to the perjury and obstruction charges.

> The Court: All right. Well, I think this is a very close question. And as I understand what Mr. Weisman is saying it impeaches the denial about the code of silence, and I would concede that it probably does. But it is, you know, highly prejudicial for the defense, I think, and would open an area of inquiry that could easily open up some collateral issues. So I'm going to sustain the objection to this line of testimony (Burge 2010, pp. 260–261).

The prosecution quickly regrouped in its response to the judge's decision by requesting, since it was Friday afternoon and court would not reconvene until Monday, that it be allowed to prepare a brief over the weekend that would suggest "alternative-type questions" that would be short and "not go down the road of collateral issues." This concession to the judge's authority, as well as to the defense counsel's objection at this critical juncture to the prosecution's development of their theory of the case, is another powerful illustration of the kind of "causal unity" that Stinchcombe suggested this kind of situation produces. The key issue, of course, was the disparity between the judge's ruling against probing the code of silence and the prosecution's view that this code was not collateral but instead central to the case and the cover up—that is, lying about racial torture in Chicago's Area 2 under Burge.

As anticipated by Stinchcombe's "casual unity" prediction, on Monday morning the prosecution and defense counsel "agreed to disagree" in deference to the decision the judge had announced the preceding Friday. Instead of pursuing the code of silence, the prosecution proposed to ask about a "trait of character," arguing that character was a permissible line of inquiry under a well-known rule in the federal statutes. This character trait, the prosecution argued, was put at issue when Burge testified that he was "a responsible good supervisor as a police officer, that he maintained good gun handling practices with respect of Shadeed Mu'min, … and he said during his direct examination that to point a gun at someone would be a form of abuse" (Burge 2010, p. 266).

The judge was persuaded by the prosecution's new framing of this line of questioning, in terms of character rather than the code of silence that on the preceding Friday the prosecution had maintained prevailed under Burge in Area 2. The result, when court reconvened, was a quick volley of questions that the defense correctly predicted led to a series of denials by Burge.

> Q: At some point during that four or five months [when Laverty worked under Burge], did you un-holster your gun when Frank Laverty was in the room with you?
> A: Not to my knowledge, no, sir.
> Q: Did you point the gun at Frank Laverty?
> A: No, sir.

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

Q: Isn't it true that you said "Pow" or "Bang" pointing the gun at the back of Frank Laverty's head?
A: Said "Pow" or "Bang"?
Q: Yes, sir.
A: No, sir (Burge 2010, pp. 276–277).

The Sounds of the Silenced Sidebar

What the jurors and the courtroom observers could not know when they heard the above testimony was that Judge Lefkow had made it clear in the sidebar that although she had allowed the preceding questions, she had denied a fuller exploration of their meaning in terms of the code of silence that blanketed this entire trail. Judge Lefkow's justification was that this was a line of questioning that would be "collateral" and "prejudicial" to the charges against Jon Burge.

What the jurors and courtroom observers also could not know was that Judge Lefkow had acknowledged in the sidebar that this was a "very close" decision. The jurors and observers in addition did not know that the police witness Doris Byrd (who testified earlier in the current case) also had reported the following in a sworn statement to Attorney Flint Taylor six years earlier (Byrd 2004):

Byrd: One day we were in the room and Laverty was in there looking for a file. And when he left the room, Burge drew his weapon and pointed it at the back of Laverty and said, 'Bang.'
Taylor: Was that a message? Did you take that as a message about what would happen if police officers came forward and broke the code of silence and exposed police misconduct?
Byrd: Yes.

Yet the prosecution neither introduced this sworn statement nor now called Officer Byrd to testify in "real time." Since Judge Lefkow had already indicated in the earlier sidebar that she regarded this line of testimony as "collateral" and "prejudicial," to have done either would presumably have been futile and would have challenged the "causal unity" of the situational understanding reached with the Judge in the sidebar.

Judge Lefkow acknowledged that her ruling against the introduction of such evidence in a perjury case—because it would be "inflammatory" and "collateral"—was "close." If Officer Byrd's sworn statement had included the firing of an actual bullet or even a blank shell, it might have been inflammatory in the same way that an excessive number of gruesome crime scene photos is often regarded as "inflammatory;" yet the current case involved only a single spoken word. And since the code of silence is widely regarded as central to the problem of obtaining truthful police testimony, it is difficult to regard the incident described by Byrd as "collateral" to the question of Burge's truthfulness. As Perry said for the prosecution in the sidebar, it is "what this entire trial is all about."

Had Perry been allowed, she could have further noted just how central—rather than collateral—the code of silence was to the current trial and the place of Andrew Wilson in the prosecution of Burge. The destruction of files had been a focal point in Wilson's trial and retrial (*People v. Wilson*) for the double police murder in 1982. Jon Burge was called to testify and acknowledged in the retrial that all notes and a memo resulting from the manhunt leading to the arrest of Wilson had been destroyed. The face sheets from twenty-five street files were found, but not their contents. The destruction of this "street file evidence" played a major role in the exclusion of Wilson's confession as evidence in the retrial. Destruction of this evidence in Wilson's torture cases paralleled the withholding of the street file exposed by Laverty in the George Jones case (see Taylor

2019). Destruction of notes and files was an ongoing practice in Burge's supervision of Area 2, at least since the time of Andrew Wilson's trials for the police killings, and it was therefore of central importance with regard to the perjury and obstruction charges against Burge.

The few questions about Frank Laverty that Judge Lefkow allowed when court reconvened may have encouraged suspicions in the jurors' minds—especially if they were aware of the George Jones criminal case, the $800,000 settlement Jones received in a following civil suit, the secret "street files" that were exposed by this case, and the appellate court decision disallowing concealment of these files by police. Yet there was no direct mention in court by the prosecution of the role of the destruction of street files and its connection to the code of silence that was a salient part of Burge's activities in Area 2. This latter framing of the prosecution's case was lost in the sidebar that was beyond the hearing of the jury and the courtroom observers.

However, the disturbance in the courtroom in response to the mention of Frank Laverty's name suggested awareness of the George Jones case and its implications with regard to obstruction of justice. The *Chicago Tribune* had published a series of articles about the debacle of the George Jones mistrial, concluding that the police and prosecution had engaged in "deliberate misconduct." And a juror from the trial was later quoted in the *Chicago Lawyer* as saying, "I was amazed at how lackadaisical the police and the state's attorneys were about everything" (Bogira 2005, p. 166). The awkwardness of the sidebar having been conducted beyond the jurors' hearing, and the abbreviated questions about Frank Laverty that were allowed when court reconvened, likely renewed and perpetuated legal cynicism among the jurors and courtroom onlookers.

The Court Room Workgroup, Silent Signals, and More Missing Questions

As Burge's testimony came to an end, the prosecution asked if he noticed anything missing in the court reporter's transcription of Andrew Wilson's confession. Burge said no. The question anticipated testimony that would follow from a court reporter, Mike Hartnett, who worked with the Felony Review Unit in the State's Attorney office. Hartnett played a key role in transcribing confession statements.

Hartnett received a call from the head of the Felony Review Unit, Larry Hyman, on the morning of Andrew Wilson's interrogation. Hartnett arrived at about ten in the morning. Recall that Hyman had earlier met Wilson, who unexpectedly complained about having been tortured. Hyman had immediately demanded that Wilson be removed from his presence (Taylor 2019). Hartnett likely knew nothing about this.

At about six that evening, after he had taken two other statements, Hyman asked Hartnett to assist in taking a confession statement from Andrew Wilson. Hyman likely knew the police had mistreated Wilson during the day, although Hartnett did not indicate knowing anything about this. Rather, Hartnett's answers to the prosecution's questions suggested he was a compliant participant in what law enforcement researchers have called the "courtroom work group" (Eisenstein and Jacob, 1977). He indicated no inclination to ask probing questions of Hyman or others. And it was clear that Hartnett understood he was working at the pleasure of the State's Attorney office.

> Q: Okay. Would the state's attorney's office have had the ability to let you go if they were unhappy with your performance?
> A: I would assume so, yes.

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

> Q: Okay. And at the state's attorney's office, you took direction from them, correct? It wasn't some external office that gave you assignments.
> A: Right.
> Q: Okay. So I assume you got to know the assistant state's attorneys fairly well, especially the ones in felony review (Hartnett 2010, p. 31).

This last question obviously included Larry Hyman, but more importantly, it also included Jon Burge, with whom Hartnett was on a first name basis.

> Q: And so did you get to know the detectives a little bit, become familiar with them?
> A: Yes.
> Q: Did you know Jon Burge?
> A: Yes.
> Q: How well would you say that you knew him?
> A: As many times as I went there, Jon was pleasant. Walk in, he's always say hello, see if you wanted coffee or what not (p. 31).

Thus, Hartnett was a familiar link between Area 2 and the State's Attorney office, and he seemed to understand his role as such.

> Q: You were actually assigned specifically to this case, the investigation involving the murder of the two police officers, is that right?
> A: I was.
> Q: And why was that? Was that because they needed somebody to be on call for that case?
> A: I think so because of the nature of the case, and they said you are assigned to the case.
> Q: All right. And was that indicative of the seriousness with which the investigation was being taken?
> A: I would think so, yes (Hartnett 2010, pp. 37–38).

Hartnett clearly understood how important this "heater case" was to both the State's Attorney office and therefore Jon Burge.

The prosecution then focused on the way in which Wilson's confession was taken and asked Hartnett how it varied from normal procedure.

> Q: And did every statement start with the reading of Miranda rights?
> A: Well, somewhere in the beginning. Usually they set the stage where we were and what not first …
> Q: And was there a standard ending to all statements as well?
> A: Usually there was, yes.
> Q: Okay. And that was to ask the person if their statement had been taken voluntarily, is that right?
> A: Correct (p. 34).

The prosecution used these questions to establish that voluntariness was a standard beginning and ending part of a confession statement. It then focused on how the police handled the Wilson brothers. It asked Hartnett to explain in sequence how voluntariness was and was not addressed in three statements he took that day at Area 2 from Jackie Wilson (a defendant), Derrick Martin (a witness), and Andrew Wilson (the key defendant). Jackie Wilson came first.

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Q: All right. And when you took the statement of Jackie Wilson … Do you recall whether he was asked at the end of his statement whether it had been given voluntarily?
A: I'd have to look again to see if it is …
A: I don't see it on Jackie's. It would usually be near the end.
Q: Right. And he wasn't asked anything about is this voluntary, was he?
A: No (Hartnett 2010, pp. 54–55).

The prosecution then reiterated with Hartnett's testimony that the three statements were taken in sequence, on the same day, and all under the direction of Larry Hyman. It then asked about Derrick Martin.

Q: You took the statement of Derrick Martin between the statements of Jackie Wilson and Andrew Wilson, correct?
A: Yes.
Q: Okay. So on—do you see in Derrick Martin's statements whether he was asked if he was giving that statement voluntarily?
A: Yes. On Page 17.
Q: Okay. Now you said that you—now, he was just a witness, correct? He wasn't a suspect?
A: Correct …
Q: But Larry Hyman asked this witness if his statement was given voluntarily, didn't he?
A: Yes (Hartnett 2010 pp. 55–56).

Andrew Wilson's statement was last in the sequence.

Q: Now, I'm going to show you Andrew Wilson's statement, which I'll mark Government Exhibit 28.
A: Thank you.
Q: And I'll ask you to look at that and tell us if he was asked if that statement was given voluntarily.
A: No (p. 56).

The missing voluntariness question in the confession statements of the Wilson brothers under the supervision of Hyman remained an important issue throughout the thirty-year cover-up of the torture scandal.

The prosecution underscored the point that failing to ask about voluntariness was important by asking Hartnett about being called in cases where the defense was seeking to suppress admission of coerced confessions.

Q: You were sometimes called to testify in motions to suppress, is that right?
A: Yes.
Q: And you were called to testify about the circumstances of the interview, correct?
A: That is correct.
Q: And that the person had been read their rights, correct?
A: Yes.
Q: And were you asked about whether they appeared injured or not during the hearings?
A: Yes.

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> Q: And whether they had been asked about the voluntariness of the interview, is that right?
> A: Correct (Hartnett 2010, pp. 36–37).

The point of asking, "whether they appeared injured" was, of course, to connect the issue of voluntariness to concerns about injuries and coercion.

Because it is conceivable that failing to ask about voluntariness could be a matter of accidental omission rather than intentional commission, the prosecution also explicitly asked about "forgetfulness."

> Q: Did you ever point out to an assistant state attorney, hey, you forgot to ask him this or you didn't include the voluntary part? Did you ever do that?
> A: If an attorney forgot one of the rights, I would stop writing on my court reporter machine, and then we'd have to start all over.
> Q: So was that sort of a silent signal to them?
> A: Yes.
> Q: Now, how about at the end when they would go through the questions about the voluntariness? Did you do the same thing that you would stop if they had missed those?
> A: No.
> Q: What was the difference there?
> A: Well, the difference with the rights is if they forgot one of the rights, it was automatic you were supposed to stop because the alleged defendant was supposed to be given their Miranda rights (pp. 35–36).

In the cases of the Wilson brothers, there were further reasons to believe the failure to ask about voluntariness was problematic.

Just how problematic was suggested by the lengths Hyman went to avoid testifying about his handling of the Wilson brother cases at Area 2. Like officers and detectives in Area 2, Hyman took refuge by claiming the Fifth Amendment.

The journalist, John Conroy (2006b), wrote a scathing article about Hyman's role in the Wilson case and concluded that Andrew Wilson had been tortured in Burge's Area 2. Conroy (2006b) observed that Hyman would have known what the State's Attorney leadership group, specifically Richard M. Daley and his assistant Dan Devine, knew about the mistreatment of Andrew Wilson and the failure to include the voluntariness questions in the statements taken from the Wilson brothers. Hyman had left Area 2 in the late afternoon after taking statements from Jackie Wilson and Derrick Martin and before taking the statement from Andrew Wilson (Hartnett 2010). It is possible he left to consult with Daley and Devine about how to take the statement from Wilson.

In another article, Conroy (2007) reported that his newspaper had surveyed fourteen defense lawyers who collectively had more than 200 years of experience trying over 900 murders. The survey asked if the lawyers had ever observed a prosecutor fail to ask the voluntariness questions in any of these cases. None reported they had. The unaddressed question was whether Hyman would have decided to omit questions about the voluntariness of Wilson's confession without advice from the top of the chain of command in the State's Attorney office.

The prosecution closed its questioning of Hartnett by asking his attitude about a suspicious injury he had observed on Wilson's face.

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> Q: You testified previously, did you not, that he [Andrew] said—that you said it looked like he's been roughed up on that side of his face. Do you remember testifying to that in the grand jury?
> A: Yes, right on the side, correct.
> Q: So given that he looked like he'd been roughed up or popped on the right side, did you take a photograph of the right side of his face? …
> A: No, I took one straight ahead …
> Q: And you weren't particularly concerned with whether Andrew Wilson had been roughed up, were you?
> A: Not after what he told me, no, ma'am.
> Q: And, in fact, you told the grand jury that you didn't give a damn what happened to Andrew Wilson, didn't you?
> A: That's correct (Hartnett 2010, pp. 50–51).

The prosecution now closed its cross examination of Hartnett with a series of telling questions.

> Q: And you agree that it's unusual that at the end of the statement that Andrew Wilson was not asked if he'd been treated well?
> A: I do.
> Q: You agree it's routine to ask those questions.
> A: Yes.
> Q: And yet did you say anything to Larry: "Hey, you forgot to ask him if it was voluntary?"
> A: No.
> Q: Did you say: "Hey, it looks like he's been roughed up? Shouldn't we ask those questions?"
> A: No.
> Q: And you didn't go out and ask Lieutenant Burge: "Hey, do you know what happened to him because he looks like he's been popped, and I don't want any problems with the statement?"
> A: No.
> Q: You just did your thing and typed it up, right?
> A: I did my job and left, yes (pp. 58–59).

The prosecution took one more opportunity to hammer home this point in a brief re-cross examination:

> Q: … you see an injury on him, he doesn't speak up, so you just keep your head down and type, right?
> A: Yes.
> Q: And if you'd given a damn about him, maybe you would have asked something, right?
> A: I've never asked in any case.
> Q: Okay. You just keep your head down, don't you?
> A: I just do my job, yes, ma'am (p. 67).

From the perspective of the courtroom workgroup, doing your job apparently included observing the code of silence. The question left hanging over this trial was whether the code of silence not only reinforced a regime of racial torture, but whether then State's Attorney and later Mayor Richard M. Daley were aware and agreed to this.

https://doi.org/10.1017/S1742058X21000151 Published online by Cambridge University Press

"WHAT WAS THIS CASE ABOUT?"

The City of Chicago and the Fraternal Order of Police paid millions of dollars to defend Jon Burge, and the price tag, which also included civil court settlements and defense lawyer fees, just kept growing. When the business publication *Crain's Chicago* calculated these expenses for the period from 2010 to 2016, it came to nearly a billion dollars (Daniels 2018). The carrying costs of the resulting debt is a monetary reminder that this history is deep and long lasting. What led the city to invest so heavily in defending police torture cases? Indeed, in its summation the prosecution asked, "What was this case about?"

The case was obviously about more than lying in a 2003 civil suit. For the prosecution, the point was to convict and punish as criminal the role of Jon Burge in a gruesomely violent era that for decades had been far more apparent to Black than to White Chicagoans. Yet Burge was not convicted of racist torture or for enforcing a code of silence that protected him from conviction for thirty years; instead he was convicted for perjury and obstruction of justice. This could never have sufficiently addressed the intersectional race and gender specific consequences of the torture of more than a hundred African American men, even if this was the best and maybe the only way to convict Jon Burge of a crime. In 2011, the court sentenced Burge to four and a half years in prison. He was released three years later, even though many of his victims were still languishing on death row.

Bonilla-Silva (1997) acknowledged that over time American racial subordination has become less overtly and directly, and more covertly and indirectly racist. Yet the Burge torture regime is a reminder of the limits to which this is true. The "bit of justice" provided by Burge's perjury conviction obscured the depth and breadth of the code of silence that enabled this racist torture. The Burge torture regime dramatically demonstrated just how damaging the American racialized social system could be to Blacks. "Blacks' life chances are significantly lower than those of Whites," Bonilla-Silva (1997) noted, "and ultimately a racialized social order is distinguished by this difference in life chances" (p. 470).

Were the charges of perjury and obstruction of justice really the only possibilities given the five-year state statute of limitations for torture? We have argued that a more useful description of the criminality and its thirty-year cover-up was as "a code of silence that enabled racist torture." This description of Burge's crimes is far more useful than its formal legal designation, especially for purposes of developing a social scientific understanding of its causes and effects.

Perjury and obstruction charges were no match for the legal cynicism that street vernacular continues to memorialize with everyday community references to being "Burged." Our situational analysis of several sidebars revealed underlying sources of this cynicism. Although typically unavailable until long after important trials have finished, transcriptions of courtroom sidebars are an important source of evidence about sources of this cynicism. Arguments made in these sidebars can reveal structural realities ignored by judges who rely on formal legal reasoning to ban testimony about the imposition of racial and ethnic inequality.

Early in the Burge trial, the prosecution requested a sidebar about the testimony of Officer Sam Lacey. The transcription of this sidebar made apparent that in her pre-trial instructions, Judge Lefkow had banned testimony about the racial dynamics of Burge's Area 2 station house. This ban perpetuated a code of silence about the extreme intersectionality of Burge's *entirely* White "A Team" that tortured Black detainees. Early in this paper we reviewed the Supreme Court case of *McCleskey v. Kemp* that rejected statistical evidence of racial discrimination as failing to demonstrate

discriminatory intent in the imposition of capital punishment. This important case and its formal legal jurisprudence had a pronounced "chilling effect" on arguments inferring intent about racial discrimination in criminal cases. This early sidebar in the Burge case displayed a legacy of this chilling effect in banning consideration of the conspicuous and numerically obvious role of race in Burge's supervisory activities in the Area 2 station house.

Later, Judge Lefkow disallowed a line of questioning in the testimony of Frank McDermott by restricting consideration of Detective Frank Laverty's refusal to comply with Burge's enforcement of a code of silence in Area 2. This sidebar drew from a highly publicized case in which Frank Laverty had exposed the practice of withholding exculpatory "street files" in the prosecution of a young Black male, George Jones. Burge and other officers had attempted to prevent and punish Laverty's breach of the code of silence. The destruction of street files was not a disconnected, collateral issue in the current case: it had been a key factor in the retrial decision to throw out the 1982 tortured confession of Andrew Wilson that was now central to the 2010 Burge trial. Judge Lefkow acknowledged her refusal to consider this code of silence in the Burge case was a "close" decision. This decision blocked crucial evidence about how the code of silence enabled Burge's activities.

Reviewing the above sidebars about Burge's racist management of the code of silence exposed the larger meaning and relevance of Assistant State's Attorney Larry Hyman's use of a tightly orchestrated courtroom work group to conceal the torture that had led to Andrew Wilson's confession in the 1982 police killings. Hyman had failed to ask necessary questions about the voluntariness of Wilson's confession. Later, he took the Fifth Amendment rather than respond to questions about this.

The final dialogue cited in this paper between Larry Hyman and a court reporter Mike Hartnett illustrated how the power of what Bonilla-Silva called the informal dogma of racism can be formally mobilized in a tightly coupled criminal justice system. The lynchpin role of Hartnett in taking the tortured confession of Andrew Wilson could not be fully understood for its place in the larger code of silence that pervaded this case without the post-trial analysis of the sidebars that preceded it.

The informal workgroup that included Burge, Hyman, and Hartnett was tied to a court structure that stretched all the way from Burge's leadership to the elected and appointed occupants at the top of the Chicago's State's Attorney and Mayor's offices (see Conroy 2006b; Taylor 2019). Hartnett's testimony indicated his awareness that his silence about key aspects of the case was important. By not asking questions about the voluntariness of the statement he recorded from Wilson, Harnett played a key role in obtaining the confession that led to Wilson's conviction in his first trial. As the sidebar analysis reveals, this was not a minor or random procedural error, but rather a systemic White on Black part of how Burge and the Area 2 workgroup used the racist code of silence to enable false confessions and convictions. The court disallowed this confession in a second retrial, providing "a bit of justice," but this did not negate the larger significance of the code of silence to this case.

An example of the enduring effects of the code of silence involved the withholding of evidence about sixteen shots fired by Chicago police officer Jason Van Dyke in the 2014 killing of a Black youth, Laquan McDonald. This silence stretched beyond Chicago police officers and up the hierarchy of the police department to Mayor Rahm Emanuel who, early in his career, was a fundraiser for Richard M. Daley and later became his successor as mayor. For more than a year, Emanuel withheld—in other words silenced and thereby covered up—essential "dashboard cam" video evidence that confirmed Laquan McDonald had been moving away, rather than toward, police officers when Officer Jason Van Dyke pumped sixteen shots into McDonald's body (Smith

2019). Jon Burge's conviction for perjury and obstruction did not end the code of silence and its role in covering up racially targeted police misconduct in this city. Closer scrutiny of courtroom sidebars can play a crucial role in exposing practices like the code of silence that enabled the racist torture of more than 100 African American men under the supervision of Jon Burge.

As difficult as it was to convict Burge for the breadth and severity of the crimes he committed, it has proven even more difficult to find the right methodologies to study these kinds of crimes more generally. Bonilla-Silva (1997) made this point when he argued that familiar sociological procedures for studying discrimination in the criminal justice system and elsewhere are problematic.

> The first of these procedures has become standard practice in sociology. No serious sociologist would present racial statistics without controlling for gender and class (or at least the class of persons' family of origin). By doing this, analysts assume they can measure the unadulterated effects of "discrimination" manifested in unexplained "residuals". Despite its usefulness, however, this technique provides only a partial account of the "race effect" because (1) a significant amount of racial data cannot be retrieved through surveys and (2) the technique of "controlling for" a variable neglects the obvious—why a group is over- or underrepresented in certain categories of the control variables in the first place (p. 471).

The situational mode of analysis proposed by Stinchcombe (1991) provides a promising alternative or supplement to the above methods. This approach offers a means of uncovering the logic and method by which the dogma of formal legal equality facilitates White presumptions of racial equality, while at the same time perpetuating Black legal cynicism about the hidden structural reality of the racial *in*equality it imposes.

The code of silence that enabled Burge's racist torture tactics was part of Richard M. Daley's three decades of law-and-order politics. It was a feared instrument in the toolkit that enforced hyper-segregated exclusion and containment of Chicago's south and west side Black communities (Hagan et al., 2018). And its legacy illustrates how legally cynical memories of iron fisted repression live on in this America city where, in James Baldwin's words, "history is not the past."

This article has demonstrated how the law, as implemented through court practices and judicial rulings, can be a powerful instrument in an enforcement arsenal used to reinforce and perpetuate the hyper-segregated exclusion and containment of African Americans. We have used court transcriptions of sidebars involving judicial interactions with lawyers to illustrate how this occurred within sight but beyond the hearing of jurors and onlookers during the Burge trial. In this trial, perhaps the most important of the second Mayor Daley's regime, the sidebar rulings of Judge Joan Lefkow narrowed the capacity of prosecutors to reveal how the code of silence enabled perpetration of racist torture by Jon Burge and others. The use of unheard sidebars perpetuated a nontransparent dimension of this legal process.

One of the consequences of the use of torture and its cover up under the supervision of Jon Burge was to reinforce legal cynicism in hyper-segregated African American neighborhoods. Legal cynicism filled the void of non-transparency created by opaque charges of perjury and hushed sidebars. This cynicism reflected a collective understanding of the general orientation of the police and courts to Black lives and neighborhoods. This two-sided orientation ranges from police unresponsiveness and ineffectiveness in preventing crime and protecting crime victims, to police hyper-surveillance, intimidation, brutality, torture, and in some cases, fatal violence which too often remain unrecognized or go unpunished by formal legal procedures used in courtroom trials.

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NOTE

1. See the collected documentation of torture available here: https://www.dropbox.com/sh/ch5e6i674shwpr8/AADlPsCmSASfpbWERyCQYVdya?dl=0

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