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Metacritique and Black Lives Matter Judicial Opinions

At the height of the Black Lives Matter movement in summer 2020, U.S. district court judge Carlton W. Reeves upended judicial opinion conventions in *Jamison v. McClendon*, a case about an African American plaintiff's right to proceed with a lawsuit against a white police officer who conducted a prolonged stop. Judge Reeves opened the opinion with an elegiac catalogue of incidents involving African Americans slain by police, incorporated the plaintiff's perspective into the analysis, criticized governing law on qualified immunity in light of post-Civil War legal history, and expressly referenced the Black Lives Matter movement. Although Judge Reeves felt bound to apply inequitable doctrine in rejecting most of the plaintiff's claims, his "majority dissent" received national media coverage for its formal and substantive audacity.

Judge Reeves's opinion epitomizes a trend in U.S. jurisprudence during the Black Lives Matter era beginning in 2013, with judges using the genre of the judicial opinion not solely to explain and apply the law, but to engage in metacritique. The opinions are a key site to consider how criteria traditionally used to deem judicial opinions canonical have constituted the form as a white space. Black Lives Matter opinions challenge assumptions about the judicial opinion as an authoritative, insular, and impersonal form reinforcing an oppressive status quo. By "breaking the fourth wall" through formal innovations, the opinions collectively instigate readers to re-envision legal epistemology, drawing on insights

from critical legal research and other disciplines; the foundations of the U.S. common law system; the purposes of judicial opinions as a quintessential legal genre; and legal education's role in molding future lawyers and shaping the law. Interdisciplinarity has been integral to Black Lives Matter opinions, which commonly cite African American literature, apply insights from narratology, and present inclusive histories. Through tapping into Black intellectual traditions, the opinions embody Black experiences and speak to an audience beyond elite legal circles. As social movement lawyering's influence has extended to the judicial opinion, the form has been democratized to promote racial equality.

African American Literature as a Source of Legal Critique

Literary allusions have a long vintage in U.S. judicial opinions, with purposes ranging from providing a rhetorical flourish to buttressing an argument by appealing to popular authority. White male authors like William Shakespeare and George Orwell have been cited most frequently. Based on a review of fictional allusions in federal circuit court opinions, M. Todd Henderson observes "that "[j]udges primarily cite to novels for concepts about their world, not the world of the criminal, the marginalized, or the less fortunate."[1] Indeed, literary allusions intended to engender sympathy for African Americans have been deliberately excluded from opinions. For example, in *Fisher v. United States* (1946), a Supreme Court case involving an African American defendant who appealed a death sentence for murdering a white woman, Justice Stanley Reed wrote a letter that chided dissenting Justice Felix Frankfurter for potentially inflaming racial tensions. In a draft opinion, Justice Frankfurter had cited Richard Wright's *Native Son* (1940) and *Black Boy* (1945); however, the allusions

1 Henderson (2008), 177.

are absent from the published dissent. Wright intriguingly used legal records from *Fisher* for his short story "The Man Who Killed a Shadow" (1946), echoing Justice Frankfurter's critique of the majority opinion.

The story of *Fisher*'s afterlife reflects Kenji Yoshino's assertion: "Banished from law as a polluted discourse, literature keeps surfacing in the wake of its enforced departure."[2] Justice Sonia Sotomayor's dissent in *Utah v. Strieff* (2016), a case about the exclusionary rule's scope in the context of the Fourth Amendment's prohibition of "unreasonable searches and seizures," has become acclaimed as a Black Lives Matter opinion in part because of its citation of African American literature. The dissent employs the second person several times and references African American texts in discussing "the talk" parents of color give their children to prevent police brutality. Justice Sotomayor cites W. E. B. Du Bois's *The Souls of Black Folk* (1903), James Baldwin's *The Fire Next Time* (1963), and Ta-Nehisi Coates's *Between the World and Me* (2015). The dissent concludes that the majority opinion "implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[3]

Other opinions, such as Virginia Judge David Bernhard's opinion in *Commonwealth v. Shipp* (2020), quote from African American literature to vivify lived experiences. In *Shipp*, Judge Bernhard ruled that an African American defendant's fair trial rights could be compromised by a courtroom display that featured primarily white judges. Judge Bernhard quoted Anthony Ray Hinton's memoir *The Sun Does Shine: How I Found Life, Freedom, and Justice* (2019), particularly Hinton's recollection of "a sea of white faces" on courtroom walls that led him to feel "like an uninvited guest in a rich man's library" while on trial for

2 Yoshino (2005), 1839.
3 *Utah v. Strieff* (2016), 254.

capital murder.[4] In expanding sources considered legitimate for legal critique, Black Lives Matter opinions broaden perspectives represented in a form that has historically privileged white voices.

Narratives of Racial Surveillance from African American Perspectives

During the antebellum and Jim Crow eras, cases like *Dred Scott v. Sandford* (1857) and *Plessy v. Ferguson* (1896) exemplified the omission of African American perspectives from judicial opinions, with "the people," as referenced in the Constitution's preamble, being defined largely as white people. In *Plessy*, for instance, the Supreme Court upheld separate-but-equal laws on the premise that state legislatures were "at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort."[5] More recently, interpretive methods like originalism have tended to venerate white "founding fathers" and views of the white public preserved in historical records.

Contrastingly, Black Lives Matter opinions center African American perspectives, notably during "living while Black" incidents in which the official response to seemingly innocuous conduct has caused harm spanning from emotional trauma to death. The federal circuit court's opinion in *Estate of Jones v. City of Martinsburg* (2020), which involved an African American family suing police officers and a municipality for excessive force, juxtaposes narratives of the encounter that led to Wayne Jones's death. While the defendants "portray[ed] Jones as a fleeing, armed suspect," the opinion notes that he was an unhoused man who suf-

4 Hinton (2019), 7.

5 *Plessy v. Ferguson* (1896), 550.

fered from schizophrenia and only had "a small knife" on him.[6] Moreover, his minor violation of walking on a street, as opposed to in a sidewalk, precipitated the events that culminated in his tragic killing. The opinion recasts the facts from Jones's point-of-view: "What we see is a scared man who is confused about what he did wrong, and an officer that does nothing to alleviate that man's fears. *That* is the broader context in which five officers took Jones's life."[7] Righteous outrage concludes the opinion, with the court denying the officers qualified immunity, as they were expected to act "with respect for the dignity and worth of black lives."[8] The court castigates racist policing practices but envisions its opinion as performing reparative work by humanizing Jones and permitting a grieving family's lawsuit to continue.

While not citing critical race theorists' scholarship on counter-narrativity, the opinion demonstrates how shifting perspectives can reshape the law conceptually and on-the-ground. The use of literary techniques also results in opinions that resonate more with the public, including people of color for whom judicial depictions of race can be epistemologically violent.

Histories of White Supremacist Terrorism and the Long Civil Rights Movement

Recent years have witnessed the U.S. judiciary's growing turn to history in constitutional interpretation, but critical legal history remains marginalized. For example, in *Northeast Ohio Coalition for the Homeless v. Husted* (2016), a federal circuit court upheld restrictive voting laws over a poignant dissent by the late Judge Damon J. Keith. The majority claimed to "deeply respect" the

6 *Estate of Jones v. City of Martinsburg* (2020), 670, 671.
7 Ibid., 671.
8 Ibid., 673.

dissent's graphic history of civil rights revolution martyrs but held that standards "embodied" in the Constitution and Voting Rights Act were outcome determinative.[9]

Black Lives Matter opinions embody people, as opposed to legal abstractions, and *Harness v. Watson* (2022) is another voting rights case in which a federal circuit court dismissed the dissent's appeal to history. The majority upheld the Mississippi Constitution's felony disfranchisement provision despite conceding that the provision was originally enacted to disenfranchise African American voters, reasoning that a subsequent re-enactment of the provision during the civil rights revolution — when the state violently opposed desegregation — removed the initial racist taint. Dissenting Judge James E. Graves, Jr., refuted this account by explaining how "life for Black Mississippians in this era was little better than it had been for their grandparents in 1890."[10] Judge Graves then strikingly turned to the first person in describing his own experiences growing up in Jim Crow Mississippi and later being haunted by the specter of the state flag (which had a Confederate emblem until recently) in his chambers.

The dissent transforms the judicial opinion into a counter-archive of intertwined personal and public histories. Judge Graves links his fate with that of the plaintiffs; after recounting his life history, he declares: "[Roy] Harness and [Kamal] Karriem are Black Mississippians who are disenfranchised and deprived of a right that is the cornerstone of our democracy."[11] The collective pronoun "our" includes readers, who are led to ponder whether a state in which almost a third of African American men are disenfranchised can be meaningfully termed a democracy.

9 *Northeast Ohio Coalition for the Homeless v. Husted* (2016), 638.
10 *Harness v. Watson* (2022), 325.
11 Ibid. (342).

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Through revolutionizing an apex form in common law jurisdictions like the U.S., Black Lives Matter opinions spark reflections on how legal knowledge is produced and whose voices are represented in legal and political systems. The opinions' importance is magnified at a time when states are enacting laws that seek to stifle public conversations about the country's fraught history and inequitable present. As Fran Ansley argues:

> A canon will always to some degree represent the victor's story, the version of national events and ideas most flattering to the powerful and most stabilizing for the status quo. But repressed narratives and 'dangerous opposites' always remain in the canon as well, and they can provide alternative sources of inspiration and understanding.[12]

Literature

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12 Ansley (2000), 258.

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