RECONSTITUTING THE CANON: THE RISE OF THE BLACK LIVES MATTER JUDICIAL OPINION

ALMAS KHAN*

ABSTRACT

This article presents a critical race theory-inflected history of the U.S. judicial opinion and conceptualizes the emergence of a new form: the Black Lives Matter judicial opinion. Since the Black Lives Matter movement's inception in 2013, legal scholars have unearthed the racist intellectual history of several doctrinal fields, but the intellectual history of the judicial opinion itself as a genre at the discipline's core has been less scrutinized. Drawing on archival research and scholarship about the politics of legal canon formation, I argue that canonical U.S. Supreme Court opinions often fail to engage meaningfully with race. Moreover, scholarly canons tend to venerate white judges' opinions as exemplars, and curricular canons frequently elide racial considerations. As a result, the judicial opinion remains a quintessential "white space."

---

* Assistant Professor of Law, University of Mississippi School of Law. Ph.D., University of Virginia; J.D. with honors, University of Chicago Law School; M.A. with thesis distinction, University of California, Irvine; B.A. with distinction and Phi Beta Kappa honors, Stanford University. I thank the Association of Legal Writing Directors, the Legal Writing Institute, and LexisNexis for a grant supporting completion of this article. The article has been refined by feedback from scholars at the Society of American Law Teachers conference, the American Studies Association annual meeting, the New Directions in Law and Narrative workshop, the Judicial Rhetoric symposium at the University of Virginia School of Law, and the University of Mississippi Faculty and Graduate Forum on Race and Ethnicity. In addition, faculty at Tulane Law School and students in Simon Stern's Law and Literature course at the University of Toronto Faculty of Law provided valuable commentary during related presentations. An especial thanks extends to Marlon Ross, Robin West, Frederick Schauer (1946–2024), Teri McMurtry-Chubb, Jade Craig, Christopher Ogolla, andré douglas pond cummings, and members of the Association of American Law Schools' Section on Minority Groups, whose intellectual influence has profoundly shaped this article's development. I am also grateful to librarians at the University of Mississippi School of Law and the University of Arkansas at Little Rock, William H. Bowen School of Law for research assistance. Given my article's meta-critical intent, I close this note by critiquing the weaponization of acknowledgements notes in attempts to delegitimate the work of judges and scholars of color. *See* Benjamin S. Weiss, *Eleventh Circuit Nominee Kidd Gets Partisan Grilling in Senate Judiciary*, COURTHOUSE NEWS (June 5, 2024), https://www.courthousenews.com/eleventh-circuit-nominee-kidd-gets-partisan-grilling-in-senate-judiciary/ (discussing Republican senators' attempts to derail the nomination of federal magistrate judge Embry J. Kidd based on an acknowledgement note by Monica C. Bell in her student article *Grassroots Death Sentences?: The Social Movement for Capital Child Rape Laws*, 98 J. CRIM. L. & CRIMINOLOGY 1, 1 (2008)). Judge Kidd was narrowly confirmed to the Eleventh Circuit. Tiana Headley, *Embry Kidd to Join Thin Ranks of Black Male Circuit Judges*, BLOOMBERG L. (Nov. 18, 2024, 8:00 PM), https://news.bloomberglaw.com/us-law-week/kidd-confirmed-joins-thin-ranks-of-black-male-appellate-judges.

With the Black Lives Matter movement's rise, however, a critical mass of judges has sought to reconstitute the judicial opinion as a genre, and in turn to revolutionize legal canons. Judges who compose Black Lives Matter opinions use formal subversion as a method of meta-critique, revealing how flawed legal epistemologies have perpetuated racial injustices. In cases involving voting rights, fair trial rights, constitutional and "ordinary" tort-based claims, and Fourth Amendment protections, judges have re-envisioned the judicial opinion form, drawing on insights from African American history and literature while referencing the Black Lives Matter movement.

After theorizing common features of Black Lives Matter opinions and analyzing illustrative examples, the article encourages law faculty, lawyers, and judges to incorporate Black Lives Matter opinions into academic and pragmatic canons. Centering these innovative opinions in scholarship can enrich understandings of the relationship between social movements and legal change. In addition, the opinions mark an inflection point in the intellectual history of the U.S. judicial opinion, with critical race theory increasingly informing decisions. Curricular canons can also be transformed by including Black Lives Matter opinions, which can provide a springboard to discuss fraught issues at the heart of the discipline. For advocates, the opinions may inspire creative formalism for racial justice, and for judges, the opinions suggest a more democratic view of judging that enables historically marginalized communities to feel heard. I address objections to canonical inclusion but conclude that Black Lives Matter opinions are ultimately invaluable for rebuilding the discipline in the current Third Reconstruction.

TABLE OF CONTENTS

INTRODUCTION

> How are we to ensure that "the promise of equal justice under law is, for all our people, a living truth"? Whatever the answer, it must involve acknowledging that Darren Burley's [a Black man's] death at the hands of law enforcement is not a singular incident unmoored from our racial history. With that acknowledgment must come a serious effort to rethink what racial discrimination is, how it manifests in law enforcement and the justice system, and how the law can provide effective safeguards and redress for our neighbors, friends, and citizens who continue to bear the cruel weight of racism's stubborn legacy.
>
> –California Supreme Court Justice Goodwin Liu[1]

> Certain representational structures continue to produce black death, or death as the only horizon for black life.
>
> –Saidiya Hartman[2]

In 2020, protests for racial justice erupted worldwide, with approximately twenty-six million people participating in over two thousand demonstrations associated with the Black Lives Matter movement.[3] Since its founding by three Black women in 2013, the movement has sought to expose and remedy

---

1. B.B. v. Cnty. of Los Angeles, 471 P.3d 329, 352 (Cal. 2020) (Liu, J., concurring) (quoting Cal. Sup. Ct., Statement on Equality and Inclusion (June 11, 2020), https://newsroom.courts.ca.gov/news/supreme-court-california-issues-statement-equality-and-inclusion).

2. *On Working with Archives*, Interview by Thora Siemsen with Saidiya Hartman, CREATIVE INDEP. (Apr. 18, 2018; republished Feb. 3, 2021), https://thecreativeindependent.com/people/saidiya-hartman-on-working-with-archives/.

3. Kevin K. Gaines, *Global Black Lives Matter*, 74 AM. Q. 626, 626 (2022). The movement exemplifies what James Gray Pope defined as a "constitutional insurgency," namely "a social movement that: (1) rejects current constitutional doctrine, but rather than repudiating the Constitution altogether, draws on it for inspiration and justification; (2) unabashedly confronts official legal institutions with an outsider perspective that is either absent from or marginalized in official constitutional discourse; and (3) goes outside the formally recognized channels of representative politics to exercise direct popular power, for example through extralegal assemblies, mass protests, strikes, and boycotts." James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943–44 (1997).

racial injustices while celebrating Black lives.[4] In the U.S., activists have characterized the Black Lives Matter era as the Third Reconstruction,[5] reflecting the movement's aim to rebuild the nation's decayed legal, political, and social infrastructure. California Supreme Court Justice Goodwin Liu underscored the need for professional and societal introspection to actualize the words "Equal Justice Under Law" engraved on the U.S. Supreme Court building's façade[6] when concurring in a case involving the death of a Black man under circumstances similar to George Floyd's murder, which helped catalyze the 2020 protests. Legal scholars have in this vein published landmark scholarship revealing the racist intellectual history of several doctrinal fields, as evidenced in casebooks that often reproduce racism.[7] By contrast, the recent *Critical Race Judgments* anthology[8] seeks to counter the "representational structures" that literary historian Saidiya Hartman has associated with Black death by rewriting judicial opinions from a critical race theory perspective.

---

4. *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 408 (2018) (summarizing the movement's mission to "shift[] power into Black and other marginalized communities; shrink[] the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transform[] the relationship among state, market, and society"). For a social movement history of Black Lives Matter, see DEVA R. WOODLY, RECKONING: BLACK LIVES MATTER AND THE DEMOCRATIC NECESSITY OF SOCIAL MOVEMENTS (2022).

5. *See, e.g.*, PENIEL E. JOSEPH, THE THIRD RECONSTRUCTION: AMERICA'S STRUGGLE FOR RACIAL JUSTICE IN THE TWENTY-FIRST CENTURY (2022) (dating the start of the Third Reconstruction, following post-Civil War Reconstruction and the Civil Rights Revolution, to the election of Barack Obama as president in 2008).

6. For a photograph of the engraving, see OFF. OF THE CURATOR, SUP. CT. OF THE U.S., SUPREME COURT OF THE UNITED STATES: SELF-GUIDE TO THE BUILDING'S EXTERIOR ARCHITECTURE 1 (2024), https://www.supremecourt.gov/visiting/Exterior_Brochure_Web_FINAL_January_2024.pdf.

7. *See generally* Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022); Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199 (2022); *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787 (2019) (arguing for a more inclusive paradigm of U.S. public law beyond the Black/white binary); Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021) (discussing the marginalization of tribal law from mainstream conceptions of American law and recommending greater attention to tribal law in U.S. legal scholarship).

8. CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW (Bennett Capers, Devon W. Carbado, Robin A. Lenhardt & Angela Onwuachi-Willig eds., 2022).

Amidst the present period of racial retrenchment,[9] such opinions may seem unimaginable in reality,[10] but this article is the first to identify the emergence of a new judicial opinion form over the past decade: the Black Lives Matter opinion.[11] Opinions in this nascent form align substantively with the goals of the Black Lives Matter movement, but equally importantly, they provide meta-critiques of the legal system through formal subversion. The opinions impel readers to question the process through which judicial opinions become canonical in common law systems, including whose voices are represented in ostensibly classic opinions.[12] By interrogating "deep canonicity," which encompasses "characteristic forms of legal argument, characteristic approaches to problems, underlying narrative structures,

9. *See generally* Taifa Alexander, LaToya Baldwin Clark, Kyle Reinhard & Noah Zatz, *CRT Forward: Tracking the Attack on Critical Race Theory*, UCLA L. SCH. (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf (documenting the proliferation of "anti-CRT" laws nationally, including over 560 measures introduced from September 2020 to December 2022).

10. *Introduction* to CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW, *supra* note 8, at 4 (arguing that "against the absence of CRT perspectives in U.S. law, a clear articulation of what a Critical Race Theory presence might look like in legal doctrine becomes particularly crucial").

11. Several scholars have noted the Black Lives Matter movement's impact on individual judges' opinions or within discrete doctrinal contexts, but this article theorizes the Black Lives Matter judicial opinion as a form across doctrinal fields and analyzes the broader implications of the form. For related scholarship, see Daniel Harawa & Brandon Hasbrouck, *Antiracism in Action*, 78 WASH. & LEE L. REV. 1027, 1032 (2021) (criticizing the Supreme Court's Fourth Amendment jurisprudence but observing "[w]hat the scholarship hasn't adequately illuminated is the fact that there are judges like [Fourth Circuit Judge] Roger Gregory who are doing the most (in a good way) with the least. While the Supreme Court's jurisprudence is mostly colorblind, Judge Gregory's is not."); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 737 (2022) ("Look around and you already see the racial justice movement influencing judicial decision-making. As the streets demand justice for Black people killed by police, their names are starting to appear in legal opinions."); Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 633, 635 (2022) (listing several "movement judge[s]," defined as "jurist[s] who understand[] that our Constitution contains the democracy-affirming tools we need to dismantle systems of oppression and to achieve true equality for all people" and who are "repulsed by inequity and . . . heartily dissent when the majority creates it"); Sherri Lee Keene, *Teaching Dissents*, 107 MINN. L. REV. 2619, 2654–55 (2023) (discussing Justice Sonia Sotomayor's dissent in Utah v. Strieff, 579 U.S. 232, 243–54 (2016) (Sotomayor, J., dissenting), a Fourth Amendment case involving the exclusionary rule, including a passage where the Justice described "the talk" parents of color often give their children to avert police violence, *id.* at 254); John McMahon, *Sonia Sotomayor's Legal Phenomenology, Racial Policing, and the Limits of Law*, 53 POLITY 718, 718 (2021) (interpreting Justice Sotomayor's dissent in *Strieff* as "constructing an emergent legal theory that incorporates Black Lives Matter and the experiences of people of color subject to being stopped and searched into the core of Fourth Amendment jurisprudence"); Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187 (2018) (analyzing federal district courts judges' judicial and extrajudicial activism for criminal justice system reform).

12. During the first "canon wars" in U.S. academia and popular culture during the 1980s and 1990s, feminist legal theorist Judith Resnik called on law-and-literature scholars to destabilize the canon through attunement to "what (and who) is given voice; who privileged, repeated, and invoked; who silenced, ignored, submerged, and marginalized." Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMANS. 221, 221 (1990).

unconscious forms of categorization, and the use of canonical examples,"[13] Black Lives Matter opinions also suggest how legal epistemology can be reformed to promote racial justice. The rise of the opinions epitomizes Lani Guinier and Gerald Torres's theory of "demosprudence," which posits a synergistic interplay between social movements and judicial decisions "expand[ing] 'the constitutional canon.'"[14] For Black Lives Matter opinions, this canonical expansion has arisen, in part, through engagement with the African American literary tradition, which has powerfully reimagined law since the antebellum era.[15] The opinions delineate what Saidiya Hartman has termed the "afterlives of slavery," including African Americans' "skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment,"[16] while reconstructing the judicial opinion genre to transform legal education, scholarship, and practice.

Part I of this article will use the prism of canonicity to analyze how racism has been endemic to the construction of law as a discipline in the U.S. Although canonical texts and ideas are typically conceived of as deriving from objective criteria of value, critical theorists have illuminated how canons emerge from fraught intellectual and political processes.[17] After considering the significance of legal canons for establishing disciplinary boundaries, the section will demonstrate how judicial opinions have often been "white spaces" in multiple senses.[18] Racist rhetoric and doctrine

---

13. J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 970 (1998).

14. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2743 (2014).

15. *See* Akbar, *supra* note 4, at 408 ("The Movement for Black Lives was situating their critique in Black history and intellectual traditions, and their imagination of alternate futures in Black freedom movements. Their critique was more expansive [than that of lawyers and law faculty] at the same time as it was more grounded, and their imagination more radical.").

16. *See* SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2007). Hartman more generally argues that

> [i]f slavery persists as an issue in the political life of black America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and political arithmetic that were entrenched centuries ago.

Id.

17. Stanley Fish has characterized the debate over canonicity as clashing visions of whether canons emerge from timeless, universal criteria or are "a historical, political and social product, something that is fashioned by men and women [sic] in the name of certain interests, partisan concerns, and social and political agenda." *Canon Busting: The Basic Issues–An Interview with Stanley Fish*, 69 NAT'L F.: PHI KAPPA PHI J. 13, 13 (1989), *quoted in* Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2662 (1997) (book review).

18. *See* Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 13–17 (2021) (discussing the perceived disruptive presence of people of color in spaces conventionally coded white, including law schools).

permeate opinions in the canon (or anti-canon[19]), and peer pressure has at times led racially egalitarian judges to suppress racial dimensions of cases in their opinions. Scholarly and pedagogical canons moreover marginalize judicial opinions involving race as well as opinions authored by judges of color. Traditional criteria for canonicity undervalue opinions by "movement judges,"[20] whose opinions may be existentially challenging in deconstructing the form itself.

Despite headwinds, Black Lives Matter judicial opinions have flourished, and Part II will conceptualize the form and evaluate illustrative cases across a range of doctrinal fields: voting rights, fair trial rights, and constitutional torts (i.e., Section 1983 claims[21]).[22] The opinions span courts (federal and state, as well as trial and appellate levels[23]), types (majority opinions, concurrences, and dissents), and geographic areas, in addition to being authored by judges of diverse races and genders.[24] By "breaking the fourth

19. On the anti-canon, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (defining cases in the anti-canon of U.S. constitutional law as "embod[ying] a set of propositions that all legitimate constitutional decisions must be prepared to refute"); LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW (Austin Sarat, Lawrence Douglas & Martha M. Umphrey eds., 2021) (using the concept of infamy to analyze problematic laws); Symposium, *Supreme Mistakes*, 39 PEPP. L. REV. 1 (2011) (analyzing illustrative anti-canonical U.S. Supreme Court cases).

20. *See* Hasbrouck, *supra* note 11, at 633 (defining movement judges).

21. 42 U.S.C. § 1983.

22. I assembled the case set, which includes several dozen opinions, through scouring multiple sources, including news stories, blogs, listservs, and databases, focusing on cases that were not only substantively in accord with the Black Lives Matter movement, but that subverted the judicial opinion form for meta-critical purposes. On the challenges of finding cases using criteria not rooted in traditional doctrinal categories, see Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207, 224 (1989) (noting that while members of a feminist study group knew of several cases on a legal issue affecting women, "West indexers had created no category for it. Thus, the only way to find the cases was to know about and shepardize one or perform a word-based computer search employing as many descriptive terms and synonyms as possible. The feminists, sophisticated in ways of patriarchy and mindset, concluded from their experience that the oversight was not merely inadvertent, but rooted in the structure of male-dominated law."). The vast majority of cases I located were in public law, with Fourth Amendment caselaw comprising a significant part of the set. I will be analyzing most Fourth Amendment cases in a separate article and am here highlighting other cases that have generally received less coverage. While scholars have rightfully encouraged expanding legal canons beyond judicial opinions, see Sotirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267 (2000) and Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2699 (2014), recognizing the judicial opinion's capacity to advance racial justice is valuable.

23. For institutional and other reasons, though, few of the Black Lives Matter opinions are authored by Supreme Court justices, whose work receives the bulk of scholarly attention, particularly in public law. In addition, I agree with Judith Resnik that "[i]nclusion of texts other than the United States Supreme Court opinions [sic] is critical to the shape of the judgments we make about 'the judicial opinion' and 'the judicial voice.'" Resnik, *supra* note 12, at 230.

24. The authorship of Black Lives Matter opinions reflects the nation's demographic diversity, with both African American judges and judges of other races constituting the emerging form. Jerome McCristal Culp, Jr., relatedly suggested that Black legal scholarship could be produced by authors not identifying as Black: "Everyone has to do black scholarship if it is to succeed." Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 105.

wall,"[25] the opinions collectively instigate readers to re-envision: (1) legal epistemology, drawing on insights from critical legal research and other disciplines; (2) the foundations of the U.S. common law system; (3) the purposes of judicial opinions as a quintessential legal genre; (4) the role of legal education in molding future lawyers and shaping the law; and (5) the legal system's interaction with social movements. The opinions move beyond what Thomas Stoddard termed the "rule-shifting" function of lawmaking to its "culture-shifting" capacity, arguably democratizing the judicial opinion form.[26]

Part III will discuss implications of Black Lives Matter judicial opinions' ascendance, including how centering the opinions in scholarship and teaching can promote canonical justice. A critical mass of such opinions also has important ramifications for attorneys, signaling increased judicial receptivity to creative legal writing that advances racial equality. Relatedly, recognition of this trend can embolden other judges to innovate formally for racial justice, as is evidenced through citation practices.[27] Several of the opinions have resonated with the broader public as well,[28] suggesting that the opinions may influence social perceptions and actions. While generally commending Black Lives Matter opinions, the section will consider ethical and other objections to the form, which evoke debates dating back at least

---

25. In performance studies, the term "breaking the fourth wall" refers to puncturing the invisible wall between audience members and performers, as when actors directly address the audience or otherwise call attention to the constructedness of their performance. The technique can encourage audience participation and potentially equalize power dynamics. *See* Lluís Bonet & Emmanuel Négrier, *Context and Organizational Challenges for Citizen Engagement in the Performing Arts*, *in* BREAKING THE FOURTH WALL: PROACTIVE AUDIENCES IN THE PERFORMING ARTS 12, 21 (Lluís Bonet & Emmanuel Négrier eds., 2018), https://www.ub.edu/cultural/wp-content/uploads/2018/06/Breaking-the-fourth-wall.pdf. Legal scholars have identified the phenomenon in judicial opinions, which are rhetorical performances. *See* Keene, *supra* note 11, at 2619.

26. *See* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 972–73 (1997). Stoddard distinguishes lawmaking involving formal rule-shifting from lawmaking endeavoring to "express a new moral ideal or standard" or "change cultural attitudes and patterns," which are common aims of civil rights lawyers. *Id.* at 972. Stoddard, however, suggests that legislatures are generally preferred fora for culture-shifting lawmaking. *Id.* at 985.

27. *See, e.g.*, *In re* Edgerrin J., 271 Cal. Rptr. 3d 610, 626–27 (Ct. App. 2020) (Dato, J., concurring) (citing B.B. v. Cnty. of Los Angeles, 471 P.3d 329, 349–52 (Cal. 2020) (Liu, J., concurring)); Utah v. Strieff, 579 U.S. 232, 243–54 (2016) (Sotomayor, J., dissenting); Commonwealth v. Warren, 58 N.E.3d 333 (Mass. 2016); Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (Reeves, J.)).

28. *E.g.*, *Strieff*, 579 U.S. at 243–54 (Sotomayor, J., dissenting) (critiquing the majority's application of the exclusionary rule), *discussed in* McMahon, *supra* note 11, at 719 (noting widespread media coverage of Justice Sotomayor's dissent); *Jamison*, 476 F. Supp. 3d 386 (critiquing qualified immunity doctrine in a Section 1983 case involving the prolonged detention of a Black driver), *discussed in* Carrie Johnson, *Judge, Shielding Cop Via "Qualified Immunity," Asks Whether It Belongs in "Dustbin,"* NPR (Aug. 6, 2020, 5:01 AM), https://www.npr.org/2020/08/06/899489809/judge-shielding-cop-via-qualified-immunity-asks-whether-it-belongs-in-dustbin.

half a century to the growth of law faculty and judges of color in the U.S.[29] The opinions' potency ultimately arises from encouraging readers "to ask[] not simply which script makes the story of the law the most coherent story it can be, but which script speaks most clearly of and to the kind of society we hope to become."[30]

I. CANONICAL INJUSTICE: DISCIPLINARY CONSTRUCTION AND THE DEVALUATION OF BLACK LIVES

> The young man took a book out of one of the drawers and sat down on the edge of the dais. One who was versed in such matters would have known at a glance that it was a law book, though it had been carefully covered with heavy brown paper, either to disguise its character or to prevent its becoming soiled. He opened it and allowed the leaves to fly back as they slipped through his thumb and finger, noting regretfully one chapter after another, and stopping now and then to read a few lines.
>
> –Albion Tourgée, *Pactolus Prime*[31]

Published in the same year that the Mississippi Constitution of 1890 triggered a wave of disenfranchisement laws across the former Confederacy,[32] civil rights lawyer Albion Tourgée's novel *Pactolus Prime* attests to the epistemological violence of the Jim Crow era. In the quoted passage, an aspiring African American lawyer, Ben, experiences dejection while reading a treatise or casebook, as he realizes the challenges awaiting him in his future career. Indeed, six years after publishing the novel, Tourgée would represent Homer Plessy in *Plessy v. Ferguson*, where the U.S. Supreme Court affirmed the doctrine of separate but equal in constitutional

29. *See* Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974) (Higginbotham, J.) (involving defendants' challenge to African American judge Leon Higginbotham's impartiality in an employment discrimination case); Goldburn P. Maynard Jr., *Killing the Motivation of the Minority Law Professor*, 107 MINN. L. REV. 245, 250, 261 (2022) (contending "that the legal academy disproportionately dampens the productivity of junior scholars with radical ideas or nonnormative jeremiads by forcing them to moderate their arguments or forego truly radical ideas until after tenure or forever" and discussing pushback to critical race theory scholarship).

30. SANDRA BERNS, TO SPEAK AS A JUDGE: DIFFERENCE, VOICE AND POWER 194 (1999).

31. ALBION W. TOURGÉE, PACTOLUS PRIME 131–32 (New York, Cassell Publ'g Co. 1890).

32. *See* JOHN L. LOVE, THE DISFRANCHISEMENT OF THE NEGRO 14 (Washington, D.C., Am. Negro Acad. 1899) (lamenting that 1890 "witnessed the beginning of the execution of this conspiracy which promises to continue until the Negro is divested of every right which is worth having," as "a minority of the people of the state of Mississippi arrogated to themselves the right to despoil the majority of the citizens of the rights of free men by nullifying the Fifteenth Amendment," which had conferred voting rights on Black men).

law.[33] Over a century later, at the height of Black Lives Matter activism in 2020, Shaun Ossei-Owusu published an *ABA Journal* article asserting that "the learning of law—particularly for racial minorities—can be intellectually violent."[34] Addressing law students, Ossei-Owusu caustically observed that "the casebooks and legal authorities you learn from are not teeming with race-conscious messaging."[35]

Tourgée's and Ossei-Owusu's writings demonstrate how, from the origins of U.S. professional legal education in the late nineteenth century[36] to today, canonical legal authorities have often perpetuated racial injustices. This section will discuss the process through which judicial opinions become canonical, theorizing about legal canon formation more broadly before homing in on judicial opinions as an apex genre. The section will then address race in the judicial opinion canon, synthesizing scholarship that criticizes how courts have engaged with race in both historical and contemporary cases. Notably, the erasure of racial context between draft and published opinions demonstrates how judges create a color-evasive canon.[37] Scholarly and pedagogical canons, meanwhile, tend to venerate a small group of white judges as exemplars of the judicial opinion genre while minimizing the centrality of race in the U.S. legal system.

Canonical judicial opinions may therefore exemplify "white spaces," which sociologist Elijah Anderson defines as places where "black people are typically absent, not expected, or marginalized when present," but which are generally perceived by whites as "normal, taken-for-granted reflections

---

33. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled in part by* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overturning *Plessy* in the public education context).

34. Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, ABA J. (Oct. 15, 2020, 11:23 AM), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent.

35. *Id.*; *see also* Meera E. Deo, Chad Christensen & Jacqueline Petzold, *20 Years of LSSSE: Sharing Trends in Legal Education*, LSSSE 2024 ANNUAL REPORT 1, 17 (2024), https://lssse.indiana.edu/wp-content/uploads/2024/11/LSSSE_AR2024_20-Yr_Final.pdf (describing survey results finding "Black students are among the least satisfied with their overall law school experience, including 28% of Black men and 33% of Black women who reported their experience as only 'fair' or even 'poor' in 2024").

36. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 93–101 (1983) (discussing the American Bar Association's postbellum efforts to standardize legal education, in part from nativist concerns).

37. Given that the term "color-blindness" has ableist connotations and is also inaccurate descriptively, this article avoids the term except where it is referenced in judicial opinions and scholarship. *See* Raquel Muñiz, *A Theory of Racialized Judicial Decision-Making*, 28 MICH. J. RACE & L. 345, 350 n.34 (2023) (critiquing the color-blindness metaphor).

of civil society."[38] Such opinions may legitimate an inequitable status quo[39] by suppressing alternative legal epistemologies. This backdrop informs Black Lives Matter judicial opinions, which in I. Bennett Capers's words endorse "a reading practice of reading back, reading black," that is, "attend[ing] to the way judicial opinions function as cultural productions that create and recreate race."[40] Considering that the original U.S. Constitution contained several clauses upholding slavery,[41] race has been integral to the U.S. legal system since the founding, and Black Lives Matter opinions urge readers' critical contemplation of the entire common law tradition.[42]

A. Legal Canon Formation

The term "canon" originated in medieval England, referring to ecclesiastical law and "a collection or list of books accepted by the Christian Church as genuine and inspired,"[43] before expanding to secular meanings. Today, "canon" can also denote a "standard of judgement or authority; [or] a test, criterion, [or] means of discrimination"; a "general rule, fundamental principle, aphorism, or axiom governing the systematic or scientific treatment of a subject"; or "a body of works, etc. considered to be established as the most important or significant in a particular field."[44] A "canon" in the legal context, then, is not merely a collection of significant works but also encompasses "our notion of epistemology in law as well as what is thought important and how we measure importance."[45] Legal canons, moreover, take multiple forms, including pedagogical, scholarly,

38. Elijah Anderson, *The White Space*, 1 SOCIO. RACE & ETHNICITY 10, 10 (2015), *quoted in* Capers, *supra* note 18, at 16.

39. *See* Jack M. Balkin, "*Wrong the Day It Was Decided*": Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 688 (2005) (noting that "[c]onstructing the canon with its accompanying narratives helps legitimate a certain view of the Constitution, the Court, and the country" in the context of the Supreme Court's notorious decision in Lochner v. New York, 198 U.S. 45 (1905), which struck a state law regulating bakers' working hours).

40. I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 9 (2006).

41. *See* Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 262–63 (2001) (listing several clauses reflecting the centrality of slavery in the constitutional convention). Scholars disagree on how to identify pro-slavery clauses in the Constitution, turning in part on the primacy of text versus context and direct versus indirect intent. *See* Michael P. Zuckert, *Slavery and the Constitution*, NAT'L AFFS. (Spring 2023), https://nationalaffairs.com/publications/detail/slavery-and-the-constitution.

42. *See* Fran Ansley, *Recognizing Race in the American Legal Canon*, *in* LEGAL CANONS 238, 245 (Jack M. Balkin & Sanford Levinson eds., 2000) (calling for canon reconstruction beyond additive approaches).

43. *Canon (n. 1 & adj., additional sense*), OXFORD ENG. DICTIONARY (3d. ed. 2024).

44. *Id.*

45. Jerome McCristal Culp, Jr., *Firing Legal Canons and Shooting Blanks: Finding a Neutral Way in the Law*, 10 ST. LOUIS U. PUB. L. REV. 185, 186 (1991).

cultural, and pragmatic canons, which may not necessarily coincide.[46] Additionally, although this analysis concentrates on judicial opinions, sources in legal canons are not limited to cases or to enforceable law more broadly.[47]

While debates over canonicity may seem esoteric, a wave of book bans, anti-critical race theory laws, and revanchist curricular prescriptions underscores the public salience of the "canon wars."[48] This section will examine the socio-political process through which legal canons are constructed before analyzing the judicial opinion as a keystone genre and critiquing conventional standards legal scholars use to anoint cases as canonical.

1. Legal Canons as Socio-Political Constructions

Clashing perspectives on how legal canons are formed reflect the jurisprudential tension between legal formalism and legal realism that emerged during the late nineteenth and early twentieth centuries. Classical

---

46. *See* Balkin & Levinson, *supra* note 13, at 975 (distinguishing pedagogical, scholarly, and cultural literacy canons in the constitutional law context and noting the prospect of divergent canons). In addition, a popular canon may include cases and other sources that have permeated the public's consciousness, as with *Miranda v. Arizona*, 384 U.S. 436 (1966), originating the Miranda warning language intended to protect suspects' Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. *Cf.* Tom Donnelly, *The Popular Constitutional Canon*, 27 WM. & MARY BILL RTS. J. 911 (2019) (critiquing the popular constitutional canon in schools).

47. *See* Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977, 996 (1994) (defining the "legal canon as the collection of texts and interpretive rules that serve as a resource for effective lawyering and good judging"). Critical legal historians have also advocated for an expansive conception of what law is, which suggests a broader view of the legal canon. *See, e.g.*, William E. Forbath, Hendrik Hartog & Martha Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 762 (critiquing the "presumption that the object of legal historical study is a known and distinctive body of texts, produced and possessed by a distinctive portion of the society, texts recognized by everyone else as 'the law'").

48. *See* Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature*, 28 MICH. Q. REV. 1, 8 (1989) (asserting "Canon building is Empire building. Canon defense is national defense. Canon debate, whatever the terrain, nature, and range (of criticism, of history, of the history of knowledge, of the definition of language, the universality of aesthetic principles, the sociology of art, the humanistic imagination), is the clash of cultures. And *all* of the interests are vested."); Kasey Meehan, Jonathan Friedman, Tasslyn Magnusson & Sabrina Baêta, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/ (observing that books with race, gender, sexual orientation, and history as themes have been especially susceptible to restrictions in schools); S.C. CODE ANN. §§ 59-29-120, -130 (2024) (mandating public high school and university instruction on the U.S. Constitution, Declaration of Independence, Emancipation Proclamation, Federalist Papers, and (for university students only) "one or more documents that are foundational to the African American Freedom struggle"); Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 724–35 (2022) (categorizing types of anti-CRT laws and recommending that progressive educators exploit the vague language in several laws to incorporate more critical race theory in classrooms).

legal formalism is associated with more objective and insular views of law; contrastingly, legal realists sought to account for how social and political influences can shape legal developments.[49] Francis J. Mootz III has critiqued the implications of legal formalism for debates about legal canon formation, arguing:

> The traditional idea of a legal canon rests on the assumption that there is a rule-governed process for identifying authoritative texts, determining their meaning, and evaluating their worth. This assumption, in turn, appears to be grounded in the belief that law is a univocal, hierarchically ordered system. The canonical exemplar of this traditional view is Dean Langdell's now infamous contracts casebook . . . . It is almost too easy to debunk this traditional account of the legal canon.[50]

From a formalist position, canonical materials and ideas could be seen as inherently authoritative, and to invoke the canon is to foreclose discussion of alternatives.[51] A realist view of canon formation that recognizes how social and political factors inform the canon may seem more appealing, but

---

49. Legal realists contended that classical legal formalists perceived of law as:

> a scientific system of rules and institutions that were *complete* in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system; *conceptually ordered* in that ground-level rules could all be derived from a few fundamental principles; and socially *acceptable* in that the legal system generated normative allegiance.

Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999). Contrastingly, a retrospective on legal realism summarized "common points of departure" for legal realists as follows:

> the conception of law and society in flux, with law typically behind; the notion of judicial creation of law; the conception of law as a means to social ends, and the evaluation of law by its effects; insistence on objective study of legal problems, temporarily divorcing the "is" from the "ought"; distrust of legal rules as descriptions of how law operates or is actually administered, and particularly of their reliability as a prognostic of decision; insistence on the need for more precise study of legal situations or decisions in narrower categories, and for sustained programmatic research on these lines.

Hessel E. Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317, 319–20 (1960). For an overview of legal realism, which is linked to the jurisprudence of Supreme Court Justice Oliver Wendell Holmes, Jr., and Karl Llewellyn (among others), see JUSTIN ZAREMBY, LEGAL REALISM AND AMERICAN LAW (2014).

50. Mootz, *supra* note 47, at 981 (citing C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little Brown & Co. 2d ed. 1879)). Christopher Columbus Langdell, the dean of Harvard Law School from 1870–1895, conceived of law as a science and is credited with popularizing the casebook method of instruction that continues to dominate U.S. legal education today. For a criticism of Langdell's pedagogy, see Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007).

51. Stanley Fish, *Not of an Age, But for All Time: Canons and Postmodernism*, 43 J. LEGAL EDUC. 11, 12 (1993).

it can have troubling implications from a rule of law perspective, which is why canon deconstruction may have limited practical import.[52]

Even pragmatic canons evolve, though, with Justice John Marshall Harlan's dissent in *Plessy* being a paradigmatic example. As Alan Barth observed in a monograph on great dissents, "Although this powerful dissent sparked a brief boom in the North for Harlan for the presidency, it evoked no general outrage in the country at the Court's relegation of the black to, at best, second-class citizenship."[53] Over a century later, in *Students for Fair Admissions, Inc. v. Harvard*,[54] Chief Justice John G. Roberts, Jr.'s majority opinion quoted the dissent to justify striking race-based affirmative action in university admissions. The Chief repurposed the dissent's famous metaphor of legal color-blindness: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[55]

Aside from Justice Brett Kavanaugh's concurrence, every minority opinion in *SFFA* also quoted from Justice Harlan's dissent,[56] demonstrating how canonical judicial opinions may support contradictory narratives about the country's history and its legal system. Not only is the body of works in a legal canon potentially in flux, but the meanings of those works may change.[57] Keith Whittington and Amanda Rinderle contend that, over time,

---

52. Mootz, *supra* note 47, at 982.

53. ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 29 (1974). That observed, Justice Harlan's *Plessy* dissent was quickly canonized in the African American community. For example, African American lawyer-author Charles Chesnutt fictionalized the dissent in his novel *The Marrow of Tradition* (1901). *See* CHARLES W. CHESNUTT, THE MARROW OF TRADITION 33–41 (Werner Sollors ed., Norton 2012) (1901). Reflecting Justice Harlan's stature in the African American community at the time of his death in 1911, a resolution in a prominent African American newspaper mourned that "the Supreme Court has lost an able, fearless, and conscientious associate; the nation a distinguished citizen; the church a faithful worker, and our race a valued friend." *Justice John Marshall Harlan: Resolutions Commending His Worth*, WASH. BEE, Oct. 28, 1911, at 1.

54. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

55. *Id.* at 230 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

56. *E.g.*, *id.* at 231 (Thomas, J., concurring), 308 (Gorsuch, J., concurring), 326–27 (Sotomayor, J., dissenting), 388 (Jackson, J., dissenting). For a rhetorical critique of the case, including the vexed metaphor of legal colorblindness, see Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192 (2023).

57. This process resembles the literary canon creation process that modernist poet T. S. Eliot described in his influential essay "Tradition and the Individual Talent" (1919):

> The existing monuments form an ideal order among themselves, which is modified by the introduction of the new (the really new) work of art among them. The existing order is complete before the new work arrives; for order to persist after the supervention of novelty, the *whole* existing order must be, if ever so slightly, altered; and so the relations, proportions, values of each work of art toward the whole are readjusted; and this is conformity between the old and the new.

canonized cases become more valuable as symbols rather than as legal precedents. Using precedents strategically, "[t]he legal and political community may create 'judicial icons' that bear only a limited relationship to the original case but that serve a symbolic function for those who make use of it."[58] Whittington and Rinderle therefore conclude that "[t]he process of canonization, and de-canonization, turns on the substantive attractiveness and utility of the opinion to contemporary audiences rather than any intrinsic, original feature of the opinion itself."[59] Understanding the socio-political process through which a legal canon is constructed and the substance of the canon itself may illuminate shortfalls in framing questions within a doctrinal field, including silences in the field.[60]

Casebooks bear especial scrutiny as a potent means of canon construction, given their main purpose of educating future lawyers. Evaluating a contracts casebook through a feminist lens, Mary Joe Frug noted that "[t]he editorial choices within a casebook determine how many readers think about the law of a doctrinal area, about lawyering in that field, about clients, and about legal reasoning."[61] The next section will analyze the judicial opinion as a form and assess the virtues and shortcomings of criteria that legal scholars traditionally use to canonize opinions.

2. Conventional Criteria for Canonical Judicial Opinions

In common law systems, judicial opinions are a prestigious genre, and the form that an opinion takes is inextricably intertwined with its

---

T. S. Eliot, *Tradition and the Individual Talent (Part I)*, THE EGOIST, Sept. 1919, at 54, 55.

58. Keith E. Whittington & Amanda Rinderle, *Making a Mountain Out of a Molehill?* Marbury *and the Construction of the Constitutional Canon*, 39 HASTINGS CONST. L.Q. 823, 830 (2012).

59. *Id.*

60. *See* Balkin & Levinson, *supra* note 13, at 995 (referencing chattel slavery as an example of an underdeveloped legal topic); Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985, 1995 (2000) (arguing for scholars of race relations law to focus more on legal silences like enslaved women's lack of protection from violence and decisionmakers' avoidance of "the racial element of a controversy even when that element is, in fact, a major presence in the controversy"). Michel-Rolph Trouillot theorized that silences can:

> enter the process of historical production at four crucial moments: the moment of fact creation (the making of *sources*); the moment of fact assembly (the making of *archives*); the moment of fact retrieval (the making of *narratives*); and the moment of retrospective significance (the making of *history* in the final instance).

MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY 26 (Beacon Press 2015) (1995).

61. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1069 (1985); *see also* Kathleen D. Fletcher, *Casebooks, Bias, and Information Literacy—Do Law Librarians Have a Duty?*, 40 LEGAL REFERENCE SERVS. Q. 184 (2021) (analyzing differences in how the same cases are excerpted in constitutional law, property, and civil procedure casebooks and arguing that law librarians should teach students information literacy skills from a critical point-of-view).

substance.[62] An opinion's form can establish the range of what is considered legally feasible; as Robert Gordon has explained, "forms . . . condition not just our power to get what we want but what we want (or think we can get) itself."[63] Formal conventions of the judicial opinion arise from the genre's informational, persuasive, and institutional purposes within a specific context. The dispute-resolution and law-announcing purposes of opinions are paramount; at a minimum, judges must resolve a case and articulate a rationale for their decision.[64] Additionally, judges may need to persuade primary and secondary audiences. Primary audiences include the litigants, the lower court (if applicable), and "the court as an institution."[65] Secondary audiences vary and may include other courts, political entities, lawyers, academics, students, media, and the public.[66] Memorable judicial opinions, particularly dissents, often appeal to secondary audiences.[67] Persuasion is essential for institutional legitimacy, helping sustain public faith in the judiciary.[68]

Commentators agree that the creativity/constraint dynamic underlies judicial opinion writing, but they disagree on the scope of judicial autonomy within the genre. For example, Lani Guinier contended that "[f]or the most part, written opinions have the least demosprudential power because they have competing commitments that limit the flexibility of their argumentation, the style of their presentation, and the goal of their authors."[69] In addition to *stare decisis* considerations, Guinier noted that "standards of the 'constitutional law mafia'" do "not grant much latitude for colloquial prose or innovative formats."[70] From a law and narrative perspective, Jonathan Yovel has similarly argued that because "[m]aking

62. Benjamin N. Cardozo, *Law and Literature*, 48 YALE L.J. 489, 491 (1939), *originally published in* 14 YALE REV. 699 (1925).

63. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 111 (1984); *see also* Anat Rosenberg, *The History of Genres: Reaching for Reality in Law and Literature*, 39 L. & SOC. INQUIRY 1057, 1058 (2014) (reviewing AYELET BEN-YISHAI, COMMON PRECEDENTS: THE PRESENTNESS OF THE PAST IN VICTORIAN LAW AND FICTION (2013)) (arguing that "genres shape our common sense of reality—and the ways we can differ about it—hence genres' political significance").

64. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 811 (1961).

65. Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 17 (2009).

66. *Id.* at 19.

67. *See* Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 6 (2010) (discussing dissents that "aim[] to attract immediate public attention and, thereby, to propel legislative change").

68. *See* Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMANS. 201, 202 (1990) (explaining how "judicial language . . . must match experience and form in ways that a citizenry can recognize and accept").

69. Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 6, 52 (2008).

70. *Id.* (noting oral dissents have more demosprudential potential).

sense in law . . . is a discursive and institutional requirement," "law's approach to narration is marked by fairly conservative frameworks that adhere to an institutional requirement that stories make sense."[71]

To create this coherency, opinions typically employ the following structure: (1) introduction; (2) statement of issues; (3) factual and procedural background; (4) analysis, including application of rules to the case's facts; and (5) conclusion with disposition of the case.[72] The structure excludes information that does not fit neatly within its framework, creating the illusion of a closed narrative arc.

In contrast with this strict formalist perspective, scholars like Robert Ferguson and James Boyd White have theorized that the judicial opinion is a literary genre with personal, political, and legal functions.[73] Most provocatively, Walker Gibson likened judges to poets who exercise creativity within constraints:

> It is true that the legal writer operates within limiting situations, and he must attend painstakingly to the minutiae of facts that confront him. Yet it is also true that he is engaged in expressing in words the chaos of life, and no poet can say more. Judicial opinions and poetry are obviously not identical forms of expression; yet, in Frost's memorable phrase about poets, the legal writer too is attempting "a momentary stay against confusion." It is hard to think of a finer thing for a man to do.[74]

Because they speak as individuals rather than on behalf of the court as an institution, minority opinion authors have more freedom to be literary

---

71. Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*, 16 LAW & LIT. 127, 130 (2004).

72. JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 291–304 (5th ed. 2007).

73. Ferguson, *supra* note 68, at 202; James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1675 (1984).

74. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 930 (1961) (quoting Robert Frost, *The Figure a Poem Makes*, *in* THE ROBERT FROST READER 440 (Edward Connery Lathem & Lawrance Thompson eds., 2002) (1939)). The full line from which the quotation was extracted resonates with some judicial opinions: "It [the poem] begins in delight, it inclines to the impulse, it assumes direction with the first line laid down, it runs a course of lucky events, and ends in a clarification of life—not necessarily a great clarification, such as sects and cults are founded on, but in a momentary stay against confusion." Frost, *The Figure a Poem Makes*, *in* THE ROBERT FROST READER, at 440; *see also* Naomi Jewel Mezey, *The (Still) Unexplored Possibilities of a Poetics of Law*, 35 YALE J.L. & HUMANS. 321 (2024) (analyzing affinities between judicial opinions and poems based on Frost's essay).

judges.[75] An unconventional style may not be an unalloyed good, though, if it diminishes an opinion's substantive efficacy.[76]

This discussion highlights divergent perspectives on what renders a judicial opinion canonical, particularly for scholarly and pedagogical purposes. However, William Domnarski's enumeration of criteria in a book on U.S. Supreme Court opinions captures a general consensus[77]:

> In constructing my canon I have used the following criteria: the judicial opinion (1) comes from the United States Supreme Court, (2) establishes or acts as a harbinger of (3) an important rule (4) affecting a fundamental aspect (5) of the American democracy or the American way of life (6) with clarity, conviction, or eloquence.[78]

Besides court level, the criteria encompass legal, political, and social impact as well as style. The first criterion, which privileges U.S. Supreme Court opinions, is widely accepted but may distort perceptions not only of the judicial opinion form, but of the law itself. A jurocentric canon may sideline analyses of social movements and present an incomplete view of how law operates on the ground.[79] Additionally, given the paucity of women and

---

75. Justice Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118, 119 (1953) (stating "[i]n a dissenting opinion. . . the judge is on his own, and can express his personality, his philosophy and his uncensored convictions").

76. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1456 (1995).

77. For instance, Frank Cross and James Spriggs II note that other scholars have used the following criteria to assess a case's canonical potential: its "historical and/or social significance, its importance to the development of some area of the law, its impact on the development of American government, and relatedly, its prevalence in legal textbooks"; however, Cross and Spriggs define important, i.e., legally significant, opinions based on citation count while noting that a larger array of factors may be pertinent in determining whether an opinion is "great." Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 412, 415–16 (2010) (citation omitted); *see also* Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL OF RTS. J. 327, 329 (2009) (discussing how "a canonical text serves as a placeholder—a metonym—for a larger set of associated ideas and principles"); Mark A. Graber, *Hollow Hopes and Exaggerated Fears: The Canon/Anticanon in Context*, 125 HARV. L. REV. F. 33, 33 (2011) (describing how opinions that "influenced the course of American constitutional development" or "play[] a role in contemporary constitutional understandings" are canonical, and that an opinion's style alone is insufficient for canonicity).

78. WILLIAM DOMNARKSI, IN THE OPINION OF THE COURT 77 (1996). Casebooks and scholarship in U.S. constitutional law often apply these criteria, which tend to be implied rather than explicitly articulated. *See* Christopher D. Stone, *Towards a Theory of Constitutional Law Casebooks*, 41 S. CAL. L. REV. 1, 2 (1968) (noting constitutional law casebooks the author reviewed "lack[ed] express statement as to what consensus guided the authors of the present texts").

79. Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 55 (2001) (criticizing jurocentrism); Graber, *supra* note 77, at 38 (arguing for a pedagogical canon in constitutional law that expands beyond cases to align more with students' needs as practitioners).

people of color who have served on the Court,[80] a canon confined to U.S. Supreme Court opinions is likely to have few opinions authored by judges from historically marginalized backgrounds. While essentializing identity is problematic, research suggests a judge's background may shape judicial decision-making.[81] The second and third criteria, meanwhile, emphasize the rule-making function of canonical opinions, and the arguable heart of law as a discipline. That noted, the power of an opinion may not always reside in the rules that it lays the groundwork for or establishes, particularly with minority opinions that may seek broader cultural shifts.[82] Relatedly, the fourth and fifth criteria focus on an opinion's ramifications for "American democracy" and the "American way of life." These criteria address the "why care" question beyond the legal context, which is valuable, but their domestic emphasis may overlook global implications.[83] Lastly, the style criteria of "clarity, conviction, or eloquence" are mainstays of legal style manuals[84] and not inherently problematic. Style, though, is not neutral in the judicial opinion context; disputes over stylistic choices "seep[] into political questions about whether judges should be formalists, realists, pragmatists, or all of the above."[85] Accordingly, how style criteria are applied may reflect a canon creator's perception of the judicial role, as opposed to the text itself. The controversy over scholars from historically marginalized backgrounds publishing "voice scholarship" that uses

80. Of the 116 justices to have served on the Supreme Court, the list of historical justices who were women and people of color includes Thurgood Marshall, Sandra Day O'Connor, and Ruth Bader Ginsburg. Today, Justices Clarence Thomas, Elena Kagan, Sonia Sotomayor, Amy Coney Barrett, and Ketanji Brown Jackson reflect racial and gender diversity. *See* Rachel Wilson & Brandon Griggs, *Of the 116 Supreme Court Justices in US History, All but 8 Have Been White Men*, CNN (Feb. 4, 2024, 9:00 AM), https://www.cnn.com/politics/supreme-court-justices-dg/index.html. State supreme courts also lag on racial and gender diversity metrics. *See* Zoe Merriman, Chihiro Isozaki & Alicia Bannon, *State Supreme Court Diversity — May 2024 Update*, BRENNAN CTR. FOR JUST., N.Y.U. L. SCH. (May 22, 2024), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2024-update.

81. *See, e.g.*, Christopher Kleps, *Race, Gender, and Place: How Judicial Identity and Local Context Shape Anti-Discrimination Decisions*, 56 L. & SOC. REV. 188 (2022); Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91 (2012); Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RSCH. Q. 219 (2008).

82. Catherine L. Langford, *Appealing to the Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents*, 44 ARGUMENT & ADVOC. 119, 119–20 (2008) (discussing how landmark judicial dissents may elide routine legal questions to "appeal to a larger sense of what America 'should' be").

83. For example, Michaela Hailbronner has conceptualized a global constitutional law canon. *See generally* Michaela Hailbronner, *Constructing the Global Constitutional Canon: Between Authority and Criticism*, 69 U. TORONTO L.J. 248 (2019).

84. *See, e.g.*, ROSS GUBERMAN, POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES (2015) (presenting strategies to make legal writing more clear, eloquent, and persuasive).

85. *Id.* at xxii.

narratives and autobiography[86] also suggests that major deviations from stylistic norms in law, which include a veneer of objectivity, may prevent a judicial opinion from being canonized.

A memorandum by Chief Justice Earl Warren in *Brown v. Board of Education*, which partially overruled *Plessy v. Ferguson*, illustrates this dynamic. Chief Justice Warren advised that the opinion "should be short, readable by the lay public, non-rhetorical, un-emotional and, above all, non-accusatory."[87] *Brown*'s restrained rhetoric may be one reason why it is seen as a crown jewel in professional and popular canons, even as scholars have debated the opinion's merits[88] and published rewritten versions of the opinion with more soaring rhetoric of racial equality.[89] *Brown* epitomizes how courts have struggled to represent race in the judicial opinion form, which the following section will elaborate on and link to biases in scholarly and curricular canons.

B. Race in Canonical Judicial Opinions

The preceding analysis demonstrates how legal canons are influenced by social and political dynamics, disciplinary norms, and the individual preferences of canon creators. Social movements may thus shape legal canons, including pragmatic, scholarly, and pedagogical canons. In response, the legal discipline may either "reconstitute itself . . . or close ranks by considering what, if anything can be said to be canonical about its practices, its methods, or its materials of study."[90]

Previously, the mid-twentieth century civil rights movement prompted a canon-shaping reckoning as cases like *Brown* became enshrined in legal education, and law students of color protested for more inclusive curricula.[91] Some faculty, however, defended the traditional order, as exemplified by an

86. *See* Monica Bell, *The Obligation Thesis: Understanding the Persistent "Black Voice" in Modern Legal Scholarship*, 68 U. PITT. L. REV. 643, 650 (2007) (arguing that a group of rising Black legal scholars at the time "seem to have absorbed the academy's message that voice scholarship can be a counterproductive pursuit, not only for their careers, but also for the African-American community at large").

87. *See* Guinier, *supra* note 69, at 52 & n.233.

88. For early interventions, see, for example, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

89. *See generally* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

90. Balkin & Levinson, *supra* note 13, at 969.

91. *See, e.g.*, LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS 6 (2005); MIGUEL ESPINOZA, THE INTEGRATION OF THE UCLA SCHOOL OF LAW, 1966–1978: ARCHITECTS OF AFFIRMATIVE ACTION xxv (2018).

English legal history professor at the University of California, Berkeley. In a 1973–74 *Journal of Legal Education* article, the professor declared: "English history as a whole is unabashedly 'ethnic' history—now being challenged by the new, so-called 'third world,' ethnic histories."[92] As this example illustrates, injecting race into discussions of legal canon formation induces not only intellectual resistance, but existential anxieties about decentering white perspectives.[93] More recently, in a North Carolina case challenging the constitutionality of a traffic stop involving a Black defendant, a concurring judge lambasted the defendant's attorney for "rais[ing] a question of impartiality in traffic stops, and our justice system generally, based on the color of a person's skin and their gender. This appeal to an emotion, and to nothing before us in the Record, must be addressed, as the law applies equally to everyone."[94]

Canon creators may view race as an extraneous emotional factor in a realm where objective logic should reign supreme to uphold public confidence in the legal system.[95] Even canonical judicial opinions that explicitly address race may present narrow views of racial discrimination and contain insensitive rhetoric. Furthermore, legal scholars have tended to extol white judges' opinions as exemplars, signaling that judges of color have not contributed to the genre's development. Curricular canons may reflect these shortcomings; as Teri McMurtry-Chubb asserts: "The core legal curricular canon is dense with cases that reiterate to students that Black lives do not matter."[96] Whiteness as a norm meanwhile "remains largely invisible within legal education,"[97] although what is invisible is "not necessarily 'not-there.'"[98] This section will synthesize critical race theory

92. Thomas G. Barnes, *The Teaching of English Legal History in America: Past, Present, and Future*, 26 J. LEGAL EDUC. 326, 326 (1974). At the same time, the author speculated that Black and Latinx students may find English legal history irrelevant because it "has too much of the odor of repression about it, of promises fulfilled only for those of European extraction, of liberty by the rule of law somewhat too respectful of light complexions." *Id.* at 327.

93. *See* ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 2 (2018) (arguing that whites "consider a challenge to our racial worldviews as a challenge to our very identities as good, moral people").

94. State v. Johnson, 865 S.E.2d 673, 684 (N.C. Ct. App. 2021) (Griffin, J., concurring). On the benefits and drawbacks of calling attention to racial considerations in litigation when the topic may otherwise be avoided, see Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965 (1997).

95. *Johnson*, 865 S.E.2d at 684 (Carpenter, J., concurring) (contending that a discussion of disparate treatment based on race "overshadow[ed] the other important constitutional issues of this case, and [was] not helpful to maintaining public confidence in the judiciary or the practice of law generally").

96. Teri A. McMurtry-Chubb, *The Law School Curriculum and the Movement for Black Lives*, 31 U. FLA. J. L. & PUB. POL'Y 27, 32 (2020).

97. Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 651 (2008).

98. Morrison, *supra* note 48, at 11.

critiques of the U.S. Supreme Court's jurisprudence before examining infirmities in scholarly and curricular canons. These canons ultimately shape who is recognized as part of the academic community[99] and who has authority to generate the law.

1. Critical Race Theory Critiques of the Supreme Court's Jurisprudence

In a speech for the Constitution's bicentennial, Supreme Court Justice Thurgood Marshall summarized the Janus-faced nature of law for African Americans throughout U.S. history: "They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, have begun to win equality by law."[100] It follows that generalizing about racial issues in U.S. judicial opinions requires a nuanced perspective. However, both scholars and courts acknowledge that the country's judicial system has repeatedly perpetuated racial injustices. Erwin Chemerinsky argues that "the Supreme Court overall has had a dismal record—and that is a very generous characterization—with regard to race and equality throughout American history."[101] Focusing on nineteenth-century judicial opinions, Justin Simard contends that "[i]f we look carefully enough, we could find something objectionable about nearly every judge or opinion, if not in the treatment of the enslaved, then in the treatment of women, criminals, the poor, immigrants, or other marginalized members" of society at the time.[102]

Given its preeminence, the U.S. Supreme Court has been a focal point of analysis, with legal scholars critiquing the Court's race-related jurisprudence across the broader arc of history and in more specific contexts.[103] A growing body of scholarship has investigated the Court's rhetoric of race, theorizing how white supremacist discourse may persist subtly in an era when overt racism is verboten in judicial opinions.[104]

---

99. John E. Finn & Donald P. Kommers, *A Comparative Constitutional Law Canon?*, 17 CONST. COMMENT. 219, 226–27 (2000).

100. Hon. Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1341 (1987).

101. Erwin Chemerinsky, *Foreword* to CRITICAL RACE JUDGMENTS, *supra* note 8, at xxiii, xxiii.

102. Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 120 (2020) (noting that it is impractical to disregard all anti-canonical precedents in a common law system, though).

103. *See, e.g.*, ORVILLE VERNON BURTON & ARMAND DERFNER, JUSTICE DEFERRED: RACE AND THE SUPREME COURT (2021); Harawa, *supra* note 11; *see also* Muñiz, *supra* note 37 (theorizing about racialized judicial decision-making more generally).

104. *See, e.g.*, CEDRIC MERLIN POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY (2022); Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251 (2021); Jerome

Courts themselves have also acknowledged racial injustices in past decisions, as with the U.S. Supreme Court's ostensible overruling of *Korematsu v. United States* (1944) in *Trump v. Hawaii* (2018)[105] and the Supreme Court of Washington's condemnation of its racist precedents.[106] The state high court recognized that "[c]ourts take a step toward achieving greater justice when the people who comprise them comprehend the legacy of injustices built into our legal systems, actively work to prevent racism before it occurs, and also recognize how our participation in these systems may reify them."[107] Judicial opinions composed with this level of critical consciousness may serve reparative functions that extend beyond individual cases.

Judges attuned to racial inequality have nonetheless erased race from their published opinions, including in criminal cases heard by the U.S. Supreme Court. Originally, a draft of *Miranda v. Arizona* (1966) emphasized the potentially fraught racial dynamics of police interrogations, but after Justice William Brennan sent Chief Justice Earl Warren a memorandum suggesting it would be improper "in this context to turn police brutality into a race problem," rather than a problem of poverty, the Chief Justice excised the passage.[108] Eleventh Circuit Judge Robin Rosenbaum recently referenced this hidden history of the case in a concurrence advocating for a more realistic test to determine what constitutes a consensual police encounter under the Fourth Amendment.[109]

A capital case litigated by Charles Hamilton Houston (1895–1950), an architect of the civil rights revolution,[110] provides another example of racial

---

McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597 (1994).

105. Trump v. Hawaii, 585 U.S. 667, 710 (2018) (abrogating Korematsu v. United States, 323 U.S. 214 (1944), which had upheld the forced relocation of people of Japanese descent during World War II). While sustaining entry restrictions applicable mainly to foreign nationals from Muslim-majority countries, the Court stated: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Id.* (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

106. Henderson v. Thompson, 518 P.3d 1011, 1016 n.1 (Wash. 2022).

107. *Id.* at 1028.

108. *See* Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 421 & nn.93–94 (2012).

109. United States v. Knights, 989 F.3d 1281, 1301 (11th Cir. 2021) (Rosenbaum, J., concurring). The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

110. Houston participated in almost every civil rights case before the Supreme Court from 1930 until his premature 1950 death from overwork. John C. Brittain, *"A Lawyer is Either a Social Engineer or a Parasite to Society," in* CHARLES H. HOUSTON: AN INTERDISCIPLINARY STUDY OF CIVIL RIGHTS LEADERSHIP 103, 103 (James L. Conyers, Jr., ed., 2012). For an overview of Houston's

erasure from a historical judicial opinion with contemporary reverberations. In the case, *Fisher v. United States* (1946), a Black custodian convicted of killing a white librarian at work presented what would now be called a "Black rage defense," arguing that the librarian had called him a racial epithet prior to the altercation.[111] Justice Felix Frankfurter dissented from the majority's decision to uphold the death sentence, and in a draft opinion, he cited African American author Richard Wright's *Native Son* and *Black Boy* while attempting to depict the defendant's perspective. Justice Frankfurter's literary allusions were intended to support the claim that the defendant lacked the premeditation necessary for a first-degree murder conviction.[112] However, Justice Stanley Reed was disturbed by the dissent's framing and sent Justice Frankfurter a note reading in part: "At any rate, you could speak abstractly and enlighten the lawyers [sic], instead of concretely, it seems to me, without logical justification."[113] The published dissent omitted allusions to Wright's books and failed to meaningfully address the case's racial and social context.[114] In an instance of poetic justice, though, Wright was simultaneously drafting a short story based on the case, "The Man Who Killed a Shadow," using case materials provided by Houston.[115] *Fisher* therefore re-emerged in the literary canon, reflecting Kenji Yoshino's insight: "Banished from law as a polluted discourse, literature keeps surfacing in the wake of its enforced departure."[116]

Archival studies unearth how judges choose to engage with or disregard race, complementing scholarship that critiques the presence or absence of race in published opinions. Supreme Court justices, in particular, are likely keenly aware that their opinions may be canonized and that candor on

---

accomplishments, see JOSÉ FELIPÉ ANDERSON, GENIUS FOR JUSTICE: CHARLES HAMILTON HOUSTON AND THE REFORM OF AMERICAN LAW (2021).

111. Fisher v. United States, 328 U.S. 463, 466 (1946); Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 752 (1996) (discussing *Fisher* as illustrative of the Black rage defense); PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW (1997) (tracing the history of the Black rage defense). The majority opinion uses the euphemism "insulting words" to refer to the racial epithet, which was "black nigger." *Fisher*, 328 U.S. at 465, 478 (Frankfurter, J., dissenting).

112. David M. Siegel, *Felix Frankfurter, Charles Hamilton Houston and the "N-Word": A Case Study in the Evolution of Judicial Attitudes Toward Race*, 7 S. CAL. INTERDISC. L.J. 317, 360 (1998); RICHARD WRIGHT, NATIVE SON (1940); RICHARD WRIGHT, BLACK BOY (1945).

113. *Quoted in* Siegel, *supra* note 112, at 363.

114. *Id.* at 361, 365.

115. Richard Wright, *The Man Who Killed a Shadow*, *in* EIGHT MEN 185–201 (2008) (French version originally published in 1946, English version originally published in 1949). A 1945 letter in the Richard Wright Papers refers to Houston sending the case transcript following a conversation with Wright about the case. Letter from Mary-Jane Grunsfeld, Director, Clearing House, American Council on Race Relations, to Richard Wright (July 13, 1945) (on file with Yale University, Beinecke Rare Book & Manuscript Library, JWJ MSS 3, Box 93, Folder 1170).

116. Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1839 (2005).

perceived controversial issues like race may detract from canonical potential while compromising judicial legitimacy. Aderson François, for example, has noted the dearth of Supreme Court decisions that explicitly discuss and condemn white supremacy.[117] Scholarly and curricular canons, to the extent they privilege Supreme Court opinions, may replicate the problematic treatment of race in case law. This dynamic, in turn, diminishes the likelihood that scholars and students can envision more equitable legal canons in the future.

2. White Judges' Opinions as Exemplars in Scholarship

Race may also figure troublingly when legal scholars consider whose judicial opinions are worth canonizing as formal tour-de-forces. One of the earliest major works on exceptional judicial opinions was Supreme Court Justice Benjamin Cardozo's 1925 essay "Law and Literature."[118] In it, Justice Cardozo crafted a lineage of white male judges whom he viewed as masters of the form. Names on his list are familiar to most U.S. law students and legal scholars today: Chief Justice John Marshall, Lord Mansfield of England, Justice Benjamin Curtis, Justice Oliver Wendell Holmes, Jr., and Justice Louis Brandeis, among others.[119] Written a century ago and focused on Anglo-American judges, Justice Cardozo's list unsurprisingly lacks demographic diversity from today's vantage point. Subsequent judicial opinion writing manuals have typically excerpted opinions and guidance from the judges on Justice Cardozo's list and other white male jurists.[120] Ross Guberman's book *Point Taken: How to Write Like the World's Best Judges* (2015) is among the best known in the judicial opinion writing

117. Aderson Bellegarde François, Et in Arcadia Ego: Buck v. Davis, *Black Thugs, and the Supreme Court's Race Jurisprudence*, 15 OHIO ST. J. CRIM. L. 229, 229–33 (2017). The article's title alludes to *Buck v. Davis*, 580 U.S. 100 (2017), where the Supreme Court upheld an ineffective assistance of counsel claim in a capital case involving a Black defendant. François argues: "To Chief Justice Roberts and many of his colleagues, race in general, not white supremacy in particular, has been and is the evil in the constitutional Eden." François, *supra*, at 245.

118. Cardozo, *supra* note 62.

119. *See id.* at 493–507. In the famous Somerset case (1772), Lord Mansfield had declared that "[t]he air of England has long been too pure for a slave, and every man is free who breathes it." *Id.* at 495 (referencing Somerset v. Stewart (1772) 98 Eng. Rep. 499). Otherwise, all the listed U.S. justices are mainstays in constitutional law casebooks.

120. *See, e.g.*, JILL BARTON, SO ORDERED: THE WRITING GUIDE FOR ASPIRING JUDGES, JUDICIAL CLERKS, AND INTERNS (2017); RUGGERO J. ALDISERT, OPINION WRITING 260–61 (3d ed. 2012) (briefly lauding the writing style of Third Circuit Judge William H. Hastie, the first Black Article III judge, in light of "the unmatched trio of Justice [Oliver Wendell] Holmes[, Jr.], Judge [Benjamin] Cardozo, and Judge [Learned] Hand"); GEORGE, *supra* note 72; B. E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS (1977); APPELLATE JUDICIAL OPINIONS (Robert A. Leflar ed., 1974); *see also* ROBERT E. BACHARACH, LEGAL WRITING: A JUDGE'S PERSPECTIVE ON THE SCIENCE AND RHETORIC OF THE WRITTEN WORD (2020).

genre, and the book's marketing materials tout "numerous cases and opinions from 34 esteemed judges—from Learned Hand to Antonin Scalia."[121] First Circuit Judge Ojetta Rogeriee Thompson appears to be the only woman of color whose opinions are excerpted in the book.[122] Monographs on the judicial opinion form also tend to concentrate on white judges, in part because rhetorical scholarship generally prioritizes U.S. Supreme Court opinions.[123] Readers of these texts receive the implicit message that judges of color do not draft opinions whose form is worth emulating or that have deeply shaped doctrine.

To clarify, the argument here does not promote a racially essentialist claim about the form and substance of judicial opinions (i.e., that opinions by judges of color are necessarily distinctive from those authored by white judges).[124] Nor do I contend that the judicial opinion as a form is inherently racist[125] or advocate for the wholesale replacement of white judges' opinions in the canon of exemplary opinions with opinions authored by judges of color. My intention is instead to prompt reflection on whether the criteria for determining whether a judicial opinion should merit inclusion in

---

121. Overview, *Point Taken: How to Write Like the World's Best Judges*, OXFORD U. PRESS, https://global.oup.com/academic/product/point-taken-9780190268589?cc=us&lang=en&# (last visited Nov. 23, 2024).

122. GUBERMAN, *supra* note 84, at vii–xx (table of contents); Hon. Judith Colenback Savage, *Hon. Ojetta Rogeriee Thompson: Judge, U.S. Court of Appeals for the First Circuit*, FED. BAR ASSOC. 1 (Sept. 2014), https://www.fedbar.org/wp-content/uploads/2019/10/Thompson_Sept2014_5-pgs-pdf-3.pdf (discussing Thompson's mixed-race ancestry and noting her being the first African American and second woman appointed to the First Circuit).

123. *See, e.g.*, WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES (2007); DOMNARSKI, *supra* note 78. Feminist judicial rhetoric has been a growing area of analysis, though. *See, e.g.*, NICHOLA D. GUTGOLD, THE RHETORIC OF SUPREME COURT WOMEN: FROM OBSTACLES TO OPTIONS (2012); KATIE L. GIBSON, RUTH BADER GINSBURG'S LEGACY OF DISSENT: FEMINIST RHETORIC AND THE LAW (2018).

124. *But see* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (arguing "that those who have experienced discrimination speak with a special voice to which we should listen"). In some contexts, lived experience may overtly influence judicial rhetoric, as is suggested in Fourth Circuit Judge Roger Gregory's following critique of over-policing in Black communities:

> In a society where some are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles, it is still within their own communities—even those deemed "dispossessed" or "disadvantaged"—that they feel the most secure. Permitting unconstitutional governmental intrusions into these communities in the name of protecting them presents a false dichotomy.

United States v. Curry, 965 F.3d 313, 332 (4th Cir. 2020) (en banc) (Gregory, C.J., concurring).

125. That observed, a common law system built on *stare decisis* may perpetuate injustices, as may originalist theories of constitutional interpretation that fail to account for the perspectives of historically marginalized populations. For a range of views on the Constitution as a tool of racial justice, see Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651, Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022), and Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

the canon of "great" opinions may undervalue rhetorically bold opinions that advance racial justice.[126] Many such opinions have been authored by judges of color, who may be symbolic role models for students aspiring to serve on the bench or pursue civil rights advocacy requiring creative lawyering.[127] In addition, students attentive to the identity of opinion authors may feel alienated from the curriculum when no assigned authors share their identity, regardless of the topic.[128] The next section delves further into how racial marginalization manifests in curricular canons, particularly in casebooks.

3. Racial Marginalization in Curricular Canons

The curricular canon molds students' perceptions of the legal system, including its historical operation, contemporary function, and prospects for reform. Cases and other assigned materials are the most visible component of a curricular legal canon, but as Fran Ansley observes, more "embedded aspects" may

> include the pedagogical methods that law teachers use in their classrooms, who those teachers are, the general argument categories they encourage their students to learn how to make, the overall outline and sequence of the curriculum, and not least, the bar examination and the picture transmitted to students about the existing

126. This proposition may be disputed, but I would contend that canonical U.S. Supreme Court opinions advancing racial justice differ qualitatively overall from the Black Lives Matter opinions to be discussed in the next part. Among other differences, the Supreme Court opinions do not typically deconstruct the judicial opinion form itself to support their arguments (or at least not to the extent of the Black Lives Matter opinions), and they do not usually center the perspectives of individuals from historically marginalized populations. *But see* Charles L. Zelden, *How Do You Feel About Writing Dissents: Thurgood Marshall's Dissenting Vision for America*, 42 J. SUP. CT. HIST. 77, 83 (2017) (describing the humanistic dimension of Justice Marshall's dissents). In addition, scholarship has found gender and racial imbalances in federal circuit court publication rates, suggesting publication criteria are being applied inequitably. For a related empirical study, see Nina Varsava, *Opinion Authorship and Precedential Status*, 101 WASH. U. L. REV. 1593, 1596 (2024).

127. *See* Kirsten Widner, *The Supreme Court and the Limits of Descriptive Representation*, 55 POLITY 380, 388 (2023) (discussing how Ketanji Brown Jackson's appointment as the Supreme Court's first Black female justice could "inspire people who have not previously seen themselves reflected on the bench to seek legal careers, judgeships, or greater engagement in public life").

128. Jenny E. Carroll, who is now a law professor, has described her alienation as a female law student while reading cases primarily by male judges: "The cases I read were often written by male judges, and women only appeared occasionally when they were injured on train platforms, were negligent mothers or wives, or were disbelieved as rape victims. Whatever their details, they were the people to whom law applied, not who made law." Jenny E. Carroll, *Law Review and Finding a Place in the Academy*, 100 TEX. L. REV. ONLINE 60, 62 (2021), https://texaslawreview.org/wp-content/uploads/2021/11/Carroll_Publication.pdf.

> market for legal services and how they can or should fit themselves into it.[129]

Casebooks can influence faculty decisions at many of these levels, which may explain the burgeoning body of scholarship critiquing casebooks on inclusivity grounds. Dovetailing with the preceding section's analysis, Mitu Gulati and Veronica Sanchez tested a "superstar hypothesis" of opinion selection for casebooks. Reviewing three hundred casebooks and focusing on federal circuit court judges, they found that opinions of "superstars" (primarily white men) were disproportionately represented, while opinions of comparable quality by other judges were ignored.[130] The authors concluded that certain analytical frameworks, such as law and economics, dominated casebooks, while other equally valid methods were marginalized.[131]

A traditional doctrinal organizational scheme may itself "artificially compartmentalize the nature of racial inequality and mask[] its intersecting dimension of power."[132] This problem traces back to early American legal education; in the antebellum era, Litchfield Law School provided minimal instruction on the law of slavery, and contemporary treatises integrated slave cases into conventional common law categories, concentrating on technical rules.[133]

Today, first-year casebooks are crucial in framing how students understand the law and their future roles as lawyers and leaders. However, casebooks in core subjects, such as torts, contracts, property, civil procedure, constitutional law, and criminal law, have been found to perpetuate biases.[134] Alice Ristroph's essay "The Curriculum of the

---

129. Ansley, *supra* note 42, at 241.

130. Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1146 (2002). While this article dates back over two decades, and no comparable studies have been conducted more recently, the results track my review of constitutional law casebooks.

131. *Id.* Gulati and Sanchez suggest that opinions grounded in disciplines including philosophy, sociology, and anthropology are less likely to be included in casebooks and that search costs may deter casebook authors from expanding their canon. *Id.* at 1153, 1183. Economic analysis is arguably more prominent in judicial opinions than philosophical, sociological, and anthropological analyses, but this greater representation could result from the very phenomenon Gulati and Sanchez critique: an over-inclusion of law and economics approaches in casebooks used to educate future judges.

132. *Introduction* to CRITICAL RACE JUDGMENTS, *supra* note 8, at 10. Additionally, the order in which material is presented can impact students' views of the law. *See* Donald G. Gifford, Joseph L. Kroart III, Brian Jones & Cheryl Cortemeglia, *What's on First?: Organizing the Casebook and Molding the Mind*, 45 ARIZ. ST. L.J. 97, 105 (2013) (summarizing the results of an empirical study that tested how the sequence of torts teaching may influence students' views of the judicial role).

133. Simard, *supra* note 102, at 88.

134. *See, e.g.*, Jennifer Wriggins, *How to Include Issues of Race and Racism in the 1-L Torts Course: A Call for Reform*, 23 RUTGERS RACE & L. REV. 259, 261 (2021); Bela August Walker, *Making*

Carceral State" argues that substantive criminal law classes at U.S. law schools have helped propel mass incarceration.[135] She contends that incorporating racial considerations into the conventional criminal law canon is counterproductive, given that merely "mentioning racial disparities among those convicted and punished, while simultaneously emphasizing the legitimacy and neutrality of substantive criminal law . . . may inadvertently reinforce conceptions of Black criminality."[136] Instead, Ristroph advocates for a curricular transformation that rejects "criminal law exceptionalism" and reconceptualizes "criminal law as a human practice" that students should develop "the capacity to critique."[137]

Viewing judicial opinions as spaces of possibility for reimagining legal epistemology—rather than as white spaces in the exclusionary senses detailed in this section[138]—can have far-reaching scholarly, pedagogical, and practical ramifications across doctrinal fields. The Black Lives Matter judicial opinion, theorized and illustrated in the next section, is a particularly powerful tool for reconstructing the discipline's intellectual infrastructure to promote racial justice.

II. PERFORMANCES OF JUSTICE: THE BLACK LIVES MATTER JUDICIAL OPINION AS AN EMERGING FORM

> The United States population includes 42 million Americans of African descent. Inexplicably, these Americans are basically invisible to those of us who apply the analytical framework for reasonable behavior or beliefs. Somehow the judiciary, intentionally

---

Room in the Property Canon, 90 TEX. L. REV. 423, 423 (2011) (reviewing ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW AND RACE (2011)); Deborah Waire Post, *Outsider Jurisprudence and the "Unthinkable" Tale: Spousal Abuse and the Doctrine of Duress*, 46 U. HAW. L. REV. 469, 472 (2004); Portia Pedro, *A Prelude to a Critical Race Theory Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 159 (2021), https://virginialawreview.org/articles/a-prelude-to-a-critical-race-theoretical-account-of-civil-procedure/; Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1125 (2012) (reviewing GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (2010)); Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413 (2021). For upper-level curriculum critiques, see, for example, Shani M. King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575 (2011), Marsha Griggs, *Race, Rules, and Disregarded Reality*, 82 OHIO ST. L.J. 931 (2021) (discussing evidence) and Carliss N. Chatman, *Teaching Slavery in Commercial Law*, 28 MICH. J. RACE & L. 1 (2023).

135. Ristroph, *supra* note 7, at 1635.

136. *Id.* at 1636.

137. *Id.* at 1703–05.

138. *See* Capers, *supra* note 18, at 14 (arguing "the end goal of this Essay is to imagine the law school no longer as a white space (in terms of demographics, or what is taught, or how it is taught), but as a *white space* (as in a blank page, at once empty and full of possibilities). What would it mean to rethink, from the bottom up, what is taught, how it is taught, and to what end?").

> or not, excludes these Americans' normal behaviors, responses, and beliefs in circumstances involving law enforcement agents. . . . This fact of life observation has no bearing on the actual guilt or innocence of the defendant in this case. However, it has great significance to our Constitution, due process, equal protection, and what it means to be an American.
>
> –South Carolina Chief Justice Donald W. Beatty[139]

In a case involving a Black defendant, the chief justice of South Carolina's Supreme Court criticized the majority's application of the Fourth Amendment's reasonable person standard, challenging the objectivity of one of the most pervasive constructs in U.S. law.[140] Chief Justice Beatty moreover underscored the broader implications of his critique, suggesting that it could call into question the apparent neutrality of other legal concepts informing constitutional interpretation. The dissent's meta-critique exemplifies an emerging form of judicial opinion that has coincided with the Black Lives Matter movement's ascendance since 2013. What I call the Black Lives Matter judicial opinion has antecedents in prior cases, including Justice Thurgood Marshall's dissents, and African American intellectual traditions.[141]

Black Lives Matter judicial opinions are contemporary manifestations of what J. Clay Smith, Jr., coined the Houstonian School of Jurisprudence in honor of pioneering civil rights lawyer Charles Hamilton Houston.[142] Smith described Houstonian Jurisprudence as applying legal realist tenets to the civil rights realm in order to expose and remedy injustices.[143] Before his

---

139. State v. Spears, 839 S.E.2d 450, 467–68 (S.C. 2020) (Beatty, C.J., dissenting).

140. For recent scholarship criticizing the reasonable person construct, see Daniel S. Harawa, *Coloring in the Fourth Amendment*, 137 HARV. L. REV. 1533 (2024) and Aliza Hochman Bloom, *Objective Enough: Race is Relevant to the Reasonable Person in Criminal Procedure*, 19 STAN. J. C.R. & C.L. 1 (2023).

141. *See generally* Willie J. Epps, Jr., *The Jackie Robinsons of the Federal Judiciary: Examining the Appointment of the First Black Federal Judges*, 22 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 228 (2022); WENDY B. SCOTT & LINDA S. GREENE, "I DISSENT": THE DISSENTING OPINIONS OF JUSTICE THURGOOD MARSHALL (2010); Daniel Fryer, *Which America?: Judge Roger L. Gregory and the Tradition of African-American Political Thought*, 78 WASH. & LEE L. REV. 1087 (2021) (discussing Fourth Circuit Judge Roger Gregory's jurisprudence); David B. McNamee, "*Black Lives Matter" as a Claim of Fundamental Law*, 14 U. MASS. L. REV. 2 (2019) (situating the Black Lives Matter movement within a history of Black constitutional thought).

142. *See* J. Clay Smith, Jr., *In Memoriam: Professor Frank D. Reeves—Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence*, 18 HOWARD L.J. 1, 6 (1973).

143. *See* J. Clay Smith, Jr., *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2173, 2174–75 (1998). Houston conceived of lawyers as social engineers and developed a five-prong strategy for racial equality:

> We are taking these fights in their stages, one by one. First, the fight for physical security, next

legal career, Houston had taught African American literature at Howard University[144] and had advocated for an inclusive literary canon as an undergraduate. At nineteen, upon being selected a valedictorian of his Amherst class, Houston chose to speak on African American poet Paul Laurence Dunbar.[145] As Geraldine Segal recounts, "Someone objected to this selection, commenting that many people had never heard of Dunbar. Houston replied that by the time he finished speaking, everyone would know about Dunbar. His prediction was correct."[146] Black Lives Matter opinions carry on Houston's legacy through creative formalism, often engaging with African American literature to reshape the judicial opinion genre for racial justice. After conceptualizing the Black Lives Matter opinion, this section will dissect examples that seek to democratize the judicial opinion form. In analyzing an under-recognized trove of cases, the discussion responds to Ruth Colker's call for "resistance lawyers . . . to find the fragmentary strands of abolitionism within certain minority or dissenting judicial opinions that can be used to help make the Constitution a tool of abolitionism."[147]

> the fight for some semblance of order and justice in the processes of the administration of the government. Third, the fight for equal education, to furnish America with a class of citizens fully entitled and fully able to cope with all the difficulties and problems; fourth, to bring the Negro workers into the organized labor movement with full protection against discrimination; finally to give to the other liberal forces of America worthy recruits for the struggle to make a liberal America, to make this country a secure home for all people without regard to race, color, or creed.

Quoted in GORDON ANDREWS, UNDOING *PLESSY*: CHARLES HAMILTON HOUSTON, RACE, LABOR, AND THE LAW, 1895–1950, at 130 (2014).

144. Christel N. Temple, *Charles Hamilton Houston and Post-Negro Movement Authority: The Socio-Literary History of a Legal Warrior*, *in* CHARLES H. HOUSTON: AN INTERDISCIPLINARY STUDY OF CIVIL RIGHTS LEADERSHIP, *supra* note 110, at 171, 175.

145. Dunbar is one of the first "influential black poet[s] in American literature." *Paul Laurence Dunbar*, POETRY FOUND., https://www.poetryfoundation.org/poets/paul-laurence-dunbar (last visited Nov. 23, 2024). Financial straits precluded him from attending law school, but he became renowned for his dialect poetry and published the searing anti-racism novel *The Sport of the Gods* (1902) shortly before his early death at thirty-three. *Id.*

146. GERALDINE R. SEGAL, IN ANY FIGHT SOME FALL 23 (1975).

147. Colker, *supra* note 125, at 653; *see also* Amna A. Akbar, Sameer A. Ashar & Jocelyn Simonson, *Movement Law*,

73 STAN. L. REV. 821, 830 (2021) (characterizing "movement law scholarship" as "(1) locating resistance; (2) thinking alongside strategies, tactics, and experiments for justice; (3) shifting epistemes; and (4) adopting a solidaristic stance"). I also discuss equitist majority opinions below, which may nonetheless be construed as dissenting from trends in the Supreme Court's recent jurisprudence implicating race. Activists differ on how they define the term "abolition" in the racial justice context, but it is typically intended to evoke the antebellum period and the necessity to dismantle systems of oppression. *See* Roberts, *supra* note 125, at 6–7.

A. Conceptualizing the Black Lives Matter Judicial Opinion

A cardinal characteristic of the Black Lives Matter judicial opinions evaluated in this article is their use of formal subversion as a tool for meta-critique. Legal realist and judge Jerome Frank's description of his objectives in writing "essayistic" opinions summarizes what the Black Lives Matter opinions analyzed seek to do:

> (a) To stimulate the bar into some reflective thinking about the history of legal doctrines, so that they will go beyond the citator perspective of doctrinal evolution; (b) To induce them to reflect on the techniques of legal reasoning (e.g., to consider the nature and value of *stare decisis*, or the use and value and limitations on the proper employment of fictions); (c) To recognize that the judicial process is inescapably human, necessarily never flawless, but capable of improvement; (d) To perceive the diverse "forces" operative in decision-making, and the limited function of the courts as part of government.
>
> And, underlying it all, is a strong desire, not easily curbed, to be pedagogic—not in a didactic manner but in a way that will provoke intelligent questioning as to the worth of accepted practices in the interest of bettering these practices.[148]

In this framing, judicial opinions open up conversations about law as a discipline and the judiciary's role in a democracy.[149] While the rules an opinion proposes are important, and a traditional means to determine an opinion's canonicity, Judge Frank's approach emphasizes how opinions can also cultivate critical thinking and inspire action to rectify systemic deficiencies. More recently, scholars have proposed adopting similar criteria to Judge Frank's to gauge canonicity; for example, Michaela Hailbronner argues that judicial decisions in a global constitutional law canon should "serious[ly] engage[] with . . . substantive normative questions . . . from a global perspective."[150] Hailbronner also recommends canonizing decisions from those with "different and critical voices"; opinions "focusing on the role of law and courts in social change" as opposed to "discrete

148. *Quoted in* William O. Douglas, *Jerome N. Frank*, 10 J. LEGAL EDUC. 1, 4–5 (1957).

149. *Cf.* Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411, 414 (arguing that "baller judges" view cases as "opportunities . . . for shaping, revising, challenging, and ultimately defending first-order principles").

150. Hailbronner, *supra* note 83, at 250.

debates of principle"; and "decisions addressing key methodological questions at the core of our disciplines" (as "a subsidiary factor").[151] Black Lives Matter opinions fulfilling these criteria demonstrate how social movements can influence critical legal theory in practice by motivating judges to undertake an intellectual reconstruction of the law.

The opinions employ rhetorical strategies that flout conventions to reform the judicial opinion genre for racial justice. Three common techniques are: (1) providing a broader context for the case rooted in history; (2) questioning the idea of judicial omniscience coupled with centering the perspective of individuals from historically marginalized populations; and (3) critically evaluating legal sources while drawing on a broader array of authorities to advance claims. First, Black Lives Matter opinions often reframe legal issues implicating race in a wider historical context, with this expanded view of the problem informing the scope of proposed remedies.[152] The opinions resist arguments of history's irrelevance in resolving technical legal issues, and their candor has, at times, prompted backlash that includes charges of incivility and inflaming racial tensions.[153]

Furthermore, in calling attention to how perspective shapes judicial analysis, the opinions frequently humanize judges—whose experiences may constrain their understanding—and take the point-of-view of Black litigants striving to vindicate their rights.[154] The opinions therefore exemplify critical history, which Robert Gordon has defined as "any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present."[155]

---

151. *Id.*

152. Steven Wilf's distinction between thin and thick normativity captures Black Lives Matter opinion authors' broader ambitions: "Thin normativity is the usual kind practiced in the rarified atmosphere of law reviews: change the following provision to provide for a different outcome. Thick normativity is the shifting of lenses," "an arrow directing the is/ought distinction firmly in the direction of the ought." Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543, 562 (2011).

153. *See* Sharika Thiranagama, Tobias Kelly & Carlos Forment, *Introduction: Whose Civility?*, 18 ANTHROPOLOGICAL THEORY 153, 155 (2018) (noting that "[t]he history of civility is . . . intimately tied with class and race privilege," but not assuming civility is always problematic).

154. As legal realist Herman Oliphant once explained:

> Our social experience is limited to one class of people though we must govern all classes . . . . Individual temperament and our self-interest cause us, in the most subjective fashion, to select from the totality of our experience that which satisfies our temperament, and fortifies our interest. Thus but a small fraction of total social reality forms our attitudes and grounds our intuition of experience.

Herman Oliphant, *A Return to Stare Decisis*, 6 AM. L. SCH. REV. 215, 228 (1928). Second Circuit Judge Guido Calabresi applied Oliphant's insight in a Fourth Amendment case with a Black defendant, arguing that police "are permitted to use the most dubious of tactics not because courts are racist but because courts are 'care-less.' That is, we do not see, and so do not care, because we intuit that *that* kind of search or seizure won't happen to us." United States v. Weaver, 9 F.4th 129, 177 (2d Cir. 2021) (Calabresi, J., dissenting).

155. Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023,

Given the centrality of authoritative sources in judicial opinions, Black Lives Matter opinions also address issues in finding and interpreting sources. These challenges include the duality of precedents in a common law system, flaws in legal research infrastructure, and non-legal sources as tools for racial justice. Precedent in a common law system functions as a double-edged sword, with inequitable precedents perpetuating injustices;[156] however, ostensibly inequitable precedents may be adapted for equitable ends.[157] Black Lives Matter opinions themselves are a robust body of precedent, with majority opinions constituting governing law.

Some Black Lives Matter opinions highlight a more covert aspect of legal research, namely infrastructure, by applying theories from the rising critical legal research movement.[158] Critical legal researchers analyze how seemingly neutral legal research systems may exacerbate inequalities by "facilitat[ing] traditional legal thought and constrain[ing] novel approaches to law."[159] For example, indexes and key numbers may build on problematic existing categories, paratext like headnotes and case summaries may erase racial considerations, and legal research technology may replicate social biases.[160] Deconstructing the legal research process can reveal the underside

---

1024 (1997). Resonating with my discussion here, Gordon elaborates on his definition of critical history in the article as:

> any approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such of those as the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present.

Id.

156. *See* State v. Sum, 511 P.3d 92, 101 (Wash. 2022) (en banc) (admitting that while "many of this court's opinions concerning the civil rights and lived experiences of BIPOC [Black, Indigenous, and People of Color] have been deplorable . . . . [o]ur recent history has made notable strides toward recognizing and rejecting racial injustices").

157. *See, e.g.*, Green v. Thomas, 734 F. Supp. 3d 532, 562–64 (S.D. Miss. 2024) (Reeves, J.) (arguing that the Supreme Court's reasoning in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), which held the federal constitution provided no fundamental right to an abortion, could support the overturning of case law with a robust conception of qualified immunity for government officials). As a recent example of creative reinterpretation in the transgender rights context, a federal district court upheld a sorority's policy permitting transgender women to join based on the Supreme Court's rationale in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Westenbroek v. Kappa Kappa Gamma Fraternity, No. 23-CV-51-ABJ, 2023 U.S. Dist. LEXIS 152458, at *3 (D. Wyo. Aug. 25, 2023). In *Dale*, the Court deferred substantially to the Boy Scouts' decision to exclude a gay scoutmaster, reasoning that a contrary ruling would impinge on the organization's expressive associational rights under the First Amendment. Based on the same logic of organizational deference, the district court in *Westenbroek* held that "*Dale* controls today, interestingly with the shoe on the other foot." *Id*.

158. For an overview of critical legal research, see Nicholas F. Stump, *COVID, Climate Change, and Transformative Social Justice: A Critical Legal Research Exploration*, 47 WM. & MARY ENV'T L. & POL'Y REV. 147 (2022), and for a bibliography of the field, see Nicholas Mignanelli, *Legal Research and Its Discontents: A Bibliographic Essay on Critical Approaches to Legal Research*, 113 L. LIBR. J. 101 (2021).

159. Delgado & Stefancic, *supra* note 22, at 208.

160. *See generally* Symposium, *Critical Legal Research: The Next Wave (A Panel in Honor of*

of how opinions are constructed, prompting readers to reconsider the decisions and their own research methods. Lastly, many Black Lives Matter opinions tap into disciplines outside law that present alternative imaginaries of racial justice.[161]

While prior judicial opinions have utilized many of the rhetorical techniques above, Black Lives Matter opinions constitute a critical mass of decisions whose emergence is largely attributable to social movement activism. Several of these opinions are also distinctive in that their formal audacity differs not just in degree, but in kind, from earlier opinions regarded as iconic among scholars of race and the law.[162] The opinions

---

Richard Delgado and Jean Stefancic), 101 B.U. L. REV. ONLINE 1 (2021), https://www.bu.edu/bulawreview/2021/04/06/critical-legal-research-the-next-wave/*;* Grace Lo, *"Aliens" vs. Catalogers: Bias in the Library of Congress Subject Heading*, 38 LEGAL REFERENCE SERVS. Q. 170 (2019); Daniel Dabney, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 L. LIBR. J. 229 (2007); Jennifer Elisa Chapman, *Slave Cases and Ingrained Racism in Legal Information Infrastructures*, *in* ANTIRACIST LIBRARY AND INFORMATION SCIENCE: RACIAL JUSTICE AND COMMUNITY 107, 107–21 (Kimberly Black & Bharat Mehra eds., 2023); Michael A. Livermore et al., *Law Search in the Age of the Algorithm*, 2020 MICH. ST. L. REV. 1183. Moreover, database providers may be engaging in conduct some find ethically dubious. *See* Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255 (2019).

161. *See* Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157, 190–91 (discussing how Justice Sonia Sotomayor in *Utah v. Strieff*, 572 U.S. 232 (2016), "expands the constitutional canon in her dissent to . . . encourage greater attention to the voices and experiences of those who are often invisible in constitutional discourse, but whose perspectives and insights ought to inform such analyses"). *But see* Patrice D. Douglass, *On (Being) Fear:* Utah v. Strieff *and the Ontology of Affect*, 17 J. VISUAL CULTURE 332, 337 (2018) (critiquing the dissent for not fundamentally challenging the logic of anti-Blackness despite non-legal references). Scholars dispute the extent to which the external/internal distinction is useful in legal scholarship and the degree to which purportedly external sources can influence the law itself. *See* Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015); Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1109 (1997) (arguing that "[i]nformational changes will likely be insufficient to uproot centuries of law as a limited domain, but the forces of informational integration may be sufficiently powerful, and the nature of law sufficiently information- and source-dependent, that changes in the nature of legal information will produce changes in the nature of law").

162. Creative researching can unearth antecedents, such as this poignant passage from federal district court judge Gladys Kessler in a case alleging due process violations in administering the Medicaid public assistance program:

> This case is about people—children and adults who are sick, poor, and vulnerable—for whom life, in the memorable words of poet Langston Hughes, "ain't been no crystal stair[.]" It is written in the dry and bloodless language of "the law"—statistics, acronyms of agencies and bureaucratic entities, Supreme Court case names and quotes, official governmental reports, periodicity tables, etc. But let there be no forgetting the real people to whom this dry and bloodless language gives voice: anxious, working parents who are too poor to obtain medications or heart catheter procedures or lead poisoning screens for their children, AIDS patients unable to get treatment, elderly persons suffering from chronic conditions like diabetes and heart disease who require constant monitoring and medical attention. Behind every "fact" found herein is a human face and the reality of being poor in the richest nation on earth.

Salazar v. District of Columbia, 954 F. Supp. 278, 281 (D.D.C. 1996) (quoting LANGSTON HUGHES, *Mother to Son*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 30, 30 (Arnold Rampersad & David

frequently couch epistemological critiques of the law in literary language, appealing not only to legal experts but also to activists and the public at large through their eloquence.[163] Intermingling righteous outrage with hope,[164] these opinions attest to the judicial opinion's reparative potential, as demonstrated in the case studies below.

B. Illustrative Black Lives Matter Judicial Opinions

Black Lives Matter opinions combining formal innovation with substantive critiques represent a diverse corpus along dimensions including court level, opinion type, geographic area, and authorial identity. The opinions also span doctrinal fields, although they cluster in public law.[165] Given that official violence catalyzed the Black Lives Matter movement,[166] Fourth Amendment cases predominate both the case set and scholarship, but other notable case clusters implicate voting rights, fair trial rights, and constitutional and "ordinary" torts. Although these opinions vary doctrinally, they are intellectual kin at the formal and theoretical levels, exposing canonical injustices and reconstituting the genre to advance racial equality.

1. Elegiac Constitutionalism in Voting Rights Cases

In democracies, voting rights are conceived as a key to unlock other rights necessary for human flourishing; the denial of voting rights is thus an existential threat.[167] After the U.S. Civil War, for example, "[t]he right to vote was symbolic of the new life of black people during Reconstruction.

Roessel eds., 1994) (1922)).

163. Relatedly, Supreme Court Justice William J. Brennan, Jr., argued that the most "enduring dissents . . . . soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law." William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430–31 (1986).

164. *See generally* Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1205 (2012) (theorizing about judicial anger and discussing its benefits and drawbacks).

165. For more information on my research strategy, see *supra* note 22. I generally searched for genre-bending opinions that accord with the Black Lives Matter movement's aims. I specialize in public law, so the case set may in part reflect my own area of expertise.

166. CHRISTOPHER J. LEBRON, THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA xxiii (rev. ed. 2023).

167. *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (avowing "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); Hopkins v. Watson, 108 F.4th 371, 400 (5th Cir. 2024) (en banc) (Dennis, J., dissenting) (affirming that "to deny the right to vote is to render one without a say in the manifold ways the government touches his life").

The denial of the vote on account of race and the deepening of segregation became the central symbolic acts of a white counter-revolution that followed Reconstruction."[168] Voting rights have also been a barometer for the growth of democracy in the U.S., including the elimination of property qualifications for white men before the Civil War; a quartet of constitutional amendments expanding the right to vote to Black men, women, impoverished citizens, and young adults;[169] and the Voting Rights Act of 1965,[170] which collectively endeavored to align constitutional ideals with realities.[171] The recursive spate of restrictions on voting rights presents a counter-narrative to this uplifting account, though, with what Atiba Ellis terms a "politics of worthiness" determining who can actually vote.[172] Following the Supreme Court's decision in *Shelby County v. Holder* (2013), which curtailed a central provision of the Voting Rights Act,[173] states have enacted numerous laws constricting voting rights; as of September 2024, voters in at least thirty states faced new restrictions since the 2020 presidential election.[174] Meanwhile, Jim Crow era enactments like felony disenfranchisement laws remain valid in many states, disproportionately harming individuals from historically marginalized populations.[175]

---

168. Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 179 (E.D. Pa. 1974) (Higginbotham, J.) (quoting LOUIS R. HARLAN, BOOKER T. WASHINGTON: THE MAKING OF A BLACK LEADER, 1856–1901, at 288 (1972)).

169. The Fifteenth Amendment (1870) extended voting rights to Black men, the Nineteenth Amendment (1920) expanded the franchise to women, and the Twenty-Sixth Amendment (1971) granted eighteen to twenty-year-olds voting rights. The Twenty-Fourth Amendment (1964) banned poll taxes in federal elections and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), held that state poll taxes violated the Equal Protection Clause.

170. 52 U.S.C. § 10301-10702. On the Voting Rights Act's history, see CHARLES S. BULLOCK III, RONALD KEITH GADDIE & JUSTIN J. WERT, THE RISE AND FALL OF THE VOTING RIGHTS ACT (2016).

171. For an overview of voting rights history in the U.S., see ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT (2018).

172. Atiba R. Ellis, *The Voting Rights Paradox: Ideology and Incompleteness of American Democratic Practice*, 55 GA. L. REV. 1553, 1580 (2021); *see also* LAWRENCE GOLDSTONE, ON ACCOUNT OF RACE: THE SUPREME COURT, WHITE SUPREMACY, AND THE RAVAGING OF AFRICAN AMERICAN VOTING RIGHTS (2020) (critiquing the Supreme Court's Reconstruction-era jurisprudence involving state laws disenfranchising Black men).

173. *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013). Section 5 of the Voting Rights Act required jurisdictions with a history of racial discrimination in voting to receive preclearance from the Department of Justice or a federal district court in Washington, D.C., before implementing changes to voting procedures. *See* 52 U.S.C. § 10303. In *Shelby County*, the Court held that the formula used to determine which jurisdictions were subject to the Section 5 process was unconstitutional. *Shelby Cnty.*, 570 U.S. at 557. Congress has not enacted new legislation to remedy the constitutional deficiency since.

174. *Voting Laws Roundup: September 2024*, BRENNAN CTR. FOR JUST. (Sept. 26, 2024), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-september-2024.

175. *See* Neil L. Sobol, *Defeating De Facto Disenfranchisement of Criminal Defendants*, 75 FLA. L. REV. 287, 291 (2023) (noting "Blacks face a disenfranchisement rate 3.7 times greater than non-Blacks, with approximately one in sixteen Blacks of voting age denied the right to vote").

Several courts have recently upheld newer and older laws limiting the franchise, over formally subversive dissents grounded in elegiac constitutionalism.[176] The dissents mourn the loss of racial progress while seeking to revitalize the judicial opinion genre for a more equitable future. This section will analyze two exemplary dissents, Sixth Circuit Judge Damon Keith's dissent in *Northeast Ohio Coalition for the Homeless v. Husted* (2016), involving post-*Shelby* state statutes, and Fifth Circuit Judge James Graves, Jr.'s dissent in *Harness v. Watson* (2022), involving a felony disenfranchisement provision of the Mississippi Constitution of 1890.[177] The majority opinions and dissents clash over colorblindness as an appropriate metaphor for constitutional interpretation and how history should inform constitutional analysis. Notably, the dissenters turn to narratives of African American experiences as authority for their arguments about the perils of evading racial issues and the importance of history (i.e., not technical doctrine alone) for evaluating the constitutionality of laws with arguably racist origins. The dissents have implications beyond election law, addressing broader questions about methods of constitutional interpretation and the judiciary's role in curing laws passed with a discriminatory intent.

Northeast Ohio Coalition arose from a challenge to two Ohio bills enacted in 2014 with various restrictions applying to absentee, provisional, and in-person voters. Absentee and provisional voters faced more stringent standards for ballot approval and a shorter time frame to cure deficiencies or present valid identification, and in-person voters faced limits on poll worker assistance.[178] The state democratic party and organizations representing unhoused individuals sued to enjoin the laws, bringing claims under the First, Fourteenth, and Fifteenth Amendments and the Voting Rights Act.[179] While the district court held that the provisions at issue unduly burdened voting rights and disparately impacted racial minorities,[180]

176. *Cf.* Peter Lancelot Mallios, *Tragic Constitution: United States Democracy and Its Discontents*, 129 MOD. LANGUAGE ASS'N 708, 709 (2014) (discussing a "'tragic' turn in constitutional scholarship").

177. Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 638 (6th Cir. 2016) (Keith, J., dissenting); Harness v. Watson, 47 F.4th 296, 317 (5th Cir. 2022) (en banc) (Graves, J., dissenting), *cert. denied*, 143 S. Ct. 2426 (2023); *see also* Hopkins v. Watson, 108 F.4th 371 (5th Cir. 2024) (en banc) (rejecting an Eighth Amendment challenge to the Mississippi Constitution's felony disenfranchisement provision, over a dissent by six judges).

178. *Ne. Ohio Coal.*, 837 F.3d at 619–20 (citing OHIO REV. CODE §§ 3505.24, 3505.181(B), 3505.182, 3505.183(B)(1), 3509.06(D)(3), 3509.07 (2014)).

179. Ne. Ohio Coal. for the Homeless v. Husted, No. 2:06-CV-896, 2016 WL 3166251, at *5 (S.D. Ohio June 7, 2016), *aff'd in part, rev'd in part*, 837 F.3d 612 (6th Cir. 2016).

180. *Id.* at *35–40, 46–53. While statistics of the unhoused population are often imprecise, the district court found that 70% of one plaintiff organization's in-person applicants were Black, *id.* at *6, and a 2016 article noted that three-quarters of families served by homeless shelters in the state's most populous county were Black, Rita Price, *Why Do Black Families Make Up So Much of Central Ohio's*

the Sixth Circuit held that only a provision requiring perfection in completing an absentee ballot identification envelope's address and birthdate fields violated the Fourteenth Amendment's Equal Protection Clause.[181] On the Voting Rights Act claims, the majority held that the plaintiffs lacked empirical evidence of a disparate impact on racial minorities and that requiring voters to complete address and birth date fields did not constitute an illegal literacy test.[182] For the Equal Protection Clause claim based on undue burden, the majority's analysis turned on how it weighed the voters' burdens against the state's interests. The majority balanced the burden on all Ohio voters, not just unhoused and illiterate voters, against the state's interests, arguing that "[z]eroing in on an abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst."[183] The majority also rejected Equal Protection Clause claims alleging a lack of uniform standards[184] and intentional discrimination.[185]

The late Judge Damon Keith (1922–2019), an African American judge who had previously issued landmark rulings in cases involving school desegregation, employment and housing discrimination, and civil liberties,[186] penned a compelling dissent in the case. While the majority opinion had begun conventionally by summarizing the contested provisions and the court's rulings, Judge Keith framed the dissent within the broader context of voting rights history: "Democracies die behind closed doors. By

---

Homeless Population?, COLUMBUS DISPATCH (Dec. 6, 2016, 10:33 AM), https://www.dispatch.com/story/news/2016/12/06/why-do-black-families-make/22749869007/.

181. *Ne. Ohio Coal.*, 837 F.3d at 637 (referencing U.S. CONST. amend. XIV, § 1).

182. *Id.* at 627–30.

183. *Id.* at 631 (citing Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding Indiana voter identification law)).

184. *Id*. at 635–36. The majority also rejected a related Due Process Clause claim. *Id.* at 637.

185. *Id*. Regarding intentional discrimination, the majority held that while a "racially tinged statement by one legislator" who purportedly questioned "whether the General Assembly 'should . . . be making it easier for those people who take the bus after church on Sunday to vote' is troubling," the record as a whole did not demonstrate "that the General Assembly acted with racial animus." *Id.* District court judge Algenon Marbley had found the legislation's timing dubious but also agreed that the evidence failed to demonstrate discriminatory intent:

> Make no mistake: the Court is deeply troubled by the flurry of voting-related legislation introduced during the time period in question, all of which sought to limit the precious right to the franchise in some manner, and most of which was a peripatetic solution in search of a problem. The Court agrees, moreover, that the Republican-controlled General Assembly's frenetic pace of introducing such legislation reflects questionable motives, given the wealth of other problems facing the state which actually needed solutions. If the dog whistles in the General Assembly continue to get louder, courts considering future challenges to voting restrictions in Ohio may very well find that intentional discrimination is afoot.

Ne. Ohio Coal., 2016 WL 3166251, at *45.

186. For a biography of Judge Keith, see PETER J. HAMMER & TREVOR W. COLEMAN, CRUSADER FOR JUSTICE: FEDERAL JUDGE DAMON J. KEITH (2014), and for a documentary, see WALK WITH ME: THE TRIALS OF DAMON J. KEITH (2016).

denying the most vulnerable the right to vote, the Majority shuts minorities out of our political process . . . . I am deeply saddened and distraught by the court's deliberate decision to reverse the progress of history. I dissent."[187]

In the following section, rather than beginning with the case's facts, the dissent presented historical background in an unconventional form for a judicial opinion: eleven pages containing a gallery of martyrs slain during the civil rights revolution.[188] Each entry in the gallery includes a photograph and short vignette of the circumstances leading to the tragic death. In referencing Jimmie Lee Jackson, whose murder by Alabama state troopers propelled activism for the Voting Rights Act (**figure 1**),[189] the dissent connected civil rights history to the case at bar. Judge Keith explained that he included the "publicly available historical statements to humanize the struggle for the right to be equal participants in the democratic process" but noted that even the pictorial-textual form failed to "capture the full horror" of violent white supremacy.[190] The opinion drew upon a long history of cataloguing in African American literature, including through the form of the elegy, to remember those who would otherwise be erased by history.[191] Judge Keith also essentially embedded the Civil Rights Memorial in his opinion, with a large overlap between the forty-one names in that memorial and the thirty-seven names listed in the opinion.[192]

---

187. *Ne. Ohio Coal.*, 837 F.3d at 638 (Keith, J., dissenting) (citation omitted).

188. *See id.* at 640–50. Judge Keith explained that he sought to "give full context to the legal analysis of the issues presented in this case as well as full historical contextualization of the facts." *Id.* at 639 n.2.

189. *Id.* at 646.

190. *Id*. at 639 & 639 n.2.

191. *See* BRITTANY COOPER, BEYOND RESPECTABILITY: THE INTELLECTUAL THOUGHT OF RACE WOMEN 26 (2017) (discussing Black women using lists as "a practice of resistance against intellectual erasure"); Michael Lackey, *The Dynamics of Social Injustice in Biofiction: A Conversation with Claudia Rankine*, 56 AFR. AM. REV. 289, 292 (2023) (explaining African American poet Claudia Rankine's reasons for cataloguing Black victims of police violence in her multi-generic elegy *Citizen* (2014)).

192. *See Ne. Ohio Coal.*, 837 F.3d at 640–50 (Keith, J., dissenting); *Civil Rights Martyrs*, S. POVERTY L. CTR., https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs (last visited Nov. 23, 2024); *see also* DAVID W. WALKER, THE BLACK PANTHER PARTY: A GRAPHIC NOVEL HISTORY 12–14 (2021) (featuring a similar gallery of martyrs as the opinion).

	In 1964, **James Earl Chaney, Andrew Goodman, and Michael Henry Schwerner,** young civil rights workers, were arrested by a deputy sheriff and then released into the hands of Klansmen who had plotted their murders.[30] They were shot, and their bodies were buried in an earthen dam.[31]
	In 1964, **Lt. Col. Lemuel Penn**, a Washington, D.C., educator, was driving to D.C. from Georgia when he was shot and killed by Klansmen in a passing car.[32]
	In 1965, **Jimmie Lee Jackson** was beaten and shot by state troopers as he tried to protect his grandfather and mother from a trooper attack on civil rights marchers.[33] His death led to the voting rights march and the eventual passage of the Voting Rights Act.[34]

[30] Paula C. Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*, 17 Berkeley J. Afr.-Am. L. & Pol'y 377, 384 (2015).

[31] *Id.*

[32] Michal R. Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*, 33 Emory L.J. 93, 102-03, 129, 132 (1984).

[33] Paula C. Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*, 17 Berkeley J. Afr.-Am. L. & Pol'y 377, 386 (2015).

[34] *See id.* at 386-89.

FIGURE 1

The remainder of the opinion's main body comported with genre conventions, including a factual background section, a summary of the challenged laws, and an analysis of apparent legal errors in the majority's

decision, although using more impassioned rhetoric than is typical.[193] The dissent concluded by returning to the historical frame, particularly the theme of racial retrenchment and the importance attributed to voting dating back to the "Founding Fathers," as "who gets to vote inevitably affects who will become our leaders."[194] Judge Keith panned out to consider the court's legacy within narratives of national formation and ended on a pessimistic note, expressing his "hope that when future generations look back on these decisions, they conclude that we were on the right side of history. But today I fear that we were not."[195]

The majority's response to the dissent evidences a myopic view of legal epistemology by suggesting the relative irrelevance of history for doctrinal analysis in voting rights cases:

> We deeply respect the dissent's recounting of important parts of the racial history of our country and the struggle for voting rights, and we agree that this history may always be appropriately borne in mind. However, that history does not without more determine the outcome of today's litigation over voting practices and methods. The legal standards we must follow are set out in the cases we discuss concerning the standards embodied in the Fourteenth Amendment and Section 2 of the Voting Rights Act.[196]

The dissent's presentation of a history of white supremacist violence in suppressing civil and political rights is here implicitly cast as a dubious appeal to emotion,[197] with the law itself (and not people) being "embodied"; doctrine enables courts to evade the complexities of racial history.

---

193. Summarizing his criticisms of the majority opinion, Judge Keith asserted that "[t]he Majority applies the wrong legal tests, misapprehends the basic concept of disproportionality, and applies the wrong standard of review. Most disturbingly, the Majority substitutes its own view of the record for the carefully decided and supported factual findings of the district court." *Ne. Ohio Coal.*, 837 F.3d at 666–67 (Keith, J., dissenting). For the Voting Rights Act claim, the dissent would have considered the aggregate impact of the disputed provisions on vulnerable populations in evaluating disparate impact, in addition to accounting more fully for "the interplay of structural inequalities" when assessing undue burden. *Id.* at 657–59, 662–63. The dissent would also have evaluated the second prong of a vote-denial claim, "social and historical conditions," which the majority declined to analyze after finding the first disparate impact prong unmet. *Id.* at 627, 660–62. For the Equal Protection Clause claim, the dissent would have weighed the burden on voters and the state's interests differently than the majority based on similar reasoning as the Voting Rights Act claim analysis. *Id.* at 663–66.

194. *Id*. at 667.

195. *Id.*

196. *Id.* at 638 (majority opinion).

197. *Cf.* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1391 (2013) (positing scholarly and judicial "ambivalence toward the appropriate role of emotion in constitutional discourse").

Perhaps reflecting the majority opinion's view of history's relative irrelevance for the law, as well as the limits of legal research infrastructure, neither Lexis nor Westlaw by default properly depicts the dissent's gallery of martyrs. The electronic Lexis version has a distorted scroll-down with the text alone, and when I attempted to print the Lexis version, it in effect desecrated the dead by truncating photographs in the gallery.[198] Westlaw more accurately portrays the gallery, but only after tinkering with settings (e.g., column layout and footnote placement); the slip opinion, more than either legal database or the reporter, represents the gallery as Judge Keith likely intended.[199] Since few are likely to consult the slip opinion, though, the opinion's formal intrepidity in contesting the hegemony of text over images in legal discourse may be underappreciated.[200] Integrating images in a judicial opinion can enable a more multidimensional understanding of law, including in the racial justice context.[201] More broadly, this example demonstrates how the form in which readers encounter what seems to be the same opinion may influence interpretation, destabilizing the idea of a singular authoritative text constituting *the* judicial opinion.

Harness v. Watson similarly considers the role of history in constitutional interpretation, including issues of source legitimacy and how legal and political systems can atone for laws originally enacted with a racist intent. In *Harness*, two Black plaintiffs convicted of felonies, Roy Harness and Kamal Karriem, sued Mississippi's Secretary of State, alleging that the state constitution's felony disenfranchisement provision violated the Equal

198. Attempts to adjust formatting parameters to prevent the opinion from being mangled were unfruitful.

199. *See* Ne. Ohio Coal. for the Homeless v. Husted, Nos. 16-3603/3691, slip op. at 33–43 (6th Cir. Sept. 13, 2016) (Keith, J., dissenting).

200. *See* Linda Mulcahey, *Eyes of the Law: A Visual Turn in Socio-Legal Studies*, 44 J.L. & SOC'Y S111, S117 (2017) (discussing "a general reluctance on the part of lawyers to treat images seriously and ponder on the work they do in the legal system"). *But see* PETER GOODRICH, JUDICIAL USES OF IMAGES: VISION IN DECISION (2023) (systematizing how judges who are more receptive to the visual turn use images in their decisions).

201. *See* Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687 (2014) (historicizing the rise of visual persuasion in U.S. law and noting benefits and drawbacks of images in the discipline). For an example of a dispute between judges arising over the inclusion of an image in a judicial opinion, see Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019), *abrogated by* City of Grants Pass v. Johnson, 603 U.S. 520 (2024). Ninth Circuit Judge Marsha Berzon criticized a dissenting colleague for including an unattributed photograph of a sidewalk encampment in his opinion, which castigated the court's expansive interpretation of the Eighth Amendment in the context of unhoused individuals' rights. *See id.* at 589 (Berzon, J., concurring), 597 (Smith, J., dissenting).

Protection Clause.[202] The parties agreed that at the time of initial enactment in 1890, the state constitutional convention was motivated by racism, excluding crimes perceived to be committed more by whites and including those thought to be committed more by Blacks.[203] However, the provision had been amended by the legislature and approved by voters in 1950 and 1968, which according to the state showed that the provision had been re-enacted and purged of its white supremacist taint.[204]

Sitting en banc, the Fifth Circuit affirmed the district court's grant of summary judgment for the state, rejecting the idea of subsequent legislatures being responsible for the intent of prior ones under circumstances like the present case, namely where voters had also approved the amendments and the plaintiffs had not presented sufficient evidence of racism motivating the later enactments.[205] Three themes underlie the *per curiam* opinion: a repudiation of the inherited legislative guilt theory, an emphasis on proof of conformance with procedures absolving the state of liability, and a fear of remedial problems from a contrary ruling. First, the opinion assumes legislative good faith and is replete with quasi-religious

---

202. Harness v. Watson, 47 F.4th 296, 302 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2426 (2023). The plaintiffs also brought a Fifteenth Amendment claim, *see id.*, but the court's analysis focused on the Equal Protection Clause claim under the Fourteenth Amendment. The Supreme Court has interpreted Section Two of the Fourteenth Amendment, which permits states to deny voting rights to those who participate "in rebellion, or other crime," as affirmatively sanctioning felony disenfranchisement. *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

203. *Harness*, 47 F.4th at 300–01. The provision was adopted during a period historian Rayford Logan would later term the nadir of race relations. *See* RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877–1901 (1954). A 2018 study calculated that almost 60% of individuals disenfranchised in the state over the past thirty years were Black while approximately 36% of the state's population was Black as of 2020. *Who Can and Can't Vote in Mississippi: A Guide to the State's Lifetime Ban*, MARSHALL PROJECT (July 24, 2024, 4:10 PM), https://www.themarshallproject.org/2024/03/25/mississippi-voting-rights-ban-felony-conviction.

204. *See Harness*, 47 F.4th at 300–04. The 1968 provision, coupled with a 1972 amendment lowering the voting age from twenty-one to eighteen, refers to mentally challenged people in pejorative terms and remains operative today. The provision reads in part:

> Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector . . . .

MISS. CONST. art. XII § 241 (West, Westlaw through July 1, 2024 amendments). Also of historical relevance, a "good moral character" provision was repealed in 1965, *see The Constitution of the State of Mississippi*, MISS. SEC'Y OF STATE, https://www.sos.state.ms.us/ed_pubs/constitution/constitution.asp (last visited Nov. 23, 2024), and voter fraud was added as a disenfranchising felony in 2021, *see Harness*, 47 F.4th at 302 n.10.

205. *See Harness*, 47 F.4th at 310–11. Ten of the seventeen judges hearing the case voted to uphold the provision, including one concurrence, and seven judges dissented; the principal dissent, joined by four judges, was filed by Judge Graves.

references to later legislatures not inheriting the "sins of the father" and having the ability to "cleanse" a law "of its previous discriminatory taint."[206] As Black representation in Mississippi's legislature declined precipitously between 1876 and 1894, white supremacist legislators sought to expel Black men from politics through the state constitution or to resort to violence otherwise.[207] Within this context, the judicial rhetoric evokes Thomas Ross's theory of "white innocence," which includes an "insistence on the innocence or absence of responsibility of the contemporary white person."[208] The court cited state law to buttress its argument of a clear break between the legal past and present, noting that under Mississippi law, "constitutional amendments 'overrule[] prior interpretation[s], which become[] for all practical purposes relegated to history' and 'cease to exist.'"[209] In both law and life, though, this is a questionable proposition.[210]

The opinion also has a leitmotif of procedural redemption, with a deliberative process including stakeholders in "purposeful and race-neutral contemplation" being proof that the most recent version of the disputed provision was enacted lawfully.[211] Lastly, the court characterized the plaintiffs' proposed remedy, "that a state constitutional amendment must be voted on word for word to avoid any vestigial racial taint," as "radically prescriptive," in essence federalizing requirements for purging "long-ago

206. *See id.* at 302–03, 306, 313. On the key issue of whether the provision had been re-enacted, and therefore purged of its discriminatory taint, or merely amended, the dispute between the majority and dissent turned in significant part on how to construe the state constitutional amendment process. Voters in 1950 were only asked to remove burglary as a qualifying crime, and in 1968, they were only asked to add rape and murder as qualifying crimes (which the plaintiffs did not challenge). Voters were never given an opportunity to vote on each original qualifying crime, although they were provided the full amended text when voting. *See id.* at 307–08, 323–24 (Graves, J., dissenting).

207. *See* DeeDee Baldwin, *The First Black Legislators in Mississippi*, MISS. HIST. NOW (July 2022), https://mshistorynow.mdah.ms.gov/issue/first-black-legislators-mississippi; *Harness*, 47 F.4th at 317–19 (Graves, J., dissenting).

208. Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 3 (1990), *quoted in* Brad Desnoyer & Anne Alexander, *Race, Rhetoric, and Judicial Opinions: Missouri as a Case Study*, 76 MD. L. REV. 696, 702 (2017); *see also* Kim Shayo Buchanan & Philip Atiba Goff, *Racist Stereotype Threat in Civil Rights Law*, 67 UCLA L. REV. 316 (2020) (discussing strategies judges may use to avoid being seen as racist individually or collectively (i.e., as part of a racial group)).

209. *Harness*, 47 F.4th at 309 (citation omitted). Moreover, Mississippi's constitutional history evidences open defiance of the Supreme Court's interpretation of the Equal Protection Clause immediately before and well after 1968. As Judge Ho's concurrence in *Harness* observed, state constitutional provisions requiring segregated schools and barring interracial marriages remained on the books until 1978 and 1987, respectively, despite *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967), holding such laws unconstitutional. *See Harness*, 47 F.4th at 313 n.2 (Ho, J., concurring).

210. *See* Washington v. Lambert, 98 F.3d 1181, 1187 (9th Cir. 1996) ("Notwithstanding the views of some legal theoreticians, as a practical matter neither society nor our enforcement of the laws is yet color-blind.").

211. *See Harness*, 47 F.4th at 310.

discrimination from revised or reenacted laws."[212] Much like the majority in *Northeast Ohio Coalition*, the court acknowledged that history could theoretically be pertinent to its analysis, but concluded that evidence of "the overall social and political climate in Mississippi in the 1950s and 1960s fails to carry plaintiffs' burden to prove that the 1968 amendment intentionally discriminated against black voters."[213] The court suggests that only temporally proximate history with a direct link to the doctrinal question is relevant.

In his concurrence, Judge James Ho similarly argued that any harms from the felony disenfranchisement provision were caused upstream and that racial disparities in disenfranchisement did not alone prove discrimination.[214] Casting himself as an heir to the first Justice Harlan in interpreting the Equal Protection Clause, Judge Ho then proclaimed:

> The Constitution promises equality of treatment, not equality of outcome. It does not ask whether we have too many people of a race, whether in a prison, at a workplace, or on a college campus. Rather, it asks only whether the law governs every citizen in the same manner, regardless of their race. The Equal Protection Clause enshrines color-blindness, not critical race theory.[215]

The concurrence here intervenes not only in jurisprudential debates, but in the culture war over critical race theory, which opponents perceive as a threat to sanguine narratives of national formation.[216] Judge Ho's vision of the Constitution centers on formal equality, in contrast to the substantive equality principle at the heart of Judge James Graves, Jr.'s dissent.

Like Judge Keith in *Northeast Ohio Coalition*, Judge Graves opened his dissent provocatively, challenging the majority's interpretation of history:

> Today the en banc majority upholds a provision enacted in 1890 that was expressly aimed at preventing Black Mississippians from voting.

---

212. *Id*. at 308; *cf.* McCleskey v. Kemp, 481 U.S. 279, 315 (1987) (articulating a slippery slope concern in the capital punishment context, based on the logic that if the Court accepted the "claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty").

213. *Harness*, 47 F.4th at 309.

214. *Id.* at 315–16 (Ho, J., concurring).

215. *Id.* at 316.

216. *See generally* Jonathan Butcher & Mike Gonzalez, *Critical Race Theory, the New Intolerance, and Its Grip on America*, HERITAGE FOUND. (Dec. 7, 2020), https://www.heritage.org/civil-rights/report/critical-race-theory-the-new-intolerance-and-its-grip-america (arguing that critical race theory is inimical to American civic identity and that the ideal of "color-blind equality" fulfills the true vision of mid-twentieth century civil rights activists).

> And it does so by concluding that a virtually all-white electorate and legislature, otherwise engaged in massive and violent resistance to the Civil Rights Movement, "cleansed" that provision in 1968. Handed an opportunity to right a 130-year-old wrong, the majority instead upholds it. I respectfully dissent.[217]

Judge Graves argued that the relevant time to assess intent was 1890, but in the alternative, the plaintiffs had presented sufficient evidence that the legislature and electorate acted with discriminatory intent in 1968 to create a genuine issue of material fact precluding summary judgment for the state.[218] The dissent's core was a counter-narrative to the majority's account of the legislature's and electorate's intent in 1968 and related post-ratification history. Judge Graves asserted that "[e]ven a cursory review of Mississippi history leading up to 1968 demonstrates that life for Black Mississippians in this era was little better than it had been for their grandparents in 1890."[219] The opinion detailed "a society-wide crusade to keep Black people as second-class citizens"; the state government's racist motivations for actions during the 1950s and 1960s; and the federal government's "inaction at best, and collusion with white supremacists at worst."[220] Judge Graves also suggested the lingering aftereffects of the Jim Crow period, noting that "Mississippi is currently home to the highest percentage of Black Americans of any state in the Union. And yet, Mississippi has not elected a Black person to statewide office since, unsurprisingly, 1890."[221] Echoing the *Northeast Ohio Coalition* majority's response to Judge Keith's dissent, the majority in *Harness* responded to Judge Graves's dissent by contending that it was "not blind to the state's deplorable history of racial discrimination," but that this history did not relate to the 1968 amendment at issue and was moreover outside the record.[222]

More boldly, Judge Graves's dissent then turned to a source even further removed from "the record": African American autobiography in the form of his own experiences coming of age in Jim Crow era Mississippi.

---

217. *Harness*, 47 F.4th at 318 (Graves, J., dissenting). Supreme Court Justice Ketanji Brown Jackson's dissent from the denial of certiorari in the case echoed Judge Graves: "So, at the same time that the Court undertakes to slay other giants [i.e., race-based affirmative action], Mississippians can only hope that they will not have to wait another century for a judicial knight-errant. Constitutional wrongs do not right themselves." Harness v. Watson, 143 S. Ct. 2426, 2428 (2023) (Jackson, J., dissenting).

218. *Harness*, 47 F.4th at 321–22 (Graves, J., dissenting).

219. *Id.* at 325.

220. *Id.* at 325, 331.

221. *Id.* at 318.

222. *Id.* at 309 (majority opinion).

Incorporating his life story into the opinion punctures the illusion of objectivity that judicial opinions are expected to maintain; as Sanford Levinson observes, "One of the few expectations regarding judicial opinions . . . is that they almost always will be written in a tone of impersonality suggesting that the legal materials themselves, rather than the personal desires of the judge, required the result in question."[223] Mindful of the perceived judicial impartiality norm, Judge Graves disclaimed relying on his personal experiences in deciding the case but admitted he "would be less than candid if I did not admit I recall them. Vividly."[224] The opinion depicts white supremacy as a specter haunting the judge from the time of his youth in 1963, when "a cross was burned on my grandmother's lawn, two doors down from where I grew up."[225] Later, despite *Brown*, the judge attended a racially segregated high school with subpar white teachers in the late 1960s and early 1970s.[226] The opinion next recounts Judge Graves's ascent through the state judiciary, eventually being appointed to the Mississippi Supreme Court before joining the Fifth Circuit. While this narrative of professional rise appears to epitomize the American Dream, the judge's opinion also recalls how the state's flag, which from 1894 until 2020 had a Confederate emblem, "flew above the court, flanked my bench, and nestled in my chambers."[227] Judge Graves ended by implicitly linking his personal account with the plaintiffs' plight; the following conclusion section begins: "Harness and Karriem are Black Mississippians who are disenfranchised and deprived of a right that is a cornerstone of our democracy."[228]

---

223. Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN LAW 187, 188 (Peter Brooks & Paul Gewirtz eds., 1996); *cf.* Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1230 (1995) (discussing how outsider scholars may seek to "supersede the type of self-effacing 'objectivity' exemplified in current legal theory and practice"); Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29, 34 (2017) (tracing a rise in "voices brief . . drawn from the lives of individuals who are strangers to the case").

224. *Harness*, 47 F.4th at 341 (Graves, J., dissenting).

225. *Id*.

226. *Id*.

227. *Id*. at 342. Other state flags also have links to the Confederacy. *See* Gillian Brockell, *7 State Flags Still Have Ties to the Confederacy*, WASH. POST (Sept. 10, 2023, 6:00 AM), https://www.washingtonpost.com/history/2023/09/10/confederate-state-flags/. Meanwhile, Mississippi's two statues in the U.S. Capitol honor Confederate leaders, and the state still commemorates Confederate Heritage Month in April. *See Statues by State*, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/apps/nshc/statues/state/ (last visited Nov. 23, 2024); Ashton Pittman, *Gov. Reeves Proclaims Confederate Heritage Month in Mississippi*, MISS. FREE PRESS (Apr. 15, 2024), https://www.mississippifreepress.org/governor-reeves-proclaims-confederate-heritage-month-in-mississippi/.

228. *Harness*, 47 F.4th at 342 (Graves, J., dissenting).

The dissent therefore crafts a "public narrative" weaving "a story of self, a story of us, and a story of now."[229] Like Judge Keith, Judge Graves believed that the majority had abdicated its responsibility to rectify constitutional wrongs,[230] and he subverted genre conventions to challenge the process of historical construction in judicial opinions. Both judges mined a counter-archive to present alternative narratives of how racism may impede voting rights, drawing explicitly on African American history and implicitly on the African American literary tradition. Dissenting in a 2020 case that upheld Florida's constitutional provision governing re-enfranchisement, Eleventh Circuit Judge Jill Pryor similarly evoked African American history and literature: "Nearly a century has passed since Langston Hughes pined for an America where 'opportunity is real' and '[e]quality is in the air we breathe.'"[231] A recent failed effort in Mississippi to re-enfranchise individuals convicted of non-violent felonies demonstrates that the quest for equal citizenship is ongoing,[232] but Judge Graves and Judge Keith's dissents lay the groundwork for activism by re-envisioning the judicial opinion form to fulfill Hughes's dream.

2. The Architecture of Justice in Fair Trial Rights Cases

Like voting rights, fair trial rights have heightened symbolic significance in democracies, and jury trials in particular enable citizens to participate directly in the democratic process. "Far from being a mere procedural formality, jury trials provide the citizens with the means to exercise their control over the Judicial Branch in much the same way that the right to vote ensures the citizens' ultimate control over the Executive and Legislative

---

229. *See* Marshall Ganz, *Leading Change: Leadership, Organization, and Social Movements, in* HANDBOOK OF LEADERSHIP THEORY AND PRACTICE 527, 540 (Nitin Nohria & Rakesh Khurana eds., 2010), *quoted in* Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 624 (2018).

230. *Harness*, 47 F.4th at 343 (Graves, J., dissenting).

231. Jones v. Governor of Fla., 975 F.3d 1016, 1107 (11th Cir. 2020) (Pryor, J., dissenting) (quoting LANGSTON HUGHES, *Let America Be America Again*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES, *supra* note 162, at 189, 190 which was originally published in 1936). For another dissent in the vein of *Northeast Ohio Coalition* and *Harness*, see Community Success Initiative v. Moore, 886 S.E.2d 216, 240–74 (N.C. 2023) (Earls, J., dissenting).

232. Grant McLaughlin, *Voting Bill, Which Would Have Helped Non-Violent Felons, Dies in MS Senate*, MISS. CLARION-LEDGER (Apr. 2, 2024, 7:17 PM), https://www.clarionledger.com/story/news/politics/2024/04/02/mississippi-suffrage-bill-dies-in-senate-committee-without-vote/73185077007/. *But see* Taylor Vance, *Measures Allowing Former Felons to Gain Voting Rights Clear House Committees*, MISS. TODAY (Feb. 5, 2025), https://mississippitoday.org/2025/02/05/measures-allowing-former-felons-to-regain-voting-rights-clear-house-committees/.

Branches."[233] Jury trial rights are enshrined in two constitutional provisions, with the Sixth Amendment establishing jury trial rights in criminal cases for non-petty offenses[234] and the Seventh Amendment guaranteeing civil jury trial rights "[i]n Suits at common law" with a sufficient amount in controversy.[235] Trials are moreover the most publicly salient aspect of the judicial system, and the setting and ritualistic aura of trials magnifies their impact, as "[a]ny violation of the symbol of a ceremonial trial rouses persons who would be left unmoved by an ordinary nonceremonial injustice."[236]

The architecture of justice includes courthouses and courtrooms, which are idealized spaces even as they are used for routine legal purposes. In William Faulkner's *Requiem for a Nun*, working-class whites and Blacks constructing a courthouse believe it

> was theirs, bigger than any because it was the sum of all, it must raise all of their hopes and aspirations level with its own aspirant and soaring cupola, so that, sweating and tireless and unflagging, they would look about at one another a little shyly, a little amazed, with something like humility too, as if they were realising, or were for a moment at least capable of believing, that men, all men, including

---

233. State v. Smith, 418 S.W.3d 38, 44–45 (Tenn. 2013). Moreover, the structure of a criminal jury trial in particular mirrors that of a typical democratic political system; the judge represents the judicial branch, the prosecutor represents the executive branch, and the jury represents the legislative branch.

234. The amendment reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ." U.S. CONST. amend. VI. Except for the Vicinage Clause, the amendment has been incorporated through the Fourteenth Amendment's Due Process Clause to apply to the states. *See* Ramos v. Louisiana, 590 U.S. 83, 93 (2020); Stevenson v. Lewis, 384 F.3d 1069, 1072 (9th Cir. 2004). Article III, section 2, relatedly states in part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. art. III, § 2.

235. The amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. The amendment has not been incorporated through the Fourteenth Amendment's Due Process Clause to apply to the states, but most state constitutions have civil jury trial provisions. *See* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1973); Fleming James, Jr., *Right to a Jury Trial in Civil Action*s, 72 YALE L.J. 655, 655 (1963).

236. THURMAN ARNOLD, THE SYMBOLS OF GOVERNMENT 142 (Yale Univ. Press 1937) (1935).

> themselves, were a little better, purer maybe even, than they had thought, expected, or even needed to be.[237]

Through erecting the courthouse, the workers imagine improving themselves as they help to build a better nation. Courtrooms similarly have value beyond merely providing a space for judicial processes to transpire. As Chief Justice Earl Warren once noted:

> [T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.[238]

Court architecture can convey messages to participants in the legal system, including about the likelihood of their receiving justice in a specific case and the fairness of the system itself. With the Black Lives Matter movement's emergence, criminal defense lawyers have filed several cases challenging Confederate memorabilia and judicial portraiture in courthouses, alleging that their Black clients' fair trial rights were compromised. This section will analyze dueling decisions on Confederate memorabilia from two state appellate court panels before evaluating a state trial judge's opinion letter, which cited African American literature as support for why portraiture of white judges could render the courtroom an unconstitutional white space.[239] Judges favoring defendants have accentuated Black perspectives in their opinions and shown how the appearance and reality of justice may intersect for those enmeshed in the legal system.

---

237. WILLIAM FAULKNER, REQUIEM FOR A NUN 44 (1919). A vast body of scholarship has analyzed the symbolism of court architecture more recently. *See, e.g.*, LINDA MULCAHY, LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS AND THE PLACE OF LAW (2010); JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011); COURTHOUSE ARCHITECTURE, DESIGN AND SOCIAL JUSTICE (Kirsty Duncanson & Emma Henderson eds., 2022); Bennett Capers, *The Racial Architecture of Criminal Justice*, 74 SMU L. REV. 405 (2021).

238. Estes v. Texas, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring) (citation omitted).

239. State v. Gilbert, No. M2020-01241-CCA-R3-CD, 2021 WL 5755018 (Tenn. Crim. App. Dec. 3, 2021) (Witt, J.); State v. Martin, No. M2021-00667-CCA-R3-CD, 2022 WL 3364793 (Tenn. Crim. App. Aug. 16, 2022); Commonwealth v. Shipp, No. FE-2020-8 (Va. Cir. Ct. Dec. 20, 2020) (Bernhard, J.) (opinion letter). For an overview of these cases and similar incidents in other jurisdictions, see John G. Browning, *Messaging Matters in the Courtroom*, JUDGES' J., Winter 2022, at 31, 31–33.

Litigation over Confederate memorabilia has abounded over the past few decades,[240] and the courthouse context presents especial concerns given racial disparities in the criminal justice system.[241] In 2016, an African American attorney who unsuccessfully challenged Mississippi's state flag, which then contained the Confederate emblem, echoed Judge Graves in arguing that he faced state-approved discrimination while at court.[242] Although the case was dismissed on standing grounds for lack of a cognizable injury, Judge Carlton Reeves powerfully explained why the emblem was so offensive as "a symbol of the Old Mississippi—the Mississippi of slavery, lynchings, pain, and white supremacy."[243] Judge Reeves asserted the emblem had "no place in shaping a New Mississippi, and is better left retired to history," but in a future case or through popular action.[244] Four years later, at the height of the Black Lives Matter movement, Judge Reeves's call was answered, with a commission being authorized to design a new flag.[245]

Yet in the birthplace of the first Ku Klux Klan, across from the courthouse in Giles County, Tennessee, memorabilia sponsored by the United Daughters of the Confederacy ("U.D.C.") pervaded a jury deliberation room until 2022.[246] The memorabilia resulted in contrasting decisions by panels of the Tennessee Court of Criminal Appeals, with a

240. While litigation involving Confederate monuments has been highly publicized, Confederate memorabilia lawsuits have also arisen in other contexts. *See, e.g.*, ROGER C. HARTLEY, MONUMENTAL HARM: RECKONING WITH JIM CROW ERA CONFEDERATE MONUMENTS (2021); Brown v. Nucor Corp., 576 F.3d 149 (4th Cir. 2009) (workplace flag displays); Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013) (clothing in public schools); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015) (license plates).

241. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (10th anniv. ed. 2020).

242. Moore v. Bryant, 205 F. Supp. 3d 834, 851 n.4, 854 (S.D. Miss. 2016), *aff'd*, 853 F.3d 245 (5th Cir. 2017); Harness v. Watson, 47 F.4th 296, 342 (5th Cir. 2022) (Graves, J., dissenting), *cert. denied*, 143 S. Ct. 2426 (2023). The plaintiff, Carlos Moore, subsequently became a municipal judge and removed the state flag from his courtroom on his first day in office. Doug Criss, *Black Judge Removes Mississippi Flag with Confederate Emblem from Court*, CNN (July 20, 2017, 12:02 PM), https://www.cnn.com/2017/07/20/us/mississippi-judge-flag-trnd/index.html. As of this writing, he is facing dismissal from office for violating the Code of Judicial Conduct for Mississippi Judges. Anthony Warren, *Oral Arguments to be Reset in Carlos Moore Judicial Performance Case*, WLBT3 (July 19, 2024, 2:41 PM), https://www.wlbt.com/2024/07/19/oral-arguments-be-reset-carlos-moore-judicial-performance-case/.

243. *Moore*, 205 F. Supp. 3d at 856–57. Confederate memorialization is linked not only to historical racial violence, but to contemporary anti-Black hate crimes. *See* Brendan Lantz, Marin R. Wenger & Zachary T. Malcom, *Historical Markers or Markers of White Supremacy? Confederate Memorialization, Racial Threat, and Hate Crime*, 71 SOC. PROBLEMS 334 (2024).

244. *Moore*, 205 F. Supp. 3d at 857–58.

245. *See Harness*, 47 F.4th at 341 (Graves, J., dissenting).

246. *See* State v. Martin, No. M2021-00667-CCA-R3-CD, 2022 WL 3364793, at *8 (Tenn. Crim. App. Aug. 16, 2022); Mariah Timms, *Giles County to Remove Confederate Memorabilia from Jury Room*, JACKSON SUN, June 24, 2022, at A3.

2021 panel holding that a Black defendant's fair trial rights were violated and a 2022 panel holding that no constitutional violation occurred.[247] The oldest memorabilia likely dated to the early twentieth century, but the door to the jury room, which was "inscribed 'U.D.C. Room' in gold paint" and contained the first national flag used by the Confederacy, dated to 2005.[248] The room's interior had a framed Confederate flag; portraits of Jefferson Davis, president of the Confederacy, and John C. Brown, a Confederate general; and a U.D.C. letter discussing the room's provenance.[249] The grand jury's foreman testified that during his eighteen-year tenure, interior decorations had not been discussed and the defendant's race had never openly influenced jurors' decision-making.[250]

Judge James Curwood Witt, Jr.'s opinion for the court in *State v. Gilbert* applied the government speech doctrine to demonstrate how racist symbols may undermine the justice system's integrity. Reversing the trial court, the *Gilbert* panel held that the jury room itself communicated "extraneous prejudicial information" warranting a new trial for defendant Tim Gilbert.[251] Although the U.D.C. owned the items, the court found that the location "clothe[d] all the items, including the flag in particular, with the imprimatur of state approval."[252] The court determined that "slavery and the subjugation of black people are inextricably intertwined with the Confederacy and the symbols thereof" and that "[s]uch ideals . . . are antithetical to the American system of jurisprudence and cannot be tolerated."[253] For Judge Witt and his colleagues, the jury could be deeply influenced by any perceived official communication from the court, and that while "the government may choose to convey any message that it wants to the general public, it may not convey *any* message at all to the jurors in a criminal trial."[254] The court's analysis

247. State v. Gilbert, No. M2020-01241-CCA-R3-CD, 2021 WL 5755018, at *20 (Tenn. Crim. App. Dec. 3, 2021) (Witt, J.), *appeal denied, designated not for citation* (Tenn. May 18, 2022); *Martin*, 2022 WL 3364793, at *5.

248. *Gilbert*, 2021 WL 5755018, at *13, 17; *see also Martin*, 2022 WL 3364793, at *5.

249. *Gilbert*, 2021 WL 5755018, at *13–14. For photographs of the jury room and a discussion of the cases' context, including Confederate memorabilia outside the courthouse, see Lucy Jewel, *See That in a Small Town: Visual Rhetoric, Race, and Legal History in Tennessee*, 15 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 1, 4–11, 24–35 (2023).

250. *Martin*, 2022 WL 3364793, at *7. The trial judge in *Gilbert* similarly suggested he had seen nothing problematic while being active in the local legal community for the past forty-three years. *Gilbert*, 2021 WL 5755018, at *15.

251. *Gilbert*, 2021 WL 5755018, at *19–20.

252. *Id*. at *17.

253. *Id*. at *16.

254. *Id.* at *18. The court presumably meant any message potentially compromising the jury's impartiality.

applies critical race theorists' idea of systemic racism[255] and rejects the proposition that the defendant had to prove individual bias to sustain a Sixth Amendment claim.

Contrastingly, based in part on the logic that proof of individual bias was necessary to sustain a Sixth Amendment claim, a different panel of the Tennessee Court of Criminal Appeals found no constitutional violation in *State v. Martin*.[256] The *Martin* panel took a narrower view of the memorabilia, holding that it "did not pertain to the Defendant, to any fact of the case [which involved drugs], or to the procedural or evidentiary rules that apply to a criminal trial."[257] Moreover, defendant Barry Jamal Martin's failure to show that specific jurors recognized the memorabilia demonstrated "no unequivocal rule of law was breached."[258] Even though the jury room's interior flag contained the familiar thirteen-star "Southern Cross" pattern, the panel rejected the claim of the memorabilia being inherently prejudicial, reasoning that "the average citizen" would be unlikely to know what the memorabilia signified.[259] Ultimately, after a public outcry, the state sent the memorabilia to the National Confederate Museum, which proclaims "no politically-correct politician or justice warrior can dictate what can be displayed in the museum or how it shall be interpreted."[260] Reflecting the political polarization surrounding Confederate commemorations,[261] judges who banish vestiges of the Lost

255. Systemic racism emphasizes the ingrained, structural nature of racism, as opposed to defining racism primarily in terms of individual prejudice. *See* Eduardo Bonilla-Silva, *What Makes Systemic Racism* Systemic?, 91 SOCIO. INQUIRY 509, 514, 519 (2021). The Tennessee Supreme Court subsequently designated the opinion "Not for Citation," though, suggesting the state high court's disapproval of the panel's reasoning. *See Gilbert*, 2021 WL 5755018, *appeal denied, designated not for citation* (Tenn. May 18, 2022).

256. The different standards of review in the cases likely contributed to the contrasting holdings, although the same memorabilia were at issue. The *Gilbert* panel applied plenary review while the *Martin* panel used the plain error standard, which defers more to the trial court; additionally, the *Martin* panel found evidence of the defendant's guilt more overwhelming than the *Gilbert* panel. *See Gilbert*, 2021 WL 5755018, at *13, 20; *Martin*, 2022 WL 3364793, at *9, 12.

257. *Martin*, 2022 WL 3364793, at *11.

258. *Id*.

259. *Id*. at *12.

260. Timms, *supra* note 246, at A3; *The National Confederate Museum: The Southern Perspective on the War between the States*, NAT'L CONFEDERATE MUSEUM, https://theconfederatemuseum.com/ (last visited Nov. 23, 2024). The museum opened in 2020 near the apex of Black Lives Matter activism.

261. *See* Corey Dickstein, *Restoring Fort Bragg, Other Confederate Case Names: Can Trump Keep His Campaign Promise?*, STARS & STRIPES (Jan. 16, 2025), https://www.stripes.com/theaters/us/2025-01-16/army-bases-confederate-names-trump-16501423.html.

Cause have faced death threats and official opposition while winning awards for their courage.[262]

More expansively, a Virginia trial court judge in *Commonwealth v. Shipp* held that an array of white judicial portraits "peering on an African American defendant" during a jury trial would compromise the defendant's fair trial rights.[263] The metaphor of sight undergirds *Shipp*, including Black defendants' perceptions of justice and public views of judicial legitimacy. For Judge David Bernhard, the issue in *Shipp* was not whether the judges portrayed were overtly racist against African Americans, but whether the portraits could "serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of less standing in the dispensing of justice."[264] Judge Bernhard acknowledged the controversy over what is popularly termed "cancel culture," noting: "The low hanging rotten fruit of overt racism is easily identified and picked off to strengthen the tree of society. The more conventional symbols which to some impart tradition, and to others subtle oppression, are less comfortably addressed."[265] The opinion discussed how Black Lives Matter activism had prompted a judicial reckoning, which included recognizing how the underrepresentation of

---

262. *See, e.g.*, Matt Reynolds, *Reframing History: Judicial Portraits and Confederate Monuments Stir Debate on Bias in the Justice System*, A.B.A. J., Aug.–Sept. 2021, at 16, 17 (discussing Virginia judge Martin F. Clark, Jr.'s experiences after ordering the removal of Confederate General J. E. B. Stuart's portrait from the Patrick County Circuit Court's courtroom); *Judge Clark to Receive Carrico Professionalism Award*, VA. LAWS. WKLY. (Jan. 26, 2018), https://valawyersweekly.com/2018/01/26/judge-clark-to-receive-carrico-professionalism-award/. In an order and memorandum for the removal, Judge Clark posed a hypothetical of how white criminal defendants would feel if they were surrounded by Black officials and portraits while on trial. Martin F. Clark, Jr., *Order and Memorandum*, to Tom Rose et al., at *2 (Va. Cir. Ct. Sept. 1, 2015). Judge Clark concluded by listing reasons for his personal pride in contemporary Southern culture and ended the order with the declaration, "[t]hat's *my* Southern heritage, and it's far, far distant from the battlefields of the 1860s." *Id.* at *4; *cf. A Black Mississippi Judge's Breathtaking Speech To 3 White Murderers*, NPR (Feb. 13, 2015, 12:54 PM), https://www.npr.org/sections/codeswitch/2015/02/12/385777366/a-black-mississippi-judges-breathtaking-speech-to-three-white-murderers (noting the apparent irony of Black officials in the criminal justice system overseeing the prosecution and imprisonment of three defendants who yelled "white power" after killing a Black man).

263. Commonwealth v. Shipp, No. FE-2020-8, at *1–2 (Va. Cir. Ct. Dec. 20, 2020) (Bernhard, J.) (opinion letter). Forty-five of forty-seven portraits in the Fairfax Circuit Court courthouse, where the judge presided, were of white judges; the first African American was elected to the court in 1990, and the first woman of color joined in 2021. *Id.* at *4–5.

264. *Id.* at *2. That observed, the defense's motion in the case noted that the author of the Virginia Supreme Court's opinion in *Loving v. Commonwealth*, 147 S.E.2d 78 (Va. 1966), *rev'd sub nom. Loving v. Virginia*, 388 U.S. 1 (1967), which upheld the state's ban on interracial marriage, was among those honored with a portrait. Motion to Remove Portraiture Overwhelmingly Depicting White Jurists Hanging in Trial Courtroom, at 1, Commonwealth v. Shipp, No. FE-2020-8 (Va. Cir. Ct. Dec. 17, 2020).

265. *Shipp*, No. FE-2020-8, at *5. Josh Blackman suggests how portrait removal may impact legal canons, noting that Supreme Court Chief Justice John Marshall owned enslaved people and that portrait removal may indicate that the Chief Justice's opinions should no longer be cited. *See* Reynolds, *supra* note 262, at 17.

judges of color on the bench may corrode judicial legitimacy.[266] For Judge Bernhard, judicial legitimacy was also tied to perceptions of procedural fairness, as "a good process tends to yield the most just result."[267] In *Shipp*, the interest in "honoring past colleagues" ultimately did not outweigh the defendant's fair trial rights and the court's interest in upholding judicial canons.[268]

Like the *Gilbert* court, the *Shipp* court viewed case facts through the prism of systemic racism, but Judge Bernhard also incorporated Black voices in his opinion by quoting African American literature. The opinion commented that "[w]hile to some the issue of portraits may be a trivial matter, to those subject to the justice system, this is far from the case."[269] An extensive passage from former death row inmate Anthony Ray Hinton's memoir *The Sun Does Shine: How I Found Life, Freedom, and Justice* followed.[270] In the memoir, Hinton recounted entering an Alabama courtroom in 1986 and encountering "a sea of white faces. Wood walls, wood furniture, and white faces. The courtroom was impressive and intimidating. I felt like an uninvited guest in a rich man's library. . . . It made me feel like my very soul was put on trial and found lacking."[271] Alienation in the courtroom can signal exclusion from democratic spaces more broadly, but through building the architecture of justice in courtrooms and opinions, jurists like Judge Witt and Judge Bernhard have charted a path for reconstructing American democracy.

3. The Quest for Reparations in Constitutional Torts Cases

In addition to the voting rights and fair trial rights contexts, Black Lives Matter judicial opinions have arisen in the context of torts claims, with

---

266. *See Shipp*, No. FE-2020-8, at *4–5. The impact of Black Lives Matter activism on judicial decision-making is also referenced in another Virginia trial court opinion letter. In that case, the court had initially deemed the removal of Confederate General Robert E. Lee's portrait a political issue. After state legislation in the wake of George Floyd's murder, though, the court ordered the portrait's removal while nonetheless permitting the portraits of three other Confederate officers likely less well-known to the public to remain on display in a courtroom. *See* Commonwealth v. Murphy, Nos. CR16000204-01 to -05, CR16000239-01 to -02 & CR17000054-00, at *2–3 (Va. Cir. Ct. Sept. 10, 2020) (opinion letter); *see also* Emily Hambourger & Ian Mance, *Lawyers Must Challenge Racist Symbols in Courthouse Spaces*, N.C. ADVOCS. FOR JUST. (Feb. 2, 2022), https://www.ncaj.com/news/lawyers-must-challenge-racist-symbols-in-courthouse-spaces (referencing the Supreme Court of North Carolina's decision to remove a portrait of former Chief Justice Thomas Ruffin, an enslaver, from its courtroom).

267. *Shipp*, No. FE-2020-8, at *6.

268. *Id*. at *2, 5–6.

269. *Id.* at *6.

270. *Id.* at *6–7 (discussing ANTHONY RAY HINTON, THE SUN DOES SHINE: HOW I FOUND LIFE, FREEDOM, AND JUSTICE (2019)).

271. *Id.* at *7 (quoting HINTON, *supra* note 270, at 6).

"Living While Black" incidents often spurring litigation.[272] Seemingly mundane encounters between police and African Americans have often escalated to the point of death, resulting in cases alleging Fourth Amendment violations and, where applicable, wrongful death under state law. The doctrine of qualified immunity, which shields officials from liability where the right at issue is not "'clearly established' at the time of [the] defendant's alleged misconduct," has stymied many constitutional claims.[273] Moreover, wrongful death statutes not originally passed with the intent to encompass police brutality claims may be a doctrinal mismatch without creative lawyering.[274] While conventional structures of judicial analysis may marginalize victims' narratives in such civil rights cases,[275] Black Lives Matter opinions have used formally subversive techniques to center victims' perspectives, present progressive stories of how doctrine may develop, and highlight deficiencies in the legal research ecosystem on

---

272. The phrase "Living While Black" captures "the explicit and implicit racism that is part of Black people's quotidian experience." Jamila Jefferson-Jones, *"Driving While Black" as "Living While Black,"* 106 IOWA L. REV. 2281, 2282 (2021). For illustrative Black Lives Matter judicial opinions analyzing "Living While Black" incidents that gave rise to Fourth Amendment claims, see United States v. Kelly, 481 F. Supp. 3d 862 (S.D. Iowa 2020) (walking while Black); Bey v. Falk, 946 F.3d 304, 322–35 (6th Cir. 2019) (Clay, J., dissenting) (shopping while Black); United States v. Warfield, 727 F. App'x 182 (6th Cir. 2018) (driving while Black in the adult context); *In re* Edgerrin J., 57 Cal. App. 5th 752 (2020) (driving while Black in the juvenile context).

273. Pearson v. Callahan, 555 U.S. 223, 232 (2009); JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 71–92 (2023) (critiquing qualified immunity doctrine as a nearly insuperable bar for plaintiffs, given the tight precedential analogies required to sustain a claim and limits on which opinions have precedential value).

274. Wrongful death statutes originated in the nineteenth century to address a rise in fatal workplace accidents. *See* B.B. v. Cnty. of Los Angeles, 471 P.3d 329, 349–50 (Cal. 2020) (Liu, J., concurring). Concurring in *B.B.*, California Supreme Justice Goodwin Liu observed that the wrongful death tort could provide compensation to the family of a Black man who was asphyxiated by a police officer, but Justice Liu also noted that the tort's elements did not fully account for history in the racial justice context and that the family's other legal claims faced major hurdles. *Id.* at 350–52 (Liu, J., concurring).

275. *See* Anne E. Ralph, *Qualified Immunity, Legal Narrative, and the Denial of Knowledge*, 65 B.C. L. REV. 1317, 1323 (2024) (arguing that "[b]y excluding civil rights plaintiffs' stories and by closing the metaphorical courthouse doors to them, contemporary qualified immunity doctrine renders 'hollow' the promises of civil rights law and public perceptions of justice") (citation omitted).

which opinions rely. This section will evaluate two Section 1983 cases[276] that endeavor to repair the judicial opinion form,[277] and therefore to facilitate substantive reparations for plaintiffs and the Black community generally.

In the first opinion, *Estate of Jones v. City of Martinsburg*, Fourth Circuit Judge Henry Floyd's opinion for a unanimous panel began with the following tragic factual exposition:

> In 2013, Wayne Jones, a black man experiencing homelessness, was stopped by law enforcement in Martinsburg, West Virginia for walking alongside, rather than on, the sidewalk. By the end of this encounter, Jones would be dead. Armed only with a knife tucked into his sleeve, he was tased four times, hit in the brachial plexus, kicked, and placed in a choke hold. In his final moments, he lay on the ground between a stone wall and a wall of five police officers, who collectively fired 22 bullets.[278]

The first line emphasizes Jones's vulnerability and the trivialness of the alleged violation leading to his death, while the repetition of "wall" in the last line underscores Jones's relative powerlessness. This framing then informs the court's holding that because the law clearly establishes that "officers may not shoot a secured or incapacitated person," the officers here

---

276. Section 1983, part of the Ku Klux Klan Act of 1871, is a procedural vehicle for federal constitutional claims against state and local government officials and against local governmental entities pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The statute provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. The Supreme Court has also implied a cause of action for plaintiffs suing federal officials, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971), but this cause of action for a deprivation of constitutional rights has been constrained over time, *see* Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based* Bivens *Claims*, 96 NOTRE DAME L. REV. 1835, 1836 (2021).

277. *See* Est. of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir. 2020) (Floyd, J.); Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (Reeves, J.).

278. *Est. of Jones*, 961 F.3d at 663. The court speculated that Jones, who was schizophrenic, may have been walking on the road to avoid "dark shadows and blind corners of buildings at night." *Id.* at 671. The court likely discounted officers' testimony that Jones had moved an officer's hat and sharply poked an officer with a knife, in light of a recording in which officers said they would "have to gather some f**ing story" after the incident. *Id.* at 664–65.

were "not entitled to qualified immunity."[279] After analyzing the incident legally, the court turned to a narrative analysis, challenging the defendants' portrayal of Jones "as a fleeing armed, suspect who was not cooperating with law enforcement."[280] Instead, the court stated: "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."[281]

The "we" pronoun draws readers into the narrative of the opinion, which closes by situating the case amidst other incidents catalyzing the Black Lives Matter movement:

> Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept.[282]

Earlier, the opinion had observed that "luckily for many of us," being "'armed' with a small knife" alone does not justify law enforcement using deadly force.[283] On a personal level, then, the opinion prompts readers to reflect on their own proximity to death when interacting with law enforcement, and on a social level, the opinion encourages readers to relate Jones's death to other tragedies inspiring Black Lives Matter activism. In referencing "the dignity and worth of black lives," the opinion incorporates

279. *Id*. at 668. The court had "previously held that a jury could find that the officers violated Jones's Fourth Amendment right to be free from excessive force"; thus, the appeal centered on whether the officers were nonetheless entitled to qualified immunity because the right was not clearly established at the time of the alleged violation. *Id.* at 667.

280. *Id*. at 670.

281. *Id*. at 671.

282. *Id*. at 673.

283. *Id*. at 671.

the movement's rhetoric and casts the judiciary as a movement ally through legal interpretation propelling the plaintiffs' quest for justice.[284]

Judge Carlton Reeves's opinion in *Jamison v. McClendon*, whose introduction quotes from *Estate of Jones*,[285] may be the Black Lives Matter judicial opinion *par excellence* for its formal boldness and layers of meta-critique.[286] *Jamison* resulted from a white police officer's stop and search of Black plaintiff Clarence Jamison's car in Pelahatchie, Mississippi (approximately a half-hour from the state capital, Jackson).[287] The officer, Nick McClendon, purportedly stopped Jamison because the temporary tag on Jamison's car was folded and thus not visible.[288] From there, a nearly two-hour stop ensued during which McClendon had checks run on Jamison and the car, and McClendon also allegedly seriously damaged the car during a search.[289] Jamison then sued McClendon and the city of Pelahatchie, claiming that the defendants had violated his Fourth Amendment right to be free from unreasonable searches and that McClendon's damage to the car constituted an unlawful seizure.[290] In an opinion best characterized as a majority dissent, Judge Reeves allowed the property damage claim to proceed on procedural grounds but dismissed other claims based on qualified immunity.[291] As Judge Reeves acerbically framed the issue and his compelled holding:

> Viewing the facts in the light most favorable to Jamison, the question in this case is whether it was clearly established that an officer who

284. The prolonged nature of litigation itself may nonetheless be traumatizing for plaintiffs. The opinion followed the third appeal heard by the court, *id.* at 666, which may have influenced the opinion's rhetoric of simmering outrage.

285. Jamison v. McClendon, 476 F. Supp. 3d 386, 391–92 (S.D. Miss. 2020) (Reeves, J.).

286. *But see* ELIZABETH BERENGUER, LUCY JEWEL & TERI MCMURTRY-CHUBB, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE AND EQUITY 52–62, 75–84, 111, 123 (2023). The authors challenge the widespread view of the opinion's formal audacity, arguing that the introduction is not as intrepid as is commonly perceived, that race is insufficiently integrated into the opinion's legal analysis, and that the opinion has an overly rigid view of *stare decisis*. While these critiques have some merit, I ultimately agree with the consensus position, for reasons elucidated further below.

287. *Jamison*, 476 F. Supp. 3d at 392–93.

288. *Id*. at 393.

289. *Id*. at 392–95.

290. *Id.* at 395. In addition, Jamison alleged McClendon stopped him, searched his car, and detained him in part based on race, thus violating the Fourteenth Amendment's Equal Protection Clause; however, the court had earlier granted the defendants summary judgement on this claim, citing Jamison's failure to provide "tangible evidence." Jamison v. McClendon, No. 3:16-CV-00595-CWR-LRA, 2018 WL 4624102, at *4 (S.D. Miss. Sept. 26, 2018).

291. *Jamison*, 476 F. Supp. 3d at 418. Since McClendon had neglected to present arguments on the property damage claim in his original and renewed summary judgment motions, Judge Reeves determined McClendon had forfeited arguments on the claim at this stage of litigation; accordingly, the claim was set for trial. *Id.*

> has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person's car during a traffic stop while awaiting background check results has violated the Fourth Amendment. It is not.[292]

The opinion is dedicated to explaining how such a seemingly unjust result flows from governing law by critiquing legal narrativity, common law development, and legal research infrastructure while depicting how judicial opinions can transform legal epistemology for more equitable ends.

First, the opinion writes back to anti-Black narratives in judicial opinions and popular culture by contextualizing Jamison's experiences and presenting his perspective on events.[293] The opinion begins poetically by alluding to prior "Living (and Dying) While Black" incidents:

> Clarence Jamison wasn't jaywalking.
>
> He wasn't outside playing with a toy gun.
>
> He didn't look like a "suspicious person."
>
> He wasn't suspected of "selling loose, untaxed cigarettes."
>
> He wasn't suspected of passing a counterfeit $20 bill.
> . . . .
>
> He wasn't driving over the speed limit.
>
> He wasn't driving under the speed limit.
>
> No, Clarence Jamison was a Black man driving a Mercedes convertible.[294]

---

292. *Id.* at 416. Scholars debate whether Judge Reeves was as constrained by precedent as he perceived. *See, e.g.*, Orin S. Kerr, *Did Judge Reeves Reach the Correct Result in* Jamison v. McClendon*?*, VOLOKH CONSPIRACY (Aug. 6, 2020, 6:27 AM), https://reason.com/volokh/2020/08/06/did-judge-reeves-reach-the-correct-result-in-jamison-v-mcclendon/.

293. For an intellectual history of anti-Blackness, see ANTIBLACKNESS (Moon-Kie Jung & João H. Costa Vargas eds., 2021), and for an analysis of how Black comics artists have subverted racist caricatures in popular culture, see REBECCA WANZO, THE CONTENT OF OUR CARICATURE: AFRICAN AMERICAN COMIC ART AND POLITICAL BELONGING (2020).

294. *Jamison*, 476 F. Supp. 3d at 390–91 (citations omitted).

The speed limit lines capture the tightrope Black people and other people of color often walk in public, with deviations from a narrow norm of acceptable behavior potentially leading to death during police interactions. Later, in the facts section, the opinion subverts conventions by depicting Jamison's likely state-of-mind while impeded on his journey home to South Carolina, and accordingly why his consent to the search of his car may have been involuntary:

> This explains why he was tired. Here he was, standing on the side of a busy interstate at night for almost two hours against his will so Officer McClendon could satisfy his goal of searching Jamison's vehicle. In that amount of time, Dorothy and Toto could have made it up and down the yellow brick road and back to Kansas.[295]

Simon Stern notes that facts sections ordinarily "admit[] no space for the techniques that foster readerly engagement with fictional plots – techniques that offer direct access to a character's mental state, or that hint vaguely at an upcoming setback, encouraging readers to speculate about the protagonist's future."[296] Contrastingly, Judge Reeves's opinion immerses an audience beyond legal experts in the narrative of Jamison's tribulations, including the litigation process itself.

The opinion's subsequent analysis section narrativizes doctrine, with Section 1983 portrayed as a potential savior and qualified immunity as a judicially-created villain. As Judge Reeves observed regarding Section 1983's Reconstruction origins, "If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too."[297] During the peak of the Jim Crow era, from the 1890s to the 1940s, only a few significant Supreme Court cases upheld Section 1983 claims.[298]

---

295. *Id*. at 395 n.32. Later, when discussing whether Jamison had consented to the search of his vehicle, Judge Reeves indicated that Jamison was aware of the fraught history of African American interactions with police, particularly in light of the Black Lives Matter movement, and the opinion also referenced the white supremacist history of the area where Jamison was stopped. *Id.* at 413–16; *see also id.* at 395–96 (quoting Jamison's deposition testimony about the traumatic impact of the incident in light of similar incidents he had seen in the news).

296. Simon Stern, *Narrative in the Legal Text: Judicial Opinions and Their Narratives*, *in* NARRATIVE AND METAPHOR IN THE LAW 121, 128 (Michael Hanne & Robert Weisberg eds., 2018).

297. *Jamison*, 476 F. Supp. 3d at 397.

298. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 12 (1985). Discussing Reconstruction-era Civil Rights Acts more generally during this period, Supreme Court Justice Harry Blackmun concluded that "[a]lthough they were called on occasionally to remedy the most blatant affronts to the Reconstruction Amendments, little thought was given to utilizing them to address other incidents of slavery." *Id.*

The Supreme Court's civil rights era decision reviving Section 1983, *Monroe v. Pape*, enabled a Black family whose home was ransacked by police officers to proceed with their case against the officers,[299] suggesting judicial vindication of the statute's purpose. However, *Jamison* then presents a declension narrative, with qualified immunity precedents neutering the scope of Section 1983 such that many morally outrageous acts by officials may go unremedied.[300] Summarizing the reasons for this perverse situation, Judge Reeves commented that "judges took a Reconstruction era statute designed to protect people *from the government*, added in some 'legalistic argle-bargle,' and turned the statute on its head to protect the government *from the people*."[301]

Judge Reeves closed the opinion by suggesting the contours of a reform narrative, but he first noted a major impediment to creating such a narrative: opinion deletions from legal research databases.[302] For example, Westlaw expunged Fifth Circuit Judge Rhesa Barksdale's dissent in a case involving Section 1981, which bars racial discrimination in contracting,[303] even though the dissent had persuaded Judge Barksdale's colleagues to withdraw their prior opinion and allow a white male attorney's case alleging racial discrimination in employment to proceed.[304] Four years after *Jamison*, in *Green v. Thomas*, Judge Reeves presented "A More Democratic Vision" of qualified immunity doctrine reposing trust in juries, and he denied qualified immunity to a detective in a case where a Black defendant was falsely accused of capital murder and confined for almost two years in inhumane conditions.[305] The opinion ended: "Desmond Green has suffered two injustices. The judiciary should not impose a third. If qualified immunity would do that, closing the courthouse doors to his claims, then the doctrine should come to its overdue end."[306] *Jamison* similarly ended with a call to "[l]et us waste no time in righting this wrong," appealing to judges and other readers to restore the promise of Section 1983, much as activism had

299. *See Jamison*, 476 F. Supp. 3d at 401–02 (citing Monroe v. Pape, 365 U.S. 167, 187 (1971), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)).

300. *Jamison*, 476 F. Supp. 3d at 402–09.

301. *Id.* at 422 (citation omitted).

302. *Id.* at 423.

303. *See* 42 U.S.C. § 1981.

304. *See Jamison*, 476 F. Supp. 3d at 422–23 (referencing Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp., 646 F.3d 232 (5th Cir. 2011), *withdrawn and superseded on reh'g*, 657 F.3d 251 (5th Cir. 2011)). The withdrawn majority opinion and Judge Barksdale's dissent are available on Lexis and through other online sources.

305. Green v. Thomas, 734 F. Supp. 3d 532, 539–40, 566 (S.D. Miss. 2024) (Reeves, J.). Judge Reeves acknowledged jurors' fallibility and downsides of a less protective qualified immunity doctrine, but he ultimately expressed faith in jurors to fulfill their democratic obligations. *Id.* at 568.

306. *Id*. at 569.

previously led to the demise of "separate but equal" laws.[307] For Judge Reeves and Judge Floyd, qualified immunity doctrine often operated to devalue Black lives, but judicial opinions informed by the Black Lives Matter movement could help the country to move "one step closer to that more perfect Union"[308] envisaged in the Constitution.

* * *

On July 6, 2024, "[b]efore the ink dried" on this article,[309] a white police officer in Springfield, Illinois, killed Sonya Massey, an unarmed Black woman who had contacted 911 to report a potential intruder at her home.[310] The officer faces several charges, including first-degree murder, after fatally shooting Massey as she moved a pan of hot water from her stove.[311] Protests nationwide suggest a renewal of Black Lives Matter activism drawing public attention to the legal system's complicity in anti-Black violence.[312] U.S. judicial opinions have often perpetuated anti-Blackness, and the process of canon construction from these opinions has entrenched legal epistemologies that marginalize Black lives. Black Lives Matter judicial opinions contrastingly use African American history and literature as inspirations to imagine a more inclusive opinion form. Express references to the Black Lives Matter movement in judicial opinions challenge the idea of the common law developing hermetically, and a more democratic conception of the genre may bolster judicial legitimacy.[313] Black Lives Matter judicial opinions ultimately strive to reconstitute legal canons, broadly construed, and the following section will discuss implications of the emerging form for legal academia and practice.

---

307. *Jamison*, 476 F. Supp. 3d at 424.

308. *Id.* at 423 (alluding to the Constitution's preamble, which states: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

309. *See* Est. of Jones v. City of Martinsburg, 961 F.3d 661, 663 (4th Cir. 2020) (Floyd, J.) (referencing the opinion's publication coinciding with an FBI investigation into George Floyd's death).

310. John Bacon, Steven Spearie & Jorge L. Ortiz, *"Stop the Killings": Vigils Honor Sonya Massey as Calls for Justice Grow*, USA TODAY (July 28, 2024, 10:26 PM), https://www.usatoday.com/story/news/nation/2024/07/28/sonya-massey-shooting-vigils-updates/74578113007/.

311. *Id.*

312. *See id.*

313. *Cf.* POPKIN, *supra* note 123, at 3, 5 (arguing for a more "democratic judging" style that invites "the audience into a participatory effort to determine the law" in the U.S. context).

III. TOWARDS CANONICAL JUSTICE: RECONSTRUCTING THE DISCIPLINE THROUGH BLACK LIVES MATTER JUDICIAL OPINIONS

> 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. Since we are a society that claims a commitment to democracy, we should adopt a democratic canonical method, one that values and preserves bottom-up skepticism, a reiterative drive to revision, a restless and continuing search for the suppressed narratives of subordinated people, a suspicion of official wisdom, an acknowledgment that canons (and the challenges to them) are always in some sense provisional.
>
> –Fran Ansley[314]

At the turn of the twenty-first century, Fran Ansley called for a "democratic canonical method" that would centralize race in U.S. legal canons, and Black Lives Matter judicial opinions are optimal sources to integrate into academic and pragmatic canons. Among other functions, "[c]anons define what kinds of legal arguments are legitimate; provide norms and methods for deciding cases correctly; constitute standard narratives about the subject that may attain mythic status; and furnish stock examples of problems in the field."[315] Given their meta-critical nature, Black Lives Matter opinions can make visible the often invisible assumptions undergirding canon formation, thus allowing for a more rigorous assessment of dominant canons.[316] The opinions also model how to repair the discipline through aspiring for "canonical justice," which theater director Charles Newell describes as a "journey about expanding—

---

314. Ansley, *supra* note 42, at 258.

315. William M. Wiecek, *Is There a Canon of Constitutional History?*, 17 CONST. COMMENT. 411, 415 (2000).

316. *See* Capers, *supra* note 18, at 31 (asserting that "[t]he problem is not that race is absent from the classroom. It is that the whiteness of the curriculum goes unsaid and unremarked upon. It is like the whiteness of the portraits that line law school hallways, or the whiteness of Lady Justice. The whiteness itself is too often invisible, analogous to what I have elsewhere described as 'white letter law.'") (citation omitted).

about challenging—the question of what is classic," including by foregrounding Black perspectives.[317]

This section encourages law faculty, lawyers, and judges to pursue "canonical justice" themselves by using Black Lives Matter opinions as a springboard to re-envision the discipline. Even those skeptical about the growing trend may find it edifying to engage with the opinions, which intervene in longstanding debates about how social movements influence legal change.[318] The opinions are moreover often rhetorical masterpieces, and their techniques have widespread applicability. Lastly, the opinions mark an inflection point in the intellectual history of the U.S. judicial opinion, with critical race theory insights increasingly shaping the genre. Black Lives Matter opinions are "hidden gems . . . . demonstrating the multiple and complex ways in which race and law intersect,"[319] and they can help advance racial equality in academia and practice.

A. Curricular Re-formation

Centering Black Lives Matter judicial opinions more in scholarly canons can facilitate a re-formation of curricular canons in race and the law; "traditional" doctrinal fields; and skills classes, including legal writing courses and clinics.[320] The American Bar Association's 2024–2025 law school approval standards moreover require institutions to "provide education to law students on bias, cross-cultural competency, and racism:

---

317. Mary Abowd, *Applause, Applause!: Court Theatre Brings Home a Tony*, U. CHI. MAG., Summer 2022, at 18, 19.

318. *See, e.g.*, Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006); *see also* Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149 (2024).

319. *See* Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 UMKC L. REV. 851, 882 (2008) (discussing why the authors included state and lower federal court opinions in their co-edited anthology *Race Law Stories* (2008)).

320. Although I will concentrate primarily on "doctrinal" courses here, faculty teaching in contexts including legal writing and clinics have also criticized how their fields engage with race. *See, e.g.*, Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 255 (2019); Anne D. Gordon, *Cleaning Up Our Own Houses: Creating Anti-Racist Clinical Programs*, 29 CLINICAL L. REV. 49 (2022). The so-called doctrine/skills divide has been critiqued for artificially compartmentalizing legal education and creating a problematic faculty hierarchy. *See generally* LINDA H. EDWARDS, THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND (2017). I agree with the criticisms overall and encourage faculty who teach "doctrine" to apply pedagogical techniques from the "skills" side. For strategies, see LAWYERING SKILLS IN THE DOCTRINAL CLASSROOM: USING LEGAL WRITING PEDAGOGY TO ENHANCE TEACHING ACROSS THE LAW SCHOOL CURRICULUM (Tammy Pettinato Oltz ed., 2021).

(1) at the start of the program of legal education, and (2) at least once again before graduation."[321] Since 2020, several law schools have implemented race and the law course requirements, apparently in recognition of how race may be marginalized in the conventional curriculum.[322] Chantal Thomas observes that issues of "racial inequality and racial justice" may be discussed in some public law courses,

> [b]ut in a broader sense, the law's contribution to a social system profoundly marked by racial hierarchy goes underexamined. The process of training students into relative complacency toward the legal status quo includes relative complacency toward the legal status quo's perpetuation of racial hierarchy. Consequently, this aspect of training can produce more acute crises for law students who are members of racial minority groups.[323]

Not only may students of color potentially be alienated from a curriculum that fails to reflect their lived experiences, but faculty of color may

---

321. Standard 303(c), ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024–2025, AM. BAR ASSOC. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, at 20, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-chapter-3.pdf. The new standard has received pushback. *See* Christine Charnosky, *A "Must-Have" or "Forced Wokeness"?: Mixed Reaction to ABA's Newly Adopted Diversity Training Mandate for Law Students*, LAW.COM (Feb. 16, 2022, 2:15 PM), https://www.law.com/2022/02/16/a-must-have-or-forced-wokeness-mixed-reaction-to-abas-newly-adopted-diversity-training-mandate-for-law-students/?slreturn=20240701161652.

322. *See, e.g.*, Dermot Groome, *Educating Antiracists Lawyers: The Race and the Equal Protection of the Laws Program*, 23 RUTGERS RACE & L. REV. 65 (2021) (describing a program for first-year law students at Penn State Dickinson Law); *USC One of First Schools to Make Racism Course Mandatory*, NAT'L JURIST (Mar. 9, 2021, 11:57 AM), https://nationaljurist.com/prelaw/usc-one-first-schools-make-racism-course-mandatory/; *RWU Law Introduces Required Course on Race and the Law*, ROGER WILLIAMS UNIV. (June 29, 2021), https://www.rwu.edu/news/news-archive/rwu-law-introduces-required-course-race-and-law. These courses are often part of institutional diversity, equity, and inclusion strategic plans, which have increasingly come under threat in some states. *See* Erik Cliburn, *Law Schools Navigate the Shifting Inclusion Landscape*, INSIGHT INTO DIVERSITY (July 2, 2024), https://www.insightintodiversity.com/law-schools-navigate-the-shifting-inclusion-landscape/.

323. Chantal Thomas, *Reloading the Canon: Thoughts on Critical Pedagogy*, 92 U. COLO. L. REV. 955, 966 (2021); *see also* Etienne C. Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. POVERTY L. & POL'Y 287, 297–302 (2022) (recounting the author's traumatic law school experiences); Elizabeth Bodamer, *Do I Belong Here? Examining Perceived Experiences of Bias, Stereotype Concerns, and Sense of Belonging in U.S. Law Schools*, 69 J. LEGAL EDUC. 455, 457 (2020) (discussing results of a study finding lower levels of belonging in law school among women of color than other subgroups). U.S. legal education's reproduction of hierarchies based on race, gender, socioeconomic class, and other identity categories is a pervasive topic in scholarship. *See, e.g.*, DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (2004); WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY (2008); LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997); MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA (2019).

themselves be estranged from what they teach. Critical legal pedagogy guides with recommendations for fostering inclusion in the curriculum have accordingly proliferated, with monographs, articles, and websites providing guidance.[324]

Given that the case method of teaching common in U.S. legal academia today originated in a period when law schools were largely inaccessible to people of color and women, several scholars have proposed revamping the method.[325] Jettisoning the method is unlikely since students need case analysis skills for practice in common law jurisdictions,[326] but cases can be selected to avoid complacency toward an inequitable status quo while still

---

324. As the name implies, critical legal pedagogy is an approach to legal pedagogy informed by critical theory, and its aims include "unfreez[ing] entrenched habits of mind and deconstruct[ing] the false claims of necessity which constitute so-called 'legal reasoning'"; "alerting them [students] that legal cases potentially provide a forum for intense public consciousness-raising about issues of social justice"; and "show[ing] that the existing social order is not immutable but 'is *merely possible*, and that people have the freedom and power to act upon it."' Karl Klare, *Teaching* Local 1330*—Reflections on Critical Legal Pedagogy*, 7 UNBOUND: HARV. J. LEGAL LEFT 58, 77–78 (2011) (citation omitted). For sample sources on inclusive legal pedagogy, see INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUALITY IN THE LAW SCHOOL CLASSROOM (Nicole Dyszlewski et al. eds., 2021); INTEGRATING DOCTRINE AND DIVERSITY: BEYOND THE FIRST YEAR (Nicole Dyszlewski et al. eds., 2024); TERI A. MCMURTRY-CHUBB, STRATEGIES & TECHNIQUES FOR INTEGRATING DEI INTO THE CORE LAW CURRICULUM: A COMPREHENSIVE GUIDE TO DEI PEDAGOGY, COURSE PLANNING, AND CLASSROOM PRACTICE (2022); JAMIE R. ABRAMS, INCLUSIVE SOCRATIC TEACHING: WHY LAW SCHOOLS NEED IT AND HOW TO ACHIEVE IT (2024); Sonia M. Gipson Rankin, *What's (Race in) the Law Got to Do With It: Incorporating Race in Legal Curriculum*, 54 CONN. L. REV. 923 (2022); *1L Classes: Cases and Supporting Materials*, STANFORD L. SCH., CLEARINGHOUSE ON DIVERSITY, EQUITY & INCLUSION RSCH., https://law.stanford.edu/clearinghouse-on-diversity-equity-inclusion-research/1l-classes-cases-and-supporting-materials/ (last visited Nov. 23, 2024) (listing sources for first-year classes by doctrinal area).

325. Faculty implement the case method in different ways, but it generally entails "dissecting opinions, teasing apart the relevant from the irrelevant, drawing out rules, tracing legal reasoning, and using the knowledge gained from the opinion to address hypothetical new sets of facts." *See* Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students' Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 75 (2022), https://virginialawreview.org/wp-content/uploads/2022/02/KeenMcMahon_postEICpostOEpostXE-Updated_PostLXE.pdf. Keene and McMahon note "[t]he traditional case method has been decried for much of its century and a half of existence," *id.* at 82, and legal archaeology can be a corrective to the method, *see* Debora L. Threedy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, 18 TUL. L. REV. 1197, 1197 (2006) (describing "legal archaeology" as a method "posit[ing] that there is much to be learned from a case that does not show up in the 'official' narrative in the reported opinion and . . . seek[ing] to recover alternative, 'unofficial' accounts of the dispute").

326. *But see* Deborah Merritt & Ric Simmons, *Learning Evidence with an Uncasebook*, *in* TEACHING EVIDENCE LAW: CONTEMPORARY TRENDS AND INNOVATIONS 15, 15 (Yvonne Daly, Jeremy Gans & PJ Schwikkard eds., 2021) (introducing an "uncasebook" approach with minimal case excerpts and experiential exercises).

meeting standard learning outcomes.[327] Including Black Lives Matter opinions in the curriculum could change not only what students learn, but how they learn, as the opinions' formal audacity can inspire faculty to teach more innovatively, versus the usual case brief style of instruction. Depending on what materials the opinions are assigned with, students could develop a deeper understanding of common law reasoning, doctrinal evolution, and effective lawyering. For instance, faculty could pair the opinions with litigation documents or interviews with lawyers involved in the cases to demonstrate how judicial opinions are influenced by advocates' arguments. Since the opinions are often interdisciplinary, they can also be coupled with "non-legal" sources like literature and film, and the juxtaposition of media can spark a discussion about the potential and limits of the judicial opinion as a genre in the racial justice context.[328] Relatedly, having students rewrite opinions whose treatment of race they find troubling can cultivate their critical thinking skills while training them for practice.[329] Judges see their opinions as pedagogical tools,[330] and Black Lives Matter opinions can teach students about the U.S. legal system's inner workings.

A major objection to incorporating Black Lives Matter opinions in the curriculum is the perception of "politicizing" or "diluting" the curriculum,

---

327. While conventional learning outcomes could themselves be critiqued, the American Bar Association's learning outcomes are representative of typical institutional and course learning outcomes:

> A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

Standard 302, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024–2025, *supra* note 321, at 19–20. Finding Black Lives Matter opinions that fulfill learning outcomes may be challenging, but race and the law scholarship, librarians, listservs, and blogs can be useful sources.

328. For inspiration, see THE MEDIA METHOD: TEACHING LAW WITH POPULAR CULTURE (Christine Corcos ed., 2019). As an example of a Black Lives Matter opinion with a popular culture complement, see *Lanier v. President & Fellows of Harvard Coll.*, 191 N.E.3d 1063 (Mass. 2022); FREE RENTY: *LANIER V. HARVARD* (David Grubin 2021) (documentary discussing lawyering strategies). The case involves Tamara Lanier's quest to obtain daguerrotypes believed to be of her enslaved ancestors from Harvard University, and it implicates tort law, property law, and civil procedure.

329. Students can also include intersectional perspectives by considering how race may intersect with other dimensions of identity. *See The U.S. Feminist Judgments Project*, UNLV L., https://law.unlv.edu/us-feminist-judgments (last visited Nov. 23, 2024) (discussing volumes on the Supreme Court and several doctrinal subjects); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (theorizing intersectionality). For advice on teaching judicial opinion writing in the social justice context, see Andrea McArdle, *The Socioeconomics of Justice: The Perspective from the Law School Classroom*, 9 INT'L REV. CONSTITUTIONALISM 193 (2009).

330. *See* Guinier, *supra* note 69, at 6–7 (quoting Supreme Court Justice Anthony Kennedy's response to a Harvard Law student's question: "Judges are teachers. By our opinions, we teach.").

particularly during the current period of anti-CRT activism in the U.S.[331] Other concerns may include a lack of faculty knowledge, the possibility of entrenching race as a problematic construct, and pessimism about the efficacy of pedagogical reforms without major systemic changes in legal education.[332] On curricular "politicization," this article has underscored how canon construction is an inherently political process; the concern about curricular politicization today is ultimately a question of power. Law faculty, moreover, do not personally endorse all the cases they assign, and most faculty welcome a range of views in the classroom. While those opposing anti-racist efforts in legal academia and elsewhere wield the term "indoctrination," most such activists are more concerned with the "wrong" indoctrination, rather than indoctrination *per se*,[333] and their perceptions do not generally reflect reality in U.S. legal education. The curriculum dilution critique in part dovetails with the politicization concern, namely that instead of learning "the law," students will be brainwashed into becoming proponents of critical race theory, but there is also a more plausible pragmatic point about having limited class time to prepare students for the bar and practice.[334]

Black Lives Matter opinions can align with multiple traditional course objectives, though, and to the extent faculty lack fluency about racial issues in their fields, the ABA's curricular standards indicate they should educate themselves.[335] Furthermore, building a race-conscious curricular canon need not problematically entrench the concept of race, but can destabilize it. That noted, despite being a socio-legal construct rather than a biological

331. *See generally* Leah M. Watson, *The Anti-"Critical Race Theory" Campaign – Classroom Censorship and Racial Backlash by Another Name*, 58 HARV. C.R.-C.L. L. REV. 487 (2023).

332. *See* Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 784 (2018) (describing how "a professor may or may not be prepared to navigate a racialized interaction"); Carbado & Moran, *supra* note 319, at 852 (arguing that the "failure to consolidate a race law canon undoubtedly reflects a general ambivalence about the significance of race"); Phil Lord, *Black Lives Matter: On Challenging the Soul of Legal Education*, 54 TEX. TECH L. REV. 89, 90 (2021) (asserting that initial law school responses to the Black Lives Matter movement failed "to question, and challenge, the structure and nature of legal education").

333. *See* Watson, *supra* note 331, at 507 (noting "[t]he current classroom censorship movement began at the federal level and attempted to mandate an inaccurate portrayal of America's history with race deemed to be patriotic by conservatives").

334. Students themselves may express this concern. *See* Meera E. Deo, Maria Woodruff & Rican Vue, *Paint By Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 30–31 (2010) (referencing student anxieties about diversity-related discussions detracting from learning more "foundational" material).

335. Standard 303(c), ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024–2025, *supra* note 321, at 20; *see also* KIMBERLY E. O'LEARY & MABLE MARTIN-SCOTT, MULTICULTURAL LAWYERING: NAVIGATING THE CULTURE OF THE LAW, THE LAWYER, AND THE CLIENT (2021) (discussing how cross-cultural competency is imperative for legal practice, which law school classes must presumably prepare students for).

fact,[336] race is ingrained in U.S. law and society, and a curricular canon evading race ignores this reality. Pessimism about inclusive curricular changes on an individual level relatedly stems from an awareness of the necessity for systemic reforms to revolutionize legal education, but faculty as canon creators can indelibly impact the rising generation of lawyers.[337] Teaching Black Lives Matter opinions may thus shape how future advocates and judges develop a jurisprudence of racial justice.

B. Creative Formalism in Advocacy

Black Lives Matter opinions also have significant ramifications for practice, including in contexts like law school clinics and civil rights litigation. As Lani Guinier argued, "Through their opinions, judges send messages to social change activists as to what is possible. They 'reshap[e] perceptions of when and how particular values are realistically actionable as claims of legal right.'"[338] References to the Black Lives Matter movement in judicial opinions suggest a mutual influence, with movements also persuasively conveying their messages to judges.[339] The opinions indicate that in some contexts, lawyers may have more creative freedom in litigation documents than may be assumed, not only substantively but formally as well.[340] Social movement lawyers in particular often seek to change the prism through which a legal problem is viewed, and formal innovation can be a key strategy to accomplish this purpose. For example, advocates have incorporated images and historical background in their complaints to personalize Black plaintiffs in their cases and to situate the plaintiffs' stories

336. *See generally* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1995).

337. *See* Resnik, *supra* note 12, at 228 (describing faculty as being in a "position of privilege" to help "construct the canon").

338. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 557 (2009) (quoting Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715, 732 (1992)).

339. *See* Balkin, *supra* note 318, at 28 (discussing how social movements can "reshape constitutional common sense, moving the boundaries of what is plausible and implausible in the world of constitutional interpretation, what is a thinkable legal argument and what is constitutionally 'off the wall'") (citation omitted).

340. Judges espousing a color-blind view of legal interpretation may be provoked by what they perceive as gratuitous references to race in a given case, so advocates should craft their arguments with the likely audience in mind. Drawing attention to race may also be distracting otherwise in some cases. *See* Driver, *supra* note 108, at 409–10.

within broader narratives of racial oppression.[341] Black Lives Matter opinions also demonstrate how ostensibly conventional analytical structures like the IRAC (issue-rule-application-conclusion) paradigm can be reconfigured to promote racial justice.[342] Advocates may therefore draw inspiration from the opinions as formal exemplars whose applicability can extend beyond specific doctrinal contexts.

C. Transformative Judging

Perhaps most ambitiously—and controversially—Black Lives Matter judicial opinions suggest a conception of the judicial role aligned with what Justin Hansford has termed "cause judging."[343] Hansford describes "cause judges" as "seek[ing] to substantiate their moral or political ideals through the law," but still "subscrib[ing] to the rule of law when the law points strongly in a particular direction."[344] Contrastingly, the more "formalist notion of the judge as umpire," while reflecting what the public often states it expects from the judiciary, does not necessarily reflect reality.[345] Done ethically, cause judging can have several salutary effects, including enhancing judicial legitimacy among populations historically marginalized in the legal system.[346] A judge who uses "empathic dialogue" in opinions, for instance, "inquires beyond her professional and personal experiences before ruling, tak[ing] into account the impact of the law on all people, and

---

341. *See* Amended Complaint, Inclusive La. v. St. James Parish, No. 2:23-CV-987 (E.D. La. July 17, 2023); Complaint, Randle v. City of Tulsa, No. 2020-01179 (Okla. Dist. Ct. Sept. 1, 2020). The complaint in *Inclusive Louisiana* was filed by the Environmental Law Clinic at Tulane Law School, and the government subsequently moved to strike the historical background section discussing environmental racism. While the court denied the motion to strike, it dismissed the claims with prejudice, and the case is being appealed. *See* Inclusive La. v. St. James Parish, 702 F. Supp. 3d 478, 491, 506 (E.D. La. 2023), *appeal filed*, No. 23-30908 (5th Cir. Dec. 21, 2023). Following protracted litigation, the Supreme Court of Oklahoma recently dismissed litigation arising from the 1921 Tulsa race massacre. Randle v. City of Tulsa, 556 P.3d 612 (Okla. 2024). Although plaintiffs in these cases have not yet prevailed in court, the complaints are valuable for creating a public record of anti-Black violence and potentially motivating advocates in other cases involving racial justice to engage in creative formalism.

342. *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 413 (S.D. Miss. 2020) (Reeves, J.) ("A reader would be forgiven for pausing here and wondering whether we forgot to mention something. When in this analysis will the Court look at the elephant in the room—how race may have played a role in whether Officer McClendon's actions were coercive?") (citation omitted).

343. *See* Justin Hansford, *Cause Judging*, 27 GEO J. LEGAL ETHICS 1, 4 (2014).

344. *Id.* at 17. Drawing on Paul Butler's scholarship, Hansford distinguishes "cause judges" from "radical judges," the latter of whom may be more open about the political nature of judging and the illusoriness of objective legal analysis; Butler contends that true "radical judges" are rare in light of "the socialization of the legal system." *See id.* at 16; Paul Butler, *Should Radicals Be Judges?*, 32 HOFSTRA L. REV. 1203, 1214 (2004).

345. Hansford, *supra* note 343, at 13–14.

346. *See* ROY L. BROOKS, DIVERSITY JUDGMENTS: DEMOCRATIZING JUDICIAL LEGITIMACY xvi (2022) (arguing that "[j]udicial legitimacy inheres in judicial decision-making that faithfully engages traditional process and critical process and vindicates the diversity-and-inclusion norm").

decid[ing] in a manner that avoids doing harm."[347] Through validating "outsider" perspectives, judicial opinions may constitute "an act of empowerment" for members of subordinated communities.[348] Genre transformation may thus prefigure a socio-political transformation, including a more horizontal relationship between the judiciary and the public.

While "good" cause judging may buoy public confidence in the judiciary, "bad" cause judging may violate canons of judicial conduct by compromising the ideal of impartiality.[349] The American Bar Association's Model Code of Judicial Conduct, which many states use as a template, provides: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[350] Recently, North Carolina Supreme Court Justice Anita Earls's public statements on judicial diversity resulted in a state judicial standards commission investigation into whether Justice Earls had violated a state judicial code provision requiring judges to conduct themselves "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[351] Although the complaint was ultimately dismissed, the parameters of judicial speech under ethics codes and the First

347. Mitchell F. Crusto, *Empathic Dialogue: From Formalism to Value Principles*, 65 SMU L. REV. 845, 851–52 (2012); *cf.* Stuart Chinn, *The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality*, 2019 UTAH L. REV. 915, 970 (contending that "judicial impartiality might best be understood, in the present time, as consistent, good-faith engagement by judicial actors with the claims and interests of individuals or groups who are not obviously aligned with those judicial actors, either by ideology or by other significant elements of social status").

348. BROOKS, *supra* note 346, at 33.

349. *See* Hansford, *supra* note 343, at 4.

350. Canon 1, ABA MODEL CODE OF JUDICIAL CONDUCT (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/rule1_2promotingconfidenceinthejudiciary/; Joshua Lenon, *Understanding Judicial Codes of Conduct: A Guide for Lawyers*, CLIO (June 17, 2024), https://www.clio.com/blog/code-of-judicial-conduct/ (discussing state codes of judicial conduct being based on the ABA Model Code in many jurisdictions).

351. Mehr Sher, *Justice Earls, NC Commission End Legal Dispute; Free Speech Issue Unresolved*, CAROLINA PUB. PRESS (Jan. 17, 2024), https://carolinapublicpress.org/62831/earls-nc-legal-dispute-ends-complaint-dismissed-free-speech/; Canon 2(A), NORTH CAROLINA CODE OF JUDICIAL CONDUCT (2015), https://www.nccourts.gov/assets/inline-files/NC-Code-of-Judicial-Conduct.pdf.

Amendment remain unsettled.[352] Some judges have noted how Black Lives Matter opinions may test judicial ethics codes and have suggested code revisions to account for a more heterogenous judiciary.[353] Related to the partiality concern, charges of "judicial activism" may arise when judges are perceived to opine on matters beyond the case at hand.[354] Some scholars have accordingly called for greater rhetorical restraint in judicial opinions, with recommendations that would essentially make Black Lives Matter opinions unwritable.[355]

Black Lives Matter opinions particularly implicate ethical rules prohibiting bias and external influences on judicial conduct,[356] but the opinions published thus far should generally not be seen to violate these

352. *See* Roth, *supra* note 11, at 263 (observing "[t]he Code of Conduct for U.S. Judges does not address opinion writing"); Lynne H. Rambo, *When Should the First Amendment Protect Judges from Their Unethical Speech?*, 79 OHIO ST. L.J. 279, 283 (2018) (discussing the relative lack of case law on the constitutionality of judicial code provisions involving extrajudicial speech and noting the Supreme Court's not yet having deciding on the constitutional standard for the discipline of sitting judges). In the wake of Black Lives Matter protests during summer 2020, courts published guidelines for judicial officers' public statements and participation in rallies. *See* Judge Reba Ann Page & Justice Robert J. Torres, Jr., *As Judge and Citizen: An Ethical Path of Racial Justice*, 57 CT. REV. 72, 75–76 (2021) (listing examples).

353. *See* Judge Genesis E. Draper & Judge LaShawn A. Williams, *The Intersection of Judicial Ethics and Racial Justice*, HOUSTON LAW., Sept./Oct. 2020, at 37, 37–38 (asserting that Judge Carlton Reeves struck an appropriate balance in Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (Reeves, J.)); Hansford, *supra* note 337, at 52 (recommending the "appearance of fairness" standard over the "appearance of impartiality" standard for judicial recusal).

354. "Judicial activism" is an amorphous term, but it generally has negative implications. In an intellectual history of the term, Craig Green argues that "[f]or modern scholars who define and analyze activism, the term has come to mean (i) any serious judicial error, (ii) any undesirable result, (iii) any decision to nullify a statute, or (iv) a smorgasbord of these and other factors"; however, Green critiques these understandings and proposes that "the 'activist' label is useful only where a judge has violated cultural standards of judicial role." Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1199, 1201 (2009). Justin Hansford surveys several definitions of judicial activism, including the idea of "legislat[ing] from the bench," and concludes cause judging does not fall within the term's parameters. Hansford, *supra* note 338, at 16–18. Some scholars have called on judges to become "race activists," though. *See, e.g.*, Barbara J. Flagg, *"And Grace Will Lead Me Home": The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103, 104–05 (2013).

355. *See, e.g.*, Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 157 (2021) (conjecturing "that opinions that succeed on narrative or aesthetic grounds are more likely to be deceptive, unfair, or disrespectful").

356. *See* Rule 2.3, ABA MODEL CODE OF JUDICIAL CONDUCT (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment/ (barring judicial bias, prejudice, and harassment); Rule 2.4, ABA MODEL CODE OF JUDICIAL CONDUCT (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_4externalinfluencesonjudicialconduct/ (proscribing external influences on judicial conduct); *see also* Rule 1.2, ABA MODEL CODE OF JUDICIAL CONDUCT (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/rule1_2promotingconfidenceinthejudiciary/ (requiring judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary").

rules. In the main, opinion authors are not defying binding law to favor Black litigants or ceding decisional power to outside groups. Instead, they are using formal subversion to interrogate the deep structure of the U.S. legal system, including how the judicial opinion as a form may reproduce racism. To the extent readers experience discomfort when judges speak candidly about racial injustices, that corroborates the authors' arguments.[357] Judge Leon Higginbotham's declaration in an employment discrimination case where defendants sought to disqualify him based on race is an apt rejoinder to such critics:

> In a nation which had a revolution theoretically based on the declaration that "we hold these truths to be self-evident, that all men are created equal," a judge should not be disqualified if two centuries later he believes that the rhetoric must be made real for all citizens, including blacks, and that the dream must be "saved for all."[358]

On balance, Black Lives Matter opinions are valuable in delineating a more "bottom-up" approach to judging. Future judges who cite or produce the opinions can in turn create new "judicial narratives" that are more fully representative of the public.[359] Law faculty, lawyers, and judges who pursue canonical justice through centering Black Lives Matter opinions in their work are ultimately allies in rebuilding the discipline during the present Third Reconstruction.

---

357. Opposition based on the opinions' purported aesthetic flaws substantiates this article's contention that standards of canonicity should be reassessed.

358. Langston Hughes, *Dream of Freedom*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES, *supra* note 161, at 542, 542 (originally published in 1964)). The opinion continued by castigating "double standards" in professional spaces:

> If America is going to have a total rendezvous with justice so that there can be full equality for blacks, other minorities, and women, it is essential that the "instinct" for double standards be completely exposed and hopefully, through analysis, those elements of irrationality can be ultimately eradicated. It is regrettable that in this case I must take substantial time and effort to answer defendants' meritless allegations, but in some respects the motions merely highlight the duality of burdens which blacks have in public life. Blacks must meet not only the normal obligations which confront their colleagues, but often they must spend extraordinary amounts of time in answering irrational positions and assertions before they can fulfill their primary public responsibilities.

Local Union 542, 388 F. Supp at 181–82; *see also* LANGSTON HUGHES, *Dream of Freedom*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES, *supra* note 162, at 542.

359. *See* BERNS, *supra* note 30, at 195 (discussing a virtuous circle of diverse storytelling in the judiciary).

CONCLUSION

> If law is primarily about the exercise of power, it behooves us to examine on all levels how that power is attained, how it manifests itself, and perhaps most importantly, how it is maintained and can be subverted within the complex intricacies of its operation as discursive subjectivity.
>
> –Alison Diduck[360]

Alison Diduck's call for feminist legal scholars resonates with the purpose of Black Lives Matter opinions, which embrace critical canonicity in and beyond the judiciary. The opinions instigate reflection on how race has shaped the history of the U.S. judicial opinion as a form and how judges influenced by social movement activists have remade the genre to promote racial justice. If the judicial opinion has, in Saidiya Hartman's terms, historically been a "representational structure continu[ing] to produce black death, or death as the only horizon for black life,"[361] Black Lives Matter opinions attest to Black resiliency in a society riven with racial inequalities. As jurisdictions have sought to suppress diversity discussions,[362] Black Lives Matter opinions have also become an official means of resistance complementing unofficial activism.

While this article has focused on conceptualizing the Black Lives Matter judicial opinion as an emerging form, future scholarship analyzing other countries, time periods, identities, and genres could enrich understandings of how social movements impact the development of legal forms.[363] At heart, these movements' efforts at reconstituting legal canons speak to who is included in a disciplinary or political community, "which in turn influences which necessities will be felt and which will go unheard."[364] Integrating Black Lives Matter opinions into legal canons can ultimately help forge a more equitable world.

---

360. Alison Diduck, *Women's Legal Histories*, 8 CAN. J.L. & SOC. 181, 181 (1993).

361. *On Working with Archives*, *supra* note 2.

362. Klara Alfonseca, *Map: The Impact of Anti-DEI Legislation*, ABC NEWS (Apr. 5, 2024, 5:08 AM), https://abcnews.go.com/US/map-impact-anti-dei-legislation/story?id=108795967; ReNika Moore, *Trump's Executive Orders Rolling Back DEI and Accessibility Efforts, Explained*, ACLU (Jan. 24, 2025), https://www.aclu.org/news/racial-justice/trumps-executive-orders-rolling-back-dei-and-accessibility-efforts-explained.

363. Although this article concentrates on Black experiences in the U.S., and the Black/white paradigm has been critiqued, *see* Juan F. Perea, *The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997), the analytical framework may be useful beyond the immediate context.

364. *See* Finn & Kommers, *supra* note 99, at 226–27.