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On (Being) Fear: Utah v. Strieff and the Ontology of Affect

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Abstract

This article interrogates the dissent by Justice Sonia Sotomayor in *Utah v. Strieff*, a Fourth Amendment case on lawful police searches, to track the political assumptions that undergird conceptions of the legal boundaries of police search and seizures. Specifically, the author examines how the vestiges of slavery structure both the constitutive elements of how bodily autonomy and freedom from physical invasion is understood under the law. Thus, by employing critical Black Studies in tension with affect theory, this article questions what limits are present in the law that reify, even or especially through dissent, the ontological arrangements of slavery and its afterlife.

Keywords

affect • Blackness • critical theory • law • policing • slavery

The repetitious display of the murders and vicious beatings of unarmed Black people on visual media platforms is a peculiar yet quotidian spectacle. The hyper-prevalent nature of these occurrences, which are both legal and extra-legal, leads the viewer to assume to understand this violence. The spectacle detracts and augments the focus of the viewer, such that discussions on the gunned or ungunned status of the Black body assume the forefront of concern. The symbolic weight of the gun obfuscates the scene, reducing a paradigm of violence to the context of an event. When the gun becomes the point of entrance for analysis, critical engagement has already been forgone. The gun in fact signals a form of human relationality by suggesting that a prior transgression, being illegally armed or committing a crime, is the pretext for the gratuitous violence that is witnessed. Yet, the

scene of antiblack violence veils the fact that consent and transgression do not subtend this obscure yet familiar form of suffering. It does not matter if the Black has or does not have a gun.¹ Furthermore, it does not matter if the Black heeds or does not heed to the commands of the officer or self-deputized citizen. Blackness serves as the justifying logic for which all Human reason is forgone.

Like David Marriott's (2000: 9) theorization of the power imbued within the lynching photo, viral videos of Black mutilation are 'more than an aid to memory (though it is that too), the [image] is a part of the process, another form of racist slurs which can travel through time to do its work.' The repetition of the injury reasserts that the mutilated Black body 'don't look human, does it?' The brute force represented in these images, and repeated without recourse to an end, collides the human world – that of the witnesses – with the nonhuman world, that of the Black mutilated body *and* every Black body who is made to view their own potential violation in waiting. The latter representing what Marriott terms 'the trauma of representation', where the Black is made aware of the world's phobia and fantasy of its presence (p. 13).

While the viral video can be likened to the proliferation of lynching photos and memorabilia most pervasive in the post-reconstruction United States, the relationship is not allegoric. To speak of allegory would suggest that the impulse at the heart of the lynching spectacle has fawned, when it has instead been perfected. Marriott cites the observation made of a lynched Black man's body by a white author, who noted, amongst other things, that the victim 'Don't look human'. The question of Black (non)humanness is central to the grotesque spectacle. The viral video, like the lynching photo before it, displays and traffics images of Black mutilation that are confounded by centuries of violence. This is emblematic in its repetitions. While the technology of the violence shifts, the mutilated body at the center remains Black.

In an open letter to her colleagues, Sylvia Wynter (1994) calls upon academics, and those responsible for reporting on the status quo of race in America, not to reduce the enormity of race to any other singular social or political phenomenon, like poverty. The central concern of the letter is the question of policing and police brutality, after court documents in the early 1990s revealed that the LAPD used the designation N.H.I, 'no human involved' to document incidents in South Central Los Angeles involving young Black men. For Wynter, N.H.I was not arbitrary and was distinctly linked to the LAPD being commonly referred to as 'nigger-breakers'. Thus, she maps centuries of violence from slavery into the present that provides the preconditions for such a marker to be used not simply as a description of Black people, but as commentary on their position in the world. The 'inner-eye' of the episteme, as Wynter describes, places a distance between non-Black and Black people, while disallowing the world to see the antiblackness of N.H.I as a sustained practice.² Under this guise, N.H.I becomes articulated as a bad policing practice rather than as a critical site of

examination to engage how the concept of the Human gave rise to centuries of antiblack violence.

The provocation by Wynter, to not displace the concerns of Blackness with the conditions of life for all, is one I take up here. Rather than examining police brutality and its legal response as a problem for all, this argument contends that we must attune to the ‘representational structures [that] continue to produce Black death, or death as the only horizon for Black life’ (Hartman, cited in Siemsen, 2018). Given the current state of politics, it would be in bad faith to suggest that the conditions under which marginalized people are policed is not a political crisis for all. The intent here, however, is to place focus on how policing and the litigating of police protocols demonstrate truths about the ‘inner-eye’ or the originary violence of antiblackness. This argument is to draw into question why police violence is responded to under the precondition that Black bodies magnetize bullets.³ Lastly, to uphold the law as a site to redress the violence endured by Black people at the hands of the police, misappropriates the law as separate from, and not parcel to, the violence of its enforcement.

Utah v. Strieff

Utah v. Strieff came before the Supreme Court of the United States during the 2015 October term. The case involved a white man, Edward Strieff, who argued that the discovery of methamphetamines and other drug paraphernalia on his person by Officer Douglas Fackrell was a result of an illegal search and seizure, and thus violated his Fourth Amendment rights. The Fourth Amendment protects, amongst other things, ‘the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures’ (US Const. Amend. IV).

Officer Fackrell, who was said to be responding to an anonymous tip about drug activity in a home, decided to stake out the residence. Upon witnessing Strieff leave the residence, Fackrell requested Strieff’s identification. After running a background check, he discovered Strieff had a warrant for outstanding traffic violations. He proceeded to arrest Strieff, which involved searching his person and discovering drugs and paraphernalia. This discovery resulted in charges being filed and a conviction that Strieff subsequently appealed. The Utah court of appeals upheld the decision of the lower court to allow the admission of evidence discovered during Fackrell’s search of Strieff. The Utah Supreme Court unanimously overturned this decision. However, in a 5–3 vote the US Supreme Court overturned the Utah Supreme Court decision.

Ironically, Justice Clarence Thomas wrote the majority opinion in *Utah v. Strieff*. The irony is that Justice Thomas, the only sitting Black judge on the US Supreme Court rarely, if ever, writes opinions; he typically concurs with the conservative status quo. In the majority opinion, Thomas argues Officer Fackrell made two ‘good-faith’ mistakes that do not count as evidence of alleged police misconduct against Edward Strieff. The first

mistake was a result of Fackrell not knowing how long Strieff was in the house to determine if he was a short-term visitor potentially buying drugs. And secondly, because this prior fact was not known, Fackrell should have requested rather than demanded that Strieff speak with him. Thus, Thomas concludes, 'these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights' and furthermore that Strieff's counterargument is 'unpersuasive' (Strieff, 2016).

Justice Sonia Sotomayor wrote one of the two dissents in the *Utah v. Strieff* case. The response to Sotomayor's dissent was largely favorable because of the belief that from her position of power she brought visibility and the possibility for redress to the fact that Black people suffer at the hands of the police (Ford, 2016). The dissent speaks at length about the looming threats that emerge from the erosion of Fourth Amendment constitutional protections. The *Strieff* case emerged in the aftermath of the repetitious denial that police could be found culpable for the deaths of Black people.⁴ While many praised Sotomayor's dissent for its consideration of the judgment's potential racial implications given the current political climate, I caution against this notion. By closely examining this dissent, it becomes apparent how the belief that the law can be a site for moral or even ethical redress is affective because it is autopoietic rather than critically engaged, as it responds to and reproduces a structure of being, before the imposition of thought and/or feeling.

In the *Strieff* dissent, Sotomayor argues 'Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants – even if you are doing nothing wrong' (Strieff, 2016). She then goes on to note that Officer Fackrell by his own admission had no reason to believe Strieff committed a crime nor did he *fear* Strieff. Fear here, I would suggest, is the operative word. Essentially, Sotomayor asserts that Strieff did not present a reasonable threat to Officer Fackrell that would warrant the request for identification, the search of his person, and the arrest. Fear, then, the dissenting opinion implies, might otherwise justify a transgression of Fourth Amendment protections. In other words, fear is a logical reason for an officer to step outside of the bounds of the law.

Although fear is only briefly mentioned in the dissent, and never returned to, I argue that the use of the term juxtaposed with the justifiability of Officer Fackrell's actions arguably upends the political maneuver Sotomayor offers next. Thus the aspect of the dissent that is most lauded and praised is betrayed by a seemingly casual positioning that upholds the very violence it seeks to condemn. Yet, this invocation of fear is not concerned with how this very logic has been deputized against Black bodies and employed as justification for their violation. Furthermore, it occludes a sustained engagement with how fear has shrouded police culpability in very recent killings of unarmed Black people.

In the fourth and final section of Sotomayor's dissent, she makes an aside. Until this point Justice Ruth Bader Ginsburg has joined in support. However, in section four, Sotomayor states she is writing for herself based on her

experiences as a Latinx woman who has worked on civil rights and police brutality cases. The argument then shifts as Sotomayor asserts that if such a degradation of rights could happen to a white man, imagine what might then be able to happen to Black and brown people. Her suggestion is that if something as benign as unpaid traffic violations warrants an officer to disregard Fourth Amendment protections, then the future consequences prove to be unbearable for those already subjected to unscrupulous policing.

Sotomayor suggests that the basic tenets of consent are also eroded by this judgment, stating that with nominal non-consent,

... he may order you to stand 'helpless, perhaps facing a wall with [your] hands raised.' If the officer thinks you might be dangerous, he may then 'frisk' you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may 'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' (Strieff, 2016).

Given the captive violence that binds together slavery and its afterlife, it's clear that this arrangement is not new. From the barracoon to the slave ship, to the plantation, to the prison, Black bodies have been stripped, penetrated, and inspected without the prior consideration of consent. For Sotomayor, the loss of consent is posited here as a threat potential of this judgment. It is a threat that is from the future but anchored by the past that augments the trajectory of the present. The scene undoubtedly signals a return to slavery, or some state of slave-ishness, where bodies are made subject to search and seizure with impunity without the recourse of the law. But when has Blackness not been subjected to this arrangement? What bodies are threatened by this rearticulation of the law that Sotomayor so fears? Where is the threat located? The question then is not how do *we* prevent the loss of consent but how is consent tethered to the structural predicate of Black non-being that is silenced by the logics of consent, legal and otherwise.

The positioning of *Utah v Strieff* as a threat potential, specifically with respect to Blackness, is an affective fact, which all evidence betrays. Sotomayor ends her dissent by saying:

We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. (Strieff, 2016)

The reference to Eric Garner and the 'I can't breathe' protest cry solicits a political emotion here. The feeling of recognition through Sotomayor's assumed sidestepping of the law to use discourse not accounted for in the

legal record, as support of her claims, is nothing more than the perception of visibility.

Acknowledging that Black people are the targets of policing does nothing more than solicit agreement with a fact that is already well known, that policing is for the Black. Which is to say, Black people animate the scope of cognition with respect to criminality. To include references to ‘the talk’ Black parents give their children about the future potentials of their deaths, as Sotomayor does in her dissent, I argue, places this painful reality on display without critically destabilizing the logics that make ‘the talk’ necessary. The talk, when Black parents instruct their children on how to respond to police encounters, is an ontological imperative rather than a performative one. Under these conditions, Black parents are denied the right to parent, insofar as protecting their children is a structural impossibility. The talk is not about *if* you will encounter the police but an attempt to prepare the child for the indefinite *when*. The precondition of the encounter is their Blackness. The underlying hope of the talk is that the child will survive the first, and many, encounters; however, there are no guarantees.

Sotomayor employs a political language that is relevant to the emotional charge around Black death happening very viscerally in the contemporary political moment. By using Black Lives Matter slogans and referencing Black literature that historicizes the racial origins of policing, Sotomayor is tapping into the political and social charge of that movement that demands immediate justice and recourse to Black people dying.⁵ Rather than attending to this immediacy, I argue, the dissent displaces that concern with a focus on past and future violence rather than a direct focus on the current state of antiblack policing. Furthermore, its assumptive framing asserts that had the court decided the *Strieff* case otherwise, an intensification of police violence could have been staved off. To say this differently, the Sotomayor dissent would have us believe that had the court ruled in favor of Strieff, Black lives would matter, if not fully at least a little more. However the dissent is performing a political affinity with Black suffering that the law cannot and does not provide in this context. In fact, the narrative of political solidarity Sotomayor solicits is belied by the recognition that the will of the police is governed socially and politically outside of the law. Where Blacks are concerned, the police make the law, they do not enforce it.

While being aware of the antiblackness of policing, it is also important to consider that the extent of these practices might never be fully realized. The stripping and penetrating of Black bodies leaving them bare in the streets is phantasmagoric. They are white fantasies subtended by structural violence. As a practice, street strip searches are in fact illegal but are also upheld and carried out as *logical* responses to concerns of supposed criminal behaviors. The practice of police strip searching bodies is both an extension of the violent apparatuses of law and its enforcement and also emblematic of the libidinal economy of antiblackness. The function of the latter encompasses the real and imaginative.

The Ontological Affect of Fear

Fear, in the *Strieff* dissent, was offered as a justifiable means to forfeit legal protection. Fear is offered as the reason of affect. Like pornography, apparently one knows it when it appears. Fear relates to the ontogenetic effectiveness of antiblackness. In 'The future birth of the affective fact: The political ontology of threat', Brian Massumi (2010: 52) asks 'how could the nonexistence of what has not happened be *more* real than what is now observably over and done with?' (emphasis in original).⁶ Massumi then theorizes threat as a political ontological mode of existence. In his calculation, threat is from the future; it is open-ended not in the way that it is not but in the fact that the not is never over. As such, 'the future of threat is forever' (p. 53). Massumi notes that this affective relationship to threat is not real in spite of its nonexistence but is superlatively real because of it. Thus such hyperbolic affect to threat becomes in effect an 'operative will to power' dispensing violence without recourse (p. 63). The use of violence is subtended not by the truth of its present application but by the future necessity of warding off speculative violence in return. As Sotomayor contends, 'This court has allowed an officer to stop you for whatever reason he wants – so long as he can point to a pretextual justification after the fact' (Strieff, 2016). The dissent argues that the majority opinion employs the future as justification for the erosion of constitutional protections. Threat, in this respect, is an alert that prompts the use of violence to protect from impending violence that never definitely can be or need be proven as factual possibility. Sotomayor, like Massumi, interrogates how the affective fact of the future is just that, the biomediation of the law as justifiable means to wage an end that never ends.⁷ The question central to the dissent is how can police power be kept under control if threat can be derived from any feeling.

Massumi (2010: 58) asserts that 'the affective reality of threat is contagious'. Present in the *Strieff* dissent is its own logical entanglement with an affective fact. It frames the threat of violence with respect to another temporal limit: the past. The provocation that *Utah v Strieff* will indelibly return existence to a prior state where genitals are fondled on public display fails to grasp that, for the Black, the time of slavery is now. Thus, the dissent employs a conflation of concerns. The first is a conversation about legal rights and the autonomy of personhood. The second is a conversation about the violent constraints of Blackness. I am arguing that the latter concern is folded into a discussion of legality in a manner that leaves a pivotal question unconsidered. What does it mean to be Black before the law? Insofar as the dissent is concerned with perfecting the law, making it stronger and thus more effective at its performance, the fungible status of Blackness will be called upon to bolster claims for stronger legal integrity.

The law always locates a space outside of itself that provides justification for its transgression. Which is to say, the law will always contend that there are reasons in waiting for the law to be transgressed, for unlawfulness to become lawful. As Jacques Derrida (1990: 993) argues, 'The law is transcendent

and theological, and so always to come, always promised, because it is immanent, finite and so already past.' The onto-theological machination of the law, which is faith imbued at the level of being, is resonant in how Sotomayor calls upon the emotional-affect of fear.⁸

The constitutional subject, par excellence, and the affective fact of its violation are situated antithetically to Blackness. Black suffering is commandeered as justification through threat and thus upholds Human future potential in the face of and despite the antiblack violence that is claimed as it owns benevolent suffering. The affect of this condition is not, in essence, constitutively white, although ontologically it is antiblack. That is to say, the violence that situates Black ontological (non)being is unequivocally affective. Affect is biomediated by a structure of feeling–action–being that is predicated on Black (non)existence. Referring back to my earlier points on Wynter's articulation of the inner-eye of the episteme, affect as a structural component of power is conditioned by the replication and imaging of Black suffering. Blackness is held captive to its mutilated corporeality, as captured in the reoccurring image.

Human affect, which is to say non-Black affect, operates at the meta-level of antiblackness. Drawing upon the historical continuum on chattel slavery, affect responds to the Black body as necessitating containment. As Tyrone Palmer (2017: 47) contends, 'The nullification and denial of Black interiority and Black sentience is particularly noteworthy because it precludes the possibility of the Black as an affect agent.' Palmer is gesturing to suggest that the first ontological order of reason, that premised Blacks as the antithesis to the Human capacity for thought and feeling, is the same logic that obscures the violence that subtends Black affect. Rather, Blackness, like the first ontological order of slavery, is held captive to the registers of affect.

Sotomayor intuitively understands that the law requires an alternative space for world making that defies logic and moves forward like an autopoiesis that does not require consent for its presence and power. Massumi (2010: 64) holds that the way of the world is to permanently tell us to 'Look out!' and the way out of this affective state of existence, a way of understanding and perhaps capturing the 'political ontology of threat' is to return to 'the reality of appearance', as an 'affective twilight zone of indexical experience'. This is a way of saying that if we root our feet on the ground then critical thought will counteract our feeling. It is a political demand to upend the autopoiesis of threat by taking stock of appearance as 'the surplus of reality' because of the ontogenetic effectiveness of its nonexistence.

This for me is where the Massumi insistence on nonexistence breaks down and betrays the Black. It fails to recognize how nonexistence has promulgated the law and the world's ability to apprehend the Black across multiple realms of (non)being, without the requirement of consent.⁹ Fear is a placeholder for the alterity of the law, the codes of antiblackness, its ontogenetic possibility to apprehend the Black by any means necessary. Fear demonstrates how alterity in the case of Blackness can be a space for the intensification of violence. It is not my intent to suggest that alterity, as

Massumi describes it, cannot be an escape for Blackness. Instead, it is to hone in on how Black existence outside of the either/or of legal (political) logic provides a precondition for violence – and therefore one that underwrites/pre-conditions the use of arms in the US, as is the focus of this issue.

Double consciousness, for Sotomayor, rests on knowing the law is never on the side of the Black but that it should and can be for the Black.¹⁰ This is a perverse entanglement. Nothing about the police suggests that they have ever or will ever be on the side of Blackness. So why would such be expected? Blackness, here, is bestowed with borrowed constitutional plenitude that is felt as truth; however, there is no proof. This is to say, the grafting of constitutional protection, past and future, onto the Black assumes it can carry the potential for police protection. This feeling contends that with a strong enough fight in favor of the law, the police can be deputized by the Black for the Black. As Sotomayor so poignantly makes clear, ‘I do not doubt that most officers act in “good faith” and do not set out to break the law’ (Strieff, 2016). The question is: in good faith with respect to what social and political order?

The Dubosian problematic, of how does it feel to be a problem, is a proposition that can be employed as a meditation on the question of *being* fear. How does it feel to be fear? It is not possible to say with surety if an articulation of the Black affect of being-fear can manifest in language.¹¹ However, Blackness is the ontological antagonism between the performance of feeling-threat and the threat of the feeling of (non)being. The future past potentials of the paradigmatic arrangement that situates the Black before the law cannot be imagined. Not for the *Strieff* dissent or the semiotic structures that make the world possible.

Notes

1. My use of ‘the Black’ here draws on the usage of the term by Frank B Wilderson, III (2010), who argues that Black subjectivity exists under erasure and thus uses the Black in lieu of ‘the Black subject’ to signal the ontological violence that is central to antiblackness.
2. In ‘No Humans Involved: An Open Letter to My Colleagues’, Wynter (1994) uses the term ‘inner-eye’ to reference the affective truth of power that guides human behavior in both unspoken and immeasurable ways. However, she is also concerned with how human behavior continues to produce this structural determinant.
3. Wilderson (2010: 82) writes that:

Whiteness, then, and by extension civil society’s junior partners, can not be solely ‘represented’ as some monumentalized coherences of phallic signifiers but must, in the first ontological instance, be understood as a formation of ‘contemporaries’ who do not magnetize bullets. This is the essence of their construction through an *asignifying* absence; their signifying presence is manifest in the fact that they are, if only by default, deputized against those who do magnetize bullets: in short, White people are simply ‘protected’ by the police, they *are* the police.

4. *Utah v. Strieff* came before the US Supreme Court just months following the death of Freddie Gray by Baltimore police, and just slightly over a year following the acquittal of Dante Servin, the officer who killed Rekia Boyd, and the deaths of Eric Garner by the NYPD, and Michael Brown by Ferguson police officer, Darren Wilson. Each of these deaths was subsequently followed by fervent political uprisings that received vast national and international attention.
5. As support for her dissent's position on race and policing, Sotomayor cites the race theorists Michelle Alexander (2010), Ta-Nehisi Coates (2015) and WEB Dubois (1903). Furthermore, she uses political metaphors from Black resistance struggles like Black Lives Matter.
6. In this article, Massumi develops his argument through a theoretical critique of the contexts of the George W Bush presidency and his administration's waged war on terror.
7. Patricia T Clough (2010: 215) states that, 'biomedia produces the biomediated body as a laboring body'. She goes on to argue:

The biopolitical racism of the biomediated body engages populations in terms of their 'vulnerable biologies' – vulnerable not only to illness, life, and death but also to national and international regulatory policies, military research programs, and a range of social anxieties concerning the level of threat. (p. 223)

8. I want to thank J Kameron Carter for offering comments on an earlier version of this work that led to my theorizations on the onto-theological aspects of the law. Furthermore, 'Paratheological Blackness' (2013) by Carter has been an invaluable work in helping to craft my thinking around this concept.
9. See Palmer (2017) for a further introspection into the antiblackness of affect theory's assumption about the boundless nature of affect.
10. Sotomayor writes:

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and Black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued. (Strieff, 2016)
11. Again, see Palmer (2017) for a critical discussion of Black affect.

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