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Repository Citation

Austin, Regina, "A Dose of Color, A Dose of Reality: Contextualizing Intentional Tort Actions with Black Documentaries" (2018). *Faculty Scholarship at Penn Law*. 2187.

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A Dose of Color, A Dose of Reality: Contextualizing Intentional Tort Actions with Black Documentaries

Regina Austin

[Most white Americans don't] know how Negroes live I'm sure they have nothing whatever against Negroes, but that's really not the question The question is really a kind of apathy and ignorance, which is the price we pay for segregation. That's what segregation means. You don't know what's happening on the other side of the wall, because you don't want to know.¹

Legal education in the United States cannot adequately prepare tomorrow's lawyers without exposing them to the contexts that have given rise to the doctrines that are the bread and butter of daily classroom experience. Few tools are more effective in getting students to focus on the bigger picture than documentary films. Such films vividly display the impossibility of understanding legal clashes without appreciating how the disputants came to be in the relationships that produced the conflicts in the first instance. Here's why.

We live in a society composed of multiple overlapping, variously fluid groups categorized by race, ethnicity, and nationality; sex, gender, and sexual orientation; socioeconomic class; age and abilities; religion; and geography. These groups constantly compete for economic, cultural, and political capital and the legal ability to protect their acquisitions. Amid these conflicts, the intentional torts² regime can operate as a source of freedom and protection or oppression and control. The intentional torts doctrines exacerbate, ameliorate, or resolve intergroup and intragroup clashes by clamping down on or leaving unconstrained private physical and emotional violence in ways that affect the distribution of resources.

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1. I AM NOT YOUR NEGRO: A MAJOR MOTION PICTURE DIRECTED BY RAOUL PECK FROM TEXTS BY JAMES BALDWIN 40 (Raoul Peck ed., 2017).
2. The intentional torts include assault, battery, false imprisonment, malicious prosecution, abuse of process, intentional infliction of emotional distress, trespass to land, nuisance, defamation, invasion of privacy, and fraud, and defenses such as consent, duress, insanity, self-defense, defense of others, defense of property, necessity, and truth.

Despite the fact that intentional tort disputes often involve intergroup and intragroup clashes, tort courts generally do not engage in the kind of contextual analysis required to understand the complex stakes fueling the litigation. Contextual analysis situates tort disputes within the larger frame of powerful public and private institutions, social networks, and complex identities, none of which may be directly implicated in the particular lawsuit, but all of which may be keys to the real interests involved. As a starting point, then, contextual analysis rejects the assumption that market-based allocations of wealth are the product of “invisible hands” or that assessments of “personal responsibility” can be made without attending to the structural and systemic barriers that impede an individual’s or a group’s survival and mobility.

Contextual analysis especially exposes culture as a weapon that groups deploy in their conflicts over other kinds of capital. Culture encompasses “all socially standardized ways of seeing and thinking about the world; of understanding relationships among people, things, and events; of establishing preferences and purposes; of carrying out actions and pursuing goals.”³ Very rarely do legal actors consider the relationship between formal, state-sanctioned law and the diversity of social norms and practices that govern the everyday lives of a vast plethora of competing groups. Opposing claims of cultural superiority provide justifications for battles between and within groups that the law is asked to resolve. At the same time, cultures represent powerful normative regimes with which law must compete and which it frequently discovers that it cannot. Thus, contextual analysis represents a challenge to the effort of courts and other legal actors to portray the law as an autonomous field of knowledge and a source of neutral conflict resolution.

When one group can assert cultural and material dominance in a way that neutralizes or demeans another group’s culture and obfuscates or denies its material existence, intentional torts disputes can yield outcomes that are not in accord with reality and that condone or unleash unjust violence. Contextual analysis that exposes and dissects the group conflicts underlying intentional tort actions might prevent such skewing of outcomes.

Documentary films are enormously helpful in contextualizing torts disputes. With images, words, and music, documentaries can, to use James Baldwin’s words from the introductory quotation, pierce “the apathy and ignorance” that fuel conflict and violence between and within groups and convey with a measure of authenticity “what’s happening on the other side of the wall.”⁴ They have the capacity to represent the lived experience and culture of groups struggling in the competition for the economic, social, and cultural capital that will allow them to live a good life within the folds of a society that is just and protective of the well-being of all its inhabitants.

It follows that courts rendering decisions based on the law of intentional

3. CHARLES A. VALENTINE, *CULTURE AND POVERTY: CRITIQUE AND COUNTER-PROPOSALS* 3 (1968).

4. I AM NOT YOUR NEGRO, *supra* note 1, at 40.

torts would produce fairer and more just decisions if they resisted the cultural hegemony of narratives constructed by groups well-endowed with capital and gave greater credence to the narratives of competing groups. What follows is an illustration of how two contemporary documentaries can be used to provide a critical contextual analysis of an intentional tort case involving contemporary race relations.

Klayman v. Obama

According to the *Third Restatement of Torts*, intentional infliction of emotional distress (or “the tort of outrage” as it is also known) “originated as a catchall to permit recovery in the narrow instance when an actor’s conduct exceeded all permissible bounds of a civilized society but an existing tort was unavailable.”⁵ *Klayman v. Obama*⁶ takes this description literally and attempts to apply the tort to the impact of criticism by black public officials and grass-roots protests addressing one of the most serious civil rights issues affecting communities of color today: police-involved deaths of minority civilians.

In 2016, acting as both attorney and plaintiff, Larry Klayman brought a class-action lawsuit in the U.S. District Court for the Northern District of Texas against, among others, then-President Barack Obama, former Attorney General Eric Holder, the Reverend Al Sharpton, Minister Louis Farrakhan, George Soros, the three female co-founders of #Black Lives Matter, and Black Lives Matter itself.⁷ In addition to Klayman and Dallas police officer Demetrick Pennie, the plaintiffs consisted of “all domestic actual and defacto law enforcement officials and persons . . . of all races and ethnicities (sic), as well as relevant Jews and Caucasians also threatened and targeted and harmed by the Defendants’ ignited race war, who reside within the domestic United States.”⁸

Klayman asserted that he had standing to sue because he was “present in the United States of America” when these threats and acts of violence occurred.

5. RESTATEMENT (THIRD) OF TORTS § 46, cmt. a (AM. LAW INST., 2013).
6. Pennie v. Obama, 255 F. Supp.3d 648 (N.D. Tex. 2017). Demetrick Pennie, a Dallas police officer, was an additional individual plaintiff. *Id.* at 653.
7. Class Action Complaint, *Klayman v. Obama*, No. 16-cv-02010, 2016 WL 3769305 (N.D. Tex. July 9, 2016). Klayman also brought suit on behalf of Enrique Zamarripa, father of Patrick Zamarripa, a Dallas police officer who was slain by a sniper during a protest against a police-involved shooting. See J. Weston Phippen, *A Lawsuit Accuses Black Lives Matter of Inciting a “War on Police,”* ATLANTIC MONTHLY (Nov. 8, 2016), <https://www.theatlantic.com/news/archive/2016/11/dallas-officer-lawsuit-blm/506939/>. A disabled Baton Rouge police officer who was hit by concrete or a rock and suffered injury to his brain, jaw, and teeth also sued leaders of #Black Lives Matter; he was not represented by Klayman. See John Friend, *Permanently Disabled Louisiana Deputy Sues Leaders of Black Lives Matter*, AMERICAN FREE PRESS (July 28, 2017), <http://americanfreepress.net/permanently-disabled-louisiana-deputy-sues-leaders-of-black-lives-matter/>; Associated Press, *Can Black Lives Matter Be Sued? Federal Judge to Decide*, NBC NEWS, (June 15, 2017), <https://www.nbcnews.com/news/nbcblk/federal-judge-decide-if-black-lives-matter-can-be-sued-n772996>.
8. Class Action Complaint, *supra* note 7, at ¶ 5.

Klayman, founder of Judicial Watch and Freedom Watch, considers himself a conservative Ralph Nader. Others might charitably label him a “gadfly.” His pursuit of civil rights lawsuits seems to be a form of civil disobedience that succeeds in bringing attention to his causes.

According to the complaint, the defendants incited violence and disrespect by convincing their supporters that “there is a civil war between blacks and law enforcement,”⁹ that blacks are being targeted and hunted in order to be killed “for no reason other than racism and sport,”¹⁰ and that blacks “are under attack.”¹¹ More specifically, defendants are alleged to have “incited and inflamed violent crowds into committing arson, looting, destruction of property, assaults on police officers [and other class members], and other violence based upon the false idea that the nation’s police officers . . . are intentionally and systematically targeting, hunting, and killing blacks and arresting and prosecuting innocent blacks.”¹² The shooting of Michael Brown in Ferguson, Missouri, it is alleged, gave Obama and Holder “another opportunity to stir up major racial tensions and hatred” and allowed the President to turn “a defensive shooting into a national crisis.”¹³ As a result, crime rates are rising because fewer black people are being arrested, prosecuted, and imprisoned; more repeat offenders are being released to reoffend; and law enforcement officers are prevented from doing their jobs.¹⁴

Likewise, Black Lives Matter, according to these allegations, is not “a political project that was launched . . . to combat implicit bias and anti-black racism and to affirm the beauty and dignity of all black lives.”¹⁵ Rather it is “a violent and revolutionary criminal gang” that has “in fact incited and committed further violence, severe bodily injury and death against police officers of all races and ethnicities and Jews and Caucasians.”¹⁶ Moreover, this violence was “committed by outsiders who came to Ferguson from all over the United States, as far away as San Francisco and New York City.”¹⁷ The complaint attributes the creation of the “Black Lives Matter movement and network” to “the false and inciting propaganda” of the nationally prominent defendants.¹⁸ “Revealing the true motivations and actions of the ‘Black Lives Matter’ movement, all across the country gatherings of the movement react

9. *Id.* at ¶ 15.

10. *Id.* at ¶ 16.

11. *Id.* at ¶ 15.

12. *Id.* at ¶ 113.

13. *Id.* at ¶ 127.

14. *Id.* at ¶¶ 19, 20, 38, & 41-46.

15. *Id.* at ¶ 153.

16. *Id.* at ¶ 155.

17. *Id.* at ¶ 166.

18. *Id.* at ¶ 168.

violently and angrily to attempts to appeal for unity by saying ‘All Lives Matter.’”¹⁹

The complaint ends by claiming that these actions have resulted in severe bodily injury and death to members of the putative class and the fear of imminent severe bodily injury and death as well as continued severe emotional distress.²⁰ In addition to a number of claims based on federal civil rights and constitutional law, all of the defendants are accused of committing the common-law torts of assault and intentional infliction of emotional distress.²¹

The lawsuit was dismissed on various grounds in a thirty-two-page opinion.²² However, the trial judge refused to sustain a Rule 11(b) motion for sanctions brought by one of the defendants, who argued that the action was filed by the plaintiffs for the “purpose of garnering publicity for their views and harassing those with whom they disagree, instead of to remedy any legally cognizable injury.”²³ The court dismissed the defendant’s motion because it was unpersuaded that the plaintiffs’ claims “were not warranted by existing law or a good faith basis to extend, modify or reverse existing law.” It rejected Klayman’s retaliatory cross-motion for sanctions as well. In other words, the court did not find Klayman’s claims to be frivolous or brought in bad faith. Indeed, they likely reflect the views of many Americans about the nationwide black-led protests against police violence.

Klayman’s outrage is based on three key propositions: (1) there is no basis in fact for the claim that blacks are being targeted by law enforcement in numbers that are inconsistent with the level of crimes blacks actually commit; (2) protests by groups such as Black Lives Matter are provoking violence and the destruction of property as well as putting the lives of law enforcement officers in jeopardy in a way that warrants aggressive, militarized responses to protests by local and state authorities; and (3) the activists engaged in such protests violently reject attempts at unity under the banner of “All Lives Matter” and are criminals themselves. Klayman dismissed claims of state violence aimed at minorities and sought to stifle or repress the protests based on such views as private violence that, in his view, is without basis.

19. *Id.* at ¶ 169.

20. *Id.* at ¶ 179.

21. *Id.* at ¶¶ 210-14, 215-221.

22. Having dismissed all the federal claims and found that diversity of citizenship was not adequately pled, the court declined to exercise supplemental jurisdiction over the remaining state law claims. The court’s conclusion that the complaint did not adequately plead standing would appear to have supported a similar ruling with regard to the tort claims. *Pennie*, 255 F. Supp.3d at 659 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

23. Defendant McKesson, in supporting his Rule 11(b) motion, pointed to other cases brought by Klayman that were dismissed and should have put Klayman on notice that the present action was frivolous. The court, however, found them “too factually and legally dissimilar” to support McKesson’s motion. *Id.* at 675.

Viewed from the context of black people's past experiences in America, a good argument could be made that these propositions are fallacious. Two documentaries, one of which addresses America's historic response to black suffering and black protest and the other of which focuses on specific activities of the Black Lives Matter movement itself, expose the real stakes underlying Klayman's litigation and illustrate the power of contextual analysis for understanding intentional torts case.

"I Am Not Your Negro"

Raoul Peck's "I Am Not Your Negro" is based on an unpublished letter written by James Baldwin about the deaths of his friends Medgar Evers, Malcom X, and Martin Luther King Jr. In the documentary, James Baldwin, as channeled through scriptwriter and director Peck, offers up a meditation on the notion of American reality in the context of race relations.²⁴

Baldwin says that, as a general matter, Americans prefer fantasy over reality—i.e., "a truthful re-creation of their experience."²⁵ A steady diet of images "designed not to trouble but to reassure . . . weaken[s] our ability to deal with the world as it is, ourselves as we are."²⁶ This self-deception is conspicuous in the logic of white supremacy:

I attest to this:
The world is not white;
it never was white;
cannot be white.
White is a metaphor for power,
and that is simply a way of describing
Chase Manhattan Bank.²⁷

Black people, on the other hand, must confront the actuality that America has not "in its whole system of reality evolved any place" for them and that white Americans "have deluded themselves for so long that they really don't think [blacks are] human." Indeed, the source of Malcolm X's "great authority over any of his audiences," according to Baldwin, was that he articulated the suffering of black people, "corroborate[d] their reality," and told "them they really exist."

Black self-assertion in the face of dehumanizing white supremacy excites in whites terror and exaggeration of the threat posed by such resistance. Says Baldwin, "What one does realize is that when you try to stand up and look the

24. See I AM NOT YOUR NEGRO, *supra* note 1.

25. *Id.* at 69.

26. *Id.* at 86.

27. *Id.* at 107.

world in the face like you had a right to be here, you have attacked the entire power structure of the Western world.”²⁸ Baldwin continues, “[If] any white man in the world says ‘give me liberty or give me death,’ the entire white world applauds. When a black man says exactly the same thing, word for word, he is judged a criminal and treated like one and everything possible is done to make an example of [him], so there won’t be any more like him.”²⁹

Baldwin thus provides an explanation for Klayman’s resort to hyperbole and hysterics in dismissing blacks’ representation of, and reactions to, their experience, their reality, of dehumanizing and deadly treatment at the hand of the police. Moreover, his response to the protests in the name of Black Lives Matter evidences the alarm that Baldwin says accompanies black self-assertion in the face of white oppression. If Baldwin’s critique is given credence, Klayman’s magnification of the threat and divisiveness of black protest and his labeling protestors violent criminals should not obfuscate the underlying reality. For “All Lives Matter” to be the rallying cry of Americans concerned about police violence, there must be acceptance of the proposition that at the present moment black lives do not matter nearly enough.

Baldwin declares that the contributions of blacks, particularly the exploitation of their “cheap labor,” have created their entitlement to share in the American dream. (The same is true of other minorities.) If their entitlements are denied, there will be a reckoning someday, perhaps soon.

It is a terrible thing for an entire people to surrender to the notion that one-ninth of its population is beneath them [U]ntil the moment comes when we the Americans, we the American people, are able to accept [that] we are trying to forge a new identity for which we need each other, and that I am not a ward of America, I am not an object of missionary charity, I am one of the people who built the country. Until this moment, there is scarcely any hope for the American dream, because people who are denied participation in it, by their very presence, will wreck it. And if that happens, it is a very grave moment for the West.³⁰

For Baldwin, the American dream was in jeopardy; this is a feeling shared by many following the election of Donald Trump to the presidency. To Baldwin, the American dream required that we strive to create an identity that is inclusive of blacks and others who built the country and that supports their full participation in all of its benefits, be they economic, political, or social. Klayman’s complaint, however, does not point in the direction of such a new, expansive American identity. In his allegations, black people are associated with greater criminality and violence, lesser intelligence, and moral inferiority. Black authority figures, even the former President and Attorney General of

28. *Id.* at 49.

29. *Id.* at 81-82.

30. I AM NOT YOUR NEGRO, *supra* note 1, at 75 (quoting James Baldwin, 1965 Cambridge University Debate).

the United States, are demeaned and denigrated. Black protest activity against white supremacy is severely condemned. Reading Baldwin opens up the complaint to cultural criticism, puts it in the context of an ongoing history of contentious race relations, and allows us to see what is really at stake in the litigation.

“Whose Streets?”

While “I Am Not Your Negro” explores the reasons whites, such as Klayman and others before him, resort to fiction in the face of black suffering and organized protest, “Whose Streets” provides a direct response to Klayman’s account of the activities of the Black Lives Matter movement.

“Whose Streets?” is the work of two young black filmmakers who were on the ground in Ferguson shortly after the start of protests provoked by the August 2, 2014, police shooting of Michael Brown. It focuses on a handful of young black protestors, the core constituents of the Black Lives Matter movement. The film includes crowd-sourced material, including tweets and video shot by participants, particularly on cellphones.

The film’s aim is to counter the narrow coverage provided by the mainstream media, which concentrated on looting and violence, and to shift the focus to the lived experiences of people in the community.³¹ Numerous scenes involve protests and encounters between heavily armed or armored police officers and citizens who are often seen running from tear gas. Through extensive footage of the street protests, the directors of “Whose Streets?” set out to expose the fallacy that Black Lives Matter protests are violent and that aggressive police conduct is the result of instigation by the protestors. According to director Sabaah Folayan, “[w]henever we see someone who’s destroying property or whatever the case may be, their actions are always contextualized within a cause-and-effect relationship with what the state has done.”

The directors were conscious of the way in which viewers find their own humanity through the “selfless” act of watching others suffer; the audience may never get around to acknowledging the humanity of the sufferers themselves.³² Storytelling that portrays abuse “with little context to understand why this might be happening, encourages responses of rescue by outsiders rather than a more critical analysis of . . . power.”³³ Instead, what is needed is “a critical, complex, and contextualized storytelling that interrogates [the abuse’s]

31. David Whitt, a father of four and a recruiter for the Ferguson chapter of Copwatch, was the on-screen critic of the mainstream media’s coverage of the Ferguson Revolt. Whitt shooed away the cameramen capturing the dismantlement of a curbside memorial to Brown outside of the apartment complex from which he is subsequently evicted. Residents he has armed with cameras used them to shoot and capture citizen-police encounters.
32. Sameer Rao, *4 Questions with the Directors of the Ferguson Uprising Doc, ‘Whose Streets?’*, COLORLINES (Aug. 11, 2017) <https://www.colorlines.com/articles/4-questions-directors-ferguson-uprising-doc-whose-streets>.
33. See Sujatha Fernandes, *Stories and Statecraft: Afghan Women’s Narratives and the Construction of Western Freedoms*, 42 SIGNS: J. WOMEN IN CULTURE & SOC. 643, 664 (2017).

material and historical conditions”³⁴ and valorizes exertions of agency by the sufferers in the form of political mobilization and group action that confront the powerful.

In an implicit challenge to the dehumanization of black people of which Baldwin spoke, “Whose Streets?” humanizes Michael Brown; he is not “a juvenile delinquent,” as Klayman refers to him, but a high school graduate about to attend college who lies dead in the street for over four hours while his mother and his neighbors look on helplessly. “Whose Streets?” also humanizes the individual protestors, who are portrayed as multifaceted, complex subjects who find agency, self-direction, loving relationships, and solidarity through activism directed at improving the political and material standing of their community. “Whose Streets?” reveals that “affirm[ing] the beauty and dignity of all black lives” is a goal of the Black Lives Matter movement, putting a lie to Klayman’s cynical dismissal of it.

And “Whose Streets?” situates the protests in Ferguson in the larger social and economic context that contextual analysis demands and Klayman’s complaint completely ignores. The material conditions that triggered the protests included the fees, fines, and court costs that were disproportionately imposed on the black citizens of Ferguson and significantly worsened their economic situations. The protests succeeded in triggering a Justice Department review of the practices of the Ferguson Police Department and the Municipal Court, which exposed the full dimensions of Ferguson’s practice of generating revenue through monetizing parking, traffic, and housing code infractions and penalizing late payments and failures to appear.³⁵ “Whose Streets?” makes it clear that the solution to the problem of an unresponsive, exploitative police force, court system, and governmental authority rested in the collective hands of the people of Ferguson. Peaceful protest is hardly an outrageous response to legitimate grievances.

Reading the complaint in *Klayman v. Obama* in the context provided by “Whose Streets?” leads to three inescapable conclusions: (1) there is a basis in fact for claims that blacks are being targeted by law enforcement for shootings and arrests in numbers that are inconsistent with the amount of crime blacks actually commit; (2) anti-racist protests by groups like Black Lives Matter are not provoking racism and violence, but are protesting state-sanctioned racism and violence in ways that do not warrant aggressive, militarized responses of state and federal authorities; and (3) the protests are the product of activists from the communities where the protests are held who share the wishes of their fellow residents to live in peace with law enforcement and on fair, just, and equitable terms with their neighbors and public officials.

Contextual analysis does not resolve the cultural clashes that are a component of the intergroup and intragroup conflicts over the economic, political, and

34. *Id.*

35. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42-62 (Mar. 4, 2015).

social resources that generate intentional tort claims. But contextualizing with documentaries has the potential to break down the walls between and within groups that apathy and ignorance erect and to reveal what is really at stake.