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From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the "War On" Paradigm

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*Donald F. Tibbs**

Checks out the message in its rough stylee, the real criminals are
the C-O-P.¹

KRS-One

I’m not the other color so police think, they have the authority to
kill a minority.²

N.W.A.

Son do you know what I’m stopping you for? Cause I’m young
and I’m black and my hats real low, do I look like a mind reader
sir, I don’t know?³

Jay-Z

I. INTRODUCTION

Despite the longstanding history of race in America, the twenty-first

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1. KRS-ONE, *Sound of da Police*, on RETURN OF THE BOOM BAP (Jive Records 1993).
2. N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless Records 1988).
3. JAY-Z, *99 Problems*, on THE BLACK ALBUM (Roc-A-Fella Records 2003).

century curiously purports to be an era of post-racialism.⁴ As support, it points to the first State of the Union address ever given by an African American President, Barack Obama.⁵ President Obama's ascendancy acknowledges our racial progress, but it is far from an uncomplicated celebratory milieu.⁶ While it is true that the convergence of racial progress and multicultural democracy marks this historical moment, claiming we are indeed post-racial overstates our reliance upon its significance. Rather than destabilize the basic notions of white superiority, the significance that we have a Black⁷ president, and thus the claim that we are post-racial, actually reinvigorates what Professor Joy James called "the disciplinary narratives of anti-black racism."⁸

Taking stock in this instance, however, means recognizing how the rise of Obama raises the specter of racial uplift *by way of* the redeployment of racist tropes of Black criminality. He is nominated, runs, and wins a presidential election not because of his Blackness, in which he represents the whole spectrum of Black social and political existence, but because his brand of Blackness is the "other"—the palpable, tolerable, embraceable

4. Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807 (2011) [hereinafter Haney López, *Colorblind*]; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010) [hereinafter Haney López, *Racial Stratification*]; Karla Mari McKanders, *Black and Brown Coalition Building During the Post-Racial Obama Era*, 29 ST. LOUIS U. PUB. L. REV. 473 (2009); Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659 (2010).

5. *Tell Me More: Are We Living in a Post-Racial America?*, NPR (Feb. 11, 2009), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=100557180> (providing the transcript of the interview). In the opening interview Michel Martin claims:

[F]ew will argue this point – the election of Barack Obama as president signals changing times in how many Americans think about race. Some might argue that the election of the first African-American president indicates that race dialogue is now meaningless and perhaps even destructive, but others argue that the real challenge is to talk about race in a more constructive fashion.

Id.

6. Joy James, *Campaigns Against "Blackness": Criminality, Incivility, and Election to Executive Office*, 36 CRITICAL SOC. 25 (2010) [hereinafter James, *Campaigns*].

7. In this Article, I capitalize the term "Black" when used as an adjective or proper noun and when I refer to people of African descent individually or collectively. I do so for the reasons proffered by Critical Race Theory scholars Kimberlé Williams Crenshaw and Neil Gotanda. Professor Crenshaw stated, "Blacks like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Professor Gotanda also stresses the importance of capitalizing the term "Black" on the basis that it "has deep political and social meaning as a liberating term." Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 4 (1991).

8. James, *Campaigns*, *supra* note 6, at 26.

Black man who represents the proudest moment in colorblind ideology: the ability of young African Americans to pull themselves up by their own bootstraps. In other words, Obama rises *because of* pathological Blackness, not in spite of it. This is not to understate President Obama's qualification for the position, although many have tried.⁹ But as Professor Fred Moten explains, "[t]he cultural and political discourse on black pathology has been so pervasive that it could be said to constitute the background against which all representations of blacks, blackness, or (the color) black take place."¹⁰ Stock taking in *this* context, then, means dealing with the contradictions of the present state of America, of Obama's post-racial America, in terms of how white supremacy constitutes the basis not only for white identity but for Black subjectivity as well.

But the fashioning of Black existence within the framework of post-racialism presupposes a significant recognition about state power: how can we assess this state of dis-union through an understanding of the nexus between America's war on social issues and popular culture? In particular, how is post-racial America affected by this nation's longstanding war on Blackness, ranging from the Black Power Era to the era of Hip Hop?¹¹ How does the state's power to control the narrative of race demonstrate its ongoing efficacy in both classifying crimes and who is criminal? More importantly, what are some of the insidious ways in which state power

9. The attacks on President Obama's qualifications for President of the United States have mostly been fueled by conspiracy theories ranging from his birth qualifications to his intellectual aptitude. Some of the strongest language appeared in London-based news source *The Telegraph*, quoting retired U.S. Major General Carroll Childers, who compared Obama to "Hitler, Stalin, Saddam, Mao, and Kim Jong Il." Alex Spillius, *Barack Obama Fights Presidential Eligibility Claims*, TELEGRAPH, Mar. 2, 2009, <http://www.telegraph.co.uk/news/worldnews/barackobama/4929005/Barack-Obama-fights-presidential-eligibility-claims.html>. According to Childers,

'He is an interloper, a [sic] usurper, a fake, a scam artist, a Chicago crook, a recipient of bribes and gratuitous income for which he paid no tax, a socialist (perhaps only a communist or Marxist), and a grave danger to the future of the America that I love and have protected since I was 17 years old.'

Id. Domestically, presidential "jokeful" Donald Trump challenged President Obama's intellectual aptitude with "I heard he was a terrible student, terrible. How does a bad student go to Columbia and then Harvard?" Beth Fouhy, *Donald Trump: Obama Wasn't Qualified for Ivy League*, HUFFINGTON POST (Apr. 25, 2011), http://www.huffingtonpost.com/2011/04/25/donald-trump-obama-ivy-league_n_853525.html.

10. Fred Moten, *The Case of Blackness*, 50 CRITICISM 177, 177 (2008); *see also* FRED MOTEN, IN THE BREAK: THE AESTHETICS OF THE BLACK RADICAL TRADITION (2003) (arguing that all Black performance—culture, politics, sexuality, identity, and Blackness itself—is improvisation).

11. For an excellent source on the political connections between Black Power ideology and Hip Hop identity, see PATRICIA HILL COLLINS, FROM BLACK POWER TO HIP HOP: RACISM, NATIONALISM, AND FEMINISM (2006). While Collins's book mostly focuses on the connection between African American nationalism and feminism, her work is insightful in explaining how the waning years of Black Nationalism associated with the Black Power Era have been replaced with structuring identities through pop culture, associated with the Hip Hop Era. *See id.*

moves under the cover of *darkness*? I maintain a key component for understanding the “fallout” of declaring war on social issues and its impact on young people of color is the recognition that the state is most effective where it is least visible¹²—for example, in the trajectory of American law.

Contesting racial progress is not an easy task. After all, most Americans embrace the idea that our racial tolerance today is considerably different from the past: that the old vanguard of American racism is dead and buried, and racial enlightenment has risen from the fiery ashes of *de jure* and *de facto* segregation obliterated by 1960s civil rights struggles.¹³ While there may be some value to that argument, strict regimentation begs the question: racial enlightenment according to whom? In order to contest racial progress we must approach the discussion honestly. In other words, we need to locate these new discussions about post-racialism in the old discourse of colorblindness,¹⁴ which itself needs situating in terms of the state’s naked criminality against the liberation fighters of the Black Power Era.

Post-racialists, of course, would have us believe that the landmark ruling in *Brown v. Board of Education*¹⁵ and the passage of the Civil Rights Acts of 1964,¹⁶ the Voting Rights Act of 1965,¹⁷ and the Fair Housing Act of 1968,¹⁸ effectively made racism a thing of the past.¹⁹ In other words, law not only officially outlawed racism, but it also reframed its abrogation with

12. See Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 323–63 (Toni Morrison ed., 1992) [hereinafter Lubiano, *Black Ladies*]; see also Wahneema Lubiano, *Like Being Mugged by a Metaphor: Multiculturalism and State Narratives*, in MAPPING MULTICULTURALISM 64–75 (Avery Gordon & Christopher Newfield eds., 1996).

13. John McWhorter, *Racism in America Is Over*, FORBES, Dec. 30, 2008, http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html. McWhorter’s story not only claims that “America is past racism,” but that the election of President Obama signifies that racism is no longer a serious problem. *Id.*

14. Haney López, *Colorblind*, *supra* note 4. According to Professor Haney López, “[a]s a framework for comprehending and maneuvering around race, post-racialism must be assessed against the dominant racial ideology of our time—colorblindness.” *Id.* at 808.

15. *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

16. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

17. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

18. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81.

19. See Gary Peller, *Race-Consciousness*, 1990 DUKE L.J. 758, 847 (1990). For more scholarship on this area, see EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2003); CHARLES MILLS, THE RACIAL CONTRACT (1997); Gotanda, *supra* note 7; Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 TEX. L. REV. 1589 (1993).

irrefutable evidence of Black equality, most specifically, with the presence of more Blacks in high profile careers. But that characterization misses the mark. Because white civil society in this country has “long considered black people to be weapons of mass destruction,”²⁰ the increasing presence of Black men in prominent positions should indeed give us pause. The persistence of racial inequality is not so easily replaced because a few Blacks have poked through America’s glass ceiling in law, politics, and business. Instead, racial inequities, namely in policing and punishment, still overwhelmingly prevail.²¹ In fact, the ongoing discourse of post-racialism actually makes it difficult to discern the ongoing reality of anti-Blackness in American law. Campaigns, such as “get tough” on crime,²² wage a “war on drugs,”²³ and “increase our border security”²⁴ adopt colorblind language, but their targets are almost overwhelmingly Black and Brown people.²⁵ Simply, the effect of post-racial ideology on racial progress is to render racism illegitimate and suspect by definition, hence the use of the phrase “playing the race card” anytime a person of color simply points to the most mundane and obvious moments of racism in the post-Civil Rights Era.²⁶

Although Critical Race scholars have interrogated post-racial ideology and its jurisprudence,²⁷ no one has connected it to its material base: the

20. See Jared Sexton, *Race, Nation, and Empire in a Blackened World*, 95 RADICAL HIST. REV. 250, 250–61 (2006).

21. See Cheryl I. Harris & Devon W. Carbado, *Loot or Find: Fact or Frame?*, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA 87, 91 (David Dante Trout ed., 2007).

22. See *Beyond Getting Tough: Crime Bill Is Smart Answer*, MYRTLE BEACH SUN NEWS, Mar. 24, 2010, at A; Bob Townsend, *Jail Is Only One Step in the Process of Eliminating Crime*, HAMILTON SPECTATOR, Jan. 11, 2006, at A17; Linwood Barclay, *Crime Good Issue to Get Tough on*, TORONTO STAR, June 4, 2004, at D1.

23. See Julianne Malveaux, *Drug War Is Lost; Help the Victims Instead*, USA TODAY, Mar. 30, 1990, at 12A; Abe Mellinkoff, *Playing Political Poker with the Drug War*, S.F. CHRON., Sept. 18, 1989, at A18; *No More 'War on Drugs'*, N.Y. TIMES, Feb. 25, 1990, § 4, at 18.

24. See Alison Mitchell, *A Nation Challenged: The Borders; Officials Urge Combining Several Agencies to Create One That Protects Borders*, N.Y. TIMES, Jan. 12, 2002, at A8, available at 2002 WLNR 4008725; Tom Tancredo, *Bordering on Disaster*, N.Y. TIMES, Mar. 2, 2008, at WK13, available at 2008 WLNR 4135437.

25. See, e.g., AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION (Marie-Louie Frampton et al. eds., 2008); STEVE MARTINOT, THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE (2003).

26. Rick Horowitz, *The Card That Trumps Them All*, RALEIGH NEWS & OBSERVER, July 31, 2010.

27. For such scholarship, see *supra* note 4; see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); CHARLES LAWRENCE & MARI MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997); GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS (1998).

historiography of the late 1960s Black Power Era where the dirty work of an anti-Black state apparatus was deeply mired in extra-legal activities. During the Black Power Era, from 1966 through 1980, the state pursued two primary strategies in repressing the Black liberation struggle: to criminalize Black expressions of sovereignty and to criminally assault Black people everywhere.²⁸ The FBI's clandestine counterintelligence program, COINTELPRO, was a central means toward this end²⁹ and should be a requisite study for all generations. Fraudulent prosecutions and assassinations of Black leaders and rank and file activists were coupled with the mundane killings of everyday Black folk by the police.³⁰ Between 1966 and 1969, the federal government engaged in numerous counterintelligence operations against Black liberation organizations and their leaders.³¹ Between 1971 and 1973, nearly 1000 Black people were killed by law enforcement.³² This is a higher rate of state-sanctioned death—over one police murder per day for three years—than during the height of anti-Black lynchings around the turn of the twentieth century.³³

28. Cf. DHORUBA BIN WAHAD ET AL., *STILL BLACK, STILL STRONG: SURVIVORS OF THE U.S. WAR AGAINST BLACK REVOLUTIONARIES* (Jim Fletcher et al. eds., 1993) (arguing that the New York Panther 21 case was a conspiracy against Black revolutionaries in general and the Black Panther Party in particular).

29. The origins and various activities of COINTELPRO are well-documented. See, e.g., WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* (2002); see also Paul Wolf, *COINTELPRO*, www.COINTELPRO.ORG, www.icdc.com/~paulwolf/cointelpro/cointel.htm (last visited Sept. 13, 2011) (providing an invaluable online resource on COINTELPRO compiled by attorney Paul Wolf, whose law practice focuses on international and human rights law).

30. Ward Churchill, "To Disrupt, Discredit, and Destroy": *The FBI's Secret War Against the Black Panther Party*, in *LIBERATION, IMAGINATION, AND THE BLACK PANTHER PARTY: A NEW LOOK AT THE PANTHERS AND THEIR LEGACY* 78 (Kathleen Cleaver & George Katsiaficas eds., 2001).

31. A perfect example of the attack on Black liberation organizations is the Federal Bureau of Investigation's countermeasure against the famed Black Panther Party. Under its directive, Black Nationalist-Hate Groups, the FBI used COINTELPRO to develop a prosecution theory against the Panthers. As Frank J. Donner notes in his book, *The Age of Surveillance*, "[w]ith its 360 operations, the Black Nationalist-Hate Groups program was second in size only to the COINTELPRO-CPUSA," which related to the program against the Communist Party. Further, Donner notes that the Black Panther Party was "the subject of 233 out of 295 (79 percent) authorized black nationalist COINTELPRO actions." FRANK DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* 212, 221 (1980).

32. Akinyele Umoja, *Repression Breeds Resistance: The Black Liberation Army and the Radical Legacy of the Black Panther Party*, in *LIBERATION, IMAGINATION, AND THE BLACK PANTHER PARTY: A NEW LOOK AT THE PANTHERS AND THEIR LEGACY*, *supra* note 30, at 12.

33. Robin D.G. Kelley, *Slangin' Rocks . . . Palestinian Style: Dispatches from the Occupied Zones of North America*, in *POLICE BRUTALITY: AN ANTHOLOGY* 27, 29 (Jill Nelson ed., 2000). Also, for documentation of the state's involvement in the assassination of Martin Luther King, Jr., see WILLIAM PEPPER, *AN ACT OF STATE: THE EXECUTION OF MARTIN LUTHER KING, JR.* (2003).

To all that's been said thus far about post-racialism, I wish to add this: the discourse on post-racialism emerges from a context of profound anxiety and self-consciousness about the ongoing brutality of the law's relationship to Black Americans.³⁴ The assiduous insistence on defining racism as merely individual acts of bias betrays a desire to hide the reality of structural violence and institutionalized forms of discrimination. Whereas post-racialism emerged out of a raw and violent period of social protest and state repression, seeking to transform the meaning of these struggles from a historic political context to merely a matter of criminality, legal discourse on post-racialism appears after four decades of law and order retrenchment.³⁵ The memory of the social movements, of the state's naked criminality, and of the law as a space of open contestation has waned.³⁶ So, also, has the memory of a racial discourse that was actually grounded in reality. Post-racialism, therefore, is really about a desire by whites to move this society into a post-Black people era. It ignores the insatiable demands of the Black community and denies the ways in which Black existence is a reminder of state violence. Simply, post-racialism hopes Black people will stop being *Black*.

While new generations of young people are raised under conditions that are considerably worse than those faced prior to the post-Civil Rights Era, both liberal and conservative whites appear eager to "move on"—to disregard, with finality, the historical context that produced today's miserable conditions. The generation I refer to is the children of the Black Power activists of the 1960s and 1970s, the children who came of age in the 1980s and 1990s, and were bequeathed revolutionary ideals in a post-revolutionary age.³⁷ This generation also faced a society in which changes in

See generally CEDRIC ROBINSON, *BLACK MOVEMENTS IN AMERICA* (1997).

34. *See* STEVEN R. DONZINGER, *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 99–130 (1996); MARC MAUER, *RACE TO INCARCERATE* 56–81 (1999); JEROME MILLER, *SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 48–89 (1996); Sabina Virgo, *The Criminalization of Poverty*, in *CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS* 47–61 (Elihu Rosenblatt ed., 1996).

35. *See generally* MICHAEL SELMI, *Understanding Discrimination in a "Post-Racial" World*, 32 *CARDOZO L. REV.* 833 (2010) (suggesting that President Obama's election to the President of the United States is not an indicator that discrimination is no longer a factor in legal, social, or economic arenas); *see also* Haney López, *Colorblind*, *supra* note 4.

36. Darryl Fears, *Civil Rights Groups See Gradual End of Their Era*, *WASH. POST*, Apr. 5, 2008, at A01. According to Fears, "Forty years after the Rev. Martin Luther King, Jr. was assassinated . . . the storied organizations that propelled the modern-day civil rights movement . . . are either struggling to stay relevant or struggling to stay alive." *Id.*

37. A perfect example of a Hip Hop artist who was deeply connected to Black Power Era revolutionaries and politics was Tupac Amaru Shakur, better known by his Hip Hop nom de plume, 2Pac. Before his untimely and devastating 1996 murder, a case that Las Vegas police has yet to solve, he was a world-renowned star of Hip Hop. His namesake, Tupac Amaru II, was a Peruvian revolutionary who led an indigenous uprising against Spain and was subsequently executed.

the political economy have reduced employment and education opportunities forever, state restructuring abetted rather than ameliorated poverty, conservative jurisprudence facilitated draconian public policy, and Cold War foreign policy translated into war-making against people of color throughout the Third World.³⁸ This generation of Black and Brown youth would come to be called gangsters, thugs, and hoodlums, while they would come to call themselves “the Hip Hop generation.”³⁹

Shakur’s mother, Afeni Shakur and his father, Billy Garland, were active members of the Black Panther Party and both involved in the landmark New York Panther 21 case. Additionally, his aunt is Assata Shakur, better known as Joanne Chesimard, and his godfather is Geronimo Pratt, also known as Geronimo ji-Jaga. They were both members of the Black Panther Party as well. In his 1992 song, *Changes*, released posthumously, 2Pac accounts for the presence of the Black Panther Party in attempting to “change” the world. The lyrics of the song read:

I see no changes. Wake up in the morning and I ask myself,
 “Is life worth living? Should I blast myself?”
 I’m tired of bein’ poor and even worse I’m black.
 My stomach hurts, so I’m lookin’ for a purse to snatch.
 Cops give a damn about a negro? Pull the trigger, kill a nigga, he’s a hero.
 Give the crack to the kids who the hell cares? One less hungry mouth on the welfare.
 First ship ‘em dope & let ‘em deal the brothers.
 Give ‘em guns, step back, and watch ‘em kill each other.
 “It’s time to fight back,” that’s what Huey said.
 2 shots in the dark now Huey’s dead.

2PAC, *Changes*, on GREATEST HITS (Death Row Records 1992). The “Huey” that 2Pac mentions is the Minister of Defense for the Black Panther Party, Dr. Huey P. Newton, who was fatally shot on April 22, 1989 by Tyrone Robinson, a former member of the Black Guerilla Family, which ironically was an offshoot of Newton’s relationship with former Black Panther Field Marshall and iconic Black radical prisoner George Jackson, of the Soledad Brothers. *Suspect Admits Shooting Newton*, *Police Say*, N.Y. TIMES, Aug. 27, 1989, <http://www.nytimes.com/1989/08/27/us/suspect-admits-shooting-newton-police-say.html>. For a comprehensive historiography on 2Pac, see generally, MICHAEL ERIC DYSON, *HOLLER IF YOU HEAR ME: SEARCHING FOR TUPAC SHAKUR* (2001). For historiographies on his family and other Black Panther Party members mentioned above, see generally DAVID HILLIARD & DONALD WEISE, *THE HUEY P. NEWTON READER* (2002); ASSATA SHAKUR, *ASSATA: AN AUTOBIOGRAPHY* (2001); GEORGE JACKSON, *SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON* (1994); HUEY P. NEWTON, *REVOLUTIONARY SUICIDE* (1973); HUEY P. NEWTON, *TO DIE FOR THE PEOPLE* (1972). For a historiography on Tupac Amaru II, see JOHN A. CROW, *THE EPIC OF LATIN AMERICA 405–08* (4th ed. 1992).

38. See generally MIKE DAVIS, *PRISONERS OF THE AMERICAN DREAM: POLITICS AND ECONOMY IN THE HISTORY OF THE U.S. WORKING CLASS* (1986) (arguing progressive policies have failed the American working class); ROBIN D.G. KELLEY, *YO MAMA’S DISFUNKTIONAL!: FIGHTING THE CULTURE WARS IN URBAN AMERICA* (1998) (stating widespread misunderstandings of Black culture contribute to the inability to legislate social policy to save America’s inner cities); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997) (arguing that the disparities between Black and white upward mobility are related to economic inequalities as much as racial inequalities); NIKHIL PAL SINGH, *BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY* (2004) (arguing the current demand for colorblind policy is a product of the steady erasure of the legacy of the unfinished struggles against white supremacy).

39. BAKARI KITWANA, *THE HIP HOP GENERATION: YOUNG BLACKS AND THE CRISIS IN AFRICAN AMERICAN CULTURE* 4–5 (2002). According to Kitwana, the Hip Hop generation is comprised of “those young African Americans born between 1965 and 1984 who came of age in the eighties and nineties and who share a specific set of values and attitudes.” *Id.* at 4.

The 1980s, the beginning of the post-Civil Rights Era of colorblindness and formal legal equality, saw an increase in structural violence that hit Black communities the hardest. The portion of Black children living in poverty during this decade increased from 41.2 to 43.7 percent.⁴⁰ The increase in child poverty is directly related to deindustrialization and state restructuring. By the 1980s, the rise of the financial industry and the decline in manufacturing meant a devastating loss in stable working-class jobs, a decline in real wages for all working people, and a rise in part-time, low-wage, dead-end service-sector jobs.⁴¹ Fifty percent of Black males employed in the manufacturing sector in five Midwest states lost their jobs as a result of deindustrialization between 1979 and 1984.⁴² Consequently, between 1965 and 1990, Black family income fell fifty percent, and Black youth unemployment quadrupled.⁴³ Although popular discourse pathologized the Black family for the problems it faced during these times, the shifts in the political economy clearly meant that parents' material conditions to provide for their children had seriously deteriorated.⁴⁴

State restructuring over the course of the 1980s and 1990s undermined Civil Rights Era progress in substantial ways. It ended welfare and affirmative action, rolled back many basic social services, and established a new reliance on criminal justice to create and deal with the predictable problems connected to joblessness and poverty.⁴⁵ During this period of social change, the children of the former Black revolutionaries came to

40. GEORGE LIPSITZ, *FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC* 160 (2007).

41. *Id.* at 160–61.

42. *Id.*

43. *Id.*

44. The discourse demonizing the Black family for these shifts in the political economy, the restructuring of the state, and ongoing racial oppression were integral to accomplishing these historic political changes. The public hysteria about “welfare queens” and “crack babies” illustrates the ways in which colorblind racism fortifies the anti-Blackness of the post-Civil Rights Era. See, e.g., Lubiano, *Black Ladies*, *supra* note 12, at 323–63; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1419–21 (1991); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

45. For an excellent discussion on the impact of state restructuring and the impact it had on Black upward mobility by turning pleasure into profit, see Robin D.G. Kelley, *Playing for Keeps: Pleasure and Profit on the Postindustrial Playground*, in *THE HOUSE THAT RACE BUILT: ORIGINAL ESSAYS FROM TONI MORRISON, ANGELA Y. DAVIS, CORNEL WEST, AND OTHERS ON BLACK AMERICANS AND POLITICS IN AMERICA TODAY* 195, 195–231 (Wahneema Lubiano ed., 1997). In his article, Kelley argues that Black urban communities are hit hardest by post-industrialization as African Americans experience the physical and emotional barriers presented by the reversal of Civil Rights Era gains through economic restructuring of the nation–state. *Id.*

know the meaning of race through their experiences of continuing and cumulative discrimination in housing, employment, and education, persistent police brutality, and toxic environmental pollution in their neighborhoods.⁴⁶ In other words, unlike their parents' generation, whose struggles focused on legal equality and deeply entrenched battles against racial segregation, the Hip Hop generation is besieged by a plethora of post-Civil Rights problems, including racial profiling, rising rates of incarceration, poor(er) education, heightened sexual-identity wars, environmental racism, AIDS, and unemployment worsened by the onset of American capitalist globalization, namely job outsourcing to low wage developing countries.

Although Black residents organized their communities throughout the 1960s and 1970s against the violations of civil rights legislation guaranteeing fair housing, fair employment, and educational equity, the post-Civil Rights political imagination is more concerned with the cultural controversies stirred up by the beats, rhymes, graffiti art, dance styles, and posturing emerging from inner-city youth. From "the promises that break by themselves . . . to the breaks with great promise,"⁴⁷ the Hip Hop generation rose from the devastation of the state's war against Black revolutionaries to carry on the tradition of irreverence and creative artistry that has been a central component of Black expressive vernacular culture since at least the "baadman tales" of Jelly Roll Morton in the late nineteenth century and the age-old tradition of "signifying."⁴⁸

Like the attack on Black politics during the Black Power Era,⁴⁹ the attack on politics in rap music⁵⁰—combined with the structural violence of the political economy—narrowed the cultural terrain on which counter-

46. See LIPSITZ, *supra* note 40.

47. SEKOU SUNDIATA, *Shout Out, on BLUE ONENESS OF DREAMS* (Polygram Records 1997). Sekou Sundiata's poem *Shout Out* can be heard weekly as the opener to Greg Bridges's radio program, *Transitions on Traditions*. *Transitions on Traditions*, KPFA.ORG, www.kpfa.org/transitions-traditions (last visited Oct. 14, 2011).

48. See ROBIN D.G. KELLEY, *RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 187* (1996). On the subject of "signifying" as part and parcel of the Black cultural experience, see GUTHRIE P. RAMSEY, JR., *RACE MUSIC: BLACK CULTURE FROM BEBOP TO HIP-HOP 198* (2003). According to Ramsey, "Signifyin(g) as we know it today [is linked] to a modernist shift in black mass consciousness during the postslavery era and to psychological responses to white supremacy and racial segregation." *Id.* The process of signifying relates Black self-defensiveness and self-empowerment through "the tool of the human, urban trickster, whose general behavior is symbolized" by using a series of braggadocios lines that metaphorically represent a way of coping with the miserable human conditions. *Id.*

49. CHURCHILL & VANDER WALL, *supra* note 29; *THE FBI'S WAR ON BLACK AMERICA* (Dennis Mueller & Deb Ellis eds., 1990).

50. MICHAEL ERIC DYSON, *BETWEEN GOD AND GANGSTA RAP: BEARING WITNESS TO BLACK CULTURE* (1996); EITHNE QUINN, *NUTHIN' BUT A "G" THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP* (2005).

narratives about our present historical moment might address ongoing Black dispossession. By narrowing the field of representation, hardcore lyrics and stereotyped Black maleness become a commodity for purchase, trade, and power. In the absence of political mass movements, revolutionary hardcore or “conscious” rap is difficult to sell.⁵¹ As Professor Joy James explains:

The drive for capital promotes some and curtails other underground narratives: boasting about breaking women = \$\$; boasting about reading to your two-year-old = \$0; romanticizing killing or dying by the young rebel = \$\$; celebrating the pursuit of old age as irascible rebel = \$0. Capital as medium transforms the hardcore into market transactions, that is, into forms of alienation in labor, desire, and politics.⁵²

In other words, rapping about shooting, killing, or dominating other Black men⁵³ is far more lucrative than rapping about how corporate lawyers

51. See Joy James, “F**k tha Police [State]”: *Rap, Warfare, and the Leviathan*, in *HIP HOP AND PHILOSOPHY: RHYME 2 REASON* 65, 65–76 (Derrick Darby & Tommie Shelby eds., 2005).

52. *Id.* at 71.

53. For a perfect example of the disconnect between revolutionary hardcore conscious rap and the contemporary mainstream rap, compare KRS-One’s *Sound of da Police* with Lil’ Wayne’s *Mrs. Officer*. Both songs begin similarly, with the sound of a police siren, yet they dissimilarly describe resistance to police intervention of the simplest of American freedoms: the right to forward locomotion. KRS-One, a conscious rapper, uses verbal conquest to manage his interdiction, while Lil’ Wayne, a contemporary rapper, uses sexual conquest.

Woop, Woop, that’s the sound of da police,
Woop, woop, that’s the sound of da beast.
Woop, Woop, that’s the sound of da police,
Woop, woop, that’s the sound of da beast.
Stand clear! Don man a-talk
You can’t stand where I stand, you can’t walk where I walk.
Watch out! We run New York,
Police man come, we bust him out the park.
I know this for a fact, you don’t like how I act
You claim I’m sellin’ crack
But you be doin’ that.
I’d rather say “see ya” Cause I would never be ya
Be a officer? You WICKED overseer!

KRS-ONE, *Sound of da Police*, on *RETURN OF THE BOOM BAP* (Jive Records 1993);

Wee Ooh Wee Ooh Wee,
Wee Ooh Wee Ooh Wee
Doing a buck (100 mph) in the latest drop (top Ferrari),
I got stopped by a lady cop.
Ha ha . . . she got me thinking I can date a cop
Ha ha . . . cause her uniform pants are so tight
She read me my rights
She put me in the car, she cut off all the lights
She said I had the right to remain silent
I know I got her hollerin’ sounding like a siren

LIL’ WAYNE, *Mrs. Officer*, on *THA CARTER III* (Cash Money Records 2008).

in *Citizens United v. Federal Election Commission* colonized the First Amendment to the U.S. Constitution to define the corporation as a “legal person,” enabling them to successfully claim that the corporation is entitled to free speech like an actual human being.⁵⁴

II. CONTESTING RACIAL PROGRESS: CONNECTING BLACK POWER, HIP HOP, AND THE SALIENCE OF ANTI-BLACKNESS

In the preface to his book, *The Civil Rights Movement and the Logic of Social Change*, Professor Joseph Luters reminds us: “[T]he civil rights struggle changed American democracy in fundamental ways, pushed gross racial inequalities into the national spotlight, and triggered bold federal action.”⁵⁵ But our near obsessive praising of the long Civil Rights Movement, our over dependence on the legal victories in *Brown v. Board of Education*,⁵⁶ and the passage of the Civil Rights Act of 1964⁵⁷ to implement racial healing has left a considerable void in reconciling post-Civil Rights *racial progress* within United States’s law and order. The diffusion of Black liberation struggles and the embrace of colorblindness as a normative approach to “fixing” the United States’s social issues has allowed the state to not only regain its power over the human spirit, but also reclaim its power over reproducing a political, social, and legal anti-Black agenda.⁵⁸ Our failure to openly confront race and racism, like we did during the Civil Rights and Black Power Eras, has left the intersection of race and U.S. legal consciousness severely disjointed. While this silence in American public discourse has closed one dialogue, it has opened another. It has opened a

54. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010); see also Adam Liptak, *Justices 5-4 Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html>; THE CORPORATION (Big Picture Media 2003).

55. JOSEPH E. LUTERS, *THE CIVIL RIGHTS MOVEMENT AND THE LOGIC OF SOCIAL CHANGE* xii (2010). According to Luters, the successes of the struggles in Birmingham and Selma, account for the reason “the civil rights movement has received an enormous amount of popular and scholarly attention.” *Id.*

56. *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

57. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

58. I draw the phrase anti-Blackness from Professor Tryon Woods who uses the phrase to examine Frantz Fanon’s critique of the Black social condition in third-world decolonization struggles. According to Woods, “[B]lack people experience bodily punishment; they are imprisoned, harassed, beaten, or murdered; criminalized, stigmatized, tortured . . . or homeless not because of a particular political economy, nor because of national oppression or underdevelopment. . . . Rather, they are subjected to premature death because they are black, and as such, they *are* the violence that must be countered and expunged.” Tryon Woods, *The Fact of Anti-Blackness: Decolonization in Chiapas and the Niger River Delta*, 5 HUM. ARCHITECTURE: J. SOC. SELF-KNOWLEDGE 319, 320 (2007).

space for Hip Hop music to seriously critique what we can learn about the fallout of declaring war on Blackness.⁵⁹

What began as Hip Hop more than twenty years ago as a means for providing entertainment at parties has morphed into a billion-dollar industry spanning the world globe.⁶⁰ While some argue that Hip Hop has lost its way from its beginnings,⁶¹ where socially conscious rhymes were more common

59. A perfect example of rap music's critique of the United States's war on social issues is well documented in Tupac Shakur's 1992 song *Changes*. In the song, Tupac states:

And still I see no changes can't a brother get a little peace
 It's war on the streets & the war in the Middle East
 Instead of war on poverty they got a war on drugs
 so the police can bother me
 And I ain't never did a crime I ain't have to do
 But now I'm back with the facts givin' it back to you
 Don't let 'em jack you up, back you up,
 crack you up and pimp smack you up
 You gotta learn to hold ya own
 they get jealous when they see ya with ya mobile phone
 But tell the cops they can't touch this
 I don't trust this when they try to rush I bust this
 That's the sound of my tool you say it ain't cool
 my mama didn't raise no fool
 And as long as I stay black I gotta stay strapped
 & I never get to lay back
 'Cause I always got to worry 'bout the pay backs
 some punk that I roughed up way back
 comin' back after all these years
 rat-tat-tat-tat that's the way it is uh

2PAC, *supra* note 37.

60. The vast appeal and stretch of Hip Hop is well documented by National Geographic, which claims "[i]nternationally, hip-hop has emerged as the world's favorite youth culture," documenting the world-wide spread of rapping as an art medium and form of social and political expression. Tom Pryor, *Hip Hop Music*, NAT'L GEO. MUSIC, http://worldmusic.nationalgeographic.com/view/page.basic/genre/content.genre/hip_hop_730 (last visited Sept. 12, 2011). Additionally, Hip Hop music has reflected rap's popularity. For example, the Notorious B.I.G. in his famous song *Juicy* claims "remember Rapping Duke, duh-ha-duh-ha, you never thought that hip hop would make it this far/ now I'm in the lime-light cause I rhyme tight . . ." NOTORIOUS B.I.G., *Juicy*, on *READY TO DIE* (Bad Boy/Arista 1994). The reference to the Rapping Duke is to a parody on rap music by Shawn Brown, where the concept of the song is that John Wayne is rapping using braggadocio style to claim his superiority over rap music. In the song Brown says:

So you think you're bad, with your rap,
 Well, I'll tell ya, pilgrim. I started the crap.
 When you were in diapers and wetting the sheets,
 I was at the Ponderosa rapping to the beat

 Now Kurtis Blow, Run-D.M.C.,
 You haven't heard of rap, 'til ya heard it from me,
 I'm the baddest rapper in history
 And there'll be no more, after me.

SHAWN BROWN, *Rappin' Duke*, on *¿QUE PASA?* (JWP Records 1984).

61. Brent Staples, *How Hip-Hop Music Lost Its Way and Betrayed Its Fans*, N.Y. TIMES, May

than the braggadocios rhymes that we hear today, this Article takes a different path. It argues that rap music's real talent, its real branding, is its ability to affect legal consciousness and teach law to a generation of youth most affected by the U.S. wars on drugs and crime: the sons and daughters of the Black Power generation. In other words, Hip Hop's voice, which is arguably one of the least respected art forms in U.S. legal culture,⁶² has always, and perhaps always will, be a source of social critique.⁶³ Most importantly, it is one of the most prolific artistic mediums for critiquing America's love affair with the "War on" (drugs, crime, terror) paradigm.⁶⁴ Hip Hop critiques America's failure to uphold constitutional ideals of justice and equality and her reproduction of the long history of Black suffering inside and outside American law.⁶⁵ American society has generally missed

12, 2005, <http://www.nytimes.com/2005/05/12/opinion/12thu4.html>.

62. Noted cultural critic Roger Ebert made the following statement regarding attacks on Hip Hop:

Rap has a bad reputation in white circles, where many people believe it consists of obscene and violent anti-white and anti-female guttural. Some of it does. Most does not. Most white listeners don't care; they hear black voices in a litany of discontent, and tune out. Yet rap plays the same role today as Bob Dylan did in 1960, giving voice to the hopes and angers of a generation, and a lot of rap is powerful writing.

Roger Ebert, *Reviews: Dangerous Minds*, CHI. SUN-TIMES, Aug. 11, 1995, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19950811/REVIEWS/508110301/1023>. A further example of the attacks on Hip Hop is the legal battle over obscenity in the album *Nasty as They Wanna Be*, by Miami-based rap group 2 Live Crew. In 1990, a federal judge ruled that the album was legally obscene. *Skyywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990). The decision was later overturned by the Eleventh Circuit. *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). 2 Live Crew's album was the first album in history to be deemed legally obscene. See Mathieu Deflem, *Rap, Rock, and Censorship: Popular Culture and the Technologies of Justice*, Paper Presentation Before the Law and Society Association (May 27–30, 1993), available at <http://www.cas.sc.edu/socy/faculty/deflem/zccens97.htm>.

63. For a non-exhaustive list on Hip Hop's ability to provide social critique, see PAUL BUTLER, *LET'S GET FREE: TOWARDS A HIP HOP THEORY OF JUSTICE* (2009); MICHAEL ERIC DYSON, *KNOW WHAT I MEAN: REFLECTIONS ON HIP HOP* (2007); QUINN, *supra* note 50; IMANI PERRY, *PROPHETS OF THE HOOD: THE POLITICS AND POETICS IN HIP HOP* 38–58 (2004); TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 99–124 (1994); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004); andré douglas pond cummings, *Thug Life: Hip Hop's Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515 (2010); andré douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 U. LOUISVILLE L. REV. 499 (2010) [hereinafter cummings, *A Furious Kinship*]; Brian Goldman, *Putting Lamborghini Doors on the Escalade: A Legal Analysis of the Unauthorized Use of Brand Names in Rap/Hip-Hop*, 8 TEX. REV. ENT. & SPORTS L. 1 (2007); Christian D. Rutherford, *Gansta Culture in a Police State: The Crisis of Legal Ethics Formation Amongst Hip Hop Youth*, 18 NAT'L BLACK L.J. 305 (2004).

64. See 2PAC, *supra* note 37.

65. A perfect example of mixing the dialog on race, politics, and the history of Black suffering is well documented in Ice Cube's 2008 song *Cold Places*. In the song, Ice Cube states:

I know, it's fucked up how they do us
Pretend they really care, but then they Jerry Lewis

that point, leaving Hip Hop misunderstood, misquoted, and misused.

In the post-Civil Rights Era, the over-incarceration of young Black males has supplied the state with a powerful *legal warrant* for using color as a proxy for dangerous.⁶⁶ More importantly, American courts have followed this dominant crime-fighting paradigm by ceding more power to the state, namely the police, to employ race as a signal of increased risk of criminality.⁶⁷ Worse, legal scholars have endorsed the prosperity of a colorblind criminal justice system as “a rational adaptation to the demographics of crime.”⁶⁸ Paradoxically, this rational adaptation is made salient, and valid, by the rapid blackening of the prisoner population after the ghetto riots of the 1960s. The legal formula “Young + Black + Male” is routinely equated with “reasonable suspicion”—authorizing state-sponsored unconstitutional stops, searches, questioning, and seizures of thousands of African American males every year.⁶⁹

The presence of race, more specifically anti-Blackness, figures prominently in this legal dilemma. Consider, for example, the genesis of the modern-day stop and frisk procedure that emanated from the 1968 Supreme Court decision in *Terry v. Ohio*,⁷⁰ which itself was colored by the race of

Take that money that was allocated to us
 Put us in some fucked up trailers then sue us
 Watchin Katrina, is worsen than Ike & Tina
 See New Orleans get bitchslapped by FEMA
 Louisiana got racist-ass politics
 Free the Jena Six (NIGGA FREE THE JENA SIX!)
 Your honor, Osama, Obama
 Even, yo' mamma, ain't fuckin with my commas
 They want us to quit, forget
 And not give a shit about these sick-ass politics
 A lunatic is in the White House
 Make me wanna go do a lick right now
 But they'll make a nigga bow down
 in the penitentiary, a billion dollar industry

ICE CUBE, *Cold Places*, on RAW FOOTAGE (Lench Mob Records 2008).

66. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787–89 (1994) [hereinafter Armour, *Race Ipsa Loquitur*]; see also Lawrence Vogelmann, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 571–74 (1993). According to Professor Vogelmann, “Rodney King was portrayed as the prototypical “Big Black Man.”” *Id.* at 574.

67. See *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992) (allowing race as a factor in gauging reasonable suspicion); *United States v. Condelee*, 915 F.2d 1206 (8th Cir. 1990) (permitting race to be a factor in evaluating reasonable suspicion).

68. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 143, 146 (1997).

69. E.A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 623–25 (1993).

70. *Terry v. Ohio*, 392 U.S. 1 (1968).

defendants John W. Terry and Richard Chilton as Black men.⁷¹ In the narration of the case, Terry and Chilton make several passes in front of a series of stores, peer into the windows, and then stop and talk to each other on a local corner.⁷² Witnessing this behavior, Detective Martin McFadden, a white male police officer, approached Terry and Chilton, asked them some identifying questions, and, after being dissatisfied with their responses, spun Terry around and patted down his outer clothing to discover that he was carrying a gun in his jacket pocket.⁷³

If we pause at that legal moment, John Terry, at most, is guilty of a misdemeanor crime: carrying a concealed weapon without a permit.⁷⁴ There is no direct evidence of either his attempted robbery or that his actions were indicative of his impending decision to commit a crime. But the legal decision in *Terry* eventually came to stand for more. It became the entry into modern policing where otherwise innocent behavior, enhanced by race, suggests that young Black men are acting with criminal intent.

At trial, the arresting officer Detective McFadden took the witness stand to tell his version of the facts.⁷⁵ On cross-examination his story sounded like the pronouncement of modern-day racial profiling.⁷⁶ When asked why he decided to approach Terry and Chilton, McFadden testified that he decided to stop, question, and search Terry and Chilton because they were “negroes” and he just “didn’t like them.”⁷⁷ He was suspicious that they were “casing” a store for robbery, although he had never in his more than thirty-nine years as a police officer arrested anyone for a robbery or witnessed someone “casing” a store for a robbery.⁷⁸ Discarding this

71. Curiously, the Supreme Court opinion in *Terry v. Ohio* fails to mention that John Terry and Richard Chilton are Black, nor does it mention that Detective Martin McFadden is white. *Id.*

72. *Id.* at 5–6.

73. *Id.* at 5–8.

74. Most states recognize that carrying a concealed weapon, by a first time offender, is at most a Class 2 misdemeanor. *Cf. Carrying a Concealed Weapon*, CRIMINALDEFENSELAWYER.COM, <http://www.criminaldefenselawyer.com/crime-penalties/federal/Carrying-Concealed-Weapon.htm> (last visited Sept. 7, 2011).

75. Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN’S L. REV. 727, 728–30 (1998).

76. *Id.*

77. *Id.*

78. In 1998, the *St. John’s Law Review* hosted a symposium on *Terry v. Ohio*, and the Honorable Louis Stokes wrote an article titled *Representing John W. Terry*. *Id.* at 729. At the time, Judge Stokes was John Terry’s attorney, and he narrated the cross-examination of Detective McFadden in his article. *Id.* According to Judge Stokes, Detective McFadden described John Terry and Richard Chilton as “two Negroes” and claimed that he watched them because “well, to tell the truth, I just didn’t like ‘em.” *Id.* at 729–30.

testimony, and in fact never mentioning in the majority opinion that race was relevant to McFadden's suspicion, the Supreme Court, vis-à-vis *Terry*, avoided the salience of race in police interdictions, particularly in those instances where establishing "reasonable suspicion" is the lynchpin to the investigation.

As greater evidence of the young Black male factor affecting reasonable suspicion, the Court's establishment of the now infamous *Terry* stop was also not racially neutral in relation to its social history. When the Court decided *Terry* in 1968, the era of Black Power was at its zenith as a social movement.⁷⁹ In June 1966, SNCC President Stokely Carmichael made a "call to arms" for Black Power during the Meredith March in Greenwood, Mississippi—where civil rights leaders led a three-week-long demonstration in June 1966 to the Magnolia State's capitol following the shooting of the activist James Meredith on the second day of his one-man "march against fear."⁸⁰ Four months later, in October 1966, Black Power's lead organization, the Black Panther Party, was formed.⁸¹ For the next two years

79. For a comprehensive history of the Black Power Movement, there is a long list of scholars who have written in the genre of what Professor Peniel Joseph has coined "Black Power Studies." See Peniel E. Joseph, *Introduction to Black Power Studies: A New Scholarship*, 34 *THE BLACK SCHOLAR* 2 (2001); see also Peniel E. Joseph, *Black Liberation Without Apology: Reconceptualizing the Black Power Movement*, 34 *THE BLACK SCHOLAR* 3, 3–21 (2001). The list of growing historical scholarship on the Black Power Era includes, but is not limited to, CEDRIC JOHNSON, *REVOLUTIONARIES TO RACE LEADERS: BLACK POWER AND THE MAKING OF AFRICAN AMERICAN POLITICS* (2007); PENIEL E. JOSEPH, *WAITING 'TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER IN AMERICA* (2007) [hereinafter JOSEPH, *MIDNIGHT HOUR*]; MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1990* (1990); LEONARD MOORE, *CARL B. STOKES AND THE RISE OF BLACK POLITICAL POWER* (2002); NEIGHBORHOOD REBELS: *BLACK POWER AT THE LOCAL LEVEL* (Peniel E. Joseph ed., 2010); JEFFREY O.G. OGBAR, *BLACK POWER: RADICAL POLITICS AND AFRICAN AMERICAN IDENTITY* (2005); JAMES SMETHURST, *THE BLACK ARTS MOVEMENT: LITERARY NATIONALISM IN THE 1960S AND 1970S* (2005); *THE BLACK POWER MOVEMENT: RETHINKING THE CIVIL RIGHTS—BLACK POWER ERA* (Peniel E. Joseph ed., 2006); WILLIAM L. VAN DEBURG, *NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE, 1965–1975* (1992); KOMOZI WOODARD, *A NATION WITHIN A NATION: AMIRI BARAKA (LEROI JONES) AND BLACK POWER POLITICS* (1999). On the role of Malcolm X and the Nation of Islam in the development of Black Power, see CLAUDE ANDREW CLEGG III, *AN ORIGINAL MAN: THE LIFE AND TIMES OF ELIJAH MUHAMMAD* (1998); WILLIAM W. SALES, JR., *FROM CIVIL RIGHTS TO BLACK LIBERATION: MALCOLM X AND THE ORGANIZATION OF AFRO-AMERICAN UNITY* (1994).

80. Greater detail on the Meredith March is available in TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–68*, at 480–94 (2006); DAVID GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 475–89 (1999); JOSEPH, *MIDNIGHT HOUR*, *supra* note 79, at 132–46; PAUL ROBESON, *HERE I STAND* 33–36, 104–08 (1988); RICHARD WRIGHT, *BLACK POWER: A RECORD OF REACTIONS IN A LAND OF PATHOS* (1954); see also JOHNSON, *supra* note 79, 57–58 (2007).

81. For a comprehensive narrative history of the Black Panther Party, see PAUL ALKEBULAN, *SURVIVAL PENDING REVOLUTION: THE HISTORY OF THE BLACK PANTHER PARTY* (2007); CURTIS J. AUSTIN, *UP AGAINST THE WALL: VIOLENCE IN THE MAKING AND UNMAKING OF THE BLACK PANTHER PARTY* (2006); CHRISTIAN DAVENPORT, *MEDIA BIAS, PERSPECTIVE, AND STATE REPRESSION: THE BLACK PANTHER PARTY* (2010); IN SEARCH OF THE BLACK PANTHER PARTY: *NEW PERSPECTIVES ON A REVOLUTIONARY MOVEMENT* (Jama Lazerow & Yohuru Williams eds.,

preceding the *Terry* decision, Black Power activists advocated armed resistance to a long-standing de facto policy and practice of local police brutalizing, killing, and violating the constitutional rights of young Black men. For example, the launching of the Black Panthers began over the shooting death of Denzil Dowell, a young Black man suspected of stealing an automobile.⁸² When questioned about the legality of the shooting, the local sheriff told the Panthers that he not only had no intention of either investigating or disciplining the officer, but if they did not like his answer, they could take it up with the legislators in Sacramento.⁸³ This prompted the Panthers to march into the Sacramento legislature's assembly meeting, brandishing guns in protest, and it became the crowning achievement of their organization.⁸⁴

Additionally, the Black Power Movement set American ghettos on fire—literally and figuratively. *Terry* was decided following the long, hot summers of the mid-1960s, which yielded racial rebellions in Black American ghettos in major cities, namely Watts, Los Angeles (1965); Newark (1967); and Detroit (1967).⁸⁵ Additionally, other Black Power organizations, namely Black protection organizations such as the Deacons for Defense and Justice, were in full operation and actively working side-by-side to protect civil rights protestors from white vigilante violence as marchers attempted to legally change the racial status quo.⁸⁶ Finally, the government was directly complicit in the violence through the FBI's COINTELPRO operations designed to assault the Black body and spirit.⁸⁷ In

2006); COMRADES: A LOCAL HISTORY OF THE BLACK PANTHER PARTY (Judson L. Jeffries ed., 2007); LIBERATION, IMAGINATION, AND THE BLACK PANTHER PARTY: A NEW LOOK AT THE PANTHERS AND THEIR LEGACY, *supra* note 30; JANE RHODES, FRAMING THE BLACK PANTHERS: THE SPECTACULAR RISE OF A BLACK POWER ICON (2007); THE BLACK PANTHER PARTY RECONSIDERED (Charles Jones ed., 1998); YOHURU WILLIAMS, BLACK POLITICS/WHITE POWER: CIVIL RIGHTS, BLACK POWER, AND THE BLACK PANTHERS IN NEW HAVEN (2000).

82. *Why Was Denzil Dowell Killed April First 3.50 a.m.*, BLACK PANTHER, Apr. 25, 1967, <http://www.mindfully.org/Reform/Denzil-Dowell-Killed25apr67.htm>.

83. AUSTIN, *supra* note 81, at 78.

84. *See id.* at xi–xiv; *see also Armed Negroes Protest Gun Bill: 30 Black Panthers Invade Sacramento Legislature*, N.Y. TIMES, May 3, 1967, at 23.

85. For an excellent discussion on the factual and political significance of the Watts, Newark, and Detroit riots, see Albert Bergesen, *Official Violence During the Watts, Newark, and Detroit Race Riots of the 1960s*, in A POLITICAL ANALYSIS OF DEVIANCE 138, 138–74 (Pat Lauderdale ed., 1980).

86. *See* AUSTIN, *supra* note 81, at 10. For a comprehensive history on the Deacons for Defense, see LANCE HILL, THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT (2004).

87. *See generally* NELSON BLACKSTOCK, COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM (1988); WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES

other words, the Supreme Court decided *Terry* with race very much on its mind—how could it not? Race was everywhere then, and it remains everywhere now.

In the decades since *Terry*, however, the standard for reasonable suspicion has reached new lows. The steady lowering of the threshold of evidence required to satisfy *Terry*'s reasonable suspicion standard means that Fourth Amendment privacy rights have all but dissipated.⁸⁸ And in many respects they have dragged the legal existence of young Black men deeper asunder.⁸⁹ Since the Court's pronouncement in *Illinois v. Gates* of a "totality of circumstances" standard in evaluating police investigations, racial factors, such as ethnic stereotypes, have become more salient in determinations of criminal activity.⁹⁰ Under the *Gates* standard, modern courts take non-probative facts, which they admit do not individually establish reasonable suspicion, and add them together to justify police interdiction. In other words, the courts rely on mathematical analysis to arrive at mathematical nonsense: where $0 + 0 + 0 + 0 =$ reasonable suspicion.⁹¹ More troubling, those "zero factors" can take otherwise innocent

(2001); CHURCHILL & VANDER WALL, *supra* note 29; KENNETH O'REILLY, RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA, 1960–1972 (1989).

88. Several scholars have commented on the erosion of privacy rights and the reasonable suspicion standard formulated through *Terry*. See generally Joseph Caracappa, *Terry v. Ohio and the Power of the Police to Accost Citizens Absent Probable Cause to Arrest: A Critical Look at the Pennsylvania Experience*, 16 DUQ. L. REV. 499 (1977); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299 (2010); Gregory Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991).

89. Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998); Adina Schwartz, "Just Take Away Their Guns": *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1995).

90. *Illinois v. Gates*, 462 U.S. 213 (1988). In *Gates*, the Court replaced the infamous *Aguilar-Spinelli* test for determining the probable cause standard using informants and anonymous tips with the less restrictive "totality of the circumstances" test, thereby broadening the scope and usage of informants in police investigations. *Id.* at 230. See LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 457 (7th ed. 2010).

91. One of the best examples of this point is illustrated in *United States v. Prandy-Binett*. *United States v. Prandy-Binett*, 995 F.2d. 1069 (D.C. Cir. 1993). In *Prandy-Binett*, the defendant was approached and stopped at Union Station for suspicion of couriering drugs. *Id.* at 1069–70. In the case, the police claimed that they believed there was a fair probability of criminal activity by Prandy-Binett based on the following factors: 1) he arrived from a "source city" (from New York to Washington, D.C.); 2) he was walking faster than others departing the train; 3) he moved rapidly when he made eye contact with "plainclothes" officers; 4) he claimed he traveled from New Jersey, but the ticket actually stated the trip originated at Penn Station in New York; 5) his ticket was a one way ticket paid for in cash; 6) he said he lived in Washington, D.C. but produced a Maryland driver's license; 7) he carried a "cloth" tote or gym bag; and 8) he spent the week working in New Jersey with little luggage or change of clothes. *Id.* Not only is it entirely possible for alternative explanations for all of those factors, a fair evaluation of them—even in their totality—fails to produce one instance of criminal wrongdoing. Yet the officers produced this information to the

behavior and criminalize it through the lens of race.⁹² Worse, courts are not only comfortable with the progression of the war on crime in this manner, but have become as bold as to incorporate—and publish—these racist factors into their opinions.⁹³

Consider the following two cases. In *United States v. Condelee*, the Eighth Circuit Court of Appeals upheld the search of Chareou Caprice Condelee based on a DEA officer's evaluation of her conduct during her routine airplane travel.⁹⁴ According to the officer, who had seventeen years of experience, Ms. Condelee exhibited several factors that were sufficient to create suspicion that she was trafficking drugs.⁹⁵ Those factors were: (1) that she was traveling with only carry-on luggage; (2) that she was very nervous during a consensual search; (3) that she attempted to conceal contents of her purse from a (male) agent; and (4) that her purse made a loud noise when placed on a nearby trashcan.⁹⁶ However, most disturbing, and what actually drew the officer's attention to Ms. Condelee, was the final factor: that she was a "black woman [who] was stylishly dressed."⁹⁷

Two years later, the Eighth Circuit again found reasonable suspicion in *United States v. Weaver* because, among other things, Mr. Arthur Weaver was a "roughly dressed . . . black male," traveling directly from Los Angeles to Kansas City, who had lost his plane ticket during the flight and walked too quickly to a taxicab upon exiting the plane.⁹⁸ Interestingly, in both cases, although separated by two years, the same arresting officer, Agent Carl Hicks, used race to take otherwise nondescript behavior and criminalize it in order to justify his reasonable suspicion.⁹⁹ More simply,

court, not of suspicion of Prandy-Binnett's criminal activity, but of its probable cause or fair probability that he was trafficking in drugs.

92. See, e.g., *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992); *United States v. Condelee*, 915 F.2d 1206 (8th Cir. 1990).

93. See *Weaver*, 966 F.2d 391; *Condelee*, 915 F.2d 1206.

94. *Condelee*, 915 F.2d at 1208–09.

95. *Id.* at 1210.

96. *Id.*

97. *Id.*

98. *Weaver*, 966 F.2d at 392–93.

99. As noted in *United States v. Condelee*, Agent Carl Hicks was a seventeen-year veteran with the Drug Enforcement Administration. See *Condelee*, 915 F.2d at 1206. However, despite his years of service, and I would presume his knowledge of the law, he attempted to forcibly seize Mr. Weaver's bags after he refused to consent to a search. See *Weaver*, 966 F.2d at 392–93. Agent Hicks physically grabbed Mr. Weaver's bag after he had gotten into a taxicab, and when Mr. Weaver hit Agent Hicks's hand in order to force his removal, he was arrested. *Id.* at 394. Since the search was non-consensual, the trial court had to determine if Agent Hicks had objective articulable factors that validated his suspicion that Mr. Weaver was engaged in criminal activity. See *id.* The second factor,

since the war on crime has always been framed as a war on Blackness, and vice-versa, the Eighth Circuit comfortably relied on race as a factor in ruling on whether an officer's suspicion of criminal activity was reasonable.

While the Eighth Circuit's explicit use of a *race factor* in establishing reasonable suspicion is indeed troubling, it is far from a singular moment in Fourth Amendment jurisprudence. Particularly, the Supreme Court has not lagged far behind. In *Illinois v. Wardlow*, the Court upheld the search of William "Sam" Wardlow after an officer detained and searched him following a foot chase on the South Side of Chicago.¹⁰⁰ While en route to another part of Wardlow's *high crime* neighborhood, the officers became suspicious when Wardlow purportedly looked at their vehicle and began to run.¹⁰¹ According to the officers, Wardlow's flight was enough to establish reasonable suspicion that he was engaging in criminal activity.¹⁰² The Court, however, disagreed with the officer's statement of reasonable suspicion—yet still upheld the search.¹⁰³ Writing for a 5-4 majority, Justice Rehnquist ruled that while evasive behavior, in this case running, and mere presence in a high crime neighborhood were individually insufficient to establish reasonable suspicion, the two activities taken together justified police interdiction.¹⁰⁴ In other words, running plus a mere presence in a high crime area establish the reasonable suspicion that Sam Wardlow was engaging in criminal activity.¹⁰⁵ Of course, one should note that "high crime neighborhood" is code for poor Black ghetto.¹⁰⁶

of the eight submitted by Agent Hicks, was that Mr. Weaver "was a *roughly dressed young black male* who might be a member of a Los Angeles street gang that had been bringing narcotics into the Kansas City area." *Id.* at 392 (emphasis added). The only value to support Agent Hicks's claim was that Mr. Weaver had taken a flight from Los Angeles to Kansas City. *See id.*

100. *Illinois v. Wardlow*, 528 U.S. 119, 121 (2000).

101. *Id.* at 121–22.

102. *Id.* at 121.

103. *Id.* at 124.

104. *Id.*

105. *See* M. Emily Johnson-Liu, *Running from the Law in the Wrong Part of Town*: *Illinois v. Wardlow*, 27 AM. J. CRIM. L. 129, 129–32 (1999); Brian D. Walsh, *Illinois v. Wardlow: High Crime Areas, Flight, and the Fourth Amendment*, 54 ARK. L. REV. 879, 914 (2002); Adam B. Wolf, *The Adversity of Race and Place: Fourth Amendment Jurisprudence in Illinois v. Wardlow*, 5 MICH. J. RACE & L. 711, 714 (2000).

106. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677 (1994) ("In fact, the terms 'inner city neighborhood' and 'high-crime area' are synonymous for many Americans, including many of the regular participants in the criminal justice process."); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 137 n.115, 137–38 (1999) (quoting Harris, *supra*, at 677) ("These neighborhoods tend to be poorer, older, and less able to support jobs and infrastructure than either city neighborhoods more

With respect to race, *Wardlow* is especially troubling because it allows the police to take otherwise non-criminal behavior (movement) and criminalize it based on where it is being committed: poor Black communities. The decades following *Terry*, *Condelee*, *Weaver*, *Wardlow*, and their ilk have yielded a new standard that suggests that race, clothes, travel, and neighborhood are now salient indicators of modern crime. According to Professor David Harris, this standard “begins and perpetuates a cycle of mistrust and suspicion, a feeling that law enforcement harasses African Americans and Hispanic Americans with *Terry* stops as a way of controlling [minority] communities.”¹⁰⁷ Professor Harris is correct—*Terry* and the reasonable suspicion standard not only “strengthen the impression that this country has two justice systems, one for whites and one for minorities,”¹⁰⁸ but also that the war on social issues will continue to be situated and enforced as a war on Blackness.

III. HIP HOP AND THE FOURTH AMENDMENT: A NARRATIVE ON LAW AND POLICING

I want to now turn to my reading of Hip Hop artist KRS-One, whose moniker stands for “Knowledge Reigns Supreme,”¹⁰⁹ in order to show how rap music uses art to dialogue and openly critique law, race, and the Fourth Amendment. Here, I show the connective fissures of race and legal consciousness during the early years of Hip Hop. I use KRS-One to center my critique for three main reasons. First, to show how for a significant moment in time Hip Hop represented the highest form of legal consciousness, defined by Patricia Ewick and Susan S. Sibley as “ways in which ordinary people - rather than legal professionals - understand and make sense of the law.”¹¹⁰ Notably, in these early years Hip Hop and Critical Race Theory traveled the same path: a conscious liberation from state power by attacking the same theme (racism in American law) using the same

distant from the urban core or suburban locations . . .”); see also Albert J. Reiss, Jr., *How Serious Is Serious Crime?*, 35 VAND. L. REV. 541, 572 (1982) (“Residents of high-crime areas share certain characteristics of socioeconomic status, race, and age composition; they are likely to be black, low in socioeconomic status, and relatively young in age.”).

107. Harris, *supra* note 106, at 660.

108. *Id.*

109. See PRIYA PARMAR, KNOWLEDGE REIGNS SUPREME: THE CRITICAL PEDAGOGY OF HIP-HOP ARTIST KRS-ONE (2009); KRS-ONE, THE GOSPEL OF HIP HOP: THE FIRST INSTRUMENT (2009); KRS-ONE, RUMINATIONS (2003).

110. Patricia Ewick & Susan S. Sibley, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731, 731 (1992) (“Everyday understanding is a vital aspect of the life and power of law.”).

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critical methodology (intellectual narrative).¹¹¹ Second, KRS-One is significant because of his body of work. His most familiar songs—*Criminal Minded*,¹¹² *Black Cop*,¹¹³ and my personal favorite, *Sound of da Police*¹¹⁴—are some of the earliest expressions of “conscious rap” during the early years of Hip Hop.¹¹⁵ Finally, KRS-One does something more than most of current Hip Hop: he actively, as part of his rap persona, seeks to teach history and philosophy through his lyrical styles, thereby justifying his self-proclamation as the *Teacha*¹¹⁶ and supporting his popular songs like *You Must Learn*¹¹⁷ and *My Philosophy*.¹¹⁸

111. cummings, *A Furious Kinship*, *supra* note 63 (stating that Critical Race Theory and Hip Hop, both born from the social movements of the 1970s, share the same historiographical and intellectual space to give a voice to oppressed and disposed peoples); *see generally* KIMBERLE CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1996). While the work of Critical Race scholarship is vast and varied, the “red book,” as it is popularly known, was one of the first collections of essays on race and the law. *See also* RICHARD DELGADO, *CRITICAL RACE THEORY: THE CUTTING EDGE* (2d ed. 1991); RICHARD DELGADO, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001). According to Delgado, “Critical Race Theory sprang up in the mid-1970s, as a number of lawyers, activists, and legal scholars across the country realized, more or less simultaneously, that the heady advances of the civil rights era of the 1960s had stalled and, in many respects, were being rolled back.” *Id.* at 3–4.

112. BOOGIE DOWN PRODUCTIONS, *Criminal Minded*, on *CRIMINAL MINDED* (B-Boy Records 1987).

113. KRS-ONE, *Black Cop*, on *RETURN OF THE BOOM BAP* (Jive Records 1993).

114. KRS-ONE, *supra* note 1.

115. For an excellent discussion on rap as art and ideology, see IMANI PERRY, *PROPHETS OF THE HOOD: THE POLITICS AND POETICS IN HIP HOP* 38–58 (2004); TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 99–124 (1994).

116. KRS-ONE & MARLEY MARL, *Teacha’s Back*, on *HIP HOP LIVES* (Koch Records 2007). In the first verse of the song, KRS-One states:

The teacher’s back, the heat is back
 Had to chill for a minute so you could see what was whack
 Rappers enter the game to increase they stack
 No skill, no style, man please step back
 This that real real raw raw rah rah rappin
 We started off street, now you pop, what’s happenin?
 You callin me contradictory
 Yet I’m the most consistent MC in rap’s history
 Is that the mic give it to me; hip-hop it’s livin in me
 I smack rappers in they mouth deliberately
 KRS-One, I really MC
 I’m the difference between real and Music TV - GO!!

Id.

117. BOOGIE DOWN PRODUCTIONS, *You Must Learn*, on *GHETTO MUSIC: THE BLUEPRINT OF HIP HOP* (Jive Records 1989).

118. BOOGIE DOWN PRODUCTIONS, *My Philosophy*, on *BY ALL MEANS NECESSARY* (Jive

But it is his groundbreaking song, *Sound of da Police*, where KRS-One walks us through the first stage of Hip Hop's critical musings on colorblindness and state power by issuing a powerful critique of the nature of Black alienation in a society experiencing change and challenge in the post-Civil Rights Era.¹¹⁹ Although much of the criticism of Hip Hop has centered largely on the violence present in its word—the racism, homophobia, misogyny, drug dealing, and financial irresponsibility¹²⁰—*Sound of da Police* claims no ownership. Rather, the song investigates the struggle of Black existentialism within a system of American criminal justice that appropriates colorblindness as an interpretative strategy for understanding the disjointed character of Black double consciousness under American law.¹²¹ Using policing and Black existence as a backdrop, the song suggests how Black identity remains problematized and even fragmented by the law in the post-Civil Rights Era. KRS-One explains this in his first verse:

Stand clear! Don man a-talk
 You can't stand where I stand, you can't walk where I walk.
 Watch out! We run New York,
 Police man come, we bust him out the park.
 I know this for a fact, you don't like how I act
 You claim I'm sellin' crack
 But you be doin' that
 I'd rather say "see ya" Cause I would never be ya
 Be a officer? You WICKED overseer!
 Ya hotshot, wanna get props and be a saviour
 First show a little respect, change your behavior
 Change your attitude, change your plan
 There could never really be justice on stolen land
 Are you really for peace and equality?
 Or when my car is hooked up, you know you wanna follow me
 Your laws are minimal
 Cause you won't even think about looking at the real criminal
 This has got to cease

Records 1988).

119. KRS-ONE, *supra* note 1.

120. *Hip-Hop Faces Increasing Backlash*, ASSOCIATED PRESS, Feb. 28, 2007, <http://today.msnbc.msn.com/id/17386527/ns/today-entertainment>.

121. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (Arc Manor 2008) (1903). Although the term "double consciousness" originated in a 1897 article *Strivings of the Negro People*, written by DuBois for the *Atlantic Monthly*, the term was reproduced in *The Souls of Black Folk* under the title, *Of Our Spiritual Strivings*. *Id.* at 11–18.

Cause we be getting HYPED to the sound of da police!¹²²

Using Hip Hop, KRS-One narrates how policing Black people is actually the cornerstone of anti-Blackness under American law. Although African Americans are, arguably, protected by the U.S. Constitution to the same degree as whites, KRS-One claims that those “laws are minimal,” meaning they fail to protect Black freedom from police oppression.¹²³ According to KRS-One, this is possible because the police “won’t even think about looking at the real criminal,” by which he means the police themselves.¹²⁴ Worse, civil rights organizations, which were once the hallmark of Black liberation and freedom from legal oppression, are struggling to find modern ways of effectively managing police practices.¹²⁵ The ability to sue police, departmentally and individually, has become so bootstrapped with legal protections that it is nearly impossible to prevail in a civil lawsuit challenging oppressive police practices. Between departmental cover-ups,¹²⁶ police protocol and training policies, and the creation of legal protections in the Good Faith Doctrine¹²⁷ and Qualified Immunity,¹²⁸ legal

122. KRS-ONE, *supra* note 1.

123. *See id.*

124. *Id.*

125. *See* Fears, *supra* note 36; Lindsay Renick Mayer, *NAACP Creates New Program to Combat Police Brutality*, CRISIS, May 1, 2007, http://findarticles.com/p/articles/mi_qa4081/is_200705/ai_n19432308/?tag=content;col; *NAACP Urges Cell Phone Use to Fight Police Brutality*, CNN.COM, July 15, 2009, <http://edition.cnn.com/2009/US/07/15/naacp.police/>; Justin T. Stewart, *NAACP Responds to Police Brutality*, HIPHOPWIRED.COM, July 15, 2009, <http://hiphopwired.com/2009/07/15/naacp-responds-to-police-brutality>.

126. Matt Lait & Scott Glover, *LAPD Chief Calls for Mass Dismissal of Tainted Cases*, L.A. TIMES, Jan. 27, 2000, at A1, available at 2000 WLNR 8192450 (discussing “Ramparts” scandal in Los Angeles Police Department where scores of convictions were based on police officers frequently framing defendants); Bill Moushey, *Win at all Costs: Government Misconduct in the Name of Expedient Justice*, PITTSBURGH POST-GAZETTE, Nov. 22–Dec. 13, 1998 (ten-part series documenting misconduct by prosecutors and law enforcement personnel resulting in prosecution and conviction of innocent persons); Katherine Shaver & Steven Gray, *Lawyers Seek Names of Officers Who Lied: Montgomery Verdicts May be in Doubt*, WASH. POST, Oct. 20, 1999, at B1, available at 1999 WLNR 8652193 (discussing eight officers in Montgomery County, Maryland who repeatedly lied in court over a five-year period, affecting numerous cases); *LAPD’s Anti-Gang Unit Is Disbanded Following Widespread Corruption Scandal* (CNN television broadcast Mar. 12, 2000), available at <http://transcripts.cnn.com/TRANSCRIPTS/0003/12/sm.01.html> (providing a transcript of the broadcast).

127. Robert A. Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOY. L.A. INT’L & COMP. L. REV. 779 (1992). The good faith exception to the Fourth Amendment exclusionary rule arose in the 1984 case of *United States v. Leon*, where the Court admitted evidence of illegal drugs seized by the police pursuant to a warrant although it failed to establish probable cause. *United States v. Leon*, 468 U.S. 897 (1984). The *Leon* decision and its underlying rationale—particularly in relation to policing—has been extensively criticized. *See, e.g.*, Donald Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986); Wayne R. LaFave, *The Seductive Call of Expediency: United States v. Leon, its Rationale and Ramification*, 1984 U. ILL. L. REV. 895 (1984); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the*

vindication against police violence is Sisyphean: an endless, unavailing labor or task.¹²⁹ Further, post-Civil Rights juries continue to encourage bad police behavior through outright acquittals in criminal trials involving police brutality or reward the same through the reinstatement of rogue cops to their jobs, with the added insult of back pay.¹³⁰

The conflation of Blackness and criminality is not limited to the perimeter of the urban core; rather, its pervasiveness stretches into non-Black communities as well. In other communities, the police have extended and the courts have endorsed the “out-of-place” practice of reasonable suspicion, which permits a police officer to find suspicious a person of one ethnicity in an area primarily populated by another. Thus, when Blacks enter white neighborhoods, their race becomes the outward indicator of potential criminal activity and justifies stopping, questioning, searching, and in some cases murdering them.¹³¹ Similarly, when whites enter the ghetto, the police either assume that they are engaged in criminal activity, typically as consumers of drugs or prostitution, or that they are lost or in need of help.¹³²

Exclusionary Rule: Deregulating the Police and Derailing Law, 70 GEO. L.J. 365 (1981).

128. Frank J. Menetrez, *Lawless Law Enforcement: The Judicial Intervention of Absolute Immunity for Police and Prosecutors in California*, 49 SANTA CLARA L. REV. 393 (2009); Stephen B. O’Connell, *Police Officers Who Give False Testimony Have Absolute, Unqualified Immunity from Section 1983 Liability*, 13 TEX. TECH. L. REV. 1527 (1982).

129. EDITH HAMILTON, MYTHOLOGY 439–40 (1998). In Greek mythology, Sisyphus was a king punished by being compelled to roll a large boulder up a steep hill, only to have it roll back down and to repeat it throughout eternity. *Id.* To reference something as Sisyphean is claim that it is an endless and resultless task.

130. See, e.g., Allison Steele, *Punishment Cut for 8 Officers in Televised Beating*, PHILA. INQUIRER, Mar. 13, 2010, http://www.philly.com/philly/news/20100313_Punishment_cut_for_8_officers_in_televised_beating.html. In Philadelphia, eight police officers were videotaped by news cameras viciously beating, kicking, and punching three African American men after stopping their car. *Id.* They were originally suspended, but a grand jury determined that the officers used no more force than necessary to effectuate the arrest, reinstated their positions, and awarded them back pay. *Id.* To view the video, and judge the amount of force yourself, see *Grand Jury Frees Philly Cops* (FOX television broadcast Aug. 7, 2009), available at <http://www.youtube.com/watch?v=FRO61QRP66g> (last visited Oct. 11, 2011).

131. The most classic example of this practice and its practical consequences is the case of Johnny Gammage, a Black motorist killed in 1995 after being stopped while driving a Jaguar in an all-white Pittsburgh suburb. *Timeline: Events in the Johnny Gammage Case*, PITTSBURGH POST-GAZETTE, Oct. 12, 2005, <http://www.post-gazette.com/pg/05285/586622.stm>. Gammage was driving a vehicle that belonged to his cousin, NFL player Ray Seals, and was suffocated when officers placed him on the ground and put their knees in his back, cutting off his breathing. *Id.*

132. andré douglas pond cummings, Professor, W. Va. Univ. Coll. of Law, Address at the University of Iowa *Journal of Gender, Race & Justice* Symposium: All Eyez on Me: The War on Drugs and the Prison Industrial Complex (Mar. 4, 2011). In the opening to his presentation, Professor cummings shared a personal narrative of how Chicago police suspected that he, a white male, was purchasing or trafficking drugs after he drove into an inner-city housing project to pick up some children who were students in his after-school reading program. *Id.* After the violent encounter with the officers, which involved shouting and illegally searching his vehicle, he finally revealed that

The “out-of-place” practice of reasonable suspicion applied in both communities and random investigatory stops and street sweeps applied in Black ones indicates how race is often the sole factor in deciding which criminal suspects to detain.¹³³ As writer John Edgar Wideman points out:

It’s respectable to tar and feather criminals, to advocate locking them up and throwing away the key. It’s not racist to be against crime, even though the archetypal criminal in the media and the public imagination almost always wears “Willie” Horton’s face. Gradually, “urban” and “ghetto” have become code words for terrible places where only [B]lacks reside. Prison is rapidly being re-lexified in the same segregated fashion.¹³⁴

The courts’ widespread acceptance of race as probative of criminal activity and the steady erosion of the reasonable suspicion standard set by the judiciary’s racist interpretations of *Terry v. Ohio* produce one surety: poor, urban Blacks will always find themselves caught in the clutches of the penal system in numbers and with an intensity far disproportionate to their criminal involvement.¹³⁵ In this regard, the conflation of Blackness and crime, as collective representations of justice policy, remakes race and reactivates racism by re-legitimizing racism in American law and order.¹³⁶ In the post-Civil Rights Era, this current expression of anti-Black animus takes the form of public vituperation of young Black men as criminals and violent deviants.¹³⁷ Here, modern policing draws on slave and Jim Crow paradigms

he was a lawyer, and the officers departed. *Id.* Professor Cummings was visibly upset, shocked, and in disbelief at the high levels of violence exhibited by the officers under reasonable suspicion standards. *Id.* According to Cummings, while driving away, one of the young Black males he was transporting to dinner claimed, “Don’t worry, this happens all the time.” *Id.*

133. E.L. Johnson, *A Menace to Society: The Use of Criminal Profiles and its Effects on Black Males*, 38 *HOW. L.J.* 629, 629–74 (1995); D. COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2000).

134. John E. Wideman, *Doing Time, Marking Race*, *NATION*, Oct. 30, 1995, at 504.

135. For a thorough discussion on the probative value of race, young Black men, and the reasonableness equation, see Armour, *Race Ipsa Loquitor*, *supra* note 66. Armour refers to the assumption of Black criminality as the “Black Tax,” defined as “the price Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes.” JODY D. ARMOUR, *NEGROPHOBIA & REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 13 (1997) [hereinafter *ARMOUR, NEGROPHOBIA*].

136. MARC MAUER, *THE SENT’G PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* (2009), http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf. According to Mauer, “In effect, police agencies have frequently targeted drug law violations in low-income communities of color for enforcement operations, while substance abuse in communities with substantial resources is more likely to be addressed as a family or public health problem.” *Id.* at 2.

137. HOWARD PINDERHUGES, *RACE IN THE HOOD: CONFLICT AND VIOLENCE AMONG URBAN YOUTH* (1997). According to Pinderhuges, “[A]s black young people, their lives are defined by their racial experience. They live in a world controlled and dominated by the issue of race, and their ideas

for policing Black communities.¹³⁸ This is what KRS-One means when he claims the police act as modern day overseers of state power vexed against Black freedom.¹³⁹

Now here's a likkle truth,
 Open up your eye
 While you're checking out the boom-bap, check the exercise
 Take the word "overseer," like a sample
 Repeat it very quickly in a crew for example
 Overseer
 Overseer
 Overseer
 Overseer
 Officer, Officer, Officer, Officer!
 Yeah, officer from overseer
 You need a little clarity?
 Check the similarity!
 The overseer rode around the plantation
 The officer is off paroling all the nation
 The overseer could stop you what you're doing
 The officer will pull you over just when he's pursuing
 The overseer had the right to get ill
 And if you fought back, the overseer had the right to kill
 The officer has the right to arrest
 And if you fight back they put a hole in your chest!¹⁴⁰

Unlike the first verse of *Sound of da Police*, KRS-One uses his second verse to ask for an explanation about police rather than make a statement about it. Specifically, he wants to know why Blacks are policed more heavily than whites.¹⁴¹ Hefty resources are spent on overseeing the Black

and attitudes reflect this reality." *Id.* at 106. See also ARMOUR, NEGROPHOBIA, *supra* note 135. According to Armour, the civil rights brand of racism is no longer the vogue, rather "[g]rowing in its place, however, is the highbrow, pseudoscientific variety—racism on stilts, if you will—one that hides its fascist boots beneath a laboratory coat." *Id.* at 13.

138. See ALEXANDER, *supra* note 27. As Alexander plainly states, "[r]ather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind [during the era of Jim Crow]. Today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans." *Id.* at 2.

139. See KRS-ONE, *supra* note 1.

140. *Id.*

141. See Sandra Lee Browning et al., *Race and Getting Hassled by the Police: A Research Note*, 17 POLICE STUD. 1, 1–13 (1994) (noting that clear racial differences exist in whom police officers watch and stop).

population in ways that place Blacks and the police at ideological odds: freedom vs. repression, survival vs. destruction.¹⁴² Perhaps KRS-One recognizes these ideological odds, analogizing plantation overseers to modern police overseers:

(Woop!) They both ride horses
 After 400 years, I've got no choices!
 The police them have a little gun
 So when I'm on the streets, I walk around with a bigger one
 (Woop-woop!) I hear it all day
 Just so they can run the light and be upon their way.¹⁴³

KRS-One's reference to how the police "oversee" Black men is rooted in current policing's reaffirmation of the omnipotence of a legal Leviathan in the restricted domain of public order maintenance, symbolized by continuous battles against street delinquency. For example, Broken Windows styles of policing, which focuses on enforcing minor petty offenses such as jaywalking, loitering, or vagrancy, is used by the modern metropolis to address major political dysfunction within local communities.¹⁴⁴ Instead, however, it only succeeds at encouraging anti-

142. Schwartz, *supra* note 89 (citing James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES, Mar. 20, 1994, (Magazine), at 47). Wilson is a strong proponent of Broken Windows styles of policing, which proposes that maintenance-order policing is the best way to fight the blight of urban crime. *See infra* note 144.

143. KRS-ONE, *supra* note 1.

144. Broken Windows Thesis (BWT) was developed by criminologists George Kelling and James Q. Wilson in 1982 to explain a theory for crime deviance and maintenance-order policing. According to BWT, crime follows a developmental sequence from non-serious disorder to serious crimes. Failure to fix broken windows in a community communicates disorder and thereby, leads to crime. However, fixing the broken windows produces the exact opposite: communicates order, and either prevents or preempts more serious crimes. Therefore, the focus of Broken Windows styles of policing is on minor, petty offenses that impact the quality of life in economically distressed communities. Addressing the misdemeanors allows the more serious crimes to "take care of themselves." *See, e.g.*, George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29–38. However, there are serious conceptual flaws related to BWT, namely that, although the theory has a kind of intuitiveness, there is no evidence for the developmental sequence upon which it relies: disorder does not produce crime. The focus of BWT is on the visible signs of decay and disorder, rather than the actual danger or safety, which leaves law enforcement to police citizen's perceptions. Finally, since the police do not repair houses or conduct renovation work in the community, it is imperative to translate BWT into human terms: policing "broken" people, such as disorderly people, or persons who otherwise represent the stereotypical signs of decay, disorder, and danger—namely young Black men. For scholars' critique of BWT, see D.W. Miller, *Poking Holes in the Theory of 'Broken Windows,'* CHRON. HIGHER EDUC. Feb. 9, 2001, at A14; Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

Black policing and prosecutions.¹⁴⁵ An example of this policing style and its use is the City of Chicago's attempts to employ anti-gang statutes to sweep Black communities, in an effort to "move along" groups of three or four Black men who loiter.¹⁴⁶ Although this practice was encouraged by Chicago's political machine, namely local and state governments,

145. Samuel Walker, *Broken Windows and Fractured History: The Use and Misuse of History in Recent Police Patrol Analysis*, 1 JUST. Q. 75 (1984); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and the Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006). For greater insight into precisely how BWT fails to prevent crime and, in fact, creates more crime, see Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL'Y 419 (2007). Also see the recent story of Raquel Nelson, who lost her son to a hit-and-run driver while jaywalking across a busy Marietta, Georgia street. See Radley Balko, *Grieving Mother Faces 36 Months in Jail for Jaywalking After Son Is Killed by Hit-and-Run Driver*, HUFFINGTON POST, July 7, 2011, http://www.huffingtonpost.com/radley-balko/raquel-nelson-jail-for-jaywalking_b_905925.html. The driver, Jerry Guy, who was later located, admitted to drinking, taking painkillers, and being mostly blind in one eye. *Id.* Guy had already been convicted for two previous hit-and-run incidents and was sentenced to five years in prison for his commission of the crime—though he served only six months. *Id.* After news of the tragic incident appeared in the *Atlanta Journal and Constitution*, the Georgia Solicitor General's office charged Ms. Nelson with three misdemeanors: jaywalking, homicide by vehicle, and reckless conduct. *Id.* She was convicted by an all-white jury and faces up to three years in prison for her crime. *Id.*

146. See *City of Chicago v. Morales*, 527 U.S. 41, 47 n.2 (1999) (citing Chicago Municipal Code § 8-4-015 (1992)). In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place. *Id.* The ordinance stated:

- (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
- (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
- (c) As used in this Section:
 - (1) 'Loiter' means to remain in any one place with no apparent purpose.
 - (2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
 - ...
 - (5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.
- (e) Any person who violates this Section is subject to a fine of not less than \$100 and not more than \$500 for each offense, or imprisonment for not more than six months, or both.

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1-4-120 of this Code.

Id. Jesus Morales, who was arrested under the ordinance and was not even a gang member, sued to have the ordinance declared unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See *id.*

prosecutors, and the judiciary, this style of policing was ultimately declared unconstitutional by the United States Supreme Court in *Chicago v. Morales*.¹⁴⁷ Speaking for the Court, Justice Stevens declared that “broad sweeps [of the law] violate the requirement that a legislature establish minimum guidelines to govern law enforcement” and any ordinance that “encompasses a great deal of harmless behavior” is unconstitutional.¹⁴⁸

Curiously, this happens just when poverty-stricken Black communities demonstrate an inability to stem the decomposition of wage labor or to bridle the hypermobility of global capital and fall victim to urban gentrification.¹⁴⁹ This is not mere coincidence. Rather, it is “common sense,” a way of comprehending, explaining, and acting in the world,¹⁵⁰ but only to the extent that we invest our morphology with racial meaning.¹⁵¹ Because American legal elites have converted to the ideology of colorblind formalistic approaches to the law¹⁵² and state elites have either reduced or abandoned their work in those legal and social matters affecting their most distressed constituencies,¹⁵³ the post-Civil Rights America finds itself

147. *Id.* at 41.

148. *Id.*

149. Scott C. McDonald, *Does Gentrification Affect Crime Rates?*, 8 CRIME & JUST. 163 (1986) (arguing that gentrification leads to some eventual reduction in personal crime rates but that it has no significant effect on rates of property crime); Richard Shaffer & Neil Smith, *The Gentrification of Harlem?*, 76 ANNALS ASS'N AM. GEOGRAPHERS 347 (1986) (arguing that urban gentrification in Harlem will displace black residents at the expense of the wealthy white elite).

150. *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960'S TO THE 1990'S, at 62 (1986); 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, 5 (1994); Donald F. Tibbs & Tryon P. Woods, *The Jena Six and Black Punishment: Life and Raw Life in the Domain of Nonexistence*, 7 SEATTLE J. SOC. JUST. 235 (2008–2009). For an extended discussion of “common sense” in the construction of radical identities, see Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 SOCIALIST REV. 37 (1991).

151. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 96 (1990).

152. *See, e.g.*, Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483 (2003); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Khaled Ali Beydoun, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465 (2007); Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007). For a more precise view of how colorblindness affects policing, see, for example, Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk,”* 50 OKLA. L. REV. 451 (1997).

153. Edward S. Shihadeh & Graham C. Ousey, *Metropolitan Expansion and Black Social Dislocation: The Link Between Suburbanization and Center-City Crime*, 75 SOC. FORCES 649 (1996).

curiously comforted by an ideology that reduces young Black men to a sole criminal dimension.¹⁵⁴

IV. CONCLUSION

Focusing on the “long fetch”¹⁵⁵ of Black suffering that emanates from the era of Black Power, this Article claims that understanding the present state of anti-Blackness in modern policing and the trajectory of Fourth Amendment analysis, which currently authorizes racial stereotypes in (de)establishing privacy rights, is critical to reconciling the specter of legal violence against young Black men. While the Black Power Era was a period of Black self-determination,¹⁵⁶ the post-Civil Rights Era, which has been recognized as the Hip Hop Era, has witnessed the rise of the American gangster—emanating from the government, extending to its citizens.¹⁵⁷

Understanding how legal proclivities on race and criminal justice induce narratives that emanate from Black Power and influence rap music is important because it reveals how the contemporary dialogue championing

154. Angela Anita Allen-Bell, *The Birth of Crime: Driving While Black*, 25 S.U. L. REV. 195 (1997); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); John Dilulio, Jr., *White Lies About Black Crime*, 118 PUB. INTEREST 30, 30–44 (1995). For an excellent work on racial stereotypes, Black men, and the criminal dimension, see, for example, ARMOUR, NEGROPHOBIA, *supra* note 135.

155. LIPSITZ, *supra* note 40, at vii–xxv (2007). According to Lipsitz, the “long fetch” of music is analogous to the “long fetch” of ocean waves—where distance between a wave’s point of origin and its point of arrival is dictated by many outside factors such as wind speed, atmosphere, and the power of the currents hidden beneath the sea, whereas in music, it is the hidden histories that form, contain, and constrain the trajectory or the genre. The “long fetch” of Black suffering actually encompasses the violence of law and order on Black liberation movements ranging as far back as slavery, but more poignantly during the era of Black Power. See ROBINSON, *supra* note 33, at 123–55; see also GEORGE FREDRICKSON, *BLACK LIBERATION: A COMPARATIVE HISTORY OF BLACK IDEOLOGIES IN THE UNITED STATES AND SOUTH AFRICA* 277–319 (1995).

156. See KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1992). According to Ture, “[i]f the traditional civil rights movement was clearly in the ranks of a liberal-progressive orientation . . . some advocates of Black Power could easily conclude . . . [o]nce the national government removed the legal barriers to advancement, the task was then up to blacks themselves to devote more of their energies and resources to helping themselves. They needed to engage more in ‘self-help’ and seek to develop organizations and institutions that would rely less on government ‘handouts’ and more on their own intra-communal efforts.” *Id.* at 208 (emphasis omitted).

157. *American Gangster* was the title of rap artist Jay-Z’s tenth studio album and first concept album inspired by the historiography of Frank Lucas, a real-life gangster in Harlem who smuggled drugs into the United States using airplanes returning home from the Vietnam War. See JAY-Z, *AMERICAN GANGSTER* (Rock-A-Fella Records 2007). Lucas’s story was memorialized in a 2007 film directed by Ridley Scott and starring Denzel Washington (as Lucas) and Russell Crowe (as the New Jersey police detective Richie Roberts who eventually caught Lucas), titled *American Gangster*. See *AMERICAN GANGSTER* (Universal Pictures 2007). Jay-Z’s album provided the soundtrack for the movie, the songs mirroring the narrative in the movie. See JAY-Z, *supra*.

the successes of the Civil Rights Era fails to account for the hidden history of America's protracted war on Black liberation.¹⁵⁸ Further, missing these historical connections prevents public recognition that modern interpretations and applications of the Fourth Amendment have not only changed post-Civil Rights policing, but also retrenched anti-Blackness in everyday legal parlance.

While there is much fallout from the war on Black Power, namely the over-incarceration of young Black men, police brutality, unconstitutional searches and seizures, and racial profiling, there exists one more: the problem of honestly narrating race and law in a colorblind world.¹⁵⁹ Simply put, Hip Hop artists have replaced the political visionaries of the Black Power Era as the voices of resistance to, and freedom from, racial and political oppression deeply embedded within American law.¹⁶⁰ Recognizing the rise of Hip Hop, and rap music, as part of the fallout from the war on Black Power helps us clearly see how stories of law and order shifted from the soapbox poets of Black Power to the street poets of Hip Hop. In this space, Hip Hop's shifting discourse on law takes a decidedly different form: where reading or listening to rap music reveals how the fallout of the war on crime and the war on drugs exposes the deep connections between Black social existence and transformation within American law.

158. See KENNETH O'REILLY, *RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972* (1989). In chapter eight of O'Reilly's book, titled "Black Hate," he claims that FBI director focused his attention on Black social movements at the end of the Red Scare. According to O'Reilly, "Hoover mobilized the FBI to smash the vanguard (black political activists of liberal or radical views) and to keep track of the masses (the everyday people who lived in black communities)." *Id.* at 261. Chapter nine of O'Reilly's book, titled "The Only Good Panther [is a Dead Panther]," narrates that "[b]y June 1969 [less than three years after the Black Panther Party was officially formed] the [Federal] Bureau [of Investigation] was investigating all forty-two Panthers chapters and approximately 1,200 members and sympathizers in order 'to obtain evidence of possible violation of Federal and local laws.'" *Id.* at 298. The investigations yielded more than 348 Panthers arrested on murder, armed robbery, rape, bank robbery, drug trafficking, burglary, and dozens other charges." *Id.* at 297.

159. Haney López, *Colorblind*, *supra* note 4, at 808.

160. According to rap artist Jay-Z, context in rap music is important to understanding the historical narrative underscoring certain songs. In his song, *Lucifer*, the lyrics "Lord forgive him, he got them dark forces in him, but he also got a righteous case for sinning. Them a murder me so I got to murder them," are actually a narrative on the infamous shooting death of rap icon Christopher Wallace better known as the Notorious B.I.G., or Biggie Smalls. See JAY-Z, *Lucifer*, on *THE BLACK ALBUM* (Roc-A-Fella Records 2003). In his interview with MTV News, Jay-Z explains, "A song like 'Lucifer,' it's really about the struggle and really about dealing with death and having that feeling. The evil is inside of you, not this mythical character with pitchforks and things like that. Dealing with a feeling of wanting revenge." Jayson Rodriguez, *Jay-Z 'Decoded' Songs Like 'Lucifer' To Give Rap 'Context': MC's New Book Explains that Black Album Song Was About Biggie's Murder*, MTV.COM NEWS (Nov. 16, 2010), <http://www.mtv.com/news/articles/1652408/jayz-decoded-songs-like-lucifer-give-rap-context.jhtml>.