

## **“He’s a Black Male . . . Something Is Wrong With Him!” The Role of Race in the Stand Your Ground Debate**

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That’s one of the great frustrations of African-American life, those times when you are standing right there, minding your business, tending your house, coming home from the store, and other people are looking right at you, yet do not see you.

They see instead their own superstitions and suppositions, paranoia and guilt, night terrors and vulnerabilities. They see the perpetrator, the suspect, the mug shot, the dark and scary face that lurks at the open windows of their vivid imaginings. They see the unknown, the inassimilable, the other.<sup>1</sup>

Leonard Pitts Jr.

Stand your ground laws played a central role in the trial of Trayvon Martin. While no stand your ground hearing was held in the Trayvon Martin case, the rhetoric of “stand your ground” was pivotal in structuring the narrative relied upon by Zimmerman defenders and by his defense team. The theme was, for example, that “Zimmerman was where he had a right to be.” Because Zimmerman was where he had a “right to be,” he had a right to “stand his ground”—to defend himself when “attacked” by Trayvon Martin. But Zimmerman approached and confronted Trayvon, who was trying only to go home. *Objectively, it was Trayvon who had a right to stand his ground.* The narrative implicitly supposed that Trayvon was somehow obviously a suspicious person. These interwoven themes drove the defense and led to Zimmerman’s ultimate acquittal. But Trayvon was an unarmed child. He had done nothing more dangerous than buy a bag of Skittles. What was it that made Trayvon suspicious? I argue that it was racism. But this is not racism as hate. It was racism as common sense, the notion that there are certain blacks that “we know” are dangerous. Drawing both on my earlier work, *Race, Sex, and Suspicion: The Myth of the Black Male*, and

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1. Leonard Pitts Jr., Op-Ed., *Tragic Teen Shooting Raises Old Fears, Questions*, *MIAMI HERALD*, Mar. 17, 2012, <http://www.miamiherald.com/2012/03/17/2698133/tragic-teen-shooting-raises-old.html>.

more recent work, *Fear of a Hip-Hop Planet: America’s New Dilemma*, I propose to interrogate this racialized “logic” in which *claims of knowledge* racism masquerading as “reasonableness,” played a central role in the debate about stand your ground.

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I. INTRODUCTION

George Zimmerman claimed to know quite a lot about Trayvon Martin.

“This guy looks like he’s up to no good, or he’s on drugs or something,” Zimmerman tells the 911 operator. “He’s just staring, looking at all the houses. Now he’s coming toward me. He’s got his hand in his waistband. Something’s wrong with him.”

Zimmerman described Martin as wearing a hoodie and sweatpants or jeans. He continues: “He’s coming to check me out. He’s got something in his hands. I don’t know what his deal is. Can we get an officer over here?”

“These assholes. They always get away,” he says to the operator.<sup>2</sup>

But Zimmerman had never met Trayvon Martin. The only information he had about the seventeen-year-old was that he was wearing a hoodie and he was black. Zimmerman also had his observations about this black youth walking home: “He’s just staring, looking at all the houses.”<sup>3</sup> Thus Martin had a combination of appearance and innocent behavior. Based on nothing more than this, Zimmerman “knew” that Trayvon posed some kind of imminent danger. “I don’t know what his deal is. Can we get an officer over here?”<sup>4</sup> Zimmerman goes on to refer to

2. Trymaine Lee, *Trayvon Martin Case: 911 Audio Released of Teen Shot by Neighborhood Watch Captain (AUDIO)*, HUFFINGTON POST, (Mar. 16, 2012, 9:54 PM), [http://www.huffingtonpost.com/2012/03/16/trayvon-martin-911-audio-\\_n\\_1354909.html](http://www.huffingtonpost.com/2012/03/16/trayvon-martin-911-audio-_n_1354909.html) (click on the first link to hear the 911 call made by George Zimmerman, which is partially described in the article).

3. *Id.*

4. *Id.*

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Trayvon as an “‘asshole.’”<sup>5</sup> This reflects both a moral judgment and a high level of hostility. What made Trayvon suspicious? What made him an “ass—hole?” When he says, “these assholes always gets away,”<sup>6</sup> what explains this tacit hostility?

Zimmerman is exhibiting a set of racial assumptions. To see that racism is involved, one need only ask what would have happened instead if Justin Beiber had strolled through the Sanford neighborhood. Would Zimmerman have pursued him, confronted him, and later shot him? This, in my view, is racism. But it is not just black and white. Race has become intersectional.<sup>7</sup>

A. *Racial Profiling in the Twenty-First Century: From Bigger Thomas to Urban Thug*

In the novel *Native Son*, Bigger Thomas brutally murders two whites. According to one account, “a cordon of five thousand police, augmented by more than three hundred volunteers, was [immediately] thrown around the Black Belt.”<sup>8</sup> Soon “[s]everal hundred Negroes resembling Bigger Thomas were rounded up from South Side ‘hot spots’; they are being held for investigation.”<sup>9</sup> One commentator has noted that this scene means that “[f]or everyone who is white, all African Americans are somehow linked to Bigger Thomas.”<sup>10</sup>

Similarly, Patricia Hill Collins writes:

The controlling image of Black men as criminals or as deviant beings encapsulates this perception of Black men as inherently violent and/or hyper-heterosexual . . . . [T]his representation is more often applied to poor and working class men than to their more affluent counterparts, but all Black men are under suspicion of criminal activity or breaking rules of some sort.<sup>11</sup>

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5. *Id.*

6. *Id.*

7. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991). Introduction to the concept of “intersectionality” comes from the work of Kimberlé Crenshaw. Intersectionality generally looks at the ways in which “structures of domination” sometimes intersect and collide to marginalize people of color in ways that both combine and transcend race, gender, and class. *Id.* at 1249. My focus is on the intersection between race and intolerance of “cultural difference.”

8. RICHARD WRIGHT, *NATIVE SON* 243 (Harper Perennial Modern Classics 2005) (1940).

9. *Id.* at 244.

10. MARY HRICKO, *THE GENESIS OF THE CHICAGO RENAISSANCE: THEODORE DREISER, LANGSTON HUGHES, RICHARD WRIGHT, AND JAMES T. FARRELL* 136 (2012).

11. See PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* 158 (2005); see also D. MARVIN JONES, *RACE, SEX, AND SUSPICION: THE MYTH OF THE BLACK MALE* 2–4 (2005) [hereinafter JONES, *RACE, SEX, AND SUSPICION*]; ISHMAEL REED, *ANOTHER DAY AT THE FRONT: DISPATCHES FROM THE RACE WAR* ix–x (2003); CHARLES J. OGLETTREE, JR., *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* (2010).

This undifferentiated racial fear of black men drove racial violence in the form of lynching,<sup>12</sup> particularly in cases like that of Emmett Till, a young man who was lynched because he “wolf-whistled” at a white woman.<sup>13</sup> This linkage between images of “brutish” black men and racial fear describes the problem of black men during the era of segregation and the early civil rights era. As Collins notes, this fear is still there.<sup>14</sup>

But by the 1980s, this racial stereotyping had been given a sociological justification. Ed Koch, a former mayor of New York City, stated the following:

Today, most whites, myself included, would feel very uncomfortable in a totally black neighborhood, particularly at night. So the fear is not irrational. . . .

In New York City, [57%] of those in prison are black and [35%] Hispanic. According to Department of Justice statistics, [45%] of violent crimes are committed by black males . . . .<sup>15</sup>

In the twenty-first century, the problem of profiling is no longer a simple question of black and white. Just as Justin Beiber might have traveled home from the 7-Eleven safely, so too, I believe, would have a well-dressed black youth in polished loafers, cotton Dockers, an Izod Lacoste shirt, and a sweater around his neck.<sup>16</sup> Culturally, he would have fit in. If Trayvon did not fit in, it was because race has become more complicated. Racial identity is more fluid, more of a spectrum than two poles in space. In the post civil rights era, the color line has faded. Barack Obama is a second-term president. Deval Patrick is Governor of Massachusetts. Eric Holder is Attorney General. Black police officers are commonplace in major urban areas. These black police officers—like those on our screens in television shows like *The Wire*—do not inspire fear. But Trayvon Martin, an unarmed black youth iconically dressed as he was, did. The same moral panic, which once targeted all blacks, has refocused on black males in urban areas with saggy pants and hoodies.<sup>17</sup>

In our media culture, the image of Trayvon in his hoodie staring

12. See JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 23–26; D. MARVIN JONES, FEAR OF A HIP-HOP PLANET, AMERICA’S NEW DILEMMA 189 (2013) [hereinafter JONES, FEAR OF A HIP-HOP PLANET].

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13. JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 24; STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS 1882–1930, at 239 (1995).

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14. See COLLINS, *supra* note 11, at 159 (“Mass media marketing of thug life . . . also seems designed to scare Whites and African Americans alike into thinking that racial integration of seemingly poor and working-class Black boys (the allegedly authentic Blacks) is dangerous.”).

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15. JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 2 (citation omitted).

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16. JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 262.

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17. See *id.* at 5.

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into the camera at the 7-Eleven is the image of an urban thug. This image represents the “intersection of color and cultural alterity.”<sup>18</sup> It reflects the fact that while we may have erased the color line, we have a cultural divide between the black majority in the inner city and blacks and whites that live in suburban enclaves. We have not transcended race; we have recoded it as something that is not only a color difference but also a cultural difference.<sup>19</sup> Culture, in turn, is deeply associated with certain spaces. Dress styles like saggy pants and hoodies invoke images of the ghetto, which is deeply associated with criminals and crime.<sup>20</sup> The combination of race and this urban cultural style of dress defines a stereotype that in many ways is our new racial “other.” References to race in this Article implicitly refer to the intersectional phenomenon that race has become in the early twenty-first century.

### B. *From Racism as Hate to Reasonable Racism*

What makes Zimmerman’s assumptions about race particularly dangerous is the fact that Zimmerman is expressing racism not as hate (aversive racism<sup>21</sup>), but racism as a claim of knowledge. This latter form of racism is sometimes called—oxymoronically—reasonable racism.<sup>22</sup> Reasonable racism is the view that the stereotypes about black men are true.<sup>23</sup> It inheres in “the notion that black males really do share a dangerous tendency to violence, or mayhem, or crime,” in the notion that this stereotyping is really “common sense.”<sup>24</sup> In Zimmerman’s case, this notion that the stereotypes were true seemed to justify his actions. As Jody Armour has written, this notion can also function as excuse: “The ‘Reasonable Racist’ asserts that, even if his belief that Blacks are ‘prone to violence’ stems primarily from racism . . . he should be excused for considering the victim’s race before using force because most similarly situated Americans would have done so as well.”<sup>25</sup>

As Alan Freeman has noted, our ideas about race trace back to the 1950s.<sup>26</sup> During that time, blacks were knocked down by water hoses,

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18. *Id.* at 27 n.30.

19. *See id.*

20. *See id.* at 5–6.

21. *See generally* Samuel L. Gaertner & John. F. Dovidio, *The Aversive Form of Racism, in* PREJUDICE, DISCRIMINATION, AND RACISM: HISTORICAL TRENDS AND CONTEMPORARY APPROACHES 61 (John. F. Dovidio & Samuel L. Gaertner, eds., 1986).

22. *See* JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 3 and 147 n.3 (citing JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997)).

23. *See* JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 3.

24. *Id.*

25. ARMOUR, *supra* note 22, at 19.

26. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination*

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bitten by police dogs, and beaten by southern police wielding cattle prods. Not only has race changed in the last fifty years to become more than black and white—something that involves the intersection of race and culture, for example—but racism has also changed. The racism of the 1950s was about hate. The racism of the twenty-first century, particularly in the context of racial profiling, is racism dressed up as common sense.<sup>27</sup> While racism as hate could be described as a problem of individual irrationality, the notion that racism is reasonable appeals to notions of rationality and even science. Thus, the reasonable racist denies that he is acting on emotion. He claims to know something about the black people who he targets for violence or arrest based on who they are. A precursor to Zimmerman was Bernhard Goetz:

Canty [and four other young men] approached Goetz . . . and stated “give me five dollars.” Neither Canty nor any of the other youths displayed a weapon. . . .

. . . .  
. . . . When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot “tried to run through the crowd [but] they had nowhere to run.” Goetz then turned to his right to “go after the other two”. One of these two “tried to run through the wall of the train, but he had nowhere to go.” The other youth (Cabey) “tried pretending that he wasn’t with the others” by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been “taken care of.” Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, “I said ‘you seem to be all right, here’s another,’” and he then fired the shot which severed Cabey’s spinal cord.<sup>28</sup>

Goetz stated he was confident that none of the young men was carrying a gun.<sup>29</sup> When asked to explain why he shot them in light of this, he said that “he knew from the smile on Canty’s face they wanted to ‘play with me.’”<sup>30</sup> Following in the footsteps of Bernhard Goetz, Zimmerman made several “claims of knowledge” about Trayvon. He knew Trayvon

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*Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1057–58 (1978) (discussing the history of racial notions as they have played out in the Supreme Court, starting with the 1954 decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

27. See also JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 7.

28. *People v. Goetz*, 497 N.E.2d 41, 43–44 (N.Y. 1986) (brackets and ellipses omitted).

29. *Id.*

30. *Id.*

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was suspicious. He knew that Trayvon was a bad person who must not get away.

How did Zimmerman know all this about Trayvon—a person he had never met—just by watching him walk down the street in Sanford? The rationale—the anchor—to Zimmerman’s claim of knowledge is common sense. By stating “these assholes always get away,”<sup>31</sup> he was implying that we all know that this kind of person, like Trayvon, was dangerous and that Zimmerman did not need to see Trayvon commit a crime because it was “obvious” that Trayvon was a criminal. But the only distinguishing features about Trayvon were that he was black and wearing a hoodie.

Trayvon was, according to Derrida, an “already read text.”<sup>32</sup> He was the cover of a storybook. We all know his type so well we can judge the book by its cover; we do not have to read the book.

When Zimmerman said of Trayvon Martin, “these assholes always get away,” Trayvon as an individual disappeared. He was reduced to the dangerous essence that Trayvon’s race and appearance represented in the mind of Zimmerman. One philosopher refers to this as “mythic” thinking:

[T]he nuances of significance and value which knowledge creates in its concept of the object, which enable it to distinguish different spheres of objects and to draw a line between the world of truth and the world of appearance, are utterly lacking. . . . Instead of the dialectical movement of thought, in which every given particular is linked with other particulars in a series and thus ultimately subordinated to a general *law* and process, we have here a mere subjection to the impression itself and its momentary “presence.”<sup>33</sup>

This essentialist reasoning is circular. “[W]e seem to be caught in a circular argument, but it is not the argument which is circular—it is the human condition in which we cannot extricate an ‘objective’ reality from our ‘subjective’ perception of it.”<sup>34</sup> Trayvon was an urban thug based on assumptions about a group of people. Even if the assumptions about the group of people are correct, how did Zimmerman know if Trayvon was like the other members of the group? The answer is that

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31. See Lee, *supra* note 2.

32. JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 11; see JACQUES DERRIDA, THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND 484–85 (Alan Bass trans., 1987).

33. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 494 (1993) (quoting 2 ERNST CASSIRER, THE PHILOSOPHY OF SYMBOLIC FORM 35 (Ralph Manheim trans., 1955)).

34. *Id.* at 494 n.232 (quoting Norman N. Holland, *Transactive Criticism: Re-Creation Through Identity*, 18 CRITICISM 334, 340 (1976)).

Zimmerman mistook assumptions for facts. Why was Trayvon not entitled to be treated as an individual?

What is troubling here is not the racial character of Zimmerman's assumptions in themselves but the fact that those assumptions are widely shared.<sup>35</sup> Zimmerman made his assumptions and choices as a kind of prediction: A jury of his peers would validate them. The fact that he received broad support—as evidenced by the hundreds of thousands dollars raised to fund his defense—was embraced as a hero in many circles and was ultimately acquitted speaks volumes about the social currency of Zimmerman's assumptions.<sup>36</sup> Tragically, Zimmerman's racial assumptions are less the product of a "sick" mind than a reflection of a culture of fear that is deeply rooted in some segments of our society.

Fox News commentator Geraldo Rivera stated, "You dress like a thug, people are going to treat you like a thug."<sup>37</sup> This narrative was literally performed as elements of the media gratuitously portrayed Trayvon as a smoker of marijuana. According to an editorial by Andrew Rosenthal in the *New York Times*, the police disclosed material that suggested that Trayvon was suspended from school because he had "an empty baggie with marijuana residue."<sup>38</sup> Zimmerman's supporters circulated a "photo composite . . . showing a grinning George Zimmerman in a suit and tie next to a young, shirtless black man flipping off the camera."<sup>39</sup> One blogger referred to Trayvon as "a thug, vandal, burglar, pothead and/or drug dealer."<sup>40</sup> One enterprising Zimmerman supporter created a silhouette of a black man in a hoodie to be used on a gun range:

According to a report from Florida TV news station WKMG, an

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35. See, e.g., *supra* note 15 and accompanying text.

36. See, e.g., Ollie John, *Trayvon Martin Murder Trial: George Zimmerman's Defense Fund Is Almost Broke*, TIME (May 30, 2013), <http://newsfeed.time.com/2013/05/30/trayvon-martin-murder-trial-george-zimmermans-defense-fund-is-almost-broke/> (explaining how the George Zimmerman Legal Defense Fund had raised \$340,000 via a Kickstarter campaign); Krishnadev Calumur, *Judge to Zimmerman: "You Have No Further Business with the Court,"* NPR (July 14, 2013, 12:06 AM), <http://www.npr.org/blogs/thetwo-way/2013/07/13/201918229/judge-to-zimmerman-you-have-no-further-business-with-the-court> (discussing the variety of reactions and comments posted on NPR's article about Zimmerman's acquittal).

37. Fox's Geraldo Rivera: "You Dress Like a Thug, People Are Going to Treat You Like a Thug. That's True. I Stand by That.," MEDIA MATTERS FOR AM. (July 14, 2013, 10:23 AM), <http://mediamatters.org/video/2013/07/14/foxs-geraldo-rivera-you-dress-like-a-thug-peopl/194866>.

38. Andrew Rosenthal, *Irrelevant Dirt on Trayvon Martin*, N.Y. TIMES TAKING NOTE (Mar. 30, 2012, 6:05 PM), <http://takingnote.blogs.nytimes.com/2012/03/30/irrelevant-dirt-on-treyvon-martin/>.

39. See *id.*

40. Nicholas Stix, *Another "Honor Student": Trayvon Martin Was a Thug, Vandal, Burglar, Pothead and/or Drug Dealer, and Had Been Suspended from School at Least 3 Times*, NICHOLAS STIX, UNCENSORED (Mar. 28, 2012, 3:09 AM), <http://nicholasstixuncensored.blogspot.com/2012/03/another-honor-student-trayvon-martin.html>.



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unidentified entrepreneur aimed to profit by selling paper gun targets depicting the unarmed teenager slain in February. The targets, which were advertised for sale online until Friday, feature a hoodie with crosshairs over the chest—the place where George Zimmerman shot Martin at point-blank range. While there’s plain black in lieu of Martin’s face, tucked into the hoodie’s arm are a bag of Skittles and can of iced tea like the kind Martin was carrying on that fateful night.<sup>41</sup>

Despite its implicit racial message, the silhouette sold out very quickly.<sup>42</sup> This “urban thug” narrative resonated as a subtext throughout the stand your ground debate. It also resonated during trial. Zimmerman’s attorney created a “thug defense,” portraying Trayvon as a sinister figure lurking and menacing.<sup>43</sup> O’Mara apparently read the sentiment of the jury well, because Zimmerman was acquitted.<sup>44</sup> One juror in Zimmerman’s case added, “Zimmerman’s ‘heart was in the right place.’”<sup>45</sup>

In Part II: The Culture of Fear, I want to begin by tracing this “urban thug” image to its source in popular culture.<sup>46</sup> It is a function of a combination of middle class anxiety about the deteriorating urban scene and a spate of films and television images, which created a grotesquely racialized image of urban crime. I want to also contrast this image with reality—with figures and statistics to show how rarely black men fit this socially constructed image.

But Zimmerman’s logic is rooted in more than the fringes of popular culture.

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41. Mark Follman, *Selling Trayvon Martin for Target Practice*, MOTHER JONES (May 11, 2012, 3:43 PM), <http://www.motherjones.com/mojo/2012/05/trayvon-martin-target-practice> (citation omitted).

42. *Id.* (“[T]he seller told the [Florida] news station that the response was ‘overwhelming’ and that the targets were ‘sold out in two days.’”).

43. Mark I. Pinsky, *Trayvon Martin Trial: What to Expect*, HUFFINGTON POST (June 6, 2013, 8:18 PM), [http://www.huffingtonpost.com/mark-i-pinsky/trayvon-martin-trial-what\\_b\\_3369581.html](http://www.huffingtonpost.com/mark-i-pinsky/trayvon-martin-trial-what_b_3369581.html). Zimmerman’s defense attorneys also claimed to have video shot by Trayvon of his friends beating up a homeless person, but came under fire when it turned out that the video actually showed two unidentified homeless men in a fight. Danielle Cadet, *George Zimmerman Lawyer Mark O’Mara Fabricated Evidence, Martin Family Lawyer Claims*, HUFFINGTON POST (June 4, 2013, 10:47 AM), [http://www.huffingtonpost.com/2013/06/04/george-zimmerman-lawyer-mark-omara\\_n\\_3381804.html](http://www.huffingtonpost.com/2013/06/04/george-zimmerman-lawyer-mark-omara_n_3381804.html); Nick Chiles, *Zimmerman Lawyers Apologize for Error Describing Trayvon Martin Video*, ATLANTA BLACK STAR (June 3, 2013), <http://atlantablackstar.com/2013/06/03/zimmerman-lawyers-apologize-for-mistake-in-describing-trayvon-video/>.

44. *See, e.g.*, Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013, [http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all&_r=0).

45. *See, e.g.*, *Trayvon Martin Case: Los Angeles Protest Turns Violent*, BBC (July 16, 2013, 11:03 AM), <http://www.bbc.com/news/world-us-canada-23332602>.

46. *See infra* Part II.

### C. *Visibly Lawless People*

Zimmerman's logic on the fateful night was that here is, in front of him, a criminal type that he could identify as such by looking at him, and he should not be allowed "to get away." If we strip away the racialism, in essence, Zimmerman is saying profiling is necessary, natural, and good. This is the very core of Zimmerman's defense and the defense of the brand of stand your ground vigilantism for which Zimmerman was a rallying icon.

This idea that profiling "is a good thing" predates the controversy in Sanford. I trace it to a public discourse about race that has been taking place among segments of academia, police departments, and the media in the context of "zero tolerance" and an ongoing debate concerning preventive punishment. More specifically, in an effort to justify Chicago's anti-gang ordinance, the Chicago police openly claimed that profiling was reasonable and efficient.<sup>47</sup> Their argument was anchored in large part on a notion called "visibly lawless people."<sup>48</sup>

The fallacy of this argument about visibly lawless people is that it presupposes the profile exists independently of police practices. On the contrary, in Part III.A: Visible Lawlessness and Harm, I will present evidence that this class of people is socially constructed by the police themselves through practices that are discriminatory.<sup>49</sup>

## II. THE CULTURE OF FEAR

Racist representation of African American youth in the mainstream media has shifted. Where in the past it was typically signified through stereotypical caricatures, today it is also signified through the use of racially-coded spaces, like the post-industrial city. In the midst of various political, cultural[,] and socioeconomic factors the inner city, and people that inhabited it, became Hollywood's new symbol for vulgarity, inhumanity, and intellectual inferiority. Instead of depicting all Black's [sic] as threatening, ruthless, or academically inept, inhabitants of the ghetto which were believed to live a certain type of lifestyle, became the media's new "other."<sup>50</sup>

When we cross the line between the ghetto and the inner city we cross over into a war zone.<sup>51</sup> We cross over into communities populated by

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47. See Brief for Petitioner at \*9–10, *City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121), 1998 WL 328342.

48. *Id.*; see also *infra* Part II.

49. See *infra* Part III.A.

50. Lamar C. Johnson, *Through Viewers' Eyes: Watching Race, Space, Place and the Hood Motif in Urban High School Genre Film*, J. URB. YOUTH CULTURE, Apr. 2008, at 2, available at [http://juyc.info/pdf/Lamar\\_Johnson.pdf](http://juyc.info/pdf/Lamar_Johnson.pdf).

51. See JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 63–66.

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criminals, street gangs, drug dealers, addicts, and thugs.<sup>52</sup> This is the image of the urban ghetto that underwrites the drug war as well as a war on crime that has resulted in massive surveillance, arrest, and incarceration of huge percentages of urban youth.<sup>53</sup> This narrative also underwrites what Jonathan Simon calls “a culture of fear”: fear of drugs, fear of crime.<sup>54</sup> Much as Africa is culturally distinct from Europe, so is the ghetto culturally distinct from mainstream America. It is this socially constructed image of the ghetto that is the source of the image of the urban thug.<sup>55</sup>

This image of the ghetto is rooted in a set of social, economic, and political transformations, which created the ghetto as a geographically and economically separate place. The cultural distance followed. As Steve Macek writes:

The anxiety over deteriorating social and moral conditions in America’s cities that seized the public imagination in the late 1980s and ’90s did not materialize *ex nihilo*. Rather, the escalating urban paranoia of this period was a confused response to a set of interlocking demographic, economic, and social changes that polarized our metropolitan regions along lines of race and class.<sup>56</sup>

More specifically, the forces of globalism, technological change, and huge demographic shifts which occurred over the last thirty years led to what geographer Paul Knox calls, “the landscapes of the excluded.”<sup>57</sup> It created vast urban prairies of gutted, blighted houses where work had disappeared.<sup>58</sup>

#### A. Globalism

As industry globalized many American factories closed, especially in urban areas. In William Julius Wilson’s words, work disappeared.<sup>59</sup> “[H]ope became a lottery ticket.”<sup>60</sup> Thomas J. Sugrue describes the

52. *See id.*

53. *See id.* According to Marc Mauer, nearly a quarter of young black men from 20–29 are under arrest, on probation, or incarcerated at any given time. MARC MAUER, RACE TO INCARCERATE 139 (2d ed. 2006).

54. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 6, 30 (2007).

55. *See* JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 63–66.

56. STEVE MACEK, URBAN NIGHTMARES: THE MEDIA, THE RIGHT, AND THE MORAL PANIC OVER THE CITY 1 (2006).

57. *Id.* at 1–2 (citing PAUL KNOX, THE RESTLESS URBAN LANDSCAPE 29 (1993)).

58. *Id.* at 1 (citing KNOX, *supra* note 57, at 28–29).

59. *See generally* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1997) (arguing that the rise in crime and drugs in the late twentieth century was caused by the disappearance of blue collar industrial jobs, which was in turn caused by globalization).

60. *See* JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 2 (quoting HOUSTON A. BAKER,

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transformation of Detroit:

Since 1950, Detroit has lost nearly a million people and hundreds of thousands of jobs. Vast areas of the city, once teeming with life, now stand abandoned. . . . Factories that once provided tens of thousands of jobs now stand as hollow shells, windows broken, mute testimony to a lost industrial past. Whole rows of small shops and stores are boarded up or burned out. . . . Over a third of the city's residents live beneath the poverty line, many concentrated in neighborhoods where a majority of their neighbors are also poor.<sup>61</sup>

This pattern is widespread throughout America's major urban areas:

The urban crisis is jarringly visible in the . . . shattered storefronts and fire-scarred apartments of Chicago's South and West Sides; the rubble-strewn lots of New York's Brownsville, Bedford-Stuyvesant, and South Bronx; the surreal vistas of abandoned factories along the waterfronts and railways of Cleveland, Gary, Philadelphia, Pittsburgh, and Saint Louis; the boarded-up and graffiti-covered houses of Camden, Baltimore, and Newark. Rates of poverty among black residents of these cities all range from [20–45%].<sup>62</sup>

This massive transformation of major cities into these moonscapes of despair led to the rise of a black underclass. As Herbert J. Gans has written, "the undeserving poor were called 'paupers,' 'vagrants,' or a 'dangerous class,' but new labels are invented all the time."<sup>63</sup> The term underclass was first employed by Gunnar Myrdal in 1970, who explained that "America's large underclass in its rural and urban slums . . . [who] have not been given the education and the skills and other personality traits they need in order to become effectively in demand in the modern economy."<sup>64</sup> William Julius Wilson uses the term to describe extreme and persistent poverty.<sup>65</sup> This term has since been applied to the black poor of America's deteriorating urban areas.

It is generally understood to refer to a growing number of black persons who are uneducated, unskilled, unemployed, and often unem-

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BETRAYAL: HOW BLACK INTELLECTUALS HAVE ABANDONED THE IDEALS OF THE CIVIL RIGHTS MOVEMENT 103 (2008)).

61. THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 3 (1996). Detroit's complete collapse became undeniable when the city filed for bankruptcy in 2013. See, e.g., Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES, July 18, 2013, <http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html?pagewanted=al>.

62. SUGRUE, *supra* note 61, at 3.

63. HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY* 2 (1995).

64. GUNNAR MYRDAL, *THE CHALLENGE OF WORLD POVERTY: A WORLD ANTI-POVERTY PROGRAM IN OUTLINE* 406 (1970); see also GANS, *supra* note 63, at 2. Myrdal is most famous for another work, *An American Dilemma: The Negro Problem and Modern Democracy*. See Frances O. Wilcox, *Foreword to MYRDAL, supra* at vii.

65. See WILSON, *supra* note 59, at 175–76.

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ployable, or employed in low-paying jobs, living in unrelieved poverty, and immersed in a culture conditioned by such abject circumstances, with only limited chances or hope for upward mobility.<sup>66</sup>

While I respect the use of the term in reference to persistent poverty, I note sadly that as used by journalists and the mainstream media it is given—in Gans’ terms—a behavioral spin. Gans refers to an underclass “invented by journalists and social scientists to describe poor people who are accused, rightly or wrongly, of failing to behave in the ‘mainstream’ ways . . . .”<sup>67</sup> While the black poor are quite real, the “black underclass” as a criminal class is quite simply a stereotype. It is this sense in which the “black underclass” is used by the mainstream media. While the reasons for blacks’ relatively marginalized economic status are deeply associated with structural factors, the overwhelming mainstream view is that people become a part of this group basically through bad choices.<sup>68</sup> Given this narrow and decontextualized view of urban poverty, the concept that the black poor in urban areas is that they really are a “black underclass”—a dangerous class, a class pervasively comprised of a criminal element, unreachable and incorrigible. Thus, as the number and percentage of blacks living in poverty in urban areas grew and became increasingly concentrated, so grew white middle class fears about them.

As imagined by right-wing intellectuals, mainstream politicians, and the major media, the inner cities had become nightmare zones of crime and pathology and out-of-control urban populations were largely to blame. The geographical and cultural distance separating ghetto residents from white suburbanites predisposed the latter to accept such representations at face value. And the fears these representations tapped into stemmed, at least in part, from a middle-class suburban culture marked by racism, privatism, anti-urbanism, and extreme individualism.<sup>69</sup>

This picture of an urban dystopia was not entirely false. Certainly, there is no doubt that urban areas in the 1980s and 1990s became increasingly dangerous.<sup>70</sup> But as Macek writes:

The problem is that such depictions obscured the causes and distorted

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66. Mack H. Jones, *The Black Underclass as a Systemic Phenomenon*, in RACE, POLITICS AND ECONOMIC DEVELOPMENT: COMMUNITY PERSPECTIVES 53, 53–54 (James Jennings ed., 1992), reprinted in MACK. H. JONES, KNOWLEDGE, POWER, AND BLACK POLITICS: COLLECTED ESSAYS 167, 168 (2014).

67. GANS, *supra* note 63, at 2.

68. *See id.* at 2–3.

69. MACEK, *supra* note 56, at 2.

70. *See id.* at 26–28 (discussing increased crime rates in cities during the latter half of the twentieth century).

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the meaning of the inner city's troubles in ways that actually served to perpetuate them. A reaction to the structural economic and social problems of the postindustrial metropolis, the media-induced panic over urban disorder ultimately worked to stigmatize and "other" an already disadvantaged and unfairly marginalized urban working class, deepening and hardening the city/suburb divide in the process.<sup>71</sup>

This distortion took place massively in two areas of our media culture. One was in television.<sup>72</sup> "By the late 1980s images of unmarried ghetto mothers [and] crack users . . . were common on American television . . . . These forms of programming encoded black urban poverty as distinctively separate from the worlds of the viewing audience . . . ."<sup>73</sup> By the regular, repetitive exposure to such stereotypes, "[t]hese images [became] not only 'common,' they were repeated daily in a ritual of racial caricature."<sup>74</sup> For example, it would not be uncommon to find on the evening news "a black male correspondent covering the arrest of a black drug dealer, a black victim of a gang style killing, a teenage welfare mother, or . . . [a depiction] of deteriorating inner cities."<sup>75</sup>

In 1990, Robert Entman quantified the ways in which blacks were stereotyped or otherwise represented in the news media.<sup>76</sup> In reviewing media reports by the broadcast networks, he found the following:

1. In nearly 80% of the news stories involving blacks, a black person was allegedly involved with a violent or drug-related crime.<sup>77</sup>
2. In those news stories, "[o]ne of the most striking [racial differences] was that blacks were twice as likely to be shown in the physical grasp of a police officer."<sup>78</sup>
3. Representations of blacks in the media "were significantly less likely" to portray blacks as innocent (until proven guilty). "[T]he image of police breaking into a house to arrest accused criminals was shown [seven] times during the [survey] period. In [six] cases, the occupants were black."<sup>79</sup>
4. Images of people using or selling drugs often accompanied

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71. *Id.* at 2.

72. The following discussion is adapted from my book, *Fear of a Hip-Hop Planet*. See JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 61–63. R

73. GHENT URBAN STUDIES TEAM, THE URBAN CONDITION: SPACE, COMMUNITY, AND SELF IN THE CONTEMPORARY METROPOLIS 268 (1999).

74. JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 61. R

75. *Id.* (quoting HERMAN S. GRAY, WATCHING RACE: TELEVISION AND THE STRUGGLE FOR BLACKNESS 39 (2004) (citation omitted)).

76. *Id.* at 62 (citing Robert M. Entman, *Representation and Reality in the Portrayal of Blacks on Network Television News*, 71 JOURNALISM & MASS COMM. Q. 509 (1994)).

77. See Entman, *supra* note 76, at 512. R

78. *Id.* at 513.

79. *Id.*

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media coverage of the War on Drugs. Sixty percent of the time, the users depicted were blacks.<sup>80</sup>

“Stereotypes found in [the] news are harder to resist because the news is real. While the images are entirely stereotypical, they are presented as neutral. Entman notes that ‘the benign guise’ of these stereotypical images encourages the racial coding of criminal behavior.”<sup>81</sup>

The second locus of racial coding appeared in movies.<sup>82</sup> A new subgenre of horror film developed in the 1980s and 1990s, termed the “yuppie horror film.”<sup>83</sup> This genre “served as a powerful vehicle in constructing this narrative as a world of the ghetto as a world of sociopaths, both deadly and different from the world of mainstream whites.”<sup>84</sup> In such films, white, middle-class protagonists must survive a “terrible place, which . . . is almost always some desperately impoverished slum or ghetto.”<sup>85</sup> In the “hood” horror film, monsters are replaced with “Uzi-wielding” black teenagers and Transylvania with an “impoverished slum or ghetto.”<sup>86</sup> Such situations force their viewers to reflect on “the anxieties of an affluent culture in an era of prolonged recession.”<sup>87</sup>

One particular film, *Judgment Night*,<sup>88</sup> is “an almost perfect . . . example” of such horror films:

Premised on a crudely drawn binary opposition between the safe comforts of suburbia and the mortal dangers of the inner city, it tells the story of a group of suburban men driving to a boxing match who take a wrong turn into a “bad neighborhood” on Chicago’s South Side, witness a murder, and spend the rest of the night running from the drug dealers who are responsible for the killing.<sup>89</sup>

### B. *Trespass*<sup>90</sup>

Similarly, in *Trespass*, the yuppie heroes find themselves trapped in

80. *See id.*

81. JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62 (citing Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 JOURNALISM. & MASS COMM. Q. 341, 359 (1992)).

82. *See id.* at 62.

83. *See* MACEK, *supra* note 56, at 212 (citing Barry Keith Grant, *Rich and Strange: The Yuppie Horror Film*, 48 J. FILM & VIDEO 4 (1996)); *see also* JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62.

84. JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62 (citing MACEK, *supra* note 56, at 212–13).

85. MACEK, *supra* note 56, at 213.

86. JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62 (citing MACEK, *supra* note 56, at 212–13).

87. *Id.* at 212 (quoting Grant, *supra* note 83, at 4).

88. JUDGMENT NIGHT (Universal Pictures 1993).

89. MACEK, *supra* note 56, at 213.

90. TRESPASS (Universal Pictures 1992).

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an abandoned warehouse; the only escape was to fight “an Uzi-wielding black gang.”<sup>91</sup> “These scenes of crossing over into the nether world of urban decay ‘exude the Manichean, middle class paranoia . . . that once you leave bourgeois life, you’re immediately prey to crime, madness, squalor, [and] poverty.’”<sup>92</sup>

Another classic example includes *The Bonfire of the Vanities*.<sup>93</sup> The protagonist, Sherman McCoy, a master of the universe, accidentally finds himself and his girlfriend in a war zone in the Bronx.<sup>94</sup>

His world is destroyed when he and his girlfriend confront blacks walking toward him. She runs them over but McCoy is forced to take the rap. The film is bound up with a sense of both white guilt and the persecution of white males. But what comes through is the dividing line between safe and deadly spaces. The ghetto is an alien territory; a third world within our world in which sociopathic violence is the norm. It is a breeding ground for a pathological form of masculinity.<sup>95</sup>

The name that has been popularly given to this pathological form of masculinity is the “urban thug.” As Massey and Denton have noted, the black poor are increasingly concentrated in urban areas.<sup>96</sup> Massey and Denton refer to this as hyper-segregation.<sup>97</sup> This socioeconomic division has increasingly led to cultural separation.<sup>98</sup> The black poor in these areas adopt forms of dress, language, and mannerisms, which distinguish them from their middle class counterparts. Saggy pants, hoodies, gold-teeth, and twisty braids have become a kind of cultural currency among inner city youth. As this group is disproportionately arrested and disproportionately shown on television spread-eagle over the police car, the social construct of the “urban thug” figure is associated with real people—the black poor. Appearance, race, poverty, living in a ghetto, and being a criminal are all knotted together in a signifying chain. A complex process involving media distortion of urban life creates this linkage.

91. MACEK, *supra* note 56, at 213; *see also* JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62.

92. Grant, *supra* note 83, at 5 (citation omitted); *see also* JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62 (citing MACEK, *supra* note 56, at 213).

93. THE BONFIRE OF THE VANITIES (Warner Bros. Pictures 1990). *The Bonfire of the Vanities* was adapted from the Tom Wolfe novel of the same name. TOM WOLFE, THE BONFIRE OF THE VANITIES (1987). *See also* JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62 (citing MACEK, *supra* note 56, at 212–13).

94. JONES, FEAR OF A HIP-HOP PLANET, *supra* note 12, at 62 (citing MACEK, *supra* note 56, at 212–13).

95. *Id.*

96. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 83 (1993).

97. *Id.*

98. *See id.* at 165–67.

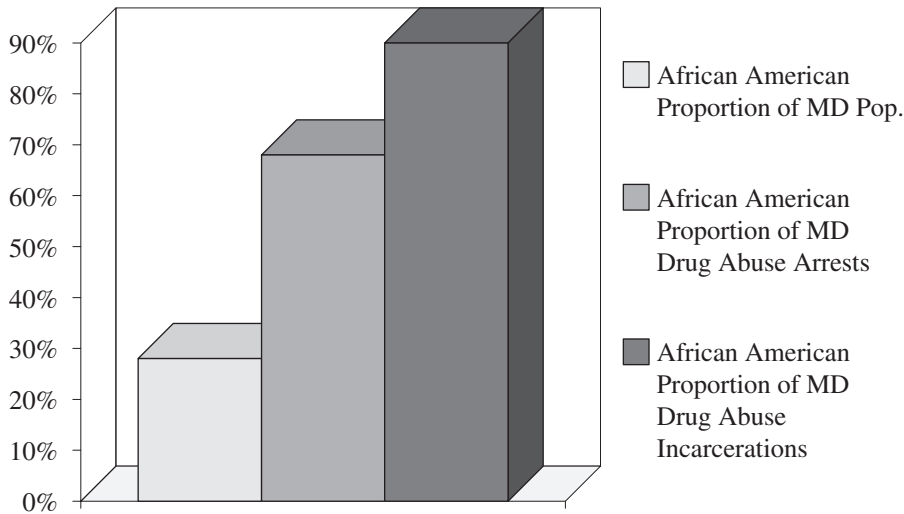


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The bottom line is that there is a difference between the real people and the image of the urban thug, which has become a metaphor for them. They are not all violent criminals or cocaine users.<sup>99</sup> Nor are any of these crimes typical. Said another way, the urban thug stereotype is not accurate; it does not typify the urban youth who live in the ghetto.

One way to see this is to look at drug use. A study in Maryland compared drug use among blacks and whites to the treatment of these two populations by the criminal justice system.<sup>100</sup> Blacks abuse cocaine at rates statistically indistinguishable from the rates of abuse by whites.<sup>101</sup> There is no meaningful difference. However, the perception by police, prosecutors and judges is obviously very different. While blacks and whites use drugs at statistically identical rates, 68% of those arrested for drugs, and 90% of those imprisoned for drugs are black.<sup>102</sup>

FIGURE 1<sup>103</sup>



While it is not true that blacks abuse drugs more often, it is true that they are arrested more often.<sup>104</sup> Based on the data, however, this seems to be a self-fulfilling prophecy. By analogy, the argument that whites are justified in being afraid of black males, particularly those who dress like

99. See *infra* Fig.2.

100. See VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., RACE AND INCARCERATION IN MARYLAND 11 (2003), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/03-10\\_rep\\_mdraceincarceration\\_ac-md-rd.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/03-10_rep_mdraceincarceration_ac-md-rd.pdf).

101. *Id.*

102. *Id.*

103. See *id.* at 12, fig.5.

104. See *id.* at 11.

Trayvon, because they commit more robberies, for example, is equally unanchored. Even if it were true that blacks are arrested more often than whites for violent crime, this does not mean that blacks commit more violent crimes, but merely that police target them disproportionately. Again, we have the problem of self-fulfilling prophecies.

But assuming for a moment that disproportionate arrests are taking place because blacks are disproportionately committing more crimes, this still does not provide an anchor for suspecting any particular black person. This is true because the number of blacks who are arrested for these violent crimes is a miniscule portion of blacks as a race.<sup>105</sup> A comparison would be to Italians and the Mafia. Assume for a moment that all members of the Mafia are Italians. I do not know if this is true and make no such claims. But assume for a moment it were. Would the fact that one is Italian mean that it were likely one was a member of the Mafia? There are more than 17 million Italians in America.<sup>106</sup> Even if the Mafia comprises thousands of people, the percentage of Italians who are members of it is infinitesimally small. The Mafia element is not typical. To say that it is reasonable to suspect a black person of being a violent criminal because blacks commit a disproportionate share of violent crime makes no more sense than it does to say one should suspect an Italian of being a member of the Mafia.

For example, consider the following graphic comparisons of people who were arrested for violent crimes in 2011.

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105. *See infra* Fig.2.

106. *American Fact Finder*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_10\\_1YR\\_B04006&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B04006&prodType=table) (last visited Apr. 11, 2014).

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FIGURE 2  
FBI STATISTICS FOR 2011<sup>107</sup>

Offense charged	Total arrests					Percent distribution <sup>1</sup>				
	Total	White	Black	American Indian or Alaskan Native	Asian or Pacific Islander	Total	White	Black	American Indian or Alaskan Native	Asian or Pacific Islander
<b>TOTAL</b>	<b>9,499,725</b>	<b>6,578,133</b>	<b>2,697,539</b>	<b>142,422</b>	<b>81,631</b>	<b>100.0</b>	<b>69.2</b>	<b>28.4</b>	<b>1.5</b>	<b>0.9</b>
Murder and nonnegligent manslaughter	8,341	4,000	4,149	105	87	100.0	48.0	49.7	1.3	1.0
Forcible rape	14,611	9,504	4,811	170	126	100.0	65.0	32.9	1.2	0.9
Robbery	82,436	35,443	45,827	619	547	100.0	43.0	55.6	0.8	0.7
Aggravated assault	305,220	194,981	102,597	4,540	3,102	100.0	63.9	33.6	1.5	1.0
Burglary	227,899	151,934	72,244	2,095	1,626	100.0	66.7	31.7	0.9	0.7
Larceny-theft	977,743	670,768	281,197	15,122	10,656	100.0	68.6	28.8	1.5	1.1
Motor vehicle theft	50,902	32,575	17,250	658	419	100.0	64.0	33.9	1.3	0.8
Arson	8,965	6,479	2,302	107	77	100.0	72.3	25.7	1.2	0.9
Violent crime <sup>2</sup>	410,608	243,928	157,384	5,434	3,862	100.0	59.4	38.3	1.3	0.9
Property crime <sup>2</sup>	1,265,509	861,756	372,993	17,982	12,778	100.0	68.1	29.5	1.4	1.0
Other assaults	952,421	625,330	304,083	14,875	8,133	100.0	65.7	31.9	1.6	0.9

There were approximately 410,000 arrests for violent crimes committed in the United States in 2011.<sup>108</sup> First of all, I note that whites were arrested most of the time for violent crimes.<sup>109</sup> Whites commit most violent crimes. Whites comprise about 59% of those arrested for violent crimes, blacks only 38%.<sup>110</sup> Statistically, one is more likely to be a victim of a violent crime at the hands of a white person than that of a black person. Similarly, there were 227,899 burglaries in 2011, for which blacks were arrested in approximately 72,000 cases, while whites were arrested in about 151,000 cases.<sup>111</sup> More to the point, even if all of the blacks were justly arrested, and there was no disproportionate targeting, the arrest figures show that the proportion of people who are black and who commit violent crimes is very small relative to the total arrests for violent crimes.

There were about 42 million blacks in the United States as of

107. *Crime in the United States 2011: Table 43A*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-43> (last visited Apr. 11, 2014).

108. *Id.* The FBI defines violent crime as murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.* n.2.

109. Whites were arrested in nearly 244,000 instances while blacks were arrested just over 157,000 times. *Id.*

110. *See id.*

111. *Id.*

2010.<sup>112</sup> Blacks made up just under 15% of the population.<sup>113</sup> Again there were approximately 157,000 blacks arrested for violent crimes in 2011.<sup>114</sup> Roughly 157,000 criminals among a population of about 42 million is less than one half of one percent. The typical black person is not a violent criminal. Similarly, around 48% of the black population in the United States is male.<sup>115</sup> That gives us just over 20 million black males in the United States. Seventy-nine percent of Americans live in urban areas.<sup>116</sup> Assuming that blacks make up an equal or greater concentration of those areas, there are approximately 32 million blacks who are urbanized. Even if we limit the comparison to blacks in urban areas, the percentage of blacks males committing a violent crime is still less than 1 percent of black males. You could repeat these comparisons throughout the chart. With few exceptions, the majority of those arrested are white. Additionally, in each case, the percentage of blacks that are involved is relatively small.<sup>117</sup> However one slices it, statistically the percentage of blacks committing violent crimes is small.

The criminal element among blacks is relatively small. This is true even if one engages in a presumption of guilt based on arrest. Most blacks are law abiding. To conflate race and criminality, being a black male and an urban thug lumps the innocent in with the guilty. It stereotypes wildly. It is circular reasoning. It is a superficial effort to rationalize racial fear.

### III. THE SOCIAL MEANING OF ZIMMERMAN'S RACIAL ASSUMPTIONS

Few of the talking heads who defended Zimmerman or stand your ground laws were academics.<sup>118</sup> But the source of Zimmerman's "logic" was as much a set of ideas as they were images from popular culture.

When Zimmerman stated, "These assholes. They always get away,"<sup>119</sup> the operative notion is "they." The idea is that there are certain

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112. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

113. The 2010 census estimated a total population of more than 308 million people living in the United States. *See id.*

114. *See supra* Fig.2.

115. *African American Statistics*, BLACK DEMOGRAPHICS, <http://blackdemographics.com/population/> (last visited Apr. 11, 2014).

116. *Urban Population (Percent of Total Population Living in Urban Areas)*, HENRY J. KAISER FAMILY. FOUND., <http://kff.org/global-indicator/urban-population/> (last visited Apr. 3, 2014).

117. *See supra* Fig.2.

118. *See, e.g., supra* notes 37, 40, and accompanying text.

119. *See, e.g., 'F-king Punks. These A-Holes. They Always Get Away': Prosecutor Gives Expletive-Laced Opening That George Zimmerman Shot Trayvon Martin 'Because He Wanted to,'* N.Y. POST (June 24, 2013, 1:30 PM), <http://nypost.com/2013/06/24/f-king-punks-these-a-holes-they-always-get-away-prosecutor-gives-expletive-laced-opening-that-george-zimmerman-shot-trayvon-martin-because-he-wanted-to/>.

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kinds of people or categories of people who are dangerous and bad. In addition, he posits that their character as dangerous and bad is apparent. The notion is we know that these kinds of people are up to no good and are bent on mischief. It follows that it is our right and duty to prevent them from doing harm.

This narrative relies on a peculiar concept of harm. In criminal law, harm is understood as an element of an *actus reus*, or criminal act.<sup>120</sup> An individual must do something or at least make an attempt. You become a criminal if—and only if—you make a particular choice. The reasonable racism framework does not require a criminal act as that concept has been traditionally understood. In the case of Trayvon, it was not what he had done—it was who he was in the first place. The notion is that “this kind” is dangerous *per se*.

But how do we know who these dangerous people—these urban thugs—are? One concept is that of visible lawlessness.<sup>121</sup> I argue that if adopted as a basis for stopping and arresting people, this is a blue print for apartheid.

Visible lawlessness in our public discourse traces back to a case called *City of Chicago v. Morales*.<sup>122</sup> In *Morales*, there were certain neighborhoods that were plagued by street gangs.<sup>123</sup> For example, in the film *New Jack City*, Hollywood depicts a neighborhood in which a drug gang takes over a housing complex.<sup>124</sup> The residents are so terrorized they are literally prisoners in their own homes.<sup>125</sup> Art imitates life. In Chicago, a group of blacks made this claim to the city about gangs in their neighborhood. According to the brief filed by the city, the Chicago gangs controlled their neighborhoods through intimidation.<sup>126</sup> “[T]he very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business.” Thus, in passing an ordinance to ban gang loitering, the city added the following preamble:

[I]n many neighborhoods throughout the City the burgeoning presence of street gang members in public has intimidated many law abiding citizens . . . .[O]ne of the methods by which criminal street gangs establish control over identifiable areas is by *loitering* in those

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120. See, e.g., CATHERINE ELLIOTT & FRANCES QUINN, *CRIMINAL LAW* 14, 14–21 (9th ed. 2013).

121. See Brief for Petitioner, *supra* note 47, at \*9–10.

122. 527 U.S. 41 (1999).

123. See *id.* at 46.

124. *NEW JACK CITY* (Warner Bros. Pictures 1991).

125. See *id.*

126. See Brief for Petitioner, *supra* note 47, at \*14.

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areas and intimidating others from entering those areas . . . .  
[L]oitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity . . . .<sup>127</sup>

In its brief, the city went on to claim, “criminal street gangs are menacing and destructive regardless of whether their members are, at a particular moment, violating other laws.”<sup>128</sup> As such, their mere presence, according to the city, constituted an implicit threat.

To combat this menace, the city enacted an ordinance prohibiting “gang members” from loitering in public. The statute read in pertinent part:

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.<sup>129</sup>

The Supreme Court struck down the statute focusing on “loitering” as the operative term of the statute. The Court held that the statute violated due process because it was unconstitutionally vague.<sup>130</sup> The Court stated,

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of “loitering,” but rather about what loitering is covered by the ordinance and what is not.<sup>131</sup>

While the Court focused on the meaning of “loitering,” for our purpose, we want to focus on the question of what “harm” does it do? Said another way: Where is the criminal act? Even if we could identify these criminal types—these visibly lawless people—what harm to they do merely by standing on a corner or gathering together to pass time?

By analogy, what was the harm that Trayvon created merely by walking through the neighborhood? Why did this give Zimmerman the justification to pursue him—some would say stalk him—and to confront him?

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127. *Id.* at \*4 (citations omitted) (emphasis added).

128. *Id.* at \*3.

129. *City of Chicago v. Morales*, 527 U.S. 41, 47 n.2 (1999).

130. *Id.* at 51.

131. *Id.* at 57.

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### A. Visible Lawlessness and Harm

In the *Morales* case, the City of Chicago argued that the mere presence of the criminal street gang member constitutes an unacceptable threat.<sup>132</sup>

A collection of brazen, disorderly and visibly lawless persons on the public ways intimidates residents, detracts from property values, and ultimately destabilizes communities.

. . . .  
 . . . The Council also found that loitering by gang members and those who join them has itself become a problem for communities because the presence of a visibly lawless element terrifies residents, invites violence, drives down property values, and otherwise tends to destabilize communities, and that these problems are not adequately addressed by existing laws.”<sup>133</sup>

This argument traces back to the broken windows thesis first articulated in an article in *The Atlantic Monthly* in 1982, in which James Q. Wilson and George L. Kelling argued that neighborhood crime is a function of disorder:

Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. . . .

. . . .  
 We suggest that “untended” behavior also leads to the breakdown of community controls.<sup>134</sup>

The broken windows thesis is that crime is most effectively combatted when the police can address signs of visible disorder—including loitering—that destabilize communities and stimulate the commission of more serious crimes.<sup>135</sup> One scholar has written that “[n]orms of order are critical to keeping social influence pointed away from, rather than toward, criminality; the spectacle of open gang activity, vandalism, aggressive panhandling, and other forms of disorder transmits signals that cause both law-breakers and law-abiders to behave in ways conducive to crime.”<sup>136</sup>

132. *See id.* at 46–47.

133. Brief for Petitioner, *supra* note 47, at \*27.

134. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, *THE ATLANTIC MONTHLY*, Mar. 1982, at 29, 30–31 (Mar. 1, 1982), available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

135. *See id.* at 38.

136. Brief for Petitioner, *supra* note 47, at \*15 (citing Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 391 (1997) (footnote omitted)).

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Through the window of this philosophy, being a criminal gang member is sufficient evidence of that harm. There is no requirement that the police observe any criminal activity; the group status itself is the “offense.”

In this context, the presence of the gang members represents “visible disorder” or what I call visible lawlessness. But a broken window is something that at least suggests criminal activity—someone has thrown a brick for example. It is the status that constitutes the disorder. This is true because residents view the mere presence of gang members as a threat or intimidation. For this to make sense, one must first get past the prohibition of status crimes. What has been called “status crime” is actually an effort less to penalize status than to prohibit “future crime.” It is a basic tenant of criminal law that the criminal conduct must have already happened. One cannot be punished, as took place in *The Minority Report*, for a “future crime” or offenses that have yet to take place.<sup>137</sup> But putting that aside for a moment, how do we know that someone is a gang member? The point is that the offending status is somehow obviously visible to the trained observer. They must in effect be visibly gang members and in effect visibly lawless.

Zimmerman seems to be invoking the strained logic of the Chicago police department in *Morales*. There is something wrong with him, Zimmerman says. He goes on to refer to Trayvon as an “asshole.”<sup>138</sup> This resonates strongly in a claim that Trayvon was somehow visibly lawless, or visibly an urban thug. There is something that made this status as a criminal obvious. Again, it could not be merely the hoodie he wore—Justin Bieber wears one as well. I argue that this visible lawlessness inevitably relies *inter alia* on race.

### B. Race and Visible Lawlessness

The category of “visibly lawless people” is not freestanding. As Bernard E. Harcourt writes, “These categories, however, do not have a pre-existent fixed reality, independent of the techniques of punishment implemented by the quality-of-life initiative. In other words, they do not pre-date the policing strategy. To the contrary, the category of the disorderly is itself a reality produced by the method of policing.”<sup>139</sup>

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137. See Mireille Hildebrandt, *Proactive Forensic Profiling: Proactive Criminalization?*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 113, 113 (R.A. Duff et al. eds., 2010) (referencing the short story by Philip K. Dick, PHILIP K. DICK, *The Minority Report*, in 4 *THE COMPLETE STORIES OF PHILIP K. DICK* (1956)).

138. See Lee, *supra* note 2.

139. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintaining Policing New York Style*, 97 *MICH. L. REV.* 291, 297 (1998).



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The method of policing is, according to Harcourt, a method of distinguishing the decent from the criminal. What Harcourt discovers is that much of this depends on an “insider-outsider dichotomy.”<sup>140</sup> The notion is that generally those causing problems are strangers.

The people were made up of “regulars” and “strangers.” Regulars included both “decent folk” and some drunks and derelicts who were always there but who “knew their place.” Strangers were, well, strangers, and viewed suspiciously, sometimes apprehensively. The officer—call him Kelly—knew who the regulars were, and they knew him. As he saw his job, he was to keep an eye on strangers, and make certain that the disreputable regulars observed some informal but widely understood rules. Drunks and addicts could sit on the stoops, but could not lie down. People could drink on side streets, but not at the main intersection. Bottles had to be in paper bags. Talking to, bothering, or begging from people waiting at the bus stop was strictly forbidden. If a dispute erupted between a businessman and a customer, the businessman was assumed to be right, especially if the customer was a stranger. If a stranger loitered, Kelly would ask him if he had any means of support and what his business was; if he gave unsatisfactory answers, he was sent on his way.<sup>141</sup>

### C. The “Out of Place” Citizen

The “insider-outsider dichotomy” connotes a notion of a “‘criminal invasion.’”<sup>142</sup> When Trayvon Martin walked to the store to get his bag of Skittles, he was visibly out of place. Sanford was first of all predominantly white.<sup>143</sup> The mere fact that he was black marked him as a presumptive outsider. His style of dress was consistent with inner-city life, but may well have looked odd in an affluent suburb. Trayvon was culturally “foreign” or alien to the place in which the confrontation occurred. Trayvon was not visibly lawless, he was visibly an outsider, culturally, and visibly black.

It is breathtakingly illogical to say that race in conjunction with looking out of place justifies being marked as a criminal. But this is all, logically, that anchors the narrative that Trayvon was an urban thug.<sup>144</sup>

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140. *Id.* at 304.

141. *Id.* (citing Kelling & Wilson, *supra* note 135, at 30).

142. *Id.* (citing Kelling & Wilson, *supra* note 135, at 32–33).

143. See Martin E. Comas, *Trayvon Martin’s Death Reminds Sanford of History of Racial Tension*, ORLANDO SENTINEL, Mar. 14, 2012, [http://articles.orlandosentinel.com/2012-03-14/news/os-trayvon-martin-shooting-sanford-20120314\\_1\\_sanford-police-lieutenant-black-pioneers-celery-avenue](http://articles.orlandosentinel.com/2012-03-14/news/os-trayvon-martin-shooting-sanford-20120314_1_sanford-police-lieutenant-black-pioneers-celery-avenue).

144. It might be argued that Trayvon was a drug smoker, a burglar, a dope dealer. The effort to demonize Trayvon is reminiscent of the effort to demonize the victims of Bernhard Goetz. See *supra* notes 28–30 and accompanying text. Based on his record that kind of speculation may well

The only thing that really anchors any of this is the fact that race does have social meaning in our society. The racial fear that concerned Wright,<sup>145</sup> the same fear that led to the death of Emmett Till,<sup>146</sup> subtly echoes throughout the story of what happened in Sanford, and helped to drive the support for Zimmerman. But today what was a racial divide has now become a cultural divide as the same moral panic that once targeted black bodies now refocuses on black men in saggy pants and hoodies. Thus the wearing of a hoodie, like race, has a social meaning as well. But is social meaning created by a combination of police practices, “hood films,” and television newsreels? The bottom line is that it is not merely Zimmerman’s racial assumptions, fears, and stereotyping which are implicated in the death of Trayvon Martin; it is, rather, our public discourse about race. It is about how that discourse has been deeply pervaded by illicit linkages between race and crime, between strangers and outsiders and between “urban poor” and “visibly lawless people.”

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take place. But Zimmerman had no access to any of this. For him, the reasonableness of his actions was based on what was visible to him on that fateful night.

145. See *supra* note 10 and accompanying text.

146. See JONES, RACE, SEX, AND SUSPICION, *supra* note 11, at 24.