Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions

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> [W]e remain imprisoned by the past as long as we deny its influence in the present.
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> —Justice William Brennan[1]

Murder and mayhem are ravaging America's inner-cities. Indeed, members of neighborhood gangs are holding an alarming number of innocent citizens "hostages in the 'hood,"[2] leaving residents of these communities afraid for their lives in public spaces.[3] In response to these terrifying conditions, many state and local governments have adopted new criminal and civil approaches designed to abate the "nuisance" of gang existence.[4]

California has positioned itself at the vanguard of this burgeoning army of states, deploying powerful new weapons in a war against local gangs for the urban landscape.[5] The escalating social costs of gang activities have brought emergency measures aimed at resuscitating ailing California communities.[6] Especially prominent—and, as we will see, problematic—among these new stratagems is the civil injunction aimed at curtailing gang activities.[7]

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1. McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

2. Robert A. Destro, *The Hostages in the 'Hood*, 36 ARIZ. L. REV. 785 (1994).

3. *See* Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477 (1994).

4. *E.g.*, Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 213 n.2, 214 n.3 (1994); *see also, e.g.*, Frank E. Harper, *To Kill the Messenger: The Deflection of Responsibility Through Scapegoating (A Socio-Legal Analysis of Parental Responsibility Laws and the Urban Gang Family)*, 8 HARV. BLACKLETTER J. 41 (1991).

5. *See* Boga, *supra* note 3, at 477.

6. *See* Alexander A. Molina, Note, *California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 SW. U. L. REV. 457, 459 (1993); *see also* Harper, *supra* note 4, at 48 (noting that in 1991 there were an estimated 50,000 to 70,000 gang members in Los Angeles County alone).

7. *See* Boga, *supra* note 3, at 477; *see also* Daniel J. Sharfstein, *Gangbusters: Enjoining the Boys in the 'Hood*, AM. PROSPECT, May-June 1997, at 58 (analyzing the costs and benefits of California's anti-gang injunctions). For a general definition of the term "civil injunction," see *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762 (1994). The Court stated:

> An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of

More specifically, municipalities are increasingly fighting gangs by appealing to courts' power to abate nuisances. Judges have responded by granting sweeping injunctions restraining gang members from fighting, using gang symbols, possessing weapons, spraying graffiti, trespassing on private property, and even socializing publicly.[8] As Terence Boga notes, "Through the magic of a judicial order, even purely social association becomes a punishable offense, subjecting violators to months of incarceration and significant fines. By means of this civil remedy, cities are effectively banishing street gangs from the realm of public space."[9]

In this Note, I identify modern anti-gang civil injunctions as a legacy of postbellum vagrancy ordinances. Juxtaposing these two periods, I show that a significant effect of measures authorizing broad police and judicial discretion in crime prevention is the domination and control of "undesirable"—but "innocent"[10]—minority groups by majority race groups. Utilizing the prominent psychological theory of aversive racism,[11] which analyzes the more subtle forms of contemporary racism, I argue that differences in the transparency of racist attitudes and actions do not necessarily reveal differences in the harmful effects that these attitudes and actions might impose on minority communities.

More concretely, the California Supreme Court's recent affirmation of purportedly race-neutral anti-gang civil injunctions threatens to harm minority communities.[12] Courts have consistently granted municipalities broadly worded injunctions that threaten to stigmatize innocent minority youth who are members of the same communities that these courts purport to want to

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> the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

Id.

8. *See* Boga, *supra* note 3, at 477.

9. *Id.*

10. The placement of the term "innocent" in quotation marks is intended to problematize the terms "innocence" and "guilt" in the context of racial discussions. For a more detailed exploration of the problematic nature of "innocence," see generally Thomas Ross, *Innocence and Affirmative Action*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 27 (Richard Delgado & Jean Stefancic eds., 1997).

11. The theory of aversive racism, proposed by John F. Dovidio and Samuel L. Gaertner, posits that

> [c]ontemporary forms of racism are more subtle and indirect than the old-fashioned forms . . . . [A]versive racism is an adaptation resulting from an assimilation of an egalitarian value system with (1) impressions derived from human cognitive mechanisms that contribute to the development of stereotypes and prejudice, and (2) feelings and beliefs derived from historical and contemporary cultural racist contexts. . . . Both the existence of almost unavoidable racial biases and the desire to be egalitarian form the basis of an ambivalence that aversive racists experience.

John F. Dovidio et al., *Stereotyping, Prejudice and Discrimination: Another Look*, *in* STEREOTYPES AND STEREOTYPING 276, 288 (C. Neil Macrae et al. eds., 1996) (citations omitted). For a more detailed discussion of aversive racism, see *infra* Section III.B.

12. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596 (Cal. 1997).

protect.[13] Some of these youth might be labeled "associates" of gangs simply because they belong to racial minorities and share living quarters or public spaces with street gang members. Others might actively affiliate with street gang members but lack the specific intent to further a gang's criminal activities.[14] Either way, anti-gang civil injunctions promise to perpetuate racial stigma and oppression. Particularly because gang members are popularly envisioned as lower-class members of racial and ethnic minorities[15] and because many minority youths romanticize gang culture,[16] communities genuinely attempting to break down systems of racial oppression cannot afford anti-gang civil injunctions. Although justified in less overtly racist terms, anti-gang injunctions share with postbellum vagrancy ordinances a repressive effect that stamps minority communities with badges of inferiority.

In Part I of this Note, I examine and critique James Q. Wilson and George L. Kelling's "broken windows" metaphor,[17] which refers to the people, entities, and symbols (e.g., homeless people, gangs) that may impinge upon a community's quality of life and thus symbolize its impending decay. The "broken windows" argument claims that broad police discretion is necessary for effective crime prevention, even if such discretion leads to some infringements on civil rights. I challenge this approach by examining its ability to grapple with one simple historical lesson: that the provision of broad police powers might result in both general violations of civil liberties and the specific oppression of minority communities.

A review of this literature is essential to an examination of anti-gang injunctions for two reasons. First, the anti-gang injunctive strategy is located within a larger, renewed call for quality-of-life improvements in American cities. Second, the "broken windows" literature provides the strongest contemporary argument for anti-gang injunctions. Thus, an examination of this literature logically precedes an informed discussion of such injunctions.

In Part II, I review the historical nexus between vagrancy laws and "undesirable" groups. Under these laws, police and courts were given broad discretionary powers that were typically used to harass innocent black people. Although the laws themselves were facially race-neutral, I argue that

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13. *See* Yoo, *supra* note 4, at 236.

14. For an informed discussion of how levels of gang participation vary, see David S. Rutkowski, Note, *A Coercion Defense for the Street Gang Criminal: Plugging the Moral Gap in Existing Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 149-50 (1996). *See generally* JOAN W. MOORE, GOING DOWN TO THE BARRIO: HOMEBOYS AND HOMEGIRLS IN CHANGE (1991) (examining the historical evolution of two Chicano gangs in the 20th century); Harper, *supra* note 4, at 49-52 (explaining the various reasons that people join gangs).

15. *See* MARTÍN SANCHEZ JANKOWSKI, ISLANDS IN THE STREET 1, 300-02 (1991); Harper, *supra* note 4, at 52.

16. Examine, for example, the lyrics and mass popularity of gangsta rap, such as 2PAC, ALL EYEZ ON ME (Death Row Records 1996); and THE NOTORIOUS B.I.G., LIFE AFTER DEATH (Bad Boy Records 1997).

17. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

implementation of these laws was often targeted at minority communities. My objective in this part (and throughout this Note) is simply to examine the historical *effects* of vagrancy laws. I do not address constitutional arguments beyond their ability to document a historical awareness of these effects.

In Part III, I draw an explicit comparison between vagrancy laws and anti-gang injunctions, using the theory of aversive racism to explain how ostensible differences between the two crime-fighting measures are largely illusory.

I. THE DANGER OF *BROKEN WINDOWS*

The renewed popularity of quality-of-life concerns is primarily the result of new community and problem-oriented policing philosophies.[18] These philosophies call for police officers to focus less on battling more serious crimes and more on "prevalent and low-key troubles" like abandoned buildings, chronic vandalism, loitering youths, unsafe parks, and gangs.[19] Noting that "the rise of crime beginning in the 1960s had coalesced with . . . [a shift of attention by police officers] away from the quality of life in public spaces,"[20] some scholars and commentators have increasingly demanded new crime-fighting approaches.

James Q. Wilson and George L. Kelling's enormously influential article, *Broken Windows*,[21] helped to accelerate these demands.[22] Indeed, *Broken Windows* provided a compelling, almost intuitive prescription for modern American policing that "powerfully provoked this new attention to quality-of-life concerns and helped stimulate what became the community policing movement of the 1980s."[23]

Key to Wilson and Kelling's "broken windows" argument is an observation that "residents of . . . foot-patrolled neighborhoods seem[] to feel

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18. For a more detailed discussion of the rise of these policing philosophies, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 565-91 (1997).

19. *Id.* at 578.

20. *Id.* at 579.

21. Wilson & Kelling, *supra* note 17.

22. *See, e.g.*, HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 23 (1990) (noting that the "broken windows" thesis is "widely cited"); WESLEY SKOGAN, DISORDER AND DECLINE 51-57 (1990) (providing empirical support for the broken windows argument); William Barr, *A Practical Solution to Crime in Our Communities*, 1 MICH. L. & POL'Y REV. 393, 396 (1996) (arguing that "the analogy of the broken windows is perfect," and noting that it explained his experience as Attorney General of the United States from 1991 to 1993); William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447 (1995) (demonstrating the author's unabashed support, as the former New York City Police Commissioner, for the "broken windows" thesis and community policing); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1171 (citing "[t]he well-known 'broken windows' thesis"); Livingston, *supra* note 18, at 583-84 ("In short, Broken Windows . . . was 'widely cited,' has become 'one of the most influential articles on policing,' and has helped to create what some have termed a 'consensus' in community and problem-oriented policing circles that the neglect of quality-of-life problems was a deficiency of urban policing in the period into the 1980s.").

23. Livingston, *supra* note 18, at 578.

more secure than persons in other areas, tend[] to believe that crime had been reduced, and seem[] to take fewer steps to protect themselves from crime."[24] Thus, the authors argue, reform era[25] police officers who emphasized crime-fighting should have instead addressed the quality-of-life concerns of the communities that they policed.[26]

To illustrate the simple premise of their argument, the authors make a memorable analogy. They note:

> 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. This is as true in nice neighborhoods as in run-down ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. . . .
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> . . . .
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> We suggest that "untended" behavior also leads to the breakdown of community controls.[27]

Addressing arguments critical of vagrancy ordinances, the authors counter that compassion should not blind us to the blemishes of disadvantaged communities. In their view, communities should willingly tolerate some infringement on the civil liberties of undesirable populations in exchange for the effective crime prevention that broad vagrancy-type laws promise.[28] They note, "Arresting a single drunk or a single vagrant who has harmed no identifiable person seems unjust, *and in a sense it is*. But failing to do anything about a score of drunks or a hundred vagrants may destroy an entire community."[29]

In the same spirit as Wilson and Kelling, Professor Randall Kennedy has articulated demands for increased police presence in minority communities. Although not explicitly a call for quality-of-life improvements, Kennedy argues that

> the main problem confronting black communities in the United States is not excessive policing and invidious punishment but rather a failure of the state to provide black communities with the equal *protection* of the laws. . . . [W]hat is *really* at stake . . . is not simply an inter-racial dispute but an actual or incipient intra-racial conflict. Although blacks subject to relatively heavy punishment for crack possession are

24. Wilson & Kelling, *supra* note 17, at 29.
25. For a discussion of "reform era" policing, see Livingston, *supra* note 18, at 565-67.
26. *See* Wilson & Kelling, *supra* note 17, at 33-34.
27. *Id.* at 31.
28. *See id.* at 35.
29. *Id.* (emphasis added).

> burdened by it, their black law-abiding neighbors are presumably helped by it . . . . Although black youngsters who wish to stay out late are burdened by a curfew, blacks who feel more secure because of the curfew are benefited. Although black members of violent gangs are burdened by police crackdowns on such gangs, blacks terrorized by gangs are aided.[30]

Central to Kennedy's critique is a self-declared appreciation of the many different sectors that constitute black communities.[31] This leads Kennedy to conclude that the disparate racial impacts of crime control policies are perhaps the result, "not of a white-dominated state apparatus 'discriminating' against blacks, but instead, of a state apparatus responding sensibly to the desires of law-abiding people—including the great mass of black communities—for protection against criminals preying upon them."[32]

The central drawback of the approaches advanced by Wilson, Kelling, and Kennedy rests in their shared blindness to the potentially harmful impact of broad police discretion on minority communities. Wilson and Kelling, for example, admit forthrightly that broad delegations of police power exist "because [society] wants an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts . . . have failed."[33] Indeed, they even concede that "a commendable desire to see that people are treated fairly moves us to worry" when someone is arrested for the "crime" of being undesirable.[34] Though they acknowledge that their approach to policing lends itself to the police's becoming "the agents of neighborhood bigotry,"[35] they conclude, in effect, that this is an acceptable cost:

> We can offer no wholly satisfactory answer to this important question [of abating police discrimination]. We are not confident that there *is* a satisfactory answer, except to *hope* that by their selection, training, and supervision, the police will be inculcated with a clear sense of the outer limit of their discretionary authority.[36]

This answer is simply not good enough. At best, Wilson and Kelling's thesis suggests that we might *someday* want to expand police officers' already significant discretionary powers. But this expansion should occur only once police officers have proven that their racial biases do not affect their work. Only then would an increase in official discretion be justified. The authors

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30. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256, 1273 (1994). Kennedy has since expanded his argument. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997).

31. *See* Kennedy, *supra* note 30, at 1274.

32. *Id.* at 1278.

33. Wilson & Kelling, *supra* note 17, at 35.

34. *Id.*

35. *Id.*

36. *Id.* (emphasis added).

have done nothing—that is, offered neither empirical data nor normative arguments—to indicate that such a retreat from the "rule-of-law"[37] approach is justified.

Like Wilson and Kelling, Kennedy provides no evidence that law enforcement officials would responsibly exercise increased power.[38] Members of racial minorities are both perpetrators and victims of violent crime. But that fact in and of itself cannot justify the perpetuation of racial stereotypes that apply to both the middle-class blacks who, presumably, are not committing violent crimes, and the stereotypical, low-life ragamuffins who are. As David Cole explains, "[T]he sheer numbers of black men in prison cannot help but have negative ripple effects throughout the black community."[39] More specifically, approximately fifty percent of all prison inmates are black.[40] In the District of Columbia in 1992, approximately forty percent of black men were incarcerated; in Baltimore that figure was fifty-six percent.[41] Indeed, the percentage of black men in prison or under some form of correctional supervision is greater than the percentage in college.[42]

Given this contextual reality, and the obvious corollary that many "criminals" are the friends, parents, and loved ones of inner-city inhabitants, proposals to write off black "criminals" might perpetuate the depressing conditions of disadvantaged communities. Cole notes:

> Incarceration of so many young black men contributes to the very problems that are so often pointed to as the source of higher crime rates in the black community. . . . By removing so many black men from the community and stigmatizing them forever with a criminal conviction, criminal law enforcement is likely to mean more single-parent families, less adult supervision of children, more unemployed and unemployable members of the community, more poverty, and in turn, more drugs, more crime and more violence. This is not to

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37. I borrow John Jeffries's definition of "rule of law." He explains:

> The rule of law signifies the constraint of arbitrariness in the exercise of government power. . . . The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the administration of justice and accountability in the use of government power.

John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985).

38. It is interesting to note, however, that even Kennedy has expressed reservations about the racial implications of anti-gang injunctions. *See* Randall Kennedy, *Guilty by Association*, AM. PROSPECT, May-June 1997, at 66.

39. David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2555 (1995).

40. *See* Fox Butterfield, *More in the U.S. Are in Prisons, Report Says*, N.Y. TIMES, Aug. 10, 1995, at A14.

41. *See* JEROME G. MILLER, NATIONAL CTR. ON INSTS. & ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN-AMERICAN MALES IN WASHINGTON, D.C.'S CRIMINAL JUSTICE SYSTEM 1 (1992).

42. *See* MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995).

> minimize the burden that criminals themselves present to the community. It is simply to suggest that incarceration—especially on such a massive scale in a well-defined community—is far from an adequate solution, and may well exacerbate the problems associated with crack and crime.[43]

Moreover, even those black people who are not inner-city residents will share in the social stigmatization that results from an increase in the black prison population.[44] The predictable result of placing more black people in prison is the further criminalization of the already maligned African-American image.[45]

Thus, despite the prescriptions of Wilson, Kelling, and Kennedy, law enforcement officials' record of racial bias argues against an expansion of their already broad discretionary powers. Perhaps these authors are optimistic that interactions between minority groups and police officers will improve. Yet, a cursory inspection of any urban newspaper or magazine indicates that police-minority interactions are in a dreadful state.[46] A blanket faith in the goodwill of police officers is thus patently unjustified and will remain so as long as crime generally[47] and quality-of-life concerns more specifically[48] are defined

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43. Cole, *supra* note 39, at 2558.

44. Cole continues:

> The criminal justice system contributes to a stereotyped and stigmatic view of African Americans as potential criminals. That stereotype plays a role in the storekeeper's decision not to buzz a young black man into her store; the employer's decision not to hire a black applicant; the police officer's decision to stop a black traveler in an airport, white neighborhood or fancy car; the citizen's decision to cross the street at the sight of an approaching group of black teenagers; and the schoolteacher's assumption that a black student is less likely to excel at school and more likely to get into trouble. In countless daily interactions and in innumerable ways, African-Americans are plagued by stereotypes fueled in no small measure by the criminal justice system.

Id. at 2561.

45. *See id.*

46. *See, e.g.*, Russell Ben-Ali, *Black Cops Question Shooting of P.A. Officer; Black Cops Demand Probe*, STAR-LEDGER (Newark, N.J.), Nov. 26, 1997, at 19; Kevin C. Dilworth, *Head of Black Police Chapter Favors Tough Stand on Brutality*, STAR-LEDGER (Newark, N.J.), Feb. 1, 1998, at 32; Michael Fletcher, *Police Brutality Protesters March on Justice Department*, WASH. POST, Sept. 13, 1997, at A6; Blaine Harden & Devon Spurgeon, *Marching New Yorkers Protest Brutality; In Wake of Allegations of Torture of Haitian Immigrant, Officers Are Called 'Perverts' and 'Racists,'* WASH. POST, Aug. 30, 1997, at A4; Michael Kramer, *How Cops Go Bad—Brutality, Racism, Cover-Ups, Lies: A Guilty Police Officer Tells How the Process Works*, TIME, Dec. 15, 1997, at 78; Joseph D. McNamara, *Too Many Cops Think It's a War*, TIME, Sept. 1, 1997, at 28; Steve Mills, *U.S. To Probe Cop's Alleged Beating; Witnesses Support Black Officer's Side of Arrest Incident*, CHI. TRIB., Jan. 10, 1998, at 1; Peter Noel, *Cop in Giuliani Time: Black Activist Charges Vicious Police Beat Down*, VILLAGE VOICE, Aug. 26, 1997, at 38; *Police Shooting Spurs Accusations of Racism; Twice in Six Months, an Unarmed Black Has Been Killed by a White Officer in Charlotte, N.C.*, ORLANDO SENTINEL, Apr. 14, 1997, at A5. *But see* Richard Lacoyo, *Good Cop, Bad Cop—Headlines About Brutality Have Overshadowed the Real News: More Cities Are Reining In Police Misbehavior*, TIME, Sept. 1, 1997, at 26.

47. *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 21 (1996).

48. *See* David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 179 (1996) ("Today, an entire class of crime, so-called 'quality of life' offenses, is defined largely as what the poor do—sleep in the streets, beg for money, squeegee unwilling car drivers' windshields, etc."). For an extreme demonstration of this point, see Ellickson, *supra* note 22, which argues for the zoning of annoying, chronically homeless people who

in terms of things that poor people and minorities do. As William Stuntz puts it,

> Criminal suspects and defendants are much more likely than the general population to be poor and black—two classes that are often thought to do badly in the political arena. And in a world where police and prosecutors have enforcement discretion, criminal suspects are defined by the willingness of public officials (police or prosecutors) to impose heavy costs on them. The very fact that they are in this particular pool suggests they need a lifeguard. . . . Criminal suspects tend not to be "like us," and the risk is that that is why they are criminal suspects.[49]

In conclusion, the problem with the arguments advanced by Wilson, Kelling, and Kennedy is two-fold. First, even if police officers were unbiased, the mass incarceration of African Americans would have a disparately negative impact on minority communities because of various concerns, including stigmatization effects, the increase in single-parent families, and related employment challenges resulting from an influx of African Americans with criminal records. Second, because police officers in fact might be motivated by bias, a "broken windows" philosophy could intensify acrimony between police officers and minority communities. Indeed, although "redneck" racism is no longer the societal norm,[50] minorities continue to occupy their historical role at the bottom of the socioeconomic ladder,[51] and laws granting police officers broad discretionary powers play a significant role in keeping them there. The remainder of this Note supports this latter claim.

II. THE LEGACY OF BLACK CODES AND VAGRANCY-TYPE LAWS

The history of vagrancy laws reveals most vividly the dangerous implications for racial minorities and other disadvantaged communities of broad police discretion in crime prevention. The origins of vagrancy legislation can be traced to the decline of feudalism and the depopulation wrought by the Black Death in the fourteenth century.[52] Vagrancy statutes were a failed

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occupy public spaces.

49. Stuntz, *supra* note 47, at 20-21.

50. *See infra* Section III.B.

51. *See generally* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (1992) (discussing the history of racism against American blacks).

52. *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615 (1956). For other insightful historical studies of vagrancy, see generally A.L. BEIER, MASTERLESS MEN: THE VAGRANCY PROBLEM IN ENGLAND, 1560-1640 (1985); JOHN POUND, POVERTY AND VAGRANCY IN TUDOR ENGLAND (1971); C.J. RIBTON-TURNER, A HISTORY OF VAGRANTS AND VAGRANCY (1972); and Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209 (1989). For discussions of more contemporary examples of vagrancy-type laws, see WILLIAM HARBUTT DAWSON, THE VAGRANCY PROBLEM (1910); LAWS OF THE VARIOUS STATES RELATING TO VAGRANCY (1916); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Jerome Hall, *The Law of Arrest in Relation*

attempt to craft "a substitute for serfdom by tying workers to their jobs."[53] Indeed, workers were forced into nomadicism by lack of work or wretched working conditions. By the middle of the seventeenth century and continuing until the nineteenth century, the existence of a large number of "masterless men and their families" crowding England's streets led to a change of emphasis in vagrancy laws.[54] Although previously directed toward requiring work at fixed locations, vagrancy laws evolved into methods of control and banishment of unwanted people who threatened "financial burden, nuisance and potential criminality."[55] These laws also ensured that "undesirable" foreigners would be denied unencumbered ingress into local communities.[56] Thus, since their conception, vagrancy statutes have aimed to control "undesirable" groups who threaten to destabilize local communities. Historically, these statutes have ensured that society's most disadvantaged groups are kept within limits defined by and acceptable to majority groups.[57]

Although vagrancy-type laws have a long and complex history within the United States,[58] racial minorities have always been a primary victim of such statutes and ordinances.[59] As the paradigmatic caste of "undesirables," black people have historically been targeted by vagrancy ordinances. This was especially true after the Civil War, when southern legislators sought innovative ways to constrain black populations that were then technically free. With the

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to Contemporary Social Problems, 3 U. CHI. L. REV. 345 (1936); Rollin M. Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 250-61 (1958); Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557 (1960); T. Leigh Anenson, Comment, *Another Casualty of the War . . . Vagrancy Laws Target the Fourth Amendment*, 26 AKRON L. REV. 493 (1993); and Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950). Commentators and jurists have debated whether there is a renewed need for vagrancy-type laws. *Compare* Barr, *supra* note 22, at 394, 396 ("[V]agrancy and anti-loitering laws would allow police to act upon their educated and professional suspicions that something is awry. . . . The key civil rights issue of today, the real civil threat, is the ability to live with some modicum of safety."), *and* Clarence Thomas, Keynote Address at Federalist Society Symposium, *reprinted in* 1 MICH. L. & POL'Y REV. 269, 269 (1996) (arguing that the rights revolution has resulted in a "culture that declined to curb the excesses of self-indulgence—vagrants and others who regularly roamed the streets had rights that could not be circumscribed by the community's sense of decorum"), *with* H. Lee Sarokin, *Civil Rights or Nuisance: How Should the Judge-Citizen View a Vagrant's Behavior?*, 1 MICH. L. REV. 379, 382 (1996) ("Curfews, rousting people, and using the billy club to get people to move on or away are very tempting tools if they rid us of crime. But what is practical and productive is not always principled and proper.").

53. Foote, *supra* note 52, at 615.

54. *See id.* at 616.

55. *Id.*

56. *See id.*

57. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 560 (1992) ("[M]ost people probably would approve of greater police authority to keep an eye on 'undesirables' (and to keep them out of 'nice' neighborhoods). That is why old-style loitering and vagrancy laws were politically tolerable, notwithstanding their stunning breadth."); *cf.* Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1205-06 (1953) (implying that law enforcement officials enforcing vagrancy laws might disproportionately target certain groups, including racial minorities).

58. *See generally, e.g.*, Foote, *supra* note 52.

59. *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (holding that vague vagrancy-type ordinances "permit[] and encourage[] arbitrary enforcement of the law" and furnish "a convenient tool" for discriminatory treatment of unpopular groups).

help of broad vagrancy ordinances that enforced the provisions of most of the former Confederate states' "Black Codes,"[60] southern officials attempted to reestablish control over their former property.

The Black Codes, which thrived in the South during Andrew Johnson's "Presidential Reconstruction" of the United States,[61] epitomized the region's dogged efforts to retain control of its black labor population, despite that group's nominal change in status from slaves to freedmen.[62] Designed to force the freed slaves to work for their former masters, the Black Codes relied upon broadly defined vagrancy statutes as the central mechanism for regulating the black workforce.[63] Under this system of socioeconomic domination, the prospect of being arrested and charged with vagrancy deterred black laborers from leaving their former masters' plantations.[64]

Articles and editorials in southern newspapers of the postbellum period provide a ready guide to the public opinion that motivated the Black Codes. For example, the editor of a southern newspaper lamented that although he accepted the fact that "fiat of war" had produced the death of slavery,[65] the lack of compelled labor would obviously translate into the destruction of the southern economy. He queried, "[D]oes any man in his right senses[] ever again expect to see clean fields and productive crops? I think not."[66]

Two powerful stereotypes of ex-slaves combine to explain the editor's conclusion. The first belief—that blacks are naturally servile—is evident in the statements of postbellum southern officials deemed responsible for "Negro affairs." For example, Reverend Horace James, Superintendent of Negro Affairs in North Carolina, declared in 1865 that blacks constituted "a nation of servants, [who would] always make the most faithful, pliable, obedient, devoted servants that can enter our dwellings. . . . In the successive orders . . . of industrial pursuits, those who have the least intelligence must needs perform the more menial services, without respect to color or birth."[67] The second

60. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 199-201 (1988); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, *in* 4 RACE, LAW AND AMERICAN HISTORY, 1700-1990, at 13, 29 (Paul Finkelman ed., 1992) ("The contract system could work only if there was some way of forcing blacks to sign labor agreements in the first place. Vagrancy statutes provided just such a means . . . .").

61. FONER, *supra* note 60, at 199.

62. *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 167 (1962). For a recounting of the black community's reactions, see Steven F. Miller et al., *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners During Presidential Reconstruction, 1865-1867*, 70 CHI.-KENT L. REV. 1059 (1995).

63. Although only Mississippi and South Carolina explicitly mentioned race in their vagrancy statutes, these statutes of all the states clearly targeted ex-slaves. *See* FONER, *supra* note 60, at 201 ("[T]he vagrant contemplated was the plantation negro.").

64. *See* DU BOIS, *supra* note 62, at 167 (noting that although "[n]egroes were no longer real estate . . . [n]egroes were liable to a slave trade under the guise of vagrancy and apprenticeship laws.").

65. THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 44 (1965) (quoting an August 23, 1865, editorial from the *Edgefield Advertiser*).

66. *Id.*

67. GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914, at 180 (1971) (quoting REVEREND HORACE JAMES,

belief—that blacks are naturally lazy—is evident from the oft-repeated declaration made during Presidential Reconstruction, "You cannot make the negro work without physical compulsion."[68] In fact, white southerners were so worried about the shiftlessness of ex-slaves that proposals circulated to consider contracting labor from foreign countries, a practice common in the West Indian British colonies following the abolition of slavery. As the *Savannah News* reported, "The editor of the Mobile Gazette, Admiral Semmes, . . . says he speaks from experience when he recommends the Coolies as a laboring class. To illustrate the industry and enterprise of this class of the Chinese he cites the wonderful growth and prosperity of the city of Singapore . . . ."[69]

In addition to economic concerns, white southerners were also concerned with the implications of mobile free blacks for their quality of life.[70] As a contributor to the *Semi-Weekly Floridian* declared, "To live in town . . . is now the general desire on the part of the freedmen. . . . A good vagrant system cannot too soon be put in operation."[71] The Black Codes—and the vagrancy ordinances they included—were thus the response of southern white leaders to concerns regarding their own newly ambiguous socioeconomic status. These typically harsh codes were intended to regulate the black community and ensure that the South would remain a "'white man's country.'"[72] The post-Civil War constitutional conventions called by southern states to reconstruct their governments also addressed this concern. Alabama, Georgia, and Mississippi, for example, inserted into their constitutions the declaration that they would "guard [the former slaves] and the State against *any evils that may arise from their sudden emancipation.*"[73] It is clear, however, that the paternalistic sponsors of these clauses primarily intended to protect southern whites from any assault on white hegemony that might result from notions of black equality.

As the first state to pass and implement its set of Black Codes, Mississippi enacted legislation designed to keep black people in their rightful place—that

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ANNUAL REPORT OF THE SUPERINTENDENT OF NEGRO AFFAIRS IN NORTH CAROLINA 46 (1865)).

68. WILSON, *supra* note 65, at 44 (quoting Senator Carl Schurz, who reported that he "had heard this hundreds of times").

69. *Id.* at 45 (quoting the *Savannah News* of November 8, 1866).

70. *See* ROBERT CRUDEN, THE NEGRO IN RECONSTRUCTION 20 (1969) ("The fact was, of course, that the white Southerner was face to face with a new phenomenon—Negro mobility—and it is not surprising that he, like others faced with situations at once new and frightening, fell back on old clichés to comfort himself and rationalize his behavior.").

71. WILSON, *supra* note 65, at 53 (quoting the *Semi-Weekly Floridian* of January 9, 1866).

72. CRUDEN, *supra* note 70, at 21 (quoting U.B. Phillips); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-29 (1997) (examining how whites' concerns regarding status limited African-American progress in the postbellum period).

73. WILSON, *supra* note 65, at 63 (emphasis added) (citing ALA. CONST. art. 4, § 36 (1865); GA. CONST. art 2, § 5 (1865); MISS. CONST. art. 8 (1865)).

is, on the plantation.[74] One of the most controversial sections of Mississippi's Black Code defined "vagrant[s]" as "runaways, drunkards, pilferers; lewd, wanton, or lascivious persons, *in speech or behavior*; those who neglect their employment, misspend their earnings, and fail to support their families; and 'all other idle and disorderly persons.'"[75] The statute also regulated white behavior that threatened the existing social order. Thus, a second group of vagrants included idle blacks and "white persons associating with them 'on terms of equality' or guilty of sexual relations with them."[76] The Act also authorized local officials to impose a special poll tax on blacks aged eighteen to sixty, the proceeds of which would be collected for a "Freedman's Pauper Fund." Failure to pay this tax constituted "*prima facie* evidence of vagrancy."[77]

Following Mississippi's lead, South Carolina, Alabama, and Louisiana passed Black Codes in 1865.[78] In early 1866, Florida, Virginia, Georgia, North Carolina, Texas, Tennessee, and Arkansas issued comparable Black Codes.[79] Although the codes varied in style and substance, they all endeavored to ensure that ex-slaves would be placed "in a special—that is, inferior—position."[80]

As a result of the North's angry reaction to southern intransigence, Presidential Reconstruction came to a close and Congressional Reconstruction began,[81] providing a brief respite from racial tyranny and ushering in the repeal of racially oppressive vagrancy statutes.[82] Nonetheless, after the 1877 Hayes-Tilden Compromise reinvigorated southern leaders by terminating Congressional Reconstruction, white southerners targeted black people once again.[83] By 1890, with Jim Crow signaling the advent of a new era of white hegemony, southern leaders were determined "to make the existing system of caste and involuntary servitude even more rigid than it had already become."[84] Excepting Tennessee, all of the former Confederate states promulgated new vagrancy laws between 1893 and 1909.[85] "These laws

74. *See id.* at 66.

75. *Id.* at 68. Compare expansions of the term "vagrant" in Alabama and Florida. Alabama's definition included "'any runaway, stubborn servant or child'" and "'a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.'" *Id.* at 76. Florida's law "'in relation to Contracts of Persons of Color'" declared that a black person must be punished for vagrancy if his master complained of "'willful disobedience of orders, wanton impudence, or disrespect to his employer or his authorized agent, failure to perform the work assigned to him, idleness, or abandonment of the premises.'" *Id.* at 99.

76. *Id.* at 68.

77. *Id.*

78. *See id.* at 71-80.

79. *See id.* at 96-115.

80. CRUDEN, *supra* note 70, at 21.

81. *See id.* at 26-34.

82. *See* FONER, *supra* note 60, at 209.

83. *See id.* at 587-601.

84. Cohen, *supra* note 60, at 30.

85. *See id.*

defined the crime of vagrancy in painstaking detail, and yet, paradoxically, they were even broader and vaguer than before."[86] Harsher than the Reconstruction-era laws that had preceded them, these new vagrancy laws served as primary tools in defining and policing the racial landscape that existed through the 1960s,[87] until the Supreme Court invalidated the use of ambiguous vagrancy laws in *Papachristou v. City of Jacksonville*.[88]

The majority opinion in *Papachristou* was the logical predicate of the Court's earlier ruling in *Shuttlesworth v. City of Birmingham*.[89] In that case, a black defendant, Shuttlesworth, was charged with violating sections 1142 and 1231 of the General Code of the City of Birmingham, which gave police officers broad powers to regulate sidewalk traffic. On April 4, 1962, Patrolman Byars of the Birmingham Police Department witnessed a group of civil rights advocates picketing selected stores. To Byars's repeated commands that the group disperse, Shuttlesworth asked, "You mean to say that we can't stand here on the sidewalk?"[90] After a few such verbal exchanges, Byars arrested Shuttlesworth, who was eventually sentenced to "180 days at hard labor and an additional 61 days at hard labor in default of a $100 fine and costs."[91]

The Supreme Court dismissed Shuttlesworth's convictions under both sections 1142 and 1231 of the Birmingham General City Code. In particular, the Court noted that section 1142, "[l]iterally read, . . . says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. . . . Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state."[92]

In *Papachristou*, the Court expanded upon this analysis. In this case, eight defendants were convicted in a Florida municipal court of violating a local vagrancy ordinance. The convictions reeked of racial discrimination. Two black men and two white women, for example, had been driving in Jacksonville when police officers stopped them and charged them with vagrancy. In a decision consistently heralded "as a triumph of the rule of law,"[93] the Court worried publicly that the real danger of broadly worded vagrancy statutes was their potential to harass and control minority groups.[94] Specifically rejecting

86. *Id.*
87. *See id.* at 30-31.
88. 405 U.S. 156 (1972).
89. 382 U.S. 87 (1965).
90. *Id.* at 89.
91. *Id.* at 88.
92. *Id.* at 90-91.
93. Livingston, *supra* note 18, at 601.
94. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972); *see also* Jeffries, *supra* note 37, at 213-14 ("[T]he 'worst case' breakdown of the rule of law is not random whim or caprice but hidden bias and prejudice. And the single most potent concern at issue here is not an abstract interest in the postulates of a just legal order but a specific commitment to end discrimination based on race or ethnicity."); Stuntz, *supra* note 47, at 21 ("[T]he real problem . . . had nothing to do with the fuzziness of the ordinance. . . . The problem in *Papachristou* was race-based criminalization.").

the argument that vagrancy statutes should be tolerated because of their usefulness in "nipp[ing crime] in the bud,"[95] the Court declared:

> Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme . . . furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk . . . only at the whim of any police officer."[96]

Clearly implying that a central feature of vagrancy statutes was the use of status as a predictor of future criminality,[97] the Court cautioned that "[a]rresting a person on suspicion . . . is foreign to our system, even when the arrest is for past criminality."[98]

Twenty-five years after *Papachristou*, police-minority interactions remain contentious.[99] It is thus troubling that quality-of-life advocates would choose to ignore the historical repudiation of broad vagrancy-type laws in order to advance their calls for increased police discretion at the street level. It was *precisely* this discretion that the Court—and civil rights organizations—rallied against in *Papachristou*.[100] Thus, although civil injunctions are often "far more specific than [the vagrancy laws] struck down in the 1960s and 1970s," they "raise many of the same concerns that led courts of that period to invalidate public order laws for vagueness."[101] Indeed, in subtle and rationalizable ways, anti-gang injunctions threaten to perpetuate the regime of racial domination that the *Papachristou* Court fought so valiantly to dismantle.

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95. *Papachristou*, 405 U.S. at 171.

96. *Id.* at 170 (quoting *Shuttlesworth*, 382 U.S. at 90; Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

97. *See id.* at 169; *see also* Foote, *supra* note 52, at 625 (noting that two different kinds of suspicion are possible—that is, suspicion for either "past" or "future" criminality—and that vagrancy laws target the latter); Lacey, *supra* note 57, at 1217 (noting that vagrancy laws aim to target future criminality).

98. *Papachristou*, 405 U.S. at 169.

99. *See* Cohen, *supra* note 48, at 179 ("Because the traditional role of the police is to enforce order upon the lower classes, . . . the poor and disempowered are inherently more likely to find themselves at the receiving end of police brutality."); *id.* at 181 ("[T]he police specifically and the government generally have lost the trust and cooperation that these communities have to offer."); *see also* Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men. Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 208 (1994) (arguing that the criminal justice system perpetuates stereotypes of black criminality).

100. *See Papachristou*, 405 U.S. at 156; *see also* Livingston, *supra* note 18, at 599 ("In the context of the . . . [1960s] civil rights struggles . . . the Supreme Court was increasingly called upon to invalidate laws punishing vagrancy, loitering, trespass, and disorderly conduct.").

101. Livingston, *supra* note 18, at 560; *see also id.* at 642-44 (discussing anti-gang injunctions).

III. AVERSIVE RACISM AND ANTI-GANG CIVIL INJUNCTIONS

At first glance, a comparison between the oppression of black people under the Black Codes and the targeting of gangs by civil injunctions might seem strained. Indeed, whereas vagrancy ordinances unapologetically invited broad police discretion, anti-gang injunctions target specifically named individuals. Moreover, modern police forces, which are fed on diets of "sensitivity training" and encompass diverse groups including African Americans, arguably do not operate within a regime of overt racial hostility. Finally, there are profound differences between the "innocent" ex-slaves *being oppressed* in the pre-*Papachristou* regime and the malevolent gangs *oppressing* communities today. The ex-slaves were marked solely because of *who* they were; gang members are ostensibly targeted because of *what* they do. Therefore, although society should not base punishment on race, it is, and should be, perfectly permissible to hold people accountable for their harmful actions.

Nonetheless, I argue in this part that these seemingly logical assertions are based on unsound distinctions. More specifically, I argue that the targeted nature of anti-gang injunctions does not counterbalance the excessive discretion that such measures provide police officers and courts. I then use the social psychological theory of aversive racism to explain why the disappearance of overt racism does not translate into the disappearance of racism per se. Finally, I conclude by noting how the amorphous concept of the "gang" invites discretionary actions that oppress innocent minority youth.

A. *Anatomy of an Anti-Gang Civil Injunction*

In this section, I dissect the anti-gang civil injunction. I demonstrate that although civil injunctions might not initially appear to invite broad police discretion, such measures might in fact allow even broader police discretion than vagrancy statutes. This inquiry is essential because civil injunctions are an increasingly fashionable means of outfitting local governments and municipalities in their "turf wars" against gangs for public spaces.[102] Indeed, municipalities are increasingly soliciting courts to use their judicial power against street gangs. Courts have generally responded favorably, granting sweeping injunctions that restrain gang members from publicly engaging in certain activities.[103] Gang members who subsequently engage in proscribed pastimes are subjected to months of incarceration and significant fines. Indeed,

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102. *See* Boga, *supra* note 3, at 477.

103. *See id.* For examples of anti-gang injunctions, see *City of Norwalk v. Orange Street Locos*, No. VC 016746 (Cal. Super. Ct. Aug. 25, 1994) (preliminary injunction); *People ex rel. Fletcher v. Acosta*, No. EC 010205 (Cal. Super. Ct. Apr. 7, 1993) (order for preliminary injunction); and *People v. Playboy Gangster Crips*, No. WEC 118860 (Cal. Super. Ct. Dec. 11, 1987) (preliminary injunction).

through the use of a civil injunction, municipalities can effectively cast out street gang members from the public space.[104]

Particularly within the State of California, local governments have sought and obtained broad injunctions aimed at limiting the scope of acceptable gang behavior.[105] Between October 1992 and July 1994, for example, municipalities in California applied for seven separate anti-gang injunctions and received five of them.[106] Although the five communities that received abatement injunctions have considered them "unqualified success[es],"[107] this "success" has come at potentially great cost to minority communities.

The lure of anti-gang injunctions stems from their nature as civil, as opposed to criminal, penalties.[108] Although criminal laws are limited, logically enough, to criminal behavior, injunctions can target noncriminal conduct, offering prosecutors a "regime [that] operates as a remedy apart from the criminal law."[109] Theoretically, police and the attorneys who assist them *could* seek carefully crafted civil injunctions that would "limit police authority by specifying the particular neighborhoods in which they apply, the persons enjoined, and the precise conduct that is prohibited."[110] This project *could* result in an inspired "close analysis of neighborhood problems and . . . collaboration between law enforcement and community residents."[111]

This optimistic dream of improved community-police cooperation, however, requires the presence of an unbiased criminal justice system for its realization. Without such a foundation, the use of anti-gang civil injunctions portends grave danger for minority communities. First, civil injunctions "lack the admittedly imperfect safeguard against arbitrary governmental action implicit in the requirement that laws be generally applied."[112] This deficiency means that key issues like specifying *who* can be legitimately enjoined, *when*

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104. *See* Boga, *supra* note 3, at 477.

105. The California Supreme Court's decision in *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), identifies two potential sources of judicial authority to issue anti-gang injunctions in California: (1) general nuisance laws; and (2) California's Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE §§ 186.20-186.28 (West 1988 & Supp. 1997). The court noted that while a legislature could declare a legislative act the exclusive remedy for abating gang activity, STEP expressly allows other means of enjoining criminal street gangs. *See Acuna*, 929 P.2d at 614. Regardless of which source of authority is invoked, the person seeking an injunction must demonstrate that the defendant has violated her rights. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762 (1994). Accordingly, she must identify some legal source promulgating the rights that she claims the defendant has violated.

106. *See* Yoo, *supra* note 4, at 219.

107. Boga, *supra* note 3, at 485.

108. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1345-48 (1991) (discussing the appeal of civil as opposed to criminal remedies).

109. *Id.* at 1343.

110. Livingston, *supra* note 18, at 644-45.

111. *Id.* at 645.

112. *Id.* at 643.

injunctive relief is appropriate, and *how* relief should be fashioned in different circumstances will ultimately depend upon a particular court's views.[113]

The Supreme Court recognized this danger of civil injunctions in *Madsen v. Women's Health Center, Inc.*[114] The majority noted:

> Ordinances represent a legislative choice regarding the promotion of particular social interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. Injunctions also carry greater risk of censorship and discriminatory application than do general ordinances. "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[115]

In his dissenting opinion, Justice Scalia derided both the *Madsen* majority's ultimate decision to uphold the civil injunction and, more generally, the use of civil injunctions targeted at the conduct of unpopular groups. Adding to the list of dangers that attach to civil injunctions, Justice Scalia warned that constitutional free speech rights "should not lightly be placed within the control of a single man or woman," particularly when an injunction signifies the taking of sides in a dispute.[116]

A second danger of civil injunctions stems from the fact that many guarantees of the Bill of Rights attach themselves only to criminal proceedings. Although civil injunctions promise the possibility of removing street gangs from public spaces without the hassle of worrying about individual rights,[117] enjoined groups are left without secure constitutional protection. As Mary Cheh explains:

> Police and prosecutors have embraced civil strategies not only because they expand the arsenal of weapons available to reach antisocial behavior, but also because officials believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials . . . . A persistent question remains regarding the use of civil remedies to check antisocial behavior: what constitutional limits constrain their use?[118]

Unfortunately, the answer to Cheh's "persistent question" is "not enough." In fact, the reason that civil remedies are so attractive to prosecutors and police

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113. *See id.* at 643-44.

114. 512 U.S. 753 (1994).

115. *Id.* at 764 (quoting Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949)) (citations omitted).

116. *Id.* at 793 (Scalia, J., dissenting).

117. *But cf.* Stuntz, *supra* note 47, at 1 (noting that an alternative approach would be for courts to manipulate the substantive scope of criminal law).

118. Cheh, *supra* note 108, at 1329.

officers is precisely that civil due process requirements are much less stringent and comprehensive than analogous criminal due process guarantees.[119] In particular, although a party to a civil proceeding will normally be guaranteed a predeprivation hearing and the burden of persuasion will rest with the moving party, the threshold of proof is not beyond a reasonable doubt, but the less demanding preponderance-of-the-evidence standard.[120] Additionally, there is no right to appointment of counsel.[121] Once one adds to these considerations courts' "freedom to proscribe otherwise legal acts and create personal criminal codes"[122] and the deference that appellate courts give trial judges,[123] the full extent of the limited protections available to a party in a civil proceeding becomes more apparent.

Finally, although a defendant in contempt proceedings (which are used to enforce violations of injunctions) obtains the panoply of procedural due process guarantees that attach to criminal penalties, the collateral bar rule of *Walker v. Birmingham*[124] prohibits such a defendant from challenging an injunction's constitutionality, limiting the issues in the contempt hearing to whether the court had jurisdiction to issue the injunction and whether the defendant knowingly violated it.[125] As Justice Scalia explained in *Madsen*, the imposition of the collateral bar rule means that the targets of injunctions who have neither the time nor the money to challenge them "face a Hobson's choice: They must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings."[126] Indeed, an indigent and uneducated defendant might not have access to counsel, a fact that potentially impinges on such a defendant's ability to challenge both an injunction's scope and the factual basis for subjecting the defendant to an injunction.[127] Moreover, in those situations in which the injunction was issued ex parte, the injunction's target will have been denied a chance to be heard and will subsequently have the burden of proving that the court's order was improper.[128] The sum of these dangers is that defendants in civil

119. *See* Yoo, *supra* note 4, at 253-55. *But see* Cheh, *supra* note 108, at 1369 (arguing that civil procedural due process imposes significant safeguards against arbitrariness.)

120. *See* Cheh, *supra* note 108, at 1394.

121. *See id.* at 1395 n.365.

122. Yoo, *supra* note 4, at 254.

123. For cases demonstrating the traditionally limited scope of appellate review, see, for example, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); and *Brown v. Chote*, 411 U.S. 452 (1973). For a case demonstrating how the expeditious nature of an injunction can translate into relaxed procedural considerations, see, for example, *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940). But for an example of extensive review by an appellate court, see *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

124. 388 U.S. 307 (1967).

125. *See id.* at 315.

126. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 793-94 (1994) (Scalia, J., dissenting).

127. *See* Yoo, *supra* note 4, at 255.

128. *See id.*

proceedings are left relatively unprotected, an acutely vulnerable position if the defendants belong to politically underrepresented minority groups.

An examination of the five primary restrictions evident in California's anti-gang injunctions illustrates both the crime-fighting promise and the repressive potential of this approach. First, the injunctions have prohibited gang members from annoying or harassing neighborhood residents. Second, they have targeted gang members' attempts to demand entry into residents' homes. Third, the injunctions have regulated gang clothing and hand signs. Fourth, they have restricted the local movement of gang members. And fifth, they have curtailed gang members' right to congregate in public spaces.[129]

Although these provisions are facially race-neutral, they must be reviewed skeptically. Indeed, despite their lack of overt racial language, these provisions—in particular, the restrictions on the rights to association and movement—bear an uncomfortable resemblance to the postbellum vagrancy laws.

B. *Aversive Racism*

The overt system of racial subordination represented by the Black Codes is largely a historical artifact.[130] Most whites no longer publicly express thoughts of black inferiority.[131] Nonetheless, blacks and other minorities continue to suffer from stigma and disadvantage.[132] This is largely because more subtle forms of racism now dominate the racial landscape.[133]

Building upon this observation, Samuel Gaertner and John Dovidio have constructed a theoretical model known as "aversive racism."[134] The

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129. *See id.* at 222-25.

130. *See generally* NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) (providing a comprehensive statistical compilation of race opinion surveys); HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA 193 (1985) (charting racial attitudes).

131. *See* Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41, 43 (1987).

132. *See generally* BELL, *supra* note 51 (detailing the history of racism within the United States).

133. *See* Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61, 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986); James R. Klugel & Eliot R. Smith, *Whites' Beliefs About Black Opportunities*, 47 AM. SOC. REV. 518, 529 (1982). Klugel and Smith's research is presented in greater detail in JAMES R. KLUGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY (1986).

134. *See* Gaertner & Dovidio, *supra* note 133. A number of other social psychological theories also attempt to explain modern forms of racism. *See, e.g.*, Patricia G. Devine & Kristin A. Vasquez-Suson, *The Rocky Road to Positive Intergroup Relations*, *in* RACISM: THE PROBLEM AND THE RESPONSE 234 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (advancing a prejudice disassociation model that explains the process by which people can inhibit or control their racist tendencies); Irwin Katz et al., *Racial Ambivalence, Value Duality, and Behavior*, *in* PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 133, at 35 (arguing that "ambivalent racism" reflects a combination of sympathy for blacks' plight with the belief that they have contributed significantly to it); John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 133, at 91 (arguing that "modern racists" are largely unaware of their racist feelings); Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, *in* RACISM:

individual they characterize as the aversive racist disassociates herself from overtly racist actions and may even exaggerate her behaviors to reinforce her nondiscriminatory self-perception.[135] Along political axes, she would be labeled a "liberal."[136] Nonetheless, her racial attitudes are essentially ambivalent.[137] Although the subject might not openly express hostility or hate for black people, her likely reactions will often include discomfort, uneasiness, and fear[138] expressed in "subtle, rationalizable ways."[139] Gaertner and Dovidio label this model aversive racism because the aversive racist regards as aversive not only blacks, but also suggestions that she is prejudiced.[140] Thus, even as the subject maintains a perception of being egalitarian, her actions reveal that she has not fully internalized egalitarian attitudes.[141]

Unlike early theories of racism that focused upon the psychopathology of prejudice,[142] aversive racism posits that "the negative feelings that aversive racists harbor toward blacks are rooted in three types of normal, often adaptive, psychological processes."[143] The first process is cognitive in the sense that it involves the human need to classify things.[144] The problem of aversive racism begins, however, when the need to classify transforms itself into in-group bias.[145] The second process is motivational because it relates to the

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THE PROBLEM AND THE RESPONSE, *supra*, at 34-35 (arguing that power "engenders stereotypic thinking, encourages in-group favoritism, and enhances perceived intergroup differences"); David O. Sears, *Racism and Politics in the United States*, *in* RACISM: THE PROBLEM AND THE RESPONSE, *supra*, at 76, 83-89 (explaining how "symbolic racism" articulates itself through political values and personal ideology); Jim Sidanius et al., *Hierarchical Group Relations, Institutional Terror, and the Dynamics of the Criminal Justice System*, *in* RACISM: THE PROBLEM AND THE RESPONSE, *supra*, at 136 (advancing a "social domination" theory, which maintains that complex human societies appear predisposed to organize themselves as group-based social hierarchies with one or a small number of dominant groups and at least one subordinate group). Aversive racism theory's primary competitors are probably "symbolic racism" and "modern racism." I have opted to use aversive racism because, unlike these alternatives, it focuses upon the actions and motivations of people who would probably label themselves "liberal." For legally oriented critiques of modern forms of racism, see R. Richard Banks & Jennifer L. Eberhardt, *Social Psychological Processes and the Legal Bases of Racial Categorization*, *in* RACISM: THE PROBLEM AND THE RESPONSE, *supra*, at 54; Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 983-85 (1993); and Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

135. *See* Gaertner & Dovidio, *supra* note 133, at 62.

136. *See* John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, *in* RACISM: THE PROBLEM AND THE RESPONSE, *supra* note 134, at 3, 8. This facet of aversive racism distinguishes it from its prime competitors—that is, symbolic racism and "modern racism"—because those models focus more on political conservatives. *See id.*

137. *See* Gaertner & Dovidio, *supra* note 133, at 61.

138. *See* Dovidio & Gaertner, *supra* note 136, at 5.

139. Gaertner & Dovidio, *supra* note 133, at 62.

140. *See* Dovidio & Gaertner, *supra* note 136, at 5.

141. *See* Gaertner & Dovidio, *supra* note 133, at 84-86.

142. *See, e.g.*, T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950) (advancing a psychopathological theory of prejudice).

143. Dovidio & Gaertner, *supra* note 136, at 5.

144. *See* G.W. ALLPORT, THE NATURE OF PREJUDICE 17-28 (2d ed. 1958).

145. *Cf.* Operario & Fiske, *supra* note 134, at 34-35 (noting that power "engenders stereotypic thinking, encourages in-group favoritism, and enhances perceived intergroup differences").

human desire to satisfy basic needs. The problem here begins when some needs—for example, the need for power or the need for control—begin to align themselves with in-group biases.[146] The last process is sociocultural in that it stems from the internalization of social values and beliefs. If the nation's commitment to racial justice is equivocal, the aversive racism model predicts that this conflicted position will reflect itself in the racial commitments of large numbers of individual whites.[147]

Because of her dissonant racial attitudes, the aversive racist will try to avoid interracial interactions. If she cannot, she will "experience anxiety or discomfort, and consequently try to disengage from the interaction as quickly as possible."[148] Because part of her discomfort stems from a desire to act appropriately and not appear prejudiced, the aversive racist will "strictly adhere to established rules and codes of behavior" in interracial settings.[149] In such environments, the normative structure within the situation will be "clear and unambiguous."[150] Onlookers will thus scrutinize questionable racial actions more skeptically and charges of racism will be more difficult to deny. Thus, the aversive racist will likely assert that she is "color-blind" and therefore unable to act or think in discriminatory ways.[151] Conversely, when the "normative structure within the situation is weak, ambiguous, or conflicting" (e.g., in intraracial environments),[152] the subject will feel more comfortable expressing racial comments because she can more easily dismiss charges of racism.

Although the aversive racist's expression of negative racial attitudes may be subtle, the consequences of these racial attitudes are not. Aversive racism may be as, if not more, harmful to minority communities than old-fashioned, "dominative" racism.[153] Both systems "contribute to the restriction of opportunity for blacks and other minorities"[154] and "perpetuate the social and economic advantages of the majority group over minority groups."[155] Aversive racism's very subtlety, however, makes it more difficult to challenge. As Dovidio and Gaertner explain, "Like a virus that has mutated, racism has evolved into different forms that are more difficult not only to recognize but also to combat. . . . In organizational decision-making . . . in which the controlled conditions of an experiment are rarely possible, [aversive racism]

146. *See* Dovidio & Gaertner, *supra* note 136, at 6.
147. *See id.*
148. *Id.* at 7.
149. *Id.*
150. Gaertner & Dovidio, *supra* note 133, at 66.
151. Dovidio & Gaertner, *supra* note 136, at 7.
152. Gaertner & Dovidio, *supra* note 133, at 66.
153. For a discussion on "dominative" racism, see JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 54 (1970).
154. Dovidio & Gaertner, *supra* note 136, at 18.
155. *Id.* at 31.

presents a substantial challenge" to the goal of racial equality.[156] This challenge is made even more perverse by the fact that "aversive racists are not only generally unaware of their prejudice, but also . . . motivated to remain unaware."[157]

The aversive racism model is potentially illuminating when applied to Wilson and Kelling's quality-of-life arguments.[158] The theory predicts that arguments about minority communities will be framed in nonracial terms (e.g., innocent crime victims versus malevolent gang members) rather than in explicitly racial terms (e.g., threatening and undesirable minority youth versus fearful and uncomfortable members of the dominant white majority).[159] A review of the "broken windows" argument supports this framing prediction. Wilson and Kelling's discussion is fashioned as a symbolic battle between a "raceless" vagrant and an entire community.[160] With the normative racial structure thus ambiguous, the argument strategically ignores the civil rights arguments that precipitated *Papachristou*. This deracialization allows the authors to advance arguments that are in fact deeply racial in "subtle, rationalizable ways."[161]

More specifically, Wilson and Kelling call for decreased civil rights for undesirables while also repudiating police discrimination.[162] The authors thus strike an ambivalent stance by going on record as opposing racial discrimination. If an onlooker were to label them "racists," the authors would likely attempt to dismiss this claim by highlighting their opposition to police discrimination and reasserting their plea for the improved selection, training, and supervision of police officers.[163]

Nonetheless, as the aversive racism model predicts, although the racial motivations of Wilson and Kelling might be subtle, the consequences of their policy prescriptions are not. Indeed, the "broken windows" literature is arguably the academic centerpiece of the "quality-of-life" revolution,[164] which had predictably damaging effects on minority communities.[165] In fact, because of the very subtlety of the racialized arguments embedded within the "broken windows" literature, it is much more difficult to challenge the racially

156. *Id.* at 25.

157. *Id.* at 28.

158. Given the particularly pervasive influence of Wilson and Kelling's "broken windows" argument within criminology circles, public policy circles, and the academy, *see* sources cited *supra* note 22, I am arguing by extension that the existence of aversive racism in Wilson and Kelling's work is representative of a larger social phenomenon.

159. *See* Dovidio & Gaertner, *supra* note 136, at 7.

160. *See* Wilson & Kelling, *supra* note 17.

161. Gaertner & Dovidio, *supra* note 133, at 62.

162. *See* Wilson & Kelling, *supra* note 17, at 35.

163. *See id.*

164. *See* Livingston, *supra* note 18, at 578.

165. *Cf.* Cohen, *supra* note 48, at 179 (noting the overlap between "quality-of-life" offenses and things done by poor people); Cole, *supra* note 39, at 2558 (noting the negative consequences of incarcerating large numbers of African Americans).

disparate impacts of the argument's derivative programs. Unlike the old-fashioned racists who dominated political and academic discussions in the early portion of the twentieth century, aversive racists clothed their negative racial attitudes in an armor of subtlety.

Conversely, because blacks are not typically presumed to support racial discrimination against other blacks, Randall Kennedy[166] argues without much fear of being labeled a racist. He can thus easily maintain his self-image as an egalitarian, nonracist person. Indeed, the idea of the American people's labeling a black person's comments about his own race "racist" is almost unimaginable. On the contrary, most white Americans would reward authors like Kennedy with a sympathetic presumption of self-interested nonracism when such authors discuss the African-American community. Indeed, authors like Kennedy are allowed to advance potentially disparaging comments about black people because it is presumably against such authors' self-interest to stigmatize their race. Given the racial realities of modern America, the fate of black authors—even wealthy black professors—is inseparable from the fate of black people more generally. Under this logic, it would seem foolish for black authors to posit arguments aimed at hindering members of their own race. Accordingly, black authors are awarded a presumption of nonracism.

Similarly, although some black Americans might impulsively label authors like Kennedy "sell-outs" or even "Uncle Toms," it is unlikely that they would label such authors "racists." Indeed, even if authors like Kennedy were deemed "self-hating" blacks who suffered from significant class biases, it is unlikely that most African Americans would charge such authors with a *race*-based bias against the black community.[167] Again, the logic in the black community might be that it is not in the interest of any African American to impede the struggle for racial equality. Thus, although there might be significant name-calling within the black community, *class*-related disagreements, and much dispute over the political future of the black community, the normative structure is such that blacks will probably not label other blacks "racist." Were Kennedy a white author, charges of racism would be less easily dismissed. To be sure, a white person promoting Kennedy's arguments might entice charges of aversive—or even old-fashioned—racism.

C. *The Troubling Marriage of Gang Abatement Efforts and Civil Injunctions*

The aversive racism model provides a potentially powerful framework for understanding and critiquing the sweeping "wars" against the amorphous minority organizations labeled "gangs." Within the context of anti-gang civil

166. *See supra* text accompanying notes 30-32.

167. *See, e.g.*, Paul Butler, *(Color) Blind Faith: The Tragedy of* Race, Crime, and the Law, 111 HARV. L. REV. 1270, 1273 (1998) (book review) (chastising "Respectable Randall," "who admits to valuing specially the esteem of white people," as "worse than irresponsible").

injunctions, the model would predict that the raceless metaphor of "war" might mask underlying racial attitudes that ultimately conspire to oppress and stigmatize innocent minority populations generally and innocent minority youth in particular. Some of these youth might romanticize gang culture but not actively associate with gang members. Others might actively associate with gang members, but lack the specific intent to further the gang's criminal aims. In either case, anti-gang civil injunctions invite concerns identical to those that compelled the *Papachristou* Court to repudiate vague public order laws.

In this section, I address these arguments in greater depth. First, I explore the functions that gangs serve in disadvantaged communities. I then continue the previous discussion on civil injunctions and examine the California Supreme Court opinion applauding their use. Finally, I conclude by arguing that because a conspicuous effect of anti-gang injunctions (like the earlier vagrancy-type laws) is the stigmatization of minority communities, such injunctions should be tolerated only in very limited circumstances.

1. *Gangs as Proxies*

The precise identity of the "enemy" in wars against gangs is, at best, ambiguous. Apart from overhyped media definitions, the term "gang" has no clear, universally agreed-upon meaning.[168] Given the proliferation of statutes and injunctions aimed at gang abatement, however, some associations of people are clearly being targeted and punished for their collective identities.[169]

Whatever definition of "gang" one employs, there are a few recurring features. Unfortunately, "gangs" tend to "come out of low-income, non-caucasian, urban communities."[170] This observation yields two important implications. First, given that minority youths who sport urban cultural garb are often lumped together in uncomplicated stereotypes and treated suspiciously,[171] some minority youths might automatically be labeled gang members even though similarly situated—and similarly outfitted—white youth would not receive such labels.[172] Second, the confluence of these factors suggests that gangs might serve as alternative sources of social organization

168. *See* SKOGAN, *supra* note 22, at 25; Destro, *supra* note 2, at 788 ("The term 'gang' is notoriously imprecise . . . ."); *cf.* JANKOWKSI, *supra* note 15, at 141 (noting that some acts of violence committed by individuals are attributed to gangs).

169. *See* JANKOWSKI, *supra* note 15, at 141.

170. Harper, *supra* note 4, at 52. For a more comprehensive study of gang structure and membership, see generally JANKOWSKI, *supra* note 15.

171. *See* Harper, *supra* note 4, at 52 (noting the role played by the media in encouraging the public to think of gang violence as a racial problem); *see also* Magee, *supra* note 99, at 207-13 (discussing the dominant culture's negative perceptions of black men).

172. *Cf.* Harper, *supra* note 4, at 52 (noting that some criminal activity by groups of white youths is not characterized as "gang" activity); Boga, *supra* note 3, at 487-88 (noting that gangs, like fraternities and sororities, serve as socializing outlets for teenagers).

within disorganized communities[173] in a state of "violent social crisis."[174] A black man, for example, has "a 1-in-21 chance of being murdered, while a white man . . . has a 1-in-333 chance."[175] Although blacks constitute only twelve percent of the U.S. population, more than fifty percent of people in U.S. jails are black.[176] Thus, as Frank Harper concludes,

> Faced with the deterioration of traditionally stable institutions such as the family, church, or schools—institutions where adults (parents) offer strong role models and exercise true authority—"underclass" youth may turn to gang membership in hopes of finding a substitute for those unavailable institutions. Against the backdrop of urban life, gangs may offer to teenagers a variety of services they simply cannot get elsewhere.[177]

Moreover, gang protection can literally mean the difference between life and death in some communities.[178] Because many disadvantaged neighborhoods tend to be very violent and police officers are not viewed as trustworthy allies, local youths might adopt an "if you can't beat 'em join 'em" mentality.[179]

The lack of alternative outlets for social gathering, peer interaction, and communal bonding provides a second rationale for gang membership. In many communities, gangs may provide "the primary social institution of the neighborhood."[180] Terence Boga elaborates:

> Gangs, like popularly accepted associations, employ identifying clothing and secret hand signals that distinguish members from outsiders and foster feelings of camaraderie. Both gangs and fraternities serve universal needs for peer approval and companionship. The primary difference between these two associations is that fraternities occupy designated housing, while street gangs perform these functions in public space.[181]

A final incentive for joining gangs stems from the economically devastated conditions prevailing in many inner-city communities.[182] Trapped by the reality of neighborhoods in profound economic decay,[183] the "exit of large

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173. *See* Molina, *supra* note 6, at 465.

174. Harper, *supra* note 4, at 46.

175. *Id.* (citation omitted).

176. *See id.* at 46-47.

177. *Id.* at 48.

178. *See, e.g.*, Rutkowski, *supra* note 14, at 154 (recounting the story of Anthony Burgos, who was killed because he was not affiliated with a gang).

179. *Id.* at 153-55.

180. Boga, *supra* note 3, at 488.

181. *Id.* at 487-88.

182. The socioeconomic decay of American cities is charted in WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1987).

183. *See, e.g.*, MOORE, *supra* note 14, at 11-23 (examining the effect of East Los Angeles's economic deterioration on local Latinos).

urban employers, . . . structural deterioration that affects everything from housing to inner-city services,"[184] the complete egress of the middle class,[185] large-scale unemployment,[186] and parents who inhabit the bottom rungs of the socioeconomic ladder,[187] gangs—and the drug trade—might provide many inner-city youth with the "only economically rational alternative available."[188] Under this view, gangs represent "counter-organizations" geared to "fulfilling the standards of the larger society"[189] by providing minority youth with "an alternate form of employment with which they could hope to 'make it' in U.S. society."[190]

Despite the similarity of aims that precipitate gang membership within disadvantaged communities, all gang members are not created equal. According to one characterization scheme, there are three levels of standing within gangs. The first level comprises the "leaders," hard-core gang members who participate in the organization's most violent activities. These "homeboys" constitute approximately fifty percent of most gangs.[191] The second level, so-called "peripheral members," are tied to the gang, but do not actively participate in its social life; peripherals are, however, called upon to participate in the gang's activities.[192] Recruits constitute the last level of "true" gang members, and their roles are initially undefined.[193]

Outside of the gang, there are "wannabes," typically community youths infatuated with gang culture but technically not a part of it.[194] Although they do not fully share the gang's aims or activities, these youngsters might assert membership in gangs or experiment with gang clothing because of "youthful arrogance or a desire to be placed in protective custody."[195]

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184. Harper, *supra* note 4, at 46.

185. *See* WILSON, *supra* note 182, at 135-38.

186. *See id.* at 157-59.

187. *See* Boga, *supra* note 3, at 489.

188. *Id.*

189. *Id.* (citation omitted). Advertisers, for example, often target "aspirational brands" at local urban cultures, understanding that many minority youth aspire to "the imagined life of ease in white suburban country clubs." Joshua Levine, *Badass Sells*, FORBES, Apr. 21, 1997, at 142, 142-48 (describing how corporate marketplaces have discovered that "[f]or products to sell in Greenwich and Grosse Pointe, they better be 'butter' on the inner-city streets of New York and Los Angeles").

190. Boga, *supra* note 3, at 489 (footnote omitted).

191. Rutkowski, *supra* note 14, at 149.

192. *Id.*

193. *See id.*

194. *Id.* at 150. For a more detailed discussion of "wannabes," see DANIEL J. MONTI, WANNABE: GANGS IN SUBURBS AND SCHOOLS (1994), which discusses suburban gangs and "wannabes" outside of the well-known inner city gangs.

195. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 621 (Cal. 1997) (Chin, J., concurring in part and dissenting in part); *see also* Yoo, *supra* note 4, at 234 ("Be skeptical about what you hear, even if you get it directly from gang members. (Gang members have lots of games to play—with themselves, with each other, with police or anybody else in authority, and with anybody who can possibly be 'impressed.')" (quoting Joan Moore, *Gangs and Gang Violence: What We Know and What We Don't*, *in* GANG VIOLENCE PREVENTION 23, 23 (Alfredo Gonzalez et al. eds., 1990))).

This last group—and to some extent, perhaps, the group composed of peripheral members—is particularly relevant in the context of anti-gang civil injunctions and statutes. If gangs are pervasive influences within disadvantaged communities and the population of nonviolent gang members and "wannabes" is significant, broadly worded anti-gang injunctions might ensnare youngsters not involved in crime and unwittingly increase their reasons for, and ability to pursue, official or more active gang membership.[196] Comparable to the broadly worded vagrancy statutes of the postbellum period, broadly worded civil injunctions threaten to perpetuate a regime of guilt by racial and cultural association.

2. *The More Things Change . . .*

Although anti-gang civil injunctions raise many of the same concerns that the U.S. Supreme Court fretted about in *Papachristou*, the California Supreme Court recently praised their use as crime-fighting measures in the "urban war zone."[197] In *People ex rel Gallo v. Acuna*,[198] members of a San Jose gang challenged an injunction that, among other things, proscribed the gang's enjoined members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant . . . or with any other known 'VST' (Varrio Sureno Town or Varrio Sureno Treces) or 'VSL' (Varrio Sureno Locos) member."[199] In an opinion forcefully asserting a community's right of self-defense,[200] the court upheld the challenged injunction.

More specifically, Judge Brown asserted for the majority, in relevant part, that the affiliations between gang members do not merit any recognizable First Amendment protection;[201] that gang members could still "associate freely out of public view";[202] that given the gang's "hooligan-like" activities,[203] a complete ban on associations between gang members within the neighborhood was justified, especially since gang members "engaged in no expressive or speech-related activities which were not either criminally or civilly unlawful or inextricably intertwined with unlawful conduct";[204] and finally that individualized proof of specific intent for each named defendant was not

196. *See* Rutkowski, *supra* note 14, at 142.
197. *Acuna*, 929 P.2d at 601.
198. 929 P.2d 596 (Cal. 1997).
199. *Id.* at 608.
200. *See id.* at 603; *see also* Wilson & Kelling, *supra* note 17, at 38 (arguing that communities, as well as individuals, have rights of self-defense).
201. *See Acuna*, 929 P.2d at 608-09.
202. *Id.* at 616.
203. *Id.* at 613.
204. *Id.* at 615.

necessary where groups like gangs can act only through the medium of their membership.[205]

Gaertner and Dovidio's aversive racism framework is particularly useful in analyzing Judge Brown's opinion. For example, in concluding his opinion, Judge Brown noted:

> To hold that the liberty of the *peaceful, industrious* residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense. . . . Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the *idle*, the *contentious*, and the *brutal* that government was invented.[206]

In this passage, Judge Brown lumped together violent gang members with anyone who associates with them, regardless of whether these associates had any intent to commit criminal actions. Moreover, he implicitly labeled this group of people as "idle," "contentious," and "brutal" predators who are engaged in a war against the government and all "peaceful, industrious" people. True to the predictions of the aversive racism model, Justice Brown advanced underlying racial arguments in "subtle, rationalizable ways"[207] by deracializing his argument. Conceivably, this would render his arguments racially ambiguous enough to dismiss claims of racial bias.

Yet, as Judge Chin pointed out in his opinion dissenting in part, Blanca Gonzalez, a named defendant, was enjoined for guilt by racial association alone.[208] The only pieces of evidence justifying an injunction against Ms. Gonzalez were the facts that she had worn "a black top and black jeans"[209] that fit police descriptions of gang members and that she had claimed gang membership.[210] Contrary to the rule of *NAACP v. Claiborne Hardware*

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205. *See id.* at 616-17.

206. *Id.* at 618 (emphases added).

207. Gaertner & Dovidio, *supra* note 133, at 62.

208. *See Acuna*, 929 P.2d at 620 (Chin, J., concurring in part and dissenting in part). The suspect association in this case was to Latinos and Chicanos, groups who occupy the bottom of California's socioeconomic ladder. *See* Pedro A. Noguera, *Educational Rights and Latinos: Tracking as a Form of Second Generation Discrimination*, 8 LA RAZA L.J. 25, 26-28 (1995); Kevin C. Wilson, Note, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 579 (1995).

209. *Acuna*, 929 P.2d at 622 (Chin, J., concurring in part and dissenting in part).

210. *See id.* In the words of Justice Mosk, the city validates as a criminal street gang "an association of three or more persons with a common name or symbol whose members collectively or individually engage in a pattern of criminal conduct." *Id.* at 623 n.1 (Mosk, J., dissenting). To validate gang membership,

> the City merely reviews police records to identify individuals who admit membership in a gang to a peace officer, probation officer, juvenile hall or youth ranch employee, or who meet two or more of the following conditions: wear clothing or tattoos indicating gang affiliation or use gang hand signs; are named by two or more members of a gang as a member; actively

Co.,[211] there was no evidence that Ms. Gonzalez "held a specific intent to further [the gangs'] illegal aims."[212] Based on the majority's criteria for determining Sureno gang membership, "the City would consider a person to be a member of a Sureno gang if, for example, that person wore baggy pants, blue clothes, or 'Los Angeles Raiders' garments,"[213] even though this wardrobe might reflect the cultural garb of urban minority teenagers more generally. Highlighting the subtle racial undertones of Justice Brown's opinion, Justice Chin concluded, "Obviously, courts cannot enjoin all Mexican-Americans because some Mexican-Americans contribute to the nuisance in Rocksprings. Gang membership is no different, absent some evidence that contributing to the nuisance is an express or implied condition of membership."[214]

IV. CONCLUSION

Gang violence should be addressed, and people should not be terrorized in their neighborhoods. Nonetheless, hasty "emergency" measures like broad civil injunctions designed to circumvent the "rule of law" are an unacceptable means of pursuing this goal. Indeed, although not framed in the explicitly racial terms of the postbellum Black Codes, anti-gang civil injunctions share with those earlier laws the effect of stigmatizing minority communities and maintaining white hegemony.

If civil injunctions are to provide any hope of abating violent gang activity, they must be specifically targeted at people who have manifested the specific intent to further the illegal activities of the gang and its criminal activities. A contrary policy will only propel many disadvantaged minority youngsters into the welcoming arms of gang leaders. Predicting the reaction of a sixteen-year-old who has been swept up by the police for giving hand signals, Dr. Malcolm W. Klein asks, "Does he say, 'Oh my goodness gracious. I have been deterred,' or does he say, if you will pardon the language, 'Motherfuckers couldn't hold the homey.' Of course, he says the latter."[215]

Finally, the ultimate gang abatement solution is to improve the socioeconomic conditions of inner-city communities. Inner-city "gangs" largely serve as proxies for the extracurricular social organizations that are taken for

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participate in a gang crime; are identified by a reliable informant as a gang member; or are observed associating with gang members two or more times.

Id. Using these criteria, the Los Angeles Sheriff's Department estimated that 47% of all black men between the ages of 21 and 24 were actual or suspected gang members. *See id.*

211. 458 U.S. 886, 920 (1982) ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.").

212. *Id.*

213. *Acuna*, 929 P.2d at 621 (Chin, J., concurring in part and dissenting in part).

214. *Id.*

215. Dr. Malcolm W. Klein, *Street Gangs and the Juvenile Justice System in the 1990s*, 23 PEPP. L. REV. 860, 863 (1996).

granted by middle-class American teenagers, but largely absent in disadvantaged communities. Desperate people sometimes do desperate things. And to the extent that inner-city youth have few social and economic alternatives to gang membership, these youth may feel that there is no reason why they should not discard the rules of a system that has largely discarded them as "broken windows."