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HIP HOP AND THE NEW JIM CROW: RAP MUSIC'S INSIGHT ON MASS INCARCERATION

Donald F. Tibbs*

Writing in 1944 about race relations in America in his famous study *An American Dilemma*, Nobel laureate Gunnar Myrdal claimed that the police officer, “stands not only for civic order as defined in formal laws and regulations, but also for ‘White Supremacy’ and the whole set of social customs associated with this concept.”¹ Further, he noted that beyond the police, other governmental institutions, particularly the judiciary, adopted a hands-off approach to constraining police misconduct thereby implicitly authorizing police officers to exceed their lawful authority in policing African Americans. Compounding this problem was another: the especially intense racial animus that white police officers exhibit towards Black men. “Probably no group of whites in America,” Myrdal claimed, “have a lower opinion of the Negro people and are more fixed in their views than Southern policeman. To most of them . . . practically every Negro man is a potential criminal. They usually hold, in extreme form, all other derogatory beliefs about Negroes; and they are convinced that the traits are ‘racial.’”²

Almost sixty-six years after *An American Dilemma*, another groundbreaking study about race relations was published compounding Myrdal claims. In 2010, law professor Michelle Alexander released her book, *THE NEW JIM CROW*, detailing how the legacy of “white supremacy” in our criminal justice system continues

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¹ GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 2, 535 (Transaction Publishers 1996).

² *Id.* at 541.

the systemic historical practice of targeting, hunting, and capturing young Black men; as well as building a punishment industry around their mass incarceration.³ To be clear, as noted by Professor Greg Thomas, the words “white supremacy” do not appear in Alexander’s book.⁴ Neither does the combination of words “anti-Blackness,” “racist Supreme Court,” or “hyper-policing,” although she speaks to each of those issues in a much less provocative way.⁵ Regardless, Professor Alexander’s critique is timely, noteworthy, and deserving of the praise it has received. It has been regarded as a thoughtful and well-researched critique of the American War on Drugs that empirically delegitimizes the purity of American law in relation to people of color and further cements the reality that the “law-as-written” is different from the “law-in-action.”⁶

Perhaps more startling to the nascent reader on race and criminal justice policy, *THE NEW JIM CROW* proves that modern policing continues its brutal past of perpetuating a system of violence against young Black men in an unprecedented way.⁷ It details how race remains a relevant factor in the prosecution and incarceration of young Black men, and how the fallout of America’s unethical drug war is a return to Jim Crow era racial politics that continue the process of excluding black Americans from engaging in a participatory democracy by disenfranchising a new generation of political actors.⁸

³ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* 65–68 (2010).

⁴ Gregg Thomas, *Why Some Like the New Jim Crow So Much: Michelle Alexander is unlike “Some Radical Group[s]” who must be “Crazy” & “Absurd”*, <https://web.archive.org/web/20130427082750/http://www.voxunion.com/why-some-like-the-new-jim-crow-so-much/> (April 26, 2012).

⁵ *Id.* at 224–226.

⁶ See *Praise for The New Jim Crow*, *THE NEW JIM CROW*, <http://newjimcrow.com/praise-for-the-new-jim-crow> (last visited Oct. 24, 2015).

⁷ See generally Abraham L. Davis, *The Rodney King Incident Isolated Occurrence or a Continuation of a Brutal Past*, 10 HARV. J. 67 (1993) (discussing a series of events prior to and after the Rodney King beating that demonstrate the normalcy of police brutality in the black community).

⁸ For scholarly reviews and critiques of *The New Jim Crow*, see generally, *The New Jim Crow Kirkus Review*, KIRKUS REVIEWS, <https://www.kirkusreviews.com/book-reviews/michelle-alexander/the-new-jim-crow/> (last visited Nov. 23, 2015); Jonathan Wood, *Old Boss the Same as the New Boss: Critiques and Plaudits of Michelle Alexander’s New Jim Crow Metaphor*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 175 (2015); James Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012).

But, like other great scholarly works, *THE NEW JIM CROW* stands on the shoulders of a select group of predecessors: many of whom have laid the ground work for empirically critiquing prisons, policing, and the American drug war.⁹ I wish to add to that list of predecessors the luminaries of Hip Hop rap music because unlike the scholars who have an academic platform for their critique, this group of *scholars* rarely gets recognized for their contribution to our contemporary debates. Although Alexander devotes approximately three pages to integrating Hip Hop rap music into her analysis, she gives the genre as a whole short shrift when it comes to recognizing their contribution. She limits her critique to either lambasting Hip Hop rap music, particularly “gangsta rap,” as a minstrel performance of the worst stereotypes associated with black people or only mentions one artist when it is easiest to proffer their identity in a good light.¹⁰

Thus, this essay is presented as an addendum to the arguments in *THE NEW JIM CROW* through the lens of those most affected by Alexander’s analysis: young Black men. My goal is to merge rap music and *THE NEW JIM CROW*, to show how they are making the same claims, albeit using a different voice; and how the combination of those voices should be a centerpiece of our discussion about approaches to reversing mass incarceration.¹¹

Because of the breadth and depth of the subjects presented in *THE NEW JIM CROW*, I am limiting my critique to Chapter 2 titled “The

⁹ For the leading articles on the prison industrial complex and mass incarceration that pre-date *THE NEW JIM CROW*, see generally Angela Y. Davis and Cassandra Shaylor, *Race, Gender, and the Prison Industrial Complex: California and Beyond*, 2 *MERIDIANS* 1, 1 (2001); Julia Sudbury, *Celling Black Bodies: Black Women in the Global Prison Industrial Complex*, 70 *FEMINIST REV.* 57 (2002). For an excellent book, see generally JULIA SUDBURY, *GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON INDUSTRIAL COMPLEX* (2005).

¹⁰ ALEXANDER, *supra* note 3, at 168–70. Alexander not only refers to Hip Hop rap performance as a minstrel show, but she only gives credit to rap artists like Common, because he is a politically conscious rapper, or Grandmaster Flash and the Sugarhill Gang, because they represented the days of when Hip Hop language was not so divisive.

¹¹ For a more complete discussion of Hip Hop’s critique of race, crime and punishment, see generally PAMELA BRIDGEWATER ET AL., *HIP HOP AND THE LAW* (Carolina Acad. Press 1st ed.) (2015). Special attention should be paid to articles by Paul Butler, Andre Douglas Pond Cummings, Donald Tibbs, and Bret Asbury.

Lockdown.”¹² I focus on this chapter because it presents arguments that bring together important issues related to race and the law and Alexander’s claims about a racialized punishment system that has appeared in rap music since the early 1990’s. After presenting Alexander’s major concerns of race and policing, I will present a specific Hip Hop rap song along side of her critique in order to demonstrate how rap music has used the same words and text as a narrative on the epidemic of racialized policing in the War on Drugs era.¹³

The value of my critique, and the arguments I present below, is the reality that far more young Black men, and music lovers around the globe will hear, memorize, and relate to rap music before they will read the first 50 pages of Alexander’s book.¹⁴ This does not mean that THE NEW JIM CROW should not be assigned reading for generations to come. In fact, at some universities it is.¹⁵ But, long before the assignment is either made or completed, the sheer power and global presence of Hip Hop rap music will take priority. Thus, for those who are looking for another method to “teach” about law and mass

¹² ALEXANDER, *supra* note 3, at 58-94.

¹³ For an excellent discussion on rap music’s critique of prisons and punishment, see generally Andre Douglas Pond Cummings, *Thug Life: Hip Hops Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 1 (2010). For a discussion of Hip Hop’s critique of race, policing and the Fourth Amendment, see generally Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER, RACE, AND JUSTICE 47 (2012).

¹⁴ While the exact number of listeners of Hip Hop is difficult to calculate, most reports seem to think that approximately 24 million people between the ages of 19-34 from all ethnic groups and religions are estimated to make up the core listening group of the hip hop demographic. That includes 37.1% of 15-25 year olds in China that love hip hop, or about 296 million people in total. See Brandon Gaille, *25 Good Hip Hop Demographics*, (Feb. 5, 2015), <http://brandongaille.com/25-good-hip-hop-demographics/>.

¹⁵ For the Fall of 2015, the Office of the of the College at Brown University formally assigned THE NEW JIM CROW as part of the campus’ *First Readings* program. According the Brown website, the First Readings program is “a summer educational project for all new students. The program provides first-year and transfer students with a common intellectual experience that introduces them to the University and to the pleasures and rigors of undergraduate academic life. During Orientation, students meet in small groups for a First Readings Seminar, led by a member of the faculty or an upper-level administrator. See Brown University Library, *First Readings* 2015, <http://library.brown.edu/create/firstreading2015/about/>.

incarceration,¹⁶ I might suggest digging into the rich history of rap music to achieve that goal.

Truthfully, there are so many artists whose songs fit my paradigm that grasping one-line lyrics from multiple artists to make a point would overwhelm both the reader and writer. Additionally, it would, in my humble opinion, be intellectually dishonest. Thus, in the same manner that I am narrowing the scope of my review of Alexander's claims, I am also narrowing the scope of my choice of songs, using only three songs from some of Hip Hop's rap giants: West Coast superstar rap group N.W.A; Tupac Amaru Shakur, better known as 2Pac; and James Todd Smith, better known as LL Cool J. I chose these three artists because they each represent a sub-genres in Hip Hop rap music culture: Gangsta Rap, Political Rap, and B-Boy Rap. I suggest that their songs are the rap version of critiquing the arguments contained in the "Lockdown," where, like Alexander, they argue that the law unconstitutionality targets young Black men in a manner that produces and reproduces mass incarceration.

I. BEYOND LAW AND ORDER: THE FICTIONALIZATION OF POLICING AND N.W.A.'S F**K THA POLICE

In the opening paragraph of "The Lockdown," Alexander opens our eyes to the fictionalization of policing through crime dramas such as *Law and Order*. She explains that the narrative of

¹⁶ Several schools and universities are using Hip Hop to teach education and promote literacy. The concept is called Hip Hop Based Education (HHBE). It appears directly in high school curriculums and as a minor at Howard University, the University of Arizona, Cornell University, and the University of Wisconsin-Madison. For a discussion of how this curriculum is being implemented, see generally Ernest Morrell, *Toward a Critical Pedagogy of Popular Culture: Literacy Development Among Urban Youth*, 1 J. ADOLESCENT & ADULT LITERACY 72 (2002); Decoteau J. Irby, *Urban is Floating Face Down in the Mainstream: Using Hip-Hop Based Education Research to Resurrect "the Urban" in Urban Education*, 50 URBAN EDUCATION 7 (2015). Legal education, however, is lagging with the exception of Drexel University Thomas R. Kline School of Law and the West Virginia College of Law, which both hosted an entire course dedicated to the intersections of Hip Hop rap music and the Law. See L.J. Jackson, *Hip Hop at Law: Course Samples Hip-Hop's Bottom-Up Critique of the Law*, AM. BAR ASS'N. J. (Sept. 1, 2012, 9:40AM), <http://www.abajournal.com/magazine/article/hip-hopatlawcoursesampleship-hopsbottom-upcritiqueofthelaw/>.

contemporary American criminal justice is “overloaded [by] fictional dramas . . . told from the point of view of law enforcement” that presents “personal and moral victor[ies]” of the “hero cop” in a manner that presents a “fictional gloss on a brutal system of racialized oppression and control.”¹⁷ Despite the fact that some of *Law and Order*’s “ripped from the headlines” episodes¹⁸ contain characterizations that are racist, classist, sexist, and homophobic, the same message is repeatedly proffered: that the goal of policing is to protect us from criminals and our safety is dependent upon the courts allowing them to do their job, even if that means taking a few liberties with constitutional rights.

One problem noted by Alexander is the degree to which those “liberties” might morph into full-blown constitutional violations. And the fact that what we see on television is nowhere close to how the criminal justice system works in real practice.¹⁹ Her point is that young Black men experience the law very differently than the narrative that is presented on television,²⁰ and our failure to reconcile this reality leaves young Black men wallowing in the waist-high dirty waters of state violence created by colorblind critiques of American law.²¹ The lynch-pin to the “fictional gloss,” requires recognizing that

¹⁷ ALEXANDER, *supra* note 3, at 58.

¹⁸ See *id.* For a ranking of the top 50 *Law and Order* episodes in its “ripped from the headlines” series, see Shane Barnes, *Law & Order “Ripped From the Headlines” ‘Law & Order’ Episodes Ranked*, FLAVORWIRE, (Oct. 28, 2014, 12:31PM), <http://flavorwire.com/484828/the-50-best-ripped-from-the-headlines-law-order-episodes-ranked>. Of course, the OJ Simpson Trial made it in the *Law and Order* series, as did other crimes by black males such as the 2001 murder committed by ex-football player Ray Carruth, the 2004 NBA brawl between the Indiana Pacers and Detroit Pistons, Roger Hargraves’ attack on his wife Yvette Cades where he sets her on fire, the alleged rape of a hotel worker by Kobe Bryant, and two episodes devoted to Michael Jackson. *Id.*

¹⁹ ALEXANDER, *supra* note 3, at 62–63.

²⁰ *Id.* According to Alexander, “rules of law and procedure, such as ‘guilt beyond a reasonable doubt’ or ‘probable cause’ or ‘reasonable suspicion,’ can easily be found in court cases and law-school textbooks, but are much harder to find in real life.” *Id.* at 59.

²¹ See ALEXANDER, *supra* note 3, at 224. As Alexander points out, no effort to end mass incarceration can begin without first addressing imprisonment as a racial caste system, which requires us to first disavow the myth of colorblind formalism in our racial lexicon. *Id.* According to Alexander, the current system of crime control is “better designed to create crime, and perpetuate class of people, labeled criminals, rather to eliminate crime or reduce the number of criminals.” *Id.*

we live in a police state, meaning that legal outcomes are dictated and controlled by state actors such as the police, prosecutors, and the judges whom collectively operate through various axis of power.²² In other words, she explains that law does not precede policing; instead policing precedes law.²³ Alexander's grim perspective on police-race relations recalls hip-hop artists' general disdain for police officers and law enforcement.²⁴

Prior to Alexander's explanation of the "fictional gloss" or policing, a West Coast rap group known as N.W.A., an acronym for Niggas With Attitude, released a song titled *Fuck tha Police* (FTP) that appeared on their 1988 debut album *Straight Outta Compton*.²⁵ As soon as it was released, it was an immediate hit.²⁶ Situated as a

²² Although their song won't appear in this article, it is worth noting here that the rap group Dead Prez has a song titled, *Police State*, that discusses this very theme in the opening verse about the reality of police power as state power in the lives of black Americans. The song appears as the fifth track on their 2000 album, *Let's Get Free*. DEAD PREZ, *POLICE STATE* (Loud Records 2000).

The actual lyrics read:

You have the emergence in human society
of this thing that's called the State
What is the State? The State is this organized bureaucracy
It is the po-lice department. It is the Army, the Navy
It is the prison system, the courts, and what have you
This is the State -- it is a repressive organization

²³ For a thorough critique of the order of policing to law and its influence on anti-black crime and punishment, see Tyron P. Woods, *Sexual Poetic Justice: Hip Hop, Antiracist Desire, and Legal Narratives*, in BRIDGEWATER et al. *supra* note 10, at 127.

²⁴ The subjugation to and resistance of racialized policing and punishment is a prevailing theme among mainstream hip hop artists. Kevin F. Steinmetz et al., *Hip-Hop and Procedural Justice: Hip-Hop Artists' Perceptions of Criminal Justice*, 2 RACE AND JUST. 155, 155 (2012) (concluding, after empirically sampling studying 200 current songs, that "[u]nfairness and powerlessness inductively emerged as the two general themes from the hip-hop criminal justice portrayals"); see generally J. Pablo, *The Top 15 Hip Hop Songs About Police Misconduct*, THE VILLAGE VOICE, (June 1, 2012), <http://www.villagevoice.com/music/the-top-15-hip-hop-songs-about-police-misconduct-6625353>.

²⁵ Steve Hochman, *Compton Rappers Versus the Letter of the Law: FBI Claims Song by N.W.A. Advocates Violence on Police*, L.A. TIMES (Oct. 5, 1989), http://articles.latimes.com/1989-10-05/entertainment/ca-1046_1_law-enforcement; N.W.A., *Fuck tha Police*, on *STRAIGHT OUTTA COMPTON* (Ruthless Records 1988).

²⁶ Evan Serpick, *NWA: Bio*, ROLLINGSTONE, <http://www.rollingstone.com/music/artists/n-w-a/biography> (last visited Nov. 3, 2015) ("the album sold 750,000 copies even before N.W.A embarked on a tour").

“protest” song, it told a sordid tale of young Black men’s frustration with policing and a lack of accountability in the criminal justice system by putting the Los Angeles Police Department and the entire criminal justice system on trial itself.²⁷ In its aftermath, it has been widely recognized for two reasons. First, it is the progenitor for what has become the sub-genre of rap music known as Gangsta Rap,²⁸ and second, it was the first time that a group of young Black men presented a vitriolic critique of racial profiling, selective law enforcement, and state violence through a protest song.²⁹ Also notable was the song’s prophecy in exclaiming the widespread resentment against police brutality, policing shootings, and the death of young Black men in post-industrial Los Angeles, an issue which eventually erupted in the aftermath of the Rodney King beating and the acquittal of three white police officers: Stacey Koon, Timothy Wind, and Theodore Briseno.³⁰ Finally, the song was heralded by young Black

²⁷ While often perceived as a song glorifying violence against the police, *Fuck tha Police* is actually better situated as a protest song that takes the formalities of the criminal justice system and mocks the way that prosecutors allow witnesses to tell their stories in a court of law. In the opening to the song, Dr. Dre is a judge hearing a prosecution of the police department. N.W.A., *supra* note 23. Three members of the group, Ice Cube, MC Ren and then Eazy-E, take the stand to “testify” before the judge as prosecutors. *Id.* The lyrics, in succession, criticize the Los Angeles Police Department with interludes that re-enact stereotypical racial profiling and police brutality. *Id.* In the end, Judge (Dr.) Dre finds the police guilty of being “redneck, white bread, chickenshit motherfucker,” and sends him to prison. *Id.* In a reversal of the dramatization of how black people leave the courtroom following an unlawful conviction, the police officer can be heard calling N.W.A.’s testimony “a god damn lie,” and cursing the all-black cast by saying “fuck you, you black motherfuckers,” in reference to how the police talk to black Americans and how black men are treated with no respect when it comes to decision making positions related to race and policing. *Id.* For a complete transcript of the lyrics, see *Fuck tha Police Lyrics*, GENIUS.COM, <http://genius.com/4437548> (last visited Nov. 3, 2015).

²⁸ See Leola Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25, 29 (1994) (describing the genesis of “Gangsta Rap” and crediting N.W.A.’s track *Fuck Tha Police* as the first to garner national attention). For more insight into the empiric distinctions among sub-genres of rap music, see Jennifer C. Lena, *Social Context and Musical Content of Rap Music, 1979-1995*, 85 SOC. F. 479, 480, 486 (2007).

²⁹ In Ice Cube’s most infamous opening line, he says “Fuck tha Police coming straight from the underground, a young nigga got it bad cause I’m brown.” N.W.A., *supra* note 23.

³⁰ Rosanna Xia, *Where they are Now*, L.A. TIMES (Apr. 20, 2012), <http://graphics.latimes.com/towergraphic-where-they-are-now/> (detailing the officers’ involvement in the case). Ice Cube goes on to say, “I’m not the other color

males for addressing a myth about intra-racial policing by black police officers.³¹

Despite *FTP*'s brutally honest post-modern critique of unconstitutional policing, the song was widely condemned by critics. Most of the condemnation centered on the song's violent, misogynistic, anti-gay, and anti-police language and presentation. Most notable was the Federal Bureau of Investigation Assistant Director Milt Ahlerich to caution NWA's record company about the lyrics.³² Nevertheless, the harshness of critique, the response, and maybe even the language itself, is what rescued *FTP* from musical castigation. *FTP* was ranked #425 of Rolling Stone Magazine's greatest 500 songs of all times.³³ It has earned a pop culture following that appears on t-shirts, artwork, blogs, and more importantly, other rap songs by NWA's progeny of Gangsta rap artists.³⁴ Unfortunately, despite its widespread global popularity, it was not referenced in *THE NEW JIM CROW*.

so police think, they have the authority to kill a minority." *Id.*

³¹ The song also addresses the widespread presence of intra-racial violence between black police officers and young black men in post-Industrial Los Angeles. In the song Ice Cube says, "And on the other hand, without a gun they can't get none. But don't let it be a black and a white one. Cause they'll slam you down to the street top, Black police showing out for the white cop." *Id.* This dynamic also appears in carefully selected scenes about police violence in Compton, California two notable movies. See *BOYZ IN THE HOOD* (Columbia Pictures 1991); *STRAIGHT OUTTA COMPTON* (Legendary Pictures, New Line Cinema 2015).

³² For a reproduction of the F.B.I.'s letter to N.W.A.'s label, see Johnson, *supra* note 26 at 29 ("'Straight Outta Compton' encourages violence against and disrespect for the law enforcement officer. . . . I believe my views reflect the opinion of the entire law enforcement community."); Mathieu Deflem, *Rap, Rock, and Censorship: Popular Culture and the Technologies of Justice*, WWW.MATHIEUDEFLEM.NET, (Mar. 2001), <http://deflem.blogspot.com/1993/08/rap-rock-and-censorship-1993.html>. According to Deflem, "FBI Assistant Director Milt Ahlerich sent a letter to the N.W.A. distributor saying that the N.W.A. album *Straight Outta Compton* 'encourages violence against and disrespect for the law-enforcement officer.'" *Id.* Ahlerich said he 'spoke for all law enforcement', but also stated that he just wanted to bring this matter to the attention of the record company." *Id.*

³³ *500 Greatest Songs of All Time: 425: N.W.A, 'Fuck Tha Police'*, ROLLINGSTONE, <http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407/n-w-a-fuck-tha-police-20110526>.

³⁴ *Id.*

But all was not lost on NWA's brave efforts. Other young Black men adopted their style. They also used microphones, sampled beats, music studios, and the radio airwaves to tell their own sordid narratives about race and policing. While the range of these songs exists across the wide swath of Hip Hop rap music sub-genres, a quick glance at their titles speak volumes to the popularity of NWA's claims. Most notable are songs like *Black Steel in an Hour of Chaos* (1989),³⁵ *Who Got the Camera* (1992),³⁶ *Crooked Officer* (1993),³⁷ *Police State* (2000),³⁸ *99 Problems* (2004),³⁹ *Testify* (2005),⁴⁰ *Snitch* (2006),⁴¹ *Hip Hop Police* (2007),⁴² *Trapped* (1991),⁴³ and *Illegal Search* (1991).⁴⁴ Given even this short listing of Hip Hop songs, it is hard to refuse any claims that rap artists have not been a part of the critical discussion about the drug war, unconstitutional policing, and mass incarceration long before and in same manner as the critiques present in THE NEW JIM CROW.

II. THE LOCKDOWN: TERRY STOPS AND 2PAC'S "TRAPPED"

A second significant critique of "The Lockdown," is Alexander's claim that the "Rules of the Game" of mass incarceration depends heavily upon understanding "unreasonable suspicions,"⁴⁵

³⁵ PUBLIC ENEMY, *Black Steel in the Hour of Chaos*, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK. (Def Jam 1989).

³⁶ ICE CUBE, *Who Got the Camera*, on THE PREDATOR (Priority Records 1992).

³⁷ GETO BOYS, *Crooked Officer*, on TIL DEATH DO US PART (Rap-A-Lot Records 1993).

³⁸ DEAD PREZ, *supra* note 20.

³⁹ JAY Z, *99 Problems*, on THE BLACK ALBUM (Rock-A-Fella, Def Jam Records 2004). For a thorough critique of the legal aspects of 99 Problems, see Caleb Mason, *Jay Z's 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps*, in BRIDGEWATER ET AL., *supra* note 10 at 71–86.

⁴⁰ Common, *Testify*, on BE (Geffen Records 2005). While Common does get recognized in Alexander's NEW JIM CROW, ironically, it is not about this song which speaks to the manner in which the police use confidential informants and snitches that lead to the wrongful conviction of innocent black men suspected of drug dealing.

⁴¹ Obie Trice (feat. Akon), *Snitch*, on SECOND ROUND'S ON ME (Interscope, Shady Records 2006).

⁴² Chamillionaire (feat. Slick Rick), *Hip Hop Police*, on ULTIMATE VICTORY (Universal Records 2007).

⁴³ 2Pac, *Trapped*, on 2PACALYPSE NOW (Interscope Records 1991).

⁴⁴ LL COOL J, *Illegal Search*, on MAMA SAID KNOCK YOU OUT (Def Jam 1990).

⁴⁵ ALEXANDER, *supra* note 3, at 61–63.

present in Fourth Amendment analysis: namely the ruling in *Terry v. Ohio*.⁴⁶ The Supreme Court's ruling in *Terry* authorized the practice of stopping and searching a citizen without a warrant or probable cause based on a reasonable suspicion that they are involved in criminal activity. The standard is better known today as a *Terry Stop*,⁴⁷ and it is a nationwide police practice that has produced a plethora of legal problems for police departments and young Black men alike.⁴⁸

⁴⁶ 392 U.S. 1 (1968).

⁴⁷ For a thorough discussion on the *Terry* decision and how well it has stood the test of time for police officers, see generally Stephen A. Saltzburg, *Terry v. Ohio, A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, (1998). In fact, that year the St. John's Law Review hosted a symposium on the legacy of *Terry v. Ohio*, which featured a series of scholarly critiques including narratives from the attorney John Terry, the prosecutor in the case, and the law clerk for Chief Justice Warren in the *Terry v. Ohio* decision. See generally Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727–33 (1998); Reuban M. Payne, *Prosecutor's Perspective on Terry: Detective McFadden Had a Right to Protect Himself*, 72 ST. JOHN'S L. REV. 733–41 (1998); and Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891–905 (1998).

⁴⁸ See generally, Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998) (discussing how *Terry* forever altered Fourth Amendment jurisprudence and has increasingly evolved to allow police discretion to make arbitrary intrusions into the lives of Black men); Jack B. Weinstein and Mae C. Quinn, *Terry, Race, and Judicial Integrity: The Court and Suppressing during the War on Drugs*, 72 ST. JOHN'S L. REV. 1323 (2012) (discussing the problematic use of *Terry* against racial minorities the War on Drugs); Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343 (2012) (explaining that 1960's criminal procedure cases were applicable when decided but may not encompass modern police-community relations issues). More recently, police departments in major cities like New York, Philadelphia, and Chicago, all of which host a large black male population, have been sued for their racially discriminatory application of *Terry* stop, question, and frisk practices in black communities. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 605 (2013) (holding that New York City's facially neutral stop and frisk policy violated the Fourteenth Amendment because: a) the police had implemented a "policy of indirect racial profiling based on local criminal suspect data;" and b) city and police officials had been deliberately indifferent to the intentionally discriminatory application of stop and frisk); See Settlement Agreement, Class Certification, and Consent Decree, *Bailey, v. City of Philadelphia*, No. 10-5952 (E.D. Pa. Nov. 4, 2010)(explaining that the city of Philadelphia denies that its stop and frisk policy contravenes the Fourteenth Amendment or utilizes racial profiling, but agrees to take steps to ensure that the policy is constitutional); see also *Stop and Frisk Class Action Lawsuit Filed Against City of Chicago and Chicago Police Department by Romanucci & Blandin, LLC: Historic Federal Lawsuit Models Successful NYPD Case Floyd, et al v. City of New York, et al*, PR NEWSWIRE (April 22, 2015),

Alexander calls the *Terry Stop*'s standard the "unreasonableness of reasonable suspicion," and then suggests that the problem is not the ruling in *Terry* per se, but rather its implementation in the drug war.⁴⁹ She explains that "in the years since *Terry*, stops, interrogations, and searches of ordinary people . . . have become commonplace – at least for people of color," with few successes in uncovering criminal activity.⁵⁰ She explains that the *Terry Stop* is used as a constitutionally permissible tool to target and harass young Black men rather than uncover criminal activity and to gain consent to conduct a more intrusive search where otherwise it would not be constitutionally authorized.⁵¹

In 1991, rap artist 2Pac released a song that aimed specifically at the problems addressed by Alexander in her critique of the *Terry stop*.⁵² Similar to Alexander's claims that The Lockdown of young Black men begins with an unconstitutional biased policing, 2Pac makes the same claim.⁵³ The song, which is a single from his debut album *2Pacalypse Now*, is titled *Trapped* and addresses police brutality against young Black men.⁵⁴ The song is delivered into three different verses, each of which tells the narrative of the locking down of young Black men in a system that perpetuates mass incarceration.⁵⁵ In the first verse, he tells a story of being harassed and shot at by the police.⁵⁶ He then fires back and says he did it because he was tired of

<http://www.prnewswire.com/news-releases/stop-and-frisk-class-action-lawsuit-filed-against-city-of-chicago-and-chicago-police-department-by-romanucci--blandin-llc-300070281.html> (explaining that the Chicago police had disproportionately been stopping and frisking African Americans and engaging in stops without reasonable suspicion).

⁴⁹ ALEXANDER, *supra* note 3, at 62–63.

⁵⁰ *Id.*

⁵¹ *Id.* at 63.

⁵² *See*, 2PAC, *supra* note 41 (explaining his experience of police harassment).

⁵³ *Compare id.*, with ALEXANDER, *supra* note 3, at 62–63.

⁵⁴ 2PAC, *supra* note 41.

⁵⁵ *Id.*

⁵⁶ *Id.* Too many brothers daily heading for tha big penn
Niggas commin' out worse off than when they went in
Over tha years I done alot of growin' up
Getten drunk throw'n up
Cuffed up
Then I said I had enough
There must be another route, way out
To money and fame, I changed my name

constantly being profiled and abused by police officers.⁵⁷ In the third verse, he explains that the process of policing will result in his incarceration, which he refers to as a “living hell,” and argues that he would rather die than be forced to reside in a prison cell.⁵⁸

And played a different game *Id.*

Specifically, the lyrics to the first verse read:

“You know they got me trapped in this prison of seclusion
 Happiness, living on tha streets is a delusion
 Even a smooth criminal one day must get caught
 Shot up or shot down with tha bullet that he bought
 Nine millimeter kickin' thinking about what tha streets do
 to me
 Cause they never talk peace in tha black community
 All we know is violence, do tha job in silence
 Walk tha city streets like a rat pack of tyrants
 Tired of being trapped in this vicious cycle
 If one more cop harasses me I just might go psycho
 And when I gettem
 I'll hittem with tha bum rush
 Only a lunatic would like to see his skull crushed
 Yo, if your smart you'll really let me go 'G'
 But keep me cooped up in this ghetto and catch tha uzi
 They got me trapped . . .

Id.

⁵⁷ *Id.*

⁵⁸ 2PAC, *supra* note 41. Specifically, the lyrics to the third verse read:

Now I'm trapped and want to find a getaway
 All I need is a 'G' and somewhere safe to stay
 Can't use the phone
 'Cause I'm sure someone is tappin' in
 Did it before
 Ain't scared to use my gat again
 I look back at hindsight the fight was irrelevant
 But now he's the devils friend
 Too late to be tellin' him
 He shot first and I'll be damned if I run away
 Homie is done away I should of put my gun away
 I wasn't thinkin' all I heard was the ridicule
 Girlies was laughin', Tup sayin' "Damn homies is dissin' you"
 I fired my weapon
 Started steppin' in the hurricane
 I got shot so I dropped
 Feelin' a burst of pain
 Got to my feet

However, it's the second verse of the *Trapped* that speaks furtively to Alexander's arguments.⁵⁹ As a victim of the racial bias present in the long history of police by the Los Angeles Police Department against young Black men,⁶⁰ 2Pac explains that the *Terry*

Couldn't see nothin' but bloody blood
 Now I'm a fugitive to be hunted like a murderer
 Ran through an alley
 Still lookin' for my getaway
 Coppers said Freeze, or you'll be dead today
 Trapped in a corner
 Dark and I couldn't see the light
 Thoughts in my mind was the nine and a better life
 What do I do?
 Live my life in a prison cell
 I'd rather die then be trapped in a living hell
 They got me trapped . . .

Id.

⁵⁹ Compare *id.* (explaining that he can “barely walk tha city streets” because police can stop him at any time), with ALEXANDER, *supra* note 3, at 62–63 (explaining that Terry stops frequently occur “driving down the street, walking home form the bus stop, or riding the train and have “become common place – at lease for people of color”).

⁶⁰ See Tami Abdollah, *LAPD Federal Oversight Officially Ends*, HUFFINGTON POST (March 16, 2013), http://www.huffingtonpost.com/2013/05/16/lapd-federal-oversight-officially-ends_n_3289082.html (“The city of Los Angeles was forced into the consent decree in 2001 under the threat of a federal lawsuit. The U.S. government alleged a pattern of civil rights violations committed by police officers that went back decades”). It is worth noting that 2Pac’s connection to the long history of police violence against black citizens arises from his familial connections to the federal government’s war on black activists during the Black Power era. See generally “*Afeni Shakur*,” 2PACLEGACY.COM, http://web.archive.org/web/20080406215640/http://www.2paclegacy.com/images/asets/bio_afeni_shakur/afeni_shakur_biography.pdf. His father Billy Garland and his mother Afeni Shakur were active members in the Black Panther Party in New York City in the late 1960’s and early 1970s. *True Blood: Billy Garland, Tupac’s Father, Speaks*, XXL MAG.COM, <http://www.xxlmag.com/news/2012/09/true-blood-billy-garland-tupacs-father-speaks-excerpt-from-the-sept-2011-issue/>. Further, his godfather is Elmer “Geronimo” Pratt, a once high-ranking member and Deputy Minister of Defense of the Southern California Chapter of the Black Panther Party and his aunt, Assata Shakur (also known as JoAnne Chesimard), was also a member of the Black Panther Party and remains a fugitive from federal prosecution in the shooting death of Trooper Werner Foerster. *2Pac*, RAPBASMENT.COM (Apr. 9, 2008), <http://www.rapbasement.com/hip-hop/god-bless-the-dead/2pac.html>.

stop is not only unconstitutional but it leads to a system of legal violence perpetrated by the police that eventually ends in their own demise:

They got me trapped
Can barely walk the city streets
Without a cop harassing me, searching me
Then asking my identity
Hands up, throw me up against the wall
Didn't do a thing at all
I'm telling you one day these suckers got to fall
Cuffed up throw me on the concrete
Coppers try to kill me
But they didn't know this was the wrong street
Bang bang, down another casualty
But it's a cop whose shot there's brutality
Who do you blame?
It's a shame because the mans slain
He got caught in the chains of his own game
How can I feel guilty after all the things they did to me
Sweated me, hunted me
Trapped in my own community
One day I'm going to bust
Blow up on this society
Why did you lie to me?
I couldn't find a trace of equality
Work me like a slave while they laid back
Homie don't play that
It's time I let them suffer the payback
I'm trying to avoid physical contact
I can't hold back, it's time to attack jack
They got me trapped⁶¹

III. "POOR EXCUSE"⁶²: PRETEXT TRAFFIC STOPS AND LL COOL J'S
"ILLEGAL SEARCH"

Another important critique of the "The Lockdown" is called "Poor Excuse," which details how the police use "pretext stops" to hunt for drugs in the absence of any objective indicia of drug

⁶¹ 2PAC, *supra* note 41.

⁶² ALEXANDER, *supra* note 3, at 65.

activity.⁶³ One way to accomplish this goal is through the Supreme Court's decision in *Whren v. U.S.*, which held that pre-textual traffic stops are not per se unconstitutional, and the officer's motivations are irrelevant, as long as the police can demonstrate that they legitimately stopped the vehicle for violating a traffic law.⁶⁴

The problem with the ruling in *Whren*, as Alexander explains, is that sometimes the police are so motivated to hunt for drugs, that they target young Black men more because of their race than the desire to enforce traffic violations.⁶⁵ According to Alexander, "police officers use minor traffic violations as an excuse – a pretext – to search for drugs, even though there is not a shred of evidence suggesting the motorists is violating drug [trafficking] laws."⁶⁶ They then use this process of stopping Black males in their vehicles as a means to obtaining consent to search the vehicle.⁶⁷ This process of selectively targeting Black drivers on the basis of race led to significant nationwide racial profiling on the U.S. highways and earned the moniker of "Driving While Black."⁶⁸

Since the goal of pre-textual traffic stops is to search for drugs rather than enforce traffic violations, young Black men are routinely subjected to harassment when they refuse consent to search.⁶⁹ Alexander notes that this process leads to mass incarceration because in an effort to gain consent, most citizens might not realize that they are free to refuse the officer's request.⁷⁰ According to her, "people are

⁶³ *Id.* at 66.

⁶⁴ *Whren v. United States*, 517 U.S. 806, 812 (1996).

⁶⁵ ALEXANDER, *supra* note 3, at 66–68.

⁶⁶ *Id.* at 66.

⁶⁷ *Id.*

⁶⁸ See David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997) (explaining that post-*Whren* traffic codes have been disproportionately enforced against Blacks and Hispanics giving rise to the phrase "driving while black"). Beyond the above cited article, it should be noted that Professor Harris is the leading scholar on race, the Fourth Amendment, and the problems associated with policing in the aftermath of *Terry*, *Whren*, and their legal progeny. *David A. Harris: Biography*, UPITTLAW, <http://law.pitt.edu/people/david-harris> (last visited Oct. 39, 2015).

⁶⁹ See ALEXANDER, *supra* note 3, at 68 (explaining that when the stopped individual does not consent to the search, police may arrest him).

⁷⁰ *Id.* at 66.

easily intimidated when the police confront them, hands on their revolvers, and most have no idea the question [for consent to search] can be answered, ‘no’.”⁷¹ Her argument is poignant because refusals often amount in otherwise innocent people being harassed while the police exercise every measure to locate illegal contraband.⁷² A rap artist by the name of James Todd Smith, better known by his Hip Hop moniker LL Cool J, made the same argument almost two decades before *THE NEW JIM CROW*.⁷³

In his 1991 album *Mama Said Knock You Out*, LL Cool J features a song that is the rap version of Alexander’s critique of pretextual traffic stops under *Whren*.⁷⁴ The song is titled *Illegal Search*, and in it, LL Cool J uses three verses to critique the substance, logic, and practice of the police using Driving While Black tactics.⁷⁵ In each verse of the song he referenced a police officer that attempts to “catch him” carrying drugs by conducting what he refers to as an “illegal search.”⁷⁶ In a fair reprisal, LL Cool J thwarts the officer’s efforts by reminding him “that won’t work.”⁷⁷

⁷¹ *Id.* at 68.

⁷² *See id.* (explaining that when an individual does not consent to a search following a minor traffic arrest, it is constitutional for the officer to arrest him or bring a dog to sniff the car).

⁷³ ALEXANDER, *supra* note 3, at 66.

⁷⁴ Compare LL COOL J, *supra* note 42 (describing a traffic stop that begins to look like a violent arrest and search), with ALEXANDER, *supra* note 3, at 66–68 (explaining that a mere traffic stop, under current Supreme Court decisions, can quickly transform into an extensive search and even an arrest).

⁷⁵ LL COOL J, *supra* note 42.

⁷⁶ *Id.*

⁷⁷ *Id.* The first and second verses of the song read:

What the hell are you lookin' for?
Can't a young man make money anymore?
Wear my jewels and, like, freak it on the floor
Or is it my job to make sure I'm poor?
Can't my car look better than yours?
Keep a cigar in between my jaws
I drink champagne, to hell with Coors
Never sold coke in my life, I do tours
Get that flashlight out of my face
I'm not a dog, so, damn it, put away the mace
I got cash and real attorneys on the case
You're just a joker perpetratin' a ace
You got time, you want to give me a taste?
I don't smoke cigarettes, so why you lookin' for base?

A critique of the final verse captures the essence of Alexander's critique of police harassment through pre-textual traffic stops. The lyrics read:

On the turnpike, and everything's right
 In the background is flashin' lights
 Get out the car in the middle of the night
 It's freezin' cold, and you're doin' it for spite
 Slam me on the hood, yo, that ain't right
 You pull out your gun if I'm puttin' up a fight
 My car, my clothes, and my girl is hype
 But you want to replace my silver stripes
 You're a real man, your uniform is tight
 Fingerprint me, take my name and height
 Hopin' it will, but I know it won't work
 Illegal search⁷⁸

One is left wondering which "turnpike" LL Cool J might be referencing until the final spoken word in the song where we learn that he is talking about the New Jersey Turnpike,⁷⁹ which was so notorious for using *Whren* to racially profile Black men driving cars on the interstate that the Superior Court of New Jersey suppressed cases against seventeen African American defendants because the New Jersey police selectively enforced traffic laws targeting African-American violators.⁸⁰ He claims

You might plant a gun, and hope I run a race
 Eatin' in the messhall, sayin' my grace
 You tried to frame me, but it won't work
 Illegal search
 I call it nice, you call it a 'drug car'
 I say 'disco', you call it a 'drug bar'
 I say 'nice guy', you call me Mr. Good Bar
 I made progress, you say, "Not that far."
 I just started it, you're searchin' my car
 But all my paperwork is up to par
 It's in my uncle's name, so the frame won't work
 Chump; illegal search

Id.

⁷⁸ LL COOL J, *supra* at note 42.

⁷⁹ *Id.* (explaining that the incident described happened to "one of my brothers/ In New Jersey").

⁸⁰ *New Jersey v. Soto*, 734 A.2d 350, 360–61 (N.J. Super. 1996). In its ruling, the

And them cops out there
That did the wrong thing to one of my brothers
In Jersey
Keep on searching
You know what I'm sayin'?
Cause that was foul⁸¹

CONCLUSION

Discussing and debating the War on Drugs and the concomitant policing of young Black men should be the entry point of strategies targeting reversing mass incarceration. To the degree, however, that we rely on top-down critiques of this system of injustice, we must not forget those that emanate from the bottom up.⁸² Since the 1990's, at the height of the drug war, Hip Hop made the same argument about the fallout of the War on Drugs and its influence on mass incarceration, but no one seemed to be listening.⁸³ Our failure to recognize, and our attempted censoring of, the young Black men of Hip Hop, who are the front-line victims of the drug war, left them unprotected from the vice-grip of the Prison Industrial Complex, and left us uninformed about the brewing national crisis associated with "race-less" jurisprudence by the Supreme Court of the United States.⁸⁴

court relied on an empirical study conducted by Dr. John Lamberth that showed that 43% of the traffic violators stopped by the police were black, even though they only account for 15% of traffic violators. *Id.* at 352–53. The court concluded that the police exercised a de facto police of selective enforcement and granted suppression motions of the defendants. *Id.* at 360–61.

⁸¹ LL COOL J, *supra* note 42.

⁸² See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 323, 325 (1987) (explaining that instead of a top down approach of putting one's self in the position of marginalized individuals, we should listen to the actual voices of the marginalized). I draw my idea that that the young black men of Hip Hop offer the same victim-based critiques as Matsuda's victims of race discrimination. I am forever indebted to Professor Matsuda's groundbreaking article.

⁸³ See, *eg.*, LL Cool J, *supra* note 42.

⁸⁴ See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968–69 (2002) (explaining that the Court's commitment to colorblindness in the absences of overt racism has disproportionately burdened people of color with both over and under policing).

But, going forward we can learn from our mistakes. As we consider a dialog about reversing mass incarceration, we must first address the lack of state accountability for racist police officers, unethical prosecutors, unprepared public defenders, and biased judges who have soiled their hands in the blood of the War on Drugs. We should carefully examine the victim-based testimony that appears in the lyrics of Hip Hop, since they are as important and relevant as top down critiques like those of Professor Alexander's. Simply, if we wish to eradicate American racism, change our criminal justice polices, and end the pipelines-to-prison that creates mass incarceration, I suggest that we merge the two worlds of rap music and academia into a solid critical mass. But, first we have to allow rap music the intellectual space to be brave, critical, and brutally honest, and to say the things that legal scholars, sometimes for various reasons, cannot.