

CONTEMPORARY ISSUES IN CRITICAL RACE
THEORY: THE IMPLICATIONS OF RACE AS
CHARACTER EVIDENCE IN RECENT
HIGH-PROFILE CASES

Montré D. Carodine

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2014.343
<http://lawreview.law.pitt.edu>



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CONTEMPORARY ISSUES IN CRITICAL RACE THEORY: THE IMPLICATIONS OF RACE AS CHARACTER EVIDENCE IN RECENT HIGH-PROFILE CASES

Montré D. Carodine*

It was an honor to be a part of this important symposium and to be in the company of so many who, like me, were influenced by Professor Bell's work. In his usual thought provoking fashion, my colleague and friend, Professor Delgado, predicts in his symposium piece what Professor Bell's next article would be. In a sense, we are all writing Professor Bell's next article because of the seeds of critical observation and analysis that he planted in us. So, I offer my "next Derrick Bell" idea in this Essay.

Recent high-profile cases such as the trial of George Zimmerman for the killing of seventeen-year-old Trayvon Martin and the trial of Michael Dunn for the killing of seventeen-year-old Jordan Davis have sparked intense discussions about the state of race relations in this country. These discussions have intensified even more in the wake of the #BlackLivesMatter movement that has taken off across the country as a result of increased media coverage of police killings of unarmed black men.¹ Those cases certainly are notable because they present a microcosm of the reality that race is extensively litigated in American courts. Indeed, race itself is evidence—character evidence—and it has a real impact on outcomes, particularly in the criminal justice system and especially with respect to black people. I have previously referred to this problem as the "mis-characterization of blackness."²

* Professor of Law, University of Alabama School of Law. J.D. Tulane University Law School.

¹ See #BlackLivesMatter, BLACKLIVESMATTER.COM (last visited Apr. 23, 2015).

² See Montré D. Carodine, *Race is Evidence: (Mis)Characterizing Blackness in the American Civil Rights Story*, in CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS 64 (Austin Sara ed., 2014); Montré D. Carodine, "The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521 (2009).

Though the problem affects other racial minorities, the criminal system still metes out its harshest treatment to black people.³ In fact, in relatively recent studies, researchers have revealed that people who look more stereotypically black receive longer prison sentences and are more likely to receive the death penalty.⁴ So the “blacker” a person appears to be, the more “criminal” the person is perceived to be.⁵

In this Essay, I focus on recent cases to demonstrate the increasing use and normalization of race as evidence—in our streets, in the media, and in court. There is, of course, some overlap in these three categories, as these high-profile cases have progressed, but I find these categories useful, because each forum greatly affects the evidentiary value of race in society. At the end of this Essay, I also offer broad proposals for how our courts can lead the way in ameliorating this issue.

I. A QUICK LOOK AT THE HISTORICAL EVIDENTIARY VALUE OF RACE

The use of blackness as evidence has roots in the slavery era where a person’s color or apparent race was “prima facie evidence” in court that he was a slave.⁶ As a Kentucky court in the 1835 case of *Gentry v. McMinnis* said, the presumption of slave status based on color was rebuttable, but color was considered “superior evidence.”⁷ The burden of proving free status was on the person presumed to be a slave. Blackness as evidence evolved throughout the post-Civil War era, exemplified in the strict southern “Black Codes” where some behavior, like selling alcohol or possessing weapons, was criminal only if a black person engaged in it.⁸ Race could even be used as evidence of a defendant’s intent in a rape prosecution

³ See Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors’ Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL’Y 271, 278 (2012) (citations omitted) (noting “the serious disparities and injustices Blacks experience in the criminal justice system: racial profiling, wrongful convictions, mass incarceration, and police brutality”).

⁴ Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy, Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

⁵ *Id.*

⁶ 33 Ky. (3 Dana) 382, 385 (1835).

⁷ *Id.*

⁸ Jason A. Gillmer, *Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape*, 85 N.C. L. REV. 489, 514 (2007).

where the defendant was black and the accuser was white.⁹ As one writer put it, segregation was a part of life, particularly in the south where everything was separated along racial lines:

Segregation was cradle to grave. Whites and blacks were born in separate hospitals, educated in separate schools, and buried in segregated graveyards. The system was codified in state and local laws and enforced by intimidation and violence.

There were, in effect, two criminal justice systems: one for whites and another for blacks. When the color line was breached, violence was unleashed against offenders by the Ku Klux Klan, often in concert with local law enforcement officials. . . .¹⁰

II. CONTEMPORARY USAGE OF RACE AS EVIDENCE

A. *On the Streets*

The modern evidentiary use of race as a proxy for character in the criminal system has ushered in what is now known as “the New Jim Crow.”¹¹ Interestingly, however, in traditional evidence law and criminal law scholarship as well as in critical race theory scholarship, race as an evidentiary concept is largely overlooked. Yet, race has evidentiary value at every step in the criminal process, with crucial frontline decisions of police officers often being a starting place.

The controversial stop-and-frisk policy in New York is a perfect example. The New York Police Department’s own data reveal that police have specifically targeted, stopped, and frisked hundreds of thousands of blacks and Latinos in

⁹ Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1413 (2007). See also Kimberle Crenshaw, *Mapping the Margins, Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1266 (1991) (“Historically, the dominant conceptualization of rape as quintessentially Black offender/white victim has left Black men subject to legal and extralegal violence. The use of rape to legitimize efforts to control and discipline the Black community is well established, and the casting of all Black men as potential threats to the sanctity of white womanhood was a familiar construct . . .”).

¹⁰ See Leland Ware, *Civil Rights and the 1960s: A Decade of Unparalleled Progress*, 72 MD. L. REV. 1087, 1087–88 (2013).

¹¹ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

recent years.¹² In an op-ed published in July 2013, former New York Police Chief Ray Kelly staunchly defended the practice by pointing to statistics of racial minorities' involvement in crime.¹³ In this remarkable piece, Mr. Kelly actually rationalized and validated the indefensible use of race as evidence by police officers, otherwise known as racial profiling.¹⁴ He bragged about the reduced crime rate in New York, taking full credit for it and giving special props to department's implementation of widespread racial profiling.¹⁵ As one reader who commented on the article aptly observed, "[c]orrelation is not causation," as the decrease in the crime rate could be attributed to other factors, including improvements in the economy and schools as well as "the gentrification and integration of many previously dangerous neighborhoods. . . . Ray Kelly needs to show us some causality based on empirical evidence. If its [sic] as obvious as he says, then this shouldn't be hard."¹⁶

The most telling part of the piece was Mr. Kelly's dismissive acknowledgement, if you can call it an acknowledgement, that the police in New York stop people who have done nothing wrong: "It's understandable that someone who has done nothing wrong will be angry if he is stopped."¹⁷ Clearly, Mr. Kelly cannot relate to the average African American in this country. As a black woman who has been stopped in my car more than once for what amounted to racial profiling and as the spouse of a black male who has witnessed him go through the same thing (his treatment was worse than mine), I can tell him that we are beyond angry. Frankly, I do not even believe that the black community has fully processed and dealt with the ongoing psychological damage caused by persistent racial abuse and the unsettling recognition that there is no end in sight.

In August 2013 a federal judge in New York repudiated the controversial practice calling it "indirect racial profiling" that targeted blacks and Latinos who would not have been stopped had they been white:

¹² Editorial, *How to End Stop-and-Frisk Abuses*, N.Y. TIMES, May 23, 2012, at A30, available at <http://www.nytimes.com/2012/05/24/opinion/how-to-end-stop-and-frisk-abuses.html>.

¹³ Ray Kelly, Opinion, *The NYPD: Guilty of Saving 7,383 Lives*, WALL ST. J., July 23, 2013, at A17, available at <http://online.wsj.com/news/articles/SB10001424127887324448104578616333588719320>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

... [T]he City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data. This has resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause. Both statistical and anecdotal evidence showed that minorities are indeed treated differently than whites. For example, once a stop is made, blacks and Hispanics are more likely to be subjected to the use of force than whites, despite the fact that whites are more likely to be found with weapons or contraband. . . .

One NYPD official has even suggested that it is permissible to stop racially defined groups just to instill fear in them that they are subject to being stopped at any time for any reason—in the hope that this fear will deter them from carrying guns in the streets.¹⁸

Then Mayor Michael Bloomberg responded “angrily” to the opinion, arguing that the city had not been given a fair trial (an almost laughable argument, considering the patent unfairness of the stop and frisk policy).¹⁹ The newly elected mayor of New York (a white man who happens to be married to a black woman and is the father of biracial children²⁰), however, has said that the city will settle the case and implement the federal judge’s ordered reforms of the program.²¹ My concern, though, is that it will take a lot of effort to reform the culture in the police department, in the city, and throughout the country where so many believe that it is acceptable to presume criminality because of color.

Indeed, as this Essay goes to publication, this country is in the midst of a movement borne in response to the seemingly relentless killing by the police of

¹⁸ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y.), *injunction granted*, 959 F. Supp. 2d 668 (S.D.N.Y.), *stay pending appeal denied*, 959 F. Supp. 2d 691 (S.D.N.Y.), *order stayed sub nom. Ligon v. City of New York*, 538 F. App’x 101 (2d Cir.), *superseded in part, In re Reassignment of Cases*, 736 F.3d 118 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

¹⁹ Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 13, 2013, at A1, available at http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html?pagewanted=all&_r=0.

²⁰ Peggy Drexler, *Meet the Blasios, the new face of America* (Nov. 7, 2013), <http://www.cnn.com/2013/11/07/opinion/drexler-de-blasio-family/index.html?iref=allsearch>.

²¹ Benjamin Weiser & Joseph Goldstein, *Mayor Says New York Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES, Jan. 31, 2014, at A1, available at <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>. *Walter Scott’s Brother: “He was shot down like an animal,”* FOX NEWS (Apr. 8, 2015), <http://video.foxnews.com/v/4161896024001/walter-scotts-brother-he-was-shot-down-like-an-animal/?#sp=show-clips>.

unarmed black men.²² From the killing of unarmed Mike Brown by a police officer in Ferguson, Missouri to the killing in an almost “for sport” fashion of Walter Scott by a police officer in North Charleston, South Carolina (and captured on a cell phone video), intense media focus coupled with an “enough is enough” sentiment amongst many Americans (of various races and backgrounds) have sparked the #BlackLivesMatter movement.²³ The ultimate success of the movement remains to be seen—but given the deeply ingrained “blackness-equals criminality” mentality, the movement will have to be sustained and relentless to result in real reform.

B. In the Media: The Use of Racialized Evidence as Entertainment

The use of the media as a tool for racial justice is a double-edged sword. The *Zimmerman* and *Dunn* cases are perfect examples. In both cases, unarmed black teens were killed by non-black men who claimed to be afraid of the teens (*Zimmerman*’s race is ambiguous, though the police who let him go assumed that he was white; *Dunn* is clearly white). On the one hand, were it not for the media or the threat of media coverage, *Zimmerman* and *Dunn* may never have been tried. At the same time, however, even media coverage sympathetic to the victims, especially minority victims, can reduce them to mere caricatures and devalue their lives. Doing so makes it easier for the *Zimmermans* and the *Dunns* of the world to disregard lives, particularly lives of people of color, during confrontations. This problem is heightened in the case of police confrontations with black men (and women). Watching the police officer in South Carolina shooting Walter Scott in the back as he was running away made me wonder if the officer saw Mr. Scott as an animal.

The problem of the use of racialized evidence as entertainment is a part of a larger problem that has been steadily building since the O.J. Simpson trial and probably before. Because of our country’s freedom of the press tradition, the public nature of trials generally, and the use of cameras in state courtrooms across our nation, there is the potential for an accompanying spectacle with trials that raise hot button issues such as race.²⁴ Add to that mix today’s twenty-four hour news cycle, the liberal versus conservative news channel wars, and the public’s general

²² See blacklivesmatter.com.

²³ See *id.*

²⁴ See generally Nancy M. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489 (2012) (addressing federal judges’ refusal to allow camera’s in the courtroom).

perception of the trial process as entertainment (hence the popularity of shows like *Law & Order*), and you have a perfect storm.

There is also the problem of race itself, and more specifically racial minorities' pain, being fully available, even demanded, for exhibition. Indeed, one of the historical and modern uses for people of color in the country has been as white people's entertainment. One need look no further than almost any major university football or basketball program in the country, and then look at the university's general student population. The athletes are mostly black, the student body (and fan base of alumni and others) are mostly white. If race is entertainment, it is no surprise that racialized evidence, particularly as utilized in the criminal justice system, has become entertainment.

Consider the "characters" involved in the latest high-profile cases involving race. Think of George Zimmerman in particular. Observing his and his supporters' actions before, during, and after his trial, I was left with the impression that on many levels they enjoyed the spotlight and attention of the media despite the fact that Zimmerman had killed a seventeen-year-old boy. Indeed, Zimmerman has continued to thrust himself into the public eye even though he ostensibly laments the loss of his privacy.²⁵ He even signed up to participate in a "celebrity boxing match," which was later cancelled because of public outrage.²⁶

The *Zimmerman* trial produced many instances of racialized evidence as entertainment, which I discuss more below. One particularly striking instance was the computer animation that the defense produced depicting Zimmerman's account of his encounter with Martin—a scary hooded black man-boy walks up to Zimmerman, towers over him, and punches him. There are problems with computer-generated animations generally, one of them being that they are used as a substitute for reality (and often a poor substitute). In this manner, they can be dehumanizing. In the *Zimmerman* case, because of its high-profile nature, there was also the trial evidence-as-entertainment problem with the animation. The media played and replayed the animation repeatedly. Moreover, one need not look any further than YouTube to find other *Zimmerman*/Martin animations mimicking the one used at trial.

²⁵ Chris Cuomo, *George Zimmerman: "I Was the Victim,"* CNN PRESS ROOM (Feb. 17, 2014, 9:15 AM ET), <http://cnnpressroom.blogs.cnn.com/2014/02/17/george-zimmerman-i-was-the-victim/?iref=allsearch>.

²⁶ *Id.*

Racial unrest can be a lightning rod, and hence a guarantee of high television ratings for news shows or increased readership for newspapers and news sites. Over the last couple of years, we have not only witnessed the *Zimmerman* case and parts of the *Dunn* case, but there was also the Paula Deen debacle, though obviously the *Zimmerman* case was far more serious because of the loss of life. Ms. Deen was sued in 2012 by a white woman under Title VII for, among other things, making racially derogatory statements about African Americans.²⁷ The lawsuit came to a head and was quickly settled when Ms. Deen's deposition, in which she admitted to using racial slurs, became public.²⁸ It is striking that even though Ms. Deen and her brother Bubba (who ran one of Ms. Deen's restaurants) allegedly made a number of sexist statements it was the racial statements that caught the media's attention and set off a firestorm of criticism that ultimately brought Ms. Deen's deep fried sugar-coated butter empire to its knees.²⁹

In my view, the most disturbing instances demonstrating Ms. Deen's race "issues" were her use of a black man, her driver, as evidence during an interview with the *New York Times* taped before an audience (a few months after the discrimination lawsuit was filed) to prove that she was not racist. After describing how slaves were really "family" and how "devastated" her great-grandfather was after the south lost the Civil War and their slave "family,"³⁰ Ms. Deen told the audience about a "young man in [her] life" whom she would "travel to hell with": "*He's black as that board*" (meaning the backdrop on stage). . . . "*Come out here Hollis, we can't see you standing against that dark board.*"³¹ The audience then

²⁷ See Rene Lynch, *Paula Deen Lawsuit Dismissed, but Not Before It Destroyed Career*, L.A. TIMES (Aug. 23, 2013, 2:42 PM), <http://www.latimes.com/food/dailydish/la-dd-paula-deen-lawsuit-dismissed-20130823,0,1290058.story#axzz2uGPOJL7C>; Tenny Tatusian, *Judge: White Woman Cannot Sue Paula Deen for Racial Discrimination*, L.A. TIMES (Aug. 12, 2013, 6:45 PM) <http://www.latimes.com/features/food/dailydish/la-dd-paula-deen-race-claim-dismissed,0,7624365.story#axzz2uGPOJL7C>.

²⁸ Russ Bynum, *Sides Agree to Drop Paula Deen Discrimination Suit*, ASSOCIATED PRESS (July 23, 2013, 7:38 PM), <http://bigstory.ap.org/article/lawyers-settle-paula-deen-lawsuit-georgia>.

²⁹ See Marder, *supra* note 24.

³⁰ Ruth Manuel-Logan, *Paula Deen To Black Employee: 'We Can't See You Standing Against That Dark Board!'*, NEWSONE (June 24, 2013), <http://newsone.com/2613010/paula-deen-ny-times-racist>.

³¹ Eliana Dockterman, *Meet Hollis Johnson, the Man Paula Deen Calls Her 'Black Sheep.'* TIME (July 2, 2013), [http://newsfeed.time.com/2013/07/02/five-things-to-know-about-hollis-johnson-paula-deens-closest-black-friend/](http://newsfeed.time.com/2013/07/02/five-things-to-know-about-hollis-johnson-paula-deens-closest-black-friend/#ixzz2uGScpzughttp://newsfeed.time.com/2013/07/02/five-things-to-know-about-hollis-johnson-paula-deens-closest-black-friend/).

laughed.³² One must view the video clip to fully appreciate the use of racialized evidence as entertainment here.³³

What are the implications, if any, of the very public use of race evidence in the media as entertainment? In a perverse way, the use of our pain as entertainment misdirects the attention of the public from the underlying issues that produced the injustice. We focus on the drama, and not what gave birth to it, and nothing changes. Hence Ray Kelly's invocation in his op-ed of anyone else's invocation of the "death of Trayvon Martin as incendiary" (there's no mention of Zimmerman, as if Trayvon killed himself).³⁴

Many people simply take sides in high-profile race cases without trying to understand the social context in which the situations arose, and in many instances people defending their "side" lack any semblance of civility. Those who are more civilized have largely empty "conversations on race," but nothing really comes of those conversations despite the intent behind them. I will address in Part III how our courts can help us elevate our conversations on race to help bring about meaningful change, but first I will address in the next subsection how courts are currently leading us in the wrong direction.

C. *In Court*

Trials tend to be a mirror of what is happening in society. So, in the courtroom when what we think of in a more traditional sense as evidence confirms any negative racial stereotypes (like blacks being dishonest or criminally inclined), it exacerbates the preexisting problem of race as character evidence.

Thus, black witnesses who are *considered* less educated and less articulate, like Rachel Jeantel in the Zimmerman trial, will often seem less believable than similarly situated white witnesses. Ms. Jeantel was a friend of Trayvon Martin's and was on the phone with him when he first encountered Zimmerman. The public's reaction to Ms. Jeantel's testimony was polarized, to say the least. People sympathetic to her viewed the cross-examination of Ms. Jeantel by Zimmerman's

³² See Muanuel-Logan, *supra* note 30.

³³ Plookey, *Black Man Hollis Johnson Gets Disrespected By Paula Deen*, YOUTUBE (June 28, 2013), <http://www.youtube.com/watch?v=xikp9kcBAXI>.

³⁴ See Kelly, *supra* note 13.

defense team as abusive.³⁵ As an observer of the television coverage of the trial, I was certainly bothered by it. The tone was harsh, and coupled with the questioning at times, subtly (or not so subtly, depending on your viewpoint) implied that Ms. Jeantel was unintelligent and thus not credible. Her credibility was crucial, because, while there were no eyewitnesses available to testify fully about the initial confrontation and subsequent fight between Trayvon Martin and Zimmerman, Ms. Jeantel was an “ear witness” to the initial confrontation between the two. If her version is to be believed, Zimmerman approached Trayvon and started the physical altercation.³⁶ As one observer noted, “no respect was paid to Rachel Jeantel in the courtroom. She looked different, spoke different, but none of that is supposed to matter. Was she telling the truth? That’s what’s supposed to matter.”³⁷

The message that Zimmerman’s lawyer, Don West, sent the court, the jury, and the (white) public was that “she looked different, sounded different, shit she must be lying because she sure as hell ain’t one of us.”³⁸ Indeed, his own daughter, for good measure, took to social media the night that Mr. West finished his cross-examination of Ms. Jeantel, sending the message that her dad had “beat stupidity.”³⁹

The anonymous juror who was interviewed by CNN’s Anderson Cooper after the Zimmerman verdict confirms that Mr. West was effective in discrediting Ms. Jeantel and depicting her as the “other.” Juror B37 remarked that she felt “sad” for Ms. Jeantel because she thought that Ms. Jeantel “felt inadequate toward everyone because of her education and her communication skills.”⁴⁰ She did not think that Ms. Jeantel made a good witness because of some of the language that Ms. Jeantel used, which was foreign to the juror.⁴¹ Perhaps most telling was how this juror referred to the way that “they [meaning Trayvon and Ms. Jeantel] were

³⁵ Kristin A. Randall, *The George Zimmerman Trial: Witness Rachel Jeantel*, MENTAL HEALTH & CRIM. JUST. (July 1, 2013), available at <http://kristinarandle.com/blog/the-george-zimmerman-trial-witness-rachel-jeantel/>.

³⁶ See Les Grossman, *Rachel Jeantel Full Testimony, George Zimmerman Trial*, YOUTUBE (June 29, 2013), <http://www.youtube.com/watch?v=XdzrBw-x8Xc>.

³⁷ See Randall, *supra* note 35.

³⁸ *Id.*

³⁹ *Id.* (internal quotation marks omitted).

⁴⁰ Anderson Cooper, *Juror B37: Rachel Jeantel Wasn't a Good Witness*, CNN.COM (July 16, 2013, 1:55 AM), <http://ac360.blogs.cnn.com/2013/07/16/juror-b37-rachel-jeantel-wasnt-a-good-witness/>.

⁴¹ *Id.*

living,” “the type of life that they [live],” and “how they’re living, in the environment that they’re living in.” She clearly saw Rachel and Trayvon as the “other.”⁴²

Ms. Jeantel was cast as ignorant, “stupid,” and a liar—qualities that tend to render witnesses as wholly unbelievable. This was certainly the perception by many in the public. And such a perception effectively operates much like the old “competency” rules that historically kept most black witnesses off the witness stand altogether because blacks were thought to be generally dishonest.⁴³ While today black witnesses like Ms. Jeantel obviously have the “privilege” of testifying, their testimony can be disregarded all too easily because of racial bias.⁴⁴

Moreover, lawyers sometimes take advantage of deeply ingrained racial biases in much more overt ways than Mr. West did in his cross examination of Ms. Jeantel. This happened in a case that got some, but not nearly enough, attention last year. In *Calhoun v. United States*, Justice Sonia Sotomayor broke with the Supreme Court’s tradition of simply denying cert petitions summarily and actually wrote an opinion scolding a prosecutor for invoking racial stereotypes as evidence to prove the defendant’s intent to engage in a drug deal.⁴⁵ In cross-examining the defendant, the prosecutor had pressed the defendant about his knowledge regarding his friends’ activities: “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, this is a drug deal.”⁴⁶ It is disturbing (and telling) that the Court did not even see fit to grant cert in the case.

Going back to the Zimmerman trial, the case evoked racial stereotypes and biases in what was for me the most disturbing testimony of the entire trial. As part of the defense’s case, Zimmerman’s lawyers called Ms. Olivia Bertalan, a white mother who had previously been robbed by two black men in Zimmerman’s neighborhood.⁴⁷ No one even suggested that Trayvon Martin had been one of the perpetrators, so this crime had absolutely nothing to do with him. The only thing

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 133 S. Ct. 1136 (2013).

⁴⁶ *Id.* at 1136.

⁴⁷ *Axiom Amnesia, Olivia Bertalan—7/10/2013—Trayvon Martin George Zimmerman Trial*, YOUTUBE (July 10, 2013), <http://www.youtube.com/watch?v=iHxVNRMEhiU>.

that he had in common with the men who robbed this young woman was that he was black. Race *is* evidence—it certainly was in the *Zimmerman* case.

III. ADDRESSING RACE AS EVIDENCE: COURTS SHOULD LEAD BY EXAMPLE

When any type of racial bias permeates legal proceedings, the justice system legitimizes race as character evidence. Instead, our evidence and procedural rules should require judges to do everything that they can to mitigate this problem though it can probably never really be eradicated completely. Judges should have frank and open discussions with juries about racial bias. We should also modify our rules to promote efforts to ensure diverse juries, as racial diversity in the jury room helps to keep racial biases from infecting deliberations. Other mitigating tools should include the exclusion of irrelevant evidence that could only have been introduced to invite racial stereotyping and should also include sanctions against attorneys who continually try to sneak such evidence in through the back door.

When our courts decidedly take a stand and deal with racial bias within the courtroom, they will also hopefully send the message to the system's frontline representatives—like the police—and to others, like Zimmerman and Dunn, that race is inadmissible (and unacceptable) as character evidence. When our courts and other leaders in the justice system validate the practice (as former Police Chief Kelly did), they send the message to citizens, many of whom are already afraid of black people, that not only is their fear justified but that they are justified in acting on it.

Though the *Zimmerman* case received much more media attention, the *Dunn* case is just as shocking. How is it that a grown man starts an argument and ultimately kills an unarmed kid over “loud music”?⁴⁸ It is because Jordan Davis embodied the black threat to white life. Davis's color, his race, supplied all of the evidentiary proof that Dunn needed. Apparently there were members of the jury in Dunn's first trial who identified with Dunn, as they were unable to convict him on the main charge of killing Jordan (but on the lesser charges of attempted murder with respect to the other occupants in the car; he was convicted of murdering

⁴⁸ Michael Muskal, *Michael Dunn Convicted on 4 of 5 Charges in Loud-Music Murder Case*, L.A. TIMES (Feb. 15, 2014, 4:20 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-michael-dunn-loud-music-verdict-20140213,0,5446202.story#ixzz2uItCJPW5>.

Jordan after being retried months later).⁴⁹ I was particularly struck by Dunn's reaction to being arrested when he commented, as captured in jailhouse recordings, "I am the fucking victim."⁵⁰ I have no doubt that he truly feels victimized, which is tragically obvious for Jordan Davis and his family, but also for other minority youth who come in contact with people like Dunn. Dunn made no secret of his racist views, indeed in one letter that he wrote from jail, he said "'This jail is full of blacks and they all act like thugs. . . . This may sound a bit radical, but if more people would arm themselves and kill these fucking idiots when they're threatening you, eventually they may take the hint and change their behavior.'"⁵¹

Courts must start to have open discussions about race and encourage jurors to do so instead of pretending that the system is colorblind. A juror from the first Dunn trial recently spoke out and said that they did not even discuss race.⁵² If that is true, it is really a shame that they failed to discuss the most important piece of evidence in the trial, the very reason that they were there in the first place. After all, I do not think that anyone would seriously argue that Michael Dunn would have shot Jordan Davis if Davis had been white.

IV. CONCLUSION

The use of race as character evidence in recent high-profile cases has in a perverse way further legitimized the practice. It is up to our courts to delegitimize and discourage the use of race as evidence of character by the police and by persons who commit acts of violence expecting the justice system to exonerate them. It is time to have open and honest discussion in our courts about race, which hopefully, will lead to more meaningful discussions in society aimed at diminishing the evidentiary value of race. It seems that many in our nation are

⁴⁹ Elliott C. McLaughlin & John Couwels, *Michael Dunn found guilty of 1st-degree murder in loud-music trial*, CNN.COM (Oct. 1, 2014), <http://www.cnn.com/2014/10/01/justice/michael-dunn-loud-music-verdict/>.

⁵⁰ Katie McDonough, *Michael Dunn Compares Himself to a Rape Victim in Phone Calls about his Deadly Shooting of Jordan Davis*, SALON (Feb. 18, 2014, 11:42 AM), http://www.salon.com/2014/02/18/michael_dunn_compares_himself_to_a_rape_victim_in_phone_calls_about_his_deadly_shooting_of_jordan_davis/.

⁵¹ Katie McDonough, *Jordan Davis' Father on Michael Dunn Verdict: We Do Not Accept a Law that Views Our Children as "Collateral Damage,"* SALON (Feb. 16, 2014, 10:12 AM), http://www.salon.com/2014/02/16/jordan_davis_father_on_michael_dunn_verdict_we_do_not_accept_a_law_that_views_our_children_as_collateral_damage/.

⁵² Alina Machado, Dana Ford & Tom Watkins, *Juror in Michael Dunn Trial: Race Was Never a Factor*, CNN.COM (Feb. 21, 2014, 9:25 AM), <http://www.cnn.com/2014/02/20/justice/florida-loud-music-case/>.

discerning one of those critical moments, as my colleague and friend Professor Stefancic describes in her brilliant piece.⁵³ Real change will only take root if our courts are able to discern this critical moment in our nation's history and take action.

⁵³ Jean Stefancic, *Discerning Critical Moments: Lessons from the Life of Derrick Bell*, 75 U. PITT. L. REV. 457 (2014).