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# "Nigger": A Critical Race Realist Analysis of the N-word within Hate Crimes Law

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**“NIGGER”:  
A CRITICAL RACE REALIST ANALYSIS  
OF THE N-WORD WITHIN HATE CRIMES LAW**  
Gregory S. Parks\* and Shayne E. Jones\*\*

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**Abstract:** On a 2005 summer morning, Nicholas “Fat Nick” Minucci (White) beat Glenn Moore (Black) with a baseball bat and robbed him. During the assault, Minucci repeatedly screamed the N-word. At trial, Minucci’s attorney argued that he had not committed a hate crime. The essence of the defense’s argument was that Minucci’s use of the N-word while assaulting and robbing Moore was not indicative of any bias or prejudice. The defense went on to indicate that Minucci had Black friends, was immersed in Black culture, and employed the N-word as part of his everyday vocabulary. Two Black men—Gary Jenkins (hip hop music producer) and Randall Kennedy (Harvard Law Professor)—testified that the N-word is not necessarily a racial epithet. In this article, we systematically analyze this assessment of the N-word within hate crimes law. We employ a Critical Race Realist methodology toward this end. In doing so, we 1) systematically analyze Black and White usage of the N-word within popular culture (i.e., comedy, rap music, and spoken word) and 2) reconcile these findings with research on implicit (unconscious) race bias. In sum, we argue that whereas many Blacks may use the N-word, the usage of Whites immersed in Black culture is nil. Furthermore, we find that many Whites harbor implicit anti-Black biases and such biases predict racial hostility and the use of racial epithets. Consequently, within the realm of hate crimes law, courts should presume racial animus where a White person uses the N-word while committing a crime against a Black person. Furthermore, despite high rates of Black usage of the N-word and high rates of implicit anti-Black biases among Blacks, a law of intra-racial hate crimes among Blacks predicated upon their usage of the N-word would be fruitless. This is so given that the N-word means something differently when used intra-rationally among Blacks than when directed at a Blacks from Whites.

“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” –Oliver Wendell Holmes<sup>1</sup>

“Although the slang epithet ‘nigger’ may once have been in common usage ... [it] has become particularly abusive and insulting ... as it pertains to the American Negro.”  
–Louis H. Burke<sup>2</sup>

“[Crimes] motivated by bigotry usually arise not out of the pathological rantings and ravings of a few deviant types in organized hate groups, but out of the very mainstream of society.” –Jack Levin and Jack McDevitt<sup>3</sup>

### INTRODUCTION

Critical Race Realism is neither novel as a term nor as a broad concept. As early as 1992 and as late as 2005, legal scholars Derrick Bell and Emily Houh, respectively, propounded this idea. According to Bell, “black people need reform in our civil rights strategies as badly as those in the law needed a new way to consider American jurisprudence prior to the advent of the Legal Realists....*Racial Realism*—is a legal and social mechanism on which blacks can rely to have their voice and outrage heard.”<sup>4</sup> For Houh, “critical race realism encompasses not only the goals and methodologies of the broader critical race....projects, but also some of the shared goals and methodologies of legal realism....”<sup>5</sup>

Given that Critical Race Theory is the jurisprudential grandchild of Legal Realism,<sup>6</sup> both share similarities, but are yet quite different. Critical Race Theory was founded as “a race-based, systematic critique of legal reasoning and legal institutions....”<sup>7</sup> Critical Race Theory was born out of the Critical Legal Studies movement.<sup>8</sup> Not only did it take part of its name from the “crits,” it took part of its ideology from the *crits* as well. For one, critical race theorists are “critical,” quite like *crits*, in that they engage in a version of “trashing”—a hallmark of the *crits*. In this approach, they: 1) take legal arguments seriously in their own terms, 2) discover that the arguments are “foolish”, and 3) look for some order in the “internally contradictory, incoherent

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<sup>1</sup> *Town v. Eisner*, 245 U.S. 418, 425 (1918).

<sup>2</sup> *Alcorn v. Ambro Engineering, Inc.*, 2 Cal.3d 493, 498 n.4 (1970).

<sup>3</sup> JACK LEVIN AND JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED XX* (1993).

<sup>4</sup> Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

<sup>5</sup> Emily M. S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT L. REV. 455, 456-457 (2005)

<sup>6</sup> See Gregory S. Parks, Note, *Toward a Critical Race Realism*, 18 CORNELL J.L. & PUB. POL’Y (forthcoming Fall 2008).

<sup>7</sup> RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* xix (2001).

<sup>8</sup> For an account of how Critical Race Theory developed from Critical Legal Studies and the Law & Society movement see Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARVARD BLACKLETTER L. J. 1 (2002); Bernie Donna-Marie Jones, *Critical Race Theory: Protesting Against Formalism in the Law, 1969-1999* (December 2002) (unpublished Ph.D. dissertation, University of Virginia) (on file with Proquest).

chaos [they have] exposed.”<sup>9</sup> Critical Race Theorists do not endorse rights-trashing, like the *crits*.<sup>10</sup> Nonetheless, both sets of jurisprudes engage in a “full frontal assault” on modern jurisprudence.<sup>11</sup> Earlier, the realists employed a similar technique called debunking.<sup>12</sup> This entailed subjecting questionable judicial opinions to logical analysis in order to expose their inconsistencies, unsubstantiated premises, and tendency to “pass off contingent judgments as inexorable.”<sup>13</sup> Debunking flowed from two methods of attack—rule and fact skepticism. Rule skeptics argued that case decisions do not necessarily flow from general legal propositions—that logic did not govern judicial thought processes.<sup>14</sup> Other features were argued to have factored into the equation<sup>15</sup> such as policy considerations.<sup>16</sup> Fact skeptics either argued that the facts found by the judge or jury are inconsistent with the actual facts<sup>17</sup> or that the reactions of judges and juries to facts are unpredictable.<sup>18</sup>

Despite these similarities, Critical Race Theorists are arguably distinguished from the realists in that the latter, and not the former, made the synthesis of law and social science a hallmark of their agenda.<sup>19</sup> The empirical exploits of Realists such as Charles E. Clark and William O. Douglas at Yale,<sup>20</sup> Underhill Moore at Yale,<sup>21</sup> and Walter Wheeler Cook and colleagues at Johns Hopkins<sup>22</sup> are well-documented. Many of the *crits* founders were formerly

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<sup>9</sup> Mark G. Kelman, *Trashing*, 36 STANFORD L. REV. 293, 293 (1984).

<sup>10</sup> Patricia Williams indicated that “rights are to law what conscious commitments are to the psyche. This country’s worst historical moments have not been attributable to rights-assertion, but to a failure of rights-commitment. From this perspective, the problem with rights discourse is not that the discourse is itself constricting, but that it exists in a constricted referential universe. The body of private laws epitomized by contract, including slave contracts, for example, is problematic not only because it endows certain parties with rights, but because it denies the object of contract any rights at all.” Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 424 (1987).

<sup>11</sup> Allan C. Hutchison & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STANFORD L. REV. 199, 199 (1984).

<sup>12</sup> See G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L. J. 819, 821-22 (1986). Debunking is best exemplified by the works of realists Wesley Hohfeld and Karl Llewellyn. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16 (1913); Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1238-39 (1931).

<sup>13</sup> White, *supra* note 12, at 819.

<sup>14</sup> Timothy Lowell Smith, *Formalism, Pragmatism, and Nihilism in Legal Thought* 48-49 (July 1996) (unpublished Ph.D. dissertation, The Johns Hopkins University) (on file with). For more about rule skepticism see WILFRED E. RUMBLE, JR., *AMERICAN LEGAL REALISM, REFORM, AND THE JUDICIAL PROCESS* 48-68 (1968).

<sup>15</sup> Smith, *supra* note 14, at 48-49.

<sup>16</sup> Smith, *supra* note 14, at 50, 54; Bruce Evans Pencek, *The Political Theory of Legal Realism* 1 (June 1988) (unpublished Ph.D. dissertation, Cornell University). Before the Realists, Justice Oliver Wendell Holmes noted that “[t]he felt necessities of time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogisms in determining the rules by which men should be governed.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>17</sup> RUMBLE, *supra* note 14, at 109-110.

<sup>18</sup> *Id.* at 111.

<sup>19</sup> White, *supra* note 12, at 823. This is not to say that Critical Race Theorists totally eschew empiricism and social science. In fact, they have made efforts to incorporate social scientific findings in their scholarship. See *CRITICAL RACE THEORY: THE CUTTING EDGE* 129-78 (Richard Delgado & Jean Stefancic eds., 1999).

<sup>20</sup> See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE* 81-114 (1995)

<sup>21</sup> See *id.* at 115-146.

<sup>22</sup> See *id.* at 147-210.

active in the law and society movement, which had its roots with the realists.<sup>23</sup> The *crits*, however, ultimately disagreed with their law and society colleagues on key issues. One issue that cleaved the *crits* from the law and society movement was the debate about the utility of empirical social science. In a 1977 article in the *Law and Society Review*,<sup>24</sup> *crit* David Trubek assailed empirical social science.<sup>25</sup> First, Trubek suggested that empirical research legitimates the status quo in that it implies that research facts were objectively “there.” Second, he argued that a scholar could not separate ideology from methodology in any type of research, including empirical research. Ultimately, according to G. Edward White, Trubek argued that “to be politically reformist and methodologically neutral was a contradiction in terms.”<sup>26</sup>

There is a current effort afoot, however, which seeks to reconcile Critical Race Theory with other elements of its realist roots.<sup>27</sup> As named by Bell and Houh, this effort is called Critical Race Realism. As the authors see it, Critical Race Realism situates itself within the growing contemporary efforts—such as empirical legal studies,<sup>28</sup> the New Legal Realism Project,<sup>29</sup> and Behavioral Realism<sup>30</sup>—to integrate law and social science. Furthermore, its goal is to more systematically “enable and to compel law-making ... to take more account ... of the *social facts* upon which law must proceed and to which law must be applied.”<sup>31</sup> This article applies Critical Race Realist methodology in an effort to analyze how the law should construe the N-word in potential hate crime cases. It does so by systematically assessing the usage of that word on the part of Whites who might justify their usage by arguing that they are immersed in certain elements of (Black) popular culture. In addition to this analytic technique, the article imports empirical research on implicit social cognition into our understanding of hate crimes law. Towards this end, this article adds to the scant legal scholarship on the N-word.<sup>32</sup>

Section I highlights a particular case in which a White person’s, who was allegedly immersed in Black culture, use of the N-word during his assault of a Black man was analyzed. Part II provides a general overview of U.S. hate crimes law and how racial epithets are

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<sup>23</sup> Parks, *supra* note 6, at section I(D).

<sup>24</sup> David Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & SOC’Y REV. 529 (1977).

<sup>25</sup> White, *supra* note 12, at 834.

<sup>26</sup> *Id.*

<sup>27</sup> See generally GREGORY S. PARKS, ET AL., CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY RACE AND LAW (forthcoming August 2008)

<sup>28</sup> See generally Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741 (2004); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002); Gregory Mitchell, *Empirical legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167 (2004); Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1 (2002).

<sup>29</sup> See generally, *New Legal Realism Symposium: Is It Time for a New Legal Realism?*, 2005 WISC L. REV. 335 (2005); Symposium, *New Legal Realism*, 31 LAW & SOC. INQUIRY 797 (2006).

<sup>30</sup> See generally, *Behavioral Realism Symposium*, 94 CAL. L. REV. 945 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063 (2006); Jerry Kang, *Behavioral Realism: Future History of Implicit Bias and the Law*, Lecture at Ohio State University (November 2006), available at <http://www.law.ucla.edu/kang/Talks/talks.html>.

<sup>31</sup> Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 26 HARV. L. REV. 489, 512-13 (1912).

<sup>32</sup> See Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129 (2003); Randall L. Kennedy, “Nigger!” as a Problem in the Law, 2001 U. ILL. L. REV. 935 (2001); David M. Siegel, *Felix Frankfurter, Charles Hamilton Houston and the “N-Word”: A Case Study in the Evolution of Judicial Attitudes Towards Race*, 7 S. Cal. Interdisc. L.J. 317 (1998).

traditionally viewed within this area of law. Section III provides a brief historical and contemporary analysis of the word and how has been and is understood. Section IV makes two arguments in support of why, when the N-word is uttered in the context of a non-Black person committing a crime against a Black person, the crime should be construed as a hate crime. The first is that despite the proliferation of the N-word throughout Black popular culture, by-and-large, even Whites immersed in that culture do not use that word—especially amongst Blacks they do not know very well. The second is that a remarkably large percentage of Whites harbor implicit racial attitudes against Blacks. As such, a White person’s utterance of the N-word while committing an act of violence or intimidation against a Black person may be seen as a leakage of these implicit racial biases. Part V addresses why, despite Blacks’ high rate of implicit anti-Black bias and more frequent use of the N-Word than Whites, the arguments we put forth about inter-racial hate crimes do not apply intra-racially among Blacks.

## I

### HARVARD LAW PROFESSOR MAKES THE CASE: N-WORD ≠ RACIAL ANIMUS, NECESSARILY

On the morning of June 29, 2005 Glenn Moore, a 23 year-old black man, and his two friends trolled Howard Beach—a Queens, New York neighborhood.<sup>33</sup> Though they looked for cars to steal, they stole no cars that night.<sup>34</sup> In the wrong neighborhood at the wrong time, Moore and his friends were chased by a group of young White men.<sup>35</sup> Among those men was Nicholas “Fat Nick” Minucci.<sup>36</sup> During the chase, Moore fell and was trapped by Minucci and his group.<sup>37</sup> Moore reported that Minucci called him “nigger” and said, “We’ll show you not to come rob White boys.”<sup>38</sup> Minucci then robbed Moore of several clothing items and made him drop to his knees, whereupon, Minucci struck Moore in the head with an aluminum bat while screaming “nigger.”<sup>39</sup> At trial, witnesses testified that Mr. Minucci repeatedly called Moore “nigger” in anger while chasing him and beating him in the head.<sup>40</sup> Albert Gaudelli, Minucci’s lawyer, argued that Moore fractured his skull when he fell. According to Frank Agnostini, one of Minucci’s accomplices in the attack, Minucci indeed hit Moore in the head and that the sound of the bat striking Moore’s head “sounded like Barry Bonds hit a home run.”<sup>41</sup> Minucci contended that he used the N-word as a benign address while preventing Moore from committing a crime.<sup>42</sup>

During the four week trial,<sup>43</sup> prosecutor Michelle Goldstein repeatedly used the bat to hit the juror’s box in an effort to approximate the sound the bat made when Minucci struck Moore. As she did so, she noted that Minucci uttered the words, “You see what you get, nigger, for coming into our neighborhood?”<sup>44</sup> In contrast, Minucci’s counsel, Albert Guadelli, repeatedly

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<sup>33</sup> Herb Boyd, *Minucci Guilty of Hate Crime*, N.Y. AMSTERDAM NEWS, June 15, 2006, at 10; *See also* Corey Kilgannon, *Epithet ‘Has Many Meanings,’ A Harvard Professor Testifies*, N.Y. TIMES, June 8, 2006, at 1.

<sup>34</sup> *Id.*

<sup>35</sup> George E. Curry, *Randall Kennedy: Negro Please*, ATLANTA DAILY WORLD, June 23, 2006, at 5.

<sup>36</sup> Boyd, *supra* note 33; Curry, *supra* note 35.

<sup>37</sup> Boyd, *supra* note 33.

<sup>38</sup> Curry, *supra* note 35.

<sup>39</sup> Boyd, *supra* note 33.

<sup>40</sup> Kilgannon, *supra* note 33.

<sup>41</sup> Curry, *supra* note 35.

<sup>42</sup> Kilgannon, *supra* note 33.

<sup>43</sup> Boyd, *supra* note 33.

<sup>44</sup> *Id.*

argued that Minucci’s use of “nigger” should be ignored—that Minucci’s use of the word was not intended to be a racial epithet.<sup>45</sup> He argued that Minucci, growing up in a racially diverse neighborhood next to Howard Beach, grew up with non-White friends and employed the N-word as part of his everyday vocabulary.<sup>46</sup> During his closing arguments, Guadelli indicated that “[p]eople use the word in different ways.” He went on to state that “[t]here was no intent of bias or prejudice.” In his closing argument, Guadelli said, “You don’t have to like that word. I don’t like that word, no one over 30 likes it, but it’s a fact that people under 30 use the word differently. Ignore this word, it’s merely another descriptive word.”<sup>47</sup> The jury took just over two days to convict Minucci of attacking Glenn Moore.<sup>48</sup> He was convicted of second-degree assault as a hate crime for the baseball-bat attack and first- and second-degree robbery as a hate crime for stealing Moore’s clothing items.<sup>49</sup> He was sentenced to 15 years.<sup>50</sup>

The newsworthy aspect of this case was not the assault itself; it was the expert testimony for the defense by two Black men. First was Gary Jenkins, a hip-hop music producer, who indicated that the N-word “has been permutated and morphed by a generation of younger people who moved it around and changed it into a matter of parlance.”<sup>51</sup> In essence, as Jenkins noted, “[t]here has got to be more to it than a word to find someone a racist.”<sup>52</sup> The second, and more important or at least more high profile expert, was, Randall Kennedy—Rhodes Scholar, Michael R. Klein Professor of Law at Harvard, and author of the book *Nigger: The Strange Career of a Troublesome Word*. Since 2002, Randall Kennedy has served as an expert witness about the use of the N-word in approximately a half-dozen court cases.<sup>53</sup> This was the first criminal case.<sup>54</sup> In a nutshell, Kennedy testified that Minucci, influenced by rap lyrics, did not believe the N-word was a racial epithet and insult.<sup>55</sup> He also testified that the N-word has multiple meanings and is not necessarily employed as a racial epithet.<sup>56</sup> Blacks were outraged not simply by Kennedy’s testimony but by the fact that he testified for free.<sup>57</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> Kilgannon, *supra* note 33.

<sup>47</sup> Curry, *supra* note 35.

<sup>48</sup> Boyd, *supra* note 33.

<sup>49</sup> Curry, *supra* note 35.

<sup>50</sup> Joseph Williams, *Under the Skin*, THE BOSTON GLOBE, Nov. 5, 2006, at 42.

<sup>51</sup> Curry, *supra* note 35.

<sup>52</sup> *Id.*

<sup>53</sup> Williams, *supra* note 50.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Curry, *supra* note 35; Kilgannon, *supra* note 33. On direct examination, Professor Kennedy’s question and answer consisted of the following:

Q: “Can you tell me what – how the word is used in society today?”

A: “The word is used in lots of different ways, so the word has many meanings depending on the circumstances. Sometimes the word is used as a racial insult; that is its primary historical meaning. Sometimes the word is used as a term of endearment. Sometimes the word is used as a gesture of solidarity. Sometimes the word is used satirically. The word is used in a wide variety of ways.”

Q: “What has your study revealed with respect to the use of this word by young people?”

A: Again, young people use the word in all sorts of different ways. There are some people who use the word because they have *Seen* it... I talk about how in San Francisco amongst Asian American youngsters, they will use the word amongst themselves and refer to themselves by this word, and whites use the word amongst themselves and refer to one another by this word from time to time.” Transcript of Expert Testimony at 1378-1379, *New York v. Minucci*, unpublished opinion.

<sup>57</sup> Williams, *supra* note 50.

## II AMERICAN HATE CRIMES LAW

“Hate” crimes is a bit of a misnomer in that the crimes are not typically about hate. Though the statutory definition of “hate crime” varies from state to state, a common thread is that the crimes are about bias and prejudice.<sup>58</sup> Hate crimes differ from two broad categories of crimes. They differ from crimes committed with no particular regard to the victim’s characteristics. They also differ from crimes committed precisely because the victim is a specific person. Unlike the former, hate crimes are committed against people with specific identifying characteristics. Unlike the latter, hate crimes are not committed against people because of their personal identity. Those who commit hate crimes are not focused on *who* the victim is, but rather *what* he or she is.<sup>59</sup>

Law enforcement agencies employ bias crime indicators to determine if a hate crime has been committed.<sup>60</sup> Among these indicators are racial differences and comments, written statements, or gestures.<sup>61</sup> These are deemed to be the objective facts or circumstances present during the commission of the criminal act that suggest that the offender’s conduct was motivated, at least partially, by some form of bias.<sup>62</sup> These indicators need not suggest that the offender’s predominant motivation was bias.<sup>63</sup> The presence of any indicator must merely suggest the possibility of a bias motivation for the offense, which is determined on a case-by-case basis.<sup>64</sup>

Hate crime laws have been introduced as federal criminal statutes, state criminal and civil statutes, local ordinances, and university hate speech codes. Federal criminal statutes are generally intended to bolster state criminal laws.<sup>65</sup> State, as opposed to federal law, violations present the largest number of criminal prosecutions.<sup>66</sup> Prosecution under hate crime statutes generally requires the commission of a predicate offense coupled with some form of animus, with the statute typically enhancing the punishment for the predicate offense.<sup>67</sup> The states have taken various approaches to ethnic intimidation and/or violence. Some created entirely new crimes that consist of bias-motivated commission of a crime already in existence in the state’s criminal code. Other states treat the assailant’s bias motivation as an aggravating circumstance during sentencing or provide for enhanced penalties where bias was a motivation for crime commission. A few states statutorily define bias crimes as civil rights violations, just as federal legislation does.<sup>68</sup>

In order to convict an individual of a hate crime, the state should provide evidence of the following: 1) that the defendant committed the legally prohibited act, 2) the defendant selected the victim due to the victim’s characteristics, and 3) the defendant demonstrated bias or prejudice because of said characteristic.<sup>69</sup> There are three approaches to define the defendant’s state of

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<sup>58</sup> JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES 11 (1998).

<sup>59</sup> FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9 (1999).

<sup>60</sup> K.A. MCLUGHLIN, S.M. MALLOY, K.J. BRILLIANT, & C. LANG, RESPONDING TO HATE CRIME: A MULTIDISCIPLINARY CURRICULUM FOR LAW ENFORCEMENT AND VICTIM ASSISTANCE PROFESSIONALS 14 (2000).

<sup>61</sup> *Id.* at 15.

<sup>62</sup> *Id.* at 14.

<sup>63</sup> *Id.* at 15.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 70.

<sup>66</sup> *Id.*

<sup>67</sup> 15 Am. Jur. 2d, Civil Rights §21.

<sup>68</sup> HATE CRIMES LAW 254 (2006).

<sup>69</sup> *Id.* at 247.

mind when committing a hate crime. The racial animus approach necessitates evidence that the defendant's bias toward the victim's characteristics motivated the crime.<sup>70</sup> The discriminatory selection approach necessitates proof that the defendant selected the victim based on the victim's characteristics.<sup>71</sup> The "because of" approach necessitates proof that the defendant committed the crime because of the victim's characteristics.<sup>72</sup> Despite these statutory variations in requisite mental state, most state courts have interpreted their respective statutes similarly. In essence, they largely require a causal connection between the criminal conduct and the statutorily protected characteristics.

After *Wisconsin v. Mitchell*,<sup>73</sup> several courts interpreted their state statutes such that it resembled the language in the Wisconsin statute—requiring that the defendant “intentionally select” the victim because of some protected characteristic.<sup>74</sup> Subsequent cases further refined this “intentional selection” concept by indicating that premeditation is not required.<sup>75</sup> What is required, however, is merely a “but for” connection between the criminal conduct and the victim's protected status.<sup>76</sup> Moreover, the defendant's bias motivation need only be a substantial reason for the criminal conduct and need not rise to the level of the sole reason for the conduct.<sup>77</sup> This does not mean, however, that mere biased thoughts result in defendants' enhanced punishment.<sup>78</sup> Proving that a defendant was motivated by bias or some form of discriminatory animus is a difficult, albeit necessary, task.<sup>79</sup> However, the defendant's words often supply the evidence in the form of racially-tinged speech during the commission of the crime.<sup>80</sup> This includes the N-word.

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<sup>70</sup> 57 Am Jur. Proof of Facts 3d 1 (2005). *See, e.g.*, D.C. Code Ann. §22-4001 (“demonstrate prejudice”); Fla. Stat. Ann. §775.085(1) (“evidence prejudice”).

<sup>71</sup> 57 Am Jur. Proof of Facts 3d 1 (2005). *See, e.g.*, Alaska Stat. § 12.55.155(c)(22) (“knowingly directed [offense at victim] because of”); Cal. Penal Code § 190.2(a)(16) (victim “intentionally killed because of”); Mo. Ann. Stat. § 557.035 (“knowingly motivated because of”); R.I. Gen. Laws § 12-19-38 (“intentionally selected”); Va. Code Ann. § 18.2-57 (“intentionally selects”); Wis. Stat. Ann. § 939.645(1)(b) (“intentionally selects”).

<sup>72</sup> 57 Am Jur. Proof of facts 3d 1 (2005). *See, e.g.*, Ala. Code § 13A-5-13 (“was motivated by”); Ky. Rev. Stat. Ann. § 532.031 (intentionally because of”); N.H. Rev. Stat. Ann. § 651:6.I(g) (“substantially motivated by”).

<sup>73</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (rejecting the idea that the state creates a “thought crime” and thus violates the First Amendment by punishing a crime more severely where a defendant selects his victim due to a discriminatory motive).

<sup>74</sup> *See, e.g.*, *State v. Stalder*, 630 So. 2d 1072, 1075-1077 (Fla 1994); *Dobbins v. State*, 631 So. 2d 303 (Fla. 1994); *State v. Mortimer*, 135 N.J. 517, 641 A.2d 257, 2650266 (1994); *State v. Talley*, 122 Wash. 2d 192, 858 P.2d 217, 229 (1993).

<sup>75</sup> *See, e.g.*, *State v. Pollard*, 80 Wash. App. 60, 906 P.2d 976, 979 (Div. 1 1995); *People v. Davis*, 285 Ill. App. 3d 875, 221 Ill. Dec. 102, 674 N.E.2d 895, 898 (1st Dist. 1996).

<sup>76</sup> *See, e.g.*, *State v. Hart*, 677 So. 2d 385, 386-387 (Fla. Dist. Ct. App. 4th Dist. 1996); *People v. Nitz*, 285 Ill. App. 3d 364, 221 Ill. Dec. 9, 674 N.E.2d 802, 806-807 (3d Dist. 1996); *Martinez v. State*, 980 S.W.2d 662, 666-667 (Tex. App. San Antonio 1998).

<sup>77</sup> *See, e.g.*, *Hart*, 677 So. 2d at 386-387; *Nitz*, 674 N.E.2d at 806.

<sup>78</sup> *See, e.g.*, *In re M.S.*, 10 Cal. 4th 698, 42 Cal. Rptr. 2d 355, 896 P.2d 1365, 1377 (1995); *Matter of Welfare of S.M.J.*, 556 N.W.2d 4, 7 (Minn. Ct. App. 1996).

<sup>79</sup> *See, e.g.*, N.Y. Penal Law § 485.05(2) (stating that proof that the defendant and victim are of different group affiliations “does not, by itself, constitute legally sufficient evidence satisfying the people's burden” to prove intent).

<sup>80</sup> *See, e.g.*, *People v. Lashley*, 1 Cal App. 4th 938, 2 Cal. Rptr. 2d. 629, 637 (2d Dist. 1991); *City of Wichita v. Edwards*, 23 Kan. App. 2d 962, 939 P.2d 942, 950 (1997); *People v. Davis*, 285 Ill. App. 3d 875, 221 Ill. Dec. 102, 674 N.E.2d 895 (1st Dist 1996); *Kinser v. State*, 88 Md. App. 17, 591 A.2d 894, 896 (1991); *Com v. Stephens*, 25 Mass. App. Ct. 117, 515 N.E.2d 606, 610 (1987).

### III “NIGGER”:

#### A GENERAL ANALYSIS OF THE WORD

The N-word is derived from the Latin word for the color black, *niger*.<sup>81</sup> And if there was ever a benign intent behind the word, it eventually took a pejorative turn. In 1837, Hosae Easton wrote that nigger:

“is an opprobrious term, employed to impose contempt upon [blacks] as an inferior race.... The term in itself would be perfectly harmless were it used only to distinguish one class of society from another; but its not used with that intent.... [I]t flows from the fountain of purpose to injure.”<sup>82</sup>

Easton noted that often White adults employed the word as a tool to instruct White children how to behave and not to behave. Adults reprimanded children for being “ignorant as niggers,” for having “no more credit than niggers,” for being “worse than niggers.”<sup>83</sup> They disciplined White children by telling them that if they misbehaved they would made to sit with niggers, consigned to the “nigger seat,” or be carried away by “the old nigger.”<sup>84</sup>

*Merriam-Webster’s Collegiate Dictionary* describes it as “rank[ing] perhaps as the most offensive and inflammatory racial slur in English.”<sup>85</sup> The N-word, according to Randall Kennedy, has become *the* paradigmatic racial epithet.<sup>86</sup> He writes that it is the slur that generates other slurs. For example, “Arabs are called sand niggers, Irish the niggers of Europe, and Palestinians the niggers of the Middle East.” He adds that “black bowling balls have been called nigger eggs, games of craps nigger golf, watermelons nigger hams, rolls of one dollar bills nigger rolls, bad luck nigger luck, gossip nigger news, and heavy boots nigger stompers.”<sup>87</sup> Other recent commentators have also articulated that the N-word is the penultimate racial epithet. Judge Steven Reinhardt describes it as “the most noxious racial epithet in the contemporary American lexicon.”<sup>88</sup> Writer Andrew Hacker noted that it “stands alone [in] its power to tear at one’s insides.”<sup>89</sup> Journalist Farai Chideya called it “the all-American trump card, the nuclear bomb of racial epithets.”<sup>90</sup> A dramatization of this fact is demonstrated in a *Saturday Night Live* skit by Richard Pryor and Chevy Chase and discussed in Randall Kennedy’s book entitled *Nigger*:

“White,” says Chase.

“Black,” Pryor replies.

“Bean.”

“Pod.”

“Negro.”

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<sup>81</sup> RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* 4 (2002).

<sup>82</sup> HOSEA EASTON, *A TREATISE ON THE INTELLECTUAL CHARACTER AND CIVIL AND POLITICAL CONDITION OF THE COLORED PEOPLE OF THE UNITED STATES; AND THE PREJUDICE EXERCISED TOWARDS THEM* 40-41 (1837).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, ELEVENTH EDITION 837 (2003).

<sup>86</sup> Randall Kennedy, *Who Can Say “Nigger” and Other Considerations*, 26 J. BLACKS IN HIGHER EDUCATION 88 (Winter 1999-2000) (stating that “nigger is and has long been *the* outstanding racial insult on the American social landscape”).

<sup>87</sup> KENNEDY, *supra* note 81, at 27-28.

<sup>88</sup> *Monteiro v. Tempe Union High School District*, 158 F.3d 1022 (9th Cir. 1998).

<sup>89</sup> ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 42 (1992).

<sup>90</sup> FARAI CHIDEYA, *THE COLOR OF OUR FUTURE* 9 (1999).

“Whitey,” Pryor replies lightly.  
 “Tarbaby.”  
 “What did you say?” Pryor asks, puzzled.  
 “Tarbaby,” Chase repeats, monotone.  
 “Ofay,” Pryor says sharply.  
 “Colored.”  
 “Redneck!”  
 “Jungle bunny!”  
 “Peckerwood,” Pryor yells.  
 “Burrhead!”  
 “Cracker.”  
 “Spearchucker!”  
 “White trash!”  
 “Jungle bunny!”  
 “Honky!”  
 “Spade!”  
 “Honky, honky!”  
 “Nigger,” says Chase smugly [aware that, when pushed, he can always use the trump card].  
 “Dead honky!” Pryor growls [resorting to the threat of violence now that he has been outgunned in the verbal game of racial insult].<sup>91</sup>

Though it is impossible to unequivocally declare that when used as an insult, the N-word is a more potent epithet than others, it has been “the most socially consequential racial insult.”<sup>92</sup> In illustrating this point, Kennedy searched federal and state court cases to distinguish the N-word from other racial epithets. He found that, as of July 2001, “wetback” appeared in 50, “kike” in 84, “gook” in 90, and “honky” in 286. The N-word, however, appeared in 4,219 cases.<sup>93</sup>

In the past several years the N-word has been the focus of considerable debate. In 2007, Ralph Papitto, chairman of Roger Williams University board, resigned after he admittedly used the N-word when discussing his frustration over pressures to diversify the board.<sup>94</sup> The Arts and Entertainment (“A&E”) television network pulled bounty hunter Duane “Dog” Chapman’s television show after a private telephone conversation of his, where he repeatedly used the N-word, was posted online.<sup>95</sup> And despite having graduated from Harvard Law School at the age of 19, Kiwi Camara’s history of writing “nig” in online class notes at Harvard when referencing Blacks resulted in a protest during his *Yale Law Journal* symposium presentation<sup>96</sup> and cost this genius a tenure-track faculty position at George Mason University Law School.<sup>97</sup> Incidents such as these, along with the continued use of the N-word among Blacks, caused the NAACP to have

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<sup>91</sup> KENNEDY, *supra* note 81, at 30-31

<sup>92</sup> *Id.* at 31-32.

<sup>93</sup> *Id.* at 32.

<sup>94</sup> See *University Leader Resigns After Using ‘N’ Word*, NEWS-TIMES, July, 17, 2007, at Local.

<sup>95</sup> See Jaymes Song, *Bounty Hunter in the Doghouse: Popular A&E Show Pulled Indefinitely, Chapman Vows Never to Use the N-word Again*, SEATTLE TIMES, Nov. 3, 2007, at A2.

<sup>96</sup> See Avi Salzman, *Symposium Guest’s Word Stirs Controversy at Yale*, N.Y. TIMES, March 8 2006, at 7.

<sup>97</sup> See Jenna Russell, *At Harvard Law, One-word Lessons*, BOSTON GLOBE, April 20, 2002, at B1; See also Ian Shapira, *Racist Writings as a Teen Haunted GMU Candidate*, WASHINGTON POST, April 3, 2007, at B.

a mock funeral for the word,<sup>98</sup> the New York City Council to pass a resolution banning the word,<sup>99</sup> and Reverend Al Sharpton to ask Cartoon Network for an apology over the use of the N-word in a Black animated series *The Boondocks* where Dr. Martin Luther King, Jr. is depicted as saying the word.<sup>100</sup>

One might speculate that the N-word has been part of the vocabulary of only those from the White underclass—so-called White trash. Historically, however, privileged and powerful Whites indulged in usage of the word as well. In response to news that Black leader Booker T. Washington dined at the White House, South Carolina Senator Benjamin Tillman indicated, “The action of President Roosevelt in entertaining that nigger will necessitate our killing a thousand niggers in the South before they will learn their place again.”<sup>101</sup> In 1938, when Allen Barkley, majority leader of the United States Senate, placed anti-lynching legislation on the agenda, South Carolina Senator James Byrnes faulted Walter White—a black NAACP official. Byrnes declared that Barkley “can’t do anything without talking to that nigger first.”<sup>102</sup> U.S. Supreme Court Justice James Clark McReynolds called Howard University, a historically black institution, as a “nigger university.”<sup>103</sup> President Harry Truman described Congressman Adam Clayton Powell as “that damned nigger preacher,”<sup>104</sup> and President Lyndon Johnson referred to his maid as a “nigger.”<sup>105</sup>

In addition to being employed by Whites as a racial slur against Blacks, the N-word has taken on a number of other meanings as well. For instance, it has served as a slur against liberal Whites—or at least those perceived to be liberal. During the civil rights era, Whites who joined Blacks in protest for Black social equality were referred to as “nigger lovers.” For example, when Black and White “freedom riders” rode together on a bus violating unlawful Jim Crow custom, the White bus driver delivered the riders to an angry mob of White racists in Alabama. When he did so, he yelled to the mob, “Well, boys, here they are. I brought you some niggers and nigger lovers.”<sup>106</sup> During a Maryland rally, a spokesman for the National States Rights Party indicated that most “nigger lovers are sick in the mind” and “should be bound, hung, and killed.”<sup>107</sup> “Nigger lover” is still employed to describe Whites who refuse to discriminate against Blacks, confront anti-Black practices, work on Blacks’ electoral campaigns, nominate Blacks for club membership, protect Blacks during the course of their official duties, and who merely socialize with Blacks.<sup>108</sup> Venus Evans-Winters, assistant professor of social work and urban education at Illinois Wesleyan University, noted that the N-word, contemporarily, is also used as

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<sup>98</sup> See Suzette Hackney, *The N-word Is Laid to Rest: Hundreds of Onlookers Cheered as the NAACP Attempted to Do Away with a Racist Expression, by Holding a Public Burial for the N-word*, MIAMI HERALD, July 10, 2007, at A5.

<sup>99</sup> See Emi Endo, *N.Y. Council Backs N-word Abstinence in Resolution*, CHICAGO TRIBUNE, March 1, 2007, at 6.

<sup>100</sup> See *MLK & the N-word: Boondocks, Sharpton Do Battle*, CINCINNATI POST, Jan. 26, 2006, at C8.

<sup>101</sup> STEPHEN KANTROWITZ, *BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY* 259 (2000).

<sup>102</sup> JOHN EGERTON, *SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* 117 (1994).

<sup>103</sup> WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 15 (1980).

<sup>104</sup> DAVID MCCOLLOUGH, *TRUMAN* 576 (1992).

<sup>105</sup> ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE MEANS OF ASCENT* 70 (1990).

<sup>106</sup> DAVID HALBERSTAM, *THE CHILDREN* 261 (1998).

<sup>107</sup> *Lynch v. State*, 236 A.2d 45, 48 (Md. Ct. Spec. App. 1967).

<sup>108</sup> KENNEDY, *supra* note 81, at 27

a pronoun, like “he, she or it.”<sup>109</sup> In a recent *Esquire* article, John Ridley, like in the stand-up routine of comedian Chris Rock,<sup>110</sup> used the N-word to draw a distinction between “upstanding” Black people and low class “niggers.”<sup>111</sup>

#### IV

##### THE N-WORD AND PRESUMPTIVE WHITE RACIAL ANIMUS

Though the jury convicted Nicholas Minucci of a hate crime in the attack and robbery of Glenn Moore,<sup>112</sup> one could foresee a very different outcome to that case. What if there was considerable evidence introduced at trial that Minucci only listened to hip-hop music, wore clothing characteristic of hip-hop culture, frequented Black comedy clubs and venues where spoken word was performed by Black poets? What if some of his best-friends were Black? This section rebuts the presumption that in a situation similar to Minucci’s, his conduct reflects anything but racial animus and thus a hate crime. The rationale is twofold: First, Whites do not traditionally assume that their use of the N-word towards a Black person can be construed as anything other than racial hostility. This is especially so when they are simultaneously attempting to intimidate or commit an act of aggression against a Black person. The fact that even Whites who are immersed in Black popular culture rarely use the word publicly suggests that their use of the word remains taboo. Second, research on implicit social cognition suggests that a remarkably high percentage of Whites harbor unconscious anti-Black attitudes.<sup>113</sup> Usage of the N-word while attempting to intimidate or commit an act of aggression against a Black person provides an instance where such attitudes are leaked out into explicit behavior.

##### A. Black and White Use of the N-word in Popular Culture

Regardless of how the N-word is used, there has been a growing tension over its use. Historically, there were times when the N-word was deemed acceptable among some Blacks when the word was used only amongst them.<sup>114</sup> Employing the N-word may have been an attempt to take the bite out of the word, to turn a negative into a positive, or be defiant.<sup>115</sup> The

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<sup>109</sup> Pam Adams, *N-word Use “A Real Eye-opener”: Whether Spoken by Whites or Blacks, ‘Soundtrack to American Racism’ Stirs Debate*, PEORIA STAR JOURNAL, Jan. 7, 2007, at A1.

<sup>110</sup> Chris Rock, *Who You Calling a Racist*, in *AFRICAN AMERICAN HUMOR: THE BEST BLACK COMEDY FROM SLAVERY TO TODAY* 281 (Mel Watkins ed., 2002).

<sup>111</sup> John Ridley, *The Manifesto of Ascendancy for the Modern American Nigger*, *ESQUIRE*, at 108. Ridley describes “niggers” as “the oppressed minority *within* our minority. Always down. Always out. Always complaining that they can’t get a break. Notoriously poor about doing for themselves. Constantly in need of a leader but unable to follow in any direction that’s navigated by hard work, self-reliance. And though they spliff and drink and procreate their way into welfare doles and WIC lines, niggers will tell you their state of being is no fault of their own. They are not responsible for their nearly 5 percent incarceration rate and their 9.2 percent unemployment rate. Not responsible for the 11.8 percent rate at which they drop out of high school. For the 69.3 percent of births they create out of wedlock.” *Id.* He goes on to describe black people as, “inheritors of ‘the Deal’ forced upon entrenched white social, political, and legal establishment when my parents’ generation won the struggle for civil rights. The Deal: We (blacks) take what is rightfully ours and you (the afore-described establishment) get citizens who will invest the same energy and dedication into raising families and working hard and being all around good people as was invested in snapping the neck of Jim Crow.” *Id.*

<sup>112</sup> Curry, *supra* note 35.

<sup>113</sup> Brian A. Nosek, et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 *EUROPEAN REV. SOC. PSYCHOL.* 36, XX (2007).

<sup>114</sup> Kennedy, *supra* note 86, at 89.

<sup>115</sup> KENNEDY, *supra* note 81, at 48-50

N-word has become increasingly popular among hip hop generation black youth.<sup>116</sup> And not surprisingly, some Whites have caught on to using the word. For those who use it, there are informal rules, however. An “a” ending is more acceptable than an “r,” and their use of the word is tolerated only if they are around Black people they know extremely well. Even then, it could be met with disapproval and even violence.<sup>117</sup> Despite these instances of toleration of Whites use of the N-word, those instances are a rarity and highly contextual. By and large, Whites use of the N-word is not tolerated, and even Whites immersed in Black popular culture understand this. Black comedians, rappers, and spoken-word artists have given the N-word entrée into popular American culture by peppering their routines and lyrics with the word.<sup>118</sup> Nonetheless, Whites who engage in racialized comedy, partake in hip hop culture, and participate in the spoken word community refrain from use of the word or, in those rare instances when they have employed it, have done so at their peril.

### *1. Racialized Comedy*

Within Black comedy, the N-word has been featured prominently<sup>119</sup> and has been interpreted among black people “within a specific, clearly defined context, tone, and set of codes rooted in black cultural vernacular.”<sup>120</sup> It has, as a result, been seen and used as a benign or friendly term—at least vis-à-vis gangsta rap.<sup>121</sup> Richard Pryor is credited with making it popular for blacks to use the N-word in their comedy routines, especially after his 1974 Grammy Award-winning album *That Nigger’s Crazy*.<sup>122</sup> The word has been used among Black comedians to help punctuate what may seem more like social commentary than mere jokes. For example, Richard Pryor spoke on police degradation of Blacks,<sup>123</sup> Paul Mooney on how Whites blame an

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<sup>116</sup> Neal Justin, ‘N’ Word Heard More Often, but Context Crucial: Long Used by Hip-hop Crowd, The Word with an Ugly Past is Entering Mainstream Culture. STAR TRIBUNE, Nov. 10, 1005, at 1A. (stating that “[d]uring a recent session with about a dozen black teens, almost all said they use the word regularly. Some use it as much as 50 times a day”).

<sup>117</sup> *Id.*

<sup>118</sup> Pam Adams, *N-word Use “A Real Eye-opener” – Whether Spoken by Whites or Blacks, ‘Soundtrack to American Racism’ Stirs Debate*, PEORIA STAR JOURNAL, Jan. 7, 2007, at A1; Earl Ofari Hutchinson, *‘Kramer’ and the N-word Double Standard*, DAILY NEWS OF L.A., Nov. 26, 2006, at V1; Neal Justin, ‘N’ Word Heard More Often, but Context Crucial: Long Used by Hip-hop Crowd, The Word with an Ugly Past is Entering Mainstream Culture. STAR TRIBUNE: NEWSPAPER OF THE TWIN CITIES, Nov. 10, 1005. 1A; *Tarantino’s Mantra: ‘Pulp’ Director Has Wrongheaded Approach to the N-word*, CHICAGO TRIBUNE, Nov. 6, 1994.

<sup>119</sup> KENNEDY, *supra* note 81, at 40-41.

<sup>120</sup> Robin D. G. Kelley, *Kickin’ Reality, Kickin’ Ballistics: Gangsta Rap and Postindustrial Los Angeles, in DROPPIN’ SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 137* (William Eric Perkins ed. 1996) [hereinafter DROPPIN’ SCIENCE]. “The use of ‘nigger’ with other black English markers has the effect of ‘smiling when you say that.’ The use of standard English with ‘nigger,’ in the words of an informant, is ‘the wrong tone of voice’ and may be taken as abusive.” Gloria Mitchell-Klernan, *Signifying, Loud-talking, and Marking, in RAPPIN AND STYLIN OUT: COMMUNICATION IN BLACK AMERICA 328* (Thomas Kochman ed. 1974).

<sup>121</sup> Kelley, *supra* note 91.

<sup>122</sup> RICHARD PRYOR, *THAT NIGGER’S CRAZY* (Reprise Records, 1974). The album explores a number of topics including “...Pryor’s professional fears (‘Hope I’m funny ... because I know niggers ready to kick ass’), blacks alleged ability to avoid certain types of danger (‘Niggers never get burned up in buildings....White folks just panic, run to the door, fall all over each other....Niggers get outside, then argue’), black parenting styles (‘My father was one of them eleven-o’clock niggers’), comparative sociology (‘White folks fuck quiet; niggers make noise’), racial anthropology (‘White folks... don’t know how to play the dozens’), and social commentary (‘Nothing can scare a nigger after four-hundred years of this shit’) KENNEDY, *supra* note 81, at 40-41.

<sup>123</sup> Richard Pryor, *Nigger Look Just Like You, in AFRICAN AMERICAN HUMOR: THE BEST BLACK COMEDY FROM SLAVERY TO TODAY 301* (Mel Watkins ed., 2002) [hereinafter AFRICAN AMERICAN HUMOR]. “Police degrade you, I

inordinate amount of wrongs on blacks,<sup>124</sup> and Chris Rock on the distinction between upstanding Blacks and low class niggers.<sup>125</sup> Dave Chapelle, in his remarkably successful show that aired on Comedy Central routinely used the word. His social commentary is highlighted by his skit about a White family called the Nigggar family, which played on stereotypes associated with Blacks. In the first scene, the Nigggar family is at the kitchen table dialoguing over breakfast:

Husband : Look hun, my sister just had another baby. Look at this little bundle of joy.

Wife : She's got those Nigggar lips.

Husband : I know, so thin. Is Tim still asleep?

Wife : I think so.

Husband: He sure is one lazy Nigggar.

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don't know, it's often you wonder why a nigger don't just go completely mad. No, you do. You get your shit together, you work all week, right. Then you get dressed, you make, say a cat make \$125. He get \$80 if he lucky, right, and go out clean, be drivin' with his old lady going out to a club. Then the police pull over. 'GET OUT OF THE CAR! THERE WAS A ROBBERY, NIGGER LOOK JUST LIKE YOU. ALL RIGHT PUT YOUR HANDS UP, TAKE YOUR PANTS DOWN, SPREAD YOUR CHEEKS.'

Now, what nigger feel like havin' fun after that?

'Oh, let's just go home, baby.' You go home and beat your kids and shit. You goin' take that shit out on somebody.'"

<sup>124</sup> PAUL MOONEY, RACE (Step Sun Music Entertainment 1993). Paul Mooney also comments on such topics as Nigger Vampire, how saying nigger Makes My teeth White, Niggerstein, Nigger Raisins, and a Nigger History Lesson. Paul Mooney, *Blame-a-Nigger*, in AFRICAN AMERICAN HUMOR 281. "They don't want to give us any credit. They just want to blame everything on niggers. Didn't some white man in Boston shoot his pregnant wife and then shoot himself, talkin' about, "Oh niggers did it." Always trying to blame some niggers... That's why I'm gonna start a new ad, 1-900-Blame-a -Nigger. So when white folks get in trouble, just call my agency.

'Hello, Blame-a-Nigger? I just pushed my mother down a flight of stairs. I don't want to go to jail. Send a nigger over here!'

'All right, I got one on parole. I'll send him right over ma'am.'"

<sup>125</sup> Chris Rock, *Who You Calling a Racist*, in AFRICAN AMERICAN HUMOR 281. "Who's more racist: black people or white people?

Black people.

You know why? Because black people hate black people, too. Everything white people hate about black people, black people don't like about black people. It's like our own personal civil war.

On one side, there's black people.

On the other, you've got niggers.

The niggers have got to go. Every time black people wan tot have a good time, niggers mess it up. You can't do anything without some ignorant-ass niggers fucking it up.

Can't keep a disco open more than three weeks. Grand opening? Grand closing.

Can't go to a movie the first week it opens. Why? Because niggers are shooting at the screen.

'This movie is so good I gotta bust a cap in here.'

I love black people, but I hate niggers. I'm tired of niggers. I wish they would let me join the Ku Klux Klan. I'd do a drive-by from L.A. to Brooklyn.

You can't have anything valuable when you're around niggers. You can't have a big screen TV. Well, you can have it, but you better move it in at three o'clock in the morning, paint it white, and hope niggers think it's a basinet.

You can't have anything in your house. Why? Because the niggers who are next door will break in, take it all, and then come over the next day and go, 'We heard you got robbed.'

'You know because you robbed me. You weren't hearing shit, because you were doing shit.'"

I'm tired of niggers. Tired, tired, tired.'"

Richard Pryor was the first to make the subtle distinction between black people and "niggers," not in a stand-up routine but as part of a rehabilitative journey to Africa. Pryor noted that, there are "no niggers [in Africa]... The people [in Africa], they still have their self-respect, their pride." See Derrick Z. Jackson, *Epithet Stung, Even for Pryor*, BOSTON GLOBE, Dec. 14, 2005, at A23.

Son: Good morning mom; good morning dad.  
Husband: You know Tim, we're having a dinner party tonight; I trust you'll be here.  
Son: Oh, I can't. I have my first big date with Jenny Halstead.

In the second scene, another family in the neighborhood discusses their assumptions about the Niggers:

Wife: Jenny has a date tonight with a Nigger boy from school.  
Husband: What!? Oh God, no!  
Daughter: No daddy, that's his name—Timmy Nigger.  
Husband: Oh, of course. That Nigger he's a very good athlete and so well-spoken. That family's going places. I mean we're rich, but they're Nigger rich.

In the third scene, the Nigger family interacts with their black milkman:

Milkman: Mornin' Niggers.  
Husband: Why it's Clifford, our colored milkman.  
Milkman: It's my favorite family to deliver milk to—the Niggers. Mmm. Mmm. Something sho' smells good. You Niggers cooking?  
Wife: We sure are. There's some leftover bacon if you'd like some.  
Milkman: Oooh, none for me. I know better than to get between a Nigger and their pork. I might get my fingers bit. Here you go. I'd hate to bother you about this, well you didn't pay your bill last week, and I know how forgetful you Niggers are when it comes to paying bills.  
Husband: Sorry Clifford; it slipped my mind. Here you go. Sorry about that.  
Milkman: Oh, Nigger please; Nigger please. Well, take care Mr. N-word. I have a hot date with the wife tonight.  
Husband: Alright, take care.  
MM: Alright, peace Nigger.<sup>126</sup>

Despite black comedians' frequent use of the N-word, White comedians, with few exceptions, have rarely been given a pass by White or Black audiences for using the N-word. Most White comedians avoid use of the word altogether. White comedians like Andrew Dice Clay, during the 1990s, used his comedy to slur minorities, homosexuals, and women.<sup>127</sup> However, despite his over-the-line attacks on Asians, for example, as "urine-colored people with towels on their heads,"<sup>128</sup> even Clay restrained himself when it came to using the N-word in his routines. Even contemporary White comedians, like Lisa Lampanelli whose routines focus on issues of race and who unabashedly employs other epithets during her act, dare not employ the N-word.<sup>129</sup>

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<sup>126</sup> DAVE CHAPELLE, CHAPELLE'S SHOW, SEASON 2 (Comedy Central 2005).

<sup>127</sup> JACK LEVIN & JACK MCDEVITT, HATE CRIMES REVISITED: AMERICA'S WAR ON THOSE WHO ARE DIFFERENT 38 (2002).

<sup>128</sup> John Leo, *Even Lenny Bruce Would Know Better*, U.S. NEWS & WORLD REPORT, May 28, 1990, p. 21.

<sup>129</sup> See, e.g., [http://www.youtube.com/watch?v=35CXbEpoA\\_c&mode=relatedsearch=](http://www.youtube.com/watch?v=35CXbEpoA_c&mode=relatedsearch=). "That's right bitches; you know I bang a lot of black guys. That's my thing; that's right, son. Yeah son. It aint by choice. I just haven't lost enough weight to get a white guy to fuck me. That's the problem. You white devils with your skinny bitches. I gotta put up with that. Cause black guys enjoy the padunkadunk. Isn't that right? Even though you're kind of a white black guy—like a Bill Cosby black. You know a black guy with white features like a job and a cell phone. You

One rare exception was during Black Entertainment Television's 1998 season of *Comic View* when Gary Owens became the first and only White comedian to host a season. During his winning routine during the competition to become host, Owens said the N-word and received a standing ovation from the largely Black audience. He ultimately landed the coveted spot over black comedians who competed.<sup>130</sup> Though his use of the word was clearly accepted by members of the audience, Black comedians took offense to it.<sup>131</sup> In another instance, the creators of Comedy Central's television show *South Park* were lauded for their comedic social commentary on the N-word. In one episode, a character named Randy appeared on *Wheel of Fortune* and had to provide an answer for "people who annoy you," which had the letters "N\_GGERS." He incorrectly answered with "NIGGERS" when the correct answer was "NAGGERS." During the course of the show, the N-word was used 42 times, but the episode was focused on the lesson Randy learned from having used the word.<sup>132</sup>

Another exception was Michael Richards', Kramer from *Seinfeld*, Laugh Factory routine on November 17, 2006. His routine, however, had much different results than Gary Owens'. During his stand-up act, Richards perceived that he was being heckled by some members of the audience. Two men who he lashed out at in particular were Kyle Doss and Frank McBride—both black.<sup>133</sup> According to Doss, a large multi-ethnic group of individuals went to the Laugh Factory. They interrupted Richards' act simply by walking in, taking their seats, and ordering their drinks.<sup>134</sup> According to Doss, Richards noted, "All the Blacks and Mexicans are here."<sup>135</sup> Doss went on to tell Richards he lacked humor, to which Richards responded with "Fuck you, nigger."<sup>136</sup> Much of Richards' tirade was caught on tape, but according to Doss, some of what Richards said was inaudible. For example, Doss indicated that Richards said that he had enough money to put Doss and McBride in jail, that he could buy Doss and McBride, and that "when I wake up I'm still going to be rich, but when you wake up, you're still going to be a [nigger]."<sup>137</sup> The true brunt of Richards attack was seen on a recording made on an audience member's cellular telephone:

Richards: Shut up! Fifty years ago, we'd have you upside down with a fucking fork up your ass. You can talk! You can talk! You can talk! You're brave now motherfucker! Throw his ass out. He's a nigger! He's a nigger! He's a nigger! A nigger! Look, there's a nigger! Oooh, oooh. Alright you see? This shocks you; it shocks you to see what's buried beneath you stupid motherfuckers!  
Audience Member: That was uncalled for.

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never see that. That must be some pre-paid shit motherfucker! Prepaid, prepaid. But black guys are cool. They do like a big ass. My black boyfriend says 'the bigger the cushion, the sweeter the pushin'.' Bull, he just wants to have something to hide behind when the cops start shooting. 'Cause once you go black, the cops will attack. How you doing Hector, popi conyo? I love that little spic. I always wanted to bang one of you bastards. But my parents are those old fashioned racist Italians. And you know the old saying, 'Once you go Hispanic, woohoo, mom and dad start to panic.' Well, because you steal..." *Id.*

<sup>130</sup> DARRYL LITTLETON, *BLACK COMEDIANS ON BLACK COMEDY: HOW AFRICAN AMERICANS TAUGHT US TO LAUGH* 214 (2006).

<sup>131</sup> *Id.* at 215-218.

<sup>132</sup> <http://www.milkandcookies.com/link/58827/detail/> ;

[http://southpark.comedycentral.com/video\\_by\\_episode.jhtml?episodeId=102800](http://southpark.comedycentral.com/video_by_episode.jhtml?episodeId=102800)

<sup>133</sup> Aldore D. Collier, *Black Leaders Unite in Call to End the Use of the 'N' Word*, JET, at 6.

<sup>134</sup> *Today Show*, Nov. 22, 2006, [http://www.youtube.com/watch?v=BQ5R2NLI\\_NY](http://www.youtube.com/watch?v=BQ5R2NLI_NY) (last visited February 13, 2007).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

Richards: What was uncalled for? It's uncalled for you to interrupt my ass you cheap motherfucker! You guys have been talkin' and talkin' and talkin'. I don't know, I don't know, I don't know. What's the matter? Is this too much for you to handle? They're going to arrest me for calling a Black man a nigger. Wait a minute, where' he going?

Audience member: That was uncalled for you fucking cracker-ass motherfucker.

Richards: Cracker-ass? You calling me cracker ass, nigger?

Audience Member: Fucking white boy.

Richards: Are you threatening me?

Audience Member: We'll see what's up.

Richards: Oh, it's a big threat. That's how you get back at the man.

Audience Member: That was real uncalled for.

Richards: Wait a minute; he's not going is he?

Audience Member: It's not funny, that's why you're a reject—never had no shows, never had no movies, *Seinfeld*—that's it.

Richards: Oh, I guess you got me there. You're absolutely right. I'm just a wash up. Gotta stand on a stage.

Audience Member: That's un-fucking called for. That ain't necessary.

Richards: Well, you interrupted me pal. That's what happens when you interrupt the White man; don't you know?

Audience Member: Uncalled for. That was uncalled for.

Richards: You see? You see? There's still those words, those words, those words.<sup>138</sup>

Though Richards' comments went beyond a comic routine and turned into a tirade, the fall-out from his comments highlighted that whether Black comedians use the N-word or not, its use by White comedians is largely not tolerated. Paul Mooney, who routinely uses the N-word in his stand-up comedy acts, vowed to never use the word again after seeing the Michael Richards video. Mooney noted, "I've used it and I've abused it. Seeing the video put me in shock—and I'm not easily shocked. [Richards] cured me. He's my Dr. Phil. Hip-hoppers need to wake up."<sup>139</sup>

## 2. Rap Music

Rappers, particularly so-called "gangsta rappers," have employed the N-word in their lyrics—and possibly with increasing frequency.<sup>140</sup> Aside from Nas whose forthcoming album is entitled *Nigger*,<sup>141</sup> Ol' Dirty Bastard's album entitled *Nigga Please*,<sup>142</sup> and NWA (Niggaz With an Attitude) who entitled one of their albums *Efil4zaggin* (Niggaz 4 Life spelled backwards),<sup>143</sup> a number of rappers have employed the N-word in their song titles. Dr. Dre's "The Day the Niggas Took Over,"<sup>144</sup> A Tribe Called Quest's "Sucka Nigga,"<sup>145</sup> Nas' "Last Real Nigga Alive,"<sup>146</sup> the

<sup>138</sup> <http://www.youtube.com/watch?v=QgmCBKPHnSy>.

<sup>139</sup> Aldore D. Collier, *Black Leaders Unite in Call to End the Use of the 'N' Word*, JET, at 6.

<sup>140</sup> Robin D. G. Kelley, *Kickin' Reality, Kickin' Ballistics: Gangsta Rap and Postindustrial Los Angeles*, in *Droppin' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 137* (William Eric Perkins ed. 1996).

<sup>141</sup> <http://www.rollingstone.com/rockdaily/index.php/2007/10/26/nas-talks-to-rs-about-new-album-controversy-while-politicians-join-fight-to-prevent-title/>

<sup>142</sup> Ol' Dirty Bastard, *Nigga Please* (Elektra 1999).

<sup>143</sup> N.W.A., *EFIL4ZAGGIN* (Priority Records 1991).

<sup>144</sup> DR. DRE, *THE CHRONIC* (Priority Records 1992).

<sup>145</sup> A TRIBE CALLED QUEST, *MIDNIGHT MARAUDERS* (Jive 1993).

Geto Boys “Trigga Happy Nigga,”<sup>147</sup> Snoop Dogg’s “Down 4 My Niggas,”<sup>148</sup> Public Enemy’s “Anti-Nigger Machine,”<sup>149</sup> DJ Quick’s “Can’t Fuck With a Nigga,”<sup>150</sup> and Tupac’s “Definition of a Thug Nigga”<sup>151</sup> all serve as examples. Rappers can mean any number of things when they employ the N-word. Rappers, and Blacks who have appropriated their language and rationale for using the N-word, often make distinctions between “nigger” and “nigga.”<sup>152</sup> On his album, *2Pacalypse Now*, rapper 2Pac indicates that “nigga” is an acronym for “Never Ignorant Getting Goals Accomplished.”<sup>153</sup> Rappers have also used “nigga” to describe a condition as opposed to skin color or culture. This variation of the N-word has been employed to propose a collective identity born out of “class consciousness, the character of inner-city space, police repression, poverty, and the constant threat of interracial violence fed by a dying economy.”<sup>154</sup> This is glaringly apparent on N.W.A.’s (Niggaz With an Attitude) *Efil4zaggin* album<sup>155</sup> where the N-word is almost synonymous for oppressed.<sup>156</sup> In some, maybe most, instances rappers employ it to refer to the basest elements of Black culture. For instance, it may be used to refer to a Black person, man usually, who is violent, hypersexual, criminal, and/or manipulative (especially of women).<sup>157</sup> Others, particularly Black Nationalist rappers, use it to describe Blacks who are defiant against White domination and exploitation<sup>158</sup> and to provide an ironic and humorous comment on the White fears of Black militancy.<sup>159</sup>

Given the crossover appeal of rap music, it was arguably only a matter of time before non-blacks might think that it was appropriate for them to use the N-word.<sup>160</sup> Whites who fancy themselves as immersed in hip-hop culture undoubtedly appropriate various aspects of that culture, including its linguistic style.<sup>161</sup> This includes using the N-word in their linguistic repertoire.<sup>162</sup> Most Whites, however, immersed in hip-hop culture often refrain from “openly and unabashedly” saying the N-word fearing that it will be perceived as a slight rather than a sign of solidarity.<sup>163</sup> The few White rappers who have attempted to use the N-word in their lyrics have created racial tension.<sup>164</sup> For instance, MTV televised a reality show called *Ego*

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<sup>146</sup> NAS, *GOD’S SON* (Sony 2002)

<sup>147</sup> GETO BOYS, *GETO BOYS* (Asylum Records 1990).

<sup>148</sup> SNOOP DOGG, *NO LIMIT TOP DOGG* (Priority Records 1999).

<sup>149</sup> PUBLIC ENEMY, *FEAR OF A BLACK PLANET* (Def jam 1990).

<sup>150</sup> VARIOUS ARTISTS, *MENACE II SOCIETY: THE ORIGINAL MOTION PICTURE SOUNDTRACK* (Jive 1992).

<sup>151</sup> VARIOUS ARTISTS, *POETIC JUSTICE* (Sony 1993).

<sup>152</sup> Kelley, *supra* note 120, at 137.

<sup>153</sup> 2PAC, *2PACALYPSE NOW* (Jive 1991).

<sup>154</sup> Kelley, *supra* note 120, at 137.

<sup>155</sup> N. .W.A., *supra* note 143.

<sup>156</sup> Kelley, *supra* note 120, at 137.

<sup>157</sup> Jason Nichols, *The Realist Nigga: Constructions of Black Masculinity Within Rap Music* 40-55 (2006) (unpublished M.A. thesis, University of Maryland-College Park) (on file with author).

<sup>158</sup> Athena Alefros, “Revolutionary but Gangsta”: An Analysis of Message Raps and Gangsta Raps in the Early 1990s at 112-115 (September 2005) (unpublished M.A. thesis, Queen’s University) (on file with author).

<sup>159</sup> Kelley, *supra* note 120, at 137 n.54.

<sup>160</sup> Randall Kennedy, *White Lie*, *NEW REPUBLIC*, Oct. 16, 2006, at 9.

<sup>161</sup> Cecelia Cutler, *Yorkville Crossing: White Teens, Hip Hop and African American English*, 3/4 *J. SOCIOLOGICAL LINGUISTICS* 428-442 (1999); Cecelia Cutler, “Keepin’ It Real”: *White Hip-hoppers’ Discourses of Language, Race, and Authenticity*, 13 *J. LINGUISTIC ANTHROPOLOGY* 211-233 (2003).

<sup>162</sup> Cutler, *supra* note 161, at 222.

<sup>163</sup> KENNEDY, *supra* note 81, at 50

<sup>164</sup> Armond White, *Who Wants to See Ten Niggers Play Basketball?*, in *DROPPIN’ SCIENCE* 197 (noting how non-White rap artist should feel free to use the N-word and critiquing a White rap groups use of the N-word in their

*Trips The (White) Rapper Show*, which featured a number of Whites who wanted to become a rapper. The winner of the show was awarded a record contract and one-hundred thousand dollars. During one episode, two of the competitors—Persia and John—got into an argument, whereby Persia repeatedly used the N-word during her rant. As a punishment, the show’s host required her to wear a necklace with “N\*WORD” emblazoned across a large faux platinum and diamond pendant. She was specifically reprimanded for her usage of the word.<sup>165</sup> If Jennifer Lopez, the high-profile Latina and former girlfriend of hip-hop mogul Sean “P-Diddy” Combs, could not use the N-word in her song lyrics without creating a furor,<sup>166</sup> it is no surprise that White rappers are barred from using it.

Quasi-empirical data also serves to further undermine the notion that simply because a White person is immersed in hip hop culture, where the N-word is frequently used, does not authorize Whites’ use of it. Towards that end, we analyze lyrics of both Black and White rappers to determine with what frequency each uses the word, comparatively. Methodologically, we selected a sampling of hip hop albums by googling “top 100 hip hop albums.” We ultimately selected the website that had the most current list—thus ranging from 1995 to 2005. We wanted to make sure we selected a site that potentially included albums released prior to or during the period of Nicholas Minucci’s assault on Glenn Moore. We ultimately selected the site that posted the March 2006 listing of best rap albums from *Hip-Hop Connection*.<sup>167</sup> For White rappers, we googled “white rappers,” and from two websites that were retrieved,<sup>168</sup> we developed a list of White rappers with widespread name recognition. We then googled each group or solo artist for lyrics to their albums. We found complete lyrics for 35 Black rappers’ albums<sup>169</sup> and

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lyrics). See YOUNG BLACK TEENAGERS, *Daddy Called Me Niga ‘Cause I Liked to Rhyme*, YOUNG BLACK TEENAGERS (MCA 1991).

<sup>165</sup> EGO TRIPS THE (WHITE) RAPPER SHOW, Dec. 8, 2006.

<http://www.vh1.com/video/play.jhtml?id=1549361&vid=127086>

<sup>166</sup> Shellie R. Warren, *J. Lo and ‘The N-word’ Split Local Listeners*, TENNESSEAN, Aug. 18, 2001, at P1E.

<sup>167</sup> <http://www.listsofbests.com/list/8992>

<sup>168</sup> [http://en.wikipedia.org/wiki/White\\_rapper](http://en.wikipedia.org/wiki/White_rapper) and <http://www.jimdavies.org/personal/white-rappers.html>

<sup>169</sup> REAKWON, ONLY BUILT FOR CUBAN LINX (1995) 18/18 songs, See <http://www.allthelyrics.com/lyrics/reakwon/> (last visited February 13, 2007); GHOSTFACE KILLAH, SUPREME CLIENTELE (2000) 14/15 songs, See <http://www.azlyrics.com/g/ghostface.html> (last visited February 13, 2007); MOBB DEEP, THE INFAMOUS (1995) 16/16 songs, See [http://www.songlyrics.com/song-lyrics/Mobb\\_Deep/9477.html](http://www.songlyrics.com/song-lyrics/Mobb_Deep/9477.html) (last visited February 13, 2007); JAY-Z, THE BLUEPRINT (2001) 12/13 songs, See <http://www.songlyrics.com/song-lyrics/Jay-Z/2682.html> (last visited February 13, 2007); OUTKAST, ATLIENS (1996) 15/15 songs, See <http://www.songlyrics.com/song-lyrics/Outkast/1960.html> (last visited February 13, 2007); GENIUS, LIQUID SWORDS (1995) 13/13 songs, See <http://www.stlyrics.com/songs/g/gza25990.html> (last visited February 13, 2007); DE LA SOUL, STAKES IS HIGH (1996) 2/17 songs, See [http://www.songlyrics.com/song-lyrics/De\\_La\\_Soul/1311.html](http://www.songlyrics.com/song-lyrics/De_La_Soul/1311.html) (last visited February 13, 2007); CLIPSE, LORD WILLIN’ (2002) 14/15 songs, See <http://www.azlyrics.com/c/clipse.html> (last visited February 13, 2007); DR. DRE, 2001(1999) 20/20 songs, See <http://www.azlyrics.com/d/drdre.html> (last visited February 13, 2007); OUTKAST, AQUEMINI (1998) 16/16 songs, See <http://www.songlyrics.com/song-lyrics/Outkast/1960.html> (last visited February 13, 2007); JAY-Z, REASONABLE DOUBT (1996) 15/15 songs, See <http://www.songlyrics.com/song-lyrics/Jay-Z/2682.html> (last visited February 13, 2007); B.I.G., LIFE AFTER DEATH (1997) 20/20 songs, See [http://www.songlyrics.com/song-lyrics/Notorious\\_B\\_I\\_G/2080.html](http://www.songlyrics.com/song-lyrics/Notorious_B_I_G/2080.html) (last visited February 13, 2007); FUGEES, THE SCORE (1996) 12/16 songs, See <http://www.songlyrics.com/song-lyrics/Fugees/4380.html> (last visited February 13, 2007); THE BEATNUTS, STONE CRAZY (1997) 14/17 songs, See [http://www.songlyrics.com/song-lyrics/Beatnuts\\_The/912.html](http://www.songlyrics.com/song-lyrics/Beatnuts_The/912.html) (last visited February 13, 2007); MOP, WARRIORZ (2000) 19/19 songs, See [http://www.songlyrics.com/song-lyrics/M\\_O\\_P/12884.html](http://www.songlyrics.com/song-lyrics/M_O_P/12884.html) (last visited February 13, 2007); OUTKAST, SPEAKERBOXXX (2003) 18/20 songs, See <http://www.songlyrics.com/song-lyrics/Outkast/1960.html> (last visited February 13, 2007); KANYE WEST, THE COLLEGE DROPOUT (2004) 20/20 songs, See <http://www.azlyrics.com/w/west.html>; GRAND PUBA, 2000 (1995) 0/11 songs, See

for 30 White rappers' albums.<sup>170</sup> Out of the Black rappers' 536 songs analyzed, 436 contained

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<http://www.lyricsdownload.com/album-B000002HF3.html> (last visited February 13, 2007); BIG L, LIFESTYLZ OV DA POOR & DANGEROUS (1995) 11/12 songs, *See* [http://www.songlyrics.com/song-lyrics/Big\\_L/5170.html](http://www.songlyrics.com/song-lyrics/Big_L/5170.html) (last visited February 13, 2007); JAY-Z, THE BLACK ALBUM (2003) 14/14 songs, *See* <http://www.songlyrics.com/song-lyrics/Jay-Z/2682.html> (last visited February 13, 2007); THE ROOTS, ILLADELPH HALFLIFE (1996) 16/20 songs, *See* <http://www.azlyrics.com/r/roots.html> (last visited February 13, 2007); LIL JON & THE EASTSIDE BOYZ, CRUNK JUICE (2004) 17/20 songs, *See* <http://www.songlyrics.com/showartists.php?letter=L> (last visited February 13, 2007); OL' DIRTY BASTARD, RETURN TO THE 36 CHAMBERS (1995) 17/17 songs, *See* <http://www.azlyrics.com/o/oldirtybastard.html> (last visited February 13, 2007); THE ALKAHOLIKS, COAST TO COAST (1995) 10/10 songs, *See* <http://www.lyricsdownload.com/album-B000002WQQ.html> (last visited February 13, 2007); SCARFACE, THE FIX (2002) 12/13 songs, *See* <http://www.allthelyrics.com/lyrics/scarface/> (last visited February 13, 2007); TUPAC, ALL EYEZ ON ME (1996) 20/20 songs, *See* <http://www.azlyrics.com/19/2pac.html> (last visited February 13, 2007); GANGSTARR, MOMENT OF TRUTH (1998) 19/20 songs, *See* <http://www.songlyrics.com/song-lyrics/Gang%20Starr/8936.html> (last visited February 13, 2007); LAURYN HILL, MISEDUCATION OF LAURYN HILL (1998) 0/16 songs, *See* [http://www.songlyrics.com/song-lyrics/Lauryn\\_Hill/7465.html](http://www.songlyrics.com/song-lyrics/Lauryn_Hill/7465.html) (last visited February 13, 2007); N.E.R.D., IN SEARCH OF (2002) 1/13 songs, *See* <http://www.songlyrics.com/song-lyrics/N.E.R.D./1600.html> (last visited February 13, 2007); THE ROOTS, THINGS FALL APART (1995) 14/18 songs, *See* <http://www.azlyrics.com/r/roots.html> (last visited February 13, 2007); KRS ONE, KRS ONE (1999) 1/14 songs, <http://www.allthelyrics.com/lyrics/krone/> (last visited February 13, 2007); 50 CENT, GET RICH OR DIE TRYIN' (2003) 16/16 songs, *See* <http://www.azlyrics.com/19/50cent.html> (last visited February 13, 2007); CAM RON, PURPLE HAZE (2004) 18/20 songs, *See* <http://www.songlyrics.com/song-lyrics/CAM'RON/410.html> (last visited February 13, 2007); WU TANG CLAN, WU TANG FOREVER (1997) 24/27 songs, *See* <http://www.azlyrics.com/w/wutang.html> (last visited February 13, 2007); LIL WAYNE, THA CARTER (2004) 19/21 songs, *See* <http://www.azlyrics.com/l/lilwayne.html> (last visited February 13, 2007).

<sup>170</sup> 3RD BASE, DERELICTS OF DIALECT (1994) 0/20, *See*

<http://www.lyred.com/lyrics/3rd+Bass/Derelicts+Of+Dialect/>; BEASTIE BOYS, CHECK YOUR HEAD (1992) 0/17 songs, *See* <http://www.azlyrics.com/b/beastie.html>; BEASTIE BOYS, HELLO NASTY (1998) 0/19 songs, *See* <http://www.azlyrics.com/b/beastie.html>; BEASTIE BOYS, ILL COMMUNICATION (1994) 0/20 songs, *See* <http://www.azlyrics.com/b/beastie.html>; BEASTIE BOYS, LICENSED TO ILL (1986) 0/13 songs, *See* <http://www.azlyrics.com/b/beastie.html>; BEASTIE BOYS, PAUL'S BOUTIQUE (1989) 0/15 songs, *See* <http://www.azlyrics.com/b/beastie.html>; BEASTIE BOYS, TO THE 5 BOROUGHS (2004) 0/15 songs, *See* <http://www.azlyrics.com/b/beastie.html>; BUBBA SPARXXX, DARK DAYS BRIGHT NIGHTS (2001) 0/18, *See* <http://www.azlyrics.com/b/bubba.html>; BUBBA SPARXXX, DELIVERANCE (2003) 0/15, *See* <http://www.azlyrics.com/b/bubba.html>; BUBBA SPARXXX, THE CHARM (2006) 1/11, *See* <http://www.azlyrics.com/b/bubba.html>; EMINEM, CURTAIN CALL (2005) 3/17, *See* <http://www.songlyrics.com/song-lyrics/Eminem/1286.html>; EMINEM, THE EMINEM SHOW (2002) 4/20, *See* <http://www.songlyrics.com/song-lyrics/Eminem/1286.html>; EMINEM, THE MARSHALL MATHERS LP (2000) 5/18, *See* <http://www.songlyrics.com/song-lyrics/Eminem/1286.html>; EMINEM, THE SLIM SHADY LP (1999) 3/20, *See* <http://www.songlyrics.com/song-lyrics/Eminem/1286.html>; EVERLAST, EAT AT WHITEY'S (2000) 0/13, *See* <http://www.azlyrics.com/e/everlast.html>; EVERLAST, WHITEY FORD SINGS THE BLUES (1998) 0/18, *See* <http://www.azlyrics.com/e/everlast.html>; HOUSE OF PAIN, HOUSE OF PAIN (1992) 1/18 songs, *See* [http://www.songlyrics.com/song-lyrics/House\\_Of\\_Pain/4960.html](http://www.songlyrics.com/song-lyrics/House_Of_Pain/4960.html); HOUSE OF PAIN, SAME AS IT EVER WAS (1994) 0/15 songs, *See* [http://www.songlyrics.com/song-lyrics/House\\_Of\\_Pain/4960.html](http://www.songlyrics.com/song-lyrics/House_Of_Pain/4960.html); HOUSE OF PAIN, TRUTH CRUSHED TO EARTH SHALL RISE (1996) 0/13 songs, *See* [http://www.songlyrics.com/song-lyrics/House\\_Of\\_Pain/4960.html](http://www.songlyrics.com/song-lyrics/House_Of_Pain/4960.html); KID ROCK, COCKY (2001) 1/14 songs, *See* [http://www.songlyrics.com/song-lyrics/Kid\\_Rock/2429.html](http://www.songlyrics.com/song-lyrics/Kid_Rock/2429.html); KID ROCK, DEVIL WITHOUT A CAUSE (1998) 2/14 songs, *See* [http://www.songlyrics.com/song-lyrics/Kid\\_Rock/2429.html](http://www.songlyrics.com/song-lyrics/Kid_Rock/2429.html); KID ROCK, GRITS SANDWICHES FOR BREAKFAST (1990) 0/13 songs, *See* [http://www.songlyrics.com/song-lyrics/Kid\\_Rock/2429.html](http://www.songlyrics.com/song-lyrics/Kid_Rock/2429.html); KID ROCK, HISTORY OF ROCK (2000) 0/14 songs, *See* [http://www.songlyrics.com/song-lyrics/Kid\\_Rock/2429.html](http://www.songlyrics.com/song-lyrics/Kid_Rock/2429.html); PAUL WALL, PEOPLE'S CHAMP (2005) 0/15, *See* <http://www.azlyrics.com/p/paulwall.html>; REMEDY, REMEDY (1993) 0/11 songs, *See* <http://www.songlyrics.com/song-lyrics/Remedy/5176.html>; SNOW, 12 INCHES OF SNOW (1993) 0/14 songs, *See* <http://www.songlyrics.com/song-lyrics/Snow/7893.html>; VANILLA ICE, BI-POLAR (2001) 0/24, *See* [http://www.lyricsmania.com/lyrics/vanilla\\_ice\\_lyrics\\_3880/](http://www.lyricsmania.com/lyrics/vanilla_ice_lyrics_3880/); VANILLA ICE, HARD TO SWALLOW (1998) 0/13, *See* [http://www.lyricsmania.com/lyrics/vanilla\\_ice\\_lyrics\\_3880/](http://www.lyricsmania.com/lyrics/vanilla_ice_lyrics_3880/); VANILLA ICE, MIND BLOWIN' (1994) 0/17, *See*

the N-word (81.3%). Out of the White rappers' 477 songs analyzed, 20 contained the N-Word (4.2%). These data were statistically analyzed, and the results indicated that difference between the percentages are statistically significant ( $\chi^2 = 606.94$ ,  $p < .001$ ), and represent a strong statistical effect ( $\Phi = .77$ ). Among these twenty songs, it is likely that a number of them featured guest appearances by Black rappers who used the N-word as opposed to the featured, White artist. These results suggest that even Whites rappers who are thoroughly immersed in black culture generally, and hip hop culture in particular, do not employ the N-word in their vocabulary with much frequency. They certainly do not use it nearly as much as one might expect they would given the argument provided by Nicholas Minucci's defense counsel and what might be implied from the defense's expert witnesses.

### 3. *Spoken Word*

Spoken word is, quite simply, recited poetry. It has long been popular in the Black community. Arguably, one of the founders of the spoken word movement is the group The Last Poets. Its members founded the group during the 1960s and unabashedly employed the N-word in a number of their song titles—*Run, Nigger*,<sup>171</sup> *Wake Up, Niggers*,<sup>172</sup> and *Niggers are Scared of Revolution*.<sup>173</sup> In the last of these titles, over a background chorus of “Niggers, niggers, all niggers, niggers, niggers,” The Last Poets rhythmically speak:

....

Niggers are lovers, are lovers, are lovers.  
Niggers loved to hear Malcolm rap.  
But they didn't love Malcolm.  
Niggers love everything but themselves.

But I'm a lover too, yes I'm a lover too.  
I love niggers, I love niggers, I love niggers.

Because niggers are me.  
And I should only love that which is me.  
I love to see niggers go through changes.  
Love to see niggers act.  
Love to see niggers make them plays and shoot the shit.

But there is one thing about niggers I do not love.  
Niggers are scared of revolution.<sup>174</sup>

More recently, spoken word artist, Julian Curry, appeared on HBO's show Def Comedy Jam and delivered his poem “Nigger, Niggas & Niggaz.” He said:

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[http://www.lyricsmania.com/lyrics/vanilla\\_ice\\_lyrics\\_3880/](http://www.lyricsmania.com/lyrics/vanilla_ice_lyrics_3880/); VANILLA ICE, TO THE EXTREME (1990) 0/15, See [http://www.lyricsmania.com/lyrics/vanilla\\_ice\\_lyrics\\_3880/](http://www.lyricsmania.com/lyrics/vanilla_ice_lyrics_3880/).

<sup>171</sup> THE LAST POETS, THE LAST POETS (Various 1970).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* See also, [www.youtube.com](http://www.youtube.com) (type “niggaz are scared of revolution”).

...

You see “nigger’s” been passed through our families, generation to generation like cancer.

It used to be said by slave masters who weren’t in the business of greeting no dancing niggers.

The only wanted good old field niggers.

But I wonder how the field nigger would feel if he was sitting next to me on the A-train at approximately three o’clock any day of the week,

And he heard his little great great grandson speak dozens if not hundreds of times from 59<sup>th</sup> Street to West 4<sup>th</sup>.

The word that made Black families pack up in the South to move North.

Would he slam a couple of these boys against the doors and ask:

‘What’s the deal, nigga? Do you think you’re keeping it real, nigga? Do you know how I was killed, nigga? They murdered me with hot rods of steel, nigga. Now how do you think this makes me feel, nigga?’

<sup>175</sup>

...

Despite the use of the N-word among Black spoken word artists, its use by Whites during their routines has likely been non-existent or marginal at best.

## B. Implicit Bias

A second factor suggests that where a White person commits an act of violence or intimidation against a Black person and hurls the N-word, such conduct should be deemed a hate crime. There is a vast and growing body of social scientific research that suggests that many Whites harbor implicit (unconscious) anti-Black attitudes. And legal academicians have begun to import this research into their scholarship.<sup>176</sup> Within the realm of hate crime laws, the

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<sup>175</sup> Julian Curry, “Niggers, Niggas & Niggas,” [www.youtube.com](http://www.youtube.com) (type “Def Poetry” and “Julian Curry”).

<sup>176</sup> See IAN AYRES, PERVERSIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 419–25 (2001); R. Richard Banks et al., *Discrimination and Implicit Racial Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006); Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL’Y 225, 238–40 (2003); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Kristin A. Lane, Jerry Kang, & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427 (2007); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, 57 DUKE L.J. (forthcoming 2007); Lateef Mtima, *The Road to the Bench: Not Even Good (Subliminal) Intentions*, 8 U. CHI. L. SCH. ROUNDTABLE 135 (2001); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L. REV. 155 (2005); Marc R. Poirier, *Is Cognitive*

utterance of the N-word by a White person while engaged in some criminal act against a Black person suggests leakage of these implicit racial biases.

An implicit construct is “the introspectively unidentified (or inaccurately identified) trace of past experience that mediates [the category of responses that are assumed to be influenced by that construct].”<sup>177</sup> Implicit cognition, in turn, reveals mental associations that people are unwilling or are unable to report. This is because such cognitions might conflict with expressly-held values or beliefs. Moreover, implicit cognitions reveal information that is not readily available to introspection for people with a desire to retrieve and/or express such information.<sup>178</sup> Therefore, the key feature of implicit measures of attitudes is that subjects, often unaware that their attitudes are being measured, are unable to exert conscious control over their responses. In this way, implicit measures of attitudes have several comparative advantages over explicit measures. First, when explicit measures are used, individuals may not reveal their true attitudes or preferences because of social desirability biases, thus attenuating the magnitude of the relationship that researchers identify between attitudes and behavior. Second, individuals may not even be aware of their true preferences or attitudes.<sup>179</sup>

In situations where people have the motivation and the opportunity to deliberately regulate their behavior, they rely primarily on effortful processing to do so—e.g., seen in explicit self-report measures. On the other hand, when either motivation or opportunity to deliberate are lacking, behavior is guided primarily by less controlled processes, which implicit measures try to tap. Thus, implicit measures should be particularly valuable predictors of behavior for situations in which people have limited control over their actions.<sup>180</sup> The Implicit Association Test (“IAT”) is a popular measure of the relative strength of associations between pairs of concepts,<sup>181</sup> including positive/negative attributes and race.

Approximately 70% of Whites harbor anti-Black/pro-White biases.<sup>182</sup> Andrew Baron and Mahzarin Banaji found that White 6-year-olds demonstrate implicit pro-White/ anti-Black

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*Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL’Y J. 459 (2003); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 915 (1999); Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500-507 (2007); Reshma M. Saujani, *The Implicit Association Test: A Measure of Unconscious Racism in Legislative Decision-making*, 8 MICH. J. RACE & L. 395 (2003); Michael S. Shin, *Comment: Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2060-2076 (2002); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 446-47 (2003).

<sup>177</sup> Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 5 (1995); *See also* Brian A. Noesk et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 266 (John A. Bargh ed. 2007) [hereinafter SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS].

<sup>178</sup> Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 5 (1995); *See also* Brian A. Noesk et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS 266.

<sup>179</sup> Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POLI. BEHAV. 343, 345 (2007)

<sup>180</sup> Malte Friese et al., *Predicting Voting Behavior with Implicit Attitude Measures: The 2002 German Parliamentary Election*, 54 EXPERIMENTAL PSYCH. 247, 247 (2007)

<sup>181</sup> Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV: What We Know So Far About the Method*, in IMPLICIT MEASURES OF ATTITUDES 62 (Bernd Wittenbrink & Norbert Schwarz eds., The Guilford Press 2007)

<sup>182</sup> Brian A. Nosek et al., *supra* note 113.

bias, with self-reported attitudes revealing bias in the same direction. In 10-year olds and adults, the same magnitude of implicit race bias is observed, although self-reported race attitudes dissipates with age—vanishing entirely in adults.<sup>183</sup>

Anthony Greenwald and colleagues found that Whites display an implicit attitudinal preference for White over Black, manifested as faster responding to the White/pleasant combination than to the Black/pleasant combination.<sup>184</sup> Leslie Ashburn-Nardo and colleagues found that Whites pair White names with pleasant words and Black names with unpleasant words more easily than they make the reverse pairings. Additionally, Whites find it easier to associate their in-group (i.e., American names) with pleasant words and the out-group (i.e., Surinam names) with unpleasant words than vice versa.<sup>185</sup> Even with equally unfamiliar exemplars for both in-group and out-group, Whites still display a pro-in-group IAT bias. Thus, it appears that even when there is minimal experiential or historical input available, peoples' minds are prepared to display bias effortlessly.<sup>186</sup> Even Whites who know that the IAT measures undesirable racist attitudes and who explicitly self-report egalitarian attitudes still find it difficult to control their biased responses.<sup>187</sup> Thierry Devos and Banaji found that Whites make no distinction between Blacks and Whites on explicit measures of "Americanness." On Implicit measures, however, Whites more easily pair American symbols with White faces rather than with Black faces.<sup>188</sup> This is even so where faces of American Blacks are more familiar than White faces.<sup>189</sup> In addition to experimental studies, numerous data have been collected via web-based IATs. Unlike experimental IAT studies, these web-based studies rely on large sample sizes. These web-based studies reveal that, among children (N = 28,816) and adults (N = 351,204), White is associated with good and Black with bad. Light skin is associated with good and dark skin with bad (N = 122,988). White is associated with harmless objects and Black with weapons (N = 85,742).<sup>190</sup>

Implicit racial bias is no mere abstraction; it is linked to the deepest recesses of the mind—particularly the amygdala. The amygdala is an almond-sized subcortical brain structure, involved in emotional learning, perceiving novel or threatening stimuli,<sup>191</sup> and fear conditioning.<sup>192</sup> And William Cunningham and colleagues found that Whites' amygdalas are activated far more when they are subliminally shown Black faces as compared to White faces.

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<sup>183</sup> Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Age 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 55-56 (2006).

<sup>184</sup> Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1474 (1998).

<sup>185</sup> Leslie Ashburn-Nardo et al., *Implicit Associations as the Seeds of Intergroup Bias: How Easily Do They Take Root*, 81 J. PERSONALITY & SOC. PSYCHOL. 789, 792 (2001).

<sup>186</sup> *Id.* at 794-95. See also Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 321-323 (2000).

<sup>187</sup> D.Y. Kim & Anthony G. Greenwald, *Voluntary Controllability of Implicit Cognition: Can Implicit Attitudes Be Faked?*, Paper presented at the annual meeting for the Midwestern Psychological Association (May 1998) (cited in Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 317 (2000).

<sup>188</sup> Thierry Devos & Mahzarin R. Banaji, *American = White*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 452-53 (2005)

<sup>189</sup> *Id.* at 455.

<sup>190</sup> Lane et al., *supra* note 181.

<sup>191</sup> Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 AM. PSYCHOLOGIST 717, 720 (2001)

<sup>192</sup> See Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000).

Moreover, the degree of amygdala activation is significantly correlated with participants' IAT scores.<sup>193</sup>

Additionally, implicit racial bias leaks into real-world behavior. Samuel Gaertner and John McLaughlin subliminally primed individuals with the word "White" or "Black" and then immediately replaced the word with a string of letters that were sometimes actual words and sometimes nonsensical. The actual words selected were associated with stereotypes of either Whites or Blacks. As quickly as possible, individuals had to identify whether the string of letters was, indeed, a word. They were faster at recognizing positive words (e.g., "smart") if they were primed with the word "White" instead of "Black."<sup>194</sup> Dovidio and colleagues also demonstrated that response times to negative target words were significantly faster following the Black prime than following the White prime.<sup>195</sup> And Patricia Devine's research reveals that subliminal priming with words stereotypically associated with Blacks leads individuals to interpret ambiguous behavior as more aggressive.<sup>196</sup>

Quite possibly, these results stemmed from more than simply using words with negative affect (e.g., "lazy"). Bargh et al. found that Whites who were subliminally primed with Black male faces (as opposed to White male faces) for a fraction of a second, responded with greater hostility and anger toward an experimenter after being told that they would have to repeat a boring task because of a computer malfunction. Here, presumably, exposure to Black faces not only activated the category "African American" but also activated the associated stereotype "hostile" and the behaviors that go along with it, leading participants to enact those behaviors within the experimental situation.<sup>197</sup>

Other behaviors, too, are implicated in implicit racial bias. Franklin Gilliam and Shanto Iyengar explored how local news crime scripts might create ingrained heuristics for understanding crime and race. They created variations of a local newscast, and among them was one in which there was a crime story with a Black suspect mugshot, and another crime story with a White-suspect mugshot. Both suspects were represented by the same morphed photograph; the only difference was skin hue in order to control for facial expression and features. The suspect appeared for only five seconds in a ten-minute newscast. Nonetheless, having seen the Black suspect, Whites showed 6% more support for punitive remedies than did the control group, which saw no crime story. When they were instead exposed to the White suspect, their support for punitive remedies increased by only 1%, which was not statistically significant.<sup>198</sup>

Allen McConnell and Jill Leibold found that Whites who revealed stronger negative attitudes toward Blacks (vs. Whites) on the IAT had more negative social interactions with a Black (vs. a White) experimenter.<sup>199</sup> Implicit race bias also predicts behavior in employment

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<sup>193</sup> See William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 811 (2004).

<sup>194</sup> Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 Soc. Psychol. Q. 23, 23 (1983).

<sup>195</sup> John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL & SOC. PSYCHOL. 510, 522-523 (1997).

<sup>196</sup> Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 11-12 (1989).

<sup>197</sup> John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238-39 (1996)

<sup>198</sup> Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 Am. J. POL. SCI. 560, 563-68 (2000).

<sup>199</sup> Allen R. McConnell & Jill M. Leibold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 438-440 (2001). Others have

situations, specifically the frequency with which individuals choose to ask racially stereotypic interview questions of Black as compared to White job candidates during simulated job interviews.<sup>200</sup> Mark Chen and John Bargh similarly found that the subliminal activation of stereotypes leads to behavioral confirmation. For instance, once racial stereotypes have been activated and manifested in a perceivers' hostile behavior toward a naive interaction partner, that behavior in turn elicits a similar response from the partner, which leads each person to believe that the other has provoked the hostile interaction.<sup>201</sup> In addition, William Cunningham and colleagues found that the stronger the endorsement of right-wing ideology, the stronger the tendency for automatic associations between Black/bad and White/good.<sup>202</sup> Similarly, John Jost and colleagues and Brian Nosek found that among Whites, political conservatism is positively associated with ingroup favoritism on both implicit and explicit measures.<sup>203</sup>

Implicit racial bias is also implicated in more life-threatening situations. B. Keith Payne subliminally primed non-Black participants with a Black or White face and subsequently asked them to identify, as fast as possible, whether the object displayed was a tool or gun. Those who are primed with the Black face more quickly identify guns correctly. In contrast, those primed with the White face more quickly identify tools correctly. When participants are time-pressured to force more errors, those primed with a Black face err more in mistaking a tool for a gun (false alarm).<sup>204</sup> Joshua Correll added to this work by creating a video game that placed photographs of a White or Black individual holding either a gun or other object (i.e., wallet, soda can, or cell phone) into diverse photographic backgrounds. Participants were instructed to decide as quickly as possible whether to shoot the target. Severe time pressure designed into the game forced errors. Individuals are more likely to mistake a Black target as armed when he in fact is unarmed (false alarms); conversely, they are more likely to mistake a White target as unarmed when he in fact is armed (misses).<sup>205</sup> In the area of health care, Alexander Green and colleagues studied internal medicine and emergency medicine physicians; they found that though none of the physicians reported explicit preferences for Whites over Blacks. Nonetheless, they found an implicit preference for Whites, implicit stereotypes that Blacks are less cooperative with medical procedures and less cooperative generally. More significantly, as physicians' pro-White bias increased so did their likelihood of providing White patients, and not treating Blacks, with a treatment for cardiovascular disease.<sup>206</sup>

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made similar findings. *See also* John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65-66 (2002).

<sup>200</sup> D. Sekaquapetwa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXP. SOC. PSYCHOL. 75, 77-78 (2003).

<sup>201</sup> Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Process: The Self-fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 552-54 (1997).

<sup>202</sup> William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULLETIN 1332, 1336 (2004).

<sup>203</sup> John J. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 902 (2004); Brian Nosek, *The Politics of Intergroup Attitudes: Implicit Cognition and Political Orientation*, Presentation at Duke University's The Psychology of Voting and Election Campaigns (Oct. 20-21, 2006).

<sup>204</sup> B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 183-86, 188 (2001).

<sup>205</sup> Joshua Correll et al., *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-17, 1319 (2002).

<sup>206</sup> Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, J. GEN. INTERNAL MED. (in press).

Most relevant to this article, Rudman and Ashmore conducted an experiment on the relationship between implicit racial attitudes and harmful behaviors towards Blacks.<sup>207</sup> In their second study, they discovered that implicit bias predicted budget cuts for Asian, back, and Jewish student organizations.<sup>208</sup> More importantly, implicit anti-Black bias predicted self-reported racial discrimination. Included in this category of behaviors were exclusion, verbal slurs, and physical harm.<sup>209</sup>

## V

### THE N-WORD AND PRESUMPTIVE BLACK INTRA-RACIAL ANIMUS

There is a plausible argument that Blacks should not be exempted from what may be deemed as intra-racial hate crimes. Most crimes against Blacks are committed by other Blacks.<sup>210</sup> Blacks more frequently use the N-word than Whites.<sup>211</sup> Moreover, Blacks harbor implicit anti-Black attitudes at almost the same rates as Whites.

For example, among 12- to 14-year-old Blacks, Andrew Baron and colleagues found that, at least by age 13, young Blacks do not show the in-group preference that has come to be the hallmark of Whites.<sup>212</sup> Among Black adults, generally, Vincent Spicer found considerable variability in Blacks' implicit racial preferences, though overall, Blacks show a significant preference for Whites over Blacks.<sup>213</sup> Vincent Spicer and Margo Monteith demonstrate that between 50% and 65% of Blacks exhibit implicit outgroup bias in favor of Whites.<sup>214</sup> Ashburn-Nardo and colleagues find that 60% of Blacks show a pro-White implicit bias, although they express highly favorable ingroup attitudes on explicit measures.<sup>215</sup>

In an Internet-based study conducted by Nosek and colleagues, Blacks show a significant preference for Whites over Blacks.<sup>216</sup> New data from three measures available to the public at a demonstration website<sup>217</sup> extended the existing evidence concerning implicit and explicit ingroup and outgroup among Blacks and Whites. Blacks show stronger explicit ingroup favoritism than White respondents, although both clearly show explicit preferences for their own group. On implicit measures, Whites show ingroup favoritism, but Blacks do not. A larger percentage of

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<sup>207</sup> See generally, Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359 (2007).

<sup>208</sup> *Id.* at 363-68.

<sup>209</sup> *Id.* at 361-63.

<sup>210</sup> SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME* (3<sup>RD</sup> ED.) 50-52 (2004).

<sup>211</sup> See *infra* Section IV(A).

<sup>212</sup> Andrew Scott Baron et al., *Implicit Race Attitudes of African American and Hispanic Children*, Poster presented at the Annual Meeting of the Society for Personality and Social Psychology (Jan. 2004) (cited in Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Age 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 57 (2006)).

<sup>213</sup> C. Vincent Spicer, *Effects of Self-Stereotyping and Stereotype Threat on African Americans' Intellectual Performance* (1999) (unpublished Ph.D. dissertation, University of Kentucky) (on file with William T. Young Library, University of Kentucky).

<sup>214</sup> John J. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 895 (2004) (citing C. Vincent Spicer & Margo J. Monteith, *Implicit Outgroup Favoritism Among Blacks and Vulnerability to Stereotype Threat* (2001) (unpublished manuscript, on file with author)).

<sup>215</sup> Leslie Asburn-Nardo et al., *Black American's Implicit Racial Associations and Their Implications for Intergroup Judgment*, 21 SOC. COGNITION 61, 73 (2003).

<sup>216</sup> Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 105-07 (2002).

<sup>217</sup> <http://tolerance.org>

Whites express ingroup favoritism on implicit measures (78.4%) than on explicit measures (51.1%), whereas a larger percentage of Blacks express ingroup favoritism on explicit measures (65.4%) than on implicit measures (40.1%). When attitudes were measured implicitly, 39.3% of Blacks show outgroup favoritism, which is about the same proportion that showed ingroup favoritism. In sum, Blacks show strong ingroup favoritism explicitly, but not implicitly. Whites, by contrast, showed strong ingroup favoritism whether it was measured explicitly or implicitly.<sup>218</sup>

In his experimental research, Robert Livingston examined the variability in Blacks' performance on two implicit measures of attitudes toward Blacks versus Whites. Participants in both samples report very strong levels of explicit ingroup bias, but significant evidence of implicit bias was not obtained on either implicit measure employed. Nonetheless, there was considerable variability in implicit bias scores, and these are related systematically to participants' reports of the extent to which they believed others undervalue their group and are prejudiced toward it. In short, participants who perceived greater negativity toward their group were more prone to favoring the outgroup (Whites) over the ingroup (Blacks). In addition, outgroup contact is related to implicit biases, and evidence that perceived negativity mediates the relation between outgroup contact and implicit biases was demonstrated. In other words, participants who report less contact with Whites are more prone to perceiving negativity toward Blacks and, in turn, to favoring Whites over Blacks implicitly.<sup>219</sup>

Despite the fact that 1) a remarkably high percentage of Blacks harbor a implicit anti-Black/pro-White biases; 2) these biases also lead to adverse behavior directed at Blacks, and 3) Blacks seem to use the N-word with far more frequency than Whites, mapping our proposed analysis of Whites onto Blacks makes little sense. Given that Black usage of the N-word carries with it a different meaning (i.e., lack of clear racial animus) than when it is used by Whites, intra-racial hate crime based on the word's usage among Blacks makes little sense.

### CONCLUSION

The N-word has long been a controversial word, symbolic of White racial animus and hostility towards Blacks. A contemporary understanding of the word, however, suggests a varied and complex understanding of it. Among Blacks, the word is not necessarily pejorative and may, at times, be either benign or a term of endearment. Noted Harvard Law School professor Randall Kennedy argued that, given this fact, Whites' usage of the word does not necessarily suggest racial animus within hate crimes jurisprudence. The error in this reasoning is twofold: A systematic analysis of Whites who are immersed in Black popular culture indicates that they do not routinely and publicly use the N-word. Furthermore, current research on implicit social cognition indicates that a majority of Whites harbor implicit anti-Black attitudes. And these attitudes are revealed in various types of behavior. Within the context of hate crime jurisprudence, Whites' usage of the N-word is an exemplar of such leakage.

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<sup>218</sup> Jost et al., *supra* note 214, at 897.

<sup>219</sup> Robert W. Livingston, *The Role of Perceived Negativity in the Moderation of African Americans' Implicit and Explicit Racial Attitudes*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 405, 409-11 (2002).