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“NIGGER”: A CRITICAL RACE REALIST ANALYSIS OF THE N-WORD WITHIN HATE CRIMES LAW

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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 Holmes¹

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. Burke²

[C]rimes 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 McDevitt³

On a 2005 summer morning in New York, Nicholas “Fat Nick” Minucci, who is White, beat Glenn Moore, who is 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

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¹ Town v. Eisner, 245 U.S. 418, 425 (1918).

² Alcorn v. Anbro Eng’g, Inc., 468 P.2d 216, 219 n.4 (Cal. 1970).

³ JACK LEVIN & JACK McDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED x-xi (1993).

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 (a hip-hop music producer) and Randall Kennedy (a 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 entertainment—and (2) reconcile these findings with research on implicit (subconscious) racial bias.

In sum, we argue that whereas the N-Word is used by Blacks in a more race neutral manner within popular culture, its usage among 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 because the N-word has a different connotation when used intra-racially among Blacks than when directed at Blacks by Whites.

I. INTRODUCTION

Critical Race Realism is neither a novel term nor a novel concept. As early as 1992 and as recently as 2005, legal scholars Derrick Bell and Emily Houh, respectively, propounded this idea. According to Bell, “Black people need reform of 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 [B]lacks can rely to have their voice and outrage heard.”⁴ 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”⁵

⁴ Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363-64 (1992) (emphasis added).

⁵ 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, 457 (2005).

From our vantage point, Critical Race Realism is an amalgamation of Critical Race Theory and Legal Realism. As Critical Race Theory is the jurisprudential grandchild of Legal Realism,⁶ 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."⁷ Critical Race Theory was born out of the Critical Legal Studies movement.⁸ Not only did it take part of its name from the adherents of Critical Legal Studies (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 chaos [they have] exposed."⁹ Critical Race Theorists do not endorse rights-trashing, like the crits.¹⁰ Nonetheless, both sets of scholars engage in a "full frontal assault" on modern jurisprudence.¹¹ Earlier, the realists employed a similar technique called debunking.¹² This entailed

⁶ See Gregory Scott Parks, Note, *Toward a Critical Race Realism*, 17 CORNELL J.L. & PUB. POL'Y (forthcoming Fall 2008).

⁷ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* xix (2001).

⁸ 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 HARV. BLACKLETTER L.J. 1 (2002); Bernie Donna-Maria Jones, *Critical Race Theory: Protesting Against Formalism in the Law, 1969-1999* (May 2002) (unpublished Ph.D. dissertation, University of Virginia) (on file with Proquest).

⁹ Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984).

¹⁰ Patricia Williams indicated that:

[R]ights 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).

¹¹ Allan C. Hutchison & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 199 (1984). Though Hutchinson and Monahan focus specifically on crits, their assertion is equally applicable to Critical Race Theorists.

¹² 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 Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in 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).

subjecting questionable judicial opinions to logical analysis in order to expose their inconsistencies, unsubstantiated premises, and tendency to “pass off contingent judgments as inexorable.”¹³ 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.¹⁴ Other features were argued to have factored into the equation,¹⁵ such as policy considerations.¹⁶ Fact skeptics either argued that the facts found by the judge or jury are inconsistent with the actual facts¹⁷ or that the reactions of judges and juries to facts are unpredictable.¹⁸

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.¹⁹ The empirical exploits of Realists such as Charles E. Clark and William O. Douglas at Yale,²⁰ Underhill Moore at Yale,²¹ and Walter Wheeler Cook and colleagues at Johns Hopkins²² are well-documented. Many of the Critical Race Theory founders were formerly active in the law and society movement, which had its roots with the realists.²³ 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

¹³ White, *supra* note 12, at 821-22.

¹⁴ Timothy L. Smith, Formalism, Pragmatism, and Nihilism in Legal Thought 48-49 (1995) (unpublished Ph.D. dissertation, The Johns Hopkins University) (on file with Proquest). For more about rule skepticism, see WILFRED E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 48-68 (1968).

¹⁵ Smith, *supra* note 14, at 48-49.

¹⁶ *Id.* at 50, 54; Bruce Evans Pencek, The Political Theory of Legal Realism 1 (June 1988) (unpublished Ph.D. dissertation, Cornell University) (on file with Cornell University Library). 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 subconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.” OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1945) (1881).

¹⁷ RUMBLE, *supra* note 14, at 109-10.

¹⁸ *Id.* at 111.

¹⁹ 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 into their scholarship. See CRITICAL RACE THEORY: THE CUTTING EDGE 129-78 (Richard Delgado & Jean Stefancic eds., 2d ed. 1999).

²⁰ See JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE 81-114 (1995).

²¹ See *id.* at 115-46.

²² See *id.* at 147-210.

²³ Parks, *supra* note 6, § I(D).

debate about the utility of empirical social science. In a 1977 article in the *Law and Society Review*,²⁴ crit theorist David Trubek assailed empirical social science.²⁵ First, Trubek suggested that empirical research legitimates the status quo in that it implies that facts researched were objectively “there” and “part of the permanent ‘reality’ of American culture.”²⁶ Second, he argued that a scholar could not separate ideology from methodology in any type of research, including empirical research.²⁷ Ultimately, according to G. Edward White, Trubek argued that “to be politically reformist and methodologically neutral was a contradiction in terms.”²⁸

There is a current effort afoot, however, which seeks to reconcile Critical Race Theory with other elements of its realist roots.²⁹ As named by Bell and Houh, this movement is called Critical Race Realism.³⁰ As articulated by the authors, Critical Race Realism situates itself within the growing contemporary attempts—such as empirical legal studies,³¹ the New Legal Realism Project,³² and Behavioral Realism³³—to integrate law and

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

²⁵ White, *supra* note 12, at 834.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See generally GREGORY S. PARKS ET AL., CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW (2008) (exploring how legal analysis and social science research can work collectively to better explain the racial dynamics that permeate the law and legal system).

³⁰ Bell, *supra* note 4; Houh, *supra* note 5.

³¹ See generally Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741 (2004) (articulating the utility of empirical legal scholarship); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000) (analyzing how empirical scholarship has progressed in legal academia); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006) (providing an empirical analysis of empiricism’s progression in legal academia); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (tracking the evolution of empirical legal scholarship and applying it to judges); Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 167 (2004) (analyzing how “the scientific status of empirical legal scholarship might be enhanced”); Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1 (analyzing the market for data that is produced at the intersection of social science and law).

³² See generally *New Legal Realism Symposium: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335; Symposium, *New Legal Realism*, 31 LAW & SOC. INQUIRY 797 (2006) (contending that it is time for 21st century legal realism).

³³ See generally *Behavioral Realism Symposium*, 94 CAL. L. REV. 945 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative*

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.”³⁴ 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. In so doing, this Article adds to the scant legal scholarship on the N-word.³⁵

Part II highlights a particular case in which a White person, who was allegedly immersed in Black culture, used the N-word during his assault of a Black man. Part III provides a general overview of U.S. hate crimes law and how racial epithets are traditionally viewed within this area of law. Part IV provides a brief historical and contemporary analysis of the N-word and how it has been and is understood. Part V 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, even Whites immersed in that culture generally do not use that word, especially when amongst Blacks they do not know very well. The second is that a remarkably large percentage of Whites harbor implicit and negative 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 VI 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.

Action, 94 CAL. L. REV. 1063 (2006) (applying research on implicit race bias to affirmative action); *Unconscious Discrimination Twenty Years Later: Application and Evolution*, 40 CONN. L. REV. 927 (2008); Videostream, Jerry Kang, Behavioral Realism: Future History of Implicit Bias and the Law, Lecture at Ohio State University (Nov. 2006), <http://jerrykang.net/Engage> (follow “realplayer” link) (discussing the role of mind sciences to an understanding of law).

³⁴ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 512-13 (1912).

³⁵ 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; 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).

II. A HARVARD LAW PROFESSOR MAKES THE CASE: THE N-WORD DOES NOT NECESSARILY EQUAL RACIAL ANIMUS

On the morning of June 29, 2005, Glenn Moore, a twenty-three-year-old Black man, and his two friends trolled Howard Beach, a Queens, New York neighborhood.³⁶ Though they were looking for cars to steal, they stole no cars that night.³⁷ In the wrong neighborhood at the wrong time, Moore and his friends were chased by a group of young White men.³⁸ Among those men was Nicholas "Fat Nick" Minucci.³⁹ During the chase, Moore fell and was trapped by Minucci and his group.⁴⁰ Moore reported that Minucci called him "nigger" and said, "We'll show you not to come and rob White boys."⁴¹ 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."⁴² At trial, witnesses testified that Minucci repeatedly and angrily called Moore "nigger" while chasing him and beating him in the head.⁴³ Albert Gaudelli, Minucci's lawyer, argued that Moore fractured his skull when he fell.⁴⁴ Frank Agnostini, one of Minucci's accomplices in the attack, testified that 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."⁴⁵ Minucci contended that he used the N-word as a benign address while preventing Moore from committing a crime.⁴⁶

During the four-week trial, prosecutor Michelle Goldstein repeatedly used the bat to hit the juror box in an effort to approximate the sound the bat made when Minucci struck Moore.⁴⁷ As she did so, she noted that Minucci uttered the words, "You see what you get, nigger, for coming into our neighborhood?"⁴⁸ In contrast, Minucci's counsel, Albert Gaudelli, repeatedly argued that Minucci's use of nigger should be ignored—that

³⁶ Herb Boyd, *Minucci Guilty of Hate Crime*, N.Y. AMSTERDAM NEWS, June 15, 2006, at 3; see also Corey Kilgannon, *Epithet 'Has Many Meanings,' a Harvard Professor Testifies*, N.Y. TIMES, June 8, 2006, at B1.

³⁷ Boyd, *supra* note 36; Kilgannon, *supra* note 36.

³⁸ George E. Curry, *Randall Kennedy: Negro Please*, ATLANTA DAILY WORLD, June 23, 2006, at 13.

³⁹ Boyd, *supra* note 36; Curry, *supra* note 38.

⁴⁰ Curry, *supra* note 38.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Kilgannon, *supra* note 36.

⁴⁴ Curry, *supra* note 38.

⁴⁵ *Id.*

⁴⁶ Kilgannon, *supra* note 36.

⁴⁷ Boyd, *supra* note 36.

⁴⁸ *Id.*

Minucci's use of the word was not intended to be a racial epithet.⁴⁹ He explained that Minucci, raised 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.⁵⁰ During his closing argument, Gaudelli indicated that "[p]eople use the word in different ways."⁵¹ He went on to assert that "[t]here was no intent of bias or prejudice"⁵² and to state: "You don't 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."⁵³ The jury took just over two days to convict Minucci of attacking Glenn Moore.⁵⁴ 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.⁵⁵ He was sentenced to fifteen years.⁵⁶

The newsworthy aspect of this case was not the assault itself, but rather the expert testimony for the defense presented 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."⁵⁷ In essence, as Jenkins noted, "There has got to be more to it than a word to find that someone is racist."⁵⁸ The second and more important, or at least higher profile, expert was Randall Kennedy: Rhodes Scholar, Michael R. Klein Professor of Law at Harvard University, 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.⁵⁹ This was the first criminal case.⁶⁰ In a nutshell, Kennedy testified that Minucci, influenced by rap lyrics, did not believe the N-word was a racial epithet and insult.⁶¹ He also testified that the N-word has multiple meanings and is not necessarily employed as a

⁴⁹ *Id.*

⁵⁰ Kilgannon, *supra* note 36.

⁵¹ Boyd, *supra* note 36.

⁵² *Id.*

⁵³ Curry, *supra* note 38.

⁵⁴ Boyd, *supra* note 36.

⁵⁵ Curry, *supra* note 38.

⁵⁶ Joseph Williams, *Under the Skin*, BOSTON GLOBE, Nov. 5, 2006, at 42.

⁵⁷ Curry, *supra* note 38.

⁵⁸ *Id.*

⁵⁹ Williams, *supra* note 56.

⁶⁰ *Id.*

⁶¹ *Id.*

racial epithet.⁶² Some Blacks were outraged not only by Kennedy's testimony, but also by the fact that he testified for free.⁶³

III. AMERICAN HATE CRIMES LAW

"Hate crimes" is a bit of a misnomer in that the crimes are not typically about actual 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.⁶⁴ Hate crimes differ from two broad categories of crimes: (1) crimes committed with no particular regard to the victim's characteristics, and (2) crimes committed precisely because the victim is a specific person. Hate crimes differ from the former in that they 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.⁶⁵

Law enforcement agencies employ bias crime indicators to determine if a hate crime has been committed.⁶⁶ Among these indicators are racial differences and comments, written statements, or gestures.⁶⁷ These are deemed to be the objective facts or circumstances present during the

⁶² Curry, *supra* note 38; Kilgannon, *supra* note 36. 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 [W]hites use the word amongst themselves and refer to one another by this word from time to time."

Transcript of Expert Testimony at 1378-79, *People v. Minucci*, 2006 N.Y. Misc. LEXIS 4109 (N.Y. Sup. Ct. Apr. 3, 2006) (No. 2629/05) (unpublished decision).

⁶³ Williams, *supra* note 56.

⁶⁴ JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* 11 (1998).

⁶⁵ FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 9 (1999).

⁶⁶ K.A. McLAUGHLIN ET AL., *RESPONDING TO HATE CRIME: A MULTIDISCIPLINARY CURRICULUM FOR LAW ENFORCEMENT AND VICTIM ASSISTANCE PROFESSIONALS* 14 (2000).

⁶⁷ *Id.* at 15-16.

commission of the criminal act that suggest that the offender's conduct was motivated, at least partially, by some form of bias.⁶⁸ These indicators need not suggest that the offender's predominant motivation was bias.⁶⁹ The presence of any indicator merely suggests the possibility of a bias motivation for the offense, the presence or absence of which is determined on a case-by-case basis.⁷⁰

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.⁷¹ State law, as opposed to federal law, violations result in the largest number of criminal prosecutions.⁷² 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.⁷³ The states have taken various approaches to ethnic intimidation and violence. Some states created entirely new crimes consisting of bias-motivated commission of a crime already defined 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.⁷⁴

In order to convict an individual of a hate crime, the state must provide evidence that (1) 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.⁷⁵ There are three approaches to defining the defendant's state of mind when committing a hate crime.⁷⁶ The "racial animus" approach requires evidence that the defendant's bias toward the victim's characteristics motivated the crime.⁷⁷ The "discriminatory selection" approach requires proof that the defendant selected the victim based on the victim's characteristics.⁷⁸ The

⁶⁸ *Id.* at 15.

⁶⁹ *Id.*

⁷⁰ *Id.* at 14.

⁷¹ *Id.* at 70.

⁷² *Id.* at 71.

⁷³ 15 AM. JUR. 2D *Civil Rights* § 21 (2000).

⁷⁴ ZACHARY J. WOLFE, *HATE CRIMES LAW* 269-72 (2008).

⁷⁵ *Id.* at 258-59.

⁷⁶ 57 AM. JUR. PROOF OF FACTS 3D *Hate Crimes* § 4 (2000) [hereinafter *Hate Crimes*].

⁷⁷ *Id.*; see, e.g., D.C. CODE § 22-3701(1) (2008) ("demonstrates . . . prejudice"); FLA. STAT. ANN. § 775.085(1)(a) (West 2005) ("evidences prejudice").

⁷⁸ *Hate Crimes*, *supra* note 76, § 4; see, e.g., ALASKA STAT. § 12.55.155(c)(22) (2007) ("knowingly directed . . . offense at a victim because of"); CAL. PENAL CODE § 190.2(a)(16)

"because of" approach requires proof that the defendant committed the crime because of the victim's characteristics.⁷⁹ Despite these statutory variations in requisite mental state, most state courts have interpreted their respective statutes similarly. In essence, all largely require a causal connection between the criminal conduct and the statutorily protected characteristics.

After the United States Supreme Court's ruling in *Wisconsin v. Mitchell*,⁸⁰ several courts interpreted their state statutes as resembling the language in the Wisconsin statute, which required that the defendant "[i]ntentionally select[]" the victim because of some protected characteristic.⁸¹ Subsequent cases further refined this "intentional selection" concept by indicating that premeditation is not required.⁸² What is required, however, is merely a "but for" connection between the criminal conduct and the victim's protected status.⁸³ 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.⁸⁴ This does not mean, however, that mere biased thoughts result in enhanced punishments.⁸⁵ Consequently, proving that a defendant was motivated by bias or some form of discriminatory animus is a difficult, albeit necessary, task.⁸⁶ The defendant's racially-tinged words during the commission of the

(West 2008) (victim "intentionally killed because of"); MO. ANN. STAT. § 557.035(1) (West 2008) ("knowingly motivated because of"); R.I. GEN. LAWS § 12-19-38(a) (2002) ("intentionally selected"); VA. CODE ANN. § 18.2-57(A) (2008) ("intentionally selects"); WIS. STAT. ANN. § 939.645(1)(b) (West 2005) ("[i]ntentionally selects").

⁷⁹ *Hate Crimes*, *supra* note 76, § 4; *see, e.g.*, ALA. CODE § 13A-5-13(b) (2005) ("was motivated by"); KY. REV. STAT. ANN. § 532.031(1) (LexisNexis 2008) ("intentionally because of"); N.H. REV. STAT. ANN. § 651:6.I(f) (LexisNexis 2008) ("substantially motivated by").

⁸⁰ 508 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).

⁸¹ *See, e.g.*, *Dobbins v. State*, 631 So. 2d 303, 303 (Fla. 1994); *State v. Stalder*, 630 So. 2d 1072, 1075-77 (Fla. 1994); *State v. Mortimer*, 641 A.2d 257, 265-66 (N.J. 1994); *State v. Talley*, 858 P.2d 217, 229 (Wash. 1993).

⁸² *See, e.g.*, *People v. Davis*, 674 N.E.2d 895, 898 (Ill. App. Ct. 1996); *State v. Pollard*, 906 P.2d 976, 979 (Wash. Ct. App. 1995).

⁸³ *See, e.g.*, *State v. Hart*, 677 So. 2d 385, 386-87 (Fla. Dist. Ct. App. 1996); *People v. Nitz*, 674 N.E.2d 802, 806-07 (Ill. App. Ct. 1996); *Martinez v. State*, 980 S.W.2d 662, 666-67 (Tex. Ct. App. 1998).

⁸⁴ *See, e.g.*, *Hart*, 677 So. 2d at 386-87; *Nitz*, 674 N.E.2d at 806.

⁸⁵ *See, e.g.*, *In re M.S.*, 896 P.2d 1365, 1377 (Cal. 1995); *Matter of Welfare of S.M.J.*, 556 N.W.2d 4, 7 (Minn. Ct. App. 1996).

⁸⁶ *See, e.g.*, N.Y. PENAL LAW § 485.05(2) (McKinney 2008) (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).

crime, however, often supply the requisite evidence.⁸⁷ One such word, frequently, is the N-word.

IV. "NIGGER": A GENERAL ANALYSIS OF THE WORD

The N-word "is derived from the Latin word for the color black, *niger*."⁸⁸ If, at any point, there was a benign intent behind the word, it eventually took a pejorative turn. In 1837, Hosea Easton wrote that the N-word:

[I]s an approbrious [sic] 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 it is not used with that intent . . . it flows from the fountain of purpose to injure.⁸⁹

Easton noted that often White adults employed the word as a tool to instruct White children how to behave and not to behave.⁹⁰ A child would be reprimanded by an adult for being "ignorant as a nigger," for having "no more credit than a nigger," or for being "worse than a little nigger."⁹¹ Adults disciplined White children by telling them that if they misbehaved they would be made to sit with niggers, consigned to the "nigger-seat," or carried away by "the old nigger."⁹²

Merriam-Webster's Collegiate Dictionary describes the word as "rank[ing] as perhaps the most offensive and inflammatory racial slur in English."⁹³ The N-word, according to Randall Kennedy, has become *the*

⁸⁷ See, e.g., *People v. Lashley*, 2 Cal. Rptr. 2d 629, 637 (Cal. Ct. App. 1991); *Davis*, 674 N.E.2d at 898; *City of Wichita v. Edwards*, 939 P.2d 942, 950 (Kan. Ct. App. 1997); *Kinser v. State*, 591 A.2d 894, 896 (Md. Ct. Spec. App. 1991); *Commonwealth v. Stephens*, 515 N.E.2d 606, 610 (Mass. App. Ct. 1987).

⁸⁸ RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* 4 n.2 (2002) ("On the etymology of *nigger*, see the *Random House Historical Dictionary of American Slang*, ed. J. E. Lighter (1997), 2:657. See also *Oxford English Dictionary*, eds. J. A. Simpson and E. S. C. Weiner, (2d ed., 1989), 10:402-4; H. L. Mencken, *The American Language: An Inquiry into the Development of English in the United States*, abridged with annotations and new material by Raven I. McDavid Jr., with the assistance of David W. Maurer (1979), 383-84; Hugh Rawson, *Wicked Words* (1989), 268-70."); GENEVA SMITHERMAN, *BLACK TALK: WORDS AND PHRASES FROM THE HOOD TO THE AMEN CORNER* 210-13 (rev. ed. 2000).

⁸⁹ H. EASTON, *A TREATISE ON THE INTELLECTUAL CHARACTER, AND CIVIL AND POLITICAL CONDITION OF THE COLORED PEOPLE OF THE U. STATES; AND THE PREJUDICE EXERCISED TOWARDS THEM* 40 (Maxwell Whiteman ed., Boston, I. Knapp 1837) (emphasis omitted).

⁹⁰ *Id.* at 40-41 (emphasis omitted).

⁹¹ *Id.* at 41 (emphasis omitted).

⁹² *Id.*

⁹³ *MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY* 837 (11th ed. 2003).

paradigmatic racial epithet.⁹⁴ He writes that it is the slur that generates other slurs.⁹⁵ For example, "Arabs are called sand niggers, Irish the niggers of Europe, and Palestinians the niggers of the Middle East."⁹⁶ 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."⁹⁷ 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."⁹⁸ Writer Andrew Hacker noted that it "stands alone [in] its power to tear at one's insides."⁹⁹ Journalist Farai Chideya called it "the all-American trump card, the nuclear bomb of racial epithets."¹⁰⁰ 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: The Strange Career of a Troublesome Word*:

"White," says Chase.

"Black," Pryor replies.

"Bean."

"Pod."

"Negro."

...

"Peckerwood," Pryor yells.

"Burrhead!"

"Cracker."

"Spearchucker!"

"White trash!"

⁹⁴ Randall L. Kennedy, *Who Can Say "Nigger" . . . and Other Considerations*, 26 J. BLACKS IN HIGHER EDUC. 86, 88 (2000) ("[N]igger is and has long been the outstanding racial insult on the American social landscape.").

⁹⁵ *Id.*

⁹⁶ KENNEDY, *supra* note 88, at 27.

⁹⁷ *Id.* at 27-28.

⁹⁸ *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998).

⁹⁹ ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 42 (Maxwell MacMillan, Int. 1992) (1992).

¹⁰⁰ FARAI CHIDEYA, THE COLOR OF OUR FUTURE 9 (1999).

"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].¹⁰¹

Though it is impossible to unequivocally declare that when used as an insult the N-word is a more potent epithet than others, commentators have called it "the most socially consequential racial insult."¹⁰² 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 fifty cases, "kike" in eighty-four, "gook" in ninety, and "honky" in 286.¹⁰³ The N-word, however, appeared in 4,219 cases.¹⁰⁴

In the past several years the N-word has been the focus of considerable debate. In 2007, Ralph Papitto, chairman of the Roger Williams University board, resigned after he admittedly used the N-word when discussing his frustration over pressures to diversify the board.¹⁰⁵ 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.¹⁰⁶ Although he had graduated from Harvard Law School at the age of nineteen, 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.¹⁰⁷ It cost him a tenure-track faculty position at George Mason University Law School.¹⁰⁸ Incidents such as these, along

¹⁰¹ KENNEDY, *supra* note 88, at 30-31.

¹⁰² *Id.* at 31-32.

¹⁰³ *Id.* at 32.

¹⁰⁴ *Id.*

¹⁰⁵ *R.I. School Official Resigns After Slur*, WASHINGTONPOST.COM, July 16, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/16/AR2007071600808.html?nav=rss_education.

¹⁰⁶ Jaymes Song, *Bounty Hunter in the Doghouse*, SEATTLE TIMES, Nov. 3, 2007, at A2.

¹⁰⁷ Avi Salzman, *Symposium Guest's Word Stirs Controversy at Yale*, N.Y. TIMES, Mar. 8, 2006, at B7.

¹⁰⁸ Jenna Russell, *At Harvard Law, One-Word Lessons*, BOSTON GLOBE, Apr. 20, 2002, at B1; see also Ian Shapira, *Racist Writing as a Teen Haunted GMU Candidate*, WASH. POST, Apr. 3, 2007, at B1.

with the continued use of the N-word among Blacks, caused the NAACP to have a mock funeral for the word.¹⁰⁹ The New York City Council to pass a resolution banning the word.¹¹⁰ And Reverend Al Sharpton to ask Cartoon Network for an apology over the use of the N-word in a Black-created animated series, *The Boondocks*, after an episode in which Dr. Martin Luther King, Jr. is depicted as saying the word.¹¹¹

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 in 1901, South Carolina Senator Benjamin Tillman stated: “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.”¹¹² In 1938, when Alben 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.”¹¹³ Supreme Court Justice James Clark McReynolds referred to Howard University, a historically Black institution, as a “nigger university.”¹¹⁴ President Harry Truman described Congressman Adam Clayton Powell as “that damn nigger preacher,”¹¹⁵ and President Lyndon Johnson referred to his maid as a “nigger.”¹¹⁶

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.” When Black and White “freedom riders” rode together on a bus, violating unlawful Jim Crow custom, the White bus driver delivered the

¹⁰⁹ Suzette Hackney, *The N-Word Is Laid to Rest*, MIAMI HERALD, July 10, 2007, at A5.

¹¹⁰ Emi Endo, *N.Y. Council Backs N-Word Abstinence in Resolution*, CHI. TRIB., Mar. 1, 2007, at 6.

¹¹¹ *MLK & the N-Word: Boondocks, Sharpton Do Battle*, CINCINNATI POST, Jan. 26, 2006, at C8; see also *The Boondocks: The Return of the King* (Adult Swim television broadcast Jan. 15, 2006), available at <http://media.putfile.com/MLK-speech-boondocks>.

¹¹² STEPHEN KANTROWITZ, BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY 259 (2000).

¹¹³ JOHN EGERTON, *SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* 117 (1994).

¹¹⁴ WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 15 (1980).

¹¹⁵ DAVID MCCOLLOUGH, *TRUMAN* 576 (1992).

¹¹⁶ ROBERT A. CARO, *MEANS OF ASCENT: THE YEARS OF LYNDON JOHNSON* 70 (1990).

riders to an angry mob of White racists in Alabama.¹¹⁷ When he did so, he yelled to the mob, "Well, boys, here they are. I brought you some niggers and nigger-lovers."¹¹⁸ During a Maryland rally, a spokesman for the National States Rights Party indicated that "[m]ost of these nigger lovers are sick in the mind . . . [and] should be bound, hung and killed."¹¹⁹ "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.¹²⁰ 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 a pronoun, like "he, she or it."¹²¹ In a recent *Esquire* article, John Ridley, like in the stand-up routine of comedian Chris Rock,¹²² used the N-word to draw a distinction between upstanding Black people and low class "niggers."¹²³

¹¹⁷ DAVID HALBERSTAM, *THE CHILDREN* 261 (1998).

¹¹⁸ *Id.*

¹¹⁹ *Lynch v. State*, 236 A.2d 45, 48 (Md. Ct. Spec. App. 1967).

¹²⁰ KENNEDY, *supra* note 88, at 27.

¹²¹ Pam Adams, *N-Word Use 'A Real Eye-Opener': Whether Spoken by Whites or Blacks, 'Soundtrack to American Racism' Stirs Debate*, PEORIA J. STAR, Jan. 7, 2007, at A1.

¹²² Chris Rock, *Who You Calling Racist?*, in ROCK THIS! (1997), reprinted in AFRICAN AMERICAN HUMOR: THE BEST BLACK COMEDY FROM SLAVERY TO TODAY 337, 344-46 (Mel Watkins ed., 2002) [hereinafter AFRICAN AMERICAN HUMOR].

¹²³ John Ridley, *The Manifesto of Ascendancy for the Modern American Nigger*, ESQUIRE, Dec. 2006, at 108. Ridley describes "niggers" as:

[T]he oppressed minority *within* our minority. Always down. Always out. Always complaining that they can't catch 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 onto 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. at 109. He goes on to describe Black people as:

[I]nheritors of "the Deal" forced upon the entrenched [W]hite social, political, and legal establishment when my parents' generation won the struggle for civil rights. The Deal: We ([B]lacks) 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.

V. 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,¹²⁴ 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, and frequented Black comedy clubs and venues where spoken word was performed by Black poets? What if some of his best friends were Black? This Part rebuts the presumption that in a situation such as Minucci's, his conduct could reflect anything but racial animus and thus be 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 true 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 or in front of Blacks suggests that their use of the word remains a known taboo. Second, research on implicit social cognition suggests that a remarkably high percentage of Whites harbor subconscious anti-Black attitudes.¹²⁵ 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 leak out and motivate explicit behavior.

A. USE OF THE N-WORD IN BLACK POPULAR CULTURE BY BLACKS AND WHITES: A COMPARATIVE STUDY

Regardless of how the N-word is used, there is 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.¹²⁶ 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 to be defiant.¹²⁷ The N-word has become increasingly popular among hip-hop generation Black youth.¹²⁸ 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

¹²⁴ Curry, *supra* note 38.

¹²⁵ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 958 (2006).

¹²⁶ Kennedy, *supra* note 94, at 89.

¹²⁷ KENNEDY, *supra* note 88, at 48-50.

¹²⁸ Neal Justin, 'N' Word Heard More Often, but Context Crucial, STAR TRIB., Nov. 10, 2005, at A1 ("During a recent session with about a dozen [B]lack teens, almost all said they use the word regularly. Some use it as much as 50 times a day.").

could be met with disapproval and even violence.¹²⁹ Despite some instances of Blacks' 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 introduced the N-word into popular American culture by peppering their routines and lyrics with the word.¹³⁰ 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. Whites' actual or constructive knowledge that they should not use the N-word means that when they do so while committing hate crimes, they know they are demonstrating bias.

1. Racialized Comedy

Within Black comedy, the N-word has been featured prominently¹³¹ and has been interpreted among Black people "within a specific, clearly defined context, tone, and set of codes rooted in [B]lack vernacular language."¹³² Some Blacks, as a result, have seen and used it as a benign or friendly term—at least in certain contexts.¹³³ 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*.¹³⁴ The word has been used among Black comedians to help

¹²⁹ *Id.*

¹³⁰ Adams, *supra* note 121; Todd Boyd, *Tarantino's Mantra?: 'Pulp' Director Has Wrongheaded Approach to the N-Word*, CHI. TRIB., Nov. 6, 1994, § 13 at 26; Earl Ofari Hutchinson, *'Kramer' and the N-Word Double Standard*, DAILY NEWS OF L.A., Nov. 26, 2006, at V1; Justin, *supra* note 128.

¹³¹ KENNEDY, *supra* note 88, at 40-41.

¹³² 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 117, 137 (William Eric Perkins ed., 1996) [hereinafter DROPPIN' SCIENCE]. "[T]he use of 'nigger' with other [B]lack 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." Claudia Mitchell-Kernan, *Signifying, Loud-Talking and Marking*, in RAPPIN' AND STYLIN' OUT: COMMUNICATION IN URBAN BLACK AMERICA 315, 328 (Thomas Kochman ed., 1972).

¹³³ Kelley, *supra* note 132.

¹³⁴ RICHARD PRYOR, *THAT NIGGER'S CRAZY* (Reprise 1974). The album explores a number of topics including:

Pryor's professional fears ("Hope I'm funny . . . because I know niggers ready to kick a***"), [B]lacks' 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"), [B]lack parenting styles ("My father was one of them eleven-o'clock niggers"), comparative sociology ("White folks f*** quiet; niggers make noise"), racial

punctuate what may seem more like social commentary than mere jokes. For example, Richard Pryor spoke on police degradation of Blacks,¹³⁵ Paul Mooney on how Whites blame an inordinate amount of wrongs on Blacks,¹³⁶ and Chris Rock on the distinction between upstanding Blacks and low class niggers.¹³⁷ Dave Chappelle, in his remarkably successful show

anthropology ("White folks . . . don't know how to play the dozens"), and social commentary ("Nothin' can scare a nigger after four hundred years of this s***").

KENNEDY, *supra* note 88, at 39-40.

¹³⁵ Richard Pryor, *Nigger Look Just Like You*, in AFRICAN AMERICAN HUMOR, *supra* note 122, at 301, 301.

Police degrade you, I don't know, it's often you wonder why a nigger don't go completely mad. No, you do. You get your s*** 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 get 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 s***. You goin' take that s*** out on somebody.

Id.

¹³⁶ PAUL MOONEY, RACE (Step Sun Music Entertainment 1993). The album also contains pieces titled *Nigger Vampire*, [Saying Nigger] *Makes My Teeth White*, *Niggerstein*, *Nigger Raisins*, and a *Nigger History Lesson*. *Id.*

They don't want to give us any credit. They just want to blame everything on niggers. Didn't some [W]hite man in Boston shoot his pregnant wife and then shoot hisself, 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 [W]hite folks get in trouble, just call my agency.

"Hello, Blame-a-Nigger? I just pushed my mother down the 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."

Paul Mooney, *Blame-a-Nigger*, in African American Humor, *supra* note 122, at 281, 281.

¹³⁷ In one of his comedy routines, Chris Rock explained:

Who's more racist: [B]lack people or [W]hite people?

Black people.

You know why? Because [B]lack people hate [B]lack people, too. Everything [W]hite people don't like about [B]lack people, [B]lack people don't like about [B]lack people. It's like our own personal civil war.

On one side, there's [B]lack people.

On the other, you've got niggers.

The niggers have got to go. Every time [B]lack people want to have a good time, niggers mess it up. You can't do anything without some ignorant-a** niggers f***ing 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.

that aired on Comedy Central, routinely used the word. His social commentary is highlighted by his skit about a White family called the Niggar family, which played on stereotypes associated with Blacks.¹³⁸ In the first scene, the Niggar family is at the kitchen table dialoguing over breakfast:

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

Wife: She's got those Niggar lips.

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

Wife: I think so.

Husband: He sure is one lazy Niggar.

Son: Good morning mom; good morning dad.

Husband: Good morning. 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 Niggars:

Wife: Jenny has a date tonight with a Niggar boy from school.

Husband: What!? Oh God, no!

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

I love [B]lack people, but I hate niggers. I am 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 live next door will break in, take it all, and then come over the next day and go, "We heard ya got robbed."

"You know because you robbed me. You weren't hearing s*** because you were *doing* s***."

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

Rock, *supra* note 122, at 344-45. 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." Derrick Z. Jackson, Op-Ed., *Epithet Stung, Even for Pryor*, BOSTON GLOBE, Dec. 14, 2005, at A23.

¹³⁸ DAVE CHAPELLE, *The Niggar Family*, CHAPELLE'S SHOW: SEASON TWO UNCENSORED! (Comedy Central television broadcast 2005), available at <http://www.comedycentral.com/videos/index.jhtml?videoId=11906&title=the-niggar-family>.

Daughter: No daddy, that's his name—Timmy Niggar.

Husband: Oh, of course. That Niggar. He's a very good athlete and so well-spoken. That family's going places. I mean, we're rich; they're Niggar rich.

In the third scene, the Niggar family interacts with their Black milkman:

Milkman: Mornin' Niggars.

Husband: Why it's Clifford, our colored milkman.

Milkman: It's my favorite family to deliver milk to—the Niggars. Mmm. Mmm. Something sho' smells good. You Niggars cookin'?

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 Niggar and their pork. Might get my fingers bit. Here you go. I-I hate to bother you about this, but uh, well you didn't pay your bill last week, and I know how forgetful you Niggars are when it comes to paying bills.

Husband: Golly Clifford; it slipped my mind. Here you go. Sorry about that.

Milkman: Oh, Niggar please; Niggar please. Well, take care Mr. N-word. I have a hot date with the wife tonight.

Husband: Alright, take care.

Milkman: Alright, peace Niggar.¹³⁹

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 their comedy to slur minorities, homosexuals, and women.¹⁴⁰ However, despite his over-the-line attacks on Asians, for example, as "urine-colored people with towels on their heads,"¹⁴¹ 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.¹⁴²

¹³⁹ *Id.*

¹⁴⁰ JACK LEVIN & JACK McDEVITT, *HATE CRIMES REVISITED: AMERICA'S WAR AGAINST THOSE WHO ARE DIFFERENT* 38 (2002).

¹⁴¹ John Leo, *Even Lenny Bruce Would Know Better*, U.S. NEWS & WORLD REP. (D.C.), May 28, 1990, at 21.

¹⁴² See, e.g., LISA LAMPANELLI, *TAKE IT LIKE A MAN* (Warner Brothers 2005), available at <http://www.youtube.com/watch?v=k7Sp24TIWAM>.

One rare exception when a White was given a pass to use the word was during Black Entertainment Television's 1998 season of *Comic View*, when Gary Owen became the first and only White comedian to host a season. During his winning routine for the competition to become host, Owen said the N-word and received a standing ovation from the largely Black audience. He ultimately landed the coveted spot over Black comedians who had competed.¹⁴³ Though his use of the word was clearly accepted by members of the audience, Black comedians took offense to it.¹⁴⁴ 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 the prompt "people who annoy you," with a game board that had the letters "N_GGERS."¹⁴⁵ He incorrectly answered with "NIGGERS" when the correct answer was "NAGGERS." During the course of the show, the N-word was used forty-two times, but the episode was focused on the lesson Randy learned from having used the word.¹⁴⁶

Michael Richards's (Kramer from *Seinfeld*) Laugh Factory routine on November 17, 2006 created the type of backlash one would expect from Whites' use of the N-word. His routine, however, had much different results than Gary Owen's. During his stand-up act, Richards perceived that he was being heckled by some members of the audience. He lashed out at

That's right bitches; you know me, I bang a lot of Black guys. That's my thing; that's right, son. Yeah son. It ain't by choice. I just haven't lost enough weight to get a White guy to f*** me. That's the problem. You White devils with your skinny bitches. I gotta put up with that. Cause Black guys enjoy the padunkadunk, son. Isn't that right? Even though you're kind of a White Black guy—like, you know, a Bill Cosby Black. You know a Black guy with White features like a job and a cell phone. You never see that. That must be some prepaid s*** motherf***er! Prepaid, prepaid. But Black guys are cool. They do like a big a**. 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, hoohoo, mom and dad start to panic." Well, because you steal.

Id.

¹⁴³ DARRYL LITTLETON, BLACK COMEDIANS ON BLACK COMEDY: HOW AFRICAN-AMERICANS TAUGHT US TO LAUGH 214 (2006).

¹⁴⁴ *Id.* at 214-18.

¹⁴⁵ TREY PARKER & MATT STONE, SOUTH PARK: THE COMPLETE ELEVENTH SEASON: WITH APOLOGIES TO JESSE JACKSON (Paramount Home Entertainment 2008), available at <http://www.southparkstudios.com/episodes/102800/>.

¹⁴⁶ *Id.*

two men in particular, Kyle Doss and Frank McBride, both Black.¹⁴⁷ According to Doss, a large multi-ethnic group of individuals went to the Laugh Factory. They interrupted Richards's act simply by walking in, taking their seats, and ordering their drinks.¹⁴⁸ According to Doss, Richards noted, "All the Blacks and Mexicans are here."¹⁴⁹ Doss went on to tell Richards he lacked humor, to which, Doss later recounted, Richards responded with "Eff you, N-word."¹⁵⁰ Much of Richards's tirade was caught on tape, but according to Doss, some of what Richards said was inaudible.¹⁵¹ 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 an n-word."¹⁵² 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 f***ing fork up your a**. You can talk! You can talk! You can talk! You're brave now motherf***er! Throw his a** 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 motherf***ers!

Audience Member: That was uncalled for.

Richards: What was uncalled for? It's uncalled for you to interrupt my a** you cheap motherf***er! 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's he going?

Audience Member: That was uncalled for you f***ing cracker-a** motherf***er.

Richards: Cracker-a**? You calling me cracker a**, nigga?

Audience Member: F***ing White boy.

Richards: Are you threatening me?

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

¹⁴⁷ Aldore D. Collier, *Black Leaders Unite in Call to End Use of the 'N' Word*, JET, Dec. 11, 2006, at 6.

¹⁴⁸ *Today Show* (NBC television broadcast Nov. 22, 2006), available at <http://www.msnbc.msn.com/id/21134540/vp/15847249#15847249>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

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 the stage.

Audience Member: That's un-f***ing 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.¹⁵³

Though Richards's comments went beyond a comic routine and turned into a tirade, the fallout 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. He (Richards) cured me. He's my Dr. Phil. Hip-hoppers need to wake up."¹⁵⁴

2. Rap Music

Rappers, particularly so-called gangsta rappers, have long employed the N-word in their lyrics—and possibly with increasing frequency.¹⁵⁵ Aside from Nas's album, which was early entitled *Nigger*,¹⁵⁶ but later changed, Ol' Dirty Bastard's album entitled *Nigga Please*,¹⁵⁷ and N.W.A. (Niggaz With Attitude) who entitled one of their albums *Efil4zaggin* (Niggaz 4 Life spelled backwards),¹⁵⁸ a number of rappers have employed

¹⁵³ 'Kramer' Unleashes Racial Tirade, MSNBC.COM, Nov. 18, 2006, <http://www.msnbc.msn.com/id/22425001/vp/15817727#15817727>.

¹⁵⁴ Collier, *supra* note 147, at 6, 8.

¹⁵⁵ Kelley, *supra* note 132, at 136-37.

¹⁵⁶ *Nas Talks to RS About New Album Controversy While Politicians Join Fight to Prevent Title*, ROLLING STONE: ROCK & ROLL DAILY, Oct. 26, 2007, <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>.

¹⁵⁷ OL' DIRTY BASTARD, NIGGA PLEASE (Elektra 1999).

¹⁵⁸ N.W.A., EFIL4ZAGGIN (Priority Records 1991).

the N-word in their song titles. Dr. Dre's *The Day the Niggas Took Over*,¹⁵⁹ A Tribe Called Quest's *Sucka Nigga*,¹⁶⁰ Nas's *Last Real Nigga Alive*,¹⁶¹ the Geto Boys *Trigga Happy Nigga*,¹⁶² Snoop Dogg's *Down 4 My Niggas*,¹⁶³ Public Enemy's *Anti-Nigger Machine*,¹⁶⁴ DJ Quick's *Can't F*** With a Nigga*,¹⁶⁵ and Tupac's *Definition of a Thug Nigga*¹⁶⁶ 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."¹⁶⁷ On his album, *2Pacalypse Now*, rapper Tupac Shakur (2Pac) indicated that "nigga" is an acronym for "Never Ignorant Getting Goals Accomplished."¹⁶⁸ Rappers have also used "nigga" to describe a condition as opposed to skin color or culture.¹⁶⁹ 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 intra racial violence fed by a dying economy."¹⁷⁰ This is glaringly apparent on N.W.A.'s *Efil4zaggin* album¹⁷¹ where the N-word is almost synonymous for oppressed.¹⁷² In some, maybe most, instances rappers employ it to refer to the basest elements of Black culture. For example, it may be used to refer to a Black person, a man usually, who is violent, hypersexual, criminal, or manipulative (especially of women).¹⁷³ Others, particularly Black Nationalist rappers, use it to describe Blacks who

¹⁵⁹ DR. DRE, *THE CHRONIC* (Priority Records 1992).

¹⁶⁰ A TRIBE CALLED QUEST, *MIDNIGHT MARAUDERS* (Jive 1993).

¹⁶¹ NAS, *GOD'S SON* (Columbia 2002).

¹⁶² GETO BOYS, *GETO BOYS* (Def American 1990).

¹⁶³ SNOOP DOGG, *NO LIMIT TOP DOGG* (Priority Records 1999).

¹⁶⁴ PUBLIC ENEMY, *FEAR OF A BLACK PLANET* (Def Jam 1990).

¹⁶⁵ VARIOUS ARTISTS, *MENACE II SOCIETY: THE ORIGINAL MOTION PICTURE SOUNDTRACK* (Jive 1992).

¹⁶⁶ VARIOUS ARTISTS, *POETIC JUSTICE* (Sony 1993).

¹⁶⁷ Kelley, *supra* note 132, at 137.

¹⁶⁸ 2PAC, *Violent*, on *2PACALYPSE NOW* (Jive 1991).

¹⁶⁹ Kelley, *supra* note 132, at 137.

¹⁷⁰ *Id.*

¹⁷¹ N.W.A., *supra* note 158.

¹⁷² Kelley, *supra* note 132, at 137.

¹⁷³ 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 University of Maryland-College Park Library).

are defiant against White domination and exploitation¹⁷⁴ and to provide an ironic and humorous comment on the White fears of Black militancy.¹⁷⁵

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.¹⁷⁶ Whites who fancy themselves as immersed in hip-hop culture undoubtedly appropriate various aspects of that culture, including its linguistic style.¹⁷⁷ This includes using the N-word in their linguistic repertoire.¹⁷⁸ Most Whites immersed in hip-hop culture, however, 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.¹⁷⁹ The few White rappers who have attempted to use the N-word in their lyrics have created racial tension.¹⁸⁰ For instance, VH1 televised a reality show called *Ego Trip's The (White) Rapper Show*, which featured Whites who wanted to become rappers. The winner of the show was awarded a record contract and one hundred thousand dollars.¹⁸¹ During one episode, two of the competitors—Persia and John—got into an argument, wherein 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.¹⁸² If Jennifer Lopez, a high-profile Latina singer and former girlfriend of hip-hop mogul Sean “Diddy” Combs, could not use the N-word in her song lyrics without creating a furor,¹⁸³ it is no surprise that White rappers are barred from using it.

¹⁷⁴ Athena Alefros, “Revolutionary but Gangsta”: An Analysis of Message Raps and Gangsta Raps in the Early 1990s, at 112-15 (Sept. 2005) (unpublished M.A. thesis, Queen's University) (on file with Queen's University Library).

¹⁷⁵ Kelley, *supra* note 132, at 156 n.54.

¹⁷⁶ Randall Kennedy, *White Lie*, NEW REPUBLIC, Oct. 16, 2006, at 9.

¹⁷⁷ Cecilia Cutler, “Keepin’ It Real”: *White Hip-Hoppers’ Discourses of Language, Race, and Authenticity*, 13 J. LINGUISTIC ANTHROPOLOGY 211 (2003) [hereinafter “Keepin’ It Real”]; Cecelia Cutler, *Yorkville Crossing: White Teens, Hip Hop and African American English*, 3/4 J. SOCIOLINGUISTICS 428 (1999).

¹⁷⁸ Cutler, “Keepin’ It Real,” *supra* note 177, at 222.

¹⁷⁹ KENNEDY, *supra* note 88, at 50.

¹⁸⁰ Armond White, *Who Wants to See Ten Niggers Play Basketball?*, in DROPPIN’ SCIENCE, *supra* note 132, at 192, 197 (suggesting that White rap artists should not feel free to use the N-word and critiquing a White rap group’s use of the N-word in its lyrics); see YOUNG BLACK TEENAGERS, *Daddy Kalled Me Niga Cause I Liked to Rhyme*, on YOUNG BLACK TEENAGERS (MCA 1991).

¹⁸¹ See *Episode I Roundtable*, on EGO TRIPS THE (WHITE) RAPPER SHOW (VH1 internet broadcast), <http://www.vh1.com/video/> (last visited Dec. 8, 2008).

¹⁸² *Id.*

¹⁸³ Shellie R. Warren, *J. Lo and ‘the N Word’ Split Local Listeners*, TENNESSEAN, Aug. 18, 2001, at 6D.

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, they are authorized to use the N-word. With this thesis in mind, we have analyzed 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 searching online for "top 100 hip-hop albums." We ultimately selected a website that had the most current list, 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*.¹⁸⁴ For White rappers, we searched for "White rappers," and from two websites that were retrieved,¹⁸⁵ we developed a list of White rappers with widespread name recognition. We then searched for each group or solo artist for lyrics to their albums. We found complete lyrics for thirty-five Black rappers' albums¹⁸⁶ and for thirty White rappers' albums.¹⁸⁷ Out of the Black rappers' 536 songs analyzed, 436 contained the N-word (81.3%). Out of the White rappers' 477 songs analyzed, twenty contained the N-Word (4.2%). These data were statistically analyzed, and the results indicated that the difference between the percentages is statistically significant ($\chi^2 = 606.94$, $p < .001$), and represents a strong statistical effect ($\Phi = .77$). Among these twenty songs, it is possible 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 White 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

The spoken word genre consists of, 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

¹⁸⁴ List of Bests, Hip-Hop Connection's "100 Greatest Rap Albums 1995-2005," July 1, 2006, <http://www.listsofbests.com/list/8992>.

¹⁸⁵ Jim Davies, White Rappers Homepage, White Rappers, <http://www.jimdavies.org/personal/white-rappers.html> (last visited Dec. 8, 2008); *Race in Hip Hop*, WIKIPEDIA, http://en.wikipedia.org/wiki/White_rapper (last visited Dec. 8, 2008).

¹⁸⁶ See *infra* app. A.

¹⁸⁷ See *infra* app. B.

founded the group during the 1960s and unabashedly employed the N-word in a number of their song titles—*Run, Nigger, Wake Up, Niggers*, and *Niggers Are Scared of Revolution*.¹⁸⁸ 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 s***.

But there is one thing about niggers I do not love.

Niggers are scared of revolution.¹⁸⁹

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

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.

They 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,

¹⁸⁸ THE LAST POETS, *THE LAST POETS* (Various 1970).

¹⁸⁹ THE LAST POETS, *Niggas Are Scared of a Revolution*, on *THE LAST POETS* (Varese Sarabande 1970), available at <http://www.youtube.com/watch?v=jVHE-oYRKts>.

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

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?"¹⁹⁰

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

Beyond an analysis of the use of the N-word in popular culture, other lines of evidence, drawn from cognitive and social psychology, suggest that the use of the N-word in the context of a criminal act constitutes prima facie evidence of a hate crime. There is a vast and growing body of social scientific research that suggests that many Whites harbor implicit (subconscious) anti-Black attitudes.¹⁹¹ Legal academicians have begun to import this research into their scholarship.¹⁹² Based on this research, it is

¹⁹⁰ Julian Curry, *Niggers Niggas & Niggaz*, on RUSSELL SIMMONS PRESENTS DEF POETRY: SEASON 4 (HBO 2004), available at <http://www.youtube.com/watch?v=wD-UpHIB9no>.

¹⁹¹ Greenwald & Krieger, *supra* note 125.

¹⁹² Charles Lawrence was the first to articulate how subconscious race bias is important to our understanding of the role that race plays vis-à-vis the law. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); see also IAN AYRES, *PERVASIVE 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); Greenwald & Krieger, *supra* note 125; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Kang & Banaji, *supra* note 33; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (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); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias*,

reasonable to conclude that, within the realm of hate crime laws, the 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]."¹⁹³ Implicit cognition, in turn, reveals mental associations that people are unwilling or are unable to report.¹⁹⁴ This is because such cognitions might conflict with expressly-held values or beliefs.¹⁹⁵ Moreover, implicit cognitions reveal information that is not readily available upon introspection for people with a desire to retrieve and/or express such information.¹⁹⁶ 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.¹⁹⁷ 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

Decisionmaking, and Misremembering, 57 DUKE L.J. 345 (2007); Lateef Mtima, *The Road to the Bench: Not Even Good (Subliminal) Intentions*, 8 U. CHI. L. SCH. ROUNDTABLE 135 (2001); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); Marc R. Poirier, *Is Cognitive 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); Reshma M. Saujani, "The Implicit Association Test": *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500-07 (2007); 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); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005); Michael S. Shin, Comment, *Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2060-76 (2002).

¹⁹³ Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 5 (1995); see also Brian A. Nosek 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).

¹⁹⁴ Patrick T. Vargas et al., *Armed Only with Paper and Pencil: "Low-Tech" Measures of Implicit Attitudes*, in IMPLICIT MEASURES OF ATTITUDES 103 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

¹⁹⁵ Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 452 (2005).

¹⁹⁶ Greenwald & Banaji, *supra* note 193; Nosek et al., *supra* note 193.

¹⁹⁷ Bernd Wittenbrink, *Measuring Attitudes Through Priming*, in IMPLICIT MEASURES OF ATTITUDES, *supra* note 194, at 17.

identify between attitudes and behavior.¹⁹⁸ Second, "individuals may not even be aware of their true preferences or attitudes."¹⁹⁹

Furthermore, explicit and implicit attitudes appear to rely on different cognitive processes, each of which suggests a specific methodology to assess them.²⁰⁰ Effortful processing occurs when individuals are motivated and possess the cognitive resources necessary to make a rational, deliberate decision. Under these circumstances, self-report measures are useful.²⁰¹ If, however, motivation is lacking or cognitive resources are compromised, decision-making will depend on less controlled processes. These conditions require an alternative method for gauging one's implicit attitudes.²⁰² The Implicit Association Test (IAT) is a popular measure of the relative strength of associations between pairs of concepts,²⁰³ including positive or negative attributes and race. Simply put, the IAT measures the relative strength of associations between pairs of concepts. A computer task asks participants to sort stimuli into one of four categories. Those four categories are paired together, so that the difficulty of the sorting process produces an index of how closely the person taking the IAT associates the categories. The race IAT, for example, asks participants to sort positive words, negative words, Black faces, and White faces. It measures how long it takes participants to pair White faces with positive words and Black faces with negative words. During the same session, it measures how long it takes participants to pair White faces with negative words and Black faces with positive words. The difference in average reaction times between the two sets of pairings provides a measure of participants' racial associations.²⁰⁴

Approximately 70% of Whites harbor anti-Black and pro-White biases.²⁰⁵ Andrew Baron and Mahzarin Banaji found that White six-year-olds demonstrate implicit pro-White and anti-Black bias, with self-reported attitudes revealing bias in the same direction. In ten-year-olds and adults

¹⁹⁸ *Id.*

¹⁹⁹ Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POL. BEHAV. 343, 345 (2007).

²⁰⁰ Malte Friese et al., *Predicting Voting Behavior with Implicit Attitude Measures: The 2002 German Parliamentary Election*, 54 EXPERIMENTAL PSYCH. 247, 247 (2007).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 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, *supra* note 194, at 59, 62.

²⁰⁴ Greenwald & Kreiger, *supra* note 125, at 952-53.

²⁰⁵ *Id.*

the same magnitude of implicit race bias is observed, although self-reported race attitudes dissipate with age—vanishing entirely in adults.²⁰⁶

Anthony Greenwald and his 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.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ Even with equally unfamiliar exemplars for both ingroup and outgroup, Whites still display a pro-ingroup IAT bias. Thus, it appears that even when there is minimal experiential or historical input available, peoples’ minds are prepared to display bias effortlessly.²¹⁰ Even Whites who know that the IAT measures undesirable racist attitudes and who explicitly self-report egalitarian attitudes find it difficult to control their biased responses.²¹¹ Thierry Devos and Banaji found that Whites make no distinction between Blacks and Whites on explicit measures of “Americanness.”²¹² On implicit measures, however, Whites more easily pair American symbols with White faces rather than with Black faces.²¹³ This is so even where faces of particular American Blacks are more familiar than White faces.²¹⁴ 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

²⁰⁶ 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).

²⁰⁷ Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1474 (1998).

²⁰⁸ 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).

²⁰⁹ *Id.*

²¹⁰ *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, 321-23 (2000).

²¹¹ Do-Yeong Kim & Anthony G. Greenwald, *Voluntary Controllability of Implicit Cognition: Can Implicit Attitudes Be Faked?* (May 1998) (unpublished paper presented at the annual meeting for the Midwestern Psychological Association), reprinted as Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83 (2003), cited in Nilanjana Dasgupta et al., *supra* note 210, at 317.

²¹² Devos & Banaji, *supra* note 195, at 452.

²¹³ *Id.* at 452-53.

²¹⁴ *Id.* at 455.

sizes.²¹⁵ These web-based studies reveal that, among children (N = 28,816) and adults (N = 732,881), White is associated with good and Black with bad.²¹⁶ Light skin is associated with good and dark skin with bad (N = 122,988).²¹⁷ White is associated with harmless objects and Black with weapons (N = 85,742).²¹⁸

Subconscious race attitudes go beyond mere positive or negative associations. For instance, a study by Phillip Goff and his colleagues investigated the relationship between implicit racial attitudes and dehumanization of Blacks.²¹⁹ In their first study, individuals were subliminally primed with images (shown for milliseconds) of Black faces, White faces, or neutral images.²²⁰ Then they were shown fuzzy images of animals (apes and non-apes), which gradually became clearer. Individuals were instructed to indicate the point at which they could identify the image.²²¹ Goff and his fellow researchers found that both Whites and non-Whites more readily associated Blacks, as compared to Whites, with apes.²²² In a second study, individuals were first subliminally shown images of ape line drawings or jumbled line drawings.²²³ Second, they were given a facial interference task designed to gauge how distracted participants would become when presented with faces prior to a test measuring their attentional bias to Black and White faces.²²⁴ Their results indicated that priming individuals with images of apes demonstrated more attentional bias towards Black faces.²²⁵ Moreover, the study found that implicit anti-Black biases predict this ape/Black association.²²⁶

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, perceptions of novel or threatening stimuli,²²⁷ and fear conditioning.²²⁸

²¹⁵ Lane et al., *supra* note 203, at 89.

²¹⁶ Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 46 tbl. 2 (2007).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292 (2008).

²²⁰ *Id.* at 295.

²²¹ *Id.*

²²² *Id.* at 296.

²²³ *Id.* at 297.

²²⁴ *Id.*

²²⁵ *Id.* 298-99.

²²⁶ *Id.* at 301.

²²⁷ Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 AM. PSYCHOLOGIST 717, 720 (2001).

William Cunningham and his colleagues found that Whites' amygdalas are activated far more when they are subliminally shown Black faces as compared to White faces.²²⁹ Moreover, the degree of amygdala activation is significantly correlated with participants' IAT scores.²³⁰

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.²³¹ 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*.²³² John Dovidio and his colleagues also demonstrated that response times to negative target words were significantly faster following the Black prime than following the White prime.²³³ And Patricia Devine's research reveals that subliminal priming with words stereotypically associated with Blacks leads individuals to interpret ambiguous behavior as more aggressive.²³⁴

Quite possibly, these results stemmed from more than simply using words with negative affect (e.g., *lazy*). John Bargh and his co-authors 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.²³⁵ 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.²³⁶

²²⁸ See Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000).

²²⁹ See William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 811 (2004).

²³⁰ *Id.*

²³¹ Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23, 23 (1983).

²³² *Id.*

²³³ John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 522-23 (1997).

²³⁴ Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 11-12 (1989).

²³⁵ 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).

²³⁶ *Id.* at 239.

Implicit racial bias may implicate other behaviors as well. 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 mugshot of a Black suspect, and another crime story with a mugshot of a White suspect.²³⁷ In order to control for facial expression and features, both suspects were represented by the same morphed photograph; the only difference was skin hue.²³⁸ The suspect appeared for only five seconds in a ten-minute newscast.²³⁹ Nonetheless, having seen the Black suspect, Whites showed 6% more support for punitive remedies than did the control group, which saw no crime story.²⁴⁰ When they were instead exposed to the White suspect, their support for punitive remedies increased by only 1%, which was not statistically significant.²⁴¹

Allen McConnell and Jill Leibold found that Whites who revealed stronger negative attitudes toward Blacks (versus Whites) on the IAT had more negative social interactions with a Black (versus a White) experimenter.²⁴² Implicit race bias also predicts behavior in employment 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.²⁴³ Mark Chen and John Bargh

²³⁷ 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 (2000).

²³⁸ *Id.*

²³⁹ *Id.* at 567.

²⁴⁰ *Id.* at 567-68.

²⁴¹ *Id.* at 568.

²⁴² John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65-66 (2002); 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, 438-40 (2001).

²⁴³ D. Sekaquapetwa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 75, 77-78 (2003). For example, sixteen of the twenty-five sentence beginnings provided to the participants in this study contained racially stereotypic questions. Some were consistent with Black stereotypes ("easily made the team; blasted loud music at a party") while others were inconsistent with Black stereotypes ("enrolled at Princeton; refused to dance"). *Id.* at 76. For a further analysis of implicit race bias in employment settings, see Georgia T. Chao & Harold W. Willaby, *International Employment Discrimination and Implicit Social Cognition: New Directions for Theory and Research*, 56 APPLIED PSYCHOL.: AN INT'L REV. 678 (2007); Sharon L. Segrest Purkiss et al., *Implicit Sources of Bias in Employment Interview Judgments and Decisions*, 101 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 152 (2006); Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 207 (2007); Jonathan C. Ziegert & Paul J. Hanges,

similarly found that the subliminal activation of stereotypes leads to behavioral confirmation.²⁴⁴ For instance, once racial stereotypes have been activated and are manifested in a perceiver's 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.²⁴⁵ 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 and bad, and between White and good.²⁴⁶ 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.²⁴⁷

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.²⁴⁸ Those who were primed with the Black face more quickly identified guns correctly.²⁴⁹ In contrast, those primed with the White face more quickly identified tools correctly.²⁵⁰ When participants were time-pressured to force more errors, those primed with a Black face erred more in mistaking a tool for a gun (a false alarm).²⁵¹ 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 (e.g., wallet, soda can, or cell phone) into diverse

Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias, 90 J. APPLIED PSYCHOL. 553 (2005).

²⁴⁴ 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).

²⁴⁵ *Id.*

²⁴⁶ William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULLETIN 1332, 1336 (2004).

²⁴⁷ 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 A. Nosek, Assistant Professor, Univ. of Va., Presentation at Duke University's Conference on the Psychology of Voting and Election Campaigns, The Politics of Intergroup Attitudes and Stereotypes (Oct. 20, 2006).

²⁴⁸ 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).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

photographic backgrounds.²⁵² Participants were instructed to decide as quickly as possible whether to shoot the target. Severe time pressure designed into the game forced errors. Individuals were more likely to mistake a Black target as armed when he in fact is unarmed (false alarms); conversely, they were more likely to mistake a White target as unarmed when he in fact is armed (misses).²⁵³

In the area of health care, Alexander Green and colleagues studied internal medicine and emergency medicine physicians; they found that none of the physicians reported explicit preferences for Whites over Blacks.²⁵⁴ Nonetheless, they found an implicit preference for White patients and implicit stereotypes that Blacks are less cooperative with medical procedures and less cooperative generally.²⁵⁵ More importantly, as physicians' pro-White bias increased so did their likelihood of providing White patients, and not Black ones, with a treatment for cardiovascular disease.²⁵⁶

Implicit anti-Black bias predicts Whites' justification of violence against Blacks. For example, Goff and colleagues discuss the historical conceptualizations of Blacks as inferior, and as more similar to apes than humans.²⁵⁷ Although such blatant racism appears to have subsided, there may be traces of this association that can be subliminally primed in individuals with images of apes or big cats.²⁵⁸ This is precisely what Goff and colleagues did. After priming, individuals were asked to view a videotape of police officers beating a suspect who individuals were led to believe was either Black or White.²⁵⁹ Individuals who believed the suspect was White perceived the police as being no more justified when primed with apes rather than big cats. Individuals who believed the suspect was Black perceived the police as being more justified when primed with apes rather than with big cats. Moreover, individuals who were primed with big cats did not think the police were more justified in beating either the White or Black suspect.²⁶⁰ In contrast, individuals who were primed with apes

²⁵² Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-17, 1319 (2002).

²⁵³ *Id.* at 1317.

²⁵⁴ Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235 (2007).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Goff et al., *supra* note 219, at 292-93.

²⁵⁸ *Id.* at 295.

²⁵⁹ *Id.* at 301-02.

²⁶⁰ *Id.* at 302.

thought the police were more justified in beating the Black, as opposed to the White, suspect.²⁶¹ Finally, Goff and colleagues discovered that Black, as opposed to White, criminal defendants are more likely to be portrayed as ape-like in news coverage, and this portrayal is associated with higher levels of state-sponsored executions.²⁶²

Most relevant to this Article, Rudman and Ashmore conducted an experiment on the relationship between implicit racial attitudes and harmful behaviors towards Blacks.²⁶³ In their second study they discovered that implicit bias predicted budget cuts for Asian, Black, and Jewish student organizations.²⁶⁴ More importantly, implicit anti-Black bias predicted self-reported racial discrimination.²⁶⁵ Included in this category of behaviors were exclusion, verbal slurs, and physical harm.²⁶⁶

Thus, Whites' usage of the N-word suggests a certain level of presumptive racial animus against Blacks. Despite the assertion that Whites who are immersed in Black culture feel comfortable using the N-word, at least with Black friends, the data fails to support this. A casual analysis of racialized comedy sketches and spoken word suggests that even where Blacks use the N-word frequently, Whites do not. An empirical analysis of rap music lyrics suggests that despite the fact that Black rappers use the N-word casually, White rappers are highly self-censored when it comes to the word. Moreover, White subconscious racial animus towards Blacks is pervasive and predictive of White usage of racial slurs against Blacks.

VI. 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. After all, most crimes against Blacks generally are committed by other Blacks.²⁶⁷ Blacks more frequently use the N-word than Whites.²⁶⁸ Moreover, Blacks harbor implicit anti-Black attitudes at almost the same rates as Whites.²⁶⁹

²⁶¹ *Id.*

²⁶² *Id.* at 304.

²⁶³ See generally Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359 (2007).

²⁶⁴ *Id.* at 363-68.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 361-63.

²⁶⁷ SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME* 50-52 (3d ed. 2004).

²⁶⁸ See *supra* Part IV.

²⁶⁹ Leslie Ashburn-Nardo et al., *Black Americans' Implicit Racial Associations and Their Implications for Intergroup Judgment*, 21 SOC. COGNITION 61, 73 (2003); Jost et al., *supra* note 247, at 895 (citing C. Vincent Spicer & Margo J. Monteith, *Implicit Outgroup*

Nonetheless, given that Blacks' interactions with other Blacks is more complex than that of Whites with Blacks, their use of the N-word is also likely more complex.

For example, among twelve to fourteen-year-old Blacks, Andrew Baron and colleagues found that, at least by age thirteen, young Blacks do not show the ingroup preference that has come to be the hallmark of Whites.²⁷⁰ 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.²⁷¹ Vincent Spicer and Margo Monteith demonstrate that between 50% and 65% of Blacks exhibit implicit outgroup bias in favor of Whites.²⁷² 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.²⁷³

In a web-based study conducted by Nosek and colleagues, Blacks demonstrated a significant pro-Black bias.²⁷⁴ New data from three measures available to the public at a demonstration website²⁷⁵ extended the existing evidence concerning implicit and explicit ingroup and outgroup bias among Blacks and Whites. Blacks "showed stronger explicit ingroup favoritism" than White subjects, "although both clearly show explicit preferences for their own group."²⁷⁶ On measures of implicit attitudes, Whites "showed ingroup favoritism," but Blacks did not demonstrate the same. A greater percentage of Whites "expressed ingroup favoritism on implicit measures (78.4%) than on explicit measures (51.1%), whereas a larger percentage of [Blacks] expressed ingroup favoritism on explicit measures (65.4%) than on implicit measures (40.1%)."²⁷⁷ When researchers measured implicit racial attitudes, "39.3% of Blacks show outgroup favoritism, which is about the same proportion that showed

Favoritism Among Blacks and Vulnerability to Stereotype Threat (2001) (unpublished manuscript, on file with William T. Young Library, University of Kentucky)).

²⁷⁰ Andrew Scott Baron et al., *Implicit Race Attitudes of African American and Hispanic Children* (Jan. 2004) (unpublished poster presented at the annual meeting of the Society for Personality and Social Psychology, on file with author), *cited in* Baron & Banaji, *supra* note 206, at 57.

²⁷¹ Jost et al., *supra* note 247, at 895 (citing Spicer & Monteith, *supra* note 269).

²⁷² *Id.*

²⁷³ Ashburn-Nardo et al., *supra* note 269, at 73.

²⁷⁴ Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 105-07 (2002).

²⁷⁵ Teaching Tolerance Homepage, <http://tolerance.org> (last visited Dec. 8, 2008).

²⁷⁶ Jost et al., *supra* note 247, at 897.

²⁷⁷ *Id.*

ingroup favoritism.”²⁷⁸ The researchers concluded that Blacks “showed strong ingroup favoritism explicitly, but not implicitly. [Whites], by contrast, showed strong ingroup favoritism whether it was measured explicitly or implicitly.”²⁷⁹

In his experimental research, Robert Livingston examined the variability in Blacks’ performance on two implicit measures of attitudes toward Blacks versus Whites.²⁸⁰ 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.²⁸¹ 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.²⁸² In short, Black participants who perceived greater negativity toward their group were more prone to favoring the outgroup (Whites) over the ingroup (Blacks).²⁸³ 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.²⁸⁴ 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.²⁸⁵

A remarkably high percentage of Blacks harbor an implicit anti-Black and pro-White biases, such biases lead to adverse behavior directed at Blacks, and Blacks seem to use the N-word with far more frequency than Whites. However, 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., lacks 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.

VII. CONCLUSION

The N-word has long been a controversial word, symbolic of White racial animus and hostility towards Blacks. A contemporary examination

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ 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, 405 (2002).

²⁸¹ *Id.* at 409-11.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

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 within the context of hate crimes. Whites' usage of the N-word while committing inter-racial crimes is an example of the leakage of implicit biases against Blacks.

The distinction between a "regular" crime and a hate crime is the motivation of the perpetrator to select a victim based on their characteristics, such as race.²⁸⁶ Despite its key role in hate crimes, motivation can be difficult to prove.²⁸⁷ Moreover, because of the often implicit nature of anti-Black bias, one's motivation is not immediately apparent. Therefore, we must look to one's actions to see if there is evidence of racial animus. As we have argued throughout this Article, implicit anti-Black bias exists, and the use of the N-word among Whites is evidence of such bias. Thus, in the Minucci case, and contrary to the testimony offered in his defense, his use of the N-word while beating Glenn Moore provides evidence that Minucci's motivation was at least in part racially motivated. When the N-word is used by a White perpetrator in the context of committing a crime against a Black victim, this can, and should, be used as evidence that the crime was racially motivated.

This Article's findings fit within a growing corpus of legal scholarship that imports empirical, social, and cognitive psychological research about implicit racial bias into the law. This research demonstrates that models of "racism" predicated on overt and explicit indicia of racial animus are outdated. Many Whites either lie about, or lack adequate access to, their actual racial attitudes. Even when they are truly immersed in Black culture, such immersion, ironically, may amplify their subconscious biases,²⁸⁸

²⁸⁶ MCLAUGHLIN ET AL., *supra* note 66.

²⁸⁷ Donald A. Saucier et al., *Effects of Victims' Characteristics on Attitudes Toward Hate Crimes*, 21 J. INTERPERSONAL VIOL. 890, 893 (2006).

²⁸⁸ Michael D. Cobb & William A. Boettcher, III, *Ambivalent Sexism and Misogynistic Rap Music: Does Exposure to Eminem Increase Sexism?*, 37 J. APPLIED SOC. PSYCHOL. 3025, 3034-36 (2007) (finding that listening to rap music increases sexism, especially among men); Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESS & INTERGROUP REL.

including anti-Black biases.²⁸⁹ Furthermore, despite the fact that liberals, who may be deemed to embrace Black culture more so than conservatives, have nearly twice the implicit pro-Black attitudes that conservatives do, the distinction between the two on levels of implicit anti-Black bias is negligible, with both above 60%.²⁹⁰ Thus, the work of social scientists and legal scholars in this area demonstrates that a contemporary and nuanced understanding of race bias has considerable implications for the law. And it should be such that gone are the days when a defendant's lack of explicit racial animus, or a court's ability to discern such, should dictate the outcome of a trial. Whether courts are grappling with *Batson* challenges, employment discrimination, affirmative action policies, or hate crimes, wherever race is implicated, research on implicit attitudes demonstrates that racial bias still exists and provides a new—and more fitting—mode of analysis.

133, 137-39, 141-44 (2002) (finding that violent and misogynistic rap music increases implicit racial stereotypes and encourages listeners to judge Blacks less favorably than Whites).

²⁸⁹ Rudman & Lee, *supra* note 288.

²⁹⁰ Greenwald & Krieger, *supra* note 125, at 958.

APPENDICES: SONG LYRICS DATABASES

The data given here regarding use of the N-word by Black and White rappers were collected on February 10, 2007. The information below represents the data that we used in order to draw the conclusions above, and is not represented to be a complete accounting of each album's lyrics. The websites listed below are provided in order to allow the interested reader to examine a cross-section of lyrics from a wide range of albums. The websites listed may not reflect the actual number of songs on an individual album; the information provided on each website may have changed since these data were collected.

APPENDIX A: BLACK RAPPERS' LYRICS

2PAC Lyrics

<http://www.azlyrics.com/19/2pac.html>

- "Nigger" is used in twenty out of twenty listed songs on the album titled *All Eyez on Me*.

50 Cent Lyrics

<http://www.azlyrics.com/19/50cent.html>

- "Nigger" is used in sixteen out of sixteen listed songs on the album titled *Get Rich or Die Tryin'*.

The Alkaholiks Lyrics: Coast II Coast Lyrics

<http://www.lyricsdownload.com/album-B000002WQQ.html>

- "Nigger" is used in ten out of ten listed songs on the album titled *Coast II Coast*.

Beatnuts Lyrics: Stone Crazy Lyrics

<http://www.songlyrics.com/beatnuts-the/stone-crazy/a-2566/>

- "Nigger" is used in fourteen out of seventeen listed songs on the album titled *Stone Crazy*.

Big L Lyrics: Lifestylez Ov Da Poor And Dangerous Lyrics

<http://www.songlyrics.com/big-l/lifestylez-ov-da-poor-and-dangerous/a-12312/>

- "Nigger" is used in eleven out of twelve listed songs on the album titled *Lifestylz Ov Da Poor & Dangerous*.

Cam'Ron Lyrics

<http://www.songlyrics.com/song-lyrics/CAM'RON/410.html>

- "Nigger" is used in eighteen out of twenty listed songs on the album titled *Purple Haze*.
-

The Clipse Lyrics: Lord Willin Lyrics

<http://www.azlyrics.com/c/clipse.html>

- “Nigger” is used in fourteen out of fifteen listed songs on the album titled *Lord Willin*.

De La Soul Lyrics: Stakes Is High Lyrics

http://www.songlyrics.com/song-lyrics/De_La_Soul/1311.html

- “Nigger” is used in two out of seventeen listed songs on the album titled *Stakes Is High*.

Dr. Dre Lyrics

<http://www.azlyrics.com/d/drdre.html>

- “Nigger” is used in twenty out of twenty listed songs on the album titled *2001*.

Fugees Lyrics: The Score Lyrics

<http://www.songlyrics.com/fugees/the-score/a-10571>

- “Nigger” is used in twelve out of sixteen listed songs on the album titled *The Score*.

Gang Starr Lyrics

<http://www.songlyrics.com/song-lyrics/Gang%20Starr/8936.html>

- “Nigger” is used in nineteen out of twenty listed songs on the album titled *Moment of Truth*.

Genius Lyrics: Liquid Swords Lyrics

<http://www.lyred.com/lyrics/Genius/Liquid+Swords>

- “Nigger” is used in thirteen out of thirteen listed songs on the album titled *Liquid Swords*.

GHOSTFACE KILLAH Lyrics

<http://www.azlyrics.com/g/ghostface.html>

- “Nigger” is used in fourteen out of fifteen listed songs on the album titled *Supreme Clientele*.

Grand Puba Lyrics: 2000 Lyrics

<http://www.lyricsdownload.com/album-B000002HF3.html>

- “Nigger” is not used on the album titled *2000*.

Lauryn Hill Lyrics

http://www.songlyrics.com/song-lyrics/Lauryn_Hill/7465.html

- “Nigger” is not used on the album titled *Miseducation of Lauryn Hill*.

Jay-Z Lyrics

<http://www.songlyrics.com/song-lyrics/Jay-Z/2682.html>

- “Nigger” is used in twelve out of thirteen listed songs on the album titled *The Blueprint*, in fifteen out of fifteen listed songs on the album titled *Reasonable Doubt*, and in fourteen out of fourteen listed songs on the album titled *The Black Album*.
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KRS-ONE Lyrics: KRS-One Lyrics

http://www.allthelyrics.com/lyrics/krone/krone_200000/

- "Nigger" is used in one out of fourteen listed songs on the album titled *KRS One*.

Lil' Wayne Lyrics

<http://www.azlyrics.com/l/lilwayne.html>

- "Nigger" is used in nineteen out of twenty-one listed songs on the album titled *Tha Carter*.

Lyrics | Collection of Song Lyrics at Song Lyrics.com

<http://www.songlyrics.com/showartists.php?letter=L>

- "Nigger" is used in seventeen out of twenty listed songs on the album titled *Crunk Juice by Lil Jon & the Eastside Boyz*.

M.O.P. Lyrics

http://www.songlyrics.com/song-lyrics/M_O_P/12884.html

- "Nigger" is used in nineteen out of nineteen listed songs on the album titled *Warriorz*.

Mobb Deep: Infamy Lyrics

<http://www.songlyrics.com/mobb-deep/infamy/a-18566/>

- "Nigger" is used in sixteen out of sixteen listed songs on the album titled *Infamy*.

N.E.R.D. Lyrics: In Search of Lyrics

<http://www.songlyrics.com/nerd/in-search-of/a-4410/>

- "Nigger" is used in twenty out of twenty listed songs on the album titled *Life After Death*.

Ol' Dirty Bastard Lyrics

<http://www.azlyrics.com/o/oldirtybastard.html>

- "Nigger" is used in seventeen out of seventeen listed songs on the album titled *Return to the 36 Chambers*.

Outkast Lyrics

<http://www.songlyrics.com/song-lyrics/Outkast/1960.html>

- "Nigger" is used in fifteen out of fifteen listed songs on the album titled *ATLiens*, in sixteen out of sixteen listed songs on the album titled *Aquemini*, and in eighteen out of twenty listed songs on the album titled *Speakerboxxx*.

Raekwon Lyrics: Only Built 4 Cuban Linx Lyrics

<http://www.allthelyrics.com/lyrics/raekwon/>

- "Nigger" is used in eighteen out of eighteen listed songs on the album titled *Only Built 4 Cuban Linx*.
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The Roots Lyrics

<http://www.azlyrics.com/r/roots.html>

- “Nigger” is used in sixteen out of twenty listed songs on the album titled *Illadelph Halflife* and in fourteen out of eighteen listed songs on the album titled *Things Fall Apart*.

Scarface Lyrics: 32 Albums

<http://www.allthelyrics.com/lyrics/scarface/>

- “Nigger” is used in twelve out of thirteen listed songs on the album titled *The Fix*.

Kanye West Lyrics

<http://www.azlyrics.com/w/west.html>

- “Nigger” is used in twenty out of twenty listed songs on the album titled *The College Dropout*.

Wu-Tang Clan Lyrics

<http://www.azlyrics.com/w/wutang.html>

- “Nigger” is used in twenty-four out of twenty-seven listed songs on the album titled *Wu Tang Forever*.
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APPENDIX B: WHITE RAPPERS' LYRICS

3rd Bass: Derelicts of Dialect Album Lyrics

<http://www.lyred.com/lyrics/3rd+Bass/Derelicts+Of+Dialect>

- "Nigger" is not used on the album titled *Derelicts of Dialect*.

Beastie Boys Lyrics

<http://www.azlyrics.com/b/beastie.html>

- "Nigger" not used on the albums titled *Check Your Head*, *Hello Nasty*, *Ill Communication*, *Licensed to Ill*, *Paul's Boutique*, and *To the 5 Boroughs*.

Bubba Sparxxx Lyrics

<http://www.azlyrics.com/b/bubba.html>

- "Nigger" is not used on the albums titled *Dark Days Bright Nights* and *Deliverance*. "Nigger" is used in one out of eleven listed songs on the album titled *The Charm*.

Eminem Lyrics

<http://www.songlyrics.com/song-lyrics/Eminem/1286.html>

- "Nigger" is used in three out of seventeen listed songs on the album titled *Curtain Call*, in fourteen out of twenty listed songs on the album titled *The Eminem Show*, in five out of eighteen listed songs on the album titled *The Marshall Mathers LP*, and in three out of twenty listed songs on the album titled *The Slim Shady LP*.

Everlast Lyrics

<http://www.azlyrics.com/e/everlast.html>

- "Nigger" is not used on the albums titled *Eat at Whitey's* and *Whitey Ford Sings the Blues*.

House of Pain Lyrics

http://www.songlyrics.com/song-lyrics/House_Of_Pain/4960.html

- "Nigger" is used in one out of eighteen listed songs on the album titled *House of Pain*. "Nigger" is not used on the albums titled *Same as It Ever Was* and *Truth Crushed to Earth Shall Rise*

Kid Rock Lyrics

http://www.songlyrics.com/song-lyrics/Kid_Rock/2429.html

- "Nigger" is used in one out of fourteen listed songs on the album titled *Cocky* and in two out of fourteen listed songs on the album titled *Devil Without a Cause*. "Nigger" is not used in the albums titled *Grit Sandwiches for Breakfast* and *History of Rock*.

Remedy Lyrics

<http://www.songlyrics.com/song-lyrics/Remedy/5176.html>

- "Nigger" is not used on the album titled *Remedy*.
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Snow Lyrics

<http://www.songlyrics.com/song-lyrics/Snow/7893.html>

- “Nigger” is not used on the album titled *12 Inches of Snow*.

Vanilla Ice Lyrics

http://www.lyricsmania.com/lyrics/vanilla_ice_lyrics_3880

- “Nigger” is not used on the albums titled *Bi-Polar*, *Hard to Swallow*, *Mind Blowin’*, and *To the Extreme*.

Paul Wall Lyrics

<http://www.azlyrics.com/p/paulwall.html>

- “Nigger” is not used on the album titled *People’s Champ*.
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