

# A 'HO NEW WORLD: RACED AND GENDERED INSULT AS ERSATZ CARNIVAL AND THE CORRUPTION OF FREEDOM OF EXPRESSION NORMS

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If buttercups buzz after the bee;  
If boats were on land, churches on sea;  
If ponies rode men, and grass ate the cow;  
If cats should be chased into holes by the mouse;  
If mamas sold their babies to gypsies for half a crown;  
If summer were spring and the other way round  
Then all the world would be upside down.<sup>1</sup>

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1. Verse from *The World Turned Upside Down*, as reprinted in Isaac Kramnick, *Introduction to THOMAS PAINE, COMMON SENSE 7, 24* (Isaac Kramnick ed., Penguin Books 1982) (1776). *The World Turned Upside Down* is an English ballad that was originally written as a song protesting the policies of Oliver Cromwell, who in 1643 banned the jubilant celebrations that typically marked English Christmas season and instead required sober, quiet celebrations. DIANE PURKISS, *THE ENGLISH CIVIL WAR: PAPISTS, GENTLEWOMEN, SOLDIERS, AND WITCHFINDERS IN THE BIRTH OF MODERN BRITAIN*, 233, 242 (2006) (detailing the attempt to bar Christmas under the rule of Oliver Cromwell and the singing of *The World Turned Upside Down* as a response). Numerous verses to the song have developed since it was first sung in the 1600s. See, e.g., *The World Turned Upside Down*, <http://www.contemplator.com/england/worldtur.html> (last visited Mar. 8, 2009). Because of its origins, the song is dual in its meaning: it has come to signify the overturning of longstanding norms by those in power, and it is also a more general symbol of the undermining of hierarchy by the oppressed. There are some who say, for example, that retreating British troops played it after being routed at Yorktown, a defeat which ultimately led to the end of the Revolutionary War and English rule in the American colonies. See, e.g., Kramnick, *supra*, at 24 (recounting that, as the British troops commanded by General Cornwallis “laid down their arms” at Yorktown, Cornwallis “ordered melancholy tunes played by his band,” specifically requesting the verse quoted here). *But cf.* Dennis Montgomery, “If Ponies Rode Men and Grass Ate the

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#### ABSTRACT

Carnivalization, a concept developed by literary theorist Mikhail Bakhtin and later employed in broad social and cultural contexts, is the tearing down of social norms, the elimination of boundaries, and the inversion of established hierarchies. It is the world turned upside down. *Ersatz* carnival is a pernicious, inverted form of carnival, one wherein counter-discourses propounded by outsiders are appropriated by elites and frequently redeployed to silence and exclude those same outsiders. The use of the slur “‘ho” by gangsta’ rappers in the performance of songs that articulate a vision of urban culture is an example of carnivalization. Thus, when words like “‘ho” are appropriated by mainstream elites and wielded as “jokes,” as was the case in the Don Imus debacle, it is a form of ersatz carnival. Tolerating raced and gendered insults such as “nappy-headed

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Cows”: Just What Tune Was in the Air when the World Turned Upside Down?, <http://www.americanrevolution.org/upside.html> (last visited Mar. 8, 2009) (analyzing accounts of the surrender and acknowledging that a definitive answer in favor of this theory cannot be proven in either direction).

'ho" in public discourse, whether as authentic carnival from the mouths of gangsta' rappers themselves or as ersatz carnival from Imus and his ilk, is troubling because in either case, racial groups and women remain the victims of an entrenched hierarchy. However, in this essay I argue that citing freedom of expression norms in support of the use of ersatz carnival is especially pernicious. The use of raced and gendered epithets in such contexts demeans and undermines the contestative, counter-hegemonic aspects of gangsta' rap discourses. Using the First Amendment and its values as both a sword and a shield, ersatz carnival appropriates a means of revolt, albeit a flawed and imperfect one, and redeploys it as a tool of retrenchment, thereby silencing subaltern voices.

## I. INTRODUCTION

For a few weeks in April 2007, the American and international public was consumed by the audacity of sports radio host Don Imus, who, on the morning of April 4, while engaging in his usual on-the-air mix of sports and political talk<sup>2</sup> combined with lowbrow humor, called members of the championship Rutgers University women's basketball team "nappy-headed<sup>3</sup> ho's."<sup>4</sup> The raced and gendered insult uttered that day was not a

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2. The sports-cum-politics talk show format is increasingly common. See, e.g., J.M. Dempsey, *KTCK, "The Ticket," Dallas-Fort Worth: "Radio by the Everyman, for the Everyman,"* in *SPORTS-TALK RADIO IN AMERICA: ITS CONTEXT AND CULTURE* 15, 15 (John Mark Dempsey ed., 2006) (discussing the success of Dallas, Texas-based KTCK, a sports talk radio station infused with popular commentary and large amounts of sex). Fans who closely identify themselves with sports teams often transfer that loyalty to sports talk stations, making it attractive to advertisers. *Id.* at 16. Sports talk radio has been hailed as a means of fostering civic discourse and communal identity in a world where more and more people are isolated. See Pamela Haag, *"The 50,000-Watt Sports Bar": Talk Radio and the Ethic of the Fan*, 95 S. ATLANTIC Q. 453, 467 (1996). However, sports radio has also been cited as a potent means of reinforcing white male middle-class hegemony. See DAVID NYLUND, BEER, BABES, AND BALLS: MASCULINITY AND SPORTS TALK RADIO 11–41 (2007); Susan J. Douglas, *Letting the Boys Be Boys: Talk Radio, Male Hysteria, and Political Discourse in the 1980s*, in *RADIO READER: ESSAYS IN THE CULTURAL HISTORY OF RADIO* 485, 485 (Michele Hilmes & Jason Loviglio eds., 2002) (arguing that talk radio generally is a means to "restore masculine prerogatives"); *id.* at 496–97 (specifically discussing Imus's role in this movement).

3. "Nappy-headed" describes the coiled, curled, natural hair texture of many persons of African ancestry. Interestingly, there was far less public discussion of the "nappy-headed" portion of Imus's remarks. This is perhaps because, unlike "ho," there is some debate as to whether it represents an epithet or a simply a descriptor. In the Western world, because of the predominance of European aesthetic norms, the term "nappy" has been, for much of its history, a disparaging remark launched at blacks, especially women. See, e.g., JILL HACKETT, *I GOTTA CROW: WOMEN, VOICE, AND WRITING* 155 (2002). In recent years, however, black women have sought to embrace the aesthetic associated with the term "nappy" as a means of resistance to racial hegemony. See ELLA SHOHAT & ROBERT STAM, *UNTHINKING EUROCENTRISM: MULTICULTURALISM AND THE MEDIA* 324–25

random occurrence; there was apparently a theme running throughout that day's show. Imus's comment immediately followed the related remark of his executive producer, Bernard McGuirk, who referred to the women as "hardcore 'ho's."<sup>5</sup> Later in the show, which was simulcast via CBS radio and on MSNBC television, McGuirk described the match between the Rutgers women's basketball team and the Tennessee women's team as the "Jigaboos versus the Wannabes."<sup>6</sup> In his own defense, Imus said that his

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(1994). Nonetheless, even among black women there remain as many tensions about the discursive nature of the word as about the actual choice of whether to sport natural, unstraightened hairstyles. See, e.g., Julianne Malveaux, *Just a Nappy-Headed Sister with the PC Blues*, BLACK ISSUES IN HIGHER EDUC., Dec. 24, 1998, at 30 (discussing controversy over word "nappy" between white female teacher and black parents arising from teacher's use of children's book *Nappy Hair*, written by scholar Carolivia Herron, to teach her class about tolerance); *id.* (discussing various ways in which black women with natural hair styles are perceived). For black women, wearing unstraightened hairstyles is often ambiguous in meaning and may be perceived as a political choice as much as an aesthetic choice. See Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1378 (1996) ("Straight hair is the traditional, legitimate hair of the white woman. Kinky hair, in its tight curly nature, is the illegitimate hair of the Blackwoman. Hairstyles of Blackwomen, such as braids, are illegitimate for Eurocentrics and designate a radical Blackwoman . . . ." (footnote omitted)); Regina E. Spellers, *The Kink Factor: A Womanist Discourse Analysis of African American Mother/Daughter Perspectives on Negotiating Black Hair/Body Politics*, in UNDERSTANDING AFRICAN AMERICAN RHETORIC 223, 232–34 (Ronald L. Jackson II & Elaine B. Richardson eds., 2003) (explaining that black women's acceptance of their own kinky hair is part of a process of "decolonization").

The issue of whether distinctly black hairstyles are appropriate for those employed in law firms recently arose when a junior editor at *Glamour Magazine* was invited to a women's luncheon at New York law firm Cleary Gottlieb to give style tips. See Vivia Chen, *Bad Hair Day: A Glamour Don't at Cleary*, AM. LAW., Aug. 2007, at 23. During the luncheon, slides were shown, and when a picture of a black woman with an afro hairstyle was presented, the editor is said to have remarked that afros were a "no-no," dreadlocks were "dreadful," and it was shocking that people thought it appropriate to wear such "political" hairstyles to work. *Id.*

4. David Carr, *Networks Condemn Remarks by Imus*, N.Y. TIMES, Apr. 7, 2007, at B7. See *infra* note 10 for a discussion of the meaning of "ho."

5. *Id.*

6. *Id.* "Jigaboo" is a disparaging term for African Americans. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 940 (4th ed. 2000). "Wannabe" is a term describing one who imitates the behavior, language, dress, or customs of another in an effort to attain that person's success or to be perceived as a member of the same social group. See *id.* at 1938. The phrase "jigaboo vs. wannabe" was made popular by African American filmmaker Spike Lee who, in his 1988 film *School Daze*, depicted opposing social groups within an all-black college as jigaboos—darker skinned women with natural, often unstraightened hairdos—versus the wannabes—lighter skinned women with straight or straightened hair who embraced white, mainstream norms. See *SCHOOL DAZE* (Columbia Pictures 1988). The conflict depicted by Lee is symbolic of broader internal social or political strife within all black settings. See Wahneema Lubiano, *But Compared to What?: Reading Realism, Representation, and Essentialism in School Daze*, Do the Right Thing, and the Spike Lee Discourse, 25 BLACK AM. LIT. FORUM 253, 277–78 (1991) (criticizing Lee's failure to depict women in *School Daze* as anything other than a reflection of their male counterparts).

remark was an “idiot comment meant to be amusing.”<sup>7</sup> However, even given Imus’s reputation for such antics, this was, according to many, going too far.<sup>8</sup> Despite protestations that his remarks were an attempt at humor and notwithstanding public apologies offered by Imus, the show was ultimately cancelled both by CBS Radio, his primary employer, and by cable channel MSNBC.<sup>9</sup>

Both during and in the aftermath of the Imus drama, observers drew parallels between Imus’s use of the word “ho” and the way in which the word was otherwise used in public discourse. The word “ho,” an abbreviation of the word “whore” when used in African American vernacular, is understood by most to be a gendered slur ascribed to women or girls who are sexually promiscuous.<sup>10</sup> Some apologists for Imus were quick to point out that the comments were no more offensive than similar remarks seen in popular culture.<sup>11</sup> Such defenses took three general approaches, two of which focused on the use of the word “ho” in hip-hop music,<sup>12</sup> especially gangsta’ rap,<sup>13</sup> and the extent to which the word has

7. Carr, *supra* note 4.

8. This incident was not the first time that Imus had made offensive sexist or racist remarks that gained widespread media attention. One of the best known is a 1993 incident in which he called then-*New York Times* White House correspondent Gwen Ifill, an African American woman (now with PBS), a “cleaning lady.” Cynthia Tucker, *Who Are the Hos Here?*, TIME, Apr. 23, 2007, at 38. See also Gwen Ifill, Op-Ed., *Trash Talk Radio*, N.Y. TIMES, Apr. 10, 2007, at A21. In another instance his show offered a parodic song that referred to former First Lady and now Secretary of State Hillary Rodham Clinton’s urinary habits and menstrual cycle. John Leo, *The Private Parts of Don Imus*, U.S. NEWS & WORLD REP., Apr. 8, 1996, at 14.

9. Bob Hebert, Op-Ed., *Paying the Price*, N.Y. TIMES, Apr. 12, 2007, at A21. The strong response by women of all races working at NBC and MSNBC appears to have played a large role in this decision. *Id.*

10. The word “ho” is slang for a prostitute and is a derogatory way to refer to a woman. OXFORD DICTIONARY OF ENGLISH 824 (2d ed. rev. 2005). Part of the power of the word is that it is a distinctly gendered insult; there is no real equivalent term for men or boys who behave the same way. Compare “man ‘ho,” which describes a sexually promiscuous man or boy. “Man ‘ho,” however, is often a term of pride, expressing virility and ability to conquer women, and so it may not have the same pejorative sting as “ho.” See, e.g., CHERYL L. KEYES, RAP MUSIC AND STREET CONSCIOUSNESS 135–36 (2002) (discussing non-pejorative uses of “ho” and attempts by female rappers to address that and other gendered words). See also *infra* note 18, discussing man (male) ‘hos.

11. See e.g., James Poniewozik, *Who Can Say What?*, TIME, Apr. 23, 2007, at 32 (discussing the use of racist and sexist insults in popular culture).

12. Hip-hop music is a style of music made popular in mostly African American neighborhoods. It is usually composed of two general elements: rapping, which consists of words spoken to music or beats, and deejaying, the selection and presentation of music and beats that accompany the lyrics. Though the term rap is sometimes used synonymously with hip-hop music, it is, in fact, a subgenre of hip-hop. See DAVID TOOP, THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP HOP 12–19 (1984) (discussing rap’s origins and its relationship to hip-hop). Beyond a musical genre, hip-hop and its progeny are often seen more broadly as a global social and political phenomenon, embracing ideals such as black autonomy and empowerment infused with African diasporic longings. See IMANI PERRY, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP 11–15 (2004).

crossed over from an essentially black, male-dominated terrain<sup>14</sup> to permeate broad popular discourse. I have characterized these approaches as follows: “it’s all good,” “goose and gander,” and “the big chill.”

Under the “it’s all good” rationale, “ho” has lost much of its negative connotation because of its frequent use in public discourse, as exemplified by gangsta’ rap. The “goose and gander” rationale posits that “ho” retains its pejorative character, but Imus could not be subject to greater rebuke than that meted out to other users of the word, namely gangsta’ rappers. The third approach, the “big chill,” also acknowledges the pejorative nature of “ho,” but posits that Imus had a right, via freedom of expression norms, to engage in name-calling of the type involved, and that to censure him for using the word would have a chilling effect on our rights to free speech. All three approaches are ultimately commentaries upon the carnivalization of public discourse that is achieved in “authentic” gangsta’ rap and upon the *ersatz* carnivalization of public discourse by social elites who appropriate gangsta’ rap discourses.

Carnivalization is the tearing down of social norms, the elimination of boundaries, and involves crowning and decrowning radical shifts and disguises.<sup>15</sup> It is the world turned upside down.<sup>16</sup> The concept suggests an interaction among various cultural, social, or linguistic manifestations

13. See *infra* Part II for a discussion of gangsta’ rap.

14. For a discussion of the role of gender in hip-hop music and rap music, see Nancy Guevara, *Women Writin’ Rappin’ Breakin’*, in *DROPPIN’ SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE* 49, 61 (William Eric Perkins ed., 1996). Guevara discusses the role of women rappers in early hip-hop music and the way in which they “developed distinctive female styles” in order to “counter male supremacy” within the genre. *Id.* at 61. See also TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 15–16, 26–27 (1994). Rose writes, “Rap music and video have been wrongfully characterized as thoroughly sexist but rightfully lambasted for their sexism. . . . Some responses to sexism in rap music adopt a tone that suggests that rappers have infected an otherwise sexism-free society.” *Id.* at 15. Rose further observes that, notwithstanding the sexism that has infused much of hip-hop music, women have long been producers in the genre. *Id.* at 26.

Even though a number of observers view hip-hop music as a mechanism of cultural resistance based within a long tradition of black protest music, some black feminists have observed that too often “hegemonic ideas about gender inform the most popular and most commercially viable aspects of the black culture industry.” S. Craig Watkins & Rana A. Emerson, *Feminist Media Criticism and Feminist Media Practices*, 571 *ANNALS AM. ACAD. POL. & SOC. SCI.* 151, 160 (2000) (citing Lubiano, *supra* note 6). However, one commentator has noted that even within popular hip-hop music, there may sometimes be feminist content which is neither clear nor simple, as such content may be obscured by accompanying imagery that seems to subjugate women. PERRY, *supra* note 12, at 180.

15. MIKHAIL BAKHTIN, *PROBLEMS OF DOSTOEVSKY’S POETICS* 129–31 (Caryl Emerson ed. & trans., Univ. of Minn. Press 1984).

16. This is an oft-used phrase in indicating the effect of carnivalization. See e.g., KAREN NEWMAN, *FASHIONING FEMININITY AND ENGLISH RENAISSANCE DRAMA* 108 (1991) (discussing how role reversals and evocation of the body/bawdy are said to turn the world upside down).

without the previously existing binary oppositions.<sup>17</sup> The popular use of the word “‘ho” is an example of carnivalization. It is an offensive term originating in the context of black street life. However, when imported to the context of hip-hop and gangsta’ rap, it is frequently expanded or even inverted, often being used as a descriptor for all women and even sometimes as a term of endearment.<sup>18</sup> Within gangsta’ rap, “‘ho” becomes a tool for confronting and breaching the boundaries of polite discourse, both public and private. This is in keeping with the nature of the broader genre of hip-hop, which is often seen as a means of expressing opposition to mainstream norms.

Hip-hop, at its best, reflects, distills, amplifies, deconstructs and re-contextualizes the social realities that are its raw material. The product of this creation then is reincorporated into that reality. Born in the ghettos of New York City in the disjuncture between the hopes of the civil rights promise and the harsh realities of economic disinvestment, hip-hop’s founding spirit expresses an insurgent rejection of business as usual.<sup>19</sup>

Hip-hop, and especially the gangsta’ rap that grows from it, is arguably carnivalization writ large.

Carnivalization, however, has its own flip-side, its own form of radical inversion. This exists in the form of *ersatz* carnival through the appropriation of carnival norms by social or political elites and a redeployment of those norms to further oppress marginalized Others.<sup>20</sup> Ersatz carnival is, to use the black urban vernacular that is all too often appropriated by elites,<sup>21</sup> a figurative “beat down”<sup>22</sup> perpetuated by elites.

17. Benzi Zhang, *Mapping Carnivalistic Discourse in Japanese-American Writing*, MELUS, Winter 1999, 19, at 19.

18. Some research suggests that the use of the word “‘ho” in certain contexts is a form of affection or gentle teasing. Laurel A. Sutton, *Bitches and Skankly Hobags: The Place of Women in Contemporary Slang*, in GENDER ARTICULATED: LANGUAGE AND THE SOCIALLY CONSTRUCTED SELF 279, 288–89 (Kira Hall & Mary Bucholtz eds., 1995). One respondent in a study remarked, “When talking about women it’s negative, but when talking to women it’s a joke.” *Id.* at 288. See also KEYES, *supra* note 10, at 135 (describing how “‘ho” and its close kin, “bitch,” may in some contexts be terms of endearment, terms expressing camaraderie, or boasts of sexual prowess, even among men). Here the author cites hip-hop group Whodini’s 1986 song *I’m a Ho*, from the album *Back in Black*:

Cuz I’m a ho, you know I’m a ho.  
I rock three different freaks after every show  
Cuz I’m a ho, you know I’m a ho.  
How do you know? Because I told you so.

*Id.* (quoting WHODINI, *I’m a Ho*, on BACK IN BLACK (Jive Records 1986)).

19. Salim Muwakkil, *Blaming Hip-Hop for Imus*, IN THESE TIMES, June 2007, at 15.

20. See *infra* Part V for a fuller discussion of the concept of ersatz carnival.

21. One may well wonder whether I, as a black woman who grew up among poor and working class family members in overwhelmingly black urban and exurban areas, but who now enjoys a relatively privileged existence, constitute an elite. If so, do I appropriate black urban culture when I use such phrases, or more broadly, when I assume an insider

Ersatz carnival verbally and spiritually assaults its subjects, all the while clothed in the raiment of freedom of expression.

Tolerating raced and gendered insults such as “nappy-headed ‘ho” in public discourse, whether as authentic carnival from the mouths of gangsta’ rappers themselves or as ersatz carnival from Imus and his ilk, is troubling because in either case, racial groups and women remain the victims of an entrenched hierarchy. However, in this article I argue that citing freedom of expression norms in support of the use of ersatz carnival is especially pernicious. In making this argument, I first consider the role of gangsta’ rap in popular culture. I then look at the way in which freedom of expression norms are deployed in the Imus debate, both from a constitutional and a philosophical standpoint. Next, I consider the nature of carnivalization and its use by marginalized groups such as gangsta’ rappers. Finally, I look at ersatz carnivalization and how it is manifested in our society, showing how the use of raced and gendered epithets in such contexts demeans and undermines the contestative, counter-hegemonic aspects of gangsta’ rap discourses. Using the First Amendment and its values as both a sword and a shield, ersatz carnival attempts to appropriate a means of revolt, albeit a flawed and imperfect one, and redeploy it as a tool of retrenchment, thereby silencing subalternate voices.

## II.

### THE ROLE OF GANGSTA’ RAP IN POPULAR CULTURE

Gangsta’ rap is a genre of music originating in the African American communities in the United States, which grew out of rap or spoken word songs. Gangsta’ rap, like the rap music on which it is based, often “samples”<sup>23</sup>—that is, it uses the music of other artists—and takes as its

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pose in discussing black urban culture? I leave that unanswered here, since elite status is, like beauty, in the eye of the beholder. Class in the black community is far more fluid than in general society, but notwithstanding this fact, internecine class conflict is increasingly cited as one source of the ills of the black community. Many scholars have written about the conflicts, both actual and imagined, between the black poor and the black middle class. In one of the most recent discussions of the topic, Michael Eric Dyson describes the conflict as one between the “Afristocracy”—upper-middle-class blacks and the black elite—and the “Ghettocracy”—poor blacks. MICHAEL ERIC DYSON, *IS BILL COSBY RIGHT?: OR HAS THE BLACK MIDDLE CLASS LOST ITS MIND?*, at xiii–xiv (2005).

22. In urban parlance, a “beat down” is a severe beating, often administered to demonstrate mastery over the victim. See JONATHON GREEN, *CASELL’S DICTIONARY OF SLANG* 85 (2d ed. 2005). See also GENEVA SMITHERMAN, *BLACK TALK: WORDS AND PHRASES FROM THE HOOD TO THE AMEN CORNER* 64 (rev. ed. 2000) (defining “beat down” as a “beating” intended to “beat somebody up badly”); *Urban Dictionary: Beat Down*, <http://www.urbandictionary.com/define.php?term=beat+down> (last visited Mar. 8, 2009) (defining “beat down” as “to verbally berate into submission” or “to physically rough up or convincingly administer authority over another person or thing”).

23. See *infra* note 46 and accompanying text.



subject gang-related and other acts of violence and makes more general references to life in inner-city black neighborhoods. It is often assailed for its violent and misogynistic lyrics.<sup>24</sup> It is, for some observers, a discursive representation of deviant behavior which is at the heart of “modern urban terror.”<sup>25</sup> In its effect it is much akin to physical violence in linguistic form.<sup>26</sup> It has been asserted that gangsta’ rap is a social scourge performed by persons who are themselves social deviants, and is hence “self-referential reportage,”<sup>27</sup> which may be understood as a “‘masculinization’ of ethnographic narrative.”<sup>28</sup> Such assertions exemplify the widespread belief that gangsta’ rap is telling the truth about life in urban areas from a black male perspective.<sup>29</sup> There are problems with this conception of gangsta’ rap.

First, gangsta’ rap is not the first variety of American music that has begun within a subcultural context and affronted mainstream norms.<sup>30</sup> One need only look to the history of jazz. Though modern jazz is frequently offered up as mellow musical renderings for urbane, educated sophisticates of all races, early jazz music was distinctly a product of the

24. See, e.g., Edward G. Armstrong, *Gangsta Misogyny: A Content Analysis of the Portrayals of Violence Against Women in Rap Music, 1987–1993*, 8 J. CRIM. JUST. & POPULAR CULTURE 96, 97 (2001).

25. *Id.* at 98.

26. *Id.* at 97 (“[A]s the physiological effects of discursive violence make evident, ‘linguistic violence is in fact a form of physical violence.’” (quoting Ellen W. Gorsevski, *The Physical Side of Linguistic Violence*, 10 PEACE REV. 513, 513 (1998))).

27. *Id.* at 104.

28. *Id.*

29. This perspective was widely seen in the so-called “Hip Hop Hearing” that took place in Congress on September 25, 2007. The hearings, called by the House Subcommittee on Commerce, Trade, and Consumer Protection and chaired by Representative Bobby L. Rush (D-Ill.), sought to answer questions about sexist and racially charged lyrics in hip-hop. See, e.g., Jeff Leeds, *Hearing Focuses on Language and Violence in Rap Music*, N.Y. TIMES, Sept. 26, 2007, at A24. One of the principal witnesses, rapper Levell Crump, known as David Banner, asserted that his work and the work of other rappers was merely a reflection, and not a cause, of society’s ills. *From Imus to Industry: The Business of Stereotypes and Degrading Images: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 110th Cong. (2007) (statement of Levell Crump); Phil Rosenthal, *Will Effort to Mix Congress, Culture Jibe?*, CHI. TRIB., Sept. 26, 2007, at 3. An executive of Viacom, one of the large-scale producers of hip-hop, echoed Banner’s comments at the hearing, stating that the company attempts to “speak authentically” in offering hip-hop. Rosenthal, *supra*, at 3.

30. See Reginald Thomas, *The Rhythm of Rhyme: A Look at Rap Music as an Art Form from a Jazz Perspective*, in AFRICAN AMERICAN JAZZ AND RAP: SOCIAL AND PHILOSOPHICAL EXAMINATIONS OF BLACK EXPRESSIVE BEHAVIOR 163, 163–164 (James L. Conyers, Jr. ed., 2001). The author describes how in the early days, blues music, ragtime, and jazz were scrutinized and often deemed unworthy of being called art. *Id.* at 163. Ragtime music, made famous to more contemporary listeners by the inclusion of the work of ragtime musician Scott Joplin in modern films and performances, was dismissed as “filthy and degenerate” music. *Id.* at 164.

black underclass.<sup>31</sup> A generation after the advent of jazz, rock and roll music, with its distinctive beats and the often suggestive dancing that accompanied the music, was the bane of many middle-class white parents whose children embraced the genre. Once derided as “‘congo rhythms’ [and] ‘jungle music,’”<sup>32</sup> rock and roll is now recognized as part of the canon of true American music.<sup>33</sup> Gangsta’ rap, therefore, arguably represents only the latest form of musical rebellion. Next, and more importantly, it is a mistake to view gangsta’ rap as a window into black life. Gangsta’ rap is better understood principally as an art form which is not intended to be construed in a literal, social scientific sense.<sup>34</sup> To argue, as some have, that gangsta’ rap is a straightforward, unvarnished, and literal depiction of life in poor, black, urban areas ignores the ways in which gangsta’ rap, like many historic forms of black cultural production in the United States and, indeed, throughout many African-ancestored communities in the West, “signifies” or obscures its ultimate meaning and uses other rhetorical tools to subvert mainstream ideals or counter social, political, and cultural hegemony.<sup>35</sup> Gangsta’ rap employs these tools of the “Black vernacular”<sup>36</sup> that are part of the “authentic Black speech and aesthetic creativity neither tailored for White audiences, nor obscured beneath Marxist cant.”<sup>37</sup>

#### *A. Signifying, Sassing, Lying, and Testifying in Gangsta’ Rap*

Gangsta’ rap, like many forms of social or political communication, draws on a variety of rhetorical mechanisms to convey its meaning.

31. See Amy Leigh Wilson, Commentary, *A Unifying Anthem or Path to Degradation?: The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425, 427–28 (2004) (discussing the black roots of jazz music and the way in which some early jazz artists were closely associated with, and even participated in, an underclass world of crime and immorality).

32. Brian Ward, *Racial Politics, Culture and the Cole Incident of 1956*, in RACE AND CLASS IN THE AMERICAN SOUTH SINCE 1890, at 181, 194 (Melvyn Stokes & Rick Halpern eds., 1994). Rock and roll music, especially as performed by blacks, was often viewed not so much as an assault on mainstream white musical styles as it was an assault on white cultural mores. Even lyrical, ballad style music performed by blacks was seen as only a few short steps away from rock and roll on a spectrum that concluded with rock and roll: music typified by “animalistic obscenity” performed by “horde[s] of Negro rock ‘n’ rollers.” *Id.*

33. See, e.g., PAUL FRIEDLANDER, ROCK AND ROLL: A SOCIAL HISTORY 16 (2d ed. 2006) (chronicling the rise of rock and roll as “black music” and describing how, in its second and subsequent generations, rock and roll crossed over to white performers and audiences and was met with wider commercial success).

34. See PERRY, *supra* note 12, at 104 (discussing representations of criminal and violent behavior in rap as a means of empowerment rather than a literal portrayal of life).

35. See SAMUEL A. FLOYD, JR., THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES 94–97 (1995) (detailing uses of signifying in various literary works and musical genres).

36. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 229 (2000) (quoting HOUSTON A. BAKER, JR., BLUES, IDEOLOGY, AND AFRO-AMERICAN LITERATURE: A VERNACULAR THEORY (1984)).

37. *Id.*

However, gangsta' rap relies heavily on rhetorical techniques that originated with, or have become closely associated with, black communities in the United States: signifying, sassing, using excessive exaggeration or intentional misstatements ("lying"), and testifying. Below I discuss the ways in which these mechanisms often shape the messages of gangsta' rap.

### 1. *Signifying*

Signifying has been described as an essentially African tradition of "reversing, revising, or parodying another's speech or discourse,"<sup>38</sup> which has become embedded in a number of pan-African cultures, through the African Diaspora created by the slave trade. Central to signifying is the notion of the duality of discourse and actions, which is a necessary and understood part of the literary message frequently delivered via the role of the trickster figure, which plays a prominent role in a multitude of literatures, including African American work.<sup>39</sup> Signifying is to some extent related to the standard English uses of signification and the structuralist conception of the sign, such as in the work of Ferdinand de Saussure.<sup>40</sup> However, signifying in African American parlance revises and critiques this more commonly understood meaning.<sup>41</sup> In this context, signifying is verbal play, or, in some cases, communicative acts that are ambiguous in their meaning and ambivalent about their goals. Because

38. ANGELYN MITCHELL, *THE FREEDOM TO REMEMBER: NARRATIVE, SLAVERY, AND GENDER IN CONTEMPORARY BLACK WOMEN'S FICTION* 14 (2002).

39. The trickster is a recurring figure, either animal or human, in numerous cultures. He relies on humor, multiplicity, paradox, and satire in an effort to survive dangers or overcome obstacles. See William J. Hynes, *Mapping the Characteristics of Mythic Tricksters: A Heuristic Guide*, in *MYTHICAL TRICKSTER FIGURES: CONTOURS, CONTEXTS, AND CRITICISMS* 33, 34 (William J. Hynes & William G. Doty eds., 1993) (describing the numerous roles and forms of the trickster, such as "deceiver/trick-player," "shape-shifter," "sacred/lewd bricoleur," and "situation-inventor"); FRANCHOT BALLINGER, *LIVING SIDEWAYS: TRICKSTERS IN AMERICAN INDIAN ORAL TRADITIONS* 55–56 (2004) (tricksters have numerous forms and variations, but key characteristics are their ability to transform and their wandering, rambling ways that defy social controls and conventions). The African American trickster exists within a particular context, that of race-based oppression; the goal of his actions is to challenge, and ultimately undermine, systemic racist oppression. See, e.g., LEWIS HYDE, *TRICKSTER MAKES THIS WORLD: MISCHIEF, MYTH, AND ART* 278 (1998) (offering one reading of trickster stories as capturing an oppressed people's refusal to be marginalized); Jeanne Campbell Reesman, *Introduction to TRICKSTER LIVES: CULTURE AND MYTH IN AMERICAN FICTION*, at ix, xv–xvi (Jeanne Campbell Reesman ed., 2001) (describing how trickster stories embody rebelliousness, constituting tricksterism as a justifiable response to experiences of slavery).

40. See HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* 45–46 (1988) (describing how the black concept of signifying, while similar to Saussure's concept of signification, is unique because black signifying involves a "confrontation between two parallel discursive universes: the black American linguistic circle and the white").

41. *Id.* at 46–49.

African signifying in the Western world grew from the context of a brutal, oppressive, race-based slavery in which direct opposition to the entrenched power structure would have been dangerous, signifying thrived as a subtextual assault upon authority, often accompanied by sly, pointed mirth and merry-making. Signifying redirects attention from the signified to the signifier, often in a bid to make manifest the materiality of the signifier in a world where the signifier is demeaned, ignored, or taken for granted.<sup>42</sup> In its subversiveness, signifying expresses the essence of carnival, for carnival, much like signifying, “is gay, triumphant, and at the same time mocking, deriding. It asserts and denies, it buries and revives.”<sup>43</sup>

Signifying in gangsta’ rap is accomplished through a number of strategies which collectively have been described as “musical signifying.”<sup>44</sup> Musical signifying refers to the rhetorical use of the musical tropes subsumed under the master trope of call and response,<sup>45</sup> which is a common feature of black music. It also refers to a number of other techniques, such as the employment of music originally created by others (“sampling”),<sup>46</sup> rearranging (“covering”) or parodying<sup>47</sup> traditional

42. *Id.* at 59.

43. MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 11–12 (Helene Iswolsky trans., Ind. Univ. Press 1984) (1965).

44. FLOYD, *supra* note 35, at 96.

45. *Id.* Call and response is an African-derived communication process that involves interaction, either verbal or nonverbal, between speaker and listener in which all of the statements (“calls”) are interspersed with spontaneous expressions (“responses”) from the listener. GENEVA SMITHERMAN, *TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA* 104 (1977). It is commonly found in the black church and is the congregation’s way of “talking back” to the minister or other religious leader. *Id.* Related to this process is musical call and response, in which the listener participates with the singer. Some scholars have suggested that this distinctly black style of music grew from religious speaker-listener call and response as speakers and listeners adopted rhythms in delivering their messages to one another. See BRIAN K. BLOUNT, *CAN I GET A WITNESS?: READING REVELATION THROUGH AFRICAN AMERICAN CULTURE* 108 (2005) (discussing how pastor-congregation interaction developed musically). Musical call and response may also be described as a form of antiphony, the exchanging of melodic sections between two different sections of an instrumental ensemble. See HENRY MARTIN & KEITH WATERS, *JAZZ: THE FIRST 100 YEARS* 124 (2d ed. 2006).

46. JOSEPH G. SCHLOSS, *MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP* 138 (2004).

47. See Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 *B.C. THIRD WORLD L.J.* 325, 330 n.21 (2007) (describing a rap parody written in the aftermath of Hurricane Katrina). One example of a gangsta’ rap parody of a mainstream hip-hop song is the parodic rap *George Bush Doesn’t Care About Black People*, written and sung by Houston rap group The Legendary K.O. to the tune of Kanye West’s hip-hop hit single *Gold Digger*. THE LEGENDARY K.O., *George Bush Doesn’t Care About Black People*, on C.I.G.A.C. MIXTAPE (2005); KANYE WEST, *Gold Digger*, on LATE REGISTRATION (Roc-A-Fella Records 2005). The rap is a powerful statement about the loss and powerlessness of poor, black Katrina victims. Below are the lyrics, in part:

I ain’t saying he’s a gold digger

mainstream pop songs (or even mainstream hip-hop songs), the use of musical rhetorical tropes,<sup>48</sup> or through dual entendres in word choices.<sup>49</sup> Sampling is an especially prevalent tool: by redeploying the work of others, gangsta' rappers at once pay homage to the artists and offer a counter to what was originally offered.<sup>50</sup>

## 2. *Sassing*

Gangsta' rap may, even while signifying and thereby obscuring its message, be viewed as an "answering back" or "sassing" in the war of images and counter-images of ghetto inhabitants found in media depictions.<sup>51</sup> In African American parlance, to "sass" is to oppose authority by talking back, offering resistance to verbal orders, commands, or pronouncements. It is frequently employed by persons in situations of express power differentials, where the voice of the oppressed is one of the few tools available for manifesting defiance; as such, sassing is often the

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But he ain't messing with no broke niggas  
 [Repeat once]  
 George Bush don't like black people  
 [Repeat four times]  
 Hurricane came through, fucked us up 'round here  
 Government acting like it's bad luck down here  
 All I know is that you better bring some trucks 'round here  
 Wonder why I got my middle finger up 'round here  
 People lives on the line you declining to help  
 Since you taking so much time we surviving ourself  
 Just me and my pets, and my kids, and my spouse  
 Trapped in my own house looking for a way out  
 . . . .  
 Five damn days, five long days  
 And at the end of the fifth he walking in like "Hey!"  
 Chilling on his vacation sitting patiently  
 Them black folks gotta hope, gotta wait and see  
 If FEMA really comes through in an emergency  
 But nobody seem to have a sense of urgency  
 Now the mayor's been reduced to crying  
 I guess Bush said, "Niggas been used to dying!"

THE LEGENDARY K.O., *supra*, as reprinted in Inniss, *supra*, app. A, at 372. See also Chris Lee, *Playback Time: Two Rappers Use Kanye West's Anti-Bush Quote to Launch a Mashed-Up Web Smash*, L.A. TIMES, Sept. 23, 2005, at E1 (describing the origins and popularity of the song); Music Video: The Legendary K.O., "George Bush Doesn't Care About Black People" (The Black Lantern 2005), available at <http://www.youtube.com/watch?v=2eIYnsqG-MM>.

48. FLOYD, *supra* note 35, at 95–96.

49. See *id.* at 95.

50. Consider, for example, the song *Gold Digger*, WEST, *supra* note 47, which samples RAY CHARLES, *I Got a Woman*, on RAY CHARLES (Atlantic 1957).

51. EITHNE QUINN, NUTHIN' BUT A "G" THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP 74 (2005).

province of women and children.<sup>52</sup> Because sassing is often seen as being specific to black women, it is arguably one of the few black rhetorical devices that represents some aspect of the discursive style of African American women.<sup>53</sup> Indeed, sass has sometimes been described as directly related to black feminist resistance to domination and dehumanization.<sup>54</sup> During the period of slavery, sassing and other more general forms of black insolence to whites had social, moral, and even political components. The act of sassing brought to bear an unsettling pressure on the racial hierarchy.<sup>55</sup> For this reason, sassing was often an offense that brought harsh penalties if deployed by a black slave against a white person.<sup>56</sup>

In addition to describing a defensive speech act used in private communications, sassing also has a broader use as a common rhetorical device in African American speech and communication, such as where the speaker highlights oppression by “talking back” to or taunting an invisible oppressor, either directly or indirectly.<sup>57</sup> The “Ain’t I a Woman?” speech

52. See, e.g., JOANNE M. BRAXTON, *BLACK WOMEN WRITING AUTOBIOGRAPHY: A TRADITION WITHIN A TRADITION* 30–32 (1989) (detailing “sassing” depicted in literature of Harriet Brent Jacobs); BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 5–9 (1989) (recalling talking back as a child and how she has come to understand true speaking as an act of resistance); GWENDOLYN D. POUGH, *CHECK IT WHILE I WRECK IT: BLACK WOMANHOOD, HIP-HOP CULTURE, AND THE PUBLIC SPHERE* 49 (2004) (discussing literary images of “sassy Black women”). See also Joni L. Jones & Teri L. Varner, “Take Care of Your Sisters”: *Communication Among the Women in the Works of Pearl Cleage*, in *CENTERING OURSELVES: AFRICAN AMERICAN FEMINIST AND WOMANIST STUDIES OF DISCOURSE* 145, 147 (Marsha Houston & Olga Idriss Davis eds., 2002) (describing sass as one of three important communication strategies for black women, the other two being silence and support).

53. See Denise Troutman, *African American Women: Talking That Talk*, in *SOCIOCULTURAL AND HISTORICAL CONTEXTS OF AFRICAN AMERICAN ENGLISH* 211, 223 (Sonia L. Lanehart ed., 2001). Troutman posits that because much of the scholarly work on African American linguistics is limited to black men’s use of language, black women’s speech styles and their uses of rhetorical tools are little remarked upon and little valued. *Id.* at 212.

54. See DOVEANNA S. FULTON, *SPEAKING POWER: BLACK FEMINIST ORALITY IN WOMEN’S NARRATIVES OF SLAVERY* 13 (2006). Fulton offers the notion of black women’s orality, in which “orality” refers to speech acts that resist or subvert oppression. *Id.*

55. See WILLIAM E. WIETHOFF, *THE INSOLENT SLAVE* 11 (2002).

56. W.B. Allen, Interview, in *BULLWHIP DAYS: THE SLAVES REMEMBER: AN ORAL HISTORY* 240, 240 (James Mellon ed., 1988). In this oral history, a reverend mentions “sassing” as an offense for which some slaves had been beaten to death. *Id.*

57. See, e.g., Anna Everett, *Double Click: The Million Woman March on Television and the Internet*, in *TELEVISION AFTER TV: ESSAYS ON A MEDIUM IN TRANSITION* 224, 229 (Lynn Spigel & Jan Olsson eds., 2004) (quoting Sojourner Truth’s “Ain’t I a Woman?” and Maxine Waters’s “I Speak Today” speeches as examples of the rhetorical use of sass). A recent example of this type of sassing can be found in Barack Obama’s speech after winning the Iowa Democratic Primary caucus: “You know, they said this day would never come. They said our sights were set too high. They said this country was too divided; too disillusioned to ever come together around a common purpose.” Senator Barack Obama, Remarks of Senator Barack Obama: Iowa Caucus Night (Jan. 3, 2008) (transcript available at [http://www.barackobama.com/2008/01/03/remarks\\_of\\_senator\\_barack\\_obam\\_39.php](http://www.barackobama.com/2008/01/03/remarks_of_senator_barack_obam_39.php)).

by Sojourner Truth and Congresswoman Maxine Waters's "I Speak Today" speech have been cited as examples where the speakers employ sassing as a rhetorical device.<sup>58</sup> Gangsta' rap, like more general forms of rap, becomes a potent form of sassing, embracing the contrary norms of a history of being silenced from which grows the emancipatory power of language.<sup>59</sup>

### 3. Lying

Yet another device that gangsta' rap employs is an outsized, hyperbolic performance which uses lies to assert its own truth. "Lying" has a particular import in African American parlance and does not refer to simply telling an untruth.<sup>60</sup> Lying is the assertion of duplicitous, exaggerated, or extravagant claims. It is a common tool in the recounting of stories in the African American community and is a fundamental element of black folk-humor.<sup>61</sup> In that context, lying is the telling of a "good story," which may or may not contain truth at some level.<sup>62</sup> Such stories, which range from offering playful ambiguity and partial truths to outrageously excessive exaggeration, help to articulate the complexities and contradictions of life for African Americans.<sup>63</sup> This is captured in the telling of narratives such as "Brer Rabbit" tales<sup>64</sup> and in the jokes of

58. Everett, *supra* note 57, at 229.

59. See generally Dean McWilliams, *Bakhtin in Brooklyn: Language in Spike Lee's Do the Right Thing*, in CARNIVALIZING DIFFERENCE: BAKHTIN AND THE OTHER 247, 253–60 (Peter I. Barta, Paul Allen Miller, Charles Platter & David Shepherd eds., 2001) (discussing the role of the disc jockey and rappers in Spike Lee's *Do the Right Thing* and how carnival norms are evident throughout this and other parts of the film).

60. GATES, *supra* note 40, at 56–57.

61. See MEL WATKINS, ON THE REAL SIDE: A HISTORY OF AFRICAN AMERICAN COMEDY 471 (Lawrence Hill Books 1999) (1994). See generally THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 63–73 (1981) (detailing various styles of black boasting and bragging, including how they differ from those same activities engaged in by white people).

62. RONALD RADANO, LYING UP A NATION: RACE AND BLACK MUSIC, at xiv (2003).

63. *Id.*

64. Brer Rabbit—or Buh Rabbit, as it is sometimes rendered—is a principal figure in the tales of Uncle Remus, which are said to be based on tales that were part of the slaves' African inheritance. HAROLD COURLANDER, A TREASURY OF AFRO-AMERICAN FOLKLORE: THE ORAL LITERATURE, TRADITIONS, RECOLLECTIONS, LEGENDS, TALES, SONGS, RELIGIOUS BELIEFS, CUSTOMS, SAYINGS AND HUMOR OF PEOPLES OF AFRICAN DESCENT IN THE AMERICAS 466 (2002). Brer Rabbit was frequently depicted or seen as a playful, fun-loving character by many of the mainstream collectors and purveyors of the tales, who ranged from amateur anthropologists to the Walt Disney Company. See, e.g., SONG OF THE SOUTH (Walt Disney Productions 1946) (classic children's film based on Uncle Remus stories, including tales of Brer Rabbit). However, as commentators like Riggins R. Earl, Jr. suggest, the gambols of Brer Rabbit were more than merely amusing—they were transgressive and oppositional. See RIGGINS R. EARL, JR., DARK SYMBOLS, OBSCURE SIGNS: GOD, SELF, AND COMMUNITY IN THE SLAVE MIND 131–32 (1993). Brer Rabbit was the quintessential trickster in African American literature and was for many a

comedians such as Richard Pryor and Chris Rock.<sup>65</sup> This type of lying is also seen in various forms of black music, and gangsta' rap is no exception.<sup>66</sup>

Gangsta' rap, with its hyper-realistic, excessive performances and its claims of racial authenticity, makes manifest the "bad nigger" archetype that holds sway in popular white imagination.<sup>67</sup> However, gangsta' rap often mocks such images at the same time that it embraces them. In this regard, gangsta' rap "lies," or intentionally renders real life into a distorted tall tale version of life in order to assert its truth. But all too often social elites view the forms of language and behaviors that are glamorized in gangsta' rap not as undermining or mocking white (and often black) mainstream norms, but rather as literally representing an altogether separate and quite real world of the black urban underclass. In this thinking, the gyrations of barely clothed young black women<sup>68</sup> that accompany gangsta' rappers' obscenity-laced paeans to conspicuous consumption, drug use, sexual exploitation of women, killing or assault are mirrors held up to black urban culture—not masks disguising black society and society at large.<sup>69</sup> This is a tragic misunderstanding: many gangsta'

figurative representation of the slave community that uses wit, wisdom, and wiles to defeat the oppressor. *Id.* at 131.

65. Richard Pryor and Chris Rock are iconic figures in African American comedy. Both Pryor, who died in 2005, and Rock frequently employed comedic storytelling rather than short succinct jokes to make their points about the absurdity of racism. These stories, trenchant and dual in meaning, frequently featured hyperbole and elaborate literary conceits laced with profane language and racial epithets. For a discussion of the work of both artists, see BAMBI HAGGINS, *LAUGHING MAD: THE BLACK COMIC PERSONA IN POST-SOUL AMERICA* 53–54, 78–79 (2007).

66. RADANO, *supra* note 62, at 28.

67. Todd Boyd, *The Day the Niggaz Took Over: Basketball, Commodity Culture, and Black Masculinity*, in *OUT OF BOUNDS: SPORTS, MEDIA, AND THE POLITICS OF IDENTITY* 123, 126 (Aaron Baker & Todd Boyd eds., 1997). The "bad nigger" is an almost folkloric representation of the black man who cannot or will not conform his behavior to the norms set by society. He is an ambiguous figure, representing autonomy and self-definition within the black community, and thereby embodying resistance to white racism, but at the same time presenting a threat to other blacks, especially women, with an unrestrained machismo that asserts itself via the physical destruction of other men and the sexual victimization of women. *Id.*

68. What is often entirely overlooked is the extent to which black women who ostensibly play the part of the 'ho in gangsta' rap videos may be performing their own form of carnival or participating in what one scholar has described as "body protest." Michèle Alexandre, *Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool Against Trinidad's Gender-Biased Laws*, 13 *DUKE J. GENDER L. & POL'Y* 177, 178–79 (2006). Body protest occurs when women "choose to dance suggestively, dress contrary to societal standards of propriety, perform sexually explicit artistic roles, bring attention to specific body parts, and adopt sexually explicit personas in order to highlight the societal restraints imposed on them." *Id.* at 179.

69. One critic described gangsta' rap as an "uncritical mirror," which "plays at rape and murder in a way that celebrates them." Brent Staples, Editorial, *The Politics of Gangster Rap: A Music Celebrating Murder and Misogyny*, *N.Y. TIMES*, Aug. 27, 1993, at A28 (internal quotation marks omitted).



rappers perform an exaggerated, inverted lifestyle for a broader culture that cannot see (or refuses to see) any irony that may be intended. This movement from the real to the hyperreal is made all the more fluid given the fact that gangsta' rap is often born not from actual experience but from media images consumed by the writers and performers of rap music.<sup>70</sup>

There is frequently a clear connection between gangsta' rap and tabloid television.<sup>71</sup> For example, Toddy Tee, the writer and performer of the 1986 rap hit "Batterram"—which chronicled the then-proliferating police use of battering rams to effect forced entries into the homes of crime suspects—stated that his inspiration for the song came from watching a news broadcast on police officers' use of battering rams.<sup>72</sup> In this instance, events involving state-sanctioned violence, often against black members of the public, gained currency only once they were repackaged for cultural consumption by the very persons from whom the experience supposedly originated. Other gangsta' rap songs have been more explicit in drawing on the link between tabloid television and gangsta' rap, often incorporating samples of news broadcasts in their work.<sup>73</sup> Gangsta' rap is hence often a revisionist image of an already deformed image of the black Other;<sup>74</sup> it is a lie re-shaped and re-told.

#### 4. Testifying

This is not to say that gangsta' rap offers no elements of reality or truth. Gangsta' rap does sometimes "testify," offering truths about urban life.<sup>75</sup> Testifying is a ritual which grew from the black church and spread beyond to broader black culture.<sup>76</sup> It typically involves first reciting a litany of personal experiences, often woes and problems, usually personally experienced by the speaker or persons close to the speaker,

70. QUINN, *supra* note 51, at 74.

71. *Id.*

72. *Id.*

73. *Id.* at 74–75.

74. *Id.* (citing MICHAEL DENNING, *THE CULTURAL FRONT: THE LABORING OF AMERICAN CULTURE IN THE TWENTIETH CENTURY* 232 (1996)).

75. See generally QUINN, *supra* note 51, at 74 (stating that, while distorted through rap lyrics, the threat of battering rams was also a "disturbing reality for young black Angelinos"). See also Gerald D. Jaynes, *Identity and Economic Performance*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 128, 133 (2000) (discussing what the author calls testimonial rap, a subgenre of gangsta' rap that "articulates the discursive location of lower-working-class African American malcontents"). According to Jaynes, contemporary rap offers "some of the clearest explications of the trope of forced agency, suspended values, and the social meaning of the word 'slave.'" *Id.*

76. See, e.g., Michele Russell, *Black-Eyed Blues Connections: Teaching Black Women, in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE* 196, 197 (Gloria T. Hull, Patricia Bell Scott & Barbara Smith eds., 1982) (listing examples of everyday testifying among contemporary black women and drawing connections to African American history).

followed by an indication that the problems have been overcome or are being managed, and finally often ends with giving thanks to God. Another variant involves a recitation of the many blessings, whether material or spiritual, that the speaker has received and a confession of the errors and sins of the speaker, followed by a giving of thanks.<sup>77</sup> Hip-hop artists, and especially gangsta' rappers, have frequently embraced the norms of testifying and confession in their songs.<sup>78</sup> Within the context of hardcore rap, the confessions and testimony offered by the performers are sometimes a means of acknowledging that moral redemption is possible even in the midst of unrepentantly living a hustler's life.<sup>79</sup> However, while gangsta' rap may tell *a* truth, it does not always tell *the* truth.<sup>80</sup> If the stories told by gangsta' rap are reflections, then they are of the funhouse mirror variety, replete with distortions, whether undersized or oversized.<sup>81</sup>

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77. See MICHAEL ERIC DYSON, OPEN MIKE: REFLECTIONS ON PHILOSOPHY, RACE, SEX, CULTURE AND RELIGION 311–12 (2003).

78. *Id.* at 312.

79. *Id.*

80. PERRY, *supra* note 12, at 39–40.

81. See VICTOR TURNER, *Images and Reflections: Ritual, Drama, Carnival, Film, and Spectacle in Cultural Performance*, in THE ANTHROPOLOGY OF PERFORMANCE 24, 42 (1988) (discussing the notion that carnival is liminal and indeterminate and more akin to a “magical mirror” than to a straightforward ritual of reversal). Turner writes, “Genres of cultural performance are not simple mirrors but magical mirrors of social reality: they exaggerate, invert, re-form, magnify, minimize, dis-color, re-color, even deliberately falsify, chronicled events.” *Id.* The extent to which rap artists fabricate lives of urban strife has been discussed widely. See, e.g., Inniss, *supra* note 47, at 355 n.184 (2007) (citing KEITH NEGUS, MUSIC GENRES AND CORPORATE CULTURES 91 (1999)); PERRY, *supra* note 12, at 90. One rap artist critiques this trend from within the genre itself, and in the song “Niggas Lie A Lot” assails gangsta' rappers' exaggerated claims to violent propensities:

Niggas Lie A Lot, Niggas Lie A Lot  
 Niggas Lie, Niggas Lie, Niggas Lie A Lot  
 I Know U Think U Nice,  
 U Just Nice On Ya Block  
 Wit These Crabs In Da Bow  
 Tryin 2 Rise 2 The Top  
 . . . .  
 I Ain't Got No Issue With The Battles Or Dissin  
 But I Keep It Straight Wit U  
 We Shootin From The Hip  
 I Can't Stand These Rappers Dat Just Shootin Off They Lip  
 Every Rapper Is A Clapper  
 Your Producer Is A Shooter  
 Engineer Gotta Nine  
 Label Boss Gotta Ruger  
 Yeah Right We Ain't Stupid  
 We Don't Believe These Losers  
 Gotta Mac In Da Booth  
 Tell The Truth, It's A Computer  
 So Let Me Guess U Make It That Impressin  
 I Seen U On MySpace, U Just Wanna Be Friends

The essence of gangsta' rap is a *mélange* somewhere between what has actually happened and what gangsta' rappers have constructed for public consumption.

*B. Putting the Gangster in Gangsta' Rap: Young Black Men as Sociopaths and the Response of Law*

The response to the proliferation of gangsta' rap has often been to demonize those seen as the principal purveyors of the genre—young black men. Clearly some urban black men engage in lawlessness and violence that harms persons both inside and outside of their own communities. Some of these acts may be part of an engagement in what has been described as “outlaw culture,” wherein persons outside the law’s regard and protection may choose intentionally to place themselves in opposition to mainstream cultural and legal norms when those norms ill-serve their communities.<sup>82</sup> It would be an error, however, to attribute black lawbreaking to a culture or subculture of violence.<sup>83</sup> Engagement in such lawlessness may arise especially in the context of acts that are *malum prohibitum*, those acts that are deemed wrong by statute but typically pose no direct or immediate harm to persons or property, as opposed to acts that are *malum in se*, those deemed evil in and of themselves and often based on longstanding moral codes. Moreover, what is frequently overlooked is the fact that black men face some very real problems as crime *victims*—highlighted in gangsta' rap—such as black-on-black crime, police brutality, and harassment.<sup>84</sup>

All too often, popular culture, fed by the news media, underestimates the extent to which gangsta' rap “tap[s] into fantasies that culturally resonated with many young heterosexual men regardless of race: rebelliousness, irreverence, fierce aggression, and the sexual exploitation

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So Let's Not Pretend, I Respected Ya Block  
Until I Put It All Together, Now Let's Connect Da Dots

....  
TALIB KWELI, *Niggas Lie a Lot* (2007) (unpublished song, lyrics available at [www.urbanlyrics.com/lyrics/talibkweli/niggasliealot.html](http://www.urbanlyrics.com/lyrics/talibkweli/niggasliealot.html)).

82. See, e.g., Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263, 265 (1993) (discussing role of African American women in shaping outlaw culture).

83. See, e.g., Robert J. Cottrol, *Submission Is Not The Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1041–42 (1998) (stating that notwithstanding the disproportionately high homicide rate among African American men, the vast majority of such men are “are neither the perpetrators nor the victims of homicide and have strong inhibitions against such,” and it would therefore be both unfair and inaccurate to use the high rates of lethal violence among African American men as the basis of claims about culture or subculture).

84. See CHARISE L. CHENEY, *BROTHERS GONNA WORK IT OUT: SEXUAL POLITICS IN THE GOLDEN AGE OF RAP NATIONALISM* 6 (2005).

of women.”<sup>85</sup> Many of the most extreme forms of gangsta’ rap—though perhaps growing out of and existing on the margins of white, mainstream culture—are nourished from the center of that culture. As cultural critic bell hooks writes,

Contrary to a racist white imagination which assumes that most young black males, especially those who are poor, live in a self-created cultural vacuum, uninfluenced by mainstream, cultural values, it is the application of those values, largely learned through passive uncritical consumption of mass media, that is revealed in “gangsta rap.”<sup>86</sup>

As another observer writes, gangsta’ rap is all too often mediated by mainstream white supremacist patriarchal forces “eager to be titillated by the thrilling despair within aggrieved black urban communities in the form of ‘bad nigga’ narratives and hyperbolic masculinism[,] underscor[ing] the[] view that the production and performativity of rap is directly at the expense of the structurally subordinated black subject.”<sup>87</sup>

It is therefore, perhaps, not surprising that a principal tool used to advance gangsta’ rap discourses, whether offered by actual gangstas or by wannabes, is law, or, more specifically, the legal norms of freedom of expression and its subsidiary norms of freedom of speech. Law, via its perceived neutrality and its focus on the individual, often avoids in the first instance the critical need to query the larger institutional arrangements and power structures that oppress women, especially women of color.<sup>88</sup> Once those values and ideals are laid open to fuller examination, however, it becomes possible to unseat law as the defender of racist and sexist speech and to use law instead as a system to dismantle its own hegemony.<sup>89</sup>

### III.

#### THE BIG CHILL: WHAT’S FREE SPEECH GOT TO DO WITH IT?

Many who decried the censure of Imus argued that Imus should not have been sanctioned by his employers for his on-the-air comments because such sanctions violate his First Amendment right to free speech

85. *Id.*

86. bell hooks, *Sexism and Misogyny: Who Takes the Rap? Misogyny, Gangsta Rap, and The Piano*, Z MAG., Feb. 1994, available at <http://race.eserver.org/misogyny.html>.

87. PETER MCLAREN, REVOLUTIONARY MULTICULTURALISM: PEDAGOGIES OF DISSENT FOR THE NEW MILLENNIUM 163 (1997).

88. See Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 894 (1989) (noting how patriarchy in the law is a result of the law’s image of women as seen only through men’s eyes).

89. Lorna McGregor, *Reconciliation: Where is the Law?*, in LAW AND THE POLITICS OF RECONCILIATION 111, 124 (Scott Veitch ed., 2007).

and would have a chilling effect that would be felt throughout the media and society at large.<sup>90</sup> Such claims are problematic for two reasons. First, such assertions misapprehend the nature of the First Amendment's protection against speech limits imposed by private entities. They reflect commonly held but potentially erroneous assumptions about the nature of constitutional protections for freedom of expression and about the reach of the First Amendment's protections for such expression, especially expressions by employees which employers find objectionable. Second, even assuming that what is at stake are broader philosophical ideals and not particular constitutional norms of freedom of expression, positing that Imus had some broader right to make his comments seriously undermines the values which support freedom of expression.

*A. Constitutional Freedom of Speech in Context—Employers and Employees*

What was often overlooked in the controversy surrounding Imus was that ultimately he was discharged from private employment as a result of his comments. While government employees who are sanctioned by their employers for exercising First Amendment rights may have a colorable claim against their employers for deprivation of their rights, this does not typically hold true for employees of private companies. Generally, in the absence of contractual or statutory provisions to the contrary, private employers have wide latitude in discharging employees.<sup>91</sup> Actions by private individuals typically do not give rise to First Amendment claims.<sup>92</sup>

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90. See, e.g., John Hourihan, Op-Ed., *No Matter What the Color, Our Skin Is Too Thin*, CONN. POST, May 30, 2007; Bob Pladek, Commentary, *I-Man Vs. I-Meant*, N.J. LAW., May 28, 2007, at 23; Robin Finn, *A Defender of the Controversial, and Now of Imus*, N.Y. TIMES, May 25, 2007, at B2.

91. See Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 299 (2005) ("The doctrine that employees hold their jobs only 'at [the employer's] will' and have 'no legal remedy for 'an employer's unjustified decision to terminate'' is the rule in all states except Montana, despite California's and New Hampshire's brief flirtations with abandoning it." (alteration in original) (footnotes omitted)). See also Edwin Robert Cottone, *Employee Protection from Unjust Discharge: A Proposal for Judicial Reversal of the Terminable-At-Will Doctrine*, 42 SANTA CLARA L. REV. 1259, 1262-72 (2002) (explaining the basis and scope of the employment at-will doctrine). For further discussion of the employment-at-will doctrine, see *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983). A private employer's ability to fire at will may be limited in a number of instances by state or federal statutes (such as those barring discrimination on certain grounds like race, gender, or disability) and in certain other cases (including, for example, where an employee's wages are garnished, or where an employee acts as a whistleblower).

92. See Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115. According to Estlund, [M]ost private employers can exercise almost unlimited "control over their employees' words and actions" if they choose to, for ordinary private sector

The Supreme Court has declared that, absent state action, it would not intervene when private employers terminate workers for the exercise of their First Amendment rights.<sup>93</sup> Under this analysis, assuming no additional contractual protections, there would arguably be little that hindered CBS from censuring or even firing Imus for his remarks.<sup>94</sup>

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employees—those who are terminable at will, as most are—enjoy very little freedom of speech as against their employer. They have no federal constitutional speech rights and only a sprinkling of nonconstitutional speech rights, most of which vary from state to state.

*Id.* at 147 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). *See also* *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (holding that a broadcast licensee could refuse to carry paid editorial advertisements from a group desiring to express its views on a public issue). In a portion of the opinion joined by only two other justices, Chief Justice Burger reasoned that a licensee's refusal to accept such an ad did not constitute governmental action for purposes of the First Amendment. *Id.* at 118–21. “The First Amendment does not reach acts of private parties in every instance where the Congress or the [Federal Communications] Commission has merely permitted or failed to prohibit such acts.” *Id.* at 119. A few state courts have, however, recognized First Amendment interests in situations involving only private actors. *See, e.g.,* *Dudek v. Pittsburg City Fire Fighters, Local No. 1*, 228 A.2d 752, 755 (Pa. 1967) (invalidating a union regulation that imposed fines against members who refused to picket, reasoning that it is “just as illegal to compel one to speak when he prefers to remain silent as it is to gag one when he wishes to talk”). *See also* *Zelenka v. Benevolent & Protective Order of Elks*, 324 A.2d 35, 39 (N.J. Super. Ct. App. Div. 1974) (finding an Elks Lodge's expulsion of a member based on publication of a newspaper ad opposing the association's racial policies violates public policy protecting free speech guaranteed in the New Jersey Constitution); *id.* (“The public policy undergirding the principle of free discussion of issues of such broad public interest as that mentioned, entirely independently of its constitutional sanction in respect of state abridgement, appears to us to far outweigh the private interest of defendants in restricting public discussion . . .”). These latter cases, however, represent a distinctly minority view.

93. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837–43 (1982) (describing four factors often considered in the state action determination regarding a private entity: receiving resources from the state, being heavily regulated by the state, performing a “public function,” and having a symbiotic relationship with the state). It may be possible, however, that a state court might become a party to a news executive's deprivation of a reporter's First Amendment rights when it dismisses the reporter's wrongful discharge complaint or a lawsuit. *See* Louis Day, *The Journalist as Citizen Activist: The Ethical Limits of Free Speech*, 4 COMM. L. & POL'Y 1, 15–16 (1999).

94. I am assuming for purposes of simplifying this discussion that there were no contractual provisions that offered Imus protection against such censure or firing. It should be noted, however, that there *were* apparently contractual protections covering Imus sufficient to induce his former employers at CBS to reach a settlement with him after his firing. It has been reported that Imus's contract with CBS contained a clause acknowledging that he was engaged to perform services that were “unique, extraordinary, irreverent, intellectual,” as well as “topical” and “controversial,” and that programs containing these elements “are desired” by CBS and “are consistent with company rules and policies.” Howard Kurtz, *Legal Battle Brews over Imus Contract with CBS*, WASH. POST, May 4, 2007, at C1.

As a result, Imus apparently threatened to sue under the contract and CBS agreed to pay Imus an undisclosed sum believed to be as much as twenty million dollars. Imus was also freed to perform similar services for another employer. *See Tell Me More: Don Imus Wins Settlement, Rutgers Athlete Fights Back* (National Public Radio broadcast Aug. 15,

In the media arena, some have argued that the First Amendment is implicated in private employer situations.<sup>95</sup> In the specific context of employees of media companies, there have also been cases which consider the extent to which reporters or others employed by private media outlets may have their freedom of expression rights limited by their employers.<sup>96</sup> Most such cases typically arise from an employee's claim that a private employer fired or otherwise sanctioned her in violation of the public policy embodied in the First Amendment.<sup>97</sup> The essence of this argument is that, by upholding the employer's actions in such cases, a state court's decision itself provides the requisite government involvement. Although private

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2007), available at <http://www.npr.org/templates/story/story.php?storyId=12802669>. See also Jacques Steinberg, *Imus Settles with CBS, Setting Up a Possible Return to Radio This Fall*, N.Y. TIMES, Aug. 15, 2007, at E1 (reporting the settlement amount at around twenty million dollars). Indeed, at the time of this writing, Imus has recommenced his career as a "shock jock," having been hired by WABC/Citadel Broadcasting. Eric Deggans, *Imus Tries to Dial Up Change*, ST. PETERSBURG TIMES (Florida), Dec. 4, 2007, at 1E. Imus promised fans that his style would not change. *Id.*

95. See Day, *supra* note 93, at 13–19, 28–32 (discussing whether First Amendment protections for institutional media may trump the free speech interests of journalists employed by them, even when journalists are censured for their off-duty activities). The author notes that there are few cases that have advocated for the "constitutionalization" of freedom of expression rights of private employees and that to do so would be to erode editorial control and ultimately undermine the credibility of the media. *Id.* at 31.

96. See *e.g.*, *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123 (Wash. 1997) (finding that Fair Campaign Practices Act cannot be applied to newspaper without infringing on newspaper's constitutionally guaranteed free press right to editorial control of paper's content).

97. The prevailing view is that the First Amendment cannot be the basis of a public policy exception in wrongful discharge claims in the absence of state action. See, *e.g.*, *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985). In *Barr*, employees alleged wrongful discharge based upon their exercise of free speech rights protected by the Illinois and United States Constitutions. *Id.* at 1355. In rejecting their claims, the court stated that the mere recitation of a constitutional provision does not establish a clear mandate of public policy. *Id.* at 1357. The court concluded that because the Constitution limits only government actions, it cannot be the basis of a First Amendment public policy claim in a wrongful discharge action involving a private-sector employer. *Id.* See also *Rozier v. St. Mary's Hosp.*, 411 N.E.2d 50, 54 (Ill. App. Ct. 1980) (finding discharge from hospital did not violate First Amendment because hospital is private and thus termination involved no "state action"); *Chin v. Am. Tel. & Tel. Co.*, 410 N.Y.S.2d 737, 741 (Sup. Ct. 1978) (stating employee failed to show public policy existed that would restrict right of private employer to discharge employee at will due to employee's political beliefs), *aff'd*, 416 N.Y.S.2d 160 (App. Div. 1979); *Shovelin v. Cent. N.M. Elec. Coop., Inc.*, 850 P.2d 996, 1009 (N.M. 1993) (finding allegation that employer infringed on employee's right to political expression when it dismissed employee for being elected mayor of city was not public policy violation sufficient to support claim for retaliatory discharge). One notable exception to this principle is *Holodnak v. Avco Corp., Avco-Lycoming Division*, 514 F.2d 285 (2d Cir. 1975), in which a federal appeals court upheld a judgment for an employee who had been dismissed for publishing an article criticizing the employer and the union. In holding that the private employer had violated the employee's free speech rights, the court noted that the company was so committed to government contract work that the employer's actions in dismissing the employee amounted to state action. *Id.* at 288–90.

actors are not typically bound by constitutional mandates, courts may, in some instances, act to protect what are perceived to be fundamental rights. In the cases which suggest that such a right might exist, the right in question often seemed to embody one of the highest ideals of the First Amendment: the right to political expression.<sup>98</sup> In those situations involving private actors where norms of freedom of expression are implicated, these norms generally promote the higher ideals of freedom of expression, such as self-governance, truth-seeking, autonomy, and especially political expression.<sup>99</sup> Moreover, in several of the cases, the statements or conduct for which the employee was sanctioned were either outside of employment or peripheral to the work for which the employee was engaged.<sup>100</sup> There thus remains solid constitutional support for the employer to set the terms for behavior and conduct within the workplace.

Hence, outside of contractual provisions to the contrary, employers are generally able to dictate their employees' performance and (at least on-the-job) behavior. Thus, even acknowledging that Imus and his staffers were engaged to offer insults, parody, and other various forms of scatological rhetoric, there is arguably always a moment where the employer may cry "enough." Moreover, even if one were to embrace the expansive view that protecting free speech rights in the private workplace is important because there is an "intrinsic value of free speech for individual autonomy, and its value in fostering individual self-realization and fulfillment, [which] transcends the boundaries established by the state action doctrine,"<sup>101</sup> not all employee speech advances these values. Within the workplace there must exist "a degree of civility, mutual respect, and tolerance," and some speech may undermine these norms.<sup>102</sup> "Harmful workplace speech," such as "personal insults, divisive gossip, racial slurs, sexual taunts, propositions, innuendo, and the like," is deleterious and

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98. See generally *Nelson*, 936 P.2d at 1126–28, (discussing the value of protecting political expression from workplace retaliation).

99. See Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 89–90 (1994) (considering the value of autonomy and the extent to which it figures in discussions about racist speech).

100. For example, there are a growing number of cases where an argument is made for protection of employees' extra-employment activities, such as where employers attempt to censure employees for blogging outside of work. For example, see Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287 (2007), in which the authors argue that blogs are "First Amendment machine[s]," *id.* at 292, functioning as "virtual union halls," *id.* at 288, and that such activities by employees should enjoy broader protections. For additional discussion of employee blogging and freedom of expression, see Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355 (2007).

101. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 106 (1995). Estlund further argues that freedom of expression at work enhances human development and well-being in much the same way as freedom of expression in civic life. *Id.*

102. *Id.* at 113.



should be limited by the employer even in the ideal free speech private workplace.<sup>103</sup> How much greater is the responsibility of the employer to restrain harmful speech when, as in the Imus case, harmful speech is published not only in the immediate private workplace, where it has the potential to harm other employees, but in the virtual workplace of the public airwaves, where potentially large numbers of non-employee listeners may be harmed by it? The public nature of Imus's work does offer a special complexity here. Imus was discharged by a private employer for statements made in the course of conducting his work. Imus's work, however, involved broadcasting over public airwaves. He was thus, it seems, privately employed to engage in public discourse, a fact which potentially casts the debate beyond explicit constitutional norms of freedom of expression and into the realm of the broader philosophical ideals that support free expression in the public arena.

### *B. Philosophical Freedom of Expression and the Role of Public Discourse*

Beneath the First Amendment's freedom of expression protections lies something far more fundamental than the constitutional limits that have developed from it. It has been observed, for example, that the First Amendment "protects the communicative processes by which the American people work toward an 'agreement' that is 'uncoerced, and reached by citizens in ways consistent with their being viewed as free and equal persons.'"<sup>104</sup> In such a formulation, public discourse becomes the principal tool by which the polity is shaped and defined. Public discourse is a heuristic device, an imperfect mechanism for mediating between the individual members of our society and the greater social mass.<sup>105</sup> Public discourse may further be defined as including the communicative processes needed to form public opinion, whether or not that opinion is directed toward specific government personnel, decisions, or policies.<sup>106</sup> Ultimately, the goal of public discourse is to forge a common will that is discursively tempered in the political public sphere.<sup>107</sup>

This broader, philosophical aspect of the First Amendment differs so much from the constitutional norms which have developed in specific subject areas that it has been observed that there are, in effect, two First

103. *Id.*

104. Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 28 (2006) (quoting John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 229-230 (1985)).

105. *Id.* (citing JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 81 (Thomas McCarthy trans., Beacon Press 1987) (1981)).

106. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 281 (1991) (reflecting on HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 285 (Anders Wedberg trans., Russell & Russell 1961) (1945)).

107. *Id.* at 282 (quoting HABERMAS, *supra* note 105, at 81).

Amendments.<sup>108</sup> One is the subject of scholarly attention and consists of a body of complex doctrine that few claim to understand.<sup>109</sup> The other First Amendment can be understood by every citizen: it encompasses the ongoing political debates that flourish in our society. If we conceive of Imus's comments as part of his contribution to public debate, however lowbrow and offensive, then it becomes more difficult to condemn them. It is sometimes difficult to untangle where private forum ends and public discourse begins, particularly given the proliferation of technological resources that make every individual a potential broadcaster.<sup>110</sup> This is especially true in the case of Imus, where he was specifically engaged to offer insults, parody, and other various forms of scatological rhetoric, all in the course of also offering clearly political commentary. Because of this hybrid nature of Imus's work, it is perhaps incorrect to dismiss his firing as merely an exercise in employer prerogative.

But even if the values which ground the First Amendment are at work in the case of Imus, it is difficult to assert that racist, sexist speech should be protected in the name of these ideals. Such an absolutist view of the First Amendment, while perhaps a reflection of the Framers' initial intent, would seem to permit almost any utterance, however offensive.<sup>111</sup> While on the one hand, permitting racist speech promotes the goal of broad personal autonomy, on the other hand it undermines one of the fundamental assumptions at work in our system of government: that "all citizens are worthy of equal concern and respect."<sup>112</sup> In a society where we hold this assumption to be paramount among our highest ideals, it is difficult to understand why we would use the Constitution to privilege individual preferences that undermine this ideal.<sup>113</sup> Users of racist speech are hence ill-situated to assert rights derived from the principle that all citizens deserve to be treated with equal respect or concern because such speakers, by their actions, subvert the very principle in which they seek solace.<sup>114</sup>

In summary, it would appear that much of the discussion about the role of the First Amendment in reference to Imus's comments is premised on misapprehensions about the application of the First Amendment to situations involving private employers and their employees. As a general

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108. Shiffrin, *supra* note 99, at 46.

109. *Id.*

110. *Id.*

111. See HARRY M. BRACKEN, FREEDOM OF SPEECH: WORDS ARE NOT DEEDS 10 (1994). According to Bracken, when the freedom of speech principle was incorporated into the Constitution, it was entirely unqualified and self-evident, and subject to almost no limits. This understanding, however, quickly gave way, as evidenced by some of the Framers' support for the speech-limiting Sedition Act. *Id.*

112. Shiffrin, *supra* note 99, at 89-90.

113. *Id.* at 90.

114. *Id.*

rule, actions by private employers do not give rise to First Amendment claims. The few cases arguing for First Amendment protection in this context may be distinguished: they involve rights that may be characterized as fundamental or rights to political expression or personal beliefs. Even if one were to conclude that what is at stake in the Imus debate is the broader, more philosophical aspects of the First Amendment (the “other” First Amendment), at the center of that other First Amendment lies the notion of public discourse, the exchange of ideas within a particular community that helps to shape the ideas and ideals of that community. It appears that neither the constitutional norms of the First Amendment nor the philosophical underpinnings of the ideal of freedom of expression offer much support for the statements of Imus. I now turn to a discussion of the concept of carnivalization and the role that it plays in assessing racist, sexist speech in public discourse.

#### IV.

#### THE NATURE OF CARNIVALIZATION

Carnivalization is a concept which refers to the process whereby conventional hierarchical barriers are removed or subjected to critical inversion, established order is undermined, or official systems are overturned. It was first introduced by literary theorist Mikhail Bakhtin, who, in *Rabelais and His World*,<sup>115</sup> and to a somewhat lesser extent in *Problems of Dostoyevsky's Poetics*,<sup>116</sup> explored the nature of carnival in its traditional context, that of pre-Lenten revelry.<sup>117</sup> For Bakhtin, carnival was, in its totality, an alternative meta-narrative in which the conventions and hierarchies of official festivals and rules of all sorts were undermined. In this sense, the notion of carnivalization embodies Bakhtin's most inclusive vision of “culture and literature as non-hierarchical plural systems.”<sup>118</sup> Although Bakhtin's notions of carnival were initially developed in a literary context, they have been widely imported to the broader contexts of public discourse and social interaction.<sup>119</sup> This has

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115. BAKHTIN, *supra* note 43.

116. BAKHTIN, *supra* note 15.

117. ROBERT STAM, *SUBVERSIVE PLEASURES: BAKHTIN, CULTURAL CRITICISM, AND FILM 85–86* (1989) (summarizing foundation of Bakhtin's ideas about carnivalization).

118. Zhang, *supra* note 17, at 19.

119. It has been observed that the interest in and the broadening application of Bakhtin's carnival occurred well after Bakhtin originally wrote and came only after Russian students in the 1960s developed an interest in his work. Michael Holquist, *Prologue to BAKHTIN*, *supra* note 43, at xix–xxii.

For all of the heightened interest in Bakhtin's carnival, one scholar has suggested that carnivalization represents “an anomaly in the overall progression of his thought.” Paul Wilkinson, E.E. Cummings, Jacques Prévert, and Bakhtin's Carnival 10 (2004) (unpublished Ph.D. dissertation, The University of North Carolina at Chapel Hill) (on file with author).

occurred because carnivalization is arguably at play any time and in any context where language is “liberat[ed] . . . from the norms of good sense and etiquette.”<sup>120</sup> Carnival has also been used to describe broader processes of social subversion, especially those seen in black communities in the West. The various forms of carnival, however, share one key feature: the revelers mock power from a position of relative powerlessness, in a system wherein the status quo is only temporarily disrupted.

### *A. Bakhtin's Carnival*

As Bakhtin explains, carnival originated in the Dionysian festivities of the Greeks and the Saturnalia of the Romans.<sup>121</sup> The Bakhtinian carnival, however, was both a specific calendrical ritual as well as a “mobile set of symbolic practices, images and discourses which were employed throughout social revolts and conflicts” or other periods of social disturbance.<sup>122</sup> Bakhtin’s carnival aesthetic was, moreover, oxymoronic; it was frequently self-reflexive and self-contradictory.<sup>123</sup> Carnival is associated with masquerade, the assumption of masks and false identities which obscure the divisions between high and low.<sup>124</sup> As one scholar writes, carnival operated as a “corrective to certain Eurocentric prejudices”<sup>125</sup> and did so by creating an atmosphere wherein “everything [was] pregnant with its opposite,” thereby “transgress[ing] the monologic true-or-false thinking typical of Western [societies].”<sup>126</sup>

Carnival, however, is more than merely a literal expression of religious observance; it is also the source of symbolic subversion of social and political norms. Carnival is both a general sense of the world and of language and a specific literary or social form.<sup>127</sup> Bakhtin described carnival as

not a spectacle seen by the people; they live in it, and everyone participates because its very idea embraces all the people. While carnival lasts, there is no other life outside it. During carnival time life is subject only to its laws, that is, the laws of its own freedom.<sup>128</sup>

120. STAM, *supra* note 117, at 99.

121. BAKHTIN, *supra* note 15, at 129.

122. PETER STALLYBRASS & ALLON WHITE, *THE POLITICS AND POETICS OF TRANSGRESSION* 15 (1986).

123. STAM, *supra* note 117, at 22.

124. *See* BAKHTIN, *supra* note 43, at 39–40.

125. STAM, *supra* note 117, at 22.

126. *Id.* (analyzing Bakhtin’s discussion of Rabelais in terms of the texts and rhetorical devices themselves, as well as their depictions of and insights into the 1930s and 1530s, respectively).

127. *See* KATERINA CLARK & MICHAEL HOLQUIST, *MIKHAIL BAKHTIN* 295–320 (1984). *See also* GARY SAUL MORSON & CARYL EMERSON, *MIKHAIL BAKHTIN: CREATION OF A PROSAICS* 443–69 (1990) (discussing how Bakhtin used carnival as a literary genre in demonstrating his view of the world and of language).

128. BAKHTIN, *supra* note 43, at 7.

Carnival, while the name of a specific historically-instanced event such as Mardi Gras, is also, for Bakhtin, “an immaterial force which such particular instances characteristically embody.”<sup>129</sup> As a mechanism of discourse, carnival conveys the notion of freedom from established norms and values, “a special type of communication impossible in everyday life,” with “special forms of marketplace speech and gesture, frank and free, permitting no distance between those who came in contact with each other and liberating from norms of etiquette and decency imposed at other times.”<sup>130</sup>

But carnival is not simply an invitation to individual freedom.<sup>131</sup> Rather, it is an invitation to become a part of a complex unity, a bodily collectivity: “In this whole the individual body ceases to a certain extent to be itself; it is possible, so to say, to exchange bodies, to be renewed (through change of costume and mask). At the same time the people become aware of their sensual, material bodily unity and community.”<sup>132</sup> Carnival was, at bottom, a process of subversion, but what carnivalization subverts are not individual, specific rituals or processes. Rather, carnivalization is the hegemonic power of totalization, “the capability of certain cultural formations to position everything else in a negative relationship to it.”<sup>133</sup> In this regard, Bakhtin’s carnival included two principal themes: ambivalent laughter and the grotesque body, both of which are encompassed within the cycle of life, death, and rebirth.<sup>134</sup> This is seen especially in the carnival rituals performed by African-ancestored persons in the West.

### *B. Black Carnivals—Rituals and Revolt*

The meaning of carnival is made manifest in the carnivals performed by African-ancestored people in the slavery and post-slavery societies of the West. Carnivals, masking, and public revelry were ways in which slaves and former slaves, hindered by white power structures, contested their suppression. One such example is a festival that occurred in black New England communities from the 1700s until just before the Civil War called “Negro Election Day.”<sup>135</sup> During this period, blacks, in what

129. MICHAEL HOLQUIST, *DIALOGISM: BAKHTIN AND HIS WORLD* 89 (2d ed. 2002).

130. BAKHTIN, *supra* note 43, at 10.

131. *See* CLARK & HOLQUIST, *supra* note 127, at 302.

132. BAKHTIN, *supra* note 43, at 255.

133. Nancy Armstrong & Leonard Tennenhouse, *Introduction* to *THE VIOLENCE OF REPRESENTATION: LITERATURE AND THE HISTORY OF VIOLENCE* 1, 15 (Nancy Armstrong & Leonard Tennenhouse eds., 1989).

134. *See* DAVID K. DANOW, *THE SPIRIT OF CARNIVAL: MAGICAL REALISM AND THE GROTESQUE* 36 (1995). *See also* GUIDO RUGGIERO, *MACHIAVELLI IN LOVE: SEX, SELF, AND SOCIETY IN THE ITALIAN RENAISSANCE* 16 (2007) (identifying Bakhtin’s “vision of the premodern grotesque body and its cycle of life, death, decay, and rebirth”).

135. Geneviève Fabre, *Performing Freedom: Negro Election Celebrations as Political and Intellectual Resistance in New England, 1740–1850*, in *CELEBRATING ETHNICITY AND*

seemed to be a mockery of white elections, robed themselves in outlandish costumes and elected governors, kings, and sheriffs with great pomp and circumstance.<sup>136</sup> Although Negro Election Day festivals have long been described as playful mimicries carried on by slaves at leisure, closer examinations suggest that they were part of the “poetics and politics of transgression” and “hidden transcript” that typified the merry-making of blacks who were constrained by dominant white power structures.<sup>137</sup> Perhaps an even more striking example of transgressive, oppositional, black public rituals is the celebration of carnivals throughout the Caribbean, Latin America, Canada, and the United States. Such celebrations have long been assumed to be related to European carnivals because of the extent to which black carnivals occur during the same times as, or even ostensibly as part of, white carnival rituals (such as Mardi Gras in New Orleans).<sup>138</sup> More recent study, however, has suggested that the carnivals performed by African-ancestored people in the West are most likely directly related to African festivals and to slave festivals that were held as shadow or rogue parades before the official white festival, in an acknowledgement of the fact that official carnivals allowed for only limited dissent from norms and are frequently subject to being tamed and packaged for broad, mainstream consumption.<sup>139</sup> Even black carnivals, as they have grown more central to popular culture, have been subject to this doubling back in search of a more authentic and unbounded form of expression.<sup>140</sup> One example is the rogue parade before the West Indian Day parade in New York in 1997, during which revelers at the pre-parade event wore swine masks and carried plungers as a commentary on the

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NATION: AMERICAN FESTIVE CULTURE FROM THE REVOLUTION TO THE EARLY TWENTIETH CENTURY 91, 95–105 (Geneviève Fabre, Jürgen Heideking & Kai Dreisbach eds., 2001).

136. *Id.*

137. *Id.* at 92. For further discussion of Negro Election Day, see also Melvin Wade, “*Shining in Borrowed Plumage*”: *Affirmation of Community in the Black Coronation Festivals of New England (c. 1750–c. 1850)*, 40 W. FOLKLORE 211 (1981) (investigating Negro Election Day as a cultural event in which black communities celebrated their existence as social systems).

138. See BARBARA EHRENREICH, *DANCING IN THE STREETS: A HISTORY OF COLLECTIVE JOY* 165–66 (2006) (suggesting that European Carnivals imported to the West were originally white-only events and that African-ancestored slaves imported to work in the West appropriated Carnival to their own uses).

139. As one observer notes, contemporary black carnivals, especially those in Caribbean islands, are promoted internationally in order to attract tourists and thus are often controlled and scrutinized by the government; this reality suggests that true subversion within such festivals goes further underground to avoid conflict and may flow over into the sociocultural forms that inhabit life outside of the carnival period. See GERALD ACHING, *MASKING AND POWER: CARNIVAL AND POPULAR CULTURE IN THE CARIBBEAN* 3–4 (2002). See also John Stewart, *Patronage and Control in the Trinidad Carnival*, in *THE ANTHROPOLOGY OF EXPERIENCE* 289, 314 (Victor W. Turner & Edward M. Bruner eds., 1986) (mentioning the effect of tourists and political sponsorship on carnival in Trinidad).

140. See Randy Kennedy, *At 30, Caribbean Festival Is Bursting at Seams*, N.Y. TIMES, Sept. 2, 1997, at B3.

police assault upon Haitian-American Abner Louima.<sup>141</sup> Pre-parade marchers were hence able to offer trenchant observation about a contemporary problem in the black community that would have been considered too risqué for the highly stylized, more politically temperate televised main parade.<sup>142</sup>

Nonetheless, black carnivals—with their crowning of often elaborately overdressed kings and queens and their parodic songs and performances mocking current events, including white oppression of blacks—have long been tools for confronting white norms and white hegemony.<sup>143</sup> Moreover, the transgression, mockery, and masking of identities that occur in black carnivals are arguably at play even in the broader context of black sociocultural norms. These factors are especially prevalent in discursive practices such as hyperbole, circumlocution, and creolized language forms (patois) that depart from the “standard” language forms that often mediate and camouflage the true nature of interracial or class-based social relations.<sup>144</sup>

In a modern context, the discourses used in gangsta’ rap, particularly words of gendered insult such as “ho” and its close kin, “bitch,” may arguably be seen as examples of black carnival that have proliferated in the West as counters to dominant white social norms. This is true even in a nominally postcolonial society based on democratic norms such as the United States where, unlike the situation in Bakhtin’s medieval carnivals or in developing countries outside the United States, there is a broad collective polity.<sup>145</sup> This presumed collectivity of ideals and popular sovereignty in the United States would seem to belie the need for sustained contestative behaviors. However, as some scholars have pointed out, the popularly imagined collective ethos of morals and values

141. *Id.* Abner Louima was a Haitian immigrant who was brutally assaulted with a toilet plunger or mop handle by New York City Police officers after being arrested outside a Brooklyn nightclub in 1997. Police sodomized Louima with the handle and then used it to break his teeth. Officers later claimed that Louima’s injuries came from a homosexual encounter. The attack on Louima was the cause of widespread protest against the police. See, e.g., Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1159–60, 1165–71 (1999) (recounting details of the attack and subsequent protest activity).

142. Marching in the New York West Indian Day Parade has become a requisite event for politicians and political candidates of many backgrounds. For example, the September 2007 parade featured then-New York Governor Elliot Spitzer, New York City Mayor Michael Bloomberg, and Police Commissioner Ray Kelly. Georgett Roberts, *West Indian Summer—B’klyn Parade a Blast*, N.Y. POST, Sept. 4, 2007, at 19.

143. WILLIAM D. PIERSEN, *BLACK LEGACY: AMERICA’S HIDDEN HERITAGE* 130–31 (1993). Pierson remarks, for example, that one type of black New Orleans group, the Zulu Krewes, at the same time mocks white stereotypes of blacks and the pretensions of white Mardi Gras groups who mask themselves for carnival. *Id.*

144. ACHING, *supra* note 139, at 3.

145. See Richard Schechner, *Carnival (Theory) After Bakhtin*, in *CARNIVAL: CULTURE IN ACTION: THE TRINIDAD EXPERIENCE* 3 (Milla Cozart Riggio ed., 2004) (raising the question of what authority is being undermined through carnivals staged within societies wherein the people themselves are sovereign).

is invariably a conservative one that postulates a false unity that attempts to suppress dissident voices.<sup>146</sup> Such an insistence on universal precepts would marginalize gangsta' rap as a clear example of "self-othering."<sup>147</sup> Self-othering originated in reference to the process whereby colonizers (the dominant group) cause the colonized (the subordinated group) to view themselves as the Other, thereby internalizing the negative views of the colonizer and creating a compulsion within the colonized to perform the role that was originally an external image.<sup>148</sup> Performers of the gangsta' rap genre glorify involvement in the criminal and the debased, seemingly conforming to all of the expectations that the white mainstream has of black urban inhabitants. However, to embrace this view misses the broader concerns of Bakhtin's notion of carnival, and of gangsta' rap itself.

Bakhtinian carnival, while usually conceived as a set of rituals of opposition and inversion, may also be viewed as a "ritual of intensification"<sup>149</sup>—that is, carnival may, via a distorted view, offer greater insight than is possible through a plain reflection: a view with more salience, clarity, and eloquence.<sup>150</sup> Gangsta' rap thereby becomes a refusal of mainstream norms and rules which, for social reasons, cannot be adopted or appropriated by many members of the black community.<sup>151</sup> In much the same way, in the carnival that is gangsta' rap, low is high and bad is good, or perhaps low is lower and bad is worse, all or any of which may be in the service of subversive discourse. Gangsta' rap, with its in-your-face vulgarity that undermines norms of civility, is thus a push back against the inner compulsion of "self-othering" and not an example of it. Even when gangsta' raps address issues of injustice or inequity, they are not in the form of lamentations or meditations. Rather, the songs offered by gangsta' rappers are most typically celebratory, boastful, and hyperbolic.

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146. JUDITH BUTLER, *GIVING AN ACCOUNT OF ONESELF* 3–6 (2005) (discussing and offering accord with philosopher Theodor Adorno and his critique of abstract universality, including the idea that because there is no longer a collective ethos, it can impose its claims to commonality only through violence).

147. For a discussion of the concept of self-othering, see Stuart Hall, *Cultural Identity and Diaspora*, in *COLONIAL DISCOURSE AND POST-COLONIAL THEORY* 392, 394–95 (Patrick Williams & Laura Chrisman eds., 1994) (discussing the devastating effects of this "inner expropriation of cultural identity").

148. *Id.*

149. NANCY SCHEPER-HUGHES, *DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL* 482 (1992).

150. RICHARD D.E. BURTON, *AFRO-CREOLE: POWER, OPPOSITION, AND PLAY IN THE CARIBBEAN* 157 (1997).

151. BUTLER, *supra* note 146, at 6 (describing how universality that fails to acknowledge cultural particularity is destined to become a site of contest or debate).



*C. Revel, Rebel, Quell—The BAU Effect*<sup>152</sup>

Notwithstanding the emancipatory potential of carnival, it is important not to overstate its long-term effects. Carnival is typically conceived of as a temporary reversal of the dominant social power structure,<sup>153</sup> and much like the traditional hierarchy that it replaces, it is rule-bound: “the social *rule* system for how to act in the reverse social roles remains in place.”<sup>154</sup> Though carnivalization levels hierarchic distinctions, the role reversals that characterize carnival at the same time “preserve[] the binary oppositions” that are at the heart of carnivalization.<sup>155</sup> In carnival, up may be down, and poor may be rich, but up is not reconceived as over or adjacent. In neither traditional nor even modern carnival settings are women (or minorities generally) usually recast as mainstream, powerful men.<sup>156</sup> In traditional European carnivals, weaker and more unpopular members of the society, such as women and religious minorities, were altogether excluded from the purportedly subversive carnival.<sup>157</sup> Bakhtin’s notion of women in carnival remains “repressed and undeveloped,”<sup>158</sup> chiefly because of Bakhtin’s fixation on the grotesque female body and its containment.<sup>159</sup> As a result of these and other limitations, it has been suggested that Bakhtinian carnival offers only a “semi-idealist” sense of the oppositional Other in carnival.<sup>160</sup> To achieve a greater disruption of norms, it is necessary to account for class, race, and other points of difference in the specific context within which carnival occurs in order to understand its antagonistic character and representation of contestative discourse.<sup>161</sup> This may explain in significant part why—even if gangsta’ rap is viewed as a carnivalistic discourse and hence a counter-hegemonic

152. BAU is my acronym for “Business as Usual,” a summary of the way in which counters to established norms are all too often crushed in the regression to the social norm that occurs after such events.

153. See JAAN VALSINER, *CULTURE AND HUMAN DEVELOPMENT* 46 (2000).

154. *Id.*

155. NEWMAN, *supra* note 16, at 108 (emphasis omitted).

156. Mary Russo, *Female Grotesques: Carnival and Theory*, in *FEMINIST STUDIES, CRITICAL STUDIES* 213, 214–17 (Teresa de Lauretis ed., 1986) (providing background information on women’s roles in carnival through an anthropological and socio-historical perspective); STALLYBRASS & WHITE, *supra* note 122, at 19.

157. Efrat Tseëlon, *Reflections on Mask and Carnival*, in *MASQUERADE AND IDENTITIES: ESSAYS ON GENDER, SEXUALITY AND MARGINALITY* 18, 28–29 (Efrat Tseëlon ed., 2001).

158. See Russo, *supra* note 156, at 219.

159. See *id.* at 214, 219.

160. José E. Limón, *Carne, Carnales, and the Carnavalesque: Bakhtinian Batos, Disorder, and Narrative Discourses*, in *SITUATED LIVES: GENDER AND CULTURE IN EVERYDAY LIFE* 62, 75 (Louise Lamphere, Helena Ragoné & Patricia Zavella eds., 1997).

161. See *id.* (citing FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 84–86 (1981)).

discourse in which profanity and violence replace polite discourse and social calm—women remain the subjects of oppression even within the counter-discourse.

Whether in the literary or the societal sense, carnivalization is about disruptions of dominant discourses, or at least about expressions of discontent with dominant discourses. The concept of carnival, though counter-hegemonic, is a sanctioned societal release valve. It is “a permissible rupture of hegemony, a contained popular blow-off as disturbing and relatively ineffectual as a revolutionary work of art.”<sup>162</sup> Even in some of the most violent forms of gangsta’ rap, which, for example, advocate the killing of white policemen, there is little sense of reality. This is because the words of the black oppressed are, for the most part, just words: they do little to alter existing race-based power differentials.<sup>163</sup> It is thus extremely problematic when carnival is itself appropriated by dominant forces in a society. This results in *ersatz* or degraded carnival, produced by cultural, social, or political elites and dominant institutions.<sup>164</sup> When this political antagonism occurs, carnival may become regressive instead of progressive and liberatory, making carnival the site of a symbolic struggle.

## V.

### ERSATZ CARNIVALIZATION

Rather than a destabilization of existing power relations, ersatz carnival offers a reification of those relations. It is a terroristic counter-discourse that seeks to turn the language of resistance against its original propounders. This is because true carnival, according to Bakhtin, is characterized by an ambivalent, dialectical laughter.<sup>165</sup> Medieval laughter was typically a way of mediating society; it was a universal, communal philosophy.<sup>166</sup> Although it has been argued that laughter “has dramatically shifted its cent[er] of meaning from the interpersonal to the intrapsychic”

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162. TERRY EAGLETON, WALTER BENJAMIN, OR, TOWARDS A REVOLUTIONARY CRITICISM 148 (1981).

163. *Cf.* BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION 15 (1992) (“The prejudicial feelings some blacks may express about whites are in no way linked to a system of domination that affords us any power to coercively control the lives and well-being of white folks.”).

164. *See id.* at 95–98 (discussing how the influence on white men of some black men’s enactments of alternative conceptions of masculinity only further entrenches the status quo because these manifestations of manliness are in accord with the dominant culture’s assessment).

165. *See* Neil Nehring, *The Riot Grrrls and “Carnival,”* in *READING ROCK AND ROLL: AUTHENTICITY, APPROPRIATION, AESTHETICS* 209, 232 (Kevin J.H. Dettmar & William Richey eds., 1999).

166. PETER GOOD, LANGUAGE FOR THOSE WHO HAVE NOTHING: MIKHAIL BAKHTIN AND THE LANDSCAPE OF PSYCHIATRY 55 (2001).

and is much weakened, laughter still has the transformative power to “mediate the values of the individual into the value of the group.”<sup>167</sup> “Properly ambivalent” laughter is aimed at the powerful, but it recognizes that what the powerless ultimately seek is social reconciliation and inclusion, even if this is sometimes obscured by their anger.<sup>168</sup> Laughter that is aimed at the powerless demeans and excludes, for those who laugh share a social acceptance and knowledge, and making those at the margins of society the butt of jokes further alienates them.<sup>169</sup>

There are, indeed, numerous examples of where the carnivalesque nature of unruly rites of rebellion is transformed into mainstream cultural representations.<sup>170</sup> By this measure, authentic gangsta’ rap, even in its profanity, is not antisocial performance by disaffected youth, but rather a genuine expression of pleasure at the margins in opposition to the values imposed by dominant society.<sup>171</sup> However, there is significant debate about the point at which gangsta’ rap discourses, and indeed other transgressive discourses, are turned not into inclusive mainstream representations but into variants of ersatz or false carnival whose goal is to exclude.

#### *A. Keeping it Real—Gangsta’ Rap as Authentic Carnival*

The question of authenticity in hip-hop or gangsta’ rap looms large, especially within a culture where a keenly felt sense of disenfranchisement expressed by the earliest forms of rap music is all too often subdued in subsequent practitioners, some of whom have been derided as poseurs whose music offers little more than pallid repackaging and redelivery of the gritty, streetwise narratives at the heart of some early gangsta’ rap.<sup>172</sup> In such cases even the most extreme forms of gangsta’ rap may be mere manifestations of carnival energy and carnival desires that lack the vitality

167. *Id.*

168. Nehring, *supra* note 165, at 232 (describing properly ambivalent laughter as “aimed at those with power and trying to heal divisions between those without it”).

169. *See* GOOD, *supra* note 166, at 55 (“Those that laugh express a sign of social acceptance and a shared knowledge. Those that fail to laugh place themselves in a lonely and defensive position.”).

170. *See generally* DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776–1820* (1997); *id.* at 2 (exploring “the festive innovations through which Americans of the early Republic practiced a divisive politics and a unifying nationalism at the same time”).

171. *See* PERRY, *supra* note 12, at 92 (discussing lyrics to song by rapper Nas that reflect the outlook of a “self-celebrating nihilist”); MIKE PRESDEE, *CULTURAL CRIMINOLOGY AND THE CARNIVAL OF CRIME* 47 (2000) (discussing generally the presence of carnival elements in many artifacts of mainstream media).

172. *See, e.g.,* QUINN, *supra* note 51, at 56 (describing the tension between “representing”—articulating genuine experiences of black street life—and “fronting”—offering weak claims of street belonging—and how both existed within the world of black rap).

of carnival participation.<sup>173</sup> The margins wherein gangsta' rap dwells may be considered places of "cultural negotiation," as the producers of gangsta' rap amass a type of countercultural capital that may sometimes be used as currency in their forays into the center where cultural normativity resides.<sup>174</sup> Even given this "cultural tourism" that often goes in two directions between the center and the margins, there is frequently an earnestness of feeling in such interactions that seeks to question misunderstandings with a goal of bridging them or, at least, to allow them to coexist comfortably for a while. In such interactions, hardcore rhetoric by gangsta' rappers that decries racist oppression or, at some of its lowest moments, demeans and devalues women, is understood for what it often is: a cry of dismay.

### *B. Ersatz or False Carnival*

By contrast, raced and gendered insults and other examples of gangsta' rap discourse wielded by the powerful are a particularly vituperative form of ersatz carnival that brooks no ambivalence, but instead exists as a site where the powerful demean the oppressed by mean-spirited diatribes meant to establish the speaker's superiority over the subjects of the discourse. Ersatz carnival is a mechanism for reclaiming attention that has been even briefly diverted to the margins, as it "foster[s] a migration of subjectivity" away from social, political, and economic concerns and redirects the focus to selfish and individualistic pursuits and pleasures.<sup>175</sup> Whereas true carnival is a process in which traditional categories and norms are breached as a means of discursive self formation, ersatz carnival becomes a means whereby transgressive identities are mass-produced and then deployed under the guise of private hedonism in the service of the elite.<sup>176</sup> This is in turn a part of a sanctioned deviance that appropriates Otherness as a means of silencing the voice of the Other and maintaining hegemony.<sup>177</sup> This is easily seen in two classic ersatz carnival

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173. See PRESDEE, *supra* note 171, at 47 (discussing artefacts of mainstream media and other postmodern cultural acts generally).

174. See *id.* at 47–48.

175. ULRIKE SCHUERKENS, *GLOBAL FORCES AND LOCAL LIFE-WORLDS: SOCIAL TRANSFORMATIONS* 31 (2004).

176. *Id.*

177. Levi-Strauss suggests that one social mechanism for addressing the "otherness" of Others was anthropophagy, the swallowing or appropriation of the Other. Inniss, *supra* note 47, at 351 (citing Zygmunt Bauman, *Uses and Disuses of Urban Space*, in *ORGANIZING METROPOLITAN SPACE AND DISCOURSE* 15, 24 (Barbara Czarniawska & Rolf Solli eds., 2001)). While in primitive societies this was accomplished by actual cannibalism, in modern societies it is accomplished by the appropriation of cultural artifacts or other attributes of the Other. *Id.* See also MAY JOSEPH, *NOMADIC IDENTITIES: THE PERFORMANCE OF CITIZENSHIP* 131–32 (1999) (discussing "ideological cannibalism" and the way in which postcolonial societies consume the cultural corpus of Others as an exercise in state-building).

events: the blackface minstrel show and, perhaps less conspicuously, professional sports as they are seen throughout the Western world.

The blackface minstrel show has long been a part of American popular culture. In such shows, whites painted their faces black and lampooned white views of black culture through comedic skits, singing, and dancing. Through the use of stock characters, blackface performers ridiculed the "plantation darcy" (Jim Crow) and the "northern dandy negro" (Zip Coon) and by doing so "rationalized racial oppression."<sup>178</sup> This was because, all too often, whites took such presentations to be depictions of authentic black culture.<sup>179</sup> Although a large number of the songs, skits, and situations grew from the imaginations of the white writers, audiences readily imputed "folk authenticity" to these performances.<sup>180</sup> This was in part because many of the whites who performed blackface were whites at the margin, often newcomers such as Irish immigrants, whose economic and social deprivation put them in closer contact with blacks than many other whites.<sup>181</sup> Frequently these whites used blackface to forge white racial solidarity, exchanging their ethnic identities for uniform white identities.<sup>182</sup> Hence, many of society's perceptions of blacks were shaped by outsiders claiming insider knowledge, often with a goal of further marginalizing the people being portrayed: "The act of blackface minstrelsy [was] . . . one of the easiest cultural spaces to mark the projection and solidification of whiteness."<sup>183</sup>

The phenomenon of the blackface minstrel is not relegated to the past. Modern manifestations are seen in white performers who mimic supposed "black" ways of being; even without make-up, they are understood by most observers to be parodying black culture. This is seen in the so-called "wigger" syndrome in which white suburban youths adopt the dress and speech of black urban culture, including the embrace of gangsta' rap.<sup>184</sup> Wiggers are understood in specific relation to hip-hop music and especially gangsta' rap.<sup>185</sup> All of the signifiers by which wiggers "code black," including their clothing, form of language, and music, are manufactured

178. Eric Lott, *Blackface and Blackness: The Minstrel Show in American Culture*, in *INSIDE THE MINSTREL MASK* 3, 3, 10 (Annemarie Bean, James V. Hatch & Brooks McNamara eds., 1996).

179. *Id.* at 3.

180. *Id.* at 4–5.

181. See SEYMOUR STARK, *MEN IN BLACKFACE: TRUE STORIES OF THE MINSTREL SHOW* 33–36 (2001).

182. *Id.* at 51.

183. Matthew Durlington, *Racial (Co)Option: Visualizing Whiteness in Suburban Space* 1 (Dec. 2, 1998) (unpublished Anthropology paper, Temple University), available at <http://astro.ocis.temple.edu/~ruby/aaa/matt.html>.

184. Crispin Sartwell, "Wigger," in *WHITE ON WHITE/BLACK ON BLACK* 35, 35 (George Yancy ed., 2005).

185. *Id.* at 43.

within the domain of hip-hop music.<sup>186</sup> It is a reverse racial passing in which whites become black.<sup>187</sup> However, passing in this context has clear limits, since most Americans assume that they know when a white person is not black, but only acting black.

Another example of ersatz carnival is seen in the culture of professional athletics. In the United States, professional sports, especially as practiced in recent years, are a unique form of cultural production that is fundamentally masculine.<sup>188</sup> The masculinity of American sports is often outsized and reflects what some have described as American sports' origin as a site of both gender and racial oppression.<sup>189</sup> Sport was thus arguably conceived of not only as, or even primarily as, a means of leisure but as a key mechanism for promoting and maintaining notions of gendered and racial superiority.<sup>190</sup> In recent years, as key roles in football, baseball, and basketball—the “big three” of American sports—have come to be dominated by blacks and other men of color, some have argued that the sexist and racist roots of sports continue to play a role in the conduct of sports, with non-white players being featured because of their profitability

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186. *Id.*

187. *See id.* (describing the wigger as a limited form of racial “passing”).

188. *See, e.g.,* Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 96–97 (2000–2001) (discussing how educational institutions are complicit in the creation of a sports culture that links athletic participation with “hegemonic masculinity”). Brake writes that “[t]he social practices surrounding sport often develop a particular type of masculinity that celebrates traditional manhood and emphasizes male dominance and the devaluation of women.” *Id.* at 93.

189. *See* Shari L. Dworkin & Michael A. Messner, *Just Do . . . What? Sport, Bodies, Gender*, in GENDER AND SPORT 17, 17–18 (Sheila Scraton & Anne Flintoff eds., 2002). The authors state:

Organized sport, as we now know it, was created in the late nineteenth and early twentieth centuries by and for White middle class men to bolster a sagging ideology of “natural superiority” over women and over race- and class-subordinated groups of men. Thus, although sport was seemingly based in natural physical endowments, it was socially constructed out of the gender, race, and class-based stratification systems of Europe and the United States.

*Id.* at 17 (citations omitted). *See also* Richard Majors, *Cool Pose: Black Masculinity and Sports*, in AFRICAN AMERICANS IN SPORT 15, 15 (Gary A. Sailes ed., 1998) (“Not only did sport make a crucial contribution to the ideological naturalization of men’s superiority over women, popular belief held that working-class men and men of color could not possibly compete successfully with ‘gentlemen.’”).

190. *See* Dworkin & Messner, *supra* note 189, at 17. An interesting peripheral consideration here is the extent to which sports metaphors have permeated American business and particularly American law. For example, two authors have noted the predominance of sports metaphors in legal opinions. *See* Maureen Archer & Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 AM. BUS. L.J. 225, 225–26 (1998). The authors note that many sports metaphors are not popular enough to become idioms in the language, and yet they persist in legal opinions. *Id.* at 231. One reason for this may be perpetuation of male dominance in a field in which women have made rapid gains. *Id.* at 232–33.

and popularity.<sup>191</sup> One commentator argues, for example, that a primary factor in the dominance of blacks in both collegiate and professional sport is “a long-standing, widely held, racist, and ill-informed presumption of innate, race-linked black athletic superiority and intellectual deficiency.”<sup>192</sup> Such presumptions are perpetuated by the behavior of some black athletes themselves, who present a “cool pose” of heightened masculinity that features unrestrained, pathological, risk-taking behaviors, including domination of women in personal life and buffoonery and narcissism on the field.<sup>193</sup> Such players are “new minstrels,”<sup>194</sup> and their behaviors become additional fuel for misogyny-besotted, racist fans who would otherwise render such black men invisible.<sup>195</sup> By supporting major sports staffed by mostly black players, some working-class, middle-class, and even upper-class whites in the stands engage in an ersatz carnival event of immense proportions, acting out fantasies of physical domination via the dark, often lower-class bodies of the players in order to bolster their already existing social and economic domination.<sup>196</sup> Such fans thereby become hyper-instrumental males, viewing not their own bodies as tools to be used to achieve a goal, but rather the bodies of entire teams of subordinated Others.<sup>197</sup> This role-playing is frequently manifested in an entire sports culture—and ultimately in a broader culture—that values strength, aggression, and violence both on and off the field, as these sports

191. See, e.g., JULES TYGIEL, *BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* (expanded ed. 1997) (analyzing the factors that led Branch Rickey of the Dodgers to integrate baseball by bringing Jackie Robinson to the major leagues).

192. Harry Edwards, *Crisis of Black Athletes on the Eve of the 21st Century*, *SOCIETY*, Mar./Apr. 2000, at 9, 9.

193. See Majors, *supra* note 189, at 16–18. An example of this might be the incidents surrounding former basketball star Isaiah Thomas who, as coach of the New York Knicks, was found guilty of sexually harassing and disparaging a female executive of the organization and then firing her for her complaints. See Cathryn Alexandra Mitchell, *MSG Case's Lessons of a Game*, *TIMES* (Trenton), Oct. 14, 2007, at D01.

194. Thad Mumford, *The New Minstrel Show: Black Vaudeville with Statistics*, *N.Y. TIMES*, May 23, 2004, at SP11.

195. See Majors, *supra* note 189, at 17 (discussing black males as either rendered invisible or viewed as helpless victims of a racist system).

196. Note that here, “class” refers to the athletes’ social backgrounds; very often by the time that athletes reach major league sports teams, their salaries have boosted them to the upper ranges of income earners in the United States.

197. I coin the term “hyper-instrumental” to describe persons who are vicariously instrumental, viewing the bodies of male athletes as tools to be consumed for the sake of the game. See MICHAEL A. MESSNER, *POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY* 62 (1992) (describing male athletes who value their bodies for how they can perform athletically as “instrumental males,” persons who are goal oriented in personal and public relations, and who are alienated from their own bodies, viewing them as machines to be used to defeat objectified opponents). See generally Bruce Kidd, *The Men's Cultural Centre: Sports and the Dynamic of Women's Oppression/Men's Repression*, in *SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES* 31 (Michael A. Messner & Donald F. Sabo eds., 1990) (discussing the building of a sports dome in Toronto, Canada as a reassertion and legitimation of male power and privilege via sports).

boosters imbibe vicariously the mayhem on the field and reflect it in their own rowdy behavior.<sup>198</sup>

This is perhaps even truer in Europe, where “football [soccer] hooliganism” is seen across the continent and where football fans sometimes exhibit wild, unrestrained behaviors, complete with objects and obscenities thrown at players, disregard for law and order, and vicious verbal racist assaults on opposing team players.<sup>199</sup> Although soccer games and the atmosphere surrounding them are sometimes compared with the Bakhtinian notion of carnival, here carnival serves a very different function: it is perverse, profane, and repressive. In the words of one commentator who described what passes for carnival in the instance of one set of English soccer fans:

[W]hat is at stake is the expression, in attenuated, deromanticized and largely implicit forms, of counter-bourgeois social-being as a manifestation of customary embodiment and grotesque-realist sensibility. The impulse is ultimately towards the confirmation of boundaries as opposed to their dissolution, and the symbolic affront to multicultural-liberal sentiment and bourgeois-expressive orthodoxy is accompanied by a specific, integrative and normalizing rationale that repeats that ideal-type Millwallism is (with few exceptions) white and male and, (with no exceptions) hegemonic-masculine and working class.<sup>200</sup>

Given the clear aspects of ersatz carnival found in the performance of team sports in Western countries, it is perhaps no accident that Imus’s remarks, made in the context of a male-centered sports and political talk show, were aimed at black women participating in and excelling at collegiate athletics.<sup>201</sup> Such women arguably exist as an affront to male notions of sports performance, especially when prevailing cultural and social norms support an almost studious *dis*interest in sports participation among women.<sup>202</sup> In

198. See Kevin Young, *Sport and Violence*, in HANDBOOK OF SPORTS STUDIES 382, 383 (Jay J. Coakley & Eric Dunning eds., 2000) (“[T]he organization and structure of sport encourages expressive and often aggressive behavior by players and fans alike, normally under carnival-like conditions.”).

199. See, e.g., GARRY ROBSON, ‘NO ONE LIKES US, WE DON’T CARE’: THE MYTH AND REALITY OF MILLWALL FANDOM 19 (2000).

200. *Id.* at 124. See also SCHUERKENS, *supra* note 175, at 31 (discussing rituals of cultural consumption such as sports games as sustaining hegemonic processes via the dominant moral codes and class system).

201. See *supra* note 2 for a discussion of the cultural impact of sports talk shows.

202. There is a large body of scholarship that discusses the cultural and normative dissonance that women in sports cause. See generally MESSNER, *supra* note 197, at 62 (“Tender feelings (toward oneself and toward others) come to be seen as an impediment . . . Physical or emotional pain are experienced as a nuisance to be ignored or done away with . . . .”); SPORT, MEN, AND THE GENDER ORDER, *supra* note 197. See also Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 825 (2006) (discussing Title IX, the statute prohibiting sex discrimination by schools, colleges, and universities that receive federal funding, and the



summary, ersatz carnival is the appropriation of Otherness that is not the mere commodification of Otherness or the simplistic representation of Otherness, but is the corruption and perversion of Otherness, usually as an expression of power or dominance at the expense of the Other.

### C. Ersatz versus Authentic

Notwithstanding the clear theoretical demarcation between the nature of true carnival and ersatz carnival, the question of whether a particular instance represents true carnival or the ersatz variety is not easily answered. This is because, in each case, the answer depends on the specific historical, social, and cultural contexts in which each instance occurs. Moreover, carnival instances may not necessarily fall clearly at either end of the spectrum, but rather may contain elements of both authentic and ersatz carnival. So, if white, heterosexual men like Don Imus call the mostly African American Rutgers women's basketball team "nappy-headed 'hos," is that authentic carnival or a degraded, repressive form of ersatz carnival? If mostly black male gangsta' rappers call black women "'hos" and "bitches," is that authentic carnival or ersatz carnival? If primetime television shows such as "Ugly Betty"<sup>203</sup> and "South Park"<sup>204</sup> use words and phrases like "bitch slap"<sup>205</sup> or nigger,<sup>206</sup> is that carnival or

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extent to which assessment of institutional compliance may be measured by whether the institution meets "women's interest" in sports but ignores the way "women's interest" in sports is socially constructed to curtail their participation).

203. In the ABC comedy *Ugly Betty*, which caricatures life at a fashion magazine and the travails of its young, outsider heroine, dialogue frequently seeks to mirror popular culture norms. In the pilot episode, a disappointment experienced by one character is described as "the bitch slap heard 'round the world." *Ugly Betty: Pilot* (ABC television broadcast Sept. 28, 2006).

204. In episode number 1101 of Comedy Central's animated television show *South Park*, the word nigger is uttered repeatedly throughout the show. *South Park: With Apologies to Jessie Jackson* (Comedy Central television broadcast Mar. 7, 2007).

205. The expression "bitch slap" is gaining increasing currency in mainstream culture, notwithstanding and very often because of its clearly sexist origins. According to the *Urban Dictionary*, to "bitch slap" is to slap someone in the face with an open hand. *Urban Dictionary: Bitch Slap*, <http://www.urbandictionary.com/define.php?term=bitch+slap> (last visited Mar. 8, 2009). Such slaps, while they are most frequently aimed at women, are also sometimes aimed at men, particularly when the desire of the slapper is to physically dominate or emasculate the male victim in retaliation for some perceived slight or challenge to the slapper. *Id.* An example of this is seen in a Washington state case, *State v. Roberts*, in which a man who was owed twenty dollars threatened to "bitch slap" the debtor and then did so, after which the debtor stabbed the slapper. *State v. Roberts*, No. 15815-2-III, 1999 Wash. App. LEXIS 1869, at \*1-\*2 (Ct. App. Oct. 26, 1999). See also *People v. Infante*, No. H030376, 2007 Cal. App. Unpub. LEXIS 1078, at \*5 (Ct. App. Feb. 13, 2007) (suspect threatened to bitch slap a female officer as she searched him). A bitch slap in the nominative case means the actual demeaning slap itself. It can also refer, however, to a mark of stigma, stain, or contamination. An example of the latter is seen in *Smith v. State*, an Alabama case where a defendant who had killed a woman in a car tried to destroy the car to avoid it being used as evidence. *Smith v. State*, 838 So. 2d 413, 425 (Ala. Crim. App.

ersatz carnival? If white students at majority white Universities attend “pimp and ‘ho” parties at white fraternity and sorority houses dressed in blackface and Afro wigs, is that true carnival or ersatz carnival?<sup>207</sup> Does it matter?

It does.

It matters because discursive formations such as gangsta’ rap that challenge mainstream power distributions and repressive norms in order to give voice to the voiceless are ultimately to be accorded higher value than discursive forms that are merely indecorous or which serve to further

2002). The defendant, in describing his actions, stated, “So, what I do, I’ll go round there and burn that bitch up, get my fingerprints off of it. So, that’s what I did. I burned that bitch slap off . . . .” *Id.* Bitch-slapping, or threats to bitch slap, are sometimes seen in tandem with a general pattern of sexual harassment of women. *See, e.g.*, Mark A. Crabtree, *Sexual Harassment Laws: A Consideration of the Imposition on Oregon Free Speech Interests*, 79 OR. L. REV. 721, 745 (2000) (discussing case where woman alleged discrimination on the basis of sex that created hostile work environment because of employer’s offensive behaviors, including waving artificial plastic penises at her, threatening to bitch slap her, and then doing so).

The existence of the term “bitch slap” is seen by some as an outgrowth of urban culture that glorifies violence, especially violence against women. *Cf.* “pimp slap.” To “pimp slap” someone is to hit him or her in the face with the back of the hand. The primary purpose of the pimp slap is to inflict punishment on the victim. While the pimp slap, like the bitch slap, may be administered by men or women, there is, as its name suggests, a sexist connotation to its use. Some sources suggest that it derives from the beatings pimps administered to prostitutes to “discipline” them in response to their failure to adhere to established rules. Urban Dictionary: Pimp Slap, <http://www.urbandictionary.com/define.php?term=pimp+slap> (last visited Mar. 8, 2009). *See also* Eager v. Commonwealth Edison Co., 187 F. Supp. 2d 1033, 1035 (N.D. Ill. 2002) (woman who worked as an electric lineman, a traditionally male occupation, filed an EEOC charge alleging sexual harassment and discrimination). After complaining to management, male coworkers taunted the woman with names such as “bitch” and “stuck-up bitch,” told her that she was “starting trouble,” and one stated that he would “pimp-slap” her. *Id.* at 1036.

206. Popular use of the word “nigger” has been a source of contention between those who condemn it and those who believe that it is essentially harmless. *See generally* RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (2003) (tracing the origins of the word nigger and exploring the controversies surrounding its use).

207. “Pimp and ‘ho” parties are frequent events at predominantly white college campuses. At such parties, white students don black face, Afro wigs, and exaggerated “ghetto fabulous” clothing, including “pimp suits” for men and scanty “‘ho outfits” for women, and speak in “black accents.” Although widely condemned by university administrators, such parties have only grown in popularity, so much so that an entire industry has sprang up to provide costumes and props for such parties. *See, e.g.*, Pimpdaddy.com, The Place for Pimp Suits, <http://www.pimpdaddy.com> (last visited Mar. 8, 2009); Pimp Website, Pimp Clothes, Hats, and Costumes, <http://www.pimphats.com> (last visited Mar. 8, 2009); Pimp Costumes, Sexy Ho Outfits and 70s Pimp Costumes, <http://www.pimp-costumes.co.uk> (last visited Mar. 8, 2009) (a United Kingdom purveyor of such wares). Such events are troubling because they are grotesque representations that create or mimic black identity divides on gender and power lines. *See also* Steven W. Bender, *Will the Wolf Survive?: Latino/a Pop Music in the Cultural Mainstream*, 78 DENV. U. L. REV. 719, 730 (2001) (observing that rap has “dealt Blacks a setback by creating or mimicking Black identity-divides on geographic . . . and other . . . lines”).

repress marginalized persons. True carnivalization represents a “rhetoric of resistance,” a language form belonging expressly to the disenfranchised and which, when used by blacks in the context of racist oppression, consistently challenges white notions of African American passivity and docility.<sup>208</sup> True carnivalization is forged from life at the margins.<sup>209</sup>

If, as in the case of gangsta’ rap, the black voices in revolt are frequently male voices who embrace and rearticulate mainstream attitudes towards women in what is almost a caricature of maleness, then the goal should be to extirpate such tendencies and to replace them with a black discursive normativity that is more thoughtful and more inwardly focused, one which encompasses both male and female points of view. There is no doubt that black communities should challenge the pervasive images of black male patriarchy that remain the norm even in an era in which black women are, more than ever, heads of households, when black women experience more professional successes outside the domestic sphere than perhaps at any time in United States history, and when black feminism has become more central to understandings of the black experience.<sup>210</sup> All too often, black men’s route to success or the perception of success is via “super patriarchy”—embracing the ideal of the controlling, oppressive male figure in an uncritical embrace of mainstream notions of patriarchy.<sup>211</sup>

## VI.

### CONCLUSION

While carnival normally serves as a means of allowing marginalized persons to breach established social and political norms and hierarchies in

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208. Ella Forbes, *Every Man Fights for His Freedom: The Rhetoric of African American Resistance in the Mid-Nineteenth Century*, in UNDERSTANDING AFRICAN AMERICAN RHETORIC, *supra* note 3, at 155, 155–56. Forbes focuses on the rhetoric of resistance of black males in the mid-nineteenth century and the way in which black rhetoric championed a “redemptive violence,” which sought to establish the natural rights of blacks to resist white racist oppression and the categorical rejection of notions of black inferiority. *Id.* at 156. As Forbes points out, this rhetoric was gender-specific; even when espoused by women, it usually emphasized black manhood by linking black male liberation to the liberation of the entire black community. *Id.*

209. As author and cultural critic bell hooks suggests, marginalized people possess more authority and knowledge to speak about their subculture given their movement between two worlds—their own and dominant culture. bell hooks, *Marginality as Site of Resistance*, in OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES 341, 341–42 (Russell Ferguson Martha Gever, Trinh T. Minh-ha & Cornel West eds., 2000).

210. MARK ANTHONY NEAL, SOUL BABIES: BLACK POPULAR CULTURE AND THE POST-SOUL AESTHETIC 91 (2002).

211. See BELL HOOKS, WE REAL COOL: BLACK MEN AND MASCULINITY 55 (2004) (recognizing that despite the advantages patriarchy provides men over women, black men are also “victims of sexist socialization”).

order to experience short-term or limited empowerment, ersatz carnival refortifies the existing hegemony of racial and gender elites and even creates new boundaries that isolate raced and gendered others. Citing the First Amendment to permit and protect raced and gendered insults creates a false parallel between the two types of discourse.

Even given the clear problems of sexism within the black community and the extent to which that sexism is expressed in gangsta' rap discourse, the gendered and raced insults offered by a white, male commentator on a national radio talk show whose themes are sports and politics, and whose intended audience is largely white and male, stand in stark contrast to even the crude rhetoric performed by gangsta' rappers. This is because such comments are not part of a rhetoric of resistance, but rather a rhetoric of oppression.

This is not to suggest that all hip-hop, or even all gangsta' rap, has political, cultural, or social value beyond its existence as an artistic or even commercial product. Such an assertion would be problematic in two respects. First, it would blur the lines between various types of rap music and the history of the genre that resulted in the politicization of some of the music.<sup>212</sup> Next, it would ignore the highly instrumental nature of a great deal of popular music production in a climate in which it is clear that rap music is sometimes more a medium than a message.<sup>213</sup> Nonetheless, it is clear that gangsta' rap originated from the margins and that much of it remains the product of an outsider perspective. Therefore to equate the comments of Imus with those of gangsta' rappers and to view Imus's comments as an accepted, if not acceptable, part of public discourse and an exemplar of what may be permitted under freedom of expression norms perverts and distends those very norms. The epithet "nappy-headed 'ho" in this context reduces young, earnest, black female student-athletes to ugly (since "nappy-headed" suggests the opposite of beauty), sexualized objects who exist only for male pleasure. Members of the subordinate group who protest the ersatz carnival use of the epithet are pummeled into silence by the First Amendment.

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212. CHENEY, *supra* note 84, at 8.

213. Author Charise L. Cheney suggests that it is "important to resist 'the populist optimism of cultural studies'" where rap music is concerned and the over-determination of politics in what is, at bottom, an art form. *Id.* at 7 (quoting ADAM KRIMS, *RAP MUSIC AND THE POETICS OF IDENTITY* 8 (2000)).