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From Habermas to "Get Rich or Die Tryin": Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere

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FROM HABERMAS TO “GET RICH OR DIE TRYIN”: HIP HOP, THE TELECOMMUNICATIONS ACT OF 1996, AND THE BLACK PUBLIC SPHERE†

Akilah N. Folami*

This Article explores the manner in which gangsta rappers, who are primarily young urban Black¹ men, navigate the mass media and rap's commercialization of the gangsta image to continue to provide seeds of political expression and resistance to that image. While other scholars have considered the political nature of rap in the context of the First Amendment, this Article's approach is unique in that it is the first to explore such concepts through the lenses of Habermas' ideal public sphere and those of his critics. While many have written gangsta rap off as being commercially co-opted or useless given its misogyny, violence, and unbridled exhortation to material consumption, “political” expression, resistance and social commentary can still be found therein. This resistance and social commentary can be found when gangsta rap is analyzed within the broader framework of the public sphere, particularly given the invisibility and marginalization of Black men in much public space in America, and the entangled relationship between gangsta rappers, the market, and the mass media.

In addition, this Article is the first to consider the Telecommunications Act of 1996 within the context of hip hop and its contribution to the proliferation of gangsta rap and to dissuading the voices of more “positive” rappers that would contest such gangsta rap. Contrary to Habermas' view that the law facilitates communication in the public sphere, and between the public sphere and the dominant society, the Telecommunications Act has contributed to stifling discourse within the hip hop community by increasing and solidifying corporate media conglomeration and control of the nation's radio airwaves. This conglomeration has been instrumental in creating the dominant gangsta image that has become, for the most part, the defacto

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1. The word “Black” (as well as the word “White”) is capitalized in this Article when it is used to refer to a racial group because it refers to a “specific cultural group and, as such, require[s] denotation as a proper noun.” Kimberleé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

voice of contemporary hip hop culture. In order to achieve the participatory democracy that Habermas and others envisioned, a wider understanding of political expression and resistance must be embraced, and the law, specifically, the Telecommunications Act, must not inhibit the articulation of alternative voices within the hip hop community that might resist, or provide a counter-hegemonic expression, to gangsta rap, and the resulting, gangsta image.

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"[H]ip-Hop is the world the slaveholders made, sent into niggafide future shock. Hip Hop is the plunder from down under, mackin' all others for pleasure. Hip Hop is the black aesthetic by-product of the American dream machine, our culture of consumption, and subliminal seduction . . . There is no such thing as good Hip-Hop or bad Hip-Hop, progressive Hip-Hop or reactionary Hip-Hop, politically incorrect or Hip-Hop with a message. It's either Hip-Hop or it ain't."

—Gregory Tate²

If skills sold, truth be told, I'd probably be lyricly, Talib Kweli. Truthfully, I wanna rhyme like Common Sense (But I did five mil). I ain't been rhyming like Common since. When your sense got that much in common and you been hustling since your inception, fuck perception,

2. YVONNE BYNOE, STAND AND DELIVER: POLITICAL ACTIVISM, LEADERSHIP, AND HIP HOP CULTURE 147 (Soft Skull Press 2004) (quoting Gregory Tate) [hereinafter Bynoe].

go with what makes sense, since I know what I'm up against. We, as rappers, must decide what's most important. And I can't help the poor if I'm one of them so I got rich and gave back. To me, that's the win, win.

—Jay-Z³

INTRODUCTION

Gregory Tate is an acclaimed author and cultural critic who has written substantially on hip hop music and culture. Jay-Z is a former drug dealer, turned "politically incorrect" gangsta rapper, turned investor in urban community redevelopment, business, and educational efforts, turned CEO of Def Jam, a major record company. Although some of the language quoted above may be offensive to both personal and political sensibilities, it is an uncensored reflection of the views of the speakers as they so chose to speak and express them. Their words best express the issues that this Article will explore. Those issues are whether, and to what extent, gangsta rappers, who are primarily young urban Black men, navigate the mass media and rap's commercialization to continue to provide seeds of political expression, and the ways in which the Telecommunications Act of 1996⁴ contributes to limiting such expression.

This Article is not the first to consider the political nature of hip hop⁵ and gangsta rap, as a few scholars have considered such issues within the context of the First Amendment and the socio-economic conditions that gave rise to hip hop's birth. This Article is, however, the first to explore whether seeds of resistance and social commentary still exist in the heavily commodified gangsta rap that dominates the nation's radio airwaves, given its, for the most part, mainstream acceptance and commercial successes. This Article is also the first to consider such issues through the lenses of Habermas' ideal public sphere and those of his critics—as it provides a more expansive framework for identifying "political" expression and social commentary than does current First Amendment jurisprudence. This Article will build on the scholarship of those who have found that hip hop was originally a "political" expression expressed in resistance to the dominant discourse and was, therefore, a part of the legacy of the

3. Jay-Z, *Moments of Clarity*, on THE BLACK ALBUM (Roc-A-Fella Records 2003).

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

5. According to historian TRICIA ROSE in BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 27 (Wesleyan University Press 1994) [hereinafter Rose], hip hop has four elements: the beat/break, break dancing or b-boying, graffiti, and rap. See *infra* section I.C for further discussion.

Black Public Sphere.⁶ This Article contends, in addition, that the highly visible and heavily commercialized gangsta rap continues to be, and is in fact, an expansion of, the Black Public Sphere and the types of expression and social commentary that occurs therein.

Moreover, this Article also explores for the first time the connection between the Telecommunications Act of 1996 (Telecommunications Act or the Act), the proliferation of gangsta rap, and the lack of diverse and alternate voices in rap and the hip hop community that is heard on the nation's radio air waves. Contrary to Habermas' view that the law facilitates communication in the public sphere and between the public sphere and the dominant society, the Telecommunications Act, has contributed to stifling discourse within the hip hop community by increasing and solidifying corporate media conglomeration and control of the nation's radio airwaves. This conglomeration has been instrumental in creating the dominant gangsta image that has become, for the most part, the defacto voice of contemporary hip hop culture. The Telecommunications Act has also contributed to limiting access to the radio air waves to those that would challenge gangsta rap and the resulting gangsta image, which is steeped in racial and sexist stereotypes. In order to achieve the participatory democracy that Habermas and others envisioned, the law, specifically, the Telecommunications Act, must not inhibit the articulation of alternative or counter-hegemonic voices (either by the gangsta rappers themselves or others) within the hip hop community that might serve to challenge the views and cultural meanings attached to mass-mediated and popular gangsta image.

Who then is Jurgen Habermas and what is the connection between him and rapper 50 Cent and his movie and album with the same title, "Get Rich or Die Tryin'?" Jurgen Habermas is a renowned European political scientist, sociologist, and critical theorist who is most known for his concept of the public sphere and his related ideas on freedom and speech. To Habermas, the public sphere was a space, in 18th Century England, where a body of private persons, unaffiliated with the state or traditional ruling authority and excluded by such ruling authority from the political decision making process, who came together to discuss matters of public

6. The Black Public Sphere "does not centrally rely on the world of magazines and coffee shops, salons and highbrow tracts. It draws energy from the vernacular practices of street talk and new music, radio shows, and church voices, entrepreneurship and circulation. Its task is not the provision of security for the freedom of conversation among intellectuals, as was the case with the bourgeois public spheres of earlier centuries. Rather, it marks a wider sphere of critical practice and visionary politics, in which intellectuals can join with the energies of the street, the school, the church, and the city to constitute a challenge to the exclusionary violence of much public space in the United States." *THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK* 2-3 (The Black Public Sphere Collective ed., Univ. of Chi. Press 1995) (an anthology discussing the Black Public Sphere with submissions from scholars of various disciplines).

concern and common interest, and to hold the state accountable via reasoned debate and deliberation.⁷

Habermas' scholarly focus was less on the implementation of change via overt political means, such as revolution, but more on accomplishing change and influence on the ruling authority via political participation as enacted through the medium of talk.⁸ Conceptually then, to Habermas, the public sphere was a space, separate and apart from the state and the market. It was to be open and accessible to all, where private interests were inadmissible, inequalities of status bracketed, and discussants were to deliberate as peers for the common good of society.⁹ Thus, the goal of deliberation was to have the private interests and life experiences of individual participants weeded out, in a neutral forum, through rational and reasoned debate among participants, in an effort to reach a collective agreement on issues of concern.¹⁰ Such agreement would serve to represent the public's opinion and was to be presented to the state, which would in turn be held accountable to addressing the needs, interests, and desires of such public.¹¹ The role of the law was to help facilitate discourse in the public sphere as well as between the public sphere and the state.¹² The state could no longer then ride the wave of absolute authority. It (and its representatives) would need to stand before, and justify its actions/inactions to a public body well versed on political matters and issues of the day and committed to the deliberative process (as opposed to armed insurrection or revolt), and to shaping and reshaping its voice into a uniform¹³ public voice/opinion.

When I began exploring the ways in which historically marginalized groups, such as women and people of color, influence the political process when they have been formally and informally excluded from the traditional democratic electoral process, hip hop was not the original

7. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy* (1992), reprinted in HABERMAS AND THE PUBLIC SPHERE, at 112 (Craig Calhoun ed., MIT Press 1999) [hereinafter Fraser].

8. *Id.* at 110–11.

9. *Id.* at 110–13.

10. *Id.* at 112–13.

11. *Id.* at 112.

12. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 150 (William Rehg trans., MIT Press 1996) (1992) [hereinafter Habermas, BETWEEN FACTS]; see also William E. Forbath, *Short-Circuit: A Critique of Habermas' Understanding of Law, Politics, and Economic Life*, 17 CARDOZO L. REV. 1441, 1445 (1996) [hereinafter Forbath].

13. Several scholars have critiqued Habermas' requirement of a uniform voice reflecting the common good, and have asserted that there is no such thing as one "uniform" voice or a singular "common" good in a pluralized society filled with socio-economic inequalities. See JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY AND DEMOCRACY (MIT Press 1996) [hereinafter Bohman]; see also Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African Americans?*, 107 HARV. L. REV. 1209 (1994).

focus. After exploring Habermas' vision of the public sphere, however, and more importantly, other scholars' modified and expanded vision of the public sphere, the connection between hip hop not only as a cultural expression but also as a political expression calling national attention to otherwise marginalized and invisible voices in the larger American political discourse became clear. Historically, hip hop arose out of the ruins of a post-industrial and ravaged South Bronx, as a form of expression of urban Black and Latino youth, who politicians and the dominant public and political discourse had written off, and, for all intent and purposes, abandoned.¹⁴

In contrast, the current state of hip hop is represented by rapper 50 Cent, who has masterfully taken advantage of the corporate-created and glorified "gangsta image" both in his movie and his rap lyrics. His semi-autobiographical movie is about his near-death experience that resulted from him trying to leave his life as a drug dealer to pursue a career as a rapper. His misogynist and violent rap lyrics are about gangsta life, money, women, and bling-bling-ing (a term used to represent excessive consumption of high priced items like diamonds).¹⁵ Today, rap is mass-produced and commercially consumed and rappers have become heavily commodified and sell anything from selling, as a commodity, the very image of the outcast and outlaw, who spews violent and misogynistic lyrics, to selling sneakers, jeans, and colognes.¹⁶

Like 50 Cent, today's rappers have taken on the very racialized and stereotyped images that have contributed significantly to their exclusion and repression in the dominant public sphere in the first place. As a result, they have also reaped, as a generation, more financial reward than any other generation of Black activists, musicians, and artists.¹⁷ Does rap then still represent a voice of the voiceless or the marginalized given its mass production and, some would say, cooptation? Does it still constitute a challenge to the larger public discourse given its commodification?

To Habermas, the answer would more than likely be a resounding no. In fact, Habermas' ideal public sphere was never realized because the public sphere became splintered with the proliferation of capitalism in late 19th century England and with individuals seeking private gain and bene-

14. GWENDOLYN POUGH, *CHECK IT WHILE I WRECK IT: BLACK WOMANHOOD, HIP-HOP CULTURE, AND THE PUBLIC SPHERE* 7, 30 (Northeastern Press 2004) [hereinafter Pough, *CHECK IT*]. While Pough explores these issues, her analysis on hip hop and the Black Public Sphere does not consider gangsta rap specifically within the context of its current commercialization and commodification or the social commentary therein.

15. Minya Oh, *Bling Bling Added to Oxford's English Dictionary*, Apr. 30, 2003, <http://www.mtv.com/news/articles/1471629/20030430/bg.jhtml?headlines=true>.

16. Yusuf Nuruddin, *Brothas Gonna Work It Out! Hip Hop Philanthropy, Black Power Vision, and the Future of the Race*, *SOCIALISM AND DEMOCRACY*, Vol. 18, Iss. 2, 231 (2004) [hereinafter Nuruddin].

17. *Id.*

fit at the expense of the common good.¹⁸ To Habermas, his utopian ideal was crushed by market infiltration, competing interest groups, and mass media—produced no longer for the purpose of encouraging public and critical debate but for coercing and manipulating public opinion.¹⁹

While Habermas was (and remains) skeptical as to the realization of his ideal public sphere given contemporary societal conditions (i.e., corporate and market controlled mass media, pluralism, rampant social inequalities and stratification),²⁰ other scholars, in examining Habermas' historical account of the public sphere, have critiqued the inherent and ideological inconsistencies of his "utopian" ideal. In their examinations of Habermas' public sphere, they have also built and expanded upon his original vision. They have found "political discourse" in the most unlikely of places, including the market and mass media, and, moreover, have explored the ways in which the law has stifled, rather than facilitated, such discourse. Scholars such as David Skover, Rosemary Coombe, Kenneth Aoki and others have explored the ways in which the market, the mass media, and even commodified identities can be used as a source and basis of political resistance to the larger public discourse.²¹ In fact, they have argued that failing to acknowledge, as Habermas does, such sites as spaces of contestation simply misses the mark when analyzing how individuals of the current, post-modernist, 21st century, consumer-oriented, mass-mediated, society form views about themselves and others, which in turn shapes their political identities and expressions.²²

With regard to the current state of hip hop and rap, some argue that "what once served as a catalyst for meaningful and systemic social change has now de-escalated into a hypersexualized hypercriminalized entertainment genre, wherein the clarion call for Black folks has become 'getting-laid-and-getting-paid by any means necessary.'"²³ As a result, and in addition to gangsta rap's heavy commercialization and commodification,

18. Fraser, *supra* note 7, at 113.

19. *Id.*

20. *Id.*

21. See Keith Aoki, "Foreign-ness" & Asian American Identities: Yellowface, World War II, Propaganda, and Bifurcated Racial Stereotypes, 4 ASIAN PAC. AM. L.J. 1 (1996) [hereinafter Aoki, *Foreign-ness*]; see also David M. Skover & Kellye Y. Testy, *LesBiGay Identity as a Commodity*, 90 CAL. L. REV. 223 (2002) [hereinafter Skover]; Rosemary J. Coombe, *Objects Of Property And Subjects Of Politics: Intellectual Property Laws And Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991) [hereinafter Coombe, *Objects*].

22. Skover, *supra* note 21, at 243.

23. Zenobia L. Hikes, *The Ills Of Rap Music Imagery: Hip Hop Viewed Through The Prisms Of Race And Gender*, http://www.spelman.edu/about_us/news/hikesarticle.shtml (last visited Aug. 23, 2006) [hereinafter Hikes]. These comments were made by Zenobia L. Hikes, Vice President for Student Affairs and Dean of Students at Spelman College, a historically Black college for women in Atlanta, Georgia in connection with a highly publicized protest effort by Spelman students against rapper Nelly. See *infra* section II.B for further discussion.

still others contend that hip hop has become disconnected from its original purpose with gangsta rap becoming useless noise and gangsta rappers, noise makers for money.²⁴ This contention is not entirely correct, however, and this Article will explore why. While gangsta rap is filled with violence and misogyny largely directed at other Black males and Black women and is indeed problematic, it is essential to continue to consider rap, including gangsta rap and its commercial success, within the context of its hip hop origins. Not unlike the originators of rap,²⁵ today's gangsta rappers are primarily Black male youth with limited societal visibility and resources, who have not only achieved more than a modicum of commercial success but, as this Article will argue, have also managed to maneuver in a very mass-mediated and corporate-dominated space (legally reinforced via the Telecommunications Act). They have also managed to provide seeds of resistance that challenge the dominantly inscribed meaning of the gangsta image. While such seeds of resistance may not receive as much attention as that of the gangsta image, it is evidence of resistance nevertheless.

Evidence of such counter-hegemonic activity in no way undermines or justifies the virulent misogyny and violence in gangsta rap lyrics and images,²⁶ but it is meant to suggest that the relationship between gangsta rappers (and in fact, most young urban Black men, in general), the media, and the market is a complex one.²⁷ Ironically, the proliferation of the mass-mediated gangsta image has begun to foster a much needed discourse within the Black community on issues related to racial stereotypes, misogyny and violence in the larger dominant society—issues that long

24. See Len Righi, *Talk-show Host Bill O'Reilly Takes A Spin Down The Straight And Narrow*, ALLENTOWN MORNING CALL, Jan. 2, 2003, at E3 (According to O'Reilly, both Jay-Z and Ludacris "have hurt 'confused and disadvantaged' youngsters who think it appropriate to call women 'ho's and to use the f-word.'"); Stanley Crouche, *Hip Hop's Thugs Hit New Low*, <http://www.globalblacknews.com/Crouch.html> (last visited Aug. 23, 2006) (He writes "black popular culture continues to descend. The most recent and monstrous aspect of it comes, as usual, from the world of hip hop, where thugs and freelance prostitutes have been celebrated for a number of years.").

25. The originators of hip hop culture and music are generally understood to be Afrika Bambaataa (whose real name is Kevin Donovan), DJ Kool Herc (whose real name is Clive Campbell), and Grandmaster Flash (whose real name is Joseph Saddler). Nelson George, *Hip Hop's Founding Fathers Speak the Truth*, reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 45 (Murray Forman & Mark Anthony Neal eds., Routledge 2004).

26. See Rose, *supra* note 5, at 103 ("To suggest that rap lyrics . . . are . . . counter-hegemonic is not to deny the ways in which [it] support[s] and affirm[s] . . . current social power inequalities.").

27. "Hip hop . . . by definition has a political content . . . rap is about giving voice to a black community otherwise underrepresented, if not silent, in the mass media." Alan Light, *About a Salary or Reality?—Rap's Recurrent Conflict* (1992), reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 144 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) [hereinafter Light] ("[R]ap by definition has a political content; even when not explicitly issues-oriented, rap is about giving voice to a black community otherwise underrepresented.").

pre-date hip hop and gangsta rappers. Such dialogue (and the maneuvering and subversive dialogue of gangsta rappers within the media) suggests that while problematic in many ways, gangsta rap is not just noise and its rappers noise makers as some contend.

In Part I, this Article will briefly discuss Habermas' theory of the public sphere and the expanded vision of his critics, the Black Public Sphere before hip hop, and hip hop, from its inception, as a continuation and expansion of the Black Public Sphere. Part II will briefly discuss the mass media as it relates to the public sphere and subverted dialogue therein, and will analyze the current state of hip hop, rappers entangled relationship with the media and with, what has become, the corporate-created "gangsta" image, and the seeds of resistance and social commentary that exists in the midst of this entangled relationship. Finally, Part III will briefly discuss the law as it relates to the public sphere, subverted dialogue, and dialogic space, and will analyze the ways in which the Telecommunications Act, in particular, stifles deliberation in the hip hop community. This Article will also briefly consider the current momentum in the hip hop community to continue to provide political discourse and social commentary within the mediated arena, despite market and government intrusion—a necessary discourse for exposing voices and issues that might not otherwise be heard.

I. THE PUBLIC SPHERE AND POLITICAL EXPRESSION

A. *The Public Sphere as Envisioned by Habermas and His Critics*

While others have written substantially on, and, in doing so, have been (and continue to be) critical of, Habermas' ideal public sphere, as discussed by him in his path breaking book, the *Structural Transformation of the Public Sphere*,²⁸ the purpose in this section is not to provide an extended analysis of the book. This section is intended to briefly highlight what Habermas saw as the model public sphere, as reflected in this work and elsewhere and as interpreted and analyzed by his critics.²⁹ It is important to note, at the outset, as Habermas does, and as other public sphere and political theorists do, that Habermas' ideal model of the public sphere is based in a particular historical period and context. The object of Habermas' inquiry in the *Structural Transformation* was the rise and decline of a historically limited and specific form of the public sphere—the liberal

28. JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (MIT Press 1991).

29. *THE PHANTOM PUBLIC SPHERE* (Bruce Robbins ed., Univ. of Minn. Press 1993); *AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE* (Nick Crossley & John Michael Roberts eds., Blackwell Publishing 2004); Bohman, *supra* note 13; MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* (Zone Books 2005).

model of the bourgeois public sphere, whose growth occurred in the 18th and early 19th centuries of Britain, France, and Germany.³⁰ His goal was not only to analyze the conditions that led to the development of this form of the public sphere but also to identify the conditions that led to its demise.³¹

The public sphere is that of a body of "private persons" assembled to discuss matters of "public concern" or "common interest."³² This sphere was not a physical space or locale per se but more a medium where political participation was effected through speech. "It is the space in which citizens deliberate about their common affairs, and hence an institutionalized arena of discursive interaction."³³ As mentioned above, historically, the public sphere gained force in early modern Europe, when power passed from the depersonalized state power of feudal lords to the growing local (state) government. It "eventuated from the struggle against absolutism (or in the British case, from the struggle for a strengthening of constitutional monarchy) and aimed at transforming arbitrary authority into rational authority subject to the scrutiny of a citizenry organized into a public body under the law."³⁴

Hence, the bourgeois public sphere served as a "counterweight to absolutist states,"³⁵ and feudal lords. This interaction between the public sphere and public authority (be it feudal lords or the representatives of the ruling authority) would "radically shift the locus of power from feudal landlords to state institutions and socially engaged, private citizens who had become public."³⁶ To Habermas, the public sphere was conceptually distinct from the state, was critical of it through the production and circulation of discourses, and mediated between the society at large and the state by holding the state accountable to society via publicity.³⁷ Initially,

30. Jürgen Habermas, *Further Reflections on the Public Sphere*, reprinted in HABERMAS AND THE PUBLIC SPHERE, at 422 (Craig Calhoun ed., MIT Press 1999) [hereinafter Habermas, *Further Reflections*].

31. Fraser, *supra* note 7, at 111.

32. *Id.* at 112.

33. *Id.* at 110.

34. Geoff Eley, *Nations, Publics and Political Cultures: Placing Habermas in the Nineteenth Century*, reprinted in HABERMAS AND THE PUBLIC SPHERE, at 290 (Craig Calhoun ed., MIT Press 1999) [hereinafter Eley].

35. Fraser, *supra* note 7, at 112.

36. Michael Hanchard, *Black Cinderella?: Race and the Public Sphere in Brazil* (1994), reprinted in THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK, at 172 (The Black Public Sphere Collective eds., Univ. of Chi. Press 1995) [hereinafter Hanchard] (briefly discussing the modifications to Habermas' ideal public sphere for his analysis of the public sphere in Brazil, and defining micro-publics as "spheres of public articulation that were not limited to, but dominated by the idioms, norms and desires of working class women and men."); see also Michael Madow, *Private Ownership of Public Image: Popular Culture And Publicity Rights*, 81 CAL. L. REV. 127, 155 (1993) [hereinafter Madow].

37. Fraser, *supra* note 7, at 112.

this call for accountability meant requiring feudal lords and (their local representatives) to disseminate information about state functioning so that state activities would be subject to critical scrutiny and the force of public opinion. "Later it meant transmitting the interests of the bourgeois society to the state via forms of legally guaranteed free speech, free press, and free assembly."³⁸ The role of the law then was to operate neutrally in facilitating discourse in the public sphere and in ensuring that such discourse was effectively communicated to the state.³⁹

These politically motivated interests of the bourgeois public sphere were not spontaneous and did not derive from, as public sphere theorist Geoff Eley puts it, the "conscious demands of reformers and their articulation into government."⁴⁰ The bourgeois public sphere did not just materialize as a mobilized and organized movement, if you will, with a clear agenda and call, by its members, to political action and deliberation. It was rather a "manifest consequence of a much deeper and long-term process of societal transformation,"⁴¹ that included a shift from feudalism to capitalism, the development of new social relations and institutional arrangements, related problems with urbanization, and an overall reshaping in social communication, places of communication, and topics of discussion.⁴²

The bourgeois public sphere assumed this socio-cultural transformation in that

[the bourgeois public sphere] was linked to the growth of urban culture . . . [and] the novel arena of a locally organized public life (meetinghouses, concert halls, theaters, opera houses, lecture halls, museums), to a new infrastructure of social communication (the press, publishing companies, and other literary media; the rise of a reading public via reading and language societies; subscription publishing and lending libraries; improved transportation; and adapted centers of sociability like coffeehouses, taverns, and clubs), and to a new universe of voluntary associations.⁴³

No longer defined by the feudal lords or absolutist states, these societies and associations (although admittedly still an exclusively bourgeois affair) offered an alternative means of expressing opinion and forming taste, which created and defined an independent public space beyond the legal prescriptions of status and behavior provided by the monarchical

38. *Id.*

39. Forbath, *supra* note 12, at 1444–45.

40. Eley, *supra* note 34, at 291.

41. *Id.*

42. *Id.* at 290–94.

43. *Id.* at 291.

and/or absolutist state.⁴⁴ These voluntary associations and societies of enlightenment “were to become a future society’s norms of political equality,”⁴⁵ as expressed through the bourgeois public sphere.⁴⁶ According to Habermas, membership to this bourgeois public sphere was “based on voluntary membership, characterized internally by egalitarian practices of sociability, free discussion, decision by the majority, etc.”⁴⁷

Finally, to Habermas’ dismay, the bourgeois public sphere and, hence, the independence of public opinion, was eroded and the legitimacy of its underlying institutions and associations were undermined, when private interests entered the picture.⁴⁸ This erosion was due, in large part, to “the non bourgeois strata gain[ing] access to the public sphere.”⁴⁹ As a result of such changes, society became

polarized by class struggle, and the public fragmented into a mass of competing interest groups. Street demonstrations and back room, brokered compromises among private interests replaced reasoned public debate about the common good. And finally, with the emergence of welfare-state mass democracy, society and the state became mutually intertwined; publicity in the sense of critical scrutiny of the state gave way to public relations, mass mediated staged displays and the manufacture and manipulation of public opinion.⁵⁰

Habermas’ vision of the ideal public sphere has been the subject of considerable criticism given that the public sphere that he uses as a model was the liberal bourgeois public sphere of early 18th Century England, which was anything but open and accessible to all, with private interests and inequalities of status bracketed. Instead, bourgeois norms and elitism excluded from the liberal bourgeois public sphere that Habermas’ idealizes, all women, all people of color, and unpropertied men.⁵¹ The “deliberation of peers” necessary for a participatory democracy, as reflected in Habermas’ model, referred then to White propertied males only. Historically then, Blacks in this country (let alone today’s rappers) would not have been envisioned as participants in the public sphere, envisioned by Habermas. As Houston Baker, Jr. noted

Blacks arrived in the new World shores precisely as property belonging to the bourgeoisie, were strategically and rigorously

44. *Id.* at 298.

45. Habermas, *Further Reflections*, *supra* note 30, at 423–24.

46. See Fraser, *supra* note 7, at 110–11.

47. Habermas, *Further Reflections*, *supra* note 30, at 423.

48. Eley, *supra* note 34, at 293.

49. Fraser, *supra* note 7, at 113.

50. *Id.*

51. *Id.* at 115–17.

prevented from acquiring literacy, and socially constructed as devoid of even a germ in their minds that might be mistaken for reason. Their role in America has, historically been one of invisibility—the irrational, illiterate, owned, nonbourgeois community of chattel, sitting bleakly in submissive silence before the state.⁵²

Scholars and critics of Habermas' early work on the public sphere have highlighted the exclusionary and inherently ideological contradictions of Habermas' model bourgeois public sphere and, by reexamining history, have provided a more expansive vision of the public sphere.⁵³ Many have argued that by idealizing the liberal bourgeois public sphere and its definition of civic participation, Habermas failed to appreciate the true repressive nature of the bourgeois public sphere, and incorrectly situated it as *the* public—ignoring the existence of alternative nonbourgeois public spheres and their means of political expression and discourse.

Moreover, they have also pointed out that contemporaneous with the "bourgeois public there arose a host of competing counter-publics, including nationalist publics, popular peasant publics, elite woman's publics and working class publics."⁵⁴ They emerged as popular movements which resonated with the same or similar democratic fervor as the bourgeois public sphere, manifesting their own distinctive movement cultures, norms, and desires.⁵⁵ Hence, the nature of the bourgeois public sphere was not only to struggle against absolutism, nobility, and the ruling authority but also to contain the lower class and the populis.⁵⁶ According to Geoff Eley, the popular containment sought by the bourgeois public was not achieved by force but by hegemonic domination—the process of convincing, or attempting to convince subjugated classes, that they were those rightly in place to become the next leaders as the moral and intellectual rulers of society.⁵⁷ Hegemonic domination required a complete diffusion throughout society of a way of life, as defined and given meaning by the ruling class, that permeated morality, customs, beliefs, values, social relations, which, as a result, solidified domination and control.⁵⁸

52. Houston A. Baker, Jr., *Critical Memory and the Black Public Sphere* (1994), reprinted in *THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK*, at 13 (The Black Public Sphere Collective eds., Univ. of Chi. Press 1995) [hereinafter Baker].

53. See Fraser, *supra* note 7; see also Eley, *supra* note 34; Mary P. Ryan, *Gender and Public Access: Women's Politics in Nineteenth-Century*, reprinted in *HABERMAS AND THE PUBLIC SPHERE*, at 284 (Craig Calhoun ed., MIT Press 1999) [hereinafter Ryan].

54. Fraser, *supra* note 7, at 116.

55. Eley, *supra* note 34, at 304.

56. Fraser, *supra* note 7, at 116.

57. Eley, *supra* note 34, at 322.

58. *Id.* at 322–23; see also ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 245–46 (Quintin Hoare & Geoffrey Newell Smith eds. & trans., 1984) (1971).

While the bourgeois public sphere signaled a shift from a repressive mode of domination to a hegemonic one, its hegemonic domination was not a fixed or an immutable condition, since hegemony is always open to being challenged.⁵⁹ In her work, Nancy Fraser highlights the many ways in which Habermas' bourgeois public sphere was challenged by what she calls "subaltern publics." Subaltern publics are parallel discursive arenas where members of subordinate social groups invent and circulate counter discourses to formulate oppositional interpretations of their identities, interests, and needs, that in turn challenge the hegemonic control of the dominant public sphere.⁶⁰ Thus, what Habermas originally saw as the end of his utopian ideal—a host of competing publics challenging and competing with each other—was there from the inception of the bourgeois public-sphere, all struggling to establish and challenge hegemonic control.⁶¹

While Habermas seems to now acknowledge that multiple publics existed concurrently with his liberal bourgeois public sphere,⁶² and that, there is, therefore, room currently for multiple and competing publics in his concept of the public sphere,⁶³ he remains committed to the notion that political deliberation and participation is only fully realized via critical debate and argument.⁶⁴ Fortunately, historian Mary Ryan, in showing that the bourgeois public sphere was never the exclusive public, also established that deliberation was not the only means of creating a counter-hegemonic identity and of exerting influence on the ruling class or authority. For Ryan, some women, excluded by bourgeois norms from the dominant public sphere, formed subaltern publics and advocated for suffrage, while other women, who did not join the open call for suffrage, found more circuitous routes to exerting political influence or expression.⁶⁵ Some of these routes included working behind the "veil of privacy" and "femininity" and within their socially constructed roles in their charitable clubs and organizations.⁶⁶ Other routes of influence included staging violent protests to express their rage and discontent with authorities.⁶⁷ She concludes that those most "remote from public authori-

59. Eley, *supra* note 34, at 323–24.

60. Fraser, *supra* note 7, at 123.

61. *Id.* at 124–25 (Fraser also points out that not all subaltern publics are guaranteed to be egalitarian and inclusive, therefore competing subaltern publics may be in contestation with not only the dominant class but also other subaltern publics).

62. Habermas, *Further Reflections*, *supra* note 30, at 423.

63. Habermas, *BETWEEN FACTS*, *supra* note 12, at 365; *see also* Forbath, *supra* note 12, at 1444–46.

64. Rosemary Coombe & Jonathan Cohen, *The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Culture Legal Studies*, 76 DENV. U. L. REV. 1029, 1043 (1999) [hereinafter Coombe, *Reflections*].

65. Ryan, *supra* note 53, at 284.

66. *Id.* at 280.

67. *Id.* at 286.

ties and governmental institutions and least versed in their language may resort to shrill tones, civil disobedience, and even violent acts in order to make themselves heard."⁶⁸ Finally, she encourages scholars to navigate wider and wilder territory to find counter-hegemonic expression and warns against "a spatial or conceptual closure that constrains the ideal of the public to a bounded sphere with a priori rules about appropriate behavior."⁶⁹

B. *The Legacy of the Black Public Sphere.*

Exploring wider and wilder territory is certainly necessary to appropriately acknowledge and find counter-hegemonic expression within the Black community to the dominant American public discourse, particularly given the history of exclusionary practices, repression and violence of much public space in the United States as it relates to Black Americans.⁷⁰ In the aftermath of slavery and of being legally labeled as three-fifths human, "Blacks had to fashion a voice, songs, articulations, conversions of wish into politics."⁷¹ Since one has to be seen (rendered visible) before one can be heard, "spectacle and cultural representation (when direct political access is not available) were the first steps in creating a disruption to the national public gaze on Blacks that was filled with negative stereotypes and images."⁷²

When during the civil rights movement, women marched in dresses, stockings, and high heels and men marched in suits and ties, the Black community "created a form of spectacle in order to gain entry into the public sphere and attract the media,"⁷³ and to present a "vision of respectability—marching and singing, not rioting and shouting."⁷⁴ By navigating the media and publicity, Blacks presented a different image of themselves than that of the dominant class, took control of the public gaze, and claimed a voice for themselves, "because when Black bodies and Black voice lay claim to public spaces previously denied to them, that space necessarily changes on some level due to their very presence. They

68. *Id.* at 285–86.

69. *Id.* at 285; see also T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 THE AM. HIST. REV. 560, 574 (1985) [hereinafter Lears] (discussing the pre-political, yet counter-hegemonic expression of slaves and showing that "their [subversive] conduct reveals a complex combination of accommodation and resistance").

70. Michael C. Dawson, *A Black Counterpublic?: Economic Earthquakes, Racial Agenda(s), and Black Politics* (1994) reprinted in THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK, at 216 (The Black Public Sphere Collective eds., Univ. of Chi. Press 1995) [hereinafter Dawson].

71. Pough, CHECK IT, *supra* note 14, at 29.

72. *Id.* at 21.

73. *Id.* at 25.

74. *Id.*

wanted mainstream America to see that they were good people, and respectable citizens who deserved civil rights.”⁷⁵

In addition, Black intellectuals were groomed for leadership and were poised to represent the Black race as member of W.E.B. DuBois’ talented tenth, which also challenged the perception of Blacks as illiterate and devoid of reason and intellect.⁷⁶ Moreover, civil rights leader Martin Luther King Jr., through his language, voice, and articulation captured “the peculiar agency of civil rights and the movement’s effort to recapture and recode all existing American arrangements of publicness.”⁷⁷ When the struggle (and the media) followed King to jail, where he wrote one of the most poignant civil rights documents entitled, “Letters from a Birmingham Jail,”⁷⁸ King helped to create the Black public sphere of jail which was transformed from a “white controlled space of criminality and incarceration . . . into a public arena for black justice and freedom.”⁷⁹ To the young Black protestors of the civil rights movement, rather than a badge of shame, “jail . . . became a primary associational and communicative site for the freedom struggle.”⁸⁰

Moreover, the new Black public sphere of civil rights even rewrote mainstream understanding of Black song and music, in that “[t]raditional gospels and hymns were rewritten to fit the mounting struggle and spectacle of the movement.”⁸¹ While “Black music was portrayed in historical writings as the source of spirited religious reverie, or, an inspiration for the most outrageous forms of secular escapism—in dives, jukes and speak-easies,”⁸² it took on a new significance in the struggle for liberation, evidencing that critical discourse can take place in a variety of media, including Black music. Gospel attracted the voices of the young across the nation and often served as “preludes and spurs to committed action in streets, towns and cities across the American South.”⁸³

In addition, the blues, although not quite as visible as gospel (and the Black church), was another redefined and hidden source of social commentary.⁸⁴ The jook and rent parties,⁸⁵ and after-hours clubs became

75. *Id.*

76. *Id.* at 24.

77. Baker, *supra* note 52, at 16.

78. MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL (Harper Collins 1994).

79. Baker, *supra* note 52, at 18–19.

80. *Id.* at 9.

81. *Id.*

82. *Id.* at 19.

83. *Id.* at 20.

84. Michael Eric Dyson, *The Culture of Hip Hop* (1993), reprinted in THAT’S THE JOINT!: THE HIP HOP STUDIES READER, at 64 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) [hereinafter Dyson].

85. Scholar Katrin Hazzard-Gordon, in her book, JOOKIN: THE RISE OF SOCIAL DANCE FORMATION IN AFRICAN AMERICAN CULTURE 80 (Temple Univ. Press 1990), analyzes

secondary sources for the dissemination of Black critical discourse. They conceptually served to extend the Black public sphere beyond expressive culture to public spaces that celebrate culture, thereby, moving further away from liberal bourgeois notions of what constitutes a public sphere.⁸⁶ This move is consistent with Ryan's call for a navigation of wider and wilder territory for evidence of political expression.

Finally, the spectacles of the civil rights movement and the model of the talented tenth leadership were not the only examples of Black participants in the Black public sphere, who made themselves visible, took control of their own voice and, in doing so, asserted their own counter-hegemonic wishes and stories. Such stories, at times, were even contrary to those presented by other subaltern Black publics. Any close reading of Black public life (as expressed either through music, church, or secular institutions) reveals that the Black public sphere in America never represented a monolithic Blackness. It was instead replete with a motley of publics that, at times, conflicted with each other over gender, class, and generational differences regarding what was deemed "best" for the race and how that "best" should be attained. For example, Black female members of organizations, like the Negro Women's Club Movement, used a variety of tactics to insert Black women and their particular wishes and needs into the public discourse by, among other things, protesting and organizing. They inserted views that were either formally excluded by the larger U.S. bourgeois public sphere, or informally excluded and ignored (like Black Americans generally) by oppositional American subaltern counter-publics, like the populist and women's movements of the late nineteenth century, or by the dominant male led civil rights Black counter-public.⁸⁷

Moreover, as the Black civil rights public sphere began to make strides, in terms of attaining publicity and visibility, and of loosening the iron grip of segregation in the South via legislative victories that gave

the rise of the jook—an underground cultural institution created by the Black working class, as a private space of leisure due to the segregated society in which they lived that excluded them from public spaces of leisure like restaurants and taverns. She defines the jook, as usually "shoddy confines," smelly and rarely immaculate. "The term itself connotes a place where lower-class African Americans drink, dance, eat, and gamble. Its constituency imposed a character and psychology, derived from their labor experience, on the first dance arena to emerge after emancipation." Similarly, rent parties were most prominent during the 1920s and 1930s as part of the Harlem, New York night life (although rent parties were held elsewhere) for many Black working class people. Such parties were beneficial to the host because they helped to raise money for rent, while serving, for others, as an enjoyable and affordable way to socialize, drink, eat, dance, gamble, and raise money for a friend in need. For further reading, see *ENCYCLOPEDIA OF THE HARLEM RENAISSANCE* (Cary D. Wintz & Paul Finkelm eds., Routledge Taylor and Francis Group Publishers 2004).

86. Pough, *CHECK IT*, *supra* note 14, at 36.

87. *Id.* at 23–24; Dawson, *supra* note 70, at 204.

true meaning to the ideals of the 13th and 14th Amendments, another subaltern urban Black public sphere captured the national gaze. This sphere expressed its discontent with the plight of urban America in a loud and confrontational manner.⁸⁸ While the "liberation struggle under King's leadership moved from invisibility to legal civil rights victories,"⁸⁹ this new visibility achieved by civil rights "scarcely constituted a gain sufficient to satisfy a black majority . . . [as] . . . was made abundantly clear as early as 1964 when the long hot summers of ghetto riots began."⁹⁰ As a result of the Los Angeles Watts Riot of 1965, "suddenly visible to national and international publicity was the black urban ghetto, where migration had brought so many former black southerners in quest of a promised industrial land."⁹¹

Black urban uprisings became the new normative publicity with the youth in these cities "confronting the forces of racism with combative strategies that they deemed far more appropriate than moral suffering or a courageous capacity to die."⁹² Out of the rubble of the urban implosion and out of "the black publicity of prison and the ranks of the Black Muslims"⁹³ came Malcolm X. Malcolm X grabbed the public gaze, claimed the urban voice, and moved a young urban Black public sphere to consciousness and action. The national gaze would soon focus not on images of noble sacrifice and respectability but on confrontational demands for urban liberation of Black America, including cultural and economic independence.⁹⁴

Another example of such confrontational demands was the Black Panther party, who with their "black leather jackets, black berets, and guns"⁹⁵ grabbed national attention, and claimed a public voice separate from that of the Black civil rights conservative public. They provide further evidence of what Fraser described as competing subaltern publics or as what historian, Bruce Hanchard, further nuances and defines as micro-public spheres.⁹⁶ The youth-led Black Panther Party, "instead of taking its cue from a talented Black elite, felt that the revolution would come from a group that the larger U.S. public had all but written off."⁹⁷ With this revolutionary image and "the rhetoric of the gun—of killing and being willing to die for the people,"⁹⁸ the Black Panthers used spectacle and rep-

88. Baker, *supra* note 52, at 30.

89. *Id.* at 33.

90. *Id.*

91. *Id.* at 30.

92. *Id.* at 31.

93. *Id.* at 32.

94. *Id.* at 34.

95. Pough, CHECK IT, *supra* note 14, at 20.

96. Hanchard, *supra* note 36, at 172.

97. Pough, CHECK IT, *supra* note 14, at 25.

98. *Id.* at 20.

resentation with a social and political goal to not only grab national attention but to rally and mobilize the masses.⁹⁹ Ultimately, the Black Panthers and the Black Power Agenda "broke . . . the lock on national definitions of AMERICA and AMERICAN that had been held for centuries by wealthy and socially privileged white males."¹⁰⁰ By the time hip hop emerged in the late 1970s, however, the political fervor for economic and political equality had died down, at least as it related to the Black lower class.¹⁰¹

C. Hip Hop as Part of the Legacy of the Black Public Sphere

Despite its commercial successes and commodification, gangsta rap must continue to be contextualized within its hip hop origins, as it still gives voice to what would otherwise be an invisible and marginalized group of Black and Latino male youth. After the violent deaths of Martin Luther King Jr., Malcolm X, and countless young Black Panther activists and nationalists, faith in the Black community for a new day had been suffocated.¹⁰² Although Black civil rights leaders attained positions of political power, with some becoming mayors of cities, many were crippled by the lack of adequate funding of social programs to aid the condition of the urban poor.¹⁰³ As a result, many distanced themselves from such concerns, and the issues of the Black bourgeoisie became increasingly different than those of its brothers and sisters occupying the lower ring of the socio-economic ladder.¹⁰⁴ While the Black bourgeoisie sought relief from racial discrimination by turning to educational and economic achievement, its urban counterpart survived with substandard housing,

99. *Id.* at 25.

100. Baker, *supra* note 52, at 35.

101. JEFF CHANG, CAN'T STOP WON'T STOP 12 (St. Martin's Press 2005) [hereinafter Chang] (While at one point the Black Panthers and the Young Lords competed with local gangs to politicize the youth, "[t]he optimism of the civil rights movement and the conviction of the Black and Brown Power movements gave way to a defocused rage and a long exhaustion."); see also *There Needs to be a Movement Political Action in the Hip Hop Era*, Issue 96, June 24, 2004, http://www.blackcommentator.com/96/96_cover_hip_hop.html [hereinafter *Political Action*] ("Whether one believes that hip hop is a full blown culture or . . . a subculture of a people, hip hop is a supremely democratic cultural manifestation that evolved in the absence of an African American political movement—a phenomenon shaped by youth on their own terms.").

102. Chang, *supra* note 101, at 9 ("As the 60's drew into the 70's King and X were gone, the well of faith and idealism that had sustained the movements against the forces of rationalization and violence drained, and a lot of Black dreams—integrationists or nationalist—simply burned.").

103. Dawson, *supra* note 70, at 216.

104. *Id.*

schooling, and social services, and often, turned to drugs and a slow spiritual and physical death.¹⁰⁵

After granting civil rights legislation and victories that would benefit a segment of America's Black population, and after significantly decreasing the federal aid to declining industrial cities, the White dominant class, unconcerned, unable, or unsure of how to fix the poverty problem in America's urban areas, turned their attention to other issues, leaving the poorest urban residents in America's large cities vulnerable and without a safety net.¹⁰⁶ For example, New York would lead other metropolitan areas into a steep employment decline and would suffer from deep federal and local government financial aid cuts to social services; as a result, "30 percent of New York's Hispanic households . . . and 25 percent of black households lived at or below the poverty line."¹⁰⁷ The South Bronx alone, which most cite as the birthplace of hip hop,¹⁰⁸ lost

600,000 manufacturing jobs; 40 percent of the sector disappeared. By the mid-seventies, average per capita income dropped to \$2,430, just half of the New York City average and 40 percent of the nationwide average. The official youth unemployment rate hit 60 percent. Youth advocates said that in some neighborhoods the true number was closer to 80 percent.¹⁰⁹

Moreover, the Bronx, which had already suffered "a brutal process of community destruction and relocation executed by municipal officials and under the direction of the legendary planner Robert Moses,"¹¹⁰

105. See Nuruddin, *supra* note 16; see also Political Action, *supra* note 102 ("Hip hop emerged at a time when the Black leadership class distance from and disdain for the lower income people had become transparently evident to inner city dwellers. A time when, in Dr. Michael Eric Dyson's words, 'we saw the political economy of crack take over the lives of Black people.'"). Crack served as a temporal escape from the realities of abject poverty, but unlike other temporal releases of the past like religion or music, it helped to destroy community relationships, increased Black on Black crime, and because it was relatively easy and inexpensive to make, led many youth to believe that the sale of it was a viable career option that would lead to upward mobility. Mark Anthony Neal, *Postindustrial Soul: Black Popular Music at the Crossroads*, reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 369 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) [hereinafter Neal, *Postindustrial*].

106. Rose, *supra* note 5, at 27 ("In the 1970s, cities across the country were gradually losing federal funding for social services, information service corporations were beginning to replace industrial factories, and corporate developers were buying up real estate to be converted into luxury housing, leaving working-class residents with limited affordable housing, a shrinking job market and diminishing social services.").

107. *Id.* at 28.

108. *Id.* at 30.

109. Chang, *supra* note 101, at 13.

110. Rose, *supra* note 5, at 30.

would continue a significant spiral downward, soon becoming "the poorest, toughest neighborhood in the whole of New York City."¹¹¹

Moses, from 1930 to 1960, executed what would become known as the "urban renewal plan," which was formulated in 1929 and was backed by business interests to make Manhattan "into a center of wealth, connected directly to the suburbs through an encircling network of highways."¹¹² Pursuant to the renewal project, Moses condemned entire neighborhoods of Manhattan urban areas, sending Black, Puerto Rican and Jewish families into the South Bronx and Brooklyn, neighborhoods which were already struggling and experiencing a decline in jobs.¹¹³ He would later develop the Cross Bronx Expressway, which would "cut directly through the center of the most heavily populated working class areas in the Bronx."¹¹⁴ And, he would, subsequently, relocate mostly White residents from the South Bronx to his newly constructed high rise apartments,¹¹⁵ and leave behind the Black and Latino residents.¹¹⁶ Moses' actions would ultimately lead to the White flight of most of the remaining White residents out of the South Bronx and into Westchester County or north eastern Bronx County.¹¹⁷

In addition, the relocation effort would lead to the closing of businesses in the area and to the rise of slumlords.¹¹⁸ Those slumlords found it more economically efficient to abandon their dilapidating buildings or to hire someone to set them ablaze (to collect insurance money), rather than

111. Dick Hebdige, *Rap and Hip-Hop: The New York Connection* (1987), reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 223–24 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) [hereinafter Hebdige].

112. Chang, *supra* note 101, at 11.

113. *Id.* The renewal and relocation project was a brutal and devastating blow to the South Bronx community because it was not a gradual process but involved the relocation of massive amounts of economically vulnerable people of color from various parts of New York City into the Bronx, a city that was already taxed economically and socially, from, among other things, the influx of Caribbean immigrants. As a result, the city was simply unable to adequately respond to the entry of the relocated residents. See Rose, *supra* note 5, at 30.

114. Rose, *supra* note 5, at 31. Although the Cross Bronx Expressway could have been constructed along an alternate route, Moses chose a path "that required the demolition of hundreds of residential and commercial buildings," and designated the homes in the path's way "slums . . . [a]lthough they were densely populated stable neighborhoods." According to Chang, "600,000 Bronx residents were caught in the crosshairs of the Expressway. Moses would bulldoze right over them." Chang, *supra* note 101, at 11. He would state, "[t]here are more people in the way—that's all . . . There's very little hardship in the thing."

115. Chang, *supra* note 101, at 12.

116. Rose, *supra* note 5, at 31.

117. Chang, *supra* note 101, at 12.

118. Rose, *supra* note 5, at 31 (Because the vacancy rates escalated, due primarily to the relocation process and White flight, "nervous landlords sold their property as quickly as possible, often to professional slumlords . . . Equally anxious shopkeepers sold their shops and established businesses elsewhere.").

to fix them.¹¹⁹ As industry jobs vanished, youth violence and gangs proliferated.¹²⁰ The South Bronx was soon declared a wasteland.¹²¹ Unsure of what to do with the urban poor and unwilling to acknowledge the devastation that resulted primarily from the renewal effort, politicians and others adopted a policy of abandonment, noting, in essence that the South Bronx and its residents were of little use.¹²² While the summer riots of 1977 would finally draw some national attention to the city and its conditions, some scholars argue that the inhabitants were still rendered invisible, as attention was focused on the conditions of the land (and not on the people).¹²³ Black and Latino residents, most of whom were originally relocated to the Bronx and subsequently left behind in the relocation of White residents out of the Bronx, remained in the Bronx. In the end, they were "left with few city resources, fragmented leadership and limited political power."¹²⁴

It is within this historical context that hip hop developed from urban Black and Latino youth, who were essentially abandoned and rendered invisible by both White and Black politicians alike and the dominant public discourse. Isolated and ignored, in what was categorized

119. Chang, *supra* note 101, at 13 ("The downward spiral created its own economy. Slumlords hired rent-a-thugs to burn the buildings down for as little as fifty dollars a job, collecting up to \$150,000 on insurance policies . . . [while] organized thieves, some of them strung out on heroin, plundered the burned buildings for valuable copper pipes, fixtures, and hardware.").

120. Neal, *Postindustrial*, *supra* note 105, at 369.

121. Chang describes how, at one point, South Bronx housing units spanning the equivalent of four square blocks were burned down in a week, leaving thousands of vacant lots and abandoned building throughout the borough. Chang, *supra* note 101, at 14–15. Despite the growing blazes, seven fire companies in the Bronx were closed down along with thousands of firefighters and fire marshals laid off. *Id.* at 15. Ironically, former Senator Daniel Patrick Moynihan of New York, was cited in the New York Daily News as saying, "People in the South Bronx don't want housing or they wouldn't burn it down." See H. Rainie, *U.S. Housing Program in South Bronx Called a Waste by Moynihan*, N.Y. DAILY NEWS, Dec. 20, 1978, at 3.

122. Edward Logue, an urban renewal official would state, "[i]n a marvelous, sad way, the South Bronx is an enormous, success story. Over 750,000 people have left in the past twenty years for middle-class success in the suburbs." See *The Ups and Downs of the South Bronx*, NATIONAL JOURNAL, Oct. 6, 1979, 1648. While Professor George Sternlieb, then director of the Center of Urban Policy at Rutgers University, would state, "The World can operate very well without the South Bronx. There's very little in it that anyone cares for." Martin Tolchin, *Future Looks Bleak for South Bronx*, N.Y. TIMES, Jan. 18, 1973, sec. A1, A50.

123. According to Tricia Rose, (in criticizing a few of the film documentaries made at the time depicting the conditions of the Bronx), "we haven't been introduced to one soul who actually lives in the South Bronx. We haven't heard one voice speaking its own language. We've merely watched a symbol of ruin: The South Bronx as last act before the end of the world. Depictions of black and Hispanic neighborhoods were drained of life, energy, and vitality. The message was loud and clear: to be stuck here was to be lost." Rose, *supra* note 5, at 33.

124. *Id.*

by most as a dying city,¹²⁵ these youth decided to celebrate, and to live,¹²⁶ despite the deteriorating conditions around them, through the beat—the first element and manifestation of hip hop culture. At a time when budget cuts lead to a reduction in school art and music programs, and when vocational training in high schools lead to jobs that had significantly decreased or no longer existed, "inner city youth transformed obsolete vocational skills from marginal occupations into the raw materials for creativity and resistance,"¹²⁷ with "turntables [becoming] instruments and lyrical acrobatics [becoming] a cultural outlet."¹²⁸ The dance, otherwise known as b-boying or break dancing¹²⁹ came next and accompanied the beat. While politicians and police officers had abandoned efforts to squash gang violence in the South Bronx, b-boying and break dancing was instrumental in defusing some of the gang violence among urban youth. Instead of taking it out on each other via guns and gang violence, b-boys settled it on the dance floor, which was usually on the hard pavement of the street.¹³⁰ The battles were intense and serious. They were often among

125. One director of a neighborhood clinic in the Bronx would describe the Bronx as "a Necropolis—a city of death." Martin Tolchin, *South Bronx: A Jungle Stalked by Fear, Seized by Rage*, N.Y. TIMES, Jan. 15, 1973, sec. A1, 19.

126. To Africa Bambaataa, one of the originators of hip hop and a leading DJ at hip hop's inception, hip hop was/is "about survival, economics and keeping our people moving on." Hebdige, *supra* note 111, at 223.

127. Rose, *supra* note 5, at 34–35. Kool Herc attended an auto mechanic trade school while Grandmaster Flash studied electronic repair of equipment, and Herc, using the skills learned in school, invented the beat or the break-beat. As a DJ at parties, Herc noticed that people were waiting for a certain part of the record (mostly disco records) to get wild on the dance floor—"the short instrumental break, when the band would drop out and the rhythm section would get elemental." Chang, *supra* note 101, at 79. As a result, Herc, who was known for his huge stereo system he named Herculords, focused on extending the beat (he would look for obscure beats in all types of music, reggae, punk, etc.) by "creat[ing] an endless collage of peak dance beats named b-beats," Rose, *supra* note 5, at 51, a process he perfected by manipulating record players. Herc "began to work two copies of the same record, back-cueing a record to the beginning of the break as the other reached the end, extending a five-second breakdown into a five-minute loop of fury . . . Before long he had tossed most of the songs [on a record], focusing on the breaks alone." Chang, *supra* note 101, at 79.

128. Clarence Lusane, *Rap, Race, and Politics* (1993), reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 351 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) [hereinafter Lusane]. Also, DJs, who were instrumental in early hip hop in creating the beat, would "connect their turntables and speakers to any available, electrical source, including street lights, turning public parks and streets into impromptu parties and community centers." Rose, *supra* note 5, at 51.

129. See Chang, *supra* note 101, at 80–81; see also Rose, *supra* note 5, at 52 ("Herc's break-beats, played on the Herculords, inspired breakdancers' freestyle moves."). Rose defines break dancing as being "[p]opping and locking . . . moves in which the joints are snapped abruptly into angular positions. And, yet, these snapping movements take place one joint after the previous one." *Id.* at 38.

130. Angela Ards, *Organizing the Hip-Hop Generation* (1999) reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 312 (Murray Forman & Mark Anthony Neal

rivals of different gangs; the dance was a dance of survival. While b-boying did not dissolve the frustrations of being poor, unemployed, and a forgotten youth, it certainly served, along with the rise of hip hop generally as a catalyst to increasing the youth led community based peace effort.¹³¹

Graffiti-ing would soon follow and was a way in which these youth made themselves visible to those outside of the Bronx.¹³² By giving themselves a tag, which is a made-up name to maintain their anonymity, and by painting on subway cars, these youth made themselves visible on their own terms.¹³³ They were rebels in their own eyes, defying the norms of society, inconspicuously in the pre-dawn hours of the day, when they jumped fences and made their way into New York subway holding stations to leave their mark. While these acts were not organized as overtly political acts, they were counter-hegemonic in that they signaled to the ruling authority that, while the South Bronx was literally burning and abandoned, the youth were living and claiming their space—in the midst of the blaze.¹³⁴ Similarly, with rap,¹³⁵ which is the act of speaking poetically and rhythmically over the beat,¹³⁶ while the lyrics were not originally

eds., Routledge 2004) (“On city streets and in parks, hip-hop crews—the peaceful alternative to gangs—sought to settle disputes through lyrical battles and break-dancing competition rather than violence.”).

131. Africa Bambaataa, a former gang member, through an organization (the Zulu Nation) he formed in 1975, sought to redirect the energies of Black and Latino youth away from gangs and towards a more positive attitude, reflected, he thought, in his hip hop culture. Although hip hop was very confrontational and competitive and “a never-ending battle for status, prestige, and group adoration,” Rose, *supra* note 5, at 36, which at times still ended in fights between dancing crews, Bambaataa, by the early 1980s, could claim thousands of members worldwide. Hebdige, *supra* note 111, at 226.

132. Graffiti writers, in taking on a tag name, began symbolically “saying their names loud all across buildings, bus stops and subway station walls.” Chang, *supra* note 101, at 74.

133. *Id.* (“[V]iolating notions of property and propriety, graffiti writers found their own kind of freedom . . . Theirs were not political statements. They were just what they were, a strike against their generation’s invisibility.”).

134. Rose, *supra* note 5, at 59 (“Graffiti and rap were especially aggressive public displays of counterpresence and voice. Each asserted the right to write—to inscribe one’s identity on an environment that seemed Teflon resistant to its young people of color.”).

135. Rap is the last, and most prominent feature, in hip hop, *Id.* at 51., which developed because as DJ’s were involved with creating and extending the beat on the turntables, rappers, also known as MCs, were introduced to enliven the crowd. Hebdige, *supra* note 111, at 224.

136. Rose, *supra* note 5, at 39, 55 (discussing how the most frequent style of rap is about bragging and oral storytelling that often was aggressive, violent and sexist in content). Many scholars have connected hip hop culture, generally, and rap, in particular, to the legacy of cultural and political expression within the Black community. See Gwendolyn D. Pough, *Seeds and Legacies: Tapping the Potential in Hip-Hop* (2001), reprinted in *THAT’S THE JOINT!: THE HIP-HOP STUDIES READER*, at 284 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) (“Hip hop culture did not just spring up full grown. It builds on a past. It has a legacy.”). Part of that legacy includes the Black Power Movement, because “as the Black Power Movement was dying out in the mid-1970s, some of the first Hip Hop jams were being thrown in parks in the South Bronx.” *Id.* Some also assert that

overtly political, the counter-hegemonic message was clear . . . I am here and here to stay. Not unlike Habermas' liberal bourgeois public sphere, voluntary associations, and reading societies of early 18th Century England, a culture (of survival) was being born in the South Bronx in the midst of the massive socio-economic transformation and decline. Hip hop, was, for Black and Latino youth living in the deteriorating conditions of the South Bronx, their own form of urban renewal.¹³⁷

Hip hop sound and culture would eventually move beyond the South Bronx and into lower Manhattan night clubs (specifically, rap and the accompanying beat), art galleries (graffiti, in particular), and even into Hollywood, establishing ultimately that something of interest could come out of the South Bronx.¹³⁸ By 1979, hip hop had its first commercial smash hit—Sugar Hill's "Rapper's Delight."¹³⁹ Soon to follow, in 1982, was, "The Message," by Grandmaster Flash and the Furious Five: it was powerful, gritty, and poignant, where listeners were "led by the ears into hell."¹⁴⁰ It too was a commercial success and served as rap's first social commentary on life in the South Bronx ghetto,¹⁴¹ which, by the 1980s, had not gotten any better.¹⁴²

With the advent of rap groups Run-DMC and Public Enemy, rap would become more defiant, critical, and filled with racial pride. Some scholars contend that rap would successfully form new allegiances with counter-culture White youth who found genuine pleasure in rap, as a

rap draws from the legacy of the Black Arts Movement, the artistic arm of the Black Power Movement, which included the revolutionary lyrics of Gill Scott-Herron and the poetry of the Last Poets. Dyson, *supra* note 40, at 61.

137. Rose, *supra* note 5, at 61.

138. See Chang, *supra* note 101, at 146–48 (discussing how graffiti made its way into the chic avante garde art scene of downtown Manhattan); see also Light, *supra* note 27, at 139 (discussing Hollywood's fascination with hip hop generally and break dancing in particular as evidenced by the breaking sequence in the movie, FLASHDANCE, and by the production of such movies as BREAKIN' and BEAT STREET).

139. Light, *supra* note 27, at 139.

140. Hebdige, *supra* note 111, at 228.

141. See Dyson, *supra* note 84, at 62 (" 'The Message' . . . pioneered the social awakening of rap into a form combining social protest, musical creation, and cultural expression. ").

142. Between 1986 and 1992, during the Reagan and Bush presidencies, "an additional 1.2 million African Americans fell below the poverty line . . . 841,000 youth fell into poverty in the first two years of the Bush administration, affecting, in some cities, as many as two-thirds of minority children." Lusane, *supra* note 129, at 352. In addition, while Black youth have always suffered high rates of unemployment since the 1960s more so than any other race, "in 1986, in the middle of the Republican years, black teenage unemployment was officially as high as 43.7 percent . . . [and] six years later . . . remained virtually unchanged." *Id.*

forbidden narrative and a symbol of rebellion, much like punk rock.¹⁴³ Run-DMC, with its hard rock guitar riffs, in its 1987 album, *Raising Hell*, would end with a call of Black pride, and would “almost singlehandedly land[] rap in the homes of many black and nonblack youths across America by producing . . . the first rap song to be featured on the twenty four hour music video channel MTV.”¹⁴⁴ Public Enemy, through its lyrics, would advance a Black Nationalist agenda, and Chuck D, the lead singer of the group, would claim, as one of the group’s goals, “to inspire five thousand potential young leaders in the black community,”¹⁴⁵ and would announce, rap, as “black America’s CNN.”¹⁴⁶

As the Black CNN, rap would broadcast what would otherwise not be “seen” or heard by the dominant discourse. With rap artists rapping about police brutality, the criminal justice system, inadequate social programs, unemployment, sex, rape, AIDS, poverty and declining living conditions, listeners learned about living in urban spaces, primarily in the East.¹⁴⁷ With Public Enemy, listeners learned that in the ghetto “911 [was] a Joke,”¹⁴⁸ that crack was an epidemic, but that “It Would Take a Nation of Millions to Hold [Them] Back”¹⁴⁹ because “The Brothas [Were Going] to Work It Out.”¹⁵⁰ Public Enemy would become the first superstar group, and through its lyrics, and those of others, like KRS-One and Boogie Down Productions (that infused the same racial pride and consciousness, in songs like “Stop the Violence” and “Self Destruction”), Blacks and other listeners learned about Black history, heroes and sheroes, intellectu-

143. Rose, *supra* note 5, at 5; see also Light, *supra* note 27, at 140 (noting that the Beastie Boys were a successful White rap group at this time that helped to give rap cross-over appeal).

144. Dyson, *supra* note 84, at 62. In addition, Run-DMC’s song, *Walk This Way*, a collaborative effort between Run-DMC and the lead singer of rock group, Aerosmith, was played on MTV and made rap even more palatable to White youth. David Samuels, *The Rap on Rap: The “Black Music” that Isn’t Either* (1991), reprinted in *THAT’S THE JOINT!: THE HIP-HOP STUDIES READER*, at 149 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) [hereinafter Samuels].

145. Light, *supra* note 27, at 141.

146. *Id.*

147. Rose, *supra* note 5, at 18. For an insightful discussion of rap’s counter-discourse on crime, punishment, and the criminal justice system, see Paul Butler, *Toward a Hip Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004).

148. The song 911 is a Joke is on Public Enemy’s 1990 album FEAR OF A BLACK PLANET and exposed how “economically oppressed black communities face scarce and substandard housing and health services, [and] minimal municipal services.” Rose, *supra* note 5, at 141.

149. IT TAKES A MILLION TO HOLD US BACK was the name of Public Enemy’s 1988 album. Some would proclaim this album Public Enemy’s most radical expression of its Black Nationalist’s rhetoric. Light, *supra* note 27, at 141.

150. The song was featured on the 1990 album FEAR OF A BLACK PLANET. For the lyrics, see Public Enemy’s official webpage <http://www.publicenemy.com/index.php?page=page5&item=3&num=57>.

als, scientists, political theorists. This was again all information that was not readily available (or even acknowledged) by the dominant discourse on Blacks and race relations.¹⁵¹

At the same time and diametrically opposed to the confrontational, yet socially conscious rappers coming from the East, came the fiery sound of the West coast. With the five member group called Niggas With Attitude's (N.W.A) release of their album, *Straight Out of Compton*, in the same year as Public Enemy's, *It Takes a Nation of Millions*, album, America, including the East coast and its rappers, got a glimpse of life in the West coast's version of the hood. This image was filled with police brutality, gang violence, crack, and pure seething rage.¹⁵² In contestation with the "positive" rap, the West coast sound was defined as "gangsta" rap,¹⁵³ and was filled with references to Black women as hos and bitches and Black men as gangstas and "niggas."¹⁵⁴ The sound and image was clearly a rejection of the Afrocentric¹⁵⁵ and nationalist sound of rap that had gripped the East coast, and was a rejection, as was East Coast rap in some ways, of Black bourgeoisie norms and ethics.

Many topics, that were formerly taboo and only discussed in private, in accordance with Black middle class norms, were now open for critique in rap music. Rappers would challenge the notion of the word, "nigger,"¹⁵⁶

151. Dyson, *supra* note 84, at 66 ("Rap has also retrieved historic black ideas, movements, and figures in combating the racial amnesia that threatens to relegate the achievements of the black past to the ash heap of dismemory.").

152. Light, *supra* note 27, at 142.

153. Chang, *supra* note 101, at 320.

154. For example, the titles of songs on albums coming out of the West coast included, N.W.A.'s *Gangsta*, *Gangsta*, and Dr. Dre's *Bitches Ain't Shit But Hoes and Tricks*. For further discussion, see Light, *supra* note 27, at 142; Davarian L. Baldwin, *Black Empires, White Desires: The Spatial Politics of Identity in the Age of Hip-Hop* (1999), reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 167 (Murray Forman & Mark Anthony Neal eds., Routledge 2004) [hereinafter Baldwin].

155. The Native Tongue movement was a loose organization comprised of individual rap groups De La Soul and A Tribe Called Quest with the goal of empowering the Black population through Afrocentric consciousness. For example, De La Soul, a group comprised of members from affluent areas in Long Island, New York, through songs like *Me, Myself and I* tried to open the space in hip hop to allow for multiple identities, beyond the urban one, while advocating for one to stay true to one's self. See Light, *supra* note 27, at 163. De La Soul would introduce Queen Latifah and Monie Love, who (along with Yo, Yo in the 1990s) would provide a strong female voice and alternative voice in the face of misogyny in the industry and in rap lyrics. For an excellent discussion of how female rappers navigated the hip hop culture to create a contesting subaltern public or micro-public, see Pough, *CHECK IT*, *supra* note 14.

156. According to the Oxford English Dictionary, the term "nigger" essentially grew out of the Spanish word "negro" and French word "negre" which was used to refer to Black people. It was a term that was used in this country to refer to Black people as slaves. See R.A.T. Judy, *On the Question of Nigga Authenticity* (1994), reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 100-11 (Murray Forman & Mark Anthony Neal eds.,

as being an inherently pejorative word, and would instead, show that it too was socially constructed and could be reworked.¹⁵⁷ In addition, rappers would extend beyond the Civil Rights and Black Nationalist public spheres and forge a new identity, one that adopted the traditional Black bourgeois notions of attaining the American Dream via capitalism and consumerism, while rejecting its elitism and belief that one had to assimilate, and deny one's Blackness to move up the social economic ladder.¹⁵⁸

Routledge 2004) [hereinafter Judy] for an informative discussion on the origins and use of the term.

157. Poets in the Black Arts Movement's frequently used the terms "nigger" and "nigga" in their poems. Examples include the Last Poet's "Wake Up, Niggers," "Niggers are Scared of Revolution," and "Die Niggas," evidencing that the terms were used commonly during the 1960s with diverse connotations depending on tone and context, ranging from contempt to camaraderie. See Nuruddin, *supra* note 16, at 231. Rappers (and hip hop culture) have, however, reworked the word so that it is now used by, and can refer to, non-Blacks. Baldwin, *supra* note 154, at 166. Although the term "nigga . . . [t]hrough hip hop became the embodiment of black defiance," it did "not mean black as much as it mean[t] being a product of the post-industrial ghetto." Such argument was the basis of Randal Kennedy's testimony in the "Fat Nick" trial in New York, and the subject of his book *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (Vintage Books 2003). In that case, a White male violently assaulted a Black youth in Howard Beach—a notoriously exclusive neighborhood in New York, where over the years several beatings and deaths of Black youth have occurred by angry White residents. Prior to violently assaulting the boy, Nick called him a "nigga." Because of Nick's use of the word, the assault charge was elevated to a hate crime. See News Exclusive, *Fat Nick Denies Racism Led to 2005 Clash*, <http://www.nydailynews.com/front/story/401320p-339880c.html> (last visited Aug. 26, 2005). Kennedy testified for the defense, suggesting that given the huge impact of hip hop culture in reshaping the meaning of the word, the use of the word alone was not enough to elevate the crime to a hate crime. While rappers and hip hop culture may have refashioned the meaning and use of the N word intra-racially, it is questionable to what extent the word has been reshaped when used inter-racially, particularly when used by a White person to a Black person. Moreover, given the context of the assault in the Fat Nick trial (i.e., in a notoriously racist neighborhood), it is difficult to imagine what other context, other than a derogatory and racist one, that the term was meant. Pat Milton, *NYC Man Convicted of Hate Crime Attack*, June 9, 2006, <http://www.forbes.com/technology/feeds/ap/2006/06/09/ap2806430.html> (discussing Nicholas Munucci's ultimate conviction for committing a hate crime). Also, for a lively and very informative discussion of the N word, and its use go to <http://www.abolishtheNword.com>. Moreover, last year, several activists and artists, including Quincy Jones and Russell Simmons, discussed the N word and its usage, in a documentary titled *THE N WORD: DIVIDED WE STAND*.

158. In addressing what Nuruddin describes as Todd Boyd's combative and controversial thesis in his book, *THE NEW H.N.I.C.: THE DEATH OF CIVIL RIGHTS AND THE REIGN OF HIP HOP* (NYU Press, 2002) on an intergenerational war in the Black community, Nuruddin, in summarizing Boyd's thesis, writes "[i]n contrast to the Hip Hop social movement, the Civil Rights generation, seeking upward mobility and escape from the segregated ghetto through Anglo-conformity, have suppressed authentic racial attitudes, ranging from anger to satire, relegating such candid opinions to conversations held in private space. The Hip Hop generation . . . view the Civil Rights generation as 'playa haters,' who are jealous of the monetary success and fame of the Hip Hop entrepreneurs who attained their success without following the tired, outmoded integrationist—assimilationist script." Nuruddin, *supra* note 16, at 4.

While holding on to the Black Panther ethic of remaining true to Blackness, i.e., to the people in the lower classes, rappers, on the other hand, would reject the Party's anti-capitalist stance.¹⁵⁹ Rappers wanted a piece of the American pie while staying grounded to the urban culture, and wanted to speak in their own voice and on their own terms.

Some leaders in the Black middle class community manifested their considerable discontent to the rappers' "own voice," by threatening to boycott locations where the "gangsta" music was sold and to drive over "gangsta" rap albums.¹⁶⁰ The sound was also offensive to the upper and middle classes of White America.¹⁶¹ Many called for censorship of the music on obscenity and indecency grounds. For the most part though, gangsta rap would survive such attacks.¹⁶² Gangsta rap was deemed protected speech under the First Amendment, that gave voice to a historically

159. Baldwin, *supra* note 154, at 168.

160. See Fahizah Alim, *Gangsta Rap: Now You're Talking Trash*, THE SACRAMENTO BEE, Sept. 1, 1993, at 5 (stating that Calvin Butts, the minister of Abyssinian Baptist Church in Harlem, steamrolled over gangsta rap tapes and cds in New York City); Leola Johnson, *Silencing Gangsta Rap: Class And Race Agendas In The Campaign Against Hardcore Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25, 34 (1994) (discussing the call for a boycott of radio stations and MTV for playing gangsta rap); William Bennett & C. Dolores Tucker, *Lyrics From The Gutter*, N.Y. TIMES, June 2, 1995, at 29 (Op-Ed piece denouncing gangsta rap and "the sponsorship of music with vulgar and misogynistic lyrics that glorify violence and promote it among children.").

161. Tipper Gore, the wife of former vice president Al Gore, and Susan Baker, the wife of Bush's former campaign manager, James Baker, formed Parents Music Resource Center (PMRC) which called for, and received, a congressional hearing on record labeling. Every song listed by the PMRC and presented at the congressional hearing as being too explicit and obscene and in need of censorship labeling was done by a Black artist. See Lusane, *supra* note 128, at 359. In her article, *Hate, Rape and Rap*, Tipper Gore, rightfully criticized the misogyny in rap lyrics but went on to try and connect rap to rape. She would also say "that rap music appeals to angry, disillusioned, unloved kids . . . and that [rap] tells them it is okay to beat people up." Dyson, *supra* note 84, at 62. In addition, N.W.A.'s song, *Fuck the Police*, criticizing police brutality by both White and Black police officers, was targeted by the FBI, who sent warnings about the song to police departments throughout the country. Samuels, *supra* note 144, at 151. Lastly, 2 Live Crew, a rap group from Florida, would face obscenity charges in Florida, and the album under attack, *AS NASTY AS THEY WANNA BE*, would be pulled from music stores by the local sheriff's department. See Emily Campbell, *Obscenity Music And The First Amendment: Was The Crew 2 Lively?*, 15 NOVA L. REV. 159, 180 (1991).

162. See Jason Talerman, *The Death Of Tupac: Will Gansta Rap Kill The First Amendment?*, 14 B.C. THIRD WORLD L.J. 117 (1994) (examining the early 1990s controversy directed at rapper Tupac Shakur in which his rap lyrics were attacked as provoking the murder of a police officer and challenged as unprotected speech under the First Amendment); Jeffrey B. Kahan, *Bach Beethoven And The (Home) Boys: Censoring Violent Rap Music In America*, 66 S. CAL. L. REV. 2583, (1993) ("investigating the machinations of censors and would-be censors in their attempts to squelch controversial musicians" like 2 Live Crew and Ice-T who were attacked for producing what some called "violent themes and obscene lyrics.").

marginalized segment of the population or that shed light on conditions in America's blighted urban areas.

While the gangsta sound continues, and in fact, is the dominant sound in contemporary rap lyrics, many have said that while things are still bad in the 'hood' they are not as bad as they were in the early 1990s and that today's "gangsta" lyrics are corporate-created to continue to sell an image that has captured consumer attention. Cultural critic Ta-Nehisi Coates writes that

like all nostalgia, the neo-gangsta is stuck in history rather than reality. The sobering fact is that the streets as [gangsta rappers, like 50 Cent] presents them, brimming with shoot-outs and crack fiends, do not exist. Of course, drugs are still a plague on America's house, and America's gun violence is a black mark on the developed world. But millennial black America is hardly the Wild West scene it was during gangsta rap's prime. Gangsta [rap] could once fairly claim to reflect a brutal present. Now it mythicizes a past that would fade away much faster without it. The streets that gangsta rappers claim as their source are no longer angry as they are sad. For that reason alone, gangsta rap should be dead by now. But still it lingers, fueled by America's myth of the menacing Black man. Gangsta rap today is about as reflective of reality as, well, a reality show.¹⁶³

The question raised in the beginning of this Article remains then: does the current state of rap, with the pervasive gangsta rap lyrics, which, to Coates, simply reflects corporate interests in continuing to market and sell the commodified gangsta identity, signal a decline in hip hop as a contribution to the discourse within the Black Public Sphere? To Habermas, the answer would more than likely be yes but, given legal and cultural studies scholarship, it is clear, however, that there is room within the Black Public Sphere for many voices, even the commodified one. In fact, some argue that such a voice is necessary,¹⁶⁴ in today's consumer oriented society that is replete with media images and symbols.

II. THE PUBLIC SPHERE, THE MARKET, AND MASS MEDIA

A. Habermas' Public Sphere and Subverted Discourse within the Market

Habermas sees the public sphere and the market as two separately functioning and independent arenas, with the market being relegated to

163. Ta-Nehisi Coates, *Keepin' It Real: Selling the Myth of Black Male Violence, Long Its Expiration Date*, VILLAGE VOICE, June 4, 2003, available at <http://www.villagevoice.com/news/0323,coates,44584,1.html>.

164. See Skover, *supra* section II.A.

the private economic sphere and coordinated by money, and with the public sphere being integrated and coordinated by language and communication.¹⁶⁵ The market's infiltration of communication led to the demise of the public sphere because information was no longer disseminated to foster critical communication and scrutiny but for manipulating and coercing public opinion for the benefit of private interests.¹⁶⁶ Moreover, given the pervasiveness of such market driven mass-mediated information, audiences became passive and uncritical consumers of such information.¹⁶⁷

While Habermas has recently acknowledged that consumers are not necessarily passive audiences of such communication and do engage in some interpretive work by actively refashioning the media texts they receive,¹⁶⁸ he still maintains that political identity and counter-hegemonic expression and influence (formed as a result of such refashioning) can only occur through the medium of critical argument.¹⁶⁹ For Habermas, the mass media may serve as a conduit for communication to consumers in the public sphere but, it is still in the public sphere and through the process of critical debate and exchange that "political" identity and expression are formulated.¹⁷⁰

Critical theorists argue, however, that the market must be taken into account, when examining what constitutes resistance in a consumer driven mass-mediated society.¹⁷¹ The "contemporary public spheres cannot

165. Habermas, *BETWEEN FACTS*, *supra* note 12, at 150; *but see* Forbath, *supra* note 12, at 1449, 1451 (critiquing Habermas' view that the market is a separate self-regulating sphere, whose operation and regulation is not appropriate for political discourse, and asserting, instead, that by excluding the market from public deliberation and scrutiny, "a world of political choices," are taken off the table . . . [since] all markets, including the economic sphere, are "political artifacts, based on and constituted by highly plastic cultural norms and legal rules.").

166. Fraser, *supra* note 7, at 113.

167. *See also* Anthony Chase, *Toward A Legal Theory Of Popular Culture*, 1986 Wis. L. REV. 527, 539-40 (1986) [hereinafter Chase] (Like Habermas, some American scholars, in adopting the ideology of the Frankfurt School to which Habermas was a student, believed that the mass media and by extension, "popular culture [were] . . . a part of the baggage of ruling class ideology, a sophisticated barrage of loaded imagery which seduced people into a life of mindless consumption and diverted them from an authentic confrontation with the way America really was.").

168. Coombe, *Reflections*, *supra* note 64, at 1043.

169. Habermas, *BETWEEN FACTS*, *supra* note 12, at 301; Forbath, *supra* note 12, at 1445 (discussing Habermas' view that communicative power drives the public sphere where will-formation is established by an active communicative citizenry).

170. Forbath, *supra* note 12, at 1441, 1444 (critiquing Habermas belief that communicative power is generated from a mobilized citizenry and is generated only from below in the public sphere).

171. Coombe, *Reflections*, *supra* note 64, at 1047; *see also* Desiree A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 616 (2000) [hereinafter Kennedy] ("The marketplace (and its major ideological tool, advertising) is the major structuring institution of contemporary consumer society [that] is an important means of public discourse."); Ronald K.L. Collins & David M. Skover, *Commerce*

be legitimated by appeal to the liberal-bourgeois model because they can no longer pretend to be a separate sphere above the market place."¹⁷² According to the critical theorists, Habermas misses the ways in which such contestation and discourse can occur within the increasingly market-driven mass mediated sphere of communication by maintaining such a position.¹⁷³ They also argue then that his "rationalism [about critical debate being the only means of political expression] cannot encompass the range of expressive activity (within the mediated sphere) that has political meaning and consequences."¹⁷⁴ Moreover, scholars have shown that the masses are far from just a "passive receiving structure for media messages, whether they be political, cultural, or advertising,"¹⁷⁵ but that everyday social relations and identities can be formulated in complex processes of media mediations.¹⁷⁶

An example of such complex processes, includes, what Keith Aoki defines as the subcultural practice of recoding. To Aoki, "subcultural practices differs from the countercultural (60's student movements) in that it recodes cultural signs rather than poses a revolutionary program of its

& Communication, 71 TEX. L. REV. 697, 699 (1993)[hereinafter Collins & Skover] ("To ignore the influence of commerce is to misunderstand the nature of much discourse in America . . . Mass advertising now typically encodes goods and services with symbolic meanings independent of their functional values.").

172. See Coombe, *Reflections*, *supra* note 64, at 1047; Collins & Skover, *supra* note 171, at 699.

173. In his article, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 79, 98 (1994) [hereinafter Stychin], Stychin contends that because the current society is a consumer-oriented one where media and mass communication is corporate-controlled, and the individual is inundated with cultural signs and signifiers that are loaded with images relating to identity, a "new terrain for the formation of an identity forged from resistance to, and through the subversion of, these very signs," and symbols, opens up.

174. Coombe, *Reflections*, *supra* note 64, at 1043; Stychin, *supra* note 173, at 101 (the appropriation and reuse of cultural images becomes an act of "discursive resistance . . . [and] . . . the interplay of culture and identity—how culture forms the self and how culture may be subversively utilized for the definition of one's self—becomes a thoroughly political matter.").

175. Stychin, *supra* note 173, at 99. In addition, Kennedy writes while "symbols used in advertising are important in shaping perceptions of oneself and others . . . [and] . . . the mass media influences society and functions as the producers and transmitters of ideologies . . . [e]mancipatory movements are concerned not just with changing social realities but also changing representations." Kennedy, *supra* note 171, at 616.

176. In *Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies*, 21 POL. THEORY, 411, 413 (1993) [hereinafter, Coombe, *Tactics*], Coombe surmises that "[i]n an era of multinational capital, characterized by the controlled programming of commodity production and the pervasive penetration of mass media, we experience the hegemony of a 'signifying culture,' in which the social world becomes saturated with shifting cultural signs—the circulation of images and texts through which we negotiate the social and our place within it."

own."¹⁷⁷ It must be grasped as a textual activity. Plural and symbolic, its resistance is performed through a spectacular transformation of the whole range of commodities, values, common-sense attitudes, etc., through a parodic collage of the privileged signs of gender, class and race that are contested, confirmed, customized. In this bricolage, the false nature of these stereotypes is exposed as the arbitrary character of the social/sexual lines they define.¹⁷⁸ In that way then, "culture [becomes] political in its role as a forum for the deployment of images that can be reworked for a variety of political ends."¹⁷⁹

For example, in the early 1990s, young Black Americans sported T-Shirts with a Black Bart Simpson on them, which stated, above or below Black Bart that "It's a Black thing. You wouldn't understand." In adopting the popular image for their own purposes, the makers (and wearers) of the T-Shirts were, according to Russell Adams, the then chairman of the Afro-American Studies Department at Howard University, picking up on a "suppressed rage in the cartoon."¹⁸⁰ Coombe points out that, although "none of the Black Bart T-shirts were licensed by [20th Century] Fox . . . [and although] . . . [u]ltimately, the reasons for the popularity of the [B]lack Bart character may be as elusive as determining where the great masses of T-shirts come from,"¹⁸¹ it serves as an example of the recoding of a popular image by a subordinated group for its own social and cultural interests—a use not intended by the creators of such image.

Similarly, within the science fiction community, there is a subculture of media fans who are predominately heterosexual middle class women, who work in the service industry or are nurses and teachers, and "organize around the production, circulation, and consumption of fan magazines (fanzines)."¹⁸² Fanzines are often created in women's homes, distributed to members for a nominal fee, and are the basis of

177. Aoki, *supra* note 21, at 59 (citing HAL FOSTER, *RECODINGS: ART SPECTACLE, CULTURAL POLITICS* 170 (Bay Press 1985)). Stychin uses the term "decoding," which essentially refers to the same practice of cultural resistance, where subversive new cultural identities are shaped, while "resisting *within* and *utilizing* the terms of the dominant discourse." Stychin, *supra* note 173, at 95–96 (emphasis added).

178. *Id.*

179. Stychin, *supra* note 173, at 101.

180. Coombe, *Objects*, *supra* note 21, at 1865 (quoting Adams).

181. *Id.* In addition, Madow analyzes the legal battle between Wayne Enterprises, a family-owned partnership possessing the exclusive rights to use John Wayne's identity, and the makers of a card that was sold in gay bookstores and had a picture of John Wayne on it, wearing a cowboy hat and bright red lipstick, with the caption, "It's such a bitch being butch." Madow, *supra* note 36, at 144. In this example, the card "recodes Wayne's image so as to make it carry a cultural meaning that presumably worked for gay men," *Id.* at 145, but for Wayne's children and other's, Wayne's image had a long held conservative macho image that should be preserved, and left uncontested or demeaned by the cards.

182. Rosemary J. Coombe, *Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy*, 26 NEW ENG. L. REV. 1221, 1260 (1991) [hereinafter Coombe, *Publicity*].

reading clubs and discussion groups.¹⁸³ One such group is comprised of *Star Trek* fans who have created a series of fanzines built around the original fiction of the *Star Trek* television series. In the *Star Trek* fanzines, however, the *Star Trek* episodes are "revised and reworked and new texts are constructed to reclaim female interests and experiences."¹⁸⁴ Most of the stories center around male friendships, where the male characters are "alternatively engendered: stripping them of a rationalist, ego-centered individualism . . . [and are imbued with] emotionality and empathy, knitting them into close family and community relationships as well as intimate caring friendships which nurture and support them in their adventures."¹⁸⁵

As a result, in the "Slash" fiction fanzines, Kirk and Spock are depicted as being in a love relationship with Kirk's and Spock's feminine and masculine traits complementing and supporting each other.¹⁸⁶ *Star Trek* fanzine's fans have explained that the fandom movement arose from "the social and cultural isolation imposed on them (both as women in patriarchal society occupying low paid jobs, and as seekers of pleasure within media representations."¹⁸⁷ Through the fanzines, they "explore their own subordinate status, voice frustration and anger with existing social conditions, envision and construct alternatives, share new understandings, and express utopian aspirations."¹⁸⁸ For Coombe then, "middle class women's use of the *Star Trek* characters in the creation of fanzines"¹⁸⁹ serves as a subversive "vehicle for marginalized subcultural groups . . . to pry open space for their cultural concerns within dominant representations; it is a way of appropriating media texts and rereading them in a fashion that serves different interest and makes those texts responsive to the . . . group's social experience."¹⁹⁰

Therefore, Coombe and other cultural legal studies scholars contend that, given these and other examples, the

dialogue and democracy in contemporary conditions must address the role of the market in shaping meanings and forms of

183. *Id.*

184. *Id.* at 1262.

185. *Id.* at 1264.

186. *Id.* at 1264-65.

187. *Id.* at 1262 (citing Henry Jenkins III, *Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching*, 5 CRITICAL STUD. MASS COMM. 85, 87 (1988)).

188. *Id.* at 1261.

189. *Id.* at 1224 (also discussing gay male appropriations in the 1950s of the images of female stars like Judy Garland, and lesbian reworking of James Dean and other sixties pop singers, as examples of "practices that recode pervasive images in a subversive but politically expressive manner."); Stychin, *supra* note 173, at 124 (analyzing the subversive nature of gay camp culture in destabilizing gender boundaries by adopting celebrity personas to forge "a gay male subcultural identity").

190. Coombe, *Publicity*, *supra* note 183, at 1246-47.

communications in civil society and must explore the ways in which publics and counter-publics maintain significant and even adversarial autonomy within, and even perhaps, by means of the market.¹⁹¹

Moreover, they posit that there must be recognition "of a more creative politics of citizenship and a greater creativity in conceiving the political, such that it can at least potentially encompass a greater range of social sites of production and reproduction that will include spheres of commerce and consumption."¹⁹²

Legal scholar, David Skover, suggests that academics and activists in the LesBiGay (a term used by Skover in his article) community have erroneously ignored the mass media as a site of contestation, rather than seeing it as a key to the LesBiGay community receiving more freedom and rights in the United States.¹⁹³ Skover points out that while the LesBiGay community has gained little formal political power in the United States, their commercial cup and visibility in the mass media "floweth over."¹⁹⁴ For Skover, activists and scholars must move beyond the view that this commercialized LesBiGay identity is of no use or purpose, when it comes to forging a political agenda for members of that community, based on the assumption that as a commodified identity, it marginalizes, neutralizes, or completely subsumes the LesBiGay political identity.¹⁹⁵ Instead, to Skover, as the commercialized LesBiGay identity talks, LesBiGays can talk back, and "essentially speak their way into being, even if, at the very least, that being is a commercial being."¹⁹⁶ Moreover, the commodified identity is itself a voice, which, for better or worse, will influence the LesBiGay quest for equality.¹⁹⁷

In his article, Skover asks scholars and activists how they hope to influence the political or legal processes affecting LesBiGay interests without focusing on the mass-mediated and commodified LesBiGay identity in those same frames. He invites them, to join with him, in

191. Coombe, *Reflections*, *supra* note 64, at 1052.

192. *Id.*

193. Skover, *supra* note 21, at 254.

194. *Id.* at 230–31.

195. *Id.* at 242–43.

196. *Id.* at 243.

197. What is scene on television or in the mass media regarding such commodified LesBiGay identity, to Skover, ultimately may influence societal perceptions of LesBiGays, which in some ways, Skover suggests could translate to influencing political perceptions and ideology. Skover, *supra* note 21, at 243. In addition, Kennedy, in examining the role media images play, particularly those used for advertisement, in shaping perceptions, writes "[t]he mass media is a significant force in producing and regulating the distribution of ideas . . . [The images presented] . . . help us to understand and make sense of the world and affect how we interact with and think about others, how we structure our lives, our morals, ethics and reasoning." Kennedy, *supra* note 171, at 657–58.

negotiating a law and politics through that projected image. He concludes that those who engage in LesBiGay identity politics "must appreciate a dynamic fact: as long as the structures of advanced capitalism remain in place, those structures that drive the modern commercial culture past the law, the emerging LesBiGay consumer identity is likely to overtake and define LesBiGay political and legal identity."¹⁹⁸

Similar to Skover's call, scholar Keith Aoki explores the many ways in which negative and racialized mass-mediated and commercialized images of Asian Americans in the United States have marginalized members of that community and have contributed to the passage and enforcement of exclusionary and repressive immigration laws. Aoki also examines the dynamics of such racial representations as it relates to the potential for Asian Americans "to use such stereotypical images to their political advantage, or at the very least, to contest, neutralize and complicate such representations."¹⁹⁹ Initially, he points out that the consumption and production of such representations in the mass media helped to create the objectified Orientalist "other,"²⁰⁰ through what legal scholar Margaret Russell defines as the "dominant gaze,"²⁰¹ and to reinforce White America's voyeuristic gaze—a process which permitted them to gaze upon and confront the racialized and objectified Orientalist other without the imminent threat that real face to face encounters presented.²⁰² While damaging in that either gaze has the tendency to "objectify and trivialize the racial identity and experiences of people of color, even when it pur-

198. Skover, *supra* note 21, at 223. To Coombe also "[t]oo little attention has been attended to the political economies that enable cultural forms to circulate—economies with legal infrastructures. The legal dimensions of cultural production, circulation, and reception have been shamefully neglected." Rosemary Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463, 477 (1998) [hereinafter Coombe, *Critical*]. In addition, legal scholar Anthony Chase writes "there can be no doubt but that popular culture can constitute political dynamite and is a force to be reckoned with." Chase, *supra* note 167, at 534. Like Skover, Chase also found striking, given the interconnection between culture, politics, and the law, "the relative lack of interest shown by the legal profession and law schools in exploring the relationship between law, lawyers, and popular culture in the United States." Currently, some law schools, like Columbia Law School, have developed centers for exploring the relationship between law and culture, see http://www.law.columbia.edu/center_program/law_culture (last visited Aug. 23, 2006).

199. Aoki, *Foreign-ness*, *supra* note 21, at 1.

200. *Id.* at 22–24.

201. The "dominant gaze," according to Professor Russell, "subtly invites the viewer to empathize and identify with its viewpoint as natural, universal and beyond challenge; [while] it marginalizes other perspectives to bolster its own legitimacy in defining narratives and images . . . [T]he . . . power lies in protecting stereotypes and biases as essential truths." *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film* in CRITICAL RACE THEORY: THE CUTTING EDGE 57 (Richard Delgado ed. 1995) [hereinafter Russell].

202. Aoki, *Foreign-ness*, *supra* note 21, at 22.

ports to represent them,"²⁰³ Aoki argues that racial stereotypes in mass media "become sites of contestation over meaning . . . [and are, therefore,] susceptible to varying degrees of negotiation and resistance, which throws open these sites for 're-coding' and reinterpretation along reconfigured artistic, cultural, economic, political and legal agendas."²⁰⁴

Aoki builds on the legal scholarship of Rosemary Coombe who advocates for the broadening of the intellectual property doctrine of fair use to allow for subcultural practices by subordinated (due to race, gender, class, etc.) groups to recode popular commodified images.²⁰⁵ In this way, subordinated groups can produce subcultures that can use the dominant society's cultural forms and recode them for a use that is drastically different from that initially intended by the dominant society in creating such cultural form.²⁰⁶ For Aoki (and Coombe), "recodification allows individuals to push and contest social boundaries and the unexamined privileges of normality (i.e., White, straight, male)"²⁰⁷ and also potentially "allow[s] members of subordinated groups to 'talk back' to power on multiple . . . levels and in so doing, to transform further iterations of the dominant discourse in an on-going, open-ended series of micro-negotiations."²⁰⁸ Micro-negotiations are "the practices that subordinated individuals and groups engage in when accepting, rejecting, or transforming different constructions of identity within the discourse of the dominant culture."²⁰⁹

This process of micro-negotiations or talking back (to negative stereotypes, in particular) through the prevailing racist discourses is by no means simple or easy especially for subordinate groups. It often requires subordinate groups to, in some degree, consent to their own subjugation, and adopt, consciously or unconsciously, a mental state that has been called by some, a "contradictory consciousness."²¹⁰ Contradictory consciousness has been defined "as the mixing of approbation and apathy, resistance and resignation."²¹¹ Given the "acute tension between the structural constraints imposed by the entrenched but dynamic U.S.

203. Russell, *supra* note 201, at 56–57.

204. Aoki, *Foreign-ness*, *supra* note 21, at 4.

205. Rosemary Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U.J. INT'L L. & POL'Y 791 (1995).

206. Naomi Mezey, *Law As Culture*, 13 YALE J.L. & HUMAN. 35, 44 (2001) [hereinafter Mezey]; see also Dick Hebdige, *SUBCULTURE: THE MEANING OF STYLE* 6–7 (Methuen & Co. 1979); Michel De Certeau, *THE PRACTICE OF EVERYDAY LIFE* (Univ. of Cal. Press 1976).

207. Keith Aoki, *How the World Dreams Itself to be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech*, 17 LOY. L.A. ENT. L.J. 523, 543 (1997) [hereinafter Aoki, *How the World Dreams*].

208. Aoki, *Foreign-ness*, *supra* note 21, at 59.

209. *Id.* at 58.

210. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 614 n. 157 (1990).

211. Lears, *supra* note 69, at 570.

discourse”²¹² and, as a result, a subordinate group member’s limited access to challenge such discourse,²¹³ such individual may need to appropriate certain aspects of the dominant discourse in order to contest them, thereby, arguably, adopting a contradictory consciousness.

An example of such contradictory consciousness is the Queer Nation’s adoption of the term “queer”²¹⁴ and their appropriation of media representations that presented gays and lesbians in an unsavory way.²¹⁵ The goal of the Queer Nation was to disrupt the heterosexist norms present in advertising and marketing campaigns. They sought to accomplish this goal by, among other things, producing a series of pseudo-advertisements adapted from several popular Gap advertisements, marketing Gap’s clothing, which featured gay, bisexual, and polymorphous celebrities.²¹⁶ Queer Nation capitalized upon these popular media images, changed the final P in Gap’s logo to Y, and in doing so “out[ed] the closeted gays and bisexual celebrities used in the ad.”²¹⁷ The pseudo-advertisements were also meant to “address the company’s policy of using gay style to sell clothes without acknowledging debts to gay street style. Style itself is “outed, as are the straight urban consumers who learn that the clothes they wear signify gay.”²¹⁸ Queer Nation’s use of such unsavory images evidences Queer Nation’s ability, in using such images, to “engage in the dialogic process of cultural formation by appropriating the power of popular media to contest, create, and disseminate cultural norms.”²¹⁹ For Aoki, this same contestatory potential exists for Asian Americans—to use popular media

212. Aoki, *Foreign-ness*, *supra* note 21, at 58.

213. Madow, *supra* note 36, at 140 (discussing that it is hard to mount subcultural readings of texts and images given that “the economic and ideological dominance of the culture industries . . . significantly limits the spaces and forms available for alternative or oppositional cultural practice.”). While the space to contest such images is “one in which the culture industries hold most of the cards,” *id.* at 141, there is still some space for subordinate and marginalized groups to maneuver. See also Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQ. 69 (1989).

214. Several activists who were victims of anti-gay violence founded Queer Nation in March 1990 in New York City to combat escalating anti-gay and lesbian violence in the nation and to combat prejudices in the art and media world by implementing a variety of tactics, including staging protests and marches. Queer Nation is also credited with beginning the process of reclaiming the word “queer,” which was at first used in a pejorative way. Since Queer Nation’s use of the word, it has now been embraced and used on mainstream television shows like *Queer Eye For the Straight Guy* and *Queer as Folk*. See WARREN JOHANSSON & WILLIAM PERCY, *OUTING: SHATTERING THE CONSPIRACY OF SILENCE* 256–66 (Haworth Press 1994).

215. Aoki, *Foreign-ness*, *supra* note 21, at 59.

216. *Id.*

217. *Id.*; Lauren Berlant & Elizabeth Freeman, *Queer Nationality*, *Boundary 2*, Vol. 19, No. 1, NEW AMERICANISTS 2: NATIONAL IDENTITIES AND POSTNATIONAL NARRATIVES, Spring, 1992, at 149–80.

218. *Id.*

219. Aoki, *How the World Dreams*, *supra* note 207, at 543.

images, even negative ones, to engage in dialogic processes of cultural formation by appropriation and approbation (and to some extent contradictory consciousness), even if temporarily, to reshape and disseminate alternative cultural norms and identities.²²⁰

Moreover, for Aoki, "ironically, as contemporary media becomes more pervasive (even while corporate ownership/control becomes more concentrated) . . . the very pervasiveness of various racialized and gendered representations may actually multiply rather than shrink the number of sites for contestation over the meaning of such representations."²²¹ While Aoki agrees with other scholars that the very existence of these negative stereotypes and racialized words and media images can be damaging²²² and have the capacity to wound,²²³ he concludes that the solution to these problematic images does "not lie in silencing those who propagate these types of images—indeed such silencing may be impossible in today's dense media environment—but in finding and creating ways to create epistemic space and a voice for those who would contest those images."²²⁴ The problem then does not lie necessarily or solely in the mass

220. Aoki, *Foreign-ness*, *supra* note 21, at 53, 59.

221. *Id.*

222. Peter Margulies, *Identity On Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 *RUTGERS L. REV.* 45, 53 (1998) ("The engine of information, opinion, and rumor that we call mass media creates identity impacts that shape our images of the world. Critical legal scholars have observed that these images . . . coalesce to form an ideology. Ideology, in turn, replicated in the "everyday discourse" that . . . drives political and legal institutions such as courts and legislatures."). In addition, Desiree Kennedy's article explores the ways in which advertisements and commercials create and perpetuate racial stereotypes, and contain subtle (and not so subtle) coded messages about culture and society, and not just the price and product information. Kennedy maintains that, as a result of corporate mass media circulation of these images, they become a part of societal mores and values and, in doing so, solidify social hierarchy, and cultural hegemony. She calls for a closer examination of First Amendment doctrine, as it relates to commercial speech, which would take into account the impact of such advertisement/speech on people of color. Kennedy ultimately calls for a more aggressive regulation of advertisement and commercial speech, that would not only consider the truth of the commercial, but also the cultural, social, and racial impact such commercial had on marginalized groups as commercial discourse. See Kennedy, *supra* note 171, at 615.

223. MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLE WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (NEW PERSPECTIVES ON LAW, CULTURE, AND SOCIETY)* (Westview Press 1993) (exploring the ways in which pernicious racial and stereotypical media images cause harm and wounds to others and suggesting that legal remedies be provided to injured parties). While Aoki supports these efforts, he sees recoding, as an additional, and perhaps, better means of disabling such harmful images. Aoki, *Foreign-ness*, *supra* note 21, at 55.

224. Aoki, *Foreign-ness*, *supra* note 21, at 55; see also Craig B. Bleifer, *Looking at Pornography Through a Habermasian Lense: Affirmative Action for Speech*, 22 *N.Y.U. REV. L. & SOC. CHANGE* 153, 191 (1996) ("I do not doubt that attitudes are damaged, at least in part by pornography, but this harm should be confronted on its own plane—at the level of social or political discourse."); Stychin, *supra* note 173, at 107–10 ("Democratic politics is

proliferation of such images, but in the limited space made accessible for the contestation and reworking of such images.²²⁵

B. *Gangsta Rap and Subverting the Gangsta Image within the Market.*

As has already been stated, rap has become one of the largest music genres in America. Several studies have established that the largest consumer base for sales of rap music is White male suburban youth.²²⁶ Some scholars contend, in an attempt to explain the enormous popularity of rap music among White consumers, that White audiences partake in a voyeuristic gaze of Black street culture which is premised (like the voyeuristic gaze of White audiences on the Orientalist other that Aoki describes) on preconceived stereotypic notions of the "other," the life of the "other," and what an encounter with the "other" would look like.

To cultural critic, Samuels, White voyeuristic rap fans, like other voyeurs, seek exotic locations and lifestyles and what they perceive to be authentic experience, and seek to experience them in comfort and security.²²⁷ They only find "staged authenticity"²²⁸ though because they are constrained to view commodified images, which are entrenched with negative racial stereotypes provided by corporate media conglomerates ready to sell entertainment and leisure pursuits.²²⁹ Samuels contends that

essentially a dialogic process whereby social identities are continually emergent in political articulation. A radical and plural democracy must maintain optimal conditions for encouraging such articulations [of identity] . . . [Such] conditions for dialogue must be conducive to the manipulation, reworking, and redeployment of the signs and symbols by which our culture permeates our lives.").

225. Stychin, *supra* note 173, at 130 ("it is in the very proliferation and deregulation of . . . representations—in the production of a chaotic multiplicity of representations—that the authority and prevalence of the reductive and violent imagery . . . will lose their monopoly . . . [and] power to define and restrict the terms of political identity").

226. Soundscan, Billboard's computerized scanning system, measures the number of sales of a record by scanning the bar code on its packaging when it is purchased. Samuels, *supra* note 144, at 147. In June 1991, Soundscan showed that the primary listeners of rap music were young suburban White males, a fact already known to MTV since the airing of *Yo! MTV Raps* and the resulting realization that the "show's audience was primarily White, male, suburban, and between the ages of 16 and 24, a demographic profile that *Yo!*'s success helped set in stone." *Id.* at 152.

227. *Id.* at 153.

228. In *THE TOURIST: A NEW THEORY OF THE LEISURE CLASS* (Schocken Book 1976), by DEAN MACCANNELL, staged authenticity is referred to in the context of the touristic gaze, which is essentially the same in concept as the voyeuristic gaze. For example, to Samuels, "[w]hite fascination with rap sprang from a particular kind of cultural tourism." Samuels, *supra* note 144, at 153. Staged authenticity is defined as the paradox of the tourists who are searching for the real in their touristic travels and yet only see the front of the stage, without recognizing or reacting to the back stage processes of production and commodification.

229. Samuels, *supra* note 144, at 147–48 ("Rap's appeal to whites rested in its evocation of an age-old image of blackness: a foreign, sexually charged, and criminal underworld

the "more rappers were packaged as violent black criminals, the bigger their white audiences became."²³⁰ Ice T, the self proclaimed OG (original gangsta) rapper from the West coast, who paved the way for N.W.A., Ice Cube, and others, would define this process, as the "niggafication" of White suburban youth and the commodification of the "nigga" persona.²³¹ Experience no longer mattered and gave way to the commodified affect of creating a consumer culture of rap, and, by extension, the perceived underworld.²³² Through gangsta rap lyrics, rap voyeurs are taken to the ghetto, which for listeners is "a place of adventure, unbridled violence, erotic fantasy, and/or an imaginary alternative to suburban boredom."²³³

In addition, "where the assimilation of black street culture by whites once required a degree of human contact between the races, the street is now available at the flick of a cable channel [or radio station]—to black and white middle class[es] alike."²³⁴ Through these, what some have called neo-gangsta lyrics, a "staged authenticity," steeped with racial stereotypes about urban Black men and women is delivered to the consuming White audience.²³⁵ Introduced voyeuristically is the ghetto-centric "nigga" persona who more often than not is a gangsta, making his money as a pimp, hustler, drug dealer or killer, and the Black woman skeezer, bitch, or ho,

against which the norms of white society are defined, and . . . defied."); see also Kennedy, *supra* note 171, at 659 ("Unfortunately, these corporate-produced images usually lack . . . authenticity . . . and frequently contain stereotypical views.").

230. Samuels, *supra* note 144, at 147; see also Davey D, *Hip Hop's Ultimate Battle: Race and the Politics of Divide and Conquer*, <http://www.daveyd.com/articleultimatebattlerace.html> (last visited Aug. 26, 2006) (As hip hop's popularity spread to White niche audience, "[w]hite owned corporations began to catch wind of this phenomenon [and] began to apply exploitive marketing schemes that were designed to capture a huge market share . . . As major corporations saw lots of white kids getting down with Hip Hop, they decided to do whatever it took to appeal to what is considered a lucrative demographic.").

231. Judy, *supra* note 156, at 113.

232. *Id.*

233. Robin D.G. Kelley, *Looking for the "Real" Nigga: Social Scientists Construct the Ghetto* (1997), reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 130 (Murray Forman & Mark Anthony Neal eds., Routledge 2004).

234. Samuels, *supra* note 144, at 153.

235. "Ghettocentrism, a style driven cult of blackness defined by crude stereotypes," Samuels, *supra* note 144, at 152, is, as a result, delivered and consumed. Samuels notes that, in essence, "[r]acism is reduced to fashion, by the rappers who use it and by the white audiences to whom such images appeal." It is because of the packaging, sale, and consumption of these racial stereotypes, via rap music, that the production of this commodified image must be analyzed and not dismissed as a lost cause (a point Skover makes in the context of the commodified LesBiGay identity), because "[g]angsta rap deals in fantasy and evil, constructing marketable stories that tell as much about its white teen listeners' desires as about its practitioners." Baldwin, *supra* note 154, at 166.

who is intent on bringing the gangsta down via sexual manipulation or even violence.²³⁶

To some cultural theorists, the corporate and market driven production of such images (visually or lyrically) for voyeuristic consumption represents a provision of a fantasy to the masses,²³⁷ in which the dominant class exercises, as a result of its access to and control of the media, a sort of cultural hegemony, ensuring that its dominant narratives, beliefs, and interests are represented in a natural way.²³⁸ Since hegemony turns ultimately on the consent of the subjugated and on their acceptance and (to some extent) internalization of the dominant norms,²³⁹ rappers, by supplying such rap lyrics and acting out the "staged authenticity" that is at the center of the voyeuristic gaze, participate in their own subjugation to corporate cultural hegemonic ideologies.²⁴⁰ On the surface, then, arguably contemporaneous rap and hip hop culture's infestation of these highly publicized and exaggerated negative stereotypes and imagery do nothing to subvert hegemonic images of Black men and women. Hence, in some ways, they consent to their own subjugation.

However, as cultural legal studies theorists have pointed out—in every image, even racial and stereotypical ones, there are multiple meanings. They are nothing more or less than "sites of contestation over meaning."²⁴¹ Although a gangsta rapper's participation in the staged authenticity takes on, in some ways, the gangsta meaning provided by the dominant discourse, such meanings are "not static or guaranteed their

236. Light, *supra* note 27, at 145 (discussing Ice Cube's song, *You Can't Fade Me*, on his album, AMERIKKKA's MOST WANTED, where he is contemplating murderous revenge on a pregnant woman who accuses him of being the father of her unborn child).

237. See Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805, 810–11 (1993) ("A commercially dominated media system is unable to pose hard questions for fear of polluting the environment for advertising messages, and for fear of turning off audiences who are much more used to experiencing pleasant feelings than having to think about hard issues. In this sense the advertising system systematically relegates discussion of key issues to the peripheries of the culture. Instead, it talks in powerful ways of desire and fantasy, pleasure and comfort."); see also Collins & Skover, *supra* note 171, at 698, 710 ("Daily, our nation's mass media cater to the desires of the marketplace as they deliver a feast of messages to consume . . . [I]t is a place where the consumer exchanges money for magic, where commercial communication promises fantasy more than utility . . . Reality as fantasy requires that certain kinds of information about products and services be suppressed: for example, the conditions of work in factories, [and] the level of wages and benefits of workers.").

238. See Lears, *supra* note 69, at 571; see also Fraser, *supra* note 7, at 117.

239. Lears, *supra* note 69, at 591 n. 57 ("The power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.").

240. See *Id.* at 567, 573.

241. Aoki, *Foreign-ness*, *supra* note 21, at 4.

meanings,"²⁴² instead, they are "susceptible to varying degrees of negotiation and resistance . . . for recoding and reinterpretation along reconfigured artistic, cultural, economic, political and legal agendas."²⁴³ Moreover, the recoding of even negative racial representations, can serve, no matter how small, as a type of contestation and "political" expression.²⁴⁴ Hence, with regard to the current affairs of rap, despite the "acute tension" between the corporate media conglomerates and rappers, and the limited space available *within* the market driven mass media for contestation,²⁴⁵ rappers, such as Jay-Z, Ice Cube, Jadakiss, and even 50 Cent have actualized the potential of which Aoki speaks. They have employed sub-cultural practices which serve to subvert and dismember the dominant racialized gaze upon the "gangsta" image that predominates rap lyrics played on the radio.

In 50 Cent's movie *Get Rich or Die Tryin'* not only do viewers get yet another mass-mediated depiction of the life of a gangsta turned rapper, with scenes of hustling in the underground economy (50 Cent selling drugs on the streets in New York), of street gangsta violence (his mother's body set ablaze after gasoline was poured on her body, his friend betraying him and shooting him in the mouth, and the extraction of another hustler's teeth by pliers), and of him bling-blinging (50 Cent riding down the street in his new shiny white BMW that is the envy of the other hustlers

242. Coombe, *Tactics*, *supra* note 176, at 414.

243. Aoki, *Foreign-ness*, *supra* note 21, at 4.

244. Professor Sally Engle Merry asserts that although small acts of subversion are characteristically individual acts of resistance that do not, for the most part, rise to the level of . . . protests movements like that of the 1960s civil rights era, such acts are still very important when power is understood in the context of social relationships and discourses. See Sally E. Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11 (1995). Additionally, given the societal shift from social justice (following the 1960s era) to developing and solidifying capitalism at home and abroad, "the hope for reform has moved to more bottom-up, small-scale changes." *Id.* at 15. So while these individual acts of resistance may not be inspired by a vision of a more just society and do not generate social movements, they are nonetheless "political activity which does not conform to conventional understandings of politics, yet is engaged in struggles over power." *Id.* at 15-16; *see also* Lears, *supra* note 69, at 569-70 ("At times, [subordinated groups] may openly revolt through strikes, factory takeovers, mass movements, and perhaps the creation of a counter-hegemony. But normally most people find it difficult, if not impossible, to translate the outlook implicit in their experience into a conception of the world that will directly challenge the hegemonic culture . . . [or] locate the source of their unease, let alone remedy it").

245. According to Rose, "[t]o dismiss rappers who do not choose "political" subjects as having no politically resistive role ignores the complex web of institutional policing to which all rappers are subjected, especially in large public space contexts. The struggle over context, meaning, and access to public space is critical to contemporary cultural politics. Power and resistance are exercised through signs, language." Rose, *supra* note 5, at 124. To Rose, such resistance in rap can often be found in the hidden transcripts in rap, which while operating within the dominant text, attempt to destabilize such meaning and legitimize a counter-hegemonic one. *Id.* at 103.

on the block), the dominant gaze on the gangsta identity is shifted, even if only temporarily. During the movie, the scene shifts from the predominant gangsta melodrama to a humanistic picture of a depressed 50 Cent sitting, with his mouth wired shut and drool falling down his mouth. He sits on the couch in his bath robe, in a house that has no heat on a cold snowy winter day, lamenting his inability to provide for his son and the mother of his son, while she, wrapped in a coat to keep warm, looks on him with pity.

Rather than taking on the skeezer/ho image or the self-sacrificing Black woman/mother who gives her life for the sake of the Black man or race²⁴⁶ (who is incidentally rarely given a scripted part in the staged authenticity gangsta drama), his son's mother confronts him about his pitiful state and tells him she resents that their son has to see him in this condition. Enraged and through a muttered voice, 50 Cent tells her to leave and she in turn storms off. In the end, the two embrace again another rare scene in these gangsta scripts of intimacy between a Black man and a woman. And if you look closely, the dominant gaze is subverted once again, when the voyeur glimpses a scene with 50 Cent, a Black man conspicuously present in the life of his son, not only playing with him on the beach but also apparently enjoying it.

In addition, at one of the very sites where the commodified gangsta image is created—albums containing the gangsta rap lyrics, there is also evidence of contestation. Some rappers squeeze on their albums one or two tracks which have the effect of subverting the dominant gaze of listeners on the deviant and socially dysfunctional gangsta. For example, Jadakiss' song, "Why?" on his *Kiss of Death* album takes on a clearly political and serious tone (although it is wedded in between his other songs on the album glorifying the gangsta life), suggesting that George Bush had information about the September 11th terrorist attack on the World Trade Center before it happened.²⁴⁷

246. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 174 (Routledge 2000).

247. <http://www.lyricstime.com/jadakiss-why-lyrics.html> (last visited Aug. 23, 2006) (The lyrics referenced here are as follows, "Why would niggaz push pounds and powder, why did Bush knock down the towers."). See <http://www.freemuse.org/sw6605.asp> (last visited Aug. 26, 2006) (discussing how Jadakiss' other gangsta rap lyrics did not garner nearly as much attention as the *Why* song). Incidentally, members from both political parties would make the same accusation against Bush, which would lead to Congressional hearings on what Bush knew and when. See THE 9/11 COMMISSION REPORT 254, available at, <http://www.9-11commission.gov/report/911Report.pdf> (last visited Aug. 23, 2006) (revealing that "[t]here were more than 40 intelligence articles in the [President's Daily Briefs] from January 20 to September 10, 2001 that related to Bin Ladin."). See also Jennifer D. Braun, *Changing Their Tunes*, NEWARK STAR-LEDGER, July 20, 2004, available at 2004 WLNR 20212299 (Jadakiss says the song "caught the ear of white America . . . [the song] is a metaphor and . . . Bush should take the blame for the terrorist attack because his administration didn't do enough to stop it.").

And again, Jay-Z, a multi-platinum rapper, who has reaped significant financial reward from his many gangsta antics, asserts²⁴⁸ in a tract titled "Moments of Clarity," in his final solo album, *The Black Album*, that while he could rap positive rap like Talib Kweli or Common Sense, he would not make any money if he continued to do so. Given his (and most rappers) former situation as a young Black man in urban America who had to hustle to make ends meet, he asserts that he had to make the best of his situation as a rapper and rap about what made money. His lyrics suggest that he is aware that he is being exploited by the music industry, that he has chosen to take on the corporate-created and consumer-driven public image through which he is seen for the purpose of reaping financial reward so that he can help the inner city and its inhabitants, a perspective some have called, as discussed above—a contradictory consciousness.²⁴⁹

Finally, Jay-Z, the former hustler, turned gangsta rapper, turned CEO of a major recording company, DEF Jam, has invested in small businesses in and throughout Brooklyn,²⁵⁰ and has started an educational and scholarship foundation, called the Shawn Carter (Jay-Z's real name) Scholarship Fund for inner city youth interested in attending college.²⁵¹ In addition, rapper 50 Cent has begun negotiations with Steve Jobs, of Apple Computer, to develop a low cost G Unit computer for sale to inner city schools.²⁵² Moreover, rappers have pushed the envelope of their once (and, arguably, continued) embrace of the gangsta image to subvert the dominant understandings and representation of that image, by taking on different identities and roles that are also within the larger public's view. Rapper Ice Cube, whose rap lyrics on his *Death Certificate* album were subject to considerable censorship attacks,²⁵³ recently produced a

248. For the specific lyrics referenced here, see *supra*, opening to this Article.

249. This conflicting mental state "points to the complexity of popular consciousness under capitalism" and manifests the ambiguities of consent, where subordinated groups can "share a kind of half-conscious complicity in their own victimization." Lears, *supra* note 69, at 569, 573; see also Rose, *supra* note 5, at 7 ("To participate in and try to manipulate the terms of mass-mediated culture is a double-edged sword that cuts both ways—it provides communication channels within and among largely disparate groups and requires compromise that often affirms the very structures much of rap's philosophy seems determined to undermine.").

250. Will Smith, *Jay-Z Back Beauty Line*, CNN/Money, Mar. 18, 2005, <http://money.cnn.com/2005/05/18/news/newsmakers/cosmetics/>.

251. <http://www.the4040club.com/index.cfm?MenuID=125&MenuGroup=Home> (last visited Aug. 26, 2006).

252. Nolan Strong, *50 Cent Negotiating with Apple for Branded Line of Home Computers*, June 19, 2006, <http://www.allhiphop.com/Hiphopnews/?ID=5798>.

253. Chang, *supra* note 101, at 347 (Three weeks after the album's release "[i]n *Billboard* magazine, editor Timothy White called for record-store chains to boycott the record, writing that [Ice Cube's] unabashed espousal of violence against Koreans, Jews and other whites crosses the line that divides art from the advocacy of crime' . . . *Death Certificate* remains the only album ever singled out for such condemnation in *Billboard* history."); see

reality-based documentary on HBO to foster a discourse on race relations and racial stereotypes. Two families, one Black and one White, exchanged lives by painting their faces in a way that reflected the racial identity of the other family, and then discussed their experiences after living in the other family's skin.²⁵⁴

Within the arena of mass media and the market, where Habermas would not have found any evidence of "political" resistance, cultural legal studies theorists have revealed a different possibility and reality. With regard to contemporaneous rap, even in the face of commodification, it could never be completely equated with cooptation (a point which David Skover makes regarding the commodified LesBiGay identity) because their (rappers) fights were always "fought out within the circuits of the market."²⁵⁵ The current manifestation of rap and rappers' subcultural practices are examples of Michel Foucault's theory that "there are no relations of power without resistance; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised."²⁵⁶ In contravention to Habermas' view that political expression can be achieved only through critical argument and reasoned debate in a separate and independent public sphere, Foucault adds that the "resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power."²⁵⁷

So while it may seem that corporate-controlled and market-driven mass media have exclusive hegemonic control over cultural expression in rap in particular, creating a "frozen homogeneity, the actual effect of such mass media over-saturation may actually be to bring about the proliferation of multiple and hybrid sites of negotiation, contestation, resistance

also Chuck Phillips, "Wiesenthal Center Denounces Ice Cube's Album," L.A. TIMES, Nov. 2, 1991, sec. CA (calling for the boycott of the album DEATH CERTIFICATE, calling the album "a cultural Molotov cocktail," "a real threat," and "anti-Semitic").

254. *Families swap race on 'Black, White,'* Feb. 27, 2006. <http://www.msnbc.msn.com/id/11394595/> (last visited on August, 26, 2006).

255. Baldwin, *supra* note 154, at 161. Many cultural critics have argued that rap has always served a dual purpose of giving voice to marginalized Black youth (primarily male) and of achieving financial success. Rap never called for the overthrow of the capitalist system but for the opening up of space so that rappers, whether they be considered positive rappers or not, could be made visible, and moreover, could partake in America's riches. See also Light, *supra* note 27, at 139. Moreover, some scholars contend that White fans have always determined the direction of hip hop, stemming back to the production of *The Message*, which received critical acclaim from White rock critics, to the creation of Run-DMC (who were solidly middle class teenagers) and their street image created by Jewish ex-punk rocker, Rick Rubin. Samuels, *supra* note 144, at 149. Rubin was the original founder of Def-Jam, a major recording label, which he later sold to Russell Simmons, brother to one of the members of Run-DMC.

256. MICHAEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 142 (Colin Gordon ed., Pantheon Books 1980).

257. *Id.*

and challenge to such hegemony and homogeneity."²⁵⁸ By subverting the dominant gaze within the commodified realm of the mass media, rappers have managed to maneuver in a tight space and have contested such hegemony and homogeneity.

However, even if one does not accept the argument that these acts constitute meaningful acts of resistance by gangsta rappers given their part in writing and producing rap lyrics that degrade Black women and promote violence, as Aoki and others have argued, censorship to prevent the production of such lyrics/images is still not the answer.²⁵⁹ It may not even arguably be possible—given the technological developments of the internet, rap's outlaw nature, and consumer demand for the forbidden. Rather, more contestation and dialogue, and space for such (by either the rappers themselves or others) is necessary and even more possible as these negative lyrics and images become hypercommodified and mass-mediated.

In fact, the proliferation of gangsta rap has led to some (much needed) discourse within the Black community—one that explores the underlying issues related to the production and distribution of gangster rap and the image of Black women presented therein.²⁶⁰ For example,

258. Aoki, *Foreign-ness*, *supra* note 21, at 59–60.

259. Even if gangsta rap was silenced, the issues that underpin the lyrics would still be present and problematic, as rappers are products of the misogynistic, violent, and consumerist culture that created them. See Liza Weisstuch, *Sexism In Rap Sparks Black Magazine To Say 'Enough!'* CHRISTIAN SCIENCE MONITOR, Jan. 12, 2005, available at <http://www.csmonitor.com/2005/0112/p11s01-alm.html> [hereinafter Weisstuch] ("If anyone singles out hip-hop, that's unfortunate: Hip hop started in mid-70s, and sexism and misogyny have been around much longer."); see also BELL HOOKS, *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 122 (Routledge 1994) ("Gangsta rap is part of the antifeminist backlash that is the rage right now. When young black males labor in the plantations of misogyny and sexism to produce, gangsta rap, white supremacist capitalist patriarchy approves the violence and materially rewards them. Far from being an expression of their 'manhood,' it is an expression of their subjugation and humiliation by the more powerful, less visible forces of patriarchal gangsterism.").

260. To Hikes these "detrimental messages that weave a deceptive web of mythology about our need to advance a culture of 'gangstas,' and embrace the ugly side of beautiful, bikini-clad, booty-shaking, young Black women with overactive libidos," Hikes, *supra* note 23, is a tragic paradigm for children "who do not have the cognitive ability to differentiate between illusion and reality." Since these lyrics and images currently serve as the predominate expression of Black culture, "for non-Black children, [they] create gross misrepresentation of the Black experience, but its impact is exceedingly worse for Black children, particularly for young Black girls whose self-worth and self-esteem are frequently being shaped by these unrealistic and harmful images of Black womanhood . . . [and the] . . . prognosis is not much better for young Black boys constantly exposed to the glorification of the 'thug life' and its perpetual cycle of violence." Moreover, see Yvonne Bynoe, *Rappers Aren't Feeling Oprah's Love*, AlterNet, June 21, 2006, <http://www.alternet.org/story/37815> for a discussion on a study released in 2004 by a Philadelphia based organization called Motivational Education Entertainment, which examined 2000 urban teens who consumed rap music and videos on a regular basis and concluded that "one of the most relevant changes (of the teens) in the hip hop generation (from their civil rights and

Essence magazine held a town hall meeting at Spelman College in 2005 to discuss the misogyny and violence in rap lyrics and videos, as part of *Essence's* year long Take Back the Music campaign. According to Michaela Angela Davis, co-founder of the campaign and executive fashion and beauty editor of *Essence*, it was only fitting for *Essence* to help people talk about some of these issues and to come up with steps to address them. She stated:

We don't have picket signs, we're not telling people what to think, we're just asking them to think . . . [To Davis] hip hop has gone through a funnel. It started off broadly, encompassing a variety of genres, and progressed from the political to the more avant-garde and satirical. But as gangsta rap has come to the fore, so have lyrics that glorify violence and misogyny.²⁶¹

The town hall meeting and campaign grew out of a controversial and highly publicized incident in which Spelman students rejected rapper Nelly's offer to perform at a Spelman event to raise awareness for bone marrow treatment within the Black community.²⁶² The event was to be co-sponsored by Spelman and a foundation started by Nelly, who had recently found out that his sister was diagnosed with the disease. Although, according to Nelly, his intentions to address a serious medical issue facing the Black community were genuine, students vowed to protest his performance, due in large part to his misogynistic rap lyrics, and one of his videos, "Tip Drill,"²⁶³ that was airing at the time on cable music and entertainment channel, BET's "uncut" after hours show. Due to the controversy and protest threat, Nelly ultimately cancelled the event. He expressed frustration that the protesting Spelman students waited until this worthy cause to voice their opposition to him, his music and his video, and that only he was being targeted and not the music industry, or the women performing in the video as well²⁶⁴—a sentiment to which some, including students from Spelman, agreed.

black power movement predecessors) is an *open* disdain for black women." (emphasis added).

261. Weisstuch, *supra* note 259.

262. Kathy Willens, *Black College Women Take Aim At Rappers*, USA TODAY, Apr. 23, 2004, available at http://www.usatoday.com/life/music/news/2004-04-23-selman-protest-rappers_x.htm [hereinafter Willens].

263. In the video, several scantily dressed Black women simulate sex with each other and in one scene a credit card is swiped through a woman's buttocks. Moya Bailey, *Dilemma*, Wiretap, May 24, 2004, <http://www.alternet.org/wiretap/18760> [hereinafter Bailey].

264. Dallas Winston, *Lil Jon And Eastside Boyz Sell Well*, June 1, 2001, <http://www.AllHipHop.com/hiphopnews/?ID=413>. But, for Moya Bailey, a junior at Spelman College at the time of the protest and who was in support of it, stated that the movement, while unexpected and fraught with internal and personal challenges for her, was never to vilify anyone in isolation, neither the Black women who chose to partake in the *Tip Drill*

According to Vice President of Student Affairs at Spelman, Zenobia Hikes, Nelly was invited to engage in a campus wide discussion, which he declined—a decision that Hikes found unfortunate in that it would have promised a dynamic discourse between Nelly and those that supported his position as well as those that opposed to it.²⁶⁵ The Take Back the Music campaign was to include petition drives and a campaign to phone complaints to television networks and radio stations that ran offensive materials.²⁶⁶ The campaign's goal, according to a professor at Spelman, was a "nuanced one that recognize[d] that not all hip hop is problematic . . . Nobody involved in the campaign [was] under the illusion that taking on a pop-culture powerhouse will be easy, but they [were] hoping that diverse forms of hip-hop-less exploitation of women—will nudge aside the more objectionable content that dominates the Top 40 airwaves."²⁶⁷ For Bailey, a junior at Spelman, "[i]t is because I love hip hop that I critique it and as part of the hip hop generation, who better than I to bring the music back to what I loved about it in the first place? For me, that sentiment can be summed up by one of the signs we had at the demonstration: 'We love hip hop, but does hip hop love us?'"²⁶⁸ And finally to Davis, who is also a former co-editor of *Vibe* magazine (a prominent hip hop magazine devoted to covering issues related to hip hop culture), "[p]ersonally I like a lot of the music. I started my career at *Vibe*. I have been a stylist for some music videos. The problem is it's the only thing we have to choose from, the only images we see of Black women. We don't want to shut it down but we do want to bring more balance to the way Black women are described and depicted."²⁶⁹

Similarly, Oprah Winfrey, due to accusations of being anti-rap as a result of a brewing controversy between she and rapper Ludacris, gave a statement on the red carpet, stating that "I am a woman who has worked very hard for my status in the world and as a human being . . . I don't want to be marginalized by music or any form of art . . . I feel rap is a form of expression, as is jazz. I'm not opposed to rap. I'm opposed to being marginalized as a woman."²⁷⁰ In a momentous event, Oprah made a

video nor Nelly. For her, she wanted to make clear that the protest effort was always "much bigger than Nelly, that he is not the scapegoat but the spark that ignited the need for a public critique of how we as women are being portrayed. [I see] "Tip Drill" in the broader context of a racist, capitalist, patriarchal system that has a vested interest in feeding stereotypes of both black men and women as hypersexual in the quest for the almighty dollar." Bailey, *supra* note 263.

265. Hikes, *supra* note 23.

266. Willens, *supra* note 262.

267. Weisstuch, *supra* note 259.

268. Bailey, *supra* note 263.

269. <http://www.debategate.com/forums/PIC/posts/233957.html> (last visited Aug. 23, 2006).

270. See Shaheem Reid, *Oprah Says She Doesn't Have Beef With Hip-Hop*, June 12, 2006, <http://www.mtv.com/news/articles/1534119/20060612/story.jhtml>.

surprise visit to former rapper Ed Lover's live radio show on Power 105.1 located in New York to diffuse the growing controversy between her and the hip hop community.²⁷¹ During her visit, Oprah asked Ed Lover why he referred to women as "bitches," to which Ed Lover initially replied that the term was not always used or meant in a demeaning way, and that men are often referred to by that term also. After Oprah explained that while rappers may see their use of such word (and the word, "Nigga"), primarily for entertainment purpose, some listeners do not get that it is not meant to be taken literally.²⁷² As a result of the exchange, Ed Lover vowed to Oprah and to his listening audience that he would never use the word "bitch" again on air.²⁷³

As these examples demonstrate, despite the limited access to the nation's radio air waves to those that would contest gangsta rap and related images, some dialogue has occurred, with the voices of critique growing with respect to gangsta rap and the industry that creates and saturates the market with it to the exclusion of others.²⁷⁴ While gangsta rappers' (and others') acts of contestation may seem small and, hence, perhaps ineffective in challenging the harmful effects of the mass production of these rap lyrics (and accompanying images), such "small" acts of resistance, still have their place.²⁷⁵ Such acts create a subverted meaning, even if brief, to the

271. Chris Richburg & Clarence Burke, *Oprah Responds to Hip Hop Criticism*, May 12, 2006, <http://www.allhiphop.com/hiphopnews/?ID=5667>.

272. Oprah described a trip she made to South Africa, in which a security guard for African political leader, Nelson Mandela greeted her and her group by saying "Hello, Niggas!," and explained to Ed Lover that the guard thought it was the norm because rap music and videos had a global and international audience who may not be aware of the long history of the word in America, or its arguable entertainment value and recoding by hip hop culture. Chris Richburg, *Oprah Responds To Hip-Hop Criticism*, May 12, 2006, <http://www.allhiphop.com/hiphopnews/?ID=5667>.

273. Before the close of the interview, Ed Lover suggested to Oprah that she should have a show exploring these and other issues related to the hip hop community, to which Oprah declined, an unfortunate response in that such discussion would have also promised to be a dynamic discourse. No doubt due to the protest by other rappers, rappers in the rap group Outkast, who would later be extended an offer to appear on the Oprah show, would decline to do so. Mark Lelinwalla, *Outkast Declines Appearance on Oprah Winfrey Show*, VIBE, July 18, 2006, available at http://www.vibe.com/news/news_headlines/2006/07/outkast_declines_appearance_on_oprah_winfrey_show/.

274. Historian Micheal Dyson is correct, however, when he asserts that it is not the role of women alone to challenge rap's misogyny, and that nonsexist men should also join in on critiquing the rappers and the White male dominated music industry. Dyson, *supra* note 84, at 65.

275. To Boyd, "[t]he space between the points where radical discourse can critique dominant culture and dominant culture becomes financially viable through the selling of this contrary discourse is the only available space for a reasoned understanding of contemporary political culture." Todd Boyd, *Check Yo Self Before You Wreck Yo Self: The Death of Politics in Rap Music and Popular Culture*, reprinted in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER*, at 327 (Murray Forman & Mark Anthony Neal eds., Routledge 2004). Moreover, others have attempted to use the commodified image of rappers to forge a

dominant meaning inscribed on the gangsta image. More of a "proliferation" of space for contestation and discourse is necessary and possible, if the law does not stifle such space or dialogic process. The Telecommunications Act has, however, contributed significantly to stifling the dialogic process with regard to the rap community by limiting access to the nation's radio airwaves to those that would challenge the gangsta image.

III. THE ROLE OF LAW AND ITS EFFECT ON SUBVERTED DISCOURSE WITHIN THE MARKET

A. *Beyond Habermas' View of the Law as Neutral: Seeing the Law in Action*

Because Habermas continues to see the economic (market) sphere as separate and independent from the public sphere, he maintains that it and its workings and regulations are not appropriate topics for discussion in the public sphere.²⁷⁶ Scholars have contended that "by excluding realms of private law and market forces from the space he regards as political, the model of democracy Habermas provides would keep existing allocations of communicative power intact while entrenching corporate dominance over realms of public communication."²⁷⁷ Hence, one such force that

traditional hip hop political movement. For example, Russell Simmons with his Hip Hop Summit Action Network has attempted to use hip hop to mobilize the youth to vote. Others have critiqued his efforts, and suggested that any viable organized hip hop movement must realize that rappers, for the most part are not activists, and that any mobilization effort must take into account the countless number of young activists across the country who are activist and community organizers, and must recognize that the role of rappers are as men of words (to capitalize on the mass appeal of such rappers and their ability to draw in the crowd) and not as men of action (like the activist that labor everyday to mobilize people around serious social justice issues). Such celebrity based mobilization efforts also fail long term because they are not organized around an agenda that identifies the issues, such as the call by celebrities for youth to vote. Such Rock the Vote or Rap the Vote campaigns were without a political platform, and were, therefore, ineffective in addressing structural inequities in society. See Bynoe, *supra* note 2; BAKARI KITWANA, *THE HIP HOP GENERATION: YOUNG BLACKS AND THE CRISIS IN AFRICAN AMERICAN CULTURE* (Basic Civitas Books 2002).

276. Coombe, *Reflections*, *supra* note 64, at 1050; Forbath, *supra* note 12, at 1445-46 ("The lifeworld is the site of the public sphere, while the systems-world is comprised of the economy and the administrative state. Habermas is at pains to enjoin any intervention from the former into the latter. Such intervention, or 'meddling,' would only interfere with the systems' self-steering mechanisms . . . [and] . . . the market dynamics of the economy.").

277. Coombe, *Reflections*, *supra* note 64, at 1039; but see Forbath, *supra* note 12, at 1453 (noting that while Habermas acknowledges that the public sphere and communication therein may be affected by the unequal distribution of social and economic power in society, he fails to elaborate on how such inequity or distribution can be addressed).

Habermas negates is the law, and its role in maintaining the unbalanced political economy of communication.²⁷⁸

To Habermas, the law is neutral and autonomous and operates to protect the lifeworld (which houses life experiences, including cultural exchanges, and the public sphere), from the incursions of the market and the state, and to aid in transmitting such lifeworld experiences to the state, via deliberation in the public sphere.²⁷⁹ Scholars have challenged Habermas' theory of the law, pointing out that the law does not always bridge the gap between the state and the lifeworld in transmitting deliberated messages, and that it does not function as neutrally as he assumes.²⁸⁰ When the law is looked at beyond the books and institutions creating and enforcing them, and is looked at more closely, and in action, as it functions in everyday life, the law then is anything but neutral.²⁸¹ Cultural legal studies scholars contend that when viewed from this perspective, the law then is, rightly seen as "one of the most potent signifying practices . . . [and] . . . can be seen as one (albeit very powerful) institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings."²⁸² In this way, the law contributes to asymmetries in the abilities of individuals and social groups to define and realize their needs.²⁸³

Additionally, the law is seen as "a central locus for the control and dissemination of cultural and signifying forms with which identities [both commodified and political] and differences are made and remade."²⁸⁴ As such, the law is involved in the hegemonic process and can assist in counter-hegemonic struggles, in that it "can strengthen the already potent grip of the culture industries over the production and circulation of meanings, or it can facilitate popular participation, including participation by subordinate and marginalized groups, in the process by which meaning

278. Coombe, *Reflections*, *supra* note 64, at 1034.

279. Habermas, *BETWEEN FACTS*, *supra* note 12, at 150; *see also* Forbath, *supra* note 12, at 1445.

280. *See* Brian Z. Tamanaha, *The View of Habermas from Below: Doubts About the Centrality of Law and the Legitimation Enterprise*, 76 DENV. L. REV. 989 (1999).

281. Coombe contends that the "law is an authoritative means and medium of cultural politics—in which distinction and difference are constructed and contested—that actively articulates that which we define as the 'social.'" Coombe, *Critical*, *supra* note 198, at 483. And contrary to Habermas' view of the law, she "rejects any vision of a social world in which differences preexist the law, and law is called upon merely to resolve and legitimate social claims generated elsewhere." Instead, Coombe "suggest we see law as providing many, if not most, of the very signifying forms that constitute socially salient distinctions, adjudicating their meanings and shaping the very practices through which such meanings are disrupted."

282. Mezey, *supra* note 206, at 45.

283. Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, And The Situation Of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 19 (2001).

284. Coombe, *Reflections*, *supra* note 64, at 1035.

is made and communicated."²⁸⁵ During this process, as "dominant groups try to naturalize the meanings that best serve their interests into the common sense and taste of the society as a whole . . . [and as] subordinate groups contest [such meanings], it is impossible . . . for the law to remain neutral in this contest."²⁸⁶ As a result, cultural legal studies scholars have begun to explore "law as discourse, process and practice—engaged in forms of both domination and resistance. Locally interpreted, law provides means and forums for legitimating and contesting dominant meanings and the social hierarchies they support . . . Legal strategies and legal institutions may lend authority to certain interpretations while denying status to others."²⁸⁷

Given media conglomerates domination of media, most theorists see the need for some form of regulation of mass media to achieve the democratic goals of a diversified communicative democracy.²⁸⁸ Corporate-controlled and market driven mass communications "simply do not permit the diversity of perspectives necessary for the flourishing of dialogic democracy . . . Access to media must be expanded if we are to secure conditions for effective communication to promote recognition of diverse interests in the political process and this may well involve regulation of the exercise of private property."²⁸⁹ As an example of such limitation to private property ownership rights, scholars have advocated for the limits to copyright and trademark ownership rights of dominant groups to increase the ability of marginalized others to contest the cultural (and in essence political) meanings of such dominant images.²⁹⁰ Added to this list should be the Telecommunications Act, that permits a corporate entity to

285. Madow, *supra* note 36, at 141, 142.

286. Coombe, *Reflections*, *supra* note 64, at 1033.

287. *Id.*

288. Madow, *supra* note 36, at 142 ("The law can accelerate the already powerful trend toward centralized, top-down management of popular culture, or it can fight a rear-guard . . . action on the side of a more decentralized, open, democratic cultural practice.").

289. Coombe, *Reflections*, *supra* note 64, at 1039; see also Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) [hereinafter Fiss] (discussing how current First Amendment jurisprudence and constitutional protections of freedom of speech fail to take into consideration the crucial challenges of capitalist mass communication in the United States).

290. Aoki, *How the World Dreams*, *supra* note 207, at 545 ("By failing to acknowledge the important role of trademarks in identity formation, the courts fail to understand the full implications of denying nonowners trademark use."); but see Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999) (arguing that recoding is counter-productive since most members of society prefer stability in the identity of cultural objects). See also Sarah La Voi, *The Value of Recoding Within Reason: A Review of Justin Hughes' "Recoding" Intellectual Property and Overlooked Audience Interests*, 14 DEPAUL-LCA J. ART & ENT. L. 171 (2004) (arguing that Hughes' analysis focuses on the privileged members of society who have a voice but fails to acknowledge that marginalized groups' voices are often drowned out and that recoding can provide an excellent means for disseminating minority messages that would otherwise go unheard).

have unrestricted cross-media ownership of various media outlets, which has had the affect of creating fewer corporate conglomerates with more concentrated control over media and mediated images, and of limiting the mediated arena as a site of contestation for those who would oppose such images.

In exploring the ways in which alternative voices may inject contestatory messages challenging mass-mediated images through the subcultural practice of recoding, Coombe and Aoki have also shown that intellectual property laws intervene powerfully to prevent such possibilities.²⁹¹ In looking at law beyond the view of statutes and reported cases, these scholars see it in terms of “counterfactuals, the missing, the hidden, the repressed, the silenced, the misrecognized, and the traces of practices and persons underrepresented or unacknowledged in its legitimations.”²⁹² For Coombe, intellectual property laws do not “function simply in a rule like fashion . . . Although it is constructed through a rhetoric of private property rights and public benefits, it is necessary to go beyond its self representation to show how it is also simultaneously a generative condition and a prohibitive boundary for practices of political expression, public sphere formation, and counterpublic articulations of political aspirations.”²⁹³

Coombe has shown how courts, through the increasing adoption and judicial enforcement of state anti-dilution statutes, have moved away from the traditional trademark theory of protecting rights in a sign only as necessary to protect consumers from deception and confusion towards a “dilution rationale” that has had the effect of solidifying corporate cultural hegemony.²⁹⁴ Since many of American culture’s powerful symbols are trademarks and many of such trademark owners are the most powerful and wealthy members of American society,²⁹⁵ Coombe contends that their power and hegemony over the meaning of such symbols and images have been solidified with judicial adoption of the dilution rationale to settle trademark infringement cases.²⁹⁶ In essence, “[h]olders of trademark rights are enabled to prevent “misappropriation” even when there is no competition between the goods and the trademark’s use is unlikely to cause public confusion.”²⁹⁷

For example, in *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 548 (1987), the Supreme Court allowed the United States Olympic Committee to prohibit a gay rights advocacy

291. Coombe, *Objects*, *supra* note 21, at 1873–77; see also Aoki, *Foreign-ness*, *supra* note 21, at 53–56.

292. Coombe, *Reflections*, *supra* note 64, at 1051.

293. *Id.*

294. Coombe, *Objects*, *supra* note 21, at 1853.

295. *Id.* at 1872.

296. *Id.*

297. *Id.* at 1870.

group from using the term OLYMPIC to promote the Gay Olympic Games.²⁹⁸ Although the advocacy group sought to use the term to bring positive recognition to the gay community—a historically marginalized and disadvantaged group, presumably because the term OLYMPIC is a key symbol that has been associated with human excellence and achievement,²⁹⁹ the Court upheld the proprietary rights of the Committee.³⁰⁰ The Court, in effect, gave the Committee "complete discretion to prohibit any use of the term that it found offensive . . . [and exemplified how] property rights . . . had priority over the expressive interests of a historically silenced minority."³⁰¹

Moreover, in the dissenting opinion for the Ninth Circuit Court of Appeals that affirmed the lower court's order granting the preliminary injunction, the judge noted that the Committee "is using its control over the term Olympic to promote the very image of homosexuals that the [advocacy group] seeks to combat: handicapped, juniors, police, Explorers, even dogs are allowed to carry the Olympic torch, but homosexuals are not."³⁰² As further evidence of the Committee's selective targeting of the use of the term, Coombe points out that even elite, all male social clubs with a social history of discrimination against minorities and women were allowed by the Committee to use the term Olympic without being subject to a legal injunction.³⁰³

As fewer and fewer intellectual defenses are available in intellectual property infringement actions,³⁰⁴ intellectual property laws then aid in

298. *S.F. Arts and Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 548 (1987).

299. The San Francisco Arts and Athletics, Inc. is a not for profit organization that sponsored the contest to "draw attention to the gay cause and to counteract negative and stereotypical biases toward gays." Robert N. Kravitz, *Trademark, Speech and the Gay Olympics Case*, 69 B.U.L. REV. 131, 160 (1989). To Kravitz, such "idea [was] similar to that of the Special Olympics, an event held for the physically handicapped," and was the type of political advocacy by a marginalized group that goes to the core of First Amendment protections. *Id.* at 179; see also Aoki, *How the World Dreams*, *supra* note 207, at 544–45 ("The Gay Olympics were designed to counteract the societal myth that gay men are unathletic and not fit for rigorous competition, as well as to provide a forum in which lesbians could compete athletically without being made to feel that their athletic ability made them less feminine . . . It was created both as a way to participate in the ongoing process of cultural formation by changing culturally held stereotypes about homosexuals, and aid in the development of personal identity.").

300. *S.F. Arts and Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 548 (1987).

301. Coombe, *Objects*, *supra* note 21, at 1875.

302. *Int'l Olympic Comm. v. S.F. Arts and Athletics, Inc.*, 789 F.2d 1319, 1323 (9th Cir. 1986) (Kozinski, J., dissenting).

303. Coombe, *Objects*, *supra* note 21, at 1876 (discussing how the Committee attorney was a member of an exclusive country club that had the term Olympic in it).

304. *Id.* at 1866–67 n. 75–77 (discussing the decrease in judicial acceptance of the fair use defense in trademark and copyright infringement cases in Canadian and American courts.); but see Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (analyzing the Eleventh Circuit's acceptance of the fair use

stifling the dialogic process between hegemonic and counter-hegemonic forces.³⁰⁵ In contemporary consumer societies, political action must include a critical engagement with commodified cultural images and expressions. Space, particularly, as it relates to negative and racial images, must be provided for the proliferation of multiple and hybrid sites of negotiation, contestation and resistance or corporate mass media hegemonic dominance.³⁰⁶ While the Telecommunications Act, as applied to this analysis with hip hop, does not turn on protecting (or limiting) the rights of owners in a symbol, mark, or image (at the expense of those that would contest that image), the point presented in this Article is that it has, like the intellectual property laws, had the effect of solidifying the cultural hegemony media conglomerates have on producing the gangsta image. Such lyrics predominate the radio airwaves, for the most part, to the exclusion of others that would contest the images presented in the lyrics.³⁰⁷ The role of the Telecommunications Act in the contest over meaning of, and challenge to, the gangsta image, in the midst of this contest has been anything but neutral. In fact, the Telecommunications Act of 1996 has

defense based on parody in the copyright infringement case, *SunTrust Bank v. Houghton Mifflin Co.*, where Margaret Mitchell's best selling novel, *Gone With the Wind*, was retold in a novel titled, *The Wind Done Gone*, from the perspective of a biracial slave, the half sister of *Scarlet*, a main figure in Mitchell's novel).

305. Scholars have also examined the ways in which the enforcement of right to publicity laws has solidified dominant cultural meanings of celebrity images. See Coombe, *Publicity Rights*, *supra* note 182, at 1221; see also Madow, *supra* note 36, at 145 ("When the law gives a celebrity a right of publicity, it does more than funnel additional income her way. It gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society: power . . . to suppress readings or appropriations of her persona that depart from, challenge, or subvert the meaning she prefers; power to deny to others the use of her persona in the construction and communication of alternative or oppositional identities and social relations; power, ultimately, to limit the expressive and communicative opportunities of the rest of us. The result is a potentially significant narrowing of the space available for alternative cultural and dialogic practice."); but see Rosemary Coombe, *Authorizing The Celebrity: Publicity Rights, Postmodern Politics, And Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 387 (1992) (noting that publicity rights law both "produces fixed, stable identities authored by the celebrity subject [and] . . . simultaneously creates the possibility of places of transgression in which the signifier's fixity and the celebrity's authority may be contested and resisted.").

306. Coombe, *Critical*, *supra* note 198, at 480-81 ("The commodification of cultural forms creates new relations of power in contemporary cultural politics—arena for connotative struggle or contested cultures . . ."); see also JANE GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (Univ. of N.C. Press 1990).

307. Similarly, while Kennedy does not discuss advertising law in the context of solidifying ownership rights in a mark or image, she explores the ways in which such laws contribute to limiting the meaning given to such image or mark and finds that "[t]he network of [advertisement] regulation is designed to protect the market, and tangentially the consumer, by focusing on a fairly narrow band of messages . . . Advertising law, as part of the legal regulation of the competitive process, cannot claim neutrality because it plays a central role in the media's creating and perpetuating stereotypes of people of color and the marginalization and commodification of their imagery." Kennedy, *supra* note 171, at 658.

contributed to creating the dominant gangsta image that has become, for the most part, the defacto voice of contemporary hip hop culture.

B. *Telecommunications Act In Action Subverting Discourse within Hip Hop*

Scholar Nancy Ehrenreich has noted that because political views are significantly affected by corporate media and because such media helps set the terms of the discussion and are not, as Habermas maintains, simply "conduits for political expressions of citizenry, legal rules protecting the productions of multimedia corporate conglomerates, under the legal fiction that they are protecting 'authorship,' actually reinforce those entities deadening hegemony over the forms of production of mass culture."³⁰⁸ The passage and enforcement of the Telecommunications Act is and was steeped with the legal fiction and rhetoric of property rights and public benefit of competition that Coombe references in her discussion of intellectual property rights. The Telecommunications Act relaxed local ownership restrictions by allowing one entity to control both a television and radio station in the fifty largest markets, hence, "[o]ne licensee may own two TV and up to six radio stations or one TV and seven radio stations in the same market if that market has at least 20 separately owned broadcast (radio/TV), newspaper and cable voices."³⁰⁹ Congress believed that in passing the Telecommunications Act a "deregulated marketplace would best serve public interest."³¹⁰ The Telecommunications Act's preface described its purpose as promoting "competition and as reduce[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage[ing] the rapid deployment of new telecommunications technologies."³¹¹

The purpose of promoting competition (and hence diversity) on the radio, in particular, was not met, however, and was arguably doomed, because immediately following the passage of the Telecommunications Act, there was a buying spree of numerous small and local radio stations by large corporate conglomerates.³¹² In fact, only one year after passage of the Telecommunications Act, "concentration in ownership mostly resulted from mergers involving the fifty largest owners . . . [namely with] . . . Chancellor Media, Clear Channel, Infinity, and Capstar, owning a majority of

308. Nancy Enrenreich, *Fifth Annual Legal Theory Symposium: Exploring Habermas on Law and Democracy*, 76 DENV. U. L. REV. 927, 936 (1999).

309. Richard E. Wiley, *Communications Law Overview: Recent Developments In Convergence, Competition And Consolidation*, 597 PLI/PAT 395, 405-06 (2000).

310. Anastasia Bednarski, *From Diversity To Duplication Mega-Mergers And The Failure of the Marketplace Model Under The Telecommunications Act of 1996*, 55 FED. COMM. L.J. 273, 275 (2003) [hereinafter Bednarski].

311. *Id.*

312. *Id.* at 287.

stations that play some of the nations' most popular formats."³¹³ Hence, the "sheer size of the biggest parent companies allow those owners to control radio's content."³¹⁴ Ultimately, as a direct result of such deregulation, "there was a steady narrowing of voices available through the major channels, a decrease in the diversity of sounds, opinions, and ideas, news and art available to mass audiences."³¹⁵

While the Telecommunications Act required the Federal Communications Commission (FCC) to conduct biennial review of the ownership regulations and their enforcement to make sure that the FCC's goals of ensuring that the public's interest through competition remained, many scholars have found that the FCC's "tendency toward deregulation reduces competition and diversity to the detriment of the public."³¹⁶ The principle of deregulation, however, was not always advocated, and, in fact, was historically rejected by the FCC and the government as a means of protecting the public by promoting a diversity of interests and voices heard over the nation's radio air waves.³¹⁷

Historically, with the enactment of the Radio Act of 1927, a five member panel called the Federal Radio Commission (FRC) was given radio licensing power to assign frequencies, regulate broadcasting hours, and regulate the general use of airwaves.³¹⁸ Congress mandated that "the standard for licensing radio stations was that the broadcaster's goals served the 'public interest, convenience, or necessity' of the people in the local broadcast market."³¹⁹ With the passage of the Communications Act of 1934, the FRC was replaced with the FCC, which empowered the panel

313. Adam J. Van Alstyne, *Clear Control: An Antitrust Analysis Of Clear Channel's Radio And Concert Empire*, 88 MINN. L. REV. 627, 640 (2004) [hereinafter Van Alstyne] (citing Mass Media Bureau, Federal Communications Comm., Review of The Radio Industry, at 3 (Sept. 2001)).

314. *Id.*

315. Chang, *supra* note 101, at 445. See also Mark Anthony Neal, *Rhythm And Bullshit?: The Slow Decline Of R&B, Part Three: Media Conglomeration, Label Consolidation And Payola*, June 30, 2005, <http://popmatters.com/music/features/050630-randb3.shtml> [hereinafter Neal], where the author writes "[i]n the aftermath of the Telecommunications Reform Act, the massive consolidation in radio has left fewer people making the decisions about what music will be played. The ten largest radio conglomerates in the U.S. control more than two thirds of the national radio audience, with Clear Channel and Viacom (which, incidentally owns both MTV and BET) controlling more than 40 percent of that. That these conditions impact what music you hear on the radio and the ability of local groups to get on their local radio station goes without saying."

316. Van Alstyne, *supra* note 313, at 628.

317. *Id.* at 630.

318. Gregory M. Prindle, *No Competition: How Radio Consolidation Has Dismissed Diversity And Sacrificed Localism*, 14 FORDHAM INTELL. PROP. & MEDIA & ENT. L.J. 279, 287 (2003) [hereinafter Prindle].

319. *Id.* at 288 (citing Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (codified at 47 U.S.C. §§ 81-121) (repealed 1934)).

to regulate not only radio but also telephone and telegraph industries.³²⁰ The 1934 Act required a government agency to grant the licenses to the stations for a definite and temporary duration and in accordance with the public interest.³²¹ The underlying belief was that the airwaves were a "scarce public resource"³²² entrusted to broadcasters, who "[i]n exchange for the free and exclusive right to exploit their licensed channels of the public radio frequency spectrum, were granted a trusteeship of such and were required to air programming that served the 'public convenience, interest or necessity.'"³²³

The FCC "interpreted the public trustee doctrine as requiring that broadcast stations 'be operated as if owned by the public . . . [a]s if people of a community should own a station and turn it over to the best man in sight with this injunction: Manage this station in our interest.'"³²⁴ Broadcasters were then "to familiarize themselves with the needs and interests of their communities."³²⁵ Additionally, the "trusteeship model did not equate the public interest with economic competition . . . the FCC [granted] licenses [on such grounds] only if there was a 'reasonable expectation that [such] competition may have some beneficial effect.'"³²⁶ Therefore, "economic efficiency could only factor into the equation as a supporting force, not a guiding principal."³²⁷

In addition, as part of the trusteeship doctrine to protect the public's best interest, the FCC, "believed that regulating local and national radio ownership was the best method of promoting competition, diversity, and localism in the radio market."³²⁸ Thus, the FCC began placing limits on radio ownership "to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming and to safeguard against undue concentration of economic power."³²⁹ The FCC established that "local residence compliments the statutory scheme and [its] allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accord[ed] with the goal of diversifying control of broadcast

320. *Id.*

321. *Id.*

322. Bednarski, *supra* note 310, at 277.

323. Anthony E. Varona, *Out Of Thin Air: Using First Amendment Public Forum Analysis To Redeem American Broadcasting Regulation*, 39 U. MICH. J. L. REFORM 149, 151 (2006) [hereinafter Varona] (citing Communications Act of 1934, ch. 652, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-615, 313 (2000))).

324. *Id.*

325. Bednarski, *supra* note 310, at 278.

326. *Id.* at 279.

327. *Id.*

328. Prindle, *supra* note 318, at 272.

329. *Id.*

stations.”³³⁰ To the FCC, media consolidation subverted the uninhibited marketplace of ideas,³³¹ which would be presented by diversified ownership and attention to local interests.³³²

However, during the early 1980s, there was an ideological shift in beliefs as to what would best serve and meet the needs of the public over the radio airwaves. “Up until the early 1980s, FCC policy basically aimed to restrict ownership concentration both locally and nationally . . . [t]he presumption was relentlessly against concentration and toward maximizing the number of independent media voices.”³³³ The trusteeship model was soon replaced with the marketplace model, which was premised on the belief that the public interest requirement could best be met by market forces.³³⁴ Marketplace ideology rejected the scarce air waves’ theory under the trusteeship model because, under the marketplace model, the view was that all resources, including the air waves, were scarce.³³⁵ Like other resources, it was assumed that the efficient use of air waves would best be served by the unregulated operation of the laws of supply and demand.³³⁶ As a result, most proponents of the marketplace model believed that deregulation, including deregulation of media radio ownership, was the most effective means of ascertaining and meeting public demand.³³⁷ Such demand turned primarily on consumption habits and in treating radio content as a consumer good.³³⁸

Many scholars, including Owen Fiss, have determined that the theory behind the marketplace model is based on erroneous assumptions and ideological flaws, and that its adoption has led to less diversity and com-

330. *Id.* at 316 (quoting Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965)).

331. See Naomi Mezey & Mark C. Niles, *Screening The Law: Ideology And Law In American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 179–181 (2005).

332. Varona, *supra* note 323, at 161; see also Prindle, *supra* note 318, at 287–88.

333. Edwin C. Baker, *Media Concentration: Giving Up On Democracy*, 54 FLA. L. REV. 839, 869 (2002) [hereinafter Baker, *Media*].

334. Bednarski, *supra* note 310, at 279.

335. *Id.* at 279–80.

336. See R. Randall Rainey & William Rehg, *Marketplace of Ideas, The Public Interest, And Federal Regulation Of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1937 (1996) [hereinafter Rainey] (discussing how the public interest is best served when the exchange of critical information, and discussion and debate are mediated by the unregulated operation of the law of supply and demand).

337. *Id.* (also discussing how the principle assumptions of a deregulated market policy is based on the idea that an unregulated telecommunications market is best suited to ascertain and meet what is in the public interest, and therefore, will respond most effectively to the public’s desire for public affairs information and debate).

338. *Id.* at 1937–38; see Christina S. Drale, *Communication Media in a Democratic Society*, 9 COMM. L. POL’Y 213, 224 (2004) (the marketplace model considers media a market commodity which is divided into four units of trade: companies, patents, frequencies and licenses).

petition, not more.³³⁹ Other scholars have also pointed out that, "[the market model assumes that] commercial market forces are pre-political and ideologically neutral; that the marketplace of ideas [as expressed through the media] is open and readily accessible to advocates of diverse or controversial issues of public interest."³⁴⁰ In a capitalist society, the public debate is "dominated by those who are economically powerful. The market . . . does not assure that all relevant views will be heard, but only those that are advocated by the rich, [and can market a product of mass appeal will attract advertisers, which dominate the programming message]."³⁴¹

Significantly, the marketplace model which is largely premised on meeting the demands of consumers and on consumption theory, also fails to take into account the ways in which corporate-controlled mass media influences consumer demand. "Consumption is managed by the mass media's capacity to convey imagery and information across vast areas to ensure a production of demand. Goods are increasingly sold by harnessing symbols."³⁴² While these symbols and "signs seem to come . . . from nowhere—across radio waves, fibers, unseen cables, and invisible microwaves and lasers . . . These images do, however, come from somewhere, and increasingly they come from fewer and fewer places,"³⁴³ due to corporate conglomeration and control of many media outlets.

Although the power of media is widening, the power base has consolidated since the adoption of the marketplace model. In 1981, "twenty corporations controlled most of the business of the country's 11,000 magazines, but only five years later that number had shrunk to six corporations . . . [and] . . . despite 25,000 media outlets in the United States, twenty-nine corporations control most."³⁴⁴ As a result, "mass media . . . and the corporate restructuring and commodification of urban space have made street corners and their speakers invisible, inaudible and obsolete as forums and agents of political dialogue . . . More of the texts we encounter in everyday life are the products of corporate marketing departments than the creations of individual authors."³⁴⁵ The model marketplace theory then "relies upon opinions, beliefs, tastes and habits already formed and presumed legitimate . . . It is inherently reactive and conservative."³⁴⁶

With respect to the Telecommunications Act, despite the questionable assumptions of the model marketplace theory, ultimately, the concern for diversity of ownership and attention to local interest, which were of

339. See Fiss, *supra* note 289.

340. See Rainey, *supra* note 336, at 1937.

341. Fiss, *supra* note 289, at 1412–13.

342. Coombe, *Objects*, *supra* note 21, at 1862–63.

343. *Id.* at 1863.

344. *Id.*

345. Coombe, *Reflections*, *supra* note 64, at 1038.

346. Drale, *supra* note 338, at 233.

considerable importance under the trusteeship model, were replaced. The secondary consideration under the trusteeship model—economic efficiency and competition—became the decisive standard under the new marketplace theory. The new model essentially became that as long as there is economic competition the rest will fall into place.³⁴⁷ As a result, less focus was placed on diversity in ownership or on viewpoint diversity.³⁴⁸ In fact, “now as long as competition exists, wide dispersal of ownership is seen as unimportant in itself and possibly inefficient.”³⁴⁹

Some scholars have argued then that with the passage of the Telecommunications Act of 1996, which “relaxed local ownership restrictions, it is difficult to explain why a single entity owning upwards of eight stations in the largest markets would reach out to the smallest groups [within a local community] without the government telling them to do so.”³⁵⁰ For example, when media giants like Clear Channel, Cumulus, Citadel and Viacom were able to purchase multiple radio stations after the Act’s removal of ownership caps on stations, the media companies bought up all of the local stations and consolidated the stations in order to maximize profits.³⁵¹ Although “local stations were supposed to be assets to local communities [and] the ownership rules were designed to keep ownership as diverse as possible . . . all that changed in the 1990’s [with the passage of the Telecommunications Act].”³⁵²

With media conglomerates having no commitment to the idea of the local interest, they “laid off hundreds, decimated community programming and all but standardized play lists across the country . . . Waves of layoffs left all the Clear Channel radio stations [in particular] with no community affairs department,”³⁵³ with individual staff responsibilities doubling, and Clear Channel without a knowledge base of the music industry.³⁵⁴ Prior to the passage of the Act, when music decisions were made at the local level,

the station’s Music Director ha[d] much greater discretion in introducing new artists to his station’s play list . . . If the Music

347. Baker, *Media*, *supra* note 333, at 870.

348. *Id.*

349. *Id.*

350. Prindle, *supra* note 318, at 299.

351. Chang, *supra* note 101, at 441–42.

352. Eric Boehlert, *Radio’s Big Bully*, Salon.com Arts & Entertainment, Apr. 30, 2001, http://archive.salon.com/ent/feature/2001/04/30/clear_channel/print.html [hereinafter Boehlert] (“Radio companies used to be severely constrained from owning . . . too many stations . . . Local stations were supposed to be assets to local communities . . . [However,] . . . President Clinton, pressured by a GOP-controlled Congress, signed into law the Telecommunications Act, which essentially did away with ownership restrictions on radio. Now, just a handful of companies control radio in the 100 largest American markets.”).

353. Chang, *supra* note 101, at 441–42.

354. *Id.* at 442.

Director [wa]s in touch with his market's live music scene and [knew] which bands [we]re creating a local stir and selling out shows, he [could] incorporate them into his station's play list confident that such a move w[ould] attract rather than send away listeners.³⁵⁵

With Clear Channel maximizing profits by, among other things, downsizing, their stations, for the most part, were now overseen and programmed by regional programmers instead of local.³⁵⁶ This led to further movement away from the local interests of the listening community.

In addition, for increased profitability, some stations even replaced live local disc jockeys, who were key to the radio industry because they "understood local tastes and intricacies,"³⁵⁷ with prerecorded announcers.³⁵⁸ In the late 1990s, such stations adopted software that allowed disc jockeys to "voice track" or "cyberjock" their shows.³⁵⁹ Voice tracking or cyberjocking allowed disk jockeys to "spend a few minutes taping their short sound bites."³⁶⁰ A computer would then patch together their show by combining the pre-recorded vocal drops, with listener calls,³⁶¹ "songs, promos, sound effects and commercials stored on a hard disk,"³⁶² which would then be sent out to other conglomerate owned stations in other local and regional areas.³⁶³ Cyberjocking and voice tracking allowed Clear Channel (and other media conglomerates) to "cut down the total number of disc jockeys and to spotlight its top talents."³⁶⁴ Hundreds, if not thousands of DJ positions were eliminated by "simply having one company

355. Michael Ortner, *Serving a Different Master-The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139, 158 (2000); see also Neal, *supra* note 316, where notable author and scholar Mark Anthony Neal writes "[i]n the past, for example, if a particular region had 20 radio stations, 20 different program directors (PDs) would likely decide what would be played. In the current environment playlist decisions are now in the hands of a smaller group of PDs, who often cede some of their decision making power to regional and national program directors."

356. See Boehlert, *supra* note 352.

357. Van Alosty, *supra* note 313, at 660.

358. *Id.*

359. Randy Dotinga, 'Good Mornin' (Your Town Here), *Wired News*, Aug. 6, 2002, <http://www.wired.com/news/business/1,54037-0.html> [hereinafter Dotinga].

360. *Id.*

361. Chang, *supra* note 101, at 442.

362. Dotinga, *supra* note 359.

363. Randy Dotinga writes, "[t]hanks to advances in audio technology and pioneering work by Clear Channel Communications, an epidemic of digital fakery has struck the radio industry. Only the listeners are live and local at many radio stations, and Clear Channel is gambling that nobody will notice. Or care." Dotinga, *supra* note 359.

364. *Id.*

jock send out his or her show to dozens of sister stations. Thanks to clever digital editing, the shows still often sound[ed] local.”³⁶⁵

Scholar Adam Van Alstyne has explored the ways in which radio consolidation allowed the few media conglomerates to generate significant advertising revenue, to enhance a station’s ability to control what the public hears on the radio or at a live concert, and to facilitate “more coercive behavior by parent companies [of radio stations] against labels and artists.”³⁶⁶ Specifically, station owners could “exert pressure on labels, and in turn the label’s artists, through listener appreciation concerts, . . . [which] . . . showcase the station rather than a particular band . . . [and] . . . usually involve several play-list acts, each performing only a few songs.”³⁶⁷ Parent companies of the stations also knew that they could “leverage their access to the airwaves to coerce labels and artists in the form of pay-for-pay and play—for—play because they [the labels and artists] have no comparable means to promote their material.”³⁶⁸

Lastly, decreased music diversity resulted from consolidation because “[i]f one owner holds most of the stations in a particular music format for a region, it is safer for the station to remain consistent in its play list. By only adding a few new songs, the station does not risk offending an advertiser.”³⁶⁹ As a result, “[w]ith few open slots for new music on tightly controlled playlists, it is increasingly difficult for new artists to enter the airwaves . . . [u]pstart [artists] have difficulty attracting audiences outside their hometown because they do not get airplay.”³⁷⁰ The state of affairs left by the passage of the Telecommunications Act led Thomas Lee, International President of the American Federation of Musicians to remark,

[t]he unfortunate fact is that radio deregulation has not fostered innovation, competition or programming diversity. Instead, it has reduced the number of radio station owners across the nation and in each geographical market . . . has enabled those stations to flood the airwaves with the same few ‘hit’ songs that are well-funded and heavily marketed. What gets left off the airwaves is everything else—music that is varied, innovative, independent, less well-funded or only locally known.³⁷¹

365. Boehlert, *supra* note 352.

366. Van Alstyne, *supra* note 313, at 653.

367. *Id.* at 645.

368. *Id.* at 653.

369. *Id.* at 660.

370. *Id.* at 659.

371. See Future of Music Coalition home page, *Radio Deregulation: Has It Served Citizens and Musicians?* <http://www.futureofmusic.org/research/radiostatements.cfm> (last visited Aug. 25, 2006).

As is evident by the unilateral sound of rap music that dominates the air waves currently, it is obvious that hip hop and its artists have felt the effects of media conglomeration. According to author, Jeff Chang, the power shift away from hip hop culture's true believers and captains of the industry in favor of the media monopolies occurred during the mid-1990s.³⁷² An example of such negative effects of such shift in hip hop culture is the once thriving, pre-corporate (pre-Telecommunications Act) adulterated, hip hop scene at KMEL-FM, one of the first leading hip hop stations in the country, in the San Francisco Bay Area.³⁷³ KMEL-FM was considered, by the local community, the "people's station" because it was engaged in the social issues of the San Francisco community,³⁷⁴ and was "located in an area blessed with one of the strongest campus and community radio networks in the country, as well as one of the most fiercely competitive commercial markets in the country."³⁷⁵

The station brought "local California artists and college and community DJs to the station, and while most were never offered full time DJ positions, they brought their listeners with them, and pushed KMEL to play cutting-edge music and offer community-oriented programming."³⁷⁶ Although much smaller than the major cities of Chicago, Miami, and Los Angeles, the Bay Area became the number two music station in the fourth-largest radio market in the country, commanding the largest radio audience among the highly coveted 18-to-34 demographic.³⁷⁷ It thrived with its music and talk shows, community oriented programming, and its pioneering Summer Jam concerts, which were soon imitated throughout the country.³⁷⁸ Moreover, in the Bay Area, competing stations often "deferred to the mix show DJs to break new artists, resulting in national hits for local artists . . . the result was a massive growth in the local urban radio

372. Chang, *supra* note 101, at 440.

373. During the late 1980s and early 1990s, as a result of the explosion of hip hop on shows like *Yo! MTV Raps*, Top 40 radio stations were discovering that rap had multi-cultural appeal. KMEL was one of the first Top 40 cross-over pop stations in the nation to abandon its pop format, embrace rap, and target young multi-racial audiences with hip hop, dance, and freestyle rapping. http://www.blinkbits.com/en_wikifeeds/KMEL-FM (last visited Aug. 25, 2006); *see also* <http://en.wikipedia.org/wiki/KMEL> (last visited Aug. 25, 2006).

374. <http://en.wikipedia.org/wiki/KMEL> (last visited Aug. 25, 2006) (discussing the ways in which KMEL, through its programs like Street Knowledge and Street Soldiers with radio personalities Davey D and Cameron Paul, successfully brought social issues that confronted the Bay Area urban community to the forefront).

375. Chang, *supra* note 101, at 440.

376. *Id.* at 441.

377. <http://en.wikipedia.org/wiki/KMEL> (last visited Aug. 25, 2006)

378. <http://www.daveyd.com/summerjam.html> (last visited Aug. 25, 2006) (briefly discussing KMEL-FM's Summer Jam outdoor concerts that began in 1986 and featured the latest rap and hip hop artists and that were, due to their success and demand in the Bay Area, replicated throughout the country).

audience.”³⁷⁹ Also during the 1980s, a thriving network of independent labels (“indies”) and regional distributors that were closely connected to the local market and talent, reaped considerable success with rap artists, more so than the further removed and distant major record companies.³⁸⁰ In fact, “in 1996, for the first time, and probably the last, indie record label market share had peaked and taken together actually outsold all the major labels.”³⁸¹

With the passage of the Telecommunications Act, San Francisco’s two most popular and competing (for developing and showcasing new talent and being up on local community affairs) radio stations, KMEL and KYLD, were both bought out by the same company and its resources consolidated.³⁸² With the national trend being towards fewer songs, KMEL and KYLD’s playlists now “looked so similar that, on any given week-night, more than half of each stations . . . countdowns might be the exact same songs.”³⁸³ With conglomeration, “specialty shows were quietly eliminated . . . local personalities got fired . . . community affairs programming was severely reduced . . . [and] . . . with narrowing playlists, local, new and independent [hip hop] artists—the kind of folks unable to compete with six-figure major label marketing budgets—inevitably got squeezed out.”³⁸⁴ As the tide turned, “even mixshow DJs—once hired to be the tastemakers and to break a record—increasingly found their mixes subjected to executive approval.”³⁸⁵ And for independent labels the picture was equally grim. After the passage of the Act, they simply were unable to compete with the expensive advertising costs for radio air play of their talent.³⁸⁶ As a result,

379. Chang, *supra* note 101, at 441.

380. Dyson, *supra* note 84, at 66.

381. Chang, *supra* note 101, at 444; *see also* Rose, *supra* note 5, at 6–7.

382. When the then parent company to KMEL, Evergreen Media, purchased KYLD in 1996 it essentially ended the ratings war between KMEL and KYLD. After a series of subsequent corporate mergers which culminated in a whopping \$24 billion deal in 1999, both stations KMEL and KYLD passed from AMFM Inc. into the hands of Clear Channel. This series of changes resulted ultimately in a format change of KMEL to prevent cannibalisation of sister station KYLD, *see* <http://en.wikipedia.org/wiki/KMEL> (last visited Aug. 25, 2006).

383. Chang, *supra* note 101, at 442.

384. *Id.* at 443.

385. *Id.*

386. Wendy Day of Rap Coalition’s Intelligence Program writes, “Radio is a very important component in rap record sales for a major label or distributor. It can mean the difference between being an underground artist hoping to sell units, or an international superstar able to transcend into film, television, and lucrative commercial endorsements and touring opportunities.” Wendy Day, *Radio*, <http://www.murderdog.com/august%5Frapcointelpro/radio.html> (last visited Aug. 25, 2006). According to Mark Anthony Neal, in quoting language from the Future of Music Coalition (FOM), a not for profit think tank based in Washington, D.C., which circulated a report, culminating its research on the effect of radio station ownership on musicians and the public, “[m]ajor record labels have large promotional budgets. Because the promotional money is there,

their sales decreased and they either closed down or were bought out.³⁸⁷ With the shrinking space available on the radio and with independent labels closing shop, it became increasingly difficult for new artists to be heard.³⁸⁸

As the previous section of this Article has established, corporations which dominate the media, have heavily marketed (to influence consumer demand), produced and perpetuated, the gangsta image by, among other things, playing gangsta rap lyrics, almost to the exclusion of other alternative voices that would contest such lyrics or image. The passage of the Telecommunications Act of 1996 has led to the development of huge corporate media conglomerations in radio that in turn control the radio airwaves and its content. The Act has made it virtually impossible for alternative voices in rap (either by the gangsta rappers themselves through their alternative "positive" tracks or by other "positive" rap artists) to be heard on the radio, since corporate conglomerates are less concerned with diversity in ideas but in meeting market created consumer demand for such lyrics.³⁸⁹

radio companies have an incentive to make access to the airwaves more scarce, and thus more expensive." Neal, *supra* note 316. According to Neal, "among the major-label conglomerates, the competition for the airwaves is fierce, as air play directly affects sales." A copy of FOM's report can be downloaded at <http://www.futureofmusic.org/research/radiostudy.cfm> (last visited Aug. 25, 2006).

387. Chang, *supra* note 101, at 444; see also Prindle, *supra* note 318, at 309 ("When independent labels forgo seeking expensive radio airplay, they guarantee lower sales and limit the ability of small labels to expand.").

388. Mark Anthony Neal explains, "with intense consolidation in both the recording industry and commercial radio, artists are squeezed out of a hearing at both the labels and radio stations. While independent labels remain an option for artists, the reality is that the four major label conglomerates—the four industry gatekeepers—are responsible for more than 80 percent of what makes it on commercial radio play lists." Neal, *supra* note 316.

389. The rap songs of rappers considered to be more positive, such as Common, Talib Kweli, Mos Def, The Roots and Dead Prez are not played on the radio nearly as much as those of the gangsta rappers. Moreover, rappers who do not fit the gangsta mold, such as Jin, an Asian American rapper, who came to the hip-hop forefront after winning several rap contests on BET, are simply squeezed out for lack of promotion. See Alice Suh, *Jin: Freestyling To The Top*, http://www.ewwoman.com/feature_december.htm (last visited Aug. 23, 2006) ("As the first Asian American rapper to be signed to a major record label, Ruff Ryders . . . [Jin's] the best freestyle rapper that I've seen . . . [h]e's just able to pull so many different elements out of the top of his head."); but see Nolan Strong, *Jin Says Rap Career Is Over, Records 'I Quit'*, <http://www.allhiphop.com/hiphopnews/?ID=4412> (last visited Aug. 25, 2006) (the Ruff Ryders label failed to capitalize on Jin's initial appeal, and "after several delays, his debut [album] THE REST IS HISTORY finally saw the light of day, but suffered due to lack of promotion."). Similarly, former producer turned rapper, Kanye West struggled to break into the rap industry "[d]ue to his appearance and overall style . . . because he was not a former street hustler and he did not wear stereotypical hip-hop apparel. He was therefore not marketable the way other rappers were." http://en.wikipedia.org/wiki/Kanye_west (last visited Aug. 25, 2006). Interestingly enough, some alternate rap (Christian Rap) voices are growing, despite lack of radio air play. See <http://www.gospelengine.com/> (last visited Aug. 25, 2006); see also Tania Padgett, *Holy*

For producer Buckwild, a Bronx native and producer of numerous successful commercial and indie songs and artists, the hip hop game is creatively dying, particularly in New York, because of

[the] one-artist saturation thing: Whoever's hitting it at one time runs the whole game. There's no diversity. The classic time for hip-hop was '94 and '95 when you had ten different artists running the game. You had Wu-Tang, Nas, Mobb Deep, Biggie, Puffy, and a Tribe Called Quest. You had mad different flavors because no two artists were the same.³⁹⁰

However, now, according to Buckwild, "you have everybody that sounds the same . . . We are definitely missing that artistry, producer and rapper-wise, and a lot of artists haven't been discovered yet . . . when these artists start to surface, we're going to have a renaissance wand, there's going to be a big change in the game."³⁹¹

According to the Prometheus Radio Project, a non-profit organization founded by a small group of radio activists in 1998, "a free, diverse, and democratic media is critical to the political and cultural health of our nation, yet we see unprecedented levels of consolidation, homogenization, and restriction in the media landscape."³⁹² As a result, the organization has committed to working toward "a future characterized by easy access to media outlets and a broad, exciting selection of cultural and informative media resources."³⁹³ Others have sought to expose alternative voices in hip hop and local talent by developing alternate radio stations using low band radio airwaves.³⁹⁴ Moreover, some rappers have turned to the internet³⁹⁵ or satellite radio to distribute some of the music that they would like to have, but often is not, played on the corporate controlled radio air waves.³⁹⁶

Hip-Hop! Rap Begins To Take Root In Religion, 2006 WLNR 12421252. In fact, Christian rap was just given a music category on the Grammy's, see http://www.gospelcity.com/dynamic/industry-articles/industry_news/332 (last visited Aug. 25, 2006).

390. Chris "Milan" Thomas, *Buckwild: Still Diggin*, www.allhiphop.com/features/?ID=1434 (last visited Aug. 25, 2006); see also Pough, CHECK IT, *supra* note 14 for a discussion of female rappers and female R. & B groups that were still considered to be a part of hip hop culture that garnered national attention in the early 1990s also.

391. *Id.*

392. www.prometheusradio.org/about_us (last visited July 11, 2006).

393. *Id.*

394. <http://www.hiphopslam.com/scratch/pirate%5Ffuckin%5Fradio.html> (on illegal "pirate radio" stations).

395. See Eben Gregory, *Ludacris Lands Show On XM Satellite Radio*, Sept. 29, 2005, <http://www.allhiphop.com/Hiphopnews/?ID=4887> [hereinafter Gregory]; see also <http://www.digitalmusicnews.com/results?title=MySpace> (last visited Aug. 25, 2006); <http://www.hiphopdx.com/index/news/id.3905/p.all/print.true> (last visited Aug. 25, 2006).

396. Gregory, *supra* note 394. Additionally, rapper Snoop Dogg hosts his own show on XM satellite radio, http://www.xmradio.com/programming/channel_guide.jsp?ch=65 (last visited Aug. 20, 2006).

In addition, some artists have introduced rap, and by extension, hip hop culture by utilizing a completely different media venue.³⁹⁷ In the recent 2006 Tribeca Film Festival, a young Black male directed and produced a movie in which rap was used to document the ways in which several Black and Latino male and female youths, featured in the film, adjusted to real life issues such as abortion and addiction to drugs.³⁹⁸ Moreover, to Bay area filmmaker, Kevin Epps, the films that he produces show that hip hop is more than about the rap music, but about a way of life that he chronicles in the neighborhood in which he grew up—Hunter's Point.³⁹⁹ He says that in his local community of Hunter's Point, he tries to educate the kids in his neighborhood about the fact that all the bling-bling in the music videos and rapped about in the rap lyrics is for the most part not real, and that there are no "(music) studio gangsters here."⁴⁰⁰ While the pimps, violence and hustlers are real in Hunter's Point, he dissuades the children from focusing on or glorifying those realities (as the current market driven rap lyrics and images do) but encourages them to use hip hop as a source of interrogation, inspiration, and empowerment.⁴⁰¹

EPILOGUE

Because the Telecommunications Act of 1996 has led to the corporate conglomeration of radio, it, ultimately, has led to the limiting of discursive space within the hip hop community. Rappers and others have attempted to pry open that space by other means, and by, what some would characterize as "small" acts of resistance. These acts of resistance are

397. In addition, prior to comedian Dave Chappelle's infamous disappearance from public view after signing a \$50 million contract with Comedy Central, a cable network channel, see *On the Beach with Dave Chappelle*, <http://www.time.com/time/arts/article/0,8599,1061415,00.html> (last visited Aug. 26, 2006), Dave Chappelle hosted a block party in Bedford Stuyvesant, an urban area in Brooklyn, New York, which he documented in his movie, *DAVE CHAPPELLE'S BLOCK PARTY*, and where he featured "positive" rappers Dead Prez, Mos Def, Common, Talib Kweli, as well as female R & B singers, Jill Scott and Erykah Badu. For a brief discussion of the film, see <http://www.imdb.com/title/tt0425598/> (last visited Aug. 23, 2006) and the positive hip hop artists, see Wesley Morris, *Dave Chappelle's Block Party Movie Review*, THE BOSTON GLOBE, Mar. 3, 2006, available at <http://www.boston.com/movies/display?display=movie&id=8674>; Roger Ebert, *Dave Chappelle's Block Party*, Mar. 3, 2006, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20060302/REVIEWS/60301011>.

398. http://www.tribecafilmfestival.org/tixSYS/2006/filmguide/event_np_summary.php?EventNumber=2740 (last visited Aug. 23, 2006).

399. Brandon Edwards, *Kevin Epps: On Point*, <http://www.allhiphop.com/features/?ID=1432> (last visited Aug. 23, 2006).

400. Joshunda Sanders, *Kevin Epps Gets Right To The Point*, S.F. CHRON., June 25, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/06/25/DD250967.DTL>.

401. *Id.*

important given the limited space in which there is to maneuver. Whether in small spaces on their albums, or in other media outlets, such as television, film, satellite radio or the internet, rappers and others have begun to expand, yet again, the notion of the public sphere and where and how subverted or counter-hegemonic discourse may occur. More space, however, must be made for those that have not reaped the same visibility or financial reward as gangsta rappers, given the access provided to them on the radio airwaves. In order to achieve the democratization of media and to achieve the participatory democracy that Habermas and others envisioned, the Telecommunications Act should encourage, rather than limit, such discourse. The Telecommunications Act has stifled this process of dialogic democracy and has served to further marginalize the alternative or counter-hegemonic voices of women and rappers, (including gangsta rappers) that would serve to challenge the views, beliefs, interests, or cultural meanings inscribed by the corporate media conglomerates.