

5-2018

## Lyrics for Lockups: Using Rap Lyrics to Prosecute in America

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### Recommended Citation

Carter, Briana (2018) "Lyrics for Lockups: Using Rap Lyrics to Prosecute in America," *Mercer Law Review*. Vol. 69 : No. 3 , Article 14.

Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol69/iss3/14](https://digitalcommons.law.mercer.edu/jour_mlr/vol69/iss3/14)

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## Comment

# Lyrics for Lockups: Using Rap Lyrics to Prosecute in America\*

### I. INTRODUCTION

Bob Marley once sang, “I shot the sheriff, but I did not shoot the deputy.”<sup>1</sup> Yet, he never went to jail for shooting that sheriff (possibly because he did not shoot the deputy). Instead, this line became known as the starting phrase of one of his most popular songs.<sup>2</sup> While it may make sense to some why Marley’s lyrics were art and not a confession to shooting his hometown sheriff, in some states, an artist’s lyrics can be used as evidence to prosecute.<sup>3</sup> More specifically, states have differed on the admissibility of a rap artist’s lyrics as evidence for prosecution.<sup>4</sup> These differences range from not being able to use the rap lyrics at all,

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\* The Author would like to thank her mother, Lovie Cooper, for her constant support and encouragement. Additionally, she wishes to thank Professor Sarah Gerwig-Moore, Mercer University School of Law, for the advice and direction she gave throughout the writing process.

1. BOB MARLEY AND THE WAILERS, *I SHOT THE SHERIFF* (Tuff Gong 1973). Victoria Walker discusses how the famous line by Bob Marley is not taken literally and is instead viewed as a part of a piece of art. Victoria Walker, *A State Court Says Rap Lyrics Can’t Be Used As Evidence In A Criminal Trial*, NPR GA. PUB. BROAD. (Aug. 6, 2014), <http://www.npr.org/sections/codeswitch/2014/08/06/338303043/a-state-court-says-rap-lyrics-cant-be-used-as-evidence-in-a-criminal-trial> (last visited Mar. 1, 2018).

2. “I Shot the Sheriff” is among a list of 100 songs on a list compiled in a Complex article titled *100 Best Bob Marley Songs*. Rob Kenner, *The 100 Best Bob Marley Songs*, COMPLEX (Aug. 1, 2017), <http://www.complex.com/music/the-best-bob-marley-songs/> (last visited Mar. 1, 2018).

3. See generally *People v. Olguin*, 31 Cal. App. 4th 1366 (1994); *United States v. Wilson*, 493 F. Supp. 2d 460 (E.D.N.Y. 2006); *United States v. Stuckey*, 253 F. App’x 468 (5th Cir. 2007); *Holmes v. State*, 129 Nev. 567 (2013).

4. *Olguin*, 31 Cal. App. 4th at 1373 (holding that the lyrics used against the defendant were not unfairly inflammatory); *State v. Cheeseboro*, 346 S.C. 526, 547 (2001) (holding that the rap lyrics used against the defendant were unfairly prejudicial).

the ability to use the rap lyrics in certain cases, to the ability to use the rap lyrics in any instance.<sup>5</sup> Further, as the issue has grown, prosecutors face varying challenges from defendants on evidentiary grounds, and courts vary on how they interpret the Federal Rules of Evidence in reference to these challenges.<sup>6</sup>

So, why the stark difference from state to state? Some states express concerns with tampering with an individual's First Amendment<sup>7</sup> rights by using rap lyrics to prosecute.<sup>8</sup> After all, the First Amendment literally says, "Congress shall make no law . . . abridging the freedom of speech."<sup>9</sup> Critics argue that using rap lyrics to prosecute a defendant abridges the freedom of speech by virtually stopping artists from writing lyrics (or certain lyrics).<sup>10</sup> The basic principal is that if someone knows their rap song or lyrics can be used against them at a later date, they will be less likely to express themselves in that way.<sup>11</sup> Allowing courts to use rap lyrics to prosecute with no interference from Congress on these constitutional grounds stifles and abridges the freedom of speech.

Adding fuel to the fire is a recent decision by the Supreme Court of the United States on a similar issue.<sup>12</sup> In *Elonis v. United States*,<sup>13</sup> Anthony Douglas Elonis faced charges for what the prosecution considered threats to his ex-wife and co-workers. The issue arose around Elonis' self-styled rap lyrics posted on Elonis' Facebook page.<sup>14</sup> Elonis began making the posts after a series of events in his home and work life.<sup>15</sup> Elonis took to Facebook to express his anger and frustrations with his situation using poetic rap-style posts to convey his thoughts.<sup>16</sup> For example, he separated

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5. See generally *Stuckey*, 253 F. App'x 468; *United States v. Herron*, No. 10-CR-0615, 2014 WL 1871909 (N.Y. App. Div. 2014); *Cheeseboro*, 346 S.C. 526.

6. See, e.g., *Stuckey*, 253 F. App'x 468; *Herron*, No. 10-CR-0615, 2014 WL 1871909; *Cheeseboro*, 346 S.C. 526.

7. U.S. CONST. amend. I.

8. Deborah C. England, *Rap Lyrics in Evidence: Is it a Crime to Rhyme?*, NOLO, <http://www.criminaldefenselawyer.com/resources/rap-lyrics-evidence-is-it-a-crime-rhyme.htm> (last visited Mar. 1, 2018).

9. U.S. CONST. amend. I.

10. England, *supra* note 8.

11. *Id.* According to England, the use of rap lyrics to prosecute will "chill" these types of expressions. *Id.*

12. *Elonis v. United States*, 135 S. Ct. 2001 (2015).

13. 135 S. Ct. 2001 (2015).

14. *Id.* at 2002.

15. When Elonis' wife and kids left him, he faced accusations of sexual harassment at his workplace, and eventually he was without a job. See *id.* at 2004–08.

16. *Id.* at 2002.

his sentences into stanzas,<sup>17</sup> used exaggerative language, and even changed his name on Facebook to “Tone Dougie.”<sup>18</sup> When faced with the indictment, Elonis contended that the charges against him were inappropriate because he did not actually intend to threaten his victims and that this was a violation of his First Amendment right to freedom of speech.<sup>19</sup>

While Elonis’ ex-wife and former employer saw him as a threat, Elonis compared himself to Eminem.<sup>20</sup> For example, Elonis wrote:

Fold up your [protection-from-abuse order] and put it in your pocket  
Is it thick enough to stop a bullet?  
Try to enforce an Order  
[T]hat was improperly granted in the first place  
Me thinks the Judge needs an education on true threat jurisprudence  
And prison time’ll add zeros to my settlement.<sup>21</sup>

Elonis’ degrading and violent message is somewhat comparable to Eminem’s discussion of his relationship with his ex-wife in various songs.<sup>22</sup> For example, in the best-selling single, “Love the Way You Lie,” featuring Rihanna, Eminem wrote:

You swore you’d never hit ‘em, never do nothin’ to hurt ‘em  
Now you’re in each other’s face  
Spewin’ venom in your words when you spit ‘em  
You push, pull each other’s hair, scratch, claw, bit ‘em.<sup>23</sup>

In this instance, similar to Elonis, Eminem speaks of violence and turmoil in a relationship. However, unlike Elonis, Eminem was not prosecuted for making threats or admitting to past instances of abuse.<sup>24</sup>

17. A stanza is a group of lines forming the basic recurring metrical unit of a poem or verse. *Stanza*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003).

18. *Elonis*, 135 S. Ct. at 2006–07.

19. *Id.*

20. *Id.* at 2007 (“At [his] trial, Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his ex-wife.”).

21. *Id.* at 2006.

22. Jackie Martell, *Rumored Reconciliation! The Top 10 Eminem Lyrics About His Rocky Relationship With Ex Kim (DETAILS)*, GLOBAL GRIND, <https://globalgrind.cassiuslife.com/3894324/eminem-lyrics-about-relationship-with-ex-kim-mathers-details/> (last visited Mar. 2, 2018) (detailing several songs with lyrics as examples that chronicle Eminem’s relationship issues mentioned by Eminem in various songs).

23. EMINEM & RIHANNA, *LOVE THE WAY YOU LIE* (Interscope Records 2010).

24. In a *People Magazine* article detailing the relationship between Eminem and his ex-wife, Kim, there are many details about the vulgar and threatening lyrics in the songs

Instead, Eminem was awarded with several weeks on the Billboard Hot 100.<sup>25</sup> It seems quite unfair that Eminem is allowed to use this type of lyrics to express himself while Elonis would not get the same freedom. The Supreme Court of the United States understood this point. The Court held that the rap-styled posts were not true threats<sup>26</sup> because Elonis did not have the subjective intent<sup>27</sup> to issue a serious threat. While Elonis' language may have been lude and vulgar, this type of speech still deserves protection, as it could lead to the elimination of an entire genre of artistic expression. Even though the problem may seem to be resolved from here, this defense would only work in instances where the defendant is being prosecuted for an actual threat. Because prosecutors have used rap lyrics for other reasons,<sup>28</sup> the Supreme Court's decision has not resolved the full issue.

The other side of the First Amendment argument is that the lyrics are not protected speech.<sup>29</sup> Although the First Amendment protects freedom of speech, the government must still provide some safeguards for instances when this speech interferes with the safety and comfort of citizens.<sup>30</sup> These critics argue that rap lyrics can interfere with this safety and comfort by issuing threats.

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where Eminem wrote about Kim. However, the article never mentions Eminem being arrested for these lyrics. Jordan Runtagh, *Inside the Troubled Life of Hailie Jade Scott's Mother, Eminem's Ex Kim Scott*, PEOPLE, <http://people.com/music/eminem-daughter-hailie-mother-kim-scott-story/> (last visited Feb. 27, 2018).

25. *Love the Way You Lie*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Love\\_the\\_Way\\_You\\_Lie](https://en.wikipedia.org/wiki/Love_the_Way_You_Lie) (last visited Mar. 1, 2018).

26. *Watts v. United States*, 394 U.S. 705, 708 (1969). A true threat is an area of speech that is not protected by the First Amendment. *Virginia v. Black*, 538 U.S. 343, 360 (2003) (holding that the essential elements of a true threat are (1) the speaker intended to communicate the threat, and (2) there was a serious intent to cause harm).

27. The Court found that a subjective intent (and not an objective intent) was necessary. A subjective intent means that the defendant is conscious of his wrongdoing and actually intends for his speech to be viewed by others as a serious threat to cause harm. That was not the intention of Elonis in this case, as he saw himself as a self-proclaimed rapper using the vulgar and violent language to express his disdain of his current circumstances. See *Elonis*, 135 S. Ct. at 2009.

28. As mentioned earlier in this Comment, rap lyrics can be offered as an actual threat, a confession, or to show motive or intent.

29. Critics, such as the lawyers in *Elonis*, argue that these rap lyrics are not protected because they are threats. See generally *Elonis*, 135 S. Ct. at 2001. This argument typically arises in a case, such as *Elonis*, where the lyrics are the actual crime.

30. *Black*, 538 U.S. at 360.

In a *Rolling Stone* article titled *Rap on Trial: Why Lyrics Should be Off-Limits*,<sup>31</sup> author Erik Nielson discusses the potential issues that arise when a jury receives lyrics as evidence.<sup>32</sup> For example, Nielson draws on his experience of testifying in the case of Anthony Murillo. The prosecutors accused and convicted Murillo's friend, Shane Villalpando, of the sexual assault of two female students. According to prosecutors, Murillo then threatened these two female students in a song he posted online, "A Moment of Life (Remix)". Prosecutors pointed to the fact that Murillo referred to the two students by name and said, "You're gonna end up dead . . . because I'm coming for your head, bitch."<sup>33</sup> After a lengthy battle of the charges being dismissed and then reinstated, the California Court of Appeals "unanimously ruled that a reasonable listener could have understood Murillo's song to convey a serious expression of intent to commit violence against the victims."<sup>34</sup>

While Nielson acknowledged the vulgar and violent nature of the song, he still saw the artistic value in the lyrics as a piece of rap culture.<sup>35</sup> In fact, Nielson actually testified as an expert in Murillo's trial, where Neilson emphasized the unfair prejudicial impact that rap lyrics can have because some jurors lack education on the art form.<sup>36</sup> Nielson described rap lyrics as "complex and slippery . . . often intentionally hyperbolic as well, drawing on the long tradition of boasting and exaggeration."<sup>37</sup>

The other side to this argument is that rap is not a new genre of music in America. The rap industry has existed since the early 1980s.<sup>38</sup> Meaning, as it has developed, the potential jury pools listening to rap as evidence understand how to take the music into consideration. The opposing side argues that the critics of this evidentiary tactic fail to realize that many jurors are aware of the complexity of rap music. This means that the jurors would not be so overwhelmed and shocked by the language and that they would not use the evidence improperly.

31. Erik Nielson, *'Rap on Trial': Why Lyrics Should Be Off-Limits*, ROLLING STONE (May 3, 2017), <http://www.rollingstone.com/culture/rap-on-trial-why-lyrics-should-be-off-limits-w479827> (last visited Mar. 1, 2018).

32. *Id.*

33. *Id.*

34. *Trial date for Orcutt rapper set for June 20*, LOMPOC RECORD (Mar. 9, 2016), [http://lompocrecord.com/santamaria/trial-date-for-orcutt-rapper-set-for-june/article\\_51dbcb41-b22f-594c-a4a6-bbf17185efa6.html](http://lompocrecord.com/santamaria/trial-date-for-orcutt-rapper-set-for-june/article_51dbcb41-b22f-594c-a4a6-bbf17185efa6.html).

35. Nielson, *supra* note 31.

36. *Id.* In some instances, jurors do not understand how rap is often fiction and that rap relies on exaggeration and depictions of violence.

37. *Id.*

38. E. Jerry Persaud, *The Signature of Hip Hop: A Global Perspective*, INT'L J. CRIMINOLOGY & SOC. THEORY 626, 626 (2011).

Aside from the issues flowing from the First Amendment and the possible prejudice artists may face from the jury, the third concern is the most daunting: the issue of race. Rap is a genre predominantly filled with artists who are African-American.<sup>39</sup> Therefore, in most cases where the prosecution uses rap lyrics, the defendant is black.<sup>40</sup> The hesitancy in allowing these lyrics to be used can, therefore, be afforded to not wanting to use this art form to further another sector of the country consisting of predominantly young black men: prison.<sup>41</sup>

A *Daily Beast* article, *Can Rap Lyrics Send You to Jail? If You're a Young Black Male, Yes*,<sup>42</sup> recently discussed the issue in full term. Based on the article, it is clear this issue not only has a huge impact on black people but, specifically, young black males, who make up most of the rap industry. In the article, Erik Nielson discusses how race interplays with the use of rap at trials. According to Nielson, "[f]or as long as there have been people of African descent on American soil, there has been hostility to their creative expressions."<sup>43</sup> In this instance, the creative expression is rap music. From Nielson's viewpoint, the prosecutors who use rap lyrics recognize the issues that come along with this evidence. Nielson claims that prosecutors see the unfair prejudice and the First Amendment issue but put these problems aside because they want the jury to see young black men in a bad light.<sup>44</sup>

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39. As of August 5, 2017, eight out of the top ten Billboard songs were by African-American artists. BILLBOARD, <http://www.billboard.com/charts/rap-song> (last visited Aug. 5, 2017).

40. Vonte Skinner, Deandre Mitchell, and Torrance Hatch are examples of African-American men in cases where the prosecution introduced their rap lyrics. Lewis Beale, *Can Rap Lyrics Send You to Jail? If You're a Young Black Male, Yes*, DAILY BEAST, <https://www.thedailybeast.com/can-rap-lyrics-send-you-to-jail-if-youre-a-young-black-male-yes> (last visited Mar. 1, 2018).

41. According to the NAACP short facts for racial disparity in incarceration in America, [i]n 2014, African Americans constituted 2.3 million, or 34%, of the total 6.8 million correctional population. African Americans are incarcerated at more than 5 times the rate of whites. The imprisonment rate for African American women is twice that of white women. Nationwide, African American children represent 32% of children who are arrested, 42% of children who are detained, and 52% of children whose cases are judicially waived to criminal court. Though African Americans and Hispanics make up approximately 32% of the US population, they comprised 56% of all incarcerated people in 2015. If African Americans and Hispanics were incarcerated at the same rates as whites, prison and jail populations would decline by almost 40%.

*Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited Mar. 4, 2018).

42. Beale, *supra* note 40.

43. *Id.*

44. *Id.*

Aside from Nielson's comments, the article also discusses some of Andrea Dennis' opinions. Similar to Nielson, Dennis also spent part of her career studying the use of rap lyrics in the prosecution of young black men. Dennis recently spoke at Mercer University School of Law's First Annual Black History Month Symposium, titled *Black History Matters: The Purpose and Relevance of Celebrating Blackness in Today's Society*, where she discussed the topic as she did in the article.<sup>45</sup>

Similar to the event, the article focused on Dennis' and Neilson's studies truly illustrating how the use of rap for prosecution is a growing issue that deserves exploration. This Comment will explore the issue by first laying out a brief history of rap music. Following this short history, there will be a discussion of how the issue began and the way the courts have used rap music. Next, this Comment will explore how different states have approached the issue. Finally, this Comment will summarize the issues and propose possible solutions.

#### *A. From Hip-Hop to Handcuffs*

##### **1. Short History of Hip-Hop**

In order to understand the issues created when rap music clashes with the criminal justice system, it is important to understand the history behind rap music. The exact birthday of rap music began sometime in the early- to mid-1970s in the Bronx neighborhood of New York City.<sup>46</sup> It began when disc jockeys (DJs) would talk to the crowd during the extended plays of isolated percussion breaks. This developed into masters of ceremonies or microphone controllers (MCs) talking and rhyming to crowds. These MCs later became known as rappers, and the isolation of percussion laid the ground-work for rap music.<sup>47</sup>

After its start in the 1970s, rap saw huge success in the 1980s. The time period was dubbed the "Golden Age" due to its innovation,

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45. Dennis informed students about some of the same issues discussed in the *Speech on Trial* article. While Dennis shares some of the concerns voiced by Nielson, Dennis discussed how the growing use of lyrics affects the change in how music is dispersed. According to Dennis, rap music is more readily available to prosecutors via sites like YouTube, making it easier for prosecutors to use this tactic. Andrea Dennis, Mercer University School of Law's First Annual Black History Month Symposium: Black History Matters: The Purpose and Relevance of Celebrating Blackness in Today's Society, *The Criminal History of Black Music* (Feb. 17, 2017).

46. *History Network Timeline on Hip-Hop: This Day in History*, HISTORY CHANNEL, <http://www.history.com/this-day-in-history/hip-hop-is-born-at-a-birthday-party-in-the-bronx> (last visited Mar. 1, 2018).

47. David Dye, *The Birth of Rap: A Look Back*, NPR, <http://www.npr.org/templates/story/story.php?storyId=7550286> (last visited Mar. 1, 2018).



introduction of new artists, and the birth of a new form of Black Nationalism.<sup>48</sup> While some rap music fueled block parties, other songs fueled and told the story of the Afrocentric movement.<sup>49</sup>

This focus on Black Nationalism caused trouble for the rap genre as some rappers expressed opposition to the criminal justice system, causing many to categorize the music as pure violence, drugs, and crime. Clarence Lusane said it best when he described the connection between rap music and the genre's image in society.<sup>50</sup> According to Lusane, rap is a product of those trapped in "cycles of violence, destitution and lives of desperation,"<sup>51</sup> meaning rap lyrics often reflect this lifestyle and do not paint the prettiest picture of American life because it shows the voice of alienated, frustrated, and rebellious black youth.<sup>52</sup>

Some do not agree with rappers painting this not-so-pretty picture of life in America. In fact, some do not see the genre as music at all. Since its inception, rap has had naysayers who feel the lyrics do not tell the story of those living a hard and destitute life but, instead, promote and inspire violence in American communities. This was often said of the lyrics rapped by rap legend Tupac Shakur. For example, in 1992, Vice President Dan Quayle commented on Tupac's "2Pacalyse Now." According to Vice President Quayle, Tupac's rap was not music and, in fact, was a disgrace to American music. Quayle even went as far as to say, "There is absolutely no reason for a record like this to be published . . . . It has no place in our society."<sup>53</sup>

Unfortunately for rap artists, Tupac was not the only artist with these types of comments said about him. One of the most controversial rap groups from the "Golden Age" was Niggaz Wit Attitudes (N.W.A.), a group from Los Angeles, California, that formed in 1986. The group got its start when O'Shea Jackson (Ice Cube) and Andre Young (Dr. Dre) began writing songs for a former drug dealer, Eric Wright (Eazy-E).<sup>54</sup> Eazy-E used his drug money to start a record label, Ruthless Records,

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48. *The Golden Age of Hip Hop*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/UsefulNotes/TheGoldenAgeOfHipHop> (last visited Mar. 1, 2018).

49. *Id.*

50. Clarence Lusane, *Rap, Race and Politics*, 35 RACE CLASS 46 (1993), <http://journals.sagepub.com/doi/pdf/10.1177/030639689303500105>.

51. *Id.*

52. *Id.*

53. Dana Hughes, *Hip-Hop in Politics: What a Difference a Generation Makes*, ABC NEWS, <http://abcnews.go.com/Politics/OTUS/hip-hop-politics-difference-generation-makes/story?id=18495205> (last visited Mar. 1, 2018).

54. "Fuck Tha Police," N.W.A., WORDPRESS, <http://wordpress.clarku.edu/musc210-hhp/hip-hop-culture-politics-exploring-the-narrative-and-power-of-rap-lyrics/fuck-tha-police-n-w-a/> (last visited Mar. 1, 2018).

and brought Ice Cube and Dr. Dre on to write music. However, when the song Ice Cube and Dr. Dre wrote, "Boyz-N-The Hood," did not go over well with the label, Eazy-E recorded the song himself. Despite this, the group's recordings were the beginning of a new era in rap music, where gangster rap became mainstream, as well as a target for mainstream criticism.<sup>55</sup>

While N.W.A had good intentions behind its art, this did not stop the Federal Bureau of Investigations (FBI) from voicing its disapproval of the group. According to then Assistant Director of the FBI's Office of Public Affairs, "[a]dvocating violence and assault is wrong, and we in the law enforcement community take except to such action."<sup>56</sup> According to the FBI, the song accounted for the deaths of at least seventy-eight law enforcement officers killed in the line of duty in 1988.<sup>57</sup>

Although the FBI took no formal legal action, an informal letter written to N.W.A.'s record label about the song was enough to cause a divide amongst the public.<sup>58</sup> As some saw it, the FBI was out-of-line by criticizing gangster rap because a government agency should recognize free expression.<sup>59</sup>

Despite there being no formal legal action by the FBI, these types of hiccups with rap music and law enforcement laid the ground-work for the main issue in this Comment. Similar to the way the FBI took N.W.A.'s words seriously and blamed the song for inciting violence, prosecutors take the words of rappers seriously and use these words to prosecute. In both instances, the lyrics meant to exclaim frustration or tell a story in an exaggerated light are taken seriously; the common denominator seems to be that the lyrics are written by young men, usually minorities. Further, the listeners misusing the lyrics are individuals who have not experienced the same lifestyle of the rapper's community, and thus, do not understand the interchangeable truths and exaggerations necessary to produce rap songs.

## **2. How Eight-Bars Began Leading to Behind Bars**

As described above, rap music has only been around since the early 1970s, yet somehow, the genre managed to develop artists, fans, and an enemy in the criminal justice system in a short period. Prosecutors used

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55. *Id.*

56. *Id.*

57. Stephen Thomas Erlewine, *Artist Biography*, N.W.A., <http://www.allmusic.com/artist/nwa-mn0000314793/biography> (last visited Mar. 1, 2018).

58. *Id.*

59. *Id.*

rap lyrics in court as early as 1994.<sup>60</sup> In 1994, prosecutors in California used the lyrics of Francisco Calderon Mora to establish Mora's membership in the Southside F Troop street gang.<sup>61</sup> Judge William Bedsworth set precedent in his appellate decision, where he proclaimed that nothing made the lyrics unreliable and that the lyrics should be considered nonfiction.<sup>62</sup>

### 3. MC: Mic Controller or Multiple Choices for Prosecutors?

With the use of rap lyrics as evidence as early as 1994, it is no surprise that prosecutors developed multiple ways to use these lyrics at trial. There are three ways prosecutors use rap lyrics at trial: (1) lyrics written after the crime are used as confessions to the alleged criminal act(s); (2) lyrics are used to show intent if the artist wrote the lyrics prior to the crime; and (3) lyrics are classified as a threat and make it a crime to rhyme. When looking at how these tactics comply with the Federal Rules of Evidence, the prosecutor and the defendant both have strong arguments as to why the lyrics should or should not be admissible.

In examining the treatment of lyrics as a confession, there are potential hearsay<sup>63</sup> objections available for the defendant. In using lyrics as a confession, prosecutors are offering an out-of-court statement to prove the truth of the matter asserted. For example, when Torrence Hatch, known by his stage name "Lil' Boosie," went on trial in Louisiana for hiring a hit man, Michael "Marlo Mike" Louding, to kill Terry Boyd, prosecutors attempted to use recordings that Lil' Boosie made after the murder.<sup>64</sup> The prosecution hired a computer forensic expert who testified that Lil' Boosie recorded a song called "187," indicating his murder-for-hire scheme.<sup>65</sup>

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60. Brendan O'Connor, *Why Are Rap Lyrics Used As Evidence in Court?*, NOISEY, [https://noisey.vice.com/en\\_us/article/rdaba6/rap-lyrics-as-evidence](https://noisey.vice.com/en_us/article/rdaba6/rap-lyrics-as-evidence) (last visited Mar. 1, 2018).

61. Specifically, the lyrics were used to show that Mora was a member of the gang, his loyalty to the gang, his familiarity with the gang's culture, and finally, his intent to commit murder. *Id.*

62. *Id.*

63. Hearsay consists of a statement ("a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion"); a declarant ("the person who made the statement"); and hearsay itself ("a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement"). FED. R. EVID. 801.

64. Lauren Savage, *Lil' Boosie's Rap Lyrics Can Be Used in Murder Trial*, BILLBOARD, <http://www.billboard.com/articles/columns/the-juice/490631/lil-boosies-rap-lyrics-can-be-used-in-murder-trial> (last visited Mar. 1, 2018).

65. The title of this song refers to the section of the California Penal Code criminalizing murder. See CAL. PENAL CODE § 187 (West 2017).

Unfortunately for artists like Lil' Boosie, prosecutors can and do argue that the lyrics are an admission by a party opponent, and therefore, are admissible under Rule 801(d)(2)(A).<sup>66</sup> In Lil' Boosie's case, this argument allowed his lyrics to be admitted at trial, while others were excluded.<sup>67</sup>

Next, rappers have to get over the hurdle of prosecutors using rap lyrics to show a rapper's intent or motive to commit the crime. For example, in the case of Darren Pratcher, who was accused of killing Terrance Kelly in 2004, prosecutors used lyrics written by Pratcher as evidence of Pratcher's intent and motive to kill.<sup>68</sup> This included the use of Pratcher's line, "[i]f you ain't from our part of town, you're a (expletive) target," to show jurors that Pratcher shot Kelly due to a neighborhood rivalry.<sup>69</sup> Despite the potential for prejudice, the judge allowed the lyrics to be used in this case, and the jury convicted Pratcher.<sup>70</sup>

The final way prosecutors use rap as evidence is to introduce lyrics as the crime itself. This technique was explored in some depth in the introduction of this Comment through *Elonis*' story.<sup>71</sup> The case of Rashee Beasley and Jamal Knox is an example of how *Elonis* will impact these types of cases.

In 2013, two years before the Supreme Court delivered its opinion in *Elonis*, Beasley and Knox were tried and convicted of two counts of witness intimidation and two counts of terroristic threats.<sup>72</sup> Beasley and Knox were originally arrested for fleeing. While the two were awaiting trial, they released a video on YouTube rapping a song they wrote after the arrest. Beasley and Knox not only mentioned the officers by last name, they also compared themselves to Richard Poplawski,<sup>73</sup> who is on

66. A statement meeting the following conditions is not hearsay: "An Opposing Party's Statement. [I]f the statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity." FED. R. EVID. 801(d)(2)(A).

67. Savage, *supra* note 64. Not all of the lyrics were allowed. There was another rule in place to ensure that Lil' Boosie got a fair trial. Instead of allowing the song to be played in its entirety, Judge Robert Ervin ruled that only three of the slang words used in the song could be used. Judge Ervin based his decision on the potential for a prejudicial impact on the jury. *Id.*

68. David Caruso, *More Rap Lyrics Showing Up in Court*, WASH. POST, [http://www.washingtonpost.com/wp-dyn/content/article/2006/12/20/AR2006122001203\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/12/20/AR2006122001203_2.html) (last visited Mar. 1, 2018).

69. *Id.*

70. *Id.*

71. See generally *Elonis*, 135 S. Ct. 2001.

72. Crime Sider Staff, *Pa. top court reviews free speech case of man's anti-police rap*, CBS NEWS, <https://www.cbsnews.com/news/pennsylvania-top-court-reviews-free-speech-case-of-jamal-knox-anti-police-rap/> (last visited Mar. 1, 2018).

73. Officers Paul J. Sciallo II, Stephen J. Mayhle, and Eric G. Kelly were killed after they responded to a domestic dispute call at Poplawski's home. Paul Reed Ward, *Poplawski*,

death row for shooting three officers. While prosecutors saw the rhymes as a clear threat to the officers who were the key to putting Beasley and Knox away, Beasley' and Knox's attorney argued that the lyrics were not actually meant to intimidate the officers.<sup>74</sup>

## II. TO PROSECUTE OR NOT TO PROSECUTE: HOW DIFFERENT STATES HAVE HANDLED THE ISSUE

### A. To Prosecute: Cases of No Error

As discussed earlier in this Comment, prosecutors used rap lyrics as evidence as early as 1994.<sup>75</sup> In *People v. Olguin*,<sup>76</sup> Caesar Javier Olguin and Francisco Calderon Mora were convicted of second-degree murder for killing John Ramirez.<sup>77</sup> The dispute grew from a disagreement over gang territory when Olguin spray-painted a house with the Southside F Troop gang insignia.<sup>78</sup> When someone marked through Olguin's insignia, he saw it as a sign of disrespect and went on a mission to find out who was responsible.<sup>79</sup> Eventually, Olguin and Mora confronted each other, along with multiple rival gang members, including John Ramirez, on March 27, 1992. It was during this confrontation that prosecutors alleged that Mora shot and killed Ramirez. Three weeks after the crime, police found rap lyrics while searching Mora's home, and both defendants objected to the admission of these lyrics at their trial.<sup>80</sup>

The defense tried multiple arguments to find some sort of reversible error on appeal.<sup>81</sup> The defendants first argued that the lyrics were not properly authenticated.<sup>82</sup> Next, the defendants questioned the inflammatory nature of the lyrics.<sup>83</sup> Further, the defendants even argued

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convicted of killing 3 police officers, gets stay of execution, PITTSBURGH POST-GAZETTE, <http://www.post-gazette.com/local/city/2017/02/16/Richard-Poplawski-who-killed-three-Pittsburgh-police-officers-gets-stay-of-execution/stories/201702160195> (last visited Aug. 19, 2017).

74. Crime Sider Staff, *supra* note 72.

75. O'Connor, *supra* note 60.

76. *Olguin*, 31 Cal. App. 4th at 1366.

77. *Id.*

78. This included "BSSR FTR El Cisco," according to the opinion. *Id.*

79. *Id.*

80. *Id.* at 1372.

81. *See id.*

82. *Id.* The court of appeals found no error in the authentication of the lyrics as Mora's. According to the court, circumstantial evidence could be used to authenticate the content of the lyrics, and the location where the lyrics were found provided ample reason for a jury to believe that Mora had written the lyrics. *Id.*

83. *Id.* at 1373.

that the lyrics amounted to inadmissible character evidence.<sup>84</sup> Fortunately for the prosecution, the California Court of Appeals did not find any merit in any of these arguments. According to the court of appeals, the trial court had broad discretion to decide the admissibility of evidence, and the court of appeals would only disturb this ruling if the trial court exercised its discretion in an arbitrary and capricious manner.<sup>85</sup>

With the trend being set early in the 1990s for California courts, it is no surprise that the use of rap lyrics continued in California courts until the early-2000s. Another famous case involving the issue is *People v. Estrada*.<sup>86</sup> Similar to *Olguin*, *Estrada* involved a murder between rival gangs.<sup>87</sup> In *Estrada*, the defendant, Miguel Estrada, was a part of the street gang Varra Pasadena Rifa (VPR). A confrontation began when Estrada approached the deceased, a member of a rival gang, about being present at an abandoned cafeteria at a local middle school.<sup>88</sup> After the confrontation ensued about gang territory, Estrada shot and killed the deceased and severely injured another young man. At first, it seemed as though Estrada would get away with his crime, as he managed to flee the country and hide for two years.<sup>89</sup>

Unfortunately for Estrada, authorities eventually found him and, during a search of his home, discovered a shoebox filled with handwritten rap lyrics.<sup>90</sup> Prosecutors took advantage of the precedent set by *Olguin* and used a gang expert to decipher the lyrics for trial. Specifically, the prosecution used four of the lyrics at trial to focus on Estrada's motive and intent for committing the murder. Unlike the court in *Olguin*, this court spent some time focusing on how the lyrics were properly used to show motive and intent.<sup>91</sup> Further, the court also denied the argument that the lyrics were cumulative of other properly admitted evidence, using the trial court discretionary rule described in *Olguin*.<sup>92</sup>

While the trend may seem to be exclusive to California thus far, courts on the other side of the country approved of this technique by the

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84. *Id.*

85. *Id.*

86. No. B151046, 2002 Cal. App. Unpub. LEXIS 7787 (Cal. Ct. App. Aug. 20, 2002).

87. *Id.* at \*1.

88. *Id.* The rival gang, Tiny Locos, was a faction of the Southside Pasadena gang. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at \*7.

92. *Id.* The trial court's discretionary decisions will be upheld unless they are unreasonable, arbitrary, and capricious. Thus, even if the evidence was cumulative, it was not completely unreasonable for the trial court to allow lyrics describing gang activity to be admitted to prove that the defendant was a member of a gang.

prosecution as well. For example, *United States v. Wilson*<sup>93</sup> was a clear illustration of New York's support of using rap lyrics as evidence against a defendant.<sup>94</sup> There, Wilson was accused of shooting and killing an undercover New York Police Department (NYPD) detective, Rodney Andrews.<sup>95</sup> Unlike the defendants in *Olguin* and *Estrada*, the lyrics used against Wilson were found on Wilson's person at the time of his arrest. Further, the prosecution also used lyrics authored by others (Omar Green and Jamaal Brown) against Wilson at his trial. Wilson argued that the lyrics were irrelevant, unfairly prejudicial, and, in the case of the lyrics authored by Green and Brown, hearsay.<sup>96</sup>

Despite the new arguments brought against the prosecution's ever-growing tactic, the United States District Court for the Eastern District of New York denied all three of Wilson's motions to exclude the rap lyrics at trial. According to the court, the lyrics found on Wilson's person were relevant under Rule 401, as they described aspects of the crime that Wilson was charged. Next, the court denied Wilson's argument that the lyrics were unfairly prejudicial under Rule 403.<sup>97</sup> The court explained that evidence is not unfairly prejudicial if it is not more inflammatory than the charged crime.<sup>98</sup> Finally, the court dismissed Wilson's claims that the lyrics by Green and Brown were hearsay, as the court considered these lyrics statements of co-conspirators.<sup>99</sup>

While the cases described thus far involved instances of gang activity, *United States v. Stuckey*<sup>100</sup> is a prime example of a defendant's lyrics describing his solo actions that were not inspired by gang membership.<sup>101</sup> *Stuckey* is a 2007 case out of Michigan in which the defendant was tried and convicted for killing Ricardo Darbins.<sup>102</sup> Thelmon Stuckey was charged with murder to prevent someone from providing information concerning a federal crime to federal authorities, and prosecutors used

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93. 493 F. Supp. 2d 460 (E.D.N.Y. 2006).

94. *Id.* at 461–62.

95. *Id.* at 461 (“Wilson [was also] charged with two counts of murder in aid of racketeering, two counts of robbery conspiracy, one count of attempted robbery, one count of carjacking, two counts of use of a firearm, and two counts of causing death through use of a firearm.”)

96. *Id.* at 462.

97. *Id.* at 462–63.

98. *Id.* at 462. In this case, Wilson was being charged with murder, and the court did not find the vulgar and brutal language of the rap lyrics to be more inflammatory than this particular charge. *Id.* at 463–64.

99. *Id.* at 463.

100. 253 F. App'x 468 (5th Cir. 2007).

101. *Id.* at 468.

102. *Id.* at 473.

Stuckey's rap lyrics to show that Stuckey despised "snitches."<sup>103</sup> In fact, Stuckey despised snitches so much that his lyrics described shooting witnesses, wrapping their bodies in plastic, and dumping their bodies in a road. Coincidentally, this was exactly how Darbins was killed. However, the prosecutors did not see this as any sort of coincidence, and they fought to admit the lyrics at trial.<sup>104</sup>

Stuckey contested the admission of the lyrics.<sup>105</sup> Unlike the other cases described thus far, Stuckey's lyrics were treated as an admission of the charged crime, rather than evidence of intent or motive.<sup>106</sup> The United States Court of Appeals for the Sixth Circuit held that the lyrics were both relevant and of great probative value. Further, the court disagreed with Stuckey's contention that the lyrics constituted admission of evidence of prior bad acts.<sup>107</sup> As the court opined, the prosecution did not admit the lyrics to show that Stuckey was violent or exhibited any other bad characteristics, but to show that Stuckey killed Darbins.<sup>108</sup> The lyrics showed this by illustrating knowledge, plan, preparation, and, arguably, *modus operandi* to the jury.<sup>109</sup>

*B. Not to Prosecute: Cases Where the Lyrics Should Not Have Been Admitted*

After reviewing the long list of cases throughout the country that support using rap lyrics against a defendant, it would seem as though the issue is a lost cause. However, there are also other cases from around the country where appellate courts did see an issue with allowing lyrics to be used as evidence. The following cases illustrate why a divide exists and why this issue is becoming a hot debate in American courts and society.

Unlike the courts in California, New York, and Nevada, the South Carolina Supreme Court took issue with the state's use of rap lyrics against Thomas Cooper, Jr.<sup>110</sup> In *State v. Cheeseboro*,<sup>111</sup> Cooper was accused of armed robbery, kidnapping, murder, assault, and battery with intent to kill.<sup>112</sup> While Cooper was awaiting his trial, he wrote a song

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103. *Id.*

104. *Id.* at 481.

105. *Id.* at 473.

106. *Id.* at 482.

107. *Id.* at 482-83.

108. *Id.* at 482.

109. *Id.*

110. *Cheeseboro*, 346 S.C. at 533.

111. 346 S.C. 526 (2001).

112. *Id.* at 533.



titled "The Ruckus." Some of the lines used by prosecutors included the following:

Want let go, set it fo' sho', I get hype like Mike put yo' blood on the dance flo' . . . .

If I hear your voice, better run like horses or like metamorphosis, turn y'all to corpses.

No fingerprints or evidence at your residence.<sup>113</sup>

According to the prosecution, the lines about "blood on the dance flo[or]" and leaving "[n]o fingerprints" were admissible under Rule 801(d)(2).<sup>114</sup> The state argued the lines were an admission by Cooper of shooting the victim and leaving the victim once he was dead. The trial judge admitted the lyrics on these grounds, allowing the jury to consider the violent imagery in its deliberations.<sup>115</sup> The supreme court disagreed with the contention that the line could be used as an admission.<sup>116</sup>

The court considered the lines too vague to support admission on Rule 801(d)(2) grounds.<sup>117</sup> Further, the court saw issues with unfair prejudice because the probative value of the lyrics was weak, as the lyrics only described general violence.<sup>118</sup> Thus, the court disagreed with the trial court by holding that the prejudicial effect of the lyrics far outweighed any probative value.<sup>119</sup> Instead of showing evidence that Cooper committed the charged crimes, the court opined the lyrics would simply make the jury think that Cooper had a violent nature due to the vulgar language.<sup>120</sup>

Aside from *Cheeseboro*, another analysis of this Comment's issue is a 2017 decision from Pennsylvania. In *United States v. Bey*,<sup>121</sup> the defendant Muadhdhin was arrested on March 28, 2016, for possession of a firearm by a convicted felon.<sup>122</sup>

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113. *Id.* at 549.

114. *Id.* at 550.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. No. 16-290, 2017 U.S. Dist. LEXIS 65644 (E.D. Pa. Apr. 28, 2017).

122. *Id.* at \*1; see 18 U.S.C. § 922(g) (2018) ("It shall be unlawful for any person—who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

The specific language of the statute is important here because the United States District Court for the Eastern District of Pennsylvania used this language to decide if using the defendant's rap lyrics was appropriate. Here, the court decided four motions by the government addressing using rap lyrics to prosecute.<sup>123</sup>

In one motion, the government sought to use a music video in which the defendant was performing the song "Criminal" under the rap name "Prada Idah."<sup>124</sup> In another motion, the government sought to include the lyrics of an undated song titled "Love Me," performed by the defendant under the rap name "Muslida Bey."<sup>125</sup> In yet another motion, the government sought to include the lyrics of the defendant's song "Straight Outta Philly."<sup>126</sup> Finally, the government sought to include lyrics from the defendant's song "Outtro," where the defendant performed as Muslida Bey.<sup>127</sup> The government supported these motions with Rules 404(b)(2)<sup>128</sup> and 801(d)(2)(A). With each of the motions being based on the same grounds, the government put all of its eggs in one basket.

In handling this complex issue, the court first addressed the admissibility of the evidence under Rule 404(b)(2).<sup>129</sup> Rule 404(b)(1)<sup>130</sup> states that evidence of a crime, wrong doing, or bad act is usually not admissible to prove a crime was committed.<sup>131</sup> However, under Rule 404(b)(2), this type of evidence is admissible when used "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>132</sup> For proper use of this exception, (1) a proper purpose must be identified; (2) the evidence must be relevant to that purpose; (3) the court must find

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123. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*1–2.

124. *Id.* at \*1. "Where I'm from we don't miss and Farrakhan the minister / play with heavy Tommy guns like John Dillinger / Muadhdhin Bey / for short I'm [inaudible] / [inaudible] told yourself Philly kill at will / all you fellas understand 'cause you hide the pills / Man I'm warning ya / go and ask Jay Electronica / 23rd and Tasker, blast you in your yarmulke / No disrespect to Jews but I move with the Uz / Coming through to bruise on you dudes." *Id.*

125. *Id.* "If you walk / we spark / you're dying / with lead flying / rock solid / small Glock in my pocket / My grandpop was Lex Boots / the Black Mafia." *Id.*

126. *Id.* at \*2. "Ain't with that chitty chatta / south Philadel / south kill at will / I feel that steel / put one in your grill / top slida / Muslida / bang choppers / shots burn in your chest / like a shot of that vodka." *Id.*

127. *Id.* "Shots fired, yeah / When you see me I'm strapped under my garments / Packin' pistols in Porsches." *Id.*

128. FED. R. EVID. 404(b)(2).

129. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*4.

130. FED. R. EVID. 404(b)(1).

131. *Id.*

132. FED. R. EVID. 404(b)(2).

that the evidence is sufficiently probative under Rule 403;<sup>133</sup> and (4) if the evidence is admitted, the defendant may request an appropriate limiting instruction<sup>134</sup> so that the jury uses the evidence properly.<sup>135</sup>

After laying out the proper analysis, the court applied it to the facts of this case. To begin with step one (a proper purpose identified), the government's purpose in using the lyrics was to show intent, knowledge, and lack of mistake.<sup>136</sup> This was not a proper purpose because the statute the defendant was charged with violating did not require proof of intent, as possession of a firearm by a convicted felon was not a specific-intent crime.<sup>137</sup> Thus, because the government did not offer a proper purpose, the court did not proceed to the other three steps and held that the lyrics were not admissible under Rule 404(b)(2).<sup>138</sup>

Following the court's description of how the Rule 404(b)(2) argument failed, the court went on to discuss the government's second evidentiary basis for admitting the lyrics, an exception to the hearsay<sup>139</sup> rule found in Rule 801(d)(2)(A).<sup>140</sup> Rule 801(d)(2)(A) allows use of hearsay if it is an opposing party's statement offered against an opposing party and "was made by the party in an individual or representative capacity."<sup>141</sup> Ultimately, the court did not rule on this issue specifically but instead, said that because the lyrics would be barred under Rule 404(b)(2), they could not be admitted under this exemption to the hearsay rule.<sup>142</sup>

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133. FED. R. EVID. 403.

134. FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."). A limiting instruction entails the judge instructing the jury that they are only to use a particular piece of evidence to establish a particular fact. In the case discussed, the judge would have instructed the jury to only use the lyrics to show intent, knowledge, or absence of mistake. Therefore, the jury could not use the evidence to prove that because the defendant rapped about guns in the past he must have possessed the gun he is charged with possessing for the current trial. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*4.

135. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*2.

136. *Id.* at \*3.

137. *Id.* at \*4. "[A] general-intent crime is one that requires proof of knowledge with respect to the *actus reus* of the crime, while a specific-intent crime, in contrast, is one whose definition requires a *special mens rea* above and beyond that which is required for the *actus reus* of the crime." *Id.* (quoting *United States v. Davis*, 328 F. App'x 138, 143 (3d Cir. 2009)). Possession of a firearm by a convicted felon is a general intent crime only requiring knowledge of the act, not a specific mental state. See 18 U.S.C. § 922(g)(1) (2018).

138. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*4.

139. Hearsay is an out of court statement that is being offered to prove the truth of the matter asserted. FED. R. EVID. 801.

140. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*5.

141. FED. R. EVID. 801(d)(2)(a).

142. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*5.

Following this analysis, the court addressed admissibility under Rule 403.<sup>143</sup> Rule 403 permits the court to exclude evidence that is relevant but has a prejudicial effect that outweighs its probative value.<sup>144</sup> To determine if the prejudicial effect outweighs the probative value, the court balances the following factors: (1) the strength of the evidence offered; (2) the need for the evidence in the specific trial in relation to other available evidence; and (3) the danger the evidence poses to inflame the jury and cause them to convict the defendant for improper evidentiary reasons.<sup>145</sup>

According to the government, the rap lyrics have a high probative value in that they show the defendant carries concealed weapons and uses guns. The specific lyrics the government pointed to included:

- “[S]mall Glock in my pocket” (*Love Me*);
- “I feel that steel” (*Straight Outta Philly*); and
- “When you see me I’m strapped under my garments. Packin’ pistols in Porsches” (*Outtro*).<sup>146</sup>

The court completely disagreed with the government’s argument and saw no value in using these lyrics.<sup>147</sup> Specifically, this court described how lyrics are a form of art that should not be depicted as autobiographical.<sup>148</sup> The court pointed out the exaggerative and metaphorical aspects of the genre and how rappers assume an alter ego in which they may describe actions—that never happened—to express themselves.<sup>149</sup> Further, the court held that there is grave difficulty in finding probative value in rap lyrics because it is a weak presumption that just because a writer writes about a certain topic he has acted in accordance with these views.<sup>150</sup>

Finally, the court addressed the other two factors in deciding admissibility under Rule 403.<sup>151</sup> The court explained that there was other available evidence to prove the elements of the crime. Following this, the court addressed whether the lyrics had a strong potential to inflame the jury.<sup>152</sup> According to the court, there was a strong possibility that the jury

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143. FED. R. EVID. 403.

144. *Id.*

145. *Bey*, 2017 U.S. Dist. LEXIS 65644, at \*6.

146. *Id.* (alteration in original).

147. *Id.* at \*6–\*7.

148. *Id.* at \*6.

149. *Id.* at \*6–\*7.

150. *Id.*

151. *Id.* at \*7.

152. *Id.*

would be inflamed after hearing the lyrics in the song describing guns, drugs, and violence. After weighing the factors, the court held that the evidence would not be admissible under Rule 403.<sup>153</sup>

This opinion illustrated a positive trend for defendants, in contrast to the cases previously discussed in this Comment. Unlike the other cases that pointed out multiple reasons for why the evidence should be admitted, this case discussed three different rules of evidence in support of excluding rap lyrics. This Author believes that the most important rule discussed was the use of Rule 403 to exclude rap lyrics. The recognition that lyrics can inflame a jury and that they do not actually have much probative value is quite important in this debate.

### *C. A Crime to Rhyme, Sometimes*

The final case up for discussion in this Comment is the case of *State v. Skinner*.<sup>154</sup> *Skinner* is a New Jersey case that went to the New Jersey Supreme Court in 2014 on the issue of admitting the defendant's rap lyrics at trial.<sup>155</sup> In *Skinner*, the defendant, Vonte Skinner, was charged with the attempted murder of Lamont Peterson. On the night of November 8, 2005, someone shot Peterson and left him paralyzed from the waist down. The defendant was linked to the case because Skinner was there when Peterson was shot.<sup>156</sup> While Peterson claimed Skinner had shot him, Skinner claimed he went to buy drugs from Peterson, and someone else shot Peterson. Despite the differences in the stories, police investigated Skinner as the prime suspect. In doing so, the police obtained a search warrant for the vehicle Skinner was driving on the night of the murder. When police searched the vehicle, they found three notebooks filled with rap lyrics that Skinner wrote.<sup>157</sup> Most of the lyrics were profane, written in first person, and made it clear that Skinner's rap name was "Real Threat."<sup>158</sup>

After Skinner was indicted for attempted murder, he learned that the State planned to use his rap lyrics at trial, and Skinner fiercely objected. Skinner fought for and was given a chance to argue against the admission of the lyrics at a preliminary hearing. However, despite Skinner's objections, the Superior Court, Law Division, of Burlington County allowed the State to use the lyrics at trial.<sup>159</sup> The first trial ended in a

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153. *Id.*

154. 218 N.J. 496 (2014).

155. *Id.* at 499.

156. *Id.* at 501.

157. *Id.* at 502.

158. *Id.* at 502–03.

159. *Id.* at 503.

mistrial, and Skinner renewed his objection to the rap lyrics for the second trial.<sup>160</sup> Once again, the trial court allowed the lyrics. In fact, the lyrics were read into the record by one of the lead detectives. The extent of the lyrics read into the record was so large that the court had to include an appendix in the opinion just for the full length of the lyrics to be included.<sup>161</sup> The lyrics read at trial included:

I'm the n\* \* \*a to drive-by and tear your block up, leave you, your homey and neighbors shot up, chest, shots will have you spittin' blood clots up. Go ahead and play hard. I'll have you in front of heaven prayin' to God, body parts displaying the scars, puncture wounds and bones blown apart, showin' your heart full of black marks, thinkin' you already been through hell, well, here's the best part.<sup>162</sup>

The State claimed these lyrics were admissible to show both motive and intent. However, as the court pointed out, these lyrics indicated various crimes, and the State did not distinguish those crimes from the current charge for attempted murder.<sup>163</sup> Further, the State did not help the jury with deciphering the slang or other exaggerative language. With these lyrics going back with the jury, the jury convicted Skinner of attempted murder, aggravated assault, and assault with a deadly weapon. Following this conviction, Skinner appealed on several grounds, one of those grounds being that the trial court erred when it allowed the State to read the rap lyrics into the record.<sup>164</sup>

The Superior Court, Appellate Division, agreed with Skinner, holding that the trial court's decision to admit the lyrics at the second trial was, indeed, reversible error.<sup>165</sup> The court of appeals expressed its concern with the prejudicial effect while other, less prejudicial evidence could be used to prove Skinner's motive and intent. The State appealed the decision, and Skinner sought certification of the decision.<sup>166</sup>

In affirming the appellate division's decision, the New Jersey Supreme Court began by relying on the evidentiary rule under which rap lyrics would normally be analyzed.<sup>167</sup> Only once had this court analyzed song lyrics, and in that case, it reviewed the admissibility under Rule

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160. *Id.* at 503–04.

161. *Id.* at 504.

162. *Id.*

163. *Id.* at 505–06.

164. *Id.* at 506.

165. *Id.* at 506.

166. *Id.*

167. *Id.* at 507.

404(b).<sup>168</sup> Rule 404(b) sets out rules for admission of crime, wrong doings, or other bad acts at trial.<sup>169</sup> After discussing how it analyzed the lyrics in the past, the court stopped to ask, “[C]an the act of writing about a crime or bad act be a bad act itself?”<sup>170</sup> The court answered this question in the negative, making it clear that no matter how vulgar and obscene lyrics may be, the act of creating these lyrics is not a bad act, crime, or wrongdoing in and of itself.<sup>171</sup> Instead, the court analyzed the lyrics under this evidentiary rule, because the purpose behind the rule protects the defendant in this scenario in the same way as it would protect a defendant who had committed a crime, wrong doing, or bad act.<sup>172</sup>

After analyzing the admissibility of the lyrics under a four prong test for Rule 404(b), the court held that the appellate division came to the correct decision.<sup>173</sup> Specifically, the court held that the lyrics did not pertain to a material issue because motive and intent were not at issue.<sup>174</sup> Further, even if motive and intent were at issue, the lyrics could only be used for this purpose if the lyrics were alleged to specifically relate to Skinner’s motive and intent in shooting Peterson.<sup>175</sup> The court found this unlikely because most of the lyrics were written long before the shooting. Further, the State did not offer any evidence that the crime, wrongs, or bad acts described in the rap lyrics could be proven by clear and convincing evidence. Finally, the court held that the prejudicial effect of the lyrics far outweighed any probative value the State may have alleged the lyrics had.<sup>176</sup> Through this analysis, the court affirmed the appellate division’s decision for a retrial.<sup>177</sup>

As Skinner and his lawyers prepare for a new trial, many news outlets are discussing the topic. As evidenced by many of the cases in this Comment, this is one of the few cases where the court has ruled in the defendant’s favor on this particular issue. News outlets jumped at the opportunity to gather the public’s opinion, specifically those in the legal field, to see what they thought the potential impact Skinner’s case would have. Some of these outlets, such as *Vice*, gathered statements from those closely involved in the case. For example, a *Vice* article asked attorney

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168. *Id.* at 517 (citing *State v. Rose*, 206 N.J. 141, 180 (2011)).

169. FED. R. EVID. 404(b).

170. *Skinner*, 218 N.J. at 517.

171. *Id.*

172. *Id.*

173. *Id.* at 525.

174. *Id.* at 524.

175. *Id.* at 520.

176. *Id.* at 524.

177. *Id.* at 525.

Ezra Roseburn, who wrote an amicus brief for the defense in *Skinner*, what her opinion of the decision was. Roseburg said,

By limiting the admissibility of artistic expressions in criminal trials to circumstances where there is a concrete connection between the expressions and the offense charged, the court has made it very difficult for prosecutors to admit creative works such as rap lyrics on the basis of vague notions of motive.<sup>178</sup>

#### IV. IMPLICATIONS

##### A. A Hypothetical

Picture this. A child is born in the city of Detroit, Michigan, to a single mother of three. This child is the youngest boy of two siblings, a younger sister and an older brother. The boy is able to speak from a young age. In fact, he learns to read and write sooner than most children. As he learns to read and write the words of others, he soon begins to write words of his own. The young boy writes his first poem at the age of five. The poem is about the things he has experienced in life. Therefore, he initially writes about cookies and kindergarten.

Throughout middle school and well into the first years of high school, the boy continued to write his poems that now turned into rap lyrics. However, as he entered his junior year of high school, the topic of these lyrics changed dramatically. The boy's life also began to change as he grew older and became more exposed to the world around him. As his environment rapidly changed, including experiencing poverty and gangs, he incorporated what he saw into his music. He also began to listen to others within the rap genre. Most of the artists he listened to talked about drugs, poverty, and sometimes violent acts. The boy experimented with his work by adding these topics into his lyrics as well. Even though he did not have much personal experience with the drugs and violence he incorporated into his lyrics, the expressive outlet was still fulfilling because he was able to rhyme and tell a story.

One night, during the boy's senior year in high school, he attended a party with a few of his friends. The boy typically hung out with this same group of friends every Friday night at a club called BJ's. The boy and his friends always had a great time there. They would dance and even have rap battles with others. These rap battles would often involve opponents

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178. Lauren Schwartzberg, *Vonte Skinner's Rap Lyrics Were Ruled Inadmissible by the New Jersey Supreme Court*, VICE, [https://www.vice.com/en\\_us/article/znwwmy/vonte-skinners-rap-lyrics-were-ruled-inadmissible-by-the-new-jersey-supreme-court](https://www.vice.com/en_us/article/znwwmy/vonte-skinners-rap-lyrics-were-ruled-inadmissible-by-the-new-jersey-supreme-court) (last visited Mar. 1, 2018).



using harsh words and metaphors describing how their rhymes were better than the others. In fact, some of the free styles that the young boy performed in the club were even put on social media. The young boy had recently gained over 150,000 views on YouTube for a rap battle he won. While the night seemed to be going normal, the young boy's life was about to change forever.

The young boy was unaware of another battle going on between one of his friends and one of the rival rap battlers. This battle was over more than rhymes. These two were in a heated battle over drugs and involved gang affiliation. This heated battle came to a head at BJ's that Friday night when the young boy's friend shot and killed the rival rap battler. The club was so dark that no one saw exactly who shot the victim. All everyone knew was that the shot came from the direction of the young boy and his friends. When the police arrived, the young boy and his three friends were all brought to the police station for questioning.

Days into the investigation of the murder, the police found the young boy's YouTube video. In the video, the young boy is seen rapping and issuing faint threats to the victim in a heated rap battle. In the battle, the young boy discussed drug turf, gang affiliation, and violent actions he would take toward the victim for stepping up to the young boy in the rap battle. When the police heard this, they immediately arrested the young boy, and the police charged him with first degree murder and also charged the young boy's friends with violating the street gangs act. Following the arrest, the police also searched the young boy's home and found other notebooks and recordings of songs.

The prosecutor did not have much evidence. Most of the evidence connecting the young boy to the shooting was circumstantial. While the prosecutor could place the young boy at BJ's on the night of the murder, the police had little evidence showing motive for the killing. Fearing a directed verdict, the prosecutor fought hard during pretrial motions to admit the young boy's rap lyrics as evidence. The prosecutor asked that the jury treat these as blanket confessions of the gang membership as well as clear intent and motive. Specifically, the prosecutor fought to include lines such as:

If you see me at BJ's you know I'm at the top  
If you try me and my crew you bound to get popped  
Bet not catch you in my section 'cause we don't play  
Get out of the building or don't see another day

According to the prosecutor, these were clear threats to kill the victim if the young boy and his friends saw the victim at BJ's. The lyrics were allowed into evidence, and the jury found the young boy guilty on all

counts. The young boy was sentenced to life without parole. And just like that, the young boy realized it was a crime to rhyme.

### *B. Analysis*

The current state of our justice system has allowed this hypothetical to be someone's reality. Throughout this Comment, many cases were mentioned where defendants were prosecuted for simply expressing themselves through rap music. Similar to the young boy described above, many rap artists use metaphors, exaggerate, or write a story they may not have even experienced themselves, instead using it simply for artistic expression. As illustrated by this story, use of rap lyrics at trial can lead to an innocent person being placed in jail for life. After all, in most of the instances discussed throughout this Comment, the crimes accused are serious and lead to life sentences or sentences that often take away the majority of the defendant's life.

Some may ask: if the prosecutor had other evidence, what is the harm in using the rap lyrics? The issue with this is that the members of a jury can convict on a single piece of evidence. Juries are told that they can base their decision or uncertainty on any single piece of evidence admitted at trial. When one of those pieces of evidence is rap lyrics, this poses a serious issue. For example, in the story described above, a juror may not understand how the young boy could rap about killing the victim but not be the actual killer. A juror might not understand the complexities and exaggerative language involved in rap music. A juror may not understand that when the young boy said, "You bound to get popped," the young boy meant that the victim was "bound to" get "schooled" in a rap battle. A juror might not understand that when the young boy said, "Get out the building or don't see another day," the young boy meant that the victim would be so embarrassed from continuously losing against the young boy in the rap battles that the victim would hide in shame.

The fear of any disconnect between the jury and the young boy in this fictional story is what pushes the need for a safeguard for these instances. It is not enough to allow trial courts throughout the country to make decisions that do not align with each other or the Federal Rules of Evidence, which the majority of states have adopted.<sup>179</sup> While the small

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179. See generally Michael H. Graham, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE (8th ed. 2003); Paul J. Liacos, Mark S. Brodin & Michael Avery, HANDBOOK OF MASSACHUSETTS EVIDENCE (7th ed. 1999). But see Faust M. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 Loy. L.A. L. REV. 1271, 1275 (1995) (noting common law evidence jurisdictions moving toward partial adoption of Federal Rules of Evidence).

victories in some states are uplifting, it is unfair for those on trial in other states in the same situation, especially when, as seen in this Comment, judges are deciding the same issue with different reasonings and outcomes.

But what about the outcomes that seem fair? What about the lyrics that are so similar to a crime that it cannot just be a coincidence? It should never be a crime to rhyme, but it should also not be acceptable to confess and not face the consequences.

Prosecutors have a valid point in wanting to use rap lyrics against a defendant. In many instances, a defendant may be using the lyrics to express himself, but this expression could be about the crime the defendant is charged with committing. In the hypothetical above, suppose that instead of being brought in for questioning, the young boy was actually arrested on the night of the murder, and instead of finding the YouTube video, the police find a notebook full of paper in the young boy's cell. Again, the prosecutor wants to use the same lyrics at trial, but this time the young boy has seemingly written about the murder after it happened. Should a jury look at this as an expression of the young boy's emotional turmoil, or should the jury look at this as a confession? After all, how is this any different from prosecutors presenting a picture drawn by the young boy depicting himself holding a gun and firing at the victim?

If the Supreme Court hears this issue, the justices will need to balance very important interests, including prosecutors' interests in holding criminals responsible and ensuring justice. After all, how is an admission through verse any different from a taped confession? In both instances, the defendant has admitted his guilt.

Critics and defendants argue that there is a major difference between using a taped confession and lyrical expressions. America's criminal justice system has put safeguards in the Rules to ensure that even some evidence showing guilt is not usable. These Rules ensure that prosecutors meet their burden and do not use unjust tactics to get a guilty verdict. These safeguards help protect factually innocent defendants. Although the lyrics in some cases may be admissions, in other instances the lyrics are used to illustrate the defendant's character. This type of character evidence does not align with the Rules.

Aside from issues with the Rules, using lyrics to prosecute also has racial implications acknowledged by individuals on both sides of the argument. Defendants and critics argue that the racial issues should have great weight. It is hard to ignore the stark racial implications involved here. Rap music is a genre predominated by African-American artists. This make-up is not only in the mainstream but is also even with those who never become famous. Thus, it is hard to dispute that a genre

comprised of predominantly of African-Americans is being used against them.

Not only is this a problem in and of itself, but this adds to the problem of a prison system already predominated by African-Americans. Many already see the justice system as unfair to, and stacked unfavorably against, African-Americans. The use of rap lyrics adds to this epidemic. Not only do African-Americans face a justice system that does not seem to work in their favor; this same justice system is using lyrics created by African-Americans against them. This is a daunting feeling and a horrific realization for defendants.

But what if it has nothing to do with race? What if other art forms are used to prosecute as well, and just as many non-African-Americans or non-rap artists are prosecuted using this same technique? This would be a great argument for prosecutors. If prosecutors could show that, similar to how an African-American rap artist is prosecuted using his lyrics, a white country singer has also been prosecuted, the racial argument would not be as strong.

Unfortunately,<sup>180</sup> there is not a strong basis for this argument because the cases are simply not there. The number of cases present within the last ten years in which artists were prosecuted for rap lyrics far outweighs the use of any other genre of music. In fact, there are very few cases in which an artist's pop or country song was used to prosecute.

This possibly illustrates something many Americans might not be comfortable with admitting. Even though rap has recently become popular, that is not to say that it is accepted as art by most Americans. Many might see rap lyrics as just words and do not give it the same validation as other genres of music. It seems more acceptable and less of a taboo to use rap lyrics over other genres because these other genres are accepted as art. These other genres are seen as music, whereas some may only see rap as violence and artists wearing gold chains. This misconception fuels the issue.

What is the solution to an issue where both sides have valid points? One has to be compassionate towards prosecutors who want to use evidence that clearly shows a defendant's involvement in a crime, especially in those situations where the lyrics describe specific details of a heinous crime. However, one also has to be compassionate towards defendants who see themselves as artists that should not have to worry about their hidden song journal being used against them at trial, especially when the lyrics only coincidentally or vaguely connect the defendant to the charged crime.

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180. This is unfortunate because if the racial issues were not there, there would not be another layer to the issue to resolve.

With both sides having valid points, what should the Supreme Court do if it were to ever hear this issue? The best plan would be to not set a hard-and-fast rule. Lyrics should not be completely off-limits, but they should also not be used at the prosecution's complete discretion. A hard-and-fast rule stating that lyrics are completely off-limits could be devastating to the prosecution of a defendant who is truly guilty, while a bright line rule declaring all lyrics admissible could be devastating to a defendant who is innocent. After all, it would seem to be more important to let ten guilty people go, rather than to allow one innocent person to be sent to jail.

### **1. Solution One**

One solution could come in the form of enforcing a strong relevance standard in cases where prosecutors wish to introduce rap lyrics. In some of the cases described in this Comment, the lyrics were only remotely connected to the crime. While the standard for relevance is not a high standard to meet, the Supreme Court could require a higher standard in these cases due to the prejudicial, reliability, constitutional, and racial issues that come along with this evidence. For example, lyrics from a defendant's five-year old rap song about selling drugs might not be admissible in a trial for a drug conspiracy where the defendant is being charged with selling drugs only within the last year.

Are the rap lyrics from five years ago relevant to the current involvement? What if the defendant did not even sell drugs when he rapped about it? What if the drugs the defendant rapped about are not even the same drugs the defendant is accused of selling? Or what about the hypothetical boy described above? He did not mention the victim by name. Should rap lyrics that are not specific enough be admissible under the relevance standard? These are questions that should be resolved case by case. This illustrates how important it is to evaluate the relevance of the rap lyrics in each case as a threshold before any other steps are taken.

### **2. Solution Two**

Another solution is a presumption that the lyrics are prejudicial and that the prosecutor must overcome this burden. This presumption would assume that anytime a prosecutor wishes to use rap lyrics, for any purpose, that the use will prejudice the defendant. This presumption, used alongside the other Rules, would ensure that the presiding judge takes into account racial biases as well as the probative value of the lyrics. This presumption would need to be overcome in pretrial motions to ensure that the jury is not exposed to the lyrics.

This solution would ensure that the jury is not tainted or given the opportunity to misinterpret the lyrics. This would also limit what lyrics

are actually introduced, forcing prosecutors to eliminate lyrics that do not meet this burden while allowing them to include lyrics that do meet the burden. For example, in a case where the defendant is being prosecuted for selling drugs, the prosecutor might be precluded from using rap lyrics discussing violence along with selling drugs. In this scenario, introducing both kinds of lyrics would be more prejudicial than probative, forcing the prosecution to fight to admit the violent lyrics into evidence.

### 3. Solution Three

Another solution would be a very detailed limiting instruction agreed upon by both the prosecution and the defense. This solution could be paired with the prejudice presumption. For example, if the prosecution does not overcome its presumption of prejudice, then there is no need to proceed. However, if the prosecution is able to overcome the presumption, the prosecutor has to present a pre-drafted limiting instruction that the court and defense counsel must agree to. For example, this limiting instruction could say,

You are about to hear evidence of the defendant's rap lyrics. I instruct you that this evidence is admitted only for the limited purpose of (the permissible purpose, such as knowledge, motive, and absence of mistake) and, therefore, you must consider it only for that limited purpose and not for any other purpose.

### 4. Solution Four

In some instances, a limiting instruction may not be enough. Some jurors may need background knowledge on how they use the rap lyrics in conjunction with other testimony. Similar to how judges instruct jurors on expert testimony, judges could provide a short explanation on rap lyrics if they are used at a trial. It might be important for jurors to know that

- (1) Rap lyrics often use metaphors;
- (2) Rap lyrics often use exaggerative phrases;
- (3) Jurors do not have to consider this a confession of the acts described in the lyrics;
- (4) Jurors must not allow you disdain for rap lyrics in general to weigh on their decision in the case;
- (5) Jurors do not have to take what the defendant said in the lyrics as true; and
- (6) Jurors must not allow their feelings toward other rappers to influence how they see the defendant.

### 5. Solution Five

A final solution could include a team effort between both the lawyers and the judge during *voir dire*. Most fears of using rap lyrics relate to how potential jurors will perceive the lyrics and how they could improperly use the lyrics during deliberation. Thus, a prosecutor would need to alert the judge and defense counsel to the planned use of this evidence during discovery. When questioning potential jurors, the prosecutor and defense counsel would be responsible for weeding through jurors who would likely show prejudice towards this defendant. Attorneys could ask questions, such as:

- (1) Who among you listens to rap music?
- (2) If you do not listen to rap music, do you dislike rap music?
- (3) Do you dislike rap music because of violent content [or the type of content in the defendant's lyrics]?
- (4) When you hear a rap song, do you see the rapper in a bad light?
- (5) Do you believe the acts described by rappers in their lyrics are true?

These are only a few of the various solutions. With such a complex problem, the only bright side is that there seems to be a few routes that the court could take, but balance is needed due to the rise in convictions.

The surest way to know an issue is becoming noteworthy is if typing only a couple words into a search engine enables the search engine to produce multiple results. Entering "rap at trial" into Google unveils the startling epidemic effecting many lives in America's justice system. This search pulls up articles, cases, and commentaries from both sides. It is undeniable that both sides have valid arguments. However, it is also undeniable that, while awaiting a clear decision on what to do, too many lives have been negatively impacted. Therefore, it is time to put an end to prosecution based on rap lyrics until there is a fair solution.

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