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RAP ON TRIAL: THE CASE FOR NONLITERAL INTERPRETATION OF RAP LYRICS

Dre'Kevius O. Huff

Abstract

Rap music: the juxtaposition of the entertainment world. Rap is both admired *and* condemned for themes expressed in its lyrics. Drug use. Misogyny. Violence. It has proven a veritable soapbox, providing social commentary about the day-to-day struggle of those living on the fringes of society, while also being a source of great controversy for mainstream society with its provocative lyrics. While music is generally a metaphoric mixture of real life experiences and creative storytelling, rap lyrics have been weaponized as damning evidence in trials against musicians—rappers in particular. Rap music, like any form of art, can be a mere expression of personal experience; not necessarily of things done, but of things witnessed, things heard, or simple puffery to gain street cred amongst peers. Using rap lyrics as evidence of intent, motive, or conspiracy could produce a chilling effect on the rap industry if rappers must keep a watchful eye for the looming specter of prosecution. Rappers may stop producing music if they must choose between disingenuity by censoring themselves or “keeping it real.” This Note will explore

* Savannah Law School, J.D., 2017; Georgia Southern University, B.S., Psychology, 2015. The Author would like to express sincere gratitude to Professor Caprice L. Roberts for providing invaluable insights and proffering scholarly sources which underpinned much of the substance of this Note. Additionally, the Author would like to thank Assistant Dean James Hicks for his oversight and mentorship during the drafting process. Special thanks to Cassandra Ramsted, whose music savvy sparked the idea to integrate a country music twist into an otherwise rap-centric Note. The Author is indebted to Marlan Eller for his extensive comments and beneficial suggestions during revisions. The Author would be remiss if he did not acknowledge *Savannah Law Review* and its indefatigable efforts throughout a laborious Note-writing process, and, more importantly, for affording the Author the opportunity to write about rap music in its purest form—raw and uncensored. Finally, the Author would like to give a rather abstract thanks to the entire rap genre. Thank you for being perpetually provocative, admirably avant-garde, and beautifully badass.

both the utility and pitfalls of using rap lyrics as evidence against criminal defendants and the collateral consequences ancillary to using them.

Introduction

And he don't know...
That I dug my key into the side
Of his pretty little souped-up four-wheel drive,
Carved my name into his leather seats...
I took a Louisville slugger to both headlights,
Slashed a hole in all four tires...
Maybe next time he'll think before he cheats.¹

These lyrics are excerpted from the chart-topper “Before He Cheats” by Carrie Underwood.² While beginning a law review Note about rap lyrics with lyrics from a country song may seem unconventional, there is a lesson to be learned here. Although reasonable people can disagree, it is a fair assumption to believe Underwood didn't really knock out her significant other's headlights with a baseball bat. No one truly suspects Bob Marley shot the sheriff,³ or believes that Freddie Mercury killed a man.⁴ Country, reggae, and rock, respectively, are not generally associated with violence. Songs in these genres are taken as music made by the artist and not statements made by the individual.

Rap music, however, is scarcely afforded the luxury of a nonliteral interpretation of its lyrics. As stated by Jay-Z in his memoir *Decoded*,

[G]reat MCing is not just about filling in the meter of the song with rhythm and melody. The other ways that poets make words work is by giving them layers of meaning, so you can use them to get at complicated truths in a way that straightforward storytelling fails to do. The words you use can be read a dozen different ways: They can be funny *and* serious. They can be symbolic *and* literal. They can be nakedly obvious *and* subliminally effective at the same time. The art of rap is deceptive. It seems so straightforward and personal and real that people read it completely literally, as raw testimony or autobiography.⁵

Paradoxes abound when rappers face criminal prosecution. When the contents of their music (which they claim embodies their personal experiences) is used against

¹ CARRIE UNDERWOOD, *Before He Cheats, on SOME HEARTS* (Arista 2006).

² *Id.*

³ THE WAILERS, *I Shot the Sheriff, on OCEAN BOULEVARD* (Tuff Gong, Island 1973) (“I shot the sheriff, but I didn't shoot no deputy.”).

⁴ QUEEN, *Bohemian Rhapsody, on A NIGHT AT THE OPERA* (EMI, Elektra, Parlophone, Hollywood 1975)

“Mama, just killed a man,
Put a gun against his head,
Pulled my trigger, now he's dead,
Mama, life had just begun,
But now I've gone and thrown it all away.”

⁵ JAY-Z, *DECODED* 54-55 (Paperback ed. 2011).

them, they must either defend their lyrics and inculcate themselves or denounce their “real” lifestyle and be derided as frauds in the rap community. Is this because of the less-than-wholesome topics—such as murder, gang violence, and drug use—that permeate to the core of today’s rap music (even though, like other genres of music, the songs are simply an artistic use of metaphor and hyperbole by a rapper who, almost always, uses a stage name and adopts a fictional persona)?

Generally, when average the person thinks about violent rap, their mind inevitably turns to the 90’s and the vitriolic East Coast vs. West Coast feuds, headed by rap icons Biggie Smalls and Tupac Shakur. Originally on good terms with one another, Tupac suspected that Biggie and Puffy were involved when he was shot outside of his Manhattan recording studio.⁶ While territorial rivalry was not uncommon in the rap community, this rivalry “blossomed into a dangerous vendetta between the east and west coast factions, stoked by lyrical provocations from Biggie (Who Shot Ya?) and Tupac (Hit ‘Em Up).”⁷ Indeed, “rap music transformed into ‘gansta’ rap and became increasingly associated with violence when rappers Tupac Shakur and [Biggie Smalls] were murdered.”⁸

Because of this association with violence that rap now possessed, courts began to disregard the notion of artistic license afforded to other genres of music and instead condemned rap for its content.⁹ Rap music, like any form of music, or any form of art, for that matter, is subject to the interpretation of the listener/viewer, but we must also consider the interpretation and intent of the writer (who often may not even be the rapper).¹⁰ However, in recent years, courts have begun using these rap lyrics as damning evidence in criminal trials.¹¹

⁶ Dorian Lynskey, *Tupac and Biggie Die as a Result of East/West Coast Beef*, THE GUARDIAN (June 12, 2011, 19:16 EDT), <https://www.theguardian.com/music/2011/jun/13/tupac-biggie-deaths>.

⁷ *Id.*

⁸ Ashley G. Chrysler, Student Scholarship, *Lyrical Lies: Examining the Use of Violent Rap Lyrics as Character Evidence Under FRE 404(b) and 403*, 2015 MICH. ST. U.C.L. 1, 11, http://digitalcommons.law.msu.edu/king/?utm_source=digitalcommons.law.msu.edu%2Fking%2F208&utm_medium=PDF&utm_campaign=PDFCoverPages (follow link citing author and title in “Submissions from 2015” section) (last visited Sept. 8, 2017).

⁹ Even Tupac, considered one of the greatest rappers in history, has faced opprobrium from the courts for his rap lyrics. In *Davidson v. Time Warner*, the United States District Court for the Southern District of Texas referred to Tupac’s album *2Pacalypse Now* as “insulting, and even outrageous.” *Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 WL 405907, at *20 (S.D. Tex. Mar. 31, 1997).

¹⁰ Many rappers utilize ghostwriters—individuals who write songs, lyrics, and instrumentals and remain anonymous—in hit songs on their albums. For a non-exhaustive list, see generally *10 Ghostwritten Hip-Hop Tracks – and the Surprising Ghostwriters Behind Them*, FACT MAGAZINE (Jan. 20, 2014), <http://www.factmag.com/2014/01/20/ghostwritten-hip-hop-tracks-ghostwriters-behind-them/>.

¹¹ See Michael Brick, *Rap Takes Center Stage at Trial in Killing of Two Detectives*, N.Y. TIMES (Dec. 12, 2006), <http://www.nytimes.com/2006/12/12/nyregion/12trial.html?pagewanted=all> (“For prosecutors, the concept of lyrics as confessional came naturally as more rap stars themselves started facing trial for shootings. Prosecutors cited Snoop Dogg’s rhyme

Ostensibly, these lyrics are used to show that the defendant had either knowledge or intent, or to prove the commission of a crime. In practice, however, these lyrics are used to paint the defendant in a negative light with the hope that the jury will convict the defendant because of what he raps about instead of the evidence presented against him.

Convicting potentially innocent defendants is not only repugnant to basic moral principles, but also to one of the paramount tenets of the criminal justice system, stating that it is “far worse to convict an innocent man than to let a guilty man go free.”¹² By convicting defendants based on their music lyrics, judges are unconsciously shaping the future of rap music by putting rappers on notice that their own livelihood could be turned against them in a courtroom. For many artists, rap is not just a form of music, but also a rich collection of art spanning decades of culture, generations of growth, and an ever-increasing fan base.

Although the culture of rap has changed drastically, there are elements of the genre that remain from its roots. The majority of rap artists are generally lower-class black males who use music as an avenue to express the struggles of their everyday lives, including poverty and crime.¹³ Not every artist has personally experienced the events expressed in their lyrics. A rapper who witnesses a murder may choose to write lyrics that provide a first-person perspective of the murder, even though he did not personally pull the trigger. However, like other forms of art, rappers must be allowed some measure of artistic license without every word, line, and verse being taken literally—a liberty afforded to other genres of music. By courts using these lyrics in their most literal fashion, rap artists are not only having their own work used against them, but are effectively being silenced by having their platform for expression taken away.

This Note will consider the consequences of using rap artists’ lyrics against them and the overwhelming prejudicial effect these lyrics have on juries. This Note will also evaluate when these lyrics should be used, in what limited scope they should be used, and why rap artists would even bother using incriminating lyrics if they know there is a chance the lyrics could be used against them. The questions I advance are these: when, if ever, can a rapper’s lyrics be used to constitute a confession against him? Additionally, do the arguably marginal probative benefits of admitting these lyrics outweigh the evidentiary and policy interests of excluding them?

‘Murder Was the Case’ in his 1996 murder trial. The rapper, whose real name is Calvin Broadus, was acquitted.”).

¹² *In re Winship*, 397 U.S. 358, 372 (1970).

¹³ Clara McNulty-Finn, *The Evolution of Rap*, HARV. POL. REV. (Apr. 10, 2014, 9:18 PM), <http://harvardpolitics.com/covers/evolution-rap/> (“[E]ven as artists were carefully constructing their persona, there was honesty in their lyrics. Poppa Sims, a lyricist associated with the major record label Bad Boy Records, emphasized that in writing openly about violence and drugs, ‘90s hip-hop artists forced listeners to consider the ‘underlying reasons behind these things . . . it was survival.’”).

I. Background

A. Birth of a Genre

Although the exact date and time is often disputed, the general consensus places the birth of rap in America around the early 1970s in the Bronx. Rap music was greatly influenced by a form of Jamaican music called “toasting,” which was when Jamaican disc jockeys spoke over the music (often rhythmically) as it played.¹⁴ In the late 1960s, this form of music made its way to the Bronx, allowing these urban street artists to deliver their own renditions of their personal struggles over instrumental beats and harmonies.¹⁵ The birth of the cassette tape not only allowed these artists to record their music, but also furthered the spread of rap music throughout the Bronx.¹⁶ Now, instead of turning to gang culture, these young artists had a nonviolent outlet to express their resentment and malaise with a governmental system they believed had all but turned its back on them.¹⁷ Armed with nothing but their voices and personal stories, rappers rushed to the studio to record their tracks and disseminate their music into the mainstream media.¹⁸ One of rap music’s initial big hits was “Rapper’s Delight” by Sugar Hill Gang.¹⁹ Vanity Fair succinctly encapsulated the sensation that was “Rapper’s Delight,” describing the song as a “freakish cultural phenomenon.”²⁰ The popularity of this song inevitably led to the growth of the rap industry and garnered the attention of music executives.

¹⁴ See generally Henry A. Rhodes, *The Evolution of Rap Music in the United States*, YALE-NEW HAVEN TCHRS. INST., <http://www.yale.edu/ynhti/curriculum/units/1993/4/93.04.04.x.html> (last visited Sept. 8, 2017).

¹⁵ Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 347 (2005).

¹⁶ *Id.*

¹⁷ *Id.* at 347–48.

¹⁸ *Id.* at 348.

¹⁹ Rhodes, *supra* note 14.

²⁰ Steven Daly, *Hip-Hop Happens*, VANITY FAIR (Oct. 10, 2006, 12:00 AM), <http://www.vanityfair.com/culture/2005/11/hiphop200511> (“Hip-hop, hibbit to the hibbit to the hip-hip-hop and you don’t stop The moment this strange incantation bubbled up through urban airwaves in October 1979, the genie was out of the bottle. This was the vocal lead-in to the Sugarhill Gang’s ‘Rapper’s Delight,’ a 12-inch single that became a freakish commercial phenomenon within weeks of its release on a then unknown independent label, Sugar Hill Records. Its peak sales of more than 50,000 copies per day would have been impressive under any circumstances, but there was a greater significance to this 15-minute-long monster hit: it was the first full-fledged rap record, and as such the catalyst for what would arguably become the cultural revolution of our times. Rock creationists can debate long and hard about which records heralded the advent of rock ‘n’ roll in the 1950s; recorded hip-hop began with a stark and solitary statement: ‘Rapper’s Delight.’”).

B. Exploitation and Commercialization

Record labels scrambled to be the first to capitalize on this newfangled genre of music.²¹ However, in order to capitalize on this music and reap the potential profits, record labels had to market rap music in a way that appealed to the record-buying masses. Characters such as Shaft, Foxy Brown, and SupaFly were well-received by America at this time; record labels soon began molding their black artists to assume the trope of social outcast.²² Most rappers, who were in the burgeoning stages of their rap careers, were tempted by promises of wealth and fame and readily signed contracts with any record label that would have them.²³ The caveat, however, required these lyricists to attain the “rapper” persona, purporting violence and sex, with the implied message being that, if the rappers did not fit the mold, they would lose their contract or never get signed in the first place.²⁴

In 1984, music group Run-DMC became the first rap music group to appeal to their white audience *en masse* with their self-titled debut album, and its follow-up, *King of Rock*.²⁵ Run-DMC was “street rapper” personified; rap publicist Bill Adler chronicled the group as

[T]he first group that came on stage as if they had just come off the street corner. But unlike the first generation of rappers, they were solidly middle class. . . . [N]either of them was deprived and neither even ran in a gang, but they became the biggest, baddest, streetest guys in the world.²⁶

While rap music still contained the essence of its origin (detailing daily struggles and fighting to survive), rap music began to progressively distance itself from its fairly humble roots.²⁷

After Run-DMC catapulted rap music to the forefront of the music scene, suburban, middle-class white youths became enamored with the music.²⁸ They were afforded a glimpse into a world completely apart from their own, even if located mere miles from their homes—a world filled with violence, crime, poverty, and death.²⁹ Rap music soon began to be determined by the tastes of its white fans, fans who wanted more aggressive, abrasive rap music.³⁰

Enter Public Enemy, an avant-garde rap group with a bombastic sound that was marketed as rap music’s next trope—indignant and defiantly black.³¹ Public

²¹ Wilson, *supra* note 15, at 349.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ David Samuels, *The Rap on Rap: The ‘Black Music’ That Isn’t Either*, NEW REPUBLIC (Nov. 11, 1991), <https://newrepublic.com/article/120894/david-samuels-rap-rap-1991>.

²⁶ *Id.*

²⁷ Wilson, *supra* note 15, at 349.

²⁸ *Id.* at 350.

²⁹ *Id.*

³⁰ *Id.*

³¹ Samuels, *supra* note 25.

Enemy became America's favorite antagonist, not only in name, but also in form. With politically charged hits such as "Fight the Power," "Night of the Living Baseheads," and "Don't Believe the Hype," Public Enemy challenged the status quo of rap and race politics.³² As Public Enemy gained more popularity, other rap groups followed suit, further exploiting the aggressive rapper persona.

Ice Cube, a member of N.W.A., further pushed the envelope on its first album-length release, *Straight Outta Compton*, in 1989.³³ With hostile songs such as "Fuck tha Police,"³⁴ N.W.A.'s songs made headlines and were removed from several consumer shelves as a result.³⁵ Ice T, the front man of Body Count, produced songs with similar messages to those of N.W.A., the most controversial being "Cop Killer,"³⁶ which received a negative reception from political figures such as President George H.W. Bush.³⁷ This style of aggressive rap was borrowed by rappers on the West Coast, where artists such as Kool G Rap and DJ Polo would create songs such as "Live and Let Die,"³⁸ in which Kool G Rap graphically details the ruthless murder of two police officers.³⁹ This level of violence in rap lyrics is not surprising, however. Research conducted in 1994 compared rap videos to music videos of other genres and concluded that rap lyrics contained twice as much lyrical and visual content embracing violence than other genres.⁴⁰ Despite these findings, however, the sale of rap albums continued to skyrocket; the more a rap artist was packaged and marketed as violent, the larger their white audiences became.⁴¹ The 1990s ushered in many new forms of rap music, but the bottom line remained the same: rap artists were participants in an obscene, illicit, and garish lifestyle.

C. Materialism in the Rap Community

As the 1990s progressed, the rap scene began to capitalize on materialism; rappers—and their fans, alike—became obsessed with gold trinkets and flouting

³² Greg Tate, *Public Enemy*, ENCYCLOPEDIA BRITANNICA (Aug. 18, 1998), <https://www.britannica.com/topic/Public-Enemy> (last updated Mar. 10, 2017).

³³ Samuels, *supra* note 25.

³⁴ N.W.A., *Fuck tha Police*, on *STRAIGHT OUTTA COMPTON* (Priority, Ruthless 1988).

³⁵ Wilson, *supra* note 15, at 351.

³⁶ BODY COUNT, *Cop Killer*, on *BODY COUNT* (Sire/Warner Bros. 1992).

³⁷ BILL OSGERBY, *YOUTH MEDIA*, 68–70 (Routledge 2004).

³⁸ KOOL G RAP, *Live and Let Die*, on *LIVE AND LET DIE* (Cold Chillin Records, 1992).

³⁹ Wilson, *supra* note 15, at 352.

⁴⁰ Cf. John Tapper, Esther Thorson & David Black, *Variations in Music Videos as a Function of their Musical Genre*, 38 J. BROAD. & ELEC. MEDIA 103, 109–14 (1994). Table 2 in the study demonstrates that the "violence" variable had a distribution score of 29%, as compared to the mean distribution score of 15% across seven genres of music studied (rap 29%, soul 6%, country 14%, heavy metal 17%, pop 15%, classic rock 0%, and alternative rock 8%).

⁴¹ Wilson, *supra* note 15, at 354.

their financial wealth to the public.⁴² Rappers found not only their success, but their own self-worth through their possessions. This era of rap bred many rags-to-riches stories, with many rappers making clear that they paved their way to success by selling drugs or through other nefarious means.⁴³ Rap's leading icons, P. Diddy and Jay-Z, began expanding rap's already far-reaching influence by branching out into other areas, especially fashion.⁴⁴ Stores like Macy's and Bloomingdale's began selling clothes that were typically associated with the rap genre, such as loose, baggy clothing.⁴⁵ As the 1990s progressed into the 2000s, rap continued to pervade into every aspect of American culture. Rap became a multi-billion-dollar industry, influencing pop culture, politics, fashion, magazines, and the like.⁴⁶ As Reverend Al Sharpton described it,

Their words, their spirit is so powerful that their voices have penetrated the mainstream culture to the point where America's culture is intertwined with the hip-hop culture, from its language to its clothing to its music. You cannot turn on a television or watch a movie and not see the influence of hip-hop. Even suburban America has been bitten by the hip-hop bug.⁴⁷

However, unlike a bug bite, rap music's effect was more than skin deep; its impact was to the very soul of America, carving out its own little place in the heart of each person who dared to immerse themselves in the world of their favorite rapper, while still remaining a world apart from the music they were enamored with.

D. Today's Mainstream Rap Culture

Even though yesteryear's rap artists adopted a violent façade merely to sell records, artists of the current century have become the gangsters they used to merely claim to be.⁴⁸ Hip-hop author Williams Perkins described it best: "In an age of mass over consumption and media hype, gangsta rap no doubt represents a

⁴² Adissa Banjoko, *Hip-Hop and the New Age of Ignorance*, HIP HOP NEWS FNV NEWSLETTER (2001), <http://www.daveyd.com/ageofignorance.html> (last visited Sept. 8, 2017).

⁴³ See THE NOTORIOUS B.I.G., *Juicy, on READY TO DIE* (Bad Boy, Arista 1994) (In the intro of the song, Biggie Smalls recalls hustling drugs out of his home for money to feed his family. As the song progresses, Biggie Smalls exalts in his lavish lifestyle).

⁴⁴ *Id.*

⁴⁵ Paul Butler, *Much Respect: Toward A Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 992–93 (2004).

⁴⁶ Wilson, *supra* note 15, at 354.

⁴⁷ AL SHARPTON, *AL ON AMERICA* 250–51 (2002).

⁴⁸ Cassidy Michael Kakin, *10 Rappers With Real Criminal Records*, SPINDITTY (Jan. 23, 2017), <https://spinditty.com/artists-bands/10-Rappers-With-Real-Criminal-Records>. Many rappers have had their rap careers plagued with criminal convictions. Rap icon Tupac Shakur and several members of his crew were charged and convicted of sexual assault in 1995. Although Tupac maintained his innocence, the judge thought otherwise. In 2007, rapper T.I. was arrested for illegal gun possession. Likewise, in 2009, Lil' Wayne plead guilty to attempted criminal possession of a firearm.

religion and ideology of authenticity.”⁴⁹ Rappers maintain their authenticity by producing music about firsthand experiences and outing those artists who fail to “keep it real.”⁵⁰ Because of the nature of rap culture, rappers must maintain their “street” image to sell records, mirroring the rapper in the proverbial catch-22 once they encounter legal trouble and must explain away their rapper persona as a veneer used to market the rapper’s music.⁵¹

E. Rappers on Trial

When defending against prosecutors armed with controversial lyrics, rappers often decry their carefully crafted rapper image, asserting their music is merely entertainment and their lyrics are the metaphorical musings of their lifetime experiences.⁵² In other forms of entertainment, such as acting, the individual’s personal identity is easily discerned from their on-screen persona. Generally, actors do not claim that their movies are representations or likenesses of their lives.⁵³ Rappers, or at least those who embrace their “gansta” persona, must suffer the slings and arrows of their decisions. After all, why should a rapper be able to say “Just kidding!” to a judge when they actively defend their “street” reputation against any rapper or critic who dares to question it?

II. When Lyrics Should Not Be Used as Evidence

Some of the thresholds for admitting evidence in trials include: (1) excluding evidence that does not make a fact more or less probable;⁵⁴ (2) irrelevant evidence;⁵⁵ and (3) evidence for which the probative value is substantially outweighed by unfair prejudice.⁵⁶ This final Federal Rule of Evidence will serve as the lodestar for why rap lyrics should not be used as evidence. Not only are rap lyrics extremely prejudicial, but they might effectively turn the jury against the defendant for the length of the trial.

A. The Fischhoff Study

In a study conducted by Stuart Fischhoff, defendants who were associated with negative rap lyrics were seen as more likely to have committed a crime (a murder, in his study) than those defendants who were not presented as having authored any rap lyrics.⁵⁷ The sample size of “jurors” consisted of 134 individuals

⁴⁹ William Eric Perkins, *The Rap Attack: An Introduction*, in *DROPPIN’ SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP-HOP CULTURE* 1, 20 (Temple Univ. 1998).

⁵⁰ Wilson, *supra* note 15, at 356–57.

⁵¹ *Id.* at 357.

⁵² *Id.*

⁵³ *Id.* at 357–58.

⁵⁴ FED. R. EVID. 401.

⁵⁵ FED. R. EVID. 402.

⁵⁶ FED. R. EVID. 404.

⁵⁷ See Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 294 J. APPLIED SOC. PSYCHOL. 795, 803 (1999) (“Study results clearly indicate that showing

representative of a broad cross-section of the community, ranging from 18 to 56 years of age, with a mean age of 27.6 years; the sample size also included participants of the Asian, White, Black, and Hispanic races.⁵⁸ Each of the 134 participants were assigned randomly to one of four condition groups.⁵⁹ Each of the groups received biographic information about the Target Male, an individual named Offord Rollins.⁶⁰ Condition 1 identifies the Target Male as an eighteen-year-old African American male high school student-athlete who has a good academic record and is planning on attending college on an athletic scholarship.⁶¹ Condition 2 contains the same facts as Condition 1, but mentions that the Target Male had been accused of murder.⁶² There was no mention of the rap lyrics in Condition 2.⁶³ Under Condition 3, the Target Male was not accused of murder, but the participants in the experiment received lyrics that were alleged to have been written by the Target Male.⁶⁴ Under Condition 4, the final condition group, the Target Male was both accused of murder *and* alleged to have written a certain set of rap lyrics.⁶⁵ After receiving their assigned condition group, the participants were surveyed on their impressions of the respective Target Male by completing a series of nine adjective scales, labeled 1–6.⁶⁶ The nine bipolar adjective scales to which the participants responded were: caring-uncaring, selfish-unselfish, gentle-rough, likable-unlikable, conceited-modest, truthful-untruthful, sexually nonaggressive-sexually aggressive, capable of murder-not capable of murder, and not a gang member-a gang member.⁶⁷

The results from Fischhoff's study were shocking. The Target Males who purportedly wrote the rap lyrics were viewed as more likely to have committed murder than the Target Males who were not assigned those lyrics.⁶⁸ These Target Males were also viewed more negatively when compared to the Target Males who were not assigned rap lyrics.⁶⁹ These results indicate the significant prejudicial impact that rap lyrics play on a juror's mind. Rap lyrics impermissibly attack a person's character and disposition; a jury's guilty verdict generally doesn't include their rationale for judgment (presumably reached by consideration of the evidence) and may belie the real reason that a jury finds a defendant guilty (his rap lyrics). Defendants may be convicted solely based on the negative perception a jury has about the defendant, rather than focusing on the actual incriminating evidence.

participants the rap lyrics exerted a significant prejudicial impact on the evaluation of a person, and particularly so when the person has been accused of murder.”).

⁵⁸ *Id.* at 798.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 799.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 800.

⁶⁹ *Id.*

Even judges, the learned arbiters of the law, have expressed their doubts over whether a courtroom is the best forum in which to dissect music lyrics. In a copyright case across the pond, an English High Court ruled that rap lyrics might as well be treated as “foreign language.”⁷⁰ Judge Lewison, a judge on the English High Court, even pondered the idea of inviting a drug dealer into court as an expert witness to resolve the confusion of the court when ruling on a copyright case between two British rap bands.⁷¹ The judge described the case as a “faintly surreal experience of three gentlemen in horsehair wigs [himself and the two barristers] examining the meaning of such phrases.”⁷² Even after listening to the music at half-speed and consulting Urban Dictionary,⁷³ the judges remained unsure of the meaning of slang used by the artists, going so far as to say that, although the lyrics were written in English, they were “for all practical purposes a foreign language” and he had no expert evidence or testimony as to what these terms meant.⁷⁴

B. When There is No Direct Link Between the Lyrics and the Crime(s)
Charged

One of the largest criticisms of the introduction of rap lyrics as evidence is the often vague nexus between defendant-authored lyrics and elements or facts of the offense charged. *State v. Skinner* is perhaps the seminal example of the cross section of rap lyrics and the law.⁷⁵ Only once before *Skinner* had the state of New Jersey evaluated the use of rap lyrics against a defendant.⁷⁶ In *Skinner*, the defendant was charged with attempted murder.⁷⁷ The victim, Lamont Peterson, who was shot seven times, told police officers that Vonte Skinner was the shooter.⁷⁸ Peterson testified that, on the night of the shooting, he and Skinner had set up a drug sale, and that, upon meeting, Skinner brandished a firearm and began shooting at Peterson.⁷⁹ While being questioned by police, Skinner admitted that he set up a drug sale with Peterson, but claimed that he fled the scene once he

⁷⁰ Richard Alleyne, *Court Row Over Rap Lyrics Leaves UK Judge Dazed and Confused*, SYDNEY MORNING HERALD (June 7, 2003), <http://www.smh.com.au/articles/2003/06/06/1054700387272.html>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Urban Dictionary is a crowd sourced online dictionary that allows individuals to define slang, phrases, and other colloquialisms. URBAN DICTIONARY, <http://www.urbandictionary.com/>.

⁷⁴ Alleyne, *supra* note 70 (the phrases researched by the judge included “fo’ shizzle my nizzle” and “mish mish man”).

⁷⁵ *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

⁷⁶ Eugene Volokh, *Speech as Evidence, and Rap Videos*, WASH. POST (Aug. 4, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/04/speech-as-evidence-and-rap-videos/?utm_term=.0f52a7e78961; *State v. Koskovich*, 776 A.2d 144 (N.J. 2001) (holding that violent writings by the defendant, that appeared to be song lyrics, were admissible and relevant to prove that the defendant killed the victims knowingly and purposefully and that the defendant was proficient with weapons).

⁷⁷ *Skinner*, 95 A.3d at 238.

⁷⁸ *Id.* at 239.

⁷⁹ *Id.* at 239–40.

heard shots fired.⁸⁰ Acting on a search warrant, the police searched Skinner's car and found three notebooks with lyrics that were authored by Skinner under the moniker "Real Threat."⁸¹ At Skinner's second trial, the first of which ended in a mistrial, Skinner objected to the admission of his rap lyrics, although the trial court, consistent with its ruling in the first trial, found them admissible.⁸² The trial transcript of the reading of Skinner's rap lyrics stretched thirteen uninterrupted pages and was "replete with expletives" and contained graphic depictions of violence, bloodshed, and death:

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. You tried to lay me down with you and your dogs until the guns barked. Your last sight you saw was the gun spark, nothin' but pure dark, like Bacardi. Dead drunk in the bar, face lent over the wheel of your car, brains in your lap, tryin' to comprehend what the f[uc]k just tore you apart, made your brains pop out your skull.⁸³

Although these lyrics depict various crimes and other bad acts, those crimes and acts were unconnected to the specific facts of the attempted murder charge against the defendant.⁸⁴ In affirming the decision of the Appellate Division to reverse Skinner's conviction, the Supreme Court of New Jersey stated,

We hold that the violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged. The admission of defendant's inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risked poisoning the jury against defendant. Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact. In the weighing process, trial courts should consider the existence of other evidence that can be used to make the same point. When

⁸⁰ *Id.* at 240.

⁸¹ *Id.*

⁸² *Id.* at 241.

⁸³ *State v. Skinner*, 95 A.3d 236, 241 (N.J. 2014). There were other lyrics cited in the case, as well as some the Supreme Court of New Jersey chose to omit from its decision.

⁸⁴ *Id.*

admissible, such evidence should be carefully redacted to ensure that irrelevant and inflammatory content is not needlessly presented to the jury.⁸⁵

The *Skinner* Court was cognizant of the fact that writing rap lyrics, no matter how unsavory, is not a crime.⁸⁶ Under N.J.R.E. 404(b) (the state level equivalent of Federal Rule of Evidence 404), the Court concluded that this rule was meant to “safeguard against propensity evidence that may poison the jury against the defendant[;]” here, the members of the jury may not have understood the artistic or expressive value in the graphic writings by Skinner.⁸⁷

Admission of generalized lyrics are often challenged by defendants for their lack of specificity to the crime(s) charged. In criminal cases involving violence, many rap lyrics contain only generalized threats or broad declarations of violence that cannot reasonably be viewed as being directed at any one individual. Adjudicated thirteen years prior to *Skinner*, the Supreme Court of South Carolina in *State v. Cheeseboro*⁸⁸ used reasoning in the same vein as the *Skinner* court. In *Cheeseboro*, the defendant was convicted of, *inter alia*, armed robbery, kidnapping, and murder stemming from the armed robbery and execution-style shooting of three victims at a barbershop in Columbia.⁸⁹ With bullets taken from the barbershop murder scene, police concluded that the bullets had been shot from the same gun that was used in the murder of a cab driver at a shopping mall.⁹⁰ During the defendant’s pretrial incarceration, prison guards confiscated a rap song from his cell. The confiscated rap song, “The Ruckus,” included lyrics such as

Want let go, set it fo’ sho’, I get hype like Mike put yo’ blood
on the dance flo’. Blow fo’ blow, toe to toe, with that no mo’.
Like the 4th of July, I spray fire in the sky. If I hear your voice,
better run like horses or like metamorphis, turn all y’all to
corpses. No fingerprints or evidence at your residence. Fools
leave clues, all I leave is a blood pool. Ten murder cases, why
the sad faces? Cause when I skipped town, I left a trail [of]
bodies on the ground.⁹¹

The Supreme Court of South Carolina concluded these lyrics contained only general references to violence, as opposed to letters written by the defendant to

⁸⁵ *Id.* at 238–39.

⁸⁶ *Id.* at 249 (“To be sure, writing rap lyrics—even disturbingly graphic lyrics, like defendant’s—is not a crime. Nor is it a bad act or a wrong to engage in the act of writing about unpalatable subjects, including inflammatory subjects such as depicting events or lifestyles that may be condemned as anti-social, mean-spirited, or amoral.”).

⁸⁷ *Id.*

⁸⁸ *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001).

⁸⁹ *Id.* at 300.

⁹⁰ *Id.* at 305.

⁹¹ *Id.* at 312.

Virgil Howard which contained identifying details of the crimes committed.⁹² In the first letter, the defendant stated

Read my last letter, you'll see where I told you about the Cee-Allah-Born. That didn't come out right because he tried to stag, so I sent him to the essence. You've heard about it. It was the one down by the mall last month. . . . Now that I got my God-U-Now back, I'm about to get busy tonight.⁹³

In pertinent part, the second letter read, "The licks that I thought were going to put me on turn out to be locked down with Self-Allah-Father-Equality."⁹⁴ Because of references to the murder scene, such as the use of prison code for "cab," "safe," and "gun," these letters to Howard (unlike the rap lyrics) were deemed relevant and admissible.

C. When the Lyrics are Highly Prejudicial and Superfluous

Defendants, instead of objecting to the admission of rap lyrics, are sometimes willing to stipulate to facts or knowledge that the prosecutor aspires to elicit by presenting these lyrics to the jury, with the return promise being the exclusion of such lyrics. In *Commonwealth v. Gray*, the defendant appealed to the Supreme Judicial Court of Massachusetts after a first-degree murder conviction in the Superior Court where the State introduced a rap video as evidence of the defendant's gang membership.⁹⁵ Over the defendant's objections, the trial judge permitted the jury to watch the video, even though the defendant was willing to stipulate to his membership in the Heath Street gang.⁹⁶ The video depicts around ten to twelve people, generally in a group rapping in the background, and a rapper or two rapping in the foreground.⁹⁷ In a number of scenes, rappers in the video, including Gray, wore typical "gangsta" clothing and bandanas tied around the lower parts of their faces.⁹⁸ The video does not show the defendant pledging his "allegiance" to the Heath Street Gang (although Gray was willing to stipulate to this fact), but is instead saturated with words and images that glorify violence, as the main rapper at times holds his hands as though it were a gun.⁹⁹ Because the prejudicial value of the video outweighed the minimal probative value—especially

⁹² *Id.* at 313. *But see* *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991) (holding that the defendant's rap verse, which contained the lyrics "I'm the biggest Dope Dealer" and used cocaine trafficking language such as "key" and "rock" were relevant to the charge of possession with the intent to distribute cocaine, and thus admissible).

⁹³ *Cheeseboro*, 552 S.E.2d at 305–06 ("Law enforcement officials familiar with a code used by inmates testified that 'Cee-Allah-Born' means 'cab,' 'God-U-Now' means 'gun,' 'licks' means robbery, and 'to stag' means 'to resist.' There was only one cab driver murder in the first three months of 1996 and it was the one matched to the .38.").

⁹⁴ *Id.* at 306 ("Law enforcement translated 'Self-Allah-Father-Equality' as meaning 'safe.' There was an unopened safe at the barbershop.").

⁹⁵ *Commonwealth v. Gray*, 978 N.E.2d 543 (Mass. 2012).

⁹⁶ *Id.* at 560.

⁹⁷ *Id.* at 553.

⁹⁸ *Id.* at 554.

⁹⁹ *Id.*

since the defendant was willing to stipulate his gang allegiance (one of the prosecutor's main reasons for wanting to admit the video)—the admission of this video was ruled to be prejudicial error.¹⁰⁰ One may assume the prosecutor *really* wanted to admit the video because of the negative reaction jurors might have to a rap video advocating violence and drug use.

III. When Rap Lyrics Should Be Used

Federal Rule of Evidence 404 and its state level equivalents remain the relevant threshold for determining the admissibility of rap lyrics. Federal Rule of Evidence 404 defines the scope of using evidence of character and prior bad acts to show whether the defendant acted in conformity therewith on a particular occasion.¹⁰¹ Federal Rule of Evidence 404 states that evidence of a person's *character* is not admissible to prove that on a particular occasion the person acted in accordance with that character.¹⁰² The rule further states that evidence of *a crime, wrong, or other act* is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.¹⁰³ However, this evidence may be admissible for reasons such as proving motive, opportunity, intent, preparation, plan, knowledge, or identity. The drafters of Rule 404 were likely aware of the unique tendency of evidence such as this to prejudice a jury.

The use of rap lyrics as evidence should only be permitted after sufficient judicial analysis of the lyrics and their subsequent bearing on the facts. Even then, these lyrics should be presented piecemeal to a jury—with solely the relevant lyrics in a song being admitted. This serves the interests of the prosecution by admitting relevant evidence, while not overly hindering the defendant by allowing the admission of other lyrics that are merely desired for their prejudicial nature.

A. When Lyrics Accurately Depict the Crime(s) for Which the Defendant is Charged

Prosecutors frequently intend to admit rap lyrics into evidence to prove some element of an offense, but because of the prejudicial value of these lyrics, exclusion is often warranted. *United States v. Stuckey* is perhaps one of the most dispositive examples of the relevance between rap lyrics and the accused crime.¹⁰⁴ Stuckey was found guilty in the shooting death of Ricardo Darbins.¹⁰⁵ At trial, “[t]he Government introduced eyewitness testimony, as well as rap lyrics written by Stuckey that exhibited Stuckey's negative feelings towards ‘snitches’ and described shooting witnesses, wrapping the bodies in plastic, and dumping the bodies in the road”—the exact circumstances of Darbins's murder.¹⁰⁶ Defendant-

¹⁰⁰ *Id.* at 562.

¹⁰¹ FED. R. EVID. 404.

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ *United States v. Stuckey*, 253 Fed. Appx. 468, 473 (6th Cir. 2007).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

authored lyrics were introduced—which the Government argued was akin to a confession—where Stuckey bragged “I expose those who knows; Fill they bodys wit ho[l]es; Rap em up in blankit; Dump they bodys on the rode.”¹⁰⁷ Song lyrics also referred to retaliating against those who snitched.¹⁰⁸ In determining that the rap lyrics were admissible, the district court stated, “[y]ou can certainly not say when somebody writes about killing snitches, that it doesn’t make the fact that they may have killed a snitch more probable.”¹⁰⁹ The United States Court of Appeals for the Sixth Circuit further expounded this reasoning, concluding that:

Stuckey’s lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street—precisely what the Government accused Stuckey of doing to Darbins in this case. Therefore, the district court did not abuse its discretion by holding that the lyrics were relevant.¹¹⁰

Stuckey presents the exact situation where defendant-authored rap lyrics are directly on point with the facts of the case and work to prove elements of the offense(s) charged. Any potential prejudice derived from lyrics of this sort is *de minimis* when compared to the overwhelming probative value received from their admission.

In *Commonwealth v. Flamer*, which was decided under analogous facts as *Stuckey*, the defendant was charged with conspiring with a third party to kill a witness prior to trial.¹¹¹ At trial, the Commonwealth of Pennsylvania desired to use against the defendant rap lyrics in which he referenced people “keeping their mouths shut,” sending his friends to kill for him, and “popping shells” in people who “run their mouth[s].”¹¹² The Supreme Court of Pennsylvania concluded that these lyrics had a tendency to show that there was a conspiratorial arrangement.¹¹³ Pennsylvania’s high court overturned the lower court’s decision which found

¹⁰⁷ *Id.* at 475.

¹⁰⁸ *Id.*

¹⁰⁹ *Stuckey*, 253 Fed. Appx. at 482–83 (“The district court held that the rap lyrics were ‘not evidence of a prior act [but instead] evidence of statements about a certain characterization or certain genre of people. In the case of snitches, a certain genre of people. It’s simply a prior statement.’ The district court also concluded that even if the lyrics were evidence of prior bad acts, they would have been admissible to show knowledge, preparation, plan, and arguably *modus operandi*. The Government introduced the rap lyrics not to show that Stuckey was of a bad character or had a propensity for violence (or another bad character trait), but to show that he killed Darbins. Statements that Stuckey dislikes and kills ‘snitches,’ fills their bodies with holes, wraps them in blankets, and dumps them in the road provides direct evidence that Stuckey shot Darbins, wrapped his body in blankets, and dumped it in the road.”).

¹¹⁰ *United States v. Stuckey*, 253 Fed. Appx. 468, 482 (6th Cir. 2007).

¹¹¹ *Commonwealth v. Flamer*, 53 A.3d 82 (Pa. Super. Ct. 2012).

¹¹² *Id.* at 89.

¹¹³ *Id.*

these lyrics inadmissible by finding that the lyrics were relevant and in contemplation of conspiracy.¹¹⁴

Although defendant-authored lyrics may employ metaphor, hyperbole, and other artistic devices, courts will not hesitate to admit them when the lyrics mirror the crime(s) charged.¹¹⁵ The utility of admitting specific and relevant evidence was present in *Holmes v. Nevada*.¹¹⁶ In this case, Holmes, the defendant, was charged with the murder of a drug dealer after he and his accomplices broke into the victim's (Nelson) studio in ski masks, made Nelson turn his pockets inside out, stole his jewelry and money, and sped off into the night.¹¹⁷ Three years later, DNA evidence was finally matched to Holmes, and he was arrested.¹¹⁸ Holmes, while awaiting extradition, wrote eighteen songs in prison, one of which specifically detailed certain aspects of the crime scene where Nelson was murdered.¹¹⁹ Holmes' song "Drug Deala" contained the following lyrics: "I catching slipping at the club and jack you for your necklace. Fuck parking lot pimping. Man I'm parking lot jacking, running through your pockets with uh ski mask on straight laughing."¹²⁰ The Supreme Court of Nevada was well aware of the difficulties of using rap lyrics, but, quoting *Hannah v. State*,¹²¹ concluded that "[r]ap lyrics often convey a less than truthful accounting of the violent or criminal character of the performing artist or composer [But t]here are certain circumstances . . . where the lyrics possess an inherent and overriding probative purpose."¹²² The Court stated:

It was not unreasonable for the district court to admit the short stanza from "Drug Deala" that it did. . . . [T]he stanza included details that matched the crime charged. "Jacking" is slang for robbery, *The Rap Dictionary*, <http://www.rapdict.org/Jack> . . . —one of the charges Holmes faced. The lyrics' reference to "jack[ing] you for your necklace" may fairly refer to Holmes stealing Nelson's chain necklace during the robbery. Police never recovered the necklace, but Holmes had a chain necklace after the crime that he did not have before; his knowledge of the necklace as reflected in the lyrics suggests that he knew Nelson

¹¹⁴ Cf. *Commonwealth v. Gibson*, No. 2788 EDA 2014, 2015 WL 6662911, at *6 (Pa. Super. Ct. Oct. 30, 2015). The Supreme Court of Pennsylvania, relying on *Flamer*, ruled that the rap videos in the case were inadmissible because (1) the videos would be of little assistance to the jury and would create an impermissible inference about Gibson's character; (2) the lyrics were unnecessary to prove the prosecution's case; and (3) unlike *Flamer*, whose lyrics were found in his cell, there were multiple people involved in the production of the rap videos, lowering the presumption that Gibson was the author of the lyrics in the rap video.

¹¹⁵ *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013).

¹¹⁶ *Id.* at 415.

¹¹⁷ *Id.* at 417.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 418.

¹²¹ *Hannah v. State*, 23 A.3d 192, 204 (2011).

¹²² *Holmes*, 306 P.3d at 419 (quoting *Hannah*, 23 A.3d at 204–05).

and may have participated in the crime. The lyrics also discuss ski masks, a parking-lot jacking of a “drug deala,” and emptying a victim’s pockets—facts about the crime that the State established, particularly through eyewitness [Kenny] Clark.¹²³

The Supreme Court of Nevada recognized the tension between deciding when lyrics are metaphorical and when a jury should have the opportunity to reasonably infer for themselves whether they believe the defendant was extolling a murder or not, as was the case for the defendant in *Holmes*.¹²⁴

B. When Lyrics Are Used to Show State of Mind, Intent, or Contemplation and Forethought

Rap lyrics frequently offer insight into the mental state of a defendant at the time of the offense(s) for which they are charged. The Court of Appeals of Michigan in *People v. Williams* upheld the admission of rap lyrics against the defendant to prove motive and intent.¹²⁵ The defendant Williams got into an altercation with the victim at an outdoor party.¹²⁶ Gunshots were fired at the crowd, which provoked the defendant to pull out his own gun, approach the original shooter, and fire at him at close range; Williams proceeded to shoot the defendant three more times as he lay dying on the ground.¹²⁷ Although Williams admitted to shooting the victim, he maintained that he did not have the requisite intent and that he was provoked by the deceased’s act of shooting at the crowd.¹²⁸ The Court of Appeals determined that the rap lyrics referred to many of the circumstances surrounding the crime.¹²⁹ One of the admitted lyrics boasted “I got ragged hollow tips that’s gone spit at yo dome;” Williams initially shot the victim

¹²³ *Id.* at 419–20.

¹²⁴ *Id.* at 418. *But see* *Jordan v. State*, No. 2014-CT-00615-SCT, 2016 WL 7474184, 4, 12, 18, 19 (Miss. Dec. 13, 2016) (Jordan was convicted of murder in a case practically devoid of any physical evidence). Justice King, in a separate written statement objecting to the en banc order, stating that the inflammatory rap video that was played at Jordan’s trial violated his rights. He stated Jordan had a tenuous connection with the rap video and that much of testimony which authenticated the video was untrue. Additionally, the trial court did not watch the short video, which King thought would have alleviated the problems with the incorrect testimony. King believed that Jordan being an extra in a rap video for a rap he did not write was not probative. King cited Charis E. Kubrin’s paper *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 Soc. PROBS. 360 (2005), which found that, in a survey of rap songs with over 1,000,000 sales, themes of violence were found in 65% of songs, and violence in 35%. King believed that from the facts of the case, the danger of unfair prejudice was high because the lyrics were offensive, vulgar, an artistic medium often misunderstood by jurors, and ultimately inadmissible.

¹²⁵ *People v. Williams*, No. 263892, 2006 WL 3682750, at *1 (Mich. App. Ct. Dec. 14, 2006).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

in the head before shooting him three more times.¹³⁰ Lyrics also included, “when I come through yo['] hood, you ain’t no good;” the evidence showed that the area where the victim was murdered was an area where he was often found (his “hood”).¹³¹

Notwithstanding prejudicial value, a court will admit rap lyrics where the lyrics detail the plan to commit an offense for which the defendant was charged. In *Cook v. State*, the defendant was convicted of shooting and killing the manager of a restaurant he robbed.¹³² Three days after the murder, police stopped the defendant’s brother, searched his car, and found a notebook which contained rap lyrics to a song entitled “Give Up the Strilla,” as well as a document titled “Plan A and Plan B.” The defendant later admitted to authoring both documents.¹³³ The song was admitted against the defendant at his trial because the Supreme Court of Arkansas saw these lyrics as probative of his intent to commit the robbery.¹³⁴ Lyrics to “Give Up the Strilla” and lines from “Plan A and Plan B” were determined to be relevant to Cook’s intent to commit the underlying aggravated robbery.¹³⁵ “Plan A and Plan B” specifically reference “[p]utt[ing the] strap to his back” and “[m]ak[ing] him give all the money.”¹³⁶ Because of the relatedness between the rap lyrics and the robbery and subsequent murder of the manager, the court admitted these lyrics over the defendant’s objections.

Rap lyrics have been used in some cases as “other acts” evidence because of their relation to a charged offense. The defendant’s lyrics in *Joynes v. State* were used to show his intent to commit the offenses of possession of deadly weapon during commission of felony, aggravated menacing, and second-degree reckless endangering; the lyrics were also used to prove the defendant’s state of mind when he authored the lyrics.¹³⁷ In *Joynes*, the defendant was a high school student in a team of three in his home economics class.¹³⁸ Morton, the lead chef of the team, asked Joynes to clean the dishes, to which Joynes responded by holding an 8-inch knife against Morton’s neck and telling Morton that Joynes would cut him if Morton bothered Joynes about cleaning up the kitchen.¹³⁹ The next day, Joynes wrote a rap entitled “What I deal Wit” during his home economics class in which he rapped that Morton was on his “hit list” and that he would put the head of his enemies on a shelf.¹⁴⁰ These lyrics were admissible because they evidenced

¹³⁰ *Id.* (“The lyric . . . is poignant because defendant initially shot Pfeiffer in his head (‘dome.’)”).

¹³¹ *People v. Williams*, No. 263892, 2006 WL 3682750, at *1 (Mich. App. Ct. Dec. 14, 2006).

¹³² *Cook v. State*, 45 S.W.3d 820 (Ark. 2001).

¹³³ *Id.* at 821.

¹³⁴ *Id.* at 823.

¹³⁵ *Id.*

¹³⁶ *Id.* at n.1 (“Mr. Cook goes by the nickname ‘Buck’. In street slang, ‘strilla’, ‘feddy’, ‘beef’, and ‘cheese’ mean money. A ‘strap’ is a gun, and a ‘slug’ is a bullet.”) (emphasis added).

¹³⁷ *Joynes v. State*, 797 A.2d 673 (Del. 2002).

¹³⁸ *Id.* at 674–75.

¹³⁹ *Id.* at 675.

¹⁴⁰ *Id.* at 675, 677.

Joynes' state of mind during the previous day's knife incident.¹⁴¹ Courts have also used rap lyrics that the defendant *didn't* write to prove the defendant's state of mind.¹⁴²

C. When the Court Provides a Limiting Instruction to the Jury

In cases where a court admits rap lyrics against a defendant, the judge will often give a cautionary instruction to the jury about how the lyrics are to be used during the jury's deliberation. Instances such as these give the jury at least some perspective in how much credence to give to the proffered rap lyrics. In *Commonwealth v. Talbert*, the defendant was convicted of two counts of first-degree murder and conspiracy for shooting and killing 17-year-old Dexter Bowie and 18-year-old Jonathan Stokely; the victims were shot thirteen and fifteen times, respectively.¹⁴³ Talbert appealed the Commonwealth's admission of a rap music video that he posted on YouTube over two years prior to the murder.¹⁴⁴ After hearing certain lyrics, the trial court concluded that it would admit the video to corroborate Talbert's role in the murders of Bowie and Stokely.¹⁴⁵ In the YouTube video, Talbert rapped "Running and running the Badlands like an Afghan[,] Choppers on deck, slide up in the caravan."¹⁴⁶ The trial court determined that the term "Badlands" is frequently used to refer to the neighborhood where the murder occurred, that "chopper" is a term used to refer to a gun, and the term "caravan" was used to mean the escape vehicle used by Talbert.¹⁴⁷ The Superior Court of Pennsylvania affirmed the admittance of Talbert's rap video into evidence to show his involvement in the murders.¹⁴⁸ The court also concluded that admitting the video did not so inflame the jury as to create a risk that the jury would convict on other factors.¹⁴⁹ In fact, the jury received two separate jury instructions; the first jury instruction was given immediately following the playing of the video, and the second was given during closing instructions. Both sets of

¹⁴¹ *Id.* at 677.

¹⁴² *See* State v. Tisius, 92 S.W.3d 751, 759 (Mo. 2002). The Supreme Court of Missouri admitted a rap song by Bone Thugs-n-Harmony against the defendant to prove his state of mind before he shot two peace officers after spending the previous forty-five minutes listening to the same song over and over in his car. Tisius' passenger and girlfriend, Tracie Bullington stated that Tisius mentioned that "it was getting about time," that he "was going to go in and just start shooting," and that he "had to do what he had to do." *Id.* This song, plus the circumstantial evidence from Bullington's statements were admitted properly to show Tisius' mental state and preparation.

¹⁴³ *Commonwealth v. Talbert*, 129 A.3d 536, 537 (Pa. Super. Ct. 2015), *appeal denied*, 138 A.3d 4 (Pa. 2016).

¹⁴⁴ *Id.* at 538.

¹⁴⁵ *Id.* at 540.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 541 ("[W]hile the admission of Talbert's rap music video certainly could have been harmful, there is no evidence to suggest that any resulting prejudice so inflamed the jury as to create a risk that the jury would convict on other factors.").

¹⁴⁹ *Commonwealth v. Talbert*, 129 A.3d 536, 541 (Pa. Super. Ct. 2015), *appeal denied*, 138 A.3d 4 (Pa. 2016).

instructions guided the jury as to how the lyrics were to be used.¹⁵⁰ Here, the instructions of the judge helped to mitigate any potential prejudice that may have stemmed from the admission of the rap video, which contained inflammatory lyrics.

In cases with multiple defendants, difficulty may arise when attempting to properly authenticate rap lyrics written by the defendant. When faced with this dilemma, a court may consider other factors, including, but not limited to, content and location of the lyrics. *People v. Olguin* considered the prejudicial value of rap lyrics written by one defendant when a codefendant authored them.¹⁵¹ In *Olguin*, codefendants Olguin and Mora were convicted of second degree murder for the slaying of John Ramirez.¹⁵² Olguin lived in West Elder Santa Ana, two houses from the intersection of Elder and Shelley.¹⁵³ Olguin graffitied the street curb of the intersection to lay territorial claim to the area for his gang, Southside F Troop.¹⁵⁴ Eventually, Olguin found that his graffiti had been crossed out by the defunct Shelley Street gang, which he took as a sign of disrespect.¹⁵⁵ Olguin, along with Mora and Jesse Hilario, two other Southside F Troop members, took it upon themselves to find out who did it, which led them to an encounter with Eugene Hernandez.¹⁵⁶ Hernandez stated that he was not in the Shelley Street gang, but that a relative crossed out the Southside graffiti.¹⁵⁷ Two relatives of Hernandez came along, which led to a confrontation between the two groups that resulted in the shooting and killing of John Ramirez, a relative of Hernandez.¹⁵⁸ Three weeks after Olguin and Mora were arrested, police found rap lyrics in Mora's home.¹⁵⁹ The Court of Appeals for the Fourth District of California determined that the contested rap lyrics were authenticated by Mora and demonstrated his membership in the Southside F Troop gang, familiarity with gang culture, and inferentially, his motive and intent regarding the murder.¹⁶⁰ The lyrics, in pertinent part, proclaim:

Special Introductions from the South Side Gang. We ware
born and raised in Santana when we see that Chacha Quintana
Ima shootin in the head make him jump like a rana just to let
him know whose controling Santana. Just crazy surenos
smoking Marijuana and if you don't like it I sujest you break
wide and if you don't stay, then you won't survive. Well make
you bleed will let you know that were from DS.G. Cause Ill be
the vato you be having in your dreams . . . you wake up all shety

¹⁵⁰ *Id.* at 542.

¹⁵¹ *See* *People v. Olguin*, 37 Cal. Rptr. 2d 596 (Cal. App. 4th Dist. 1994).

¹⁵² *Id.* at 599.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *People v. Olguin*, 37 Cal. Rptr. 2d 596, 599 (Cal. App. 4th Dist. 1994).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 603.

¹⁶⁰ *Id.*

and sweaty and then you realize that Im worser than Fredy
 cause you know were crazy vatos that don't fuck around Im that
 rapper they call Franky straight from the south Ill always be. I
 keep riming do it by my self I don't need your friendship or your
 help just give me the mic and Ill rock your world with my visius
 voice Ill take control of your body and soul. When I walk out my
 door I have to pack my forty four. R.I.P. there a bunch of punks
 they will get beat were the South Side Trooper were number
 1.¹⁶¹

The appellate court determined that the district court properly admitted the lyrics while also limiting their purpose. Even though the rap lyrics were admitted, the judge admonished the jury not to consider the lyrics against Olguin, which was sufficient because jurors are presumed to adhere to the court's instructions absent evidence to the contrary.¹⁶²

Unless specifically requested by the defendant, a court will admit rap lyrics without an instruction to the jury;¹⁶³ there are even instances where the court allows a witness to interpret the lyrics of the defendant who authored them.¹⁶⁴ Case law and rules of evidence strongly dictate whether or not rap lyrics will be admissible in any given case. Notwithstanding strict adherence to the law, there are real world implications that a court might (and probably *should*) consider when determining the admissibility of rap lyrics—implications that go beyond the four walls of a courtroom. When considering the admissibility of rap lyrics, a court should consider the real-world implications that affect the rap community, instead of strictly adhering to the law.

1. Practical Considerations

Although case law provides dicta for when lyrics should or should not be used, there are also practical policy implications that may weigh in favor of keeping these lyrics out of court. Most importantly, a court must consider a defendant's First Amendment protections and the issues that may arise from curtailing the defendant's constitutional right. In addition, there are subtle, more nuanced reasons for the exclusion of the rap lyrics, such as the relationship between courts in different levels of the appellate process and the relationship between judges and prosecutors.

¹⁶¹ *Id.* at n.3.

¹⁶² *Id.* at 604.

¹⁶³ *People v. Minnifield*, No. 09 CR 9023(03), 2014 WL 6657699, ¶ 40 (Ill. App. Ct. Nov. 24, 2014). In this case, the defendant, Minnifield, was not permitted, on appeal, to raise the issue of lack of instruction to the jury because he did not tender an instruction on how the rap song was to be interpreted at the trial level.

¹⁶⁴ *Id.* at *9, ¶ 42. The State's witness, Straight, was permitted to testify about the meaning of Minnifield's rap lyrics because of his special knowledge and familiarity with the slang terminology in a rap song.

D. Appellate Court Deference to Lower Courts & Prosecutorial Discretion

When reviewing the admission of evidence, most state appellate courts review the evidence using an abuse of discretion standard, giving wide latitude and deference to state trial courts.¹⁶⁵ In cases where the defendant is convicted, appellate courts frequently find no abuse of discretion and affirm the lower court's admission of the disputed evidence. High conviction rates all but enable prosecutors to continue the evidentiary exploitation of rap lyrics and any other evidence they can; this is compounded with the courts' reluctance to circumscribe prosecutorial discretion.¹⁶⁶ Of the many considerations that a prosecutor must consider in their decisions of whether to charge,

[i]t is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges *in the absence of sufficient admissible evidence to support a conviction*.¹⁶⁷

Despite these ethical obligations to use sufficient admissible evidence—which rap lyrics frequently are *not*—prosecutors remain undeterred in using whatever “evidence” they can to convict defendants. For example, in the unfortunate case of former No Limit rapper McKinley “Mac” Phipps, who was found guilty of manslaughter and sentenced to thirty years' imprisonment, a Huffington Post investigation uncovered evidence that the district attorney, along with manipulating evidence to secure a conviction, threatened the trial's key witness to identify Phipps as the shooter.¹⁶⁸ The investigation concluded, “[w]ith no physical evidence connecting Phipps to the crime, multiple eyewitnesses

¹⁶⁵ See *Commonwealth v. Flamer*, 53 A.3d 82, 86 (Pa. Super. Ct. 2012) (“With regard to the admission of evidence, we give the trial court broad discretion, and we will only reverse a trial court's decision to admit or deny evidence on a showing that the trial court clearly abused its discretion. An abuse of discretion is not merely an error in judgment, but an ‘overriding misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality.’”) (citations omitted); *State v. Jones*, 541 S.E.2d 813, 818 (S.C. 2001) (“The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard.”); *Cook v. State*, 45 S.W.3d 820, 822 (Ark. 2001) (“In matters relating to the admission of . . . a trial court's ruling is entitled to great weight and will not be reversed absent an abuse of discretion.”).

¹⁶⁶ Amy G. Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMP. L.Q. 35, 37 (1982).

¹⁶⁷ *Id.* at 39, n.20 (emphasis added). This excerpt, as well as other prosecutorial considerations, may be found in *American Bar Association Standards for Criminal Justice*, §§ 3-3.8, 3.9 (2d ed. 1980).

¹⁶⁸ See Daniel Krepps, *Killer Mike: Rap Lyrics Being Manipulated in Court to Land Convictions*, ROLLING STONE, (Mar. 29, 2015), <http://www.rollingstone.com/music/news/killer-mike-rap-lyrics-being-manipulated-in-court-to-land-convictions-20150329>.

identifying a different shooter, and even a confession to the crime by another man, the prosecutor went after Phipps' art."¹⁶⁹

E. The Famous Rapper and the "Nobody"

While many of the most well-known cases of rappers on trial are celebrities, the run-of-the-mill cases involve local rappers who are largely unknown outside of their immediate community; rappers whose names aren't widely known and who don't have songs that are ubiquitous in the music world. Writer Carter Maness was aware of this, stating:

I'd wager Jay Z won't be arrested based on his wordplay, just as he was never indicted for dealing crack during the first decade of his career. In rap, it's the nobodies who get screwed—the cases where rap lyrics are interpreted as terrorist threats from citizens with no criminal record, the poor kids who get lumped into conspiracies based on lyrics which prosecutors use to imply deficiencies in their character.¹⁷⁰

Maness also recognized in the article that prosecutors take advantage of rap stereotypes to win cases;¹⁷¹ instead of prosecutors and law enforcement conducting boots-to-the-ground investigations to collect real evidence and solve cases, prosecutors utilize the indoctrinated prejudices we have and use them against defendants. Use of rap lyrics has even begun to shape investigative methods by police. Maness recognized that "law enforcement continues to mine the internet for leads: SoundCloud tracks and YouTube videos are popping up in court with increased frequency, and that's a major loss for creativity—especially in an art form so reliant on powerful lyrics."¹⁷² These actions by law enforcement affect not only mainstream rappers, but also the small town rapper. The unknown artist. The "nobody." One article, citing author Erik Neilson, stated the phenomena as such: "When you put the lyrics in front of the jury or even worse when you play a video for the jury, you present the jury with an image of some sort of remorseless vicious thug," Neilson mentioned, taking note that it is not uncommon for young men to write rhymes and aspire to become rappers.¹⁷³ "What you don't see is that same kid in glasses sitting at his desk with crumpled paper all around, who has just spent hours trying to write just one of the lyrics that's in one of the dozens of notebooks that he has."¹⁷⁴ The thrust of this section of the article was to consider an infrequently-considered notion: famous rappers are not the only rappers whose lyrics go on trial. Relatively unknown rappers, or

¹⁶⁹ *Id.*

¹⁷⁰ See Carter Maness, *Let's Stop Pretending Rap Lyrics Are Evidence*, GOOD (June 7, 2016), <https://www.good.is/articles/rap-lyrics-are-not-evidence>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Lauren Williams, *Your Rap Lyrics Can Be Held Against You in a Court of Law*, MOTHERJONES (Mar. 10, 2014), <http://www.motherjones.com/politics/2014/03/rap-lyrics-trial/>.

¹⁷⁴ *Id.*

even individuals who simply write lyrics at home and consider themselves an artist face a darker reality. These artists are not superstars or frequent placeholders on the Billboard 100, nor do they have the pedestal of success to stand upon if they face prosecution for their lyrics. Through the prosecution and subsequent conviction of rapper-defendants through rap lyrics, courts are inadvertently disincentivizing rappers to *not* make music that is provocative and contentious, qualities that have been staples of the genre throughout its history. What, then, is left for a rapper wanting to remain true to himself or herself and not conforming to society's definition of acceptability by "softening" his or her rap lyrics, while also not wanting to provide prosecutors with any evidence to be used against them at trial? This conundrum is unique to the rap world, where the threat of prosecution looms over one's head with a Damocles-like presence.

F. Free Expression and the Chilling Effect

Most people interpret the First Amendment as permitting them to say whatever they want with impunity.¹⁷⁵ This concept is most prevalent in the world of art, where artists enjoy the freedom to express their ideas and thoughts in their own fashion.¹⁷⁶ When courts use creative mediums to evidence the artist's knowledge or intent to commit a crime, a chilling effect begins to permeate that medium; artists who believe their work may be used against them may refrain from exercising their First Amendment freedom of expression.¹⁷⁷ At the rate at which lyrics are being admitted into evidence against rapper-defendants, it seems unlikely that tomorrow's rappers will feel comfortable rapping and recording songs that contain violent or controversial lyrics.¹⁷⁸ This chilling effect could potentially cripple the rap industry, which thrives on the controversy it raises.¹⁷⁹ This concern was echoed by rapper Killer Mike when making a statement regarding the criminal justice system's frequent use of rap lyrics: "If we let this stand, what you're going to see is that tool is going to be used to wipe out an entire potential generation of [artists] out of our community."¹⁸⁰

The blowback Ice T received from "Cop Killer" serves as a cautionary tale.¹⁸¹ Initially, despite the criticism received for defending Ice T's controversial song, Time Warner management publicly supported Ice T.¹⁸² After police organizations threatened to request their pension funds to divest themselves of all Time Warner stock, Time Warner's support for Ice T wavered.¹⁸³ By the middle of that summer, Ice T announced he would pull "Cop Killer" from Body Count; Time Warner

¹⁷⁵ Jason E. Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 515 (2009).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 515–16.

¹⁷⁸ Wilson, *supra* note 15, at 374.

¹⁷⁹ *Id.* at 374–75.

¹⁸⁰ Krepps, *supra* note 168.

¹⁸¹ Leola Johnson, *Silencing Gangsta: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25, 32 (1994).

¹⁸² *Id.*

¹⁸³ *Id.*

quickly followed suit, stating it would pull all existing copies off the shelves and replace them with new Body Count albums, *sans* “Cop Killer.”¹⁸⁴ This affected not only Ice T, but other hardcore rappers as well. In the fall of 1992, major recording label MCA quashed the rap song “No Head, No Backstage Pass” after women at the company complained.¹⁸⁵ By a refusal of record labels to play or release the artists’ songs, this active censoring of rap gives rappers little freedom to rap about topics of their choice.

Rap music is viewed by many African-Americans to be the only pure black medium, and a critical part of the culture.¹⁸⁶ Due to its vulnerability to mainstream disdain or contempt because of its subject matter,¹⁸⁷ the preservation of rap music necessitates First Amendment protection, especially when considering that other forms of self-expression, generally considered harmful or offensive, are protected by the First Amendment.¹⁸⁸ This platform has long been the soapbox from which rappers have vocalized the concerns of their community: poverty,¹⁸⁹ the broken incarceration system,¹⁹⁰ and a myriad of other issues. One of the most poignant examples is Lil’ Wayne’s ten-minute song, “Dontgetit,” where, after rapping the first couple of verses, he reflects on the current state of the criminal justice system:

I’m just a soul whose intentions are good
Oh Lord, please don’t let me be misunderstood

I was watchin’ T.V. the other day, right
Got this white guy up there talkin’ about black guys
Talkin’ about how young black guys are targeted
Targeted by who? America

You see 1 in every 100 Americans are locked up
1 in every 9 black Americans are locked up

¹⁸⁴ *Id.* at 33.

¹⁸⁵ *Id.*

¹⁸⁶ Jeffrey B. Kahan, *Bach, Beethoven and the (Home)boys: Censoring Violent Rap Music in America*, 66 S. CAL. L. REV. 2583, 2588 (1993).

¹⁸⁷ *Id.*

¹⁸⁸ See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (defendant’s action of burning an American flag during a protest was expressive conduct that was protected by the First Amendment); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compelling public school children to salute the American flag or face expulsion was unconstitutional); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 547 (1993). The Church of Lukumi Babalu Aye practiced Santeria; animal sacrifice was a Santeria ritual during which an animal’s carotid artery would be cut and the animal would be eaten. However, the Supreme Court ruled that the city ordinance prohibiting ritual animal sacrifice was held unconstitutional.

¹⁸⁹ See 2PAC, *Changes, on GREATEST HITS* (Interscope, Amaru, Death Row 1998) (“I see no changes. Wake up in the morning and I ask myself, ‘Is life worth living? Should I blast myself?’ I’m tired of bein’ poor and even worse I’m black. My stomach hurts, so I’m lookin’ for a purse to snatch.”).

¹⁹⁰ See LIL WAYNE, *Dontgetit, on THA CARTER III* (Cash Money, Universal Motown 2008).

And see what the white guy was tryin to stress was that
The money we spend on sendin a mothafucka to jail

A young mothafucka to jail
Would be less to send his or her young ass to college
See, and another thing the white guy was stressin'
Was that our jails are populated with drug dealers

You know crack cocaine, stuff like that
Meaning due to the laws we have
On crack cocaine and regular cocaine
Police are only, I don't want to say only, right

But shit, only logic by ridin' around
In the hood all day and not in the suburbs
Because crack cocaine is mostly found in the hood
And you know the other thing is mostly found in
You know where I'm goin'

But why bring a mothafucka to jail
If it's not gon' stand up in court
Cause this drug ain't that drug
You know level 3, level 4 drug, shit like that

I guess it's all a misunderstandin', I sit back and think
You know us young mothafuckas, you know that 1 in 9
We probably only sellin' the crack cocaine
Because we in the hood

And it's not like in the suburb
We don't have what you have, why?
I really don't wanna know the answer
I guess we just misunderstood huh?¹⁹¹

Concerns such as those expressed by Lil' Wayne are pervasive in the criminal justice system and further reason why rap needs to remain open as a platform to voice such issues.

G. Possible Alternatives

While this Note is suspicious of the use of rap lyrics as evidence, this does not mean that the solution is a bright-line ban on the use of rap lyrics in criminal prosecution. As recognized in this Part, above, there are instances where there may be reasonable and legitimate interests which are served by admitting defendant-authored lyrics into evidence. These circumstances include: (1) where

¹⁹¹ *Id.*

the rap lyrics accurately depict elements of the charged offense; (2) when the judge gives a limiting instruction; and (3) other limited instances described in Part B. Because of the nature of the rap genre, however, rap lyrics serve a larger purpose than merely proving certain elements of a crime; these lyrics can prejudice a jury who finds the defendant's lyrics, or the genre as a whole, as unseemly or vulgar, and a crafty prosecutor will frequently play up these prejudices and preconceived notions about rap to help their case.¹⁹² While these prejudices help prosecutors "prove" their cases, it does nothing to help dispel these stereotypes; in fact, it does the opposite.

I propose a more moderate approach to this issue—ensuring that courts and jurors properly consider the evidentiary value of rap lyrics. To do this, society must dispel the ideas we have developed about what rap music is, what it isn't, and what it represents. By dispelling these stereotypes of rap and starting *tabula rasa*, rappers will be afforded a better chance of having rap lyrics used fairly and not for their prejudicial value.

Is there anything that rap music can do to help itself? Certainly, the same themes that make rap popular are the very themes that critics admonish as reprehensible. As Professor Paul Butler states:

One serious deficiency in hip-hop is its endemic sexism and homophobia. Can any credible theory of justice be based on a culture that routinely denigrates more than half the population? The answer must be "no." In order for hip-hop to command the moral authority that, at its best, it deserves, it must address subordination within the hip-hop nation. The problem besmirches hip-hop's extraordinary aesthetic achievement and detracts from its important evaluation of criminal justice. Hip-hop music and videos, especially, contain the kind of depictions of gender and sexuality that we might expect of adolescent boys.¹⁹³

Even though rap music does itself no favors with its "endemic sexism and homophobia"¹⁹⁴ and other topics such as drug use and violence, this does not necessarily mean that rap music can, or even should, change. Reprehensible as they may be, these topics are what make rap what it is. It may prove to be a herculean, if not impossible, task to remove this type of subject matter without transmogrifying rap music into something else. Rap music cannot be defined solely by the way it is portrayed in the media; it is an art form that has touched and changed the lives of many. As Professor Erik Nielson stated:

¹⁹² Wilson, *supra* note 15, at 368. In the prosecution of rapper C-Murder (Corey Miller), assistant district attorney Douglas W. Freese often used Miller's rap name when referring to the defendant and his background. One can only imagine the invidious reasons for this descriptive choice instead of Miller's birth name.

¹⁹³ Paul Butler, *Much Respect: Toward A Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 1015 (2004).

¹⁹⁴ *Id.*

It is true that hip-hop has been scarred by violence. Tupac Shakur and the Notorious B.I.G., for example, two of rap's most important and influential artists, were killed in the prime of their careers. But for each instance of violence, there are countless examples of lives saved or made stronger. Trust us on this: The kids spending hours per day writing rap songs aren't a threat to society; they are often trying to escape the threats *from* society.¹⁹⁵

For many youths who listen to rap music, rap represents not only an escape from the world in a figurative sense, but also in a literal sense. In fact, the archetype of what most people consider to be a rapper includes, at least in part, rappers who grew up poor and surrounded by violence, but instead of succumbing to the status quo, they used their successful rap careers to get away from the old life that gave them their new lifestyle.¹⁹⁶

H. Expert Witnesses

Judges, who disagree about how to interpret carefully crafted statutes and volumes of case law, can hardly be expected to understand and be privy to the inner workings of rap culture and the constantly-changing slang and colloquialisms. Yet, these judges, serving as the gatekeepers for the admission of evidence, retain the power of determining the validity of rap lyrics. The use of expert witnesses to explain rap lyrics to both the judge and jury would add much needed clarity; expert witnesses could give the judge and jury context from which to interpret defendant-authored lyrics.¹⁹⁷ Expert witness testimony would be admissible under Federal Rule of Evidence 702.¹⁹⁸ This rule states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based

¹⁹⁵ Erik Nielson & Michael Render (aka Killer Mike), *Rap's Poetic (In)justice: Flashback*, USA TODAY (Nov. 28, 2014), <http://www.usatoday.com/story/opinion/2014/11/28/poetic-injustice-rap-supreme-court-lyrics-violence-trial-column/19537391/>.

¹⁹⁶ See DRAKE, *Started from the Bottom, on NOTHING WAS THE SAME* (OVO, Aspire, Young Money Cash Money, Republic 2013). In *Started From the Bottom*, Drake recounts his humble beginnings and how his fame and wealth increased as he became more successful.

¹⁹⁷ Andrea L. Dennis, *Poetic (in)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 32 (2007) (“[D]efendants should be permitted to offer expert witness testimony on the composition of and societal response to rap music lyrics. An expert might offer testimony revealing that defendant-authored rap music lyrics are subject to interpretive ambiguity, are ubiquitous, constitute braggadocio, and are fantastical or fictional. Such testimony might undercut the assumption that defendant-authored rap music lyrics are autobiographical confessions of the crime charged, or an expression of mindset. Furthermore, expert testimony might reveal the character-based and inflammatory nature of rap music lyrical evidence.”).

¹⁹⁸ *Id.* at 36.

upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.¹⁹⁹

With the aid of expert witnesses, many of the lyrics that judges currently rule as admissible would be inadmissible if judges better understood the context behind the rap lyrics.

I. Changing Our Perspectives on Rap

Aware of the effect that rap music has on culture and the negative connotations given to the genre, many rap artists and rap groups attempt to change preconceived notions of those who are not fans of rap music. By communicating messages about violence and discrimination and relating that to the youth of America (one of rap's largest demographics), rap artists provide an opportunity for individuals to make positive changes in their own lives.²⁰⁰ For example, rapper Ludacris founded the Ludacris Foundation to encourage education for children; the LudaCares Program donates food and clothes to needy families during the holidays; Ludacris gives high school students scholarships for college.²⁰¹ The media often portrays rap negatively when it is related to something undesirable, such as a negative social issue or a prominent crime.²⁰² However, the truth of the matter is that rap music can be positive, and rap can increase social consciousness by increasing the awareness of issues that many inner city residents face.²⁰³

¹⁹⁹ FED. R. EVID. 702.

²⁰⁰ *Impacts of Rap Music on Youths*, WEEBLY, <http://impactofrapmusiconyouths.weebly.com/positive-impacts.html> (last visited Sept. 10, 2017).

²⁰¹ Desire Thompson, *Salute! 9 Rappers Who Give Back To The Community (LIST)*, GLOBALGRIND, <https://globalgrind.com/3868600/rappers-with-charities-give-back-to-community-list/> (last visited Sept. 10, 2017).

²⁰² *Id.*

²⁰³ *Id.*; see also *Impacts of Rap Music on Youths*, *supra* note 200. ("Hip hop has been vital in promoting social and political awareness among the youth of today. Rap music educates people from several different perspectives and raises many social issues. Rap is a channel for people to speak freely about their view on political or social issues and by doing so, it engages teenagers to become concerned and aware of these issues. This is important in making the youth aware of the world around them and the conditions they face in society, enabling individuals to discuss ways in which they can make a positive change within society. A few of the issues that hip hop has created awareness in are racial discrimination, individuality and the importance of education and believing in your dreams. . . . Music in general brings people together, but the youth of today can relate to the struggle and difficulties that most rappers talk about."); Kathleen Odenthal Romano, *How Hip-Hop Music Has Influenced American Culture and Society*, SPINDITTY (Apr. 20, 2016), <https://spinditty.com/genres/Hip-Hops-Influence-on-America> ("Hip Hop culture stands as a poignant and historically significant factor of society as it represents a reflection of socio-political woes and widespread sentiment of traditionally marginalized and oppressed communities. As such, Hip Hop is a vehicle for social commentary and awareness, as well as an avenue for public discourse. In these considerations, 1990's Hip Hop development marked a culturally nuanced and significant movement in history in both its reflection of the discontented social climate at the time and its ability to construct and reconstruct socio-cultural norms.").

Critics of rap music frequently seem to view rap in a vacuum; there are other forms of art, not just music, that touch upon the same topics, but receive none of rap's criticism. Similar topics discussed in rap can be found in books, television, movies, and video games.²⁰⁴ Anthony Giovacchini stated this anomaly as such: "The difference between shooting cops on a video screen and listening to it on a CD is not significant. You can hear about sex on a gangster rap album, but you can see the actions at the movie theater."²⁰⁵ The seemingly arbitrary distinction between rap music and other forms of media begs the question: why do critics single out rap music, while other mediums, such as books,²⁰⁶ movies,²⁰⁷ and video games,²⁰⁸ are free from this criticism because their content, the *same* content, is viewed as innocuous?

J. Constitutionally Permissible Limits on Free Speech: Obscenity

The Free Speech Clause of the First Amendment requires that "Congress shall make no law . . . abridging the freedom of speech."²⁰⁹ The Free Speech Clause exists to "protect discourse on public matters."²¹⁰ While this freedom of speech has at times been called a "liberty," it is not absolute.²¹¹ Even so, the permissible curtailment of free speech is "one of degree."²¹² The Supreme Court, while hesitant to restrict an individual's First Amendment right to freedom of speech, has recognized some limited exceptions, including obscenity,²¹³

²⁰⁴ Anthony M. Giovacchini, *The Negative Influence of Gangster Rap And What Can Be Done About It*, ETHICS OF DEV. IN A GLOBAL ENV'T (EDGE) (July 4, 1999), https://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/negative.htm (last updated July 26, 1999).

²⁰⁵ *Id.*

²⁰⁶ While courts are not known to curtail the artistic expression of authors, schools frequently ban books because of their content. J.K. Rowling's beloved *Harry Potter* series topped the list of the most challenged books of 2000. Shannon Maughan, *Harry Potter Tops List of Banned Books*, N.Y. TIMES (Feb. 8, 2001), <http://www.nytimes.com/books/01/02/04/abim/pw-potter.html>; cf. Valerie Strauss, *Top 10 Books in 2016 Most Challenged in Schools and Libraries. No. 9 is a Series Written by Bill Cosby.*, WASH. POST (Oct. 16, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/10/16/top-10-books-in-2016-most-challenged-in-schools-and-libraries-no-9-is-a-series-written-by-bill-cosby/?noredirect=on&utm_term=.155b4cfb4173 (*Harry Potter* marked the most challenged book from 2000 to 2009).

²⁰⁷ See *infra* Jacobellis v. Ohio, 378 U.S. 184 (1964).

²⁰⁸ In *Brown v. Entertainment Merchants Association*, the Supreme Court upheld the lower court's permanent injunction of a California law that imposed restrictions on the sale or rental of violent video games to minors. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011). The Court, through Justice Scalia, reinforced the basic principle that "as a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (citing *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

²⁰⁹ U.S. CONST. amend. I.

²¹⁰ *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011).

²¹¹ *Gitlow v. People of State of New York*, 268 U.S. 652, 664 (1925).

²¹² *Pennekamp v. Florida*, 328 U.S. 331, 352 (1946).

²¹³ *Roth v. U.S.*, 354 U.S. 476 (1957); see *Ginsberg v. New York*, 390 U.S. 629 (1968). Minors, it seems, have a more restricted right than adults to determine what is obscene.

incitement,²¹⁴ and fighting words.²¹⁵ Regardless of the medium of art, Justices of the Court have struggled to adequately articulate what “obscene” is. In *Jacobellis v. Ohio*, the Supreme Court reversed the conviction of a defendant, who was the manager of a movie theater, charged and convicted of possessing and exhibiting an obscene film.²¹⁶ This case is perhaps most famously known for Justice Stewart’s comment in his concurring opinion, in which he wrote that, while he could not define the kind of materials that would be considered obscene, “I know it when I see it.”²¹⁷ Justice Stewart’s acknowledgement shows the truly arbitrary and capricious fashion by which different people can interpret art. A rapper has no standard by which to gauge how his lyrics might be interpreted by a judge or jury besides “they’ll know it’s obscene when they see it.”²¹⁸ Currently, *Miller v. California* provides the standard by which the Supreme Court defines obscene.²¹⁹ Speech is obscene if, “taken as a whole, does not have serious literary, artistic, political[,] or scientific value.”²²⁰ Given rap music’s rich background and its utility as a medium for those who have historically felt ignored and been

Id. In *Ginsberg*, the Supreme Court upheld a New York statute that prohibited the sale of obscene materials to minors under 17 years of age. *Id.* Justice Brennan, writing for the majority, deferred to the knowledge of the state to regulate minors’ access to obscene materials: “We do not regard New York’s regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors’ constitutionally protected freedoms. Rather [the New York statute] simply adjusts the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests’ of such minors. . . . That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’” *Id.* (citing *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170. *But see* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975), (“Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”).

²¹⁴ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²¹⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²¹⁶ *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

²¹⁷ *Id.* at 196. Justice Stewart went on to brand this task as “trying to define what may be indefinable.” *Id.*

²¹⁸ There have been some instances, however, where courts have recognized the unpredictability of categorizing obscene materials. In *Paris Adult Theatre I v. Slaton*, the Supreme Court reversed a Georgia trial court’s denial of an injunction that would enjoin a movie theater from showing obscene materials. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). The Supreme Court approved of Georgia’s injunction procedure, noting that it provides notice to those who exhibit obscene material: “Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected.” *Id.* at 55.

²¹⁹ *Miller v. California*, 413 U.S. 15 (1973).

²²⁰ *Id.*

disenfranchised,²²¹ rap music certainly has “value.”²²² The obscenity standard is, in essence, a “visual” standard generally reserved for depictions of sex acts. In an abstract sense, applying an obscenity standard may not be appropriate, in that the written and spoken lyrics are not sex acts. Further, both “fighting words” and incitement are inappropriate classifications in which to categorize rap lyrics. Justice Sanford recognized the wide latitude that should be given to all ideas and thoughts, no matter how offensive they may seem:

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.²²³

Courts, and society at large, should not jump to condemn rap music as inciting violence simply because it can be construed that way. Obviously, whether rap music can be regarded as inciting violence and whether it *actually* incites violence are two different determinations. And until rap music actually does incite violence, the fact that it *might* serves as a poor justification for censoring the genre.

Conclusion: Where are We Now?

Rap’s enigmatic nature has drawn both criticism and praise that runs the gamut. Critics bash rap music as profane; however, proponents recognize the social platform rap provides for the disenfranchised—profane lyrics and all. It has evolved from an underground movement popular in inner cities into something that reaches beyond the realm of music. Rap has influenced fashion and politics. Unfortunately, rap music has also wormed its way into the courtroom.

Despite sharing elements with other mediums of art, rap music has been prosecuted (as well as persecuted) for being “evil” and “malicious.” The Delphic nature of rap music creates a proverbial Gordian knot for judges; how can a judge interpret rap lyrics, a form of art, in the same way that they interpret the Constitution,²²⁴ the foundation upon which the United States was built?

²²¹ See Chris Moore, “*Fuck Tha Police*”: *N.W.A.’s Most Courageous Song is Still as Relevant as Ever*, MASS APPEAL (Aug. 14, 2015), <https://massappeal.com/fuck-tha-police-nwa-most-courageous-song-is-still-as-relevant-as-ever/>. “Today’s premiere of the N.W.A. biopic *Straight Outta Compton* has everyone thinking back to a time when the streets of L.A. were burning, and ‘Fuck Tha Police’ was blasting from car tape decks everywhere. The timing of the new movie could not be better, given that ‘Fuck Tha Police’ has become the anthem of a new wave of activists fighting against police brutality and racism around the country.” *Id.*

²²² Even speech that serves no value to society is entitled to the protections of free speech. The Supreme Court recognized this in *Winters v. New York*: “Though we can see nothing of any possible value to society in these magazines [in violation of the New York Penal Code], they are as much entitled to the protection of free speech as the best of literature.” *Winters v. New York*, 333 U.S. 507, 510 (1948).

²²³ *Gitlow v. People of State of New York*, 268 U.S. 652, 673 (1925).

²²⁴ See *supra* Constitutionally Permissible Limits on Free Speech: Obscenity.

Individuals who are experts in the rap genre vehemently disagree on what rap is and what it stands for; it boggles the mind to understand how judges—who are likely not specialists in lyrical interpretation, context, or the background and history of rap—can definitively decide rap lyrics contain even a scintilla of probative evidentiary value.

While there are legitimate reasons to use rap lyrics as evidence in limited circumstances, there are arguably more reasons to exclude these lyrics and presume them as inadmissible in criminal prosecutions. By admitting these lyrics, the notion that rap music is aggressive or violent (or any other adjectives used to devalue the genre) is further reinforced when fortified by the presence of a (usually gruesome) criminal prosecution. This negative impression marginalizes rap music, even though rap represents more than just prosecutorial evidence to many people. Rap music is like any other medium of expression we enjoy. In a word, rap is entertainment. An escape. Expressive. When we debase the rap genre as wholly degenerate by using lyrics as evidence in criminal prosecutions, we negatively affect both the rapper-defendant *in* the courtroom, and the rap world *outside* of the courtroom. When critiquing or analyzing rap music for its evidentiary value, both the judge and jury must go beyond the surface of the music they are listening to and endeavor to ascertain the underlying message the artist is striving to illustrate.²²⁵ To quote actress Samantha Morton, “[R]ap music isn’t just about guns and sexism. They’re talking about real things you can hang on to, problems of identity that you have sympathy with. It’s not just about the music, with rap . . . it meant a whole lot more than that.”²²⁶

²²⁵ *Impacts of Rap Music on Youths*, *supra* note 200.

²²⁶ Burhan Wazir, *Young, Gifted and Gabby*, THE GUARDIAN (June 17, 2000, 22:34 EDT), <https://www.theguardian.com/film/2000/jun/18/features.magazine>.