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**RAP ON TRIAL: RAP LYRICS AS EVIDENCE IN CRIMINAL  
CASES**

BENNET HERBERT\*

**CONTENT**

|  |     |
|--|-----|
| INTRODUCTION.....  | 94  |
| I. HISTORY OF HIP-HOP MUSIC .....                        | 95  |
| A. ORIGINS OF HIP-HOP (1973-1981).....                   | 96  |
| B. GOLDEN AGE OF HIP-HOP (1982-1997) .....               | 98  |
| C. RAP GOES PREMIER (1998-2014) .....                    | 100 |
| D. RECENT DEVELOPMENTS IN HIP-HOP (2015–2022).....       | 103 |
| E. HISTORY OF RACIAL IMPLICATIONS .....                  | 104 |
| 1. <i>Academic Studies</i> .....                         | 105 |
| 2. <i>Policing Hip-Hop</i> .....                         | 106 |
| II. RAP LYRICS USED AS CRIMINAL EVIDENCE.....            | 107 |
| A. FEDERAL RULES OF EVIDENCE .....                       | 107 |
| 1. <i>Rule 403</i> .....                                 | 107 |
| 2. <i>Rule 404(b)</i> .....                              | 108 |
| B. EARLY CASES OF RAP LYRICS AS EVIDENCE .....           | 108 |
| 1. <i>U.S. v. Foster</i> .....                           | 108 |
| 2. <i>State v. Cheeseboro</i> .....                      | 109 |
| 3. <i>Cook v. State</i> .....                            | 109 |
| 4. <i>Greene v. Commonwealth</i> .....                   | 110 |
| 5. <i>Hannah v. State</i> .....                          | 110 |
| C. THE KEYSTONE CASE: <i>NEW JERSEY V. SKINNER</i> ..... | 111 |
| D. RECENT CASES OF RAP LYRICS AS EVIDENCE .....          | 112 |
| 1. <i>Commonwealth v. Talbert</i> .....                  | 112 |
| 2. <i>Ward v. Indiana</i> .....                          | 113 |
| 3. <i>Montague v. Maryland</i> .....                     | 113 |
| E. THE FIRST AMENDMENT.....                              | 114 |
| 1. <i>Dawson v. Delaware</i> .....                       | 114 |
| 2. <i>Tennessee v. Bassett</i> .....                     | 115 |
| F. FAMOUS ARTISTS .....                                  | 115 |

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|                                   |     |
|-----------------------------------|-----|
| 1. <i>Bobby Shmurda</i> .....     | 116 |
| 2. <i>Drakeo the Ruler</i> .....  | 117 |
| 3. <i>Tay-K</i> .....             | 120 |
| 4. <i>Mayhem Mal</i> .....        | 121 |
| 5. <i>YNW Melly</i> .....         | 121 |
| III. STATUTORY INTERVENTION ..... | 122 |
| CONCLUSION .....                  | 125 |

## INTRODUCTION

“Mamaaa,  
Just killed a man.  
Put a gun against his head, pulled my trigger,  
Now he’s dead.” – Queen, *Bohemian Rhapsody*<sup>1</sup>

“Momma, I just killed a man,  
My body still trembling, can you feel my hand?  
Don’t shed no tears,  
It won’t be long before they find out it was me,  
Momma.” – J. Cole, *Killers*<sup>2</sup>

In December of 2020, a Maryland court upheld a conviction where the defendant appealed, arguing lyrics from a rap song he recorded should not have been presented to the jury as evidence.<sup>3</sup> This was far from the first time that a defendant’s rap lyrics have been used as evidence against him at a criminal trial, and it will not be the last.

From its inception in the early 1970s, to its evolution to a more socially conscious genre of art in the 1980s, to its massive mainstream appeal in the 2010s, rap music has always been perceived through a more negative and threatening lens than other genres.<sup>4</sup> This largely racially motivated sentiment is especially prevalent in the criminal justice system. Courts continue to rule that the probative value of vague, violent rap lyrics outweigh their

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<sup>1</sup> QUEEN, *Bohemian Rhapsody*, on A NIGHT AT THE OPERA (EMI 1975).

<sup>2</sup> J. COLE, *Killers*, on THE GLORIFICATION OF GANGSTER (Alex Haldi 2011).

<sup>3</sup> Montague v. State, 243 A.3d 546 (Md. 2020).

<sup>4</sup> See Carrie B. Fried, *Bad Rap for Rap: Bias in Reaction to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135, 2141-42 (1996).

prejudicial impact and often allow rap lyrics to be admitted as evidence.<sup>5</sup>

Recently, musical artists such as Jay-Z, Meek Mill, and Killer Mike, and activists such as Michelle Alexander have signed a statement supporting a bill in the New York legislature. This bill would limit when prosecutors could introduce rap lyrics as evidence.<sup>6</sup> The statement highlights the issues of racial disparity, undue prejudice, and the importance of a musician's freedom to create art without fear of prosecution.<sup>7</sup>

The use of rap lyrics as evidence in criminal trials is becoming increasingly common for both famous rappers and less notable defendants.<sup>8</sup> In Part II, this paper summarizes a brief history of hip-hop music, discussing its inception at New York block parties in the 1970s, its rise to the top of popular music today, and the social and racial perceptions that have plagued it for decades. Part III of this paper offers background to the relevant Federal Rules of Evidence and constitutional issues at play when evaluating the use of rap lyrics in a courtroom and provides examples of when rap lyrics have been used at trials. Part IV describes the bill being proposed in the New York legislature, one that is endorsed by prominent musical artists, that would narrow when judges can admit lyrics as evidence and analyze the effect and likely success of the bill. Part V summarizes this paper and offers final recommendations.

## I. HISTORY OF HIP-HOP MUSIC

Hip-hop began in the early 1970s in the South Bronx as a result of community violence, gang activity, and poverty.<sup>9</sup> As hip-hop evolved through the decades, rap lyrics took on socially conscious

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<sup>5</sup> Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent at 17–18, *State v. Skinner*, 95 A.3d 236 (N.J. 2014) (No. A-57/58-12 (071764)).

<sup>6</sup> Shirin Ali, *Jay-Z, Other Artists Call to Ban Using Rap Lyrics as Criminal Evidence*, THE HILL (Jan. 19, 2022), <https://thehill.com/changing-america/enrichment/arts-culture/590381-jay-z-other-artists-call-to-ban-using-rap-lyrics-as/> [https://perma.cc/R4TV-PD46].

<sup>7</sup> *Id.*

<sup>8</sup> Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent, *supra* note 5, at 17–18.

<sup>9</sup> Fernando Orejuela, *Timeline of African American Music: Rap/Hip-Hop*, CARNEGIE HALL <https://timeline.carnegiehall.org/genres/rap-hip-hop> [https://perma.cc/S839-2FEN]

themes and eventually reached widespread commercial success, becoming the most popular genre of music in the United States.<sup>10</sup>

#### A. ORIGINS OF HIP-HOP (1973-1981)

In the early 1970s, young Black and Hispanic communities in the South Bronx wanted somewhere to party amidst the economic struggles of the area and unemployment.<sup>11</sup> At these parties, Black New Yorkers brought their love of funk and jazz, while Hispanic New Yorkers brought Caribbean and Latin musical influences.<sup>12</sup> Eventually, this fusion created the first traces of what we recognize as hip-hop.<sup>13</sup> The youth movement became known as “hip-hop” over time as artists such as the Furious Five’s Keith Cowboy used the terms in their raps.<sup>14</sup>

Many iconic features of modern hip-hop music can be traced to these block parties. For example, the block parties were hosted by a Master of Ceremonies (“MC”) to ensure the crowd was having a good time.<sup>15</sup> The hip-hop parties also lacked the technology to automatically and smoothly transition from one song to the next, so disc-jockeys (“DJs”) used two turntables to manually extend the break between records to ensure a smooth transition from one record to the next.<sup>16</sup> Through this process, hip-hop DJs began experimenting with “scratching” the record, giving hip-hop music some of its most iconic sounds.<sup>17</sup>

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<sup>10</sup> John Lynch, *For the First Time in History, Hip-Hop Has Surpassed Rock to Become the Most Popular Music Genre, According to Nielsen*, BUSINESS INSIDER (Jan. 4, 2018), <https://www.businessinsider.com/hip-hop-passes-rock-most-popular-music-genre-nielsen-2018-1> [https://perma.cc/H2L8-PFFJ].

<sup>11</sup> Ryan Salem, *History of New York City: Hip-Hop*, SETON HALL UNIV.: BLOG (Feb. 21, 2020), <https://blogs.shu.edu/nyc-history/2020/02/21/hip-hop/> [https://perma.cc/EW2Q-T7WV].

<sup>12</sup> See LA VERDAD: AN INTERNATIONAL DIALOGUE ON HIP HOP LATINIDADES (Melissa Castillo-Garsow & Jason Nichols eds., 2016).

<sup>13</sup> See *id.*

<sup>14</sup> Jeff Chang, *How Hip-Hop Got Its Name*, MEDIUM (Oct. 10, 2014), <https://medium.com/cuepoint/how-hip-hop-got-its-name-a3529fa4fbf1> [https://perma.cc/36F6-YYQ5].

<sup>15</sup> Daudi Abe, *MC/Master of Ceremonies (Emcee)*, BLACKPAST (Dec. 26, 2013), <https://www.blackpast.org/african-american-history/mc-emcee-master-ceremonies/> [https://perma.cc/L3RZ-87RU].

<sup>16</sup> See David McNamee, *Hey, What’s That Sound: Turntablism*, THE GUARDIAN (Jan. 11, 2010), <https://www.theguardian.com/music/2010/jan/11/hey-whats-that-sound-turntablism> [https://perma.cc/W5QC-SYTM].

<sup>17</sup> *Id.*

As the Caribbean influence from Hispanic New Yorkers melded into these hip-hop parties, some began incorporating the Jamaican tradition of “toasting,” a boastful type of spoken poetry and speech over music.<sup>18</sup> Many credit charismatic MC “DJ Kool Herc” for extending his toast between long breaks at a block party and being the first person to truly rap.<sup>19</sup> Early lyrical content of rap music primarily revolved around how good the rapper was at rhyming, how much of a good time he was to hang out with, and how he was cooler than some unidentified third party that was not the listener.<sup>20</sup>

For the first few years of hip-hop, the music was not recorded and only existed at these parties in a live setting.<sup>21</sup> Eventually, since partygoers would go home from a night of dancing and want to listen to the music they heard the night before, MCs began recording their music for distribution sometime in the late 1970s.<sup>22</sup> These recordings became popular in Harlem, the South Bronx, and eventually other cities on the East Coast, but they remained an arm’s length away from crossover success to white audiences.<sup>23</sup>

That changed in 1979 when The Sugarhill Gang released *Rapper’s Delight*.<sup>24</sup> Often wrongly cited as the first rap song, and more recently amended to be considered the first mainstream rap song, *Rapper’s Delight* was the first rap song that most white people at the time had ever heard.<sup>25</sup> Rhyming over an irresistibly catchy

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<sup>18</sup> Mike Pawka, *What is “Dub” Music Anyway? (Reggae)*, STASON, <https://stason.org/TULARC/music-genres/reggae-dub/3-What-is-Dub-music-anyway-Reggae.html> [<https://perma.cc/CA4V-SS9S>].

<sup>19</sup> See Rebecca Laurence, *40 Years from the Party Where Hip Hop Was Born*, BBC (Oct. 21, 2014), <https://www.bbc.com/culture/article/20130809-the-party-where-hip-hop-was-born> [<https://perma.cc/8PZL-MFDL>].

<sup>20</sup> Friedrich Neumann, *Hip Hop: Origins, Characteristics and Creative Processes*, 42 THE WORLD OF MUSIC 51, 57-58 (2000).

<sup>21</sup> MICKEY HESS, HIP HOP IN AMERICA: A REGIONAL GUIDE (2009).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Joe Lynch, *Chart Rewind: In 1979, Sugarhill Gang’s ‘Rapper’s Delight’ Made Its First Chart Appearance*, BILLBOARD (Oct. 13, 2014), <https://www.billboard.com/pro/sugarhill-gang-rappers-delight-first-chart-appearance-anniversary/> [<https://perma.cc/3HQB-C96L>].

<sup>25</sup> This white writer would like to take this moment to share a personal anecdote: My parents amassed a record collection featuring hundreds of records from the 1970’s and 1980’s, and *Rapper’s Delight* was for years the sole rap record in their collection. (The writer has since alleviated that). See also Elizabeth Blair, *‘Rapper’s Delight’: The One-Take Hit*, NPR (Dec. 29, 2000), <https://www.npr.org/2000/12/29/1116242/rappers-delight> [<https://perma.cc/8SYP-MDXL>].

disco beat, members Wonder Mike, Master Gee, and Big Bang Hank boasted about their smooth flows, reputation with the ladies, and ability to compel partygoers to dance.

I said a **hip, hop**, the hippie, the hippie,  
 To the hip hop-a-you don't stop the rock it,  
 To the bang-bang-boogie, say up jump the boogie,  
 To the rhythm of the boogie, the beat.  
**Now what you hear is not a test: I'm rapping to  
 the beat.**<sup>26</sup>

Wonder Mike's opening line would officially calcify hip-hop's namesake in the music industry, and the fifth line is essentially directed at white listeners: he is not testing the microphone; this is not some gimmicky introduction; what you are hearing *is* the vocal part of the song. This is rap music, and you better get used to it.

## B. GOLDEN AGE OF HIP-HOP (1982-1997)

In the early 1980s, rappers expanded upon the lyrical themes of boasting about their vernacular skill and swagger and began to incorporate their personal stories and societal issues into their songs.<sup>27</sup> Several songs did this before 1982, but that year, Grandmaster Flash and the Furious Five released the first hit to pull this off with *The Message*, which described the realities of living in low-income housing projects:

[B]ill collectors, they ring my phone, and scare my  
 wife when I'm not home. Got a bum education,  
 double-digit inflation. Can't take the train to the  
 job, there's a strike at the station...It's like a jungle  
 sometimes, it makes me wonder how I keep from  
 going under.<sup>28</sup>

Because of how popular hip-hop music has become today, many do not know that for the first ten years of its existence, it was mostly considered a phase; a gimmick that would come and go,

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<sup>26</sup> THE SUGARHILL GANG, *Rapper's Delight*, on SUGARHILL GANG (Sugar Hill Records 1979).

<sup>27</sup> See Jon Pareles, *Hip-Hop is Rock 'n' Roll, and Hall of Fame Likes It*, THE NEW YORK TIMES (Mar. 13, 2007), <https://www.nytimes.com/2007/03/13/arts/music/13hall.html> [<https://perma.cc/L77A-P8B3>].

<sup>28</sup> GRANDMASTER FLASH & THE FURIOUS FIVE, *The Message*, on THE MESSAGE (Sugar Hill Records 1982).

quicker than disco and certainly less popular.<sup>29</sup> After *Rapper's Delight*, only a few artists were able to maintain the crossover appeal to white audiences, most notably Run DMC and the Beastie Boys, but even they were considered the exception.<sup>30</sup> It was assumed that in due time rap would run its course and all popular music would return to lyrics that were sung.<sup>31</sup>

This notion was not necessarily destroyed overnight, but there were a few notable landmarks that caused many to realize rap music was not going anywhere. Perhaps the most notable was Public Enemy's 1990 record *Fear of a Black Planet*.<sup>32</sup> The critical and commercial success of Public Enemy and other rap artists around the time such as A Tribe Called Quest, N.W.A., and Tone Lōc compelled *Billboard* editor Paul Grein to dub 1990 "the year that rap exploded."<sup>33</sup> At the time of this quote, nearly one-third of songs in the *Billboard 100* were hip-hop tracks, an exponential growth from the few "gimmicky" exceptions of only five years ago.<sup>34</sup> Rap music was growing, evolving, driving conversations, being both more artistically respected and more harshly criticized, and was not going away any time soon.

As rap expanded beyond its birthplace of New York City throughout the 1980s, it morphed into subgenres.<sup>35</sup> Perhaps the most important evolution—and certainly the most relevant for this paper—was the rise of gangsta rap in Los Angeles.<sup>36</sup> Though the term itself is dismissed by several of its most notable artists, gangsta rap has been defined in various ways; but possibly the most cited definition is that it is Though the term itself is dismissed by several of its most notable artists, gangsta rap generally reflects the realities

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<sup>29</sup> Robert Hilburn, *Rap – The Power and the Controversy: Success Has Validated Pop's Most Volatile Form, But Its Future Impact Could Be Shaped by the Continuing Public Enemy Uproar*, LOS ANGELES TIMES (Feb. 4, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-02-04-ca-470-story.html> [<https://perma.cc/53JY-GBFB>].

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> 1990's: Mainstream Breakthrough, HISTORYOFHIPHOP, <https://historyofthehiphop.wordpress.com/history/1990s/> [<https://perma.cc/5USU-Q5WW>].

<sup>34</sup> Hilburn, *supra* note 29.

<sup>35</sup> Murray Forman, 'Represent': Race, Space, and Place in Rap Music, 19 POPULAR MUSIC 65, 74 (2000).

<sup>36</sup> *See id.* at 78.

of inner-city life, or “street level journalism.”<sup>37</sup> Some smaller L.A. artists recorded gangsta rap songs before 1986, Ice-T’s “Six N’ the Mornin’” was the first rap song to be considered both gangsta rap and a nationwide hit.<sup>38</sup> In the following years, artists like N.W.A., Snoop Dogg, and 2Pac would use gangsta rap to take hip-hop music to new places both commercially and artistically.<sup>39</sup>

Despite its value in popularity, musical achievement, and social commentary, this also marked the first time the general public strongly pushed back against hip-hop music from an ethical standpoint. At the center of many of these debates was whether the unfiltered lyrics—often violent, angry, or criminal in nature—were merely *portraying* the world in which the rappers lived or actively *endorsing* the actions and behaviors contained within. On one album, you could have an artist rap on one song about feeling like a victim in an urban nightmare; on the next song, the artist might rap about feeling complicit in contributing to such a toxic environment; and on the next, the artist would rap about experiencing both and feeling conflicted about their place in the system. Most of this nuance was lost on many important figures, though, as both the George H. W. Bush and Bill Clinton administrations blamed gangsta rap for causing negative societal conditions of inner cities across America<sup>40</sup>; Vice President Dan Quayle went as far as to say 2Pac’s album *2pacalypse Now* should be pulled from shelves.<sup>41</sup>

### C. RAP GOES PREMIER (1998-2014)

Gangsta rap saw its unofficial death in 1997 with the assassinations of Notorious B.I.G. and 2Pac merely seven months apart. For the next few years, hip-hop music was in a bit of an uncertain place. There was, however, still significant progress:

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<sup>37</sup> Eric Harvey, *Reality Meets Rap: The Legacy of Hip-Hop and the L.A. Riots*, RINGER (April 29, 2022, 6:20 AM) <https://www.theringer.com/2022/4/29/23047296/los-angeles-riots-uprising-1992-ice-cube-ice-t> [<https://perma.cc/QG74-W6KC>].

<sup>38</sup> Ice-T.....6 N’ The Mornin’, ASK HIPHOP, <https://history.hiphop/ice-t-6-in-the-morning/> [<https://perma.cc/7B6N-6N97>].

<sup>39</sup> See generally *id.*

<sup>40</sup> Tevi Troy, *Bill Clinton’s Rap Music Quandry*, NEW REP. (Sept. 12, 2013), <https://newrepublic.com/article/114601/bill-clintons-rap-music-quandary> [<https://perma.cc/JS8Y-HUJG>].

<sup>41</sup> B. Drummond Ayres Jr., *The 1992 Campaign: The Campaign Trail; On Quayle’s List: A Rapper and a Record Company*, N.Y. TIMES (Sept. 23, 1992), <https://www.nytimes.com/1992/09/23/us/1992-campaign-campaign-trail-quayle-s-list-rapper-record-company.html> [<https://perma.cc/3VLM-6HLU>].

female artists like Ms. Lauryn Hill, Missy Elliot, and Lil' Kim broke open the doors for massively successful female rappers; Atlanta groups Outkast and UGK added a southern funk to hip-hop production that gave it more catchy sensibilities without sanding off any of its core, raw elements; and the Jay-Z and Nas feud ensured that the headline-snatching crossover appeal of major rap beefs would not die with Biggie and 2Pac's feud.<sup>42</sup> Even with these developments, though, the genre had hit somewhat of a plateau in terms of growing mainstream (white) audiences and, in 1999, it was far behind the most popular genres in America: rock, pop, and country.<sup>43</sup> Yet, a few landmarks in the first 12 years of the 21<sup>st</sup> century took rap to new heights commercially and artistically.

Given the racial implications at play with white people's view of rap (more on that later), it makes sense that it took a white rapper with a name that sounds like a famous candy for many white people to give the genre a chance. Eminem's lyrics were violent, raunchy, and cinematically descriptive, but often they were ironic and funny.<sup>44</sup> His flows were technical and precise, and his voice would oscillate between whiny and nasally to angry and terrifying.<sup>45</sup> He was far from the first or best rapper to attempt these paradoxes, but he was the first white rapper to do it well.<sup>46</sup> Simply put, Eminem's skin color allowed him to reach a level of popularity and avoid a level of criticism that an identical Black rapper simply could not have achieved.<sup>47</sup>

<sup>42</sup> See e.g., Johnny Silvercloud, *Lady of War.*, MEDIUM (Aug. 1, 2014), <https://medium.com/afrosapiophile/female-rapper-1be314192e02> [<https://perma.cc/W8DT-N73V>]; *The South Got Something to Say: A Celebration of Southern Rap (1995-1999)*, NPR (Aug. 3, 2000, 12:00 PM), <https://www.npr.org/2020/08/03/896254950/the-south-got-something-to-say-a-celebration-of-southern-rap-1995-1999> [<https://perma.cc/KD85-KXUQ>]; Catherine Walthall, *Behind the Beef: The "Supa Ugly" Rap Battle Between Jay-Z and Nas*, AM. SONGWRITER (June 2022), <https://americansongwriter.com/behind-the-jay-z-and-nas-feud/> [<https://perma.cc/4K3P-75DC>].

<sup>43</sup> Lori Dorn, *Timeline of the Most Popular Music Genres (1910-2019)*, LAUGHING SQUID (Nov. 14, 2019), <https://laughingsquid.com/most-popular-music-genres-1910-2019/> [<https://perma.cc/EMG7-TE5D>].

<sup>44</sup> Paul Edwards, *HOW TO RAP: THE ART AND SCIENCE OF THE HIP-HOP MC 138* (Chicago Review Press 2009).

<sup>45</sup> *Id.* at 244.

<sup>46</sup> See *Eminem: The New Slim Shady*, BBC (Nov. 11, 2002, 6:10 PM), <http://news.bbc.co.uk/2/hi/entertainment/2442507.stm> [<https://perma.cc/5FZJ-QGLA>].

<sup>47</sup> See *id.*

Throughout the early 2000s, two of the most respected hip-hop producers were The Neptunes (a duo composed of Pharrell Williams and Chad Hugo) and a young producer from Chicago that went by the moniker Louis Vuitton Don.<sup>48</sup> Both expanded hip-hop's soundscape for the 21<sup>st</sup> century, with production that featured R&B hooks, catchy 808 drumbeats, and iconic samples from 1970s soul and funk music. While The Neptunes stuck mostly to producing for others—outside of some notable vocal features and Pharrell's brief visit as a mainstream solo artist around 2013—Louis Vuitton Don was itching to start his solo rap career and, in 2004, with the help of mentor Jay-Z, he released his debut album under his legal name, Kanye West.

With 2004's *The College Dropout*, Kanye incorporated funk, rock, blues, techno, soul, jazz, and even folk into the production without losing the core of hip-hop's sound.<sup>49</sup> Additionally, he gave rap musicians a path to rapping about Black identity without resorting to gang culture.<sup>50</sup> In doing these two things, Kanye massively expanded hip-hop's commercial reach and critical appreciation.<sup>51</sup> His subsequent ten year run (2004–2013) may be one of the best runs in rap history but in the history of music, regardless of genre.<sup>52</sup>

Lil Wayne successfully straddled the gangsta rap sensibilities he cultivated in the late 1990s with this newer, more accessible “hip-pop” to be the first gangsta rapper with massive crossover appeal to white audiences.<sup>53</sup> Soulja Boy weaponized the rise of the internet to

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<sup>48</sup> Nigel D., *Billboard's Top Ten Producers of the Decade*, UPROXX (Dec. 18, 2009), <https://web.archive.org/web/20111004171119/http://realtalknyny.uproxx.com/2009/12/topic/topic/news/billboards-top-10-producers-of-the-decade/> [https://perma.cc/FGH9-ST2W].

<sup>49</sup> Brad Callas, *25 Greatest Soul Chipmunk Soul Beats from Roc-A-Fella Dynasty*, DJBOOTH (Jan. 22, 2019), <https://web.archive.org/web/20190714072000/https://djbooth.net/features/2019-01-22-25-greatest-chipmunk-soul-beats-roc-a-fella> [https://perma.cc/LXT4-9PD3].

<sup>50</sup> Ike Okwerekwu, *Where's the Old Kanye?*, MEDIUM (May 13, 2019), <https://medium.com/music-for-inspiration/wheres-the-old-kanye-fc51a6905c33> [https://perma.cc/H4TA-A3Q3].

<sup>51</sup> *Id.*

<sup>52</sup> David Drake, *Is Kanye West Having the Best Run in Rap History?*, COMPLEX (Sept. 19, 2012), <https://www.complex.com/music/2012/09/is-kanye-west-having-the-best-run-in-rap-history> [https://perma.cc/DA93-FA8K].

<sup>53</sup> Sophie Schillaci & Shirley Halperin, *Is Lil Wayne a Pop Star?*, HOLLYWOOD REPORTER (Sept. 7, 2011, 3:00 PM), <https://www.hollywoodreporter.com/news/general-news/is-lil-wayne-a-pop-232192/> [https://perma.cc/2WWL-3MAC].

force his way into the conversation and, in doing so, gave white middle school administrators an easy dance to show students that they were not the enemy.<sup>54</sup>

In 2009, Aubrey Graham parlayed his success as an actor of a paraplegic highschooler on *Degrassi* into an attempt at a rap career with the moniker Drake. By combining the 808-heavy production of Kanye's later albums, a crooning R&B voice to sing more vulnerable lyrics about loss, love, and anxiety, and an admittedly questionable level of ferocious rapping proficiency (but at least a baseline level above practically all of the R&B singers of the 2000s), Drake had an entire generation of sad boys texting their exes at 2:00 A.M. By 2017, hip-hop had passed rock music as the most popular genre in America.<sup>55</sup>

#### D. RECENT DEVELOPMENTS IN HIP-HOP (2015–2022)

The rise of the internet has provided avenues for rappers outside the conventional necessity of a record deal.<sup>56</sup> Outlets like SoundCloud and YouTube have opened avenues for rappers to go viral and become overnight sensations, circumventing the arduous process and, oftentimes, parasitic relationship between label and artist.<sup>57</sup>

Throughout its nearly 50-year history, the epicenter of hip-hop had mostly shifted between the west coast and the east coast.<sup>58</sup> But in the mid-2010s, the South took center stage, particularly Atlanta, Georgia, and the South Florida region.<sup>59</sup> This transfer accompanied a shift in production to a more aggressive, bass-heavy “trap” style

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<sup>54</sup> As corny as this moment may have been, it legitimately broadened rap's appeal and accessibility to suburban soccer moms. Also, Soulja Boy provided us with one of the best hip-pop songs of this era with *Zan with that Lean*, so he gets a pass. See generally Meaghan Garvey, *The Influencer: A Decade of Soulja Boy*, PITCHFORK (July 9, 2015), <https://pitchfork.com/features/article/9682-the-influencer-a-decade-of-soulja-boy/> [https://perma.cc/4MLK-LKQG].

<sup>55</sup> Lynch, *supra* note 10.

<sup>56</sup> See Garvey, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> See Jewel Wicker, *Atlanta, the City that Defined the 2010s and Altered the Sound of the World*, DAZED (Dec. 17, 2019), <https://www.dazeddigital.com/music/article/47166/1/atlanta-changed-the-sound-of-the-world-migos-zaytoven-gucci-mané/> [https://perma.cc/4WF2-XTXL].

<sup>59</sup> *Id.*; see *The Surge of South Florida Hip-Hop: Introduction to the Music*, UNIV. MIAMI LIBRS., <https://sp.library.miami.edu/subjects/floridahip-hop> [https://perma.cc/99KF-4CLX].

of music.<sup>60</sup> Artists like Future and Young Thug launched trap into the fastest rising and eventually most popular subgenre of hip-hop, while older trap artists like Gucci Mane and 2-Chainz saw a commercial rebound for the sound they helped cultivate ten years prior.<sup>61</sup>

Lyrically, young rappers of this era placed less emphasis on clearly enunciating every word; instead, the style was defined by changing the inflection of one's voice to communicate the emotional catharsis the artist was feeling at the time.<sup>62</sup> Often dismissively called "mumble-rap," this change expanded on the more vulnerable and emotional shift that hip-hop had undergone at the beginning of the 2010s.<sup>63</sup> Hip-hop also embraced a less machismo quality than ever before, with Young Thug often seen wearing dresses and Lil Nas X being the first successful and openly gay rapper.<sup>64</sup>

## E. HISTORY OF RACIAL IMPLICATIONS

Since its inception, rap music has been undeniably intertwined with the Black identity in modern America.<sup>65</sup> As much of white America pushed back on the rise of gangsta rap in the late 1980s, it became indisputable that the racial component of hip-hop music contributed to its perceptions. Some notable academic studies have concluded that this underlying bias goes beyond a mere musical preference, resulting in egregious prejudices against hip-hop artists. Additionally, law enforcement has long had a predatory relationship with rap artists.

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<sup>60</sup> Wicker, *supra* note 58.

<sup>61</sup> *Id.*

<sup>62</sup> See PNL, *Black Thought on Mumble Rap: 'I Essentially Invented It,'* COMPLEX (Dec. 26, 2017), <https://www.complex.com/music/2017/12/black-thought-on-mumble-rap-i-essentially-invented-it>, [https://perma.cc/Q3U3-EW6K].

<sup>63</sup> *Id.*

<sup>64</sup> See Gerrick Kennedy, *Lil Nas X Makes Grammy History as the First Openly Gay Rapper Nominated in Top Categories*, L.A. TIMES (Nov. 20, 2019), <https://www.latimes.com/entertainment-arts/music/story/2019-11-20/grammy-nominations-2020-lil-nas-x-old-town-road>, [https://perma.cc/NL8B-HYZL].

<sup>65</sup> Deena Zaru & Lakeia Brown, *Hip-Hop has Been Standing Up for Black Lives for Decades: 15 Songs and Why They Matter*, ABC NEWS (July 12, 2020), <https://abcnews.go.com/Entertainment/hip-hop-standing-black-lives-decades-15-songs/story?id=71195591>, [https://perma.cc/3FP5-DP2X].

## 1. ACADEMIC STUDIES

In 1996, Indiana University's Dr. Carrie Fried conducted a study to gauge how people react to words in a rap song versus a song of another genre.<sup>66</sup> One group of subjects received written lyrics and were told they were rap lyrics, while another group was given the same lyrics, but told they were folk or country lyrics.<sup>67</sup> The results showed the group that was told the lyrics belonged to a rap song were much more likely to find the lyrics threatening, dangerous, and much more likely to take them literally and believe they were recounting a true story.<sup>68</sup> This group was also more likely to support regulating, censoring, and outright banning the song.<sup>69</sup> A similar divide appeared when the subjects were not told which genre the lyrics belonged to but were simply shown a photo of either a Black artist or a white artist in conjunction with the lyrics.<sup>70</sup>

More shocking, perhaps, is a study from Dr. Stuart Fischhoff on gangsta rap's impact on jurors. The study featured four groups of subjects: one group was told a story of a young man charged with a violent crime and shown a violent rap song he had written; one group was told a story of a young man charged with a violent crime who had never written a song; one group was shown violent rap lyrics from a young man that had never been charged with a crime; and one group was told a story about a young man that had never been charged with a crime and had never written a rap song.<sup>71</sup> Some results made perfect sense: the subjects saw the man who was charged with a crime and had written violent rap lyrics as more threatening and dangerous than the man who had done neither, for example.<sup>72</sup> However, more horrifying was the conclusion that, on average, subjects shown the violent rap lyrics from the man who had never been charged with a crime were more threatened and harbored more negative feelings towards him than the subjects who were told about the young man being charged with rape or murder who had never written a rap song.<sup>73</sup> Dr. Fischhoff concluded that, in many

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<sup>66</sup> Fried, *supra* note 4.

<sup>67</sup> *Id.* at 2136-37.

<sup>68</sup> *See id.* at 2141-44.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 798-99 (1999).

<sup>72</sup> *Id.* at 801-03.

<sup>73</sup> *Id.*

parts of America, being a rapper was more damning than being charged with murder.<sup>74</sup>

## 2. *POLICING HIP-HOP*

In 2004, an investigation from the *Miami Herald* revealed that the New York Police Department and Miami Police Department both featured unofficial “hip-hop units.”<sup>75</sup> Officers in these units would invest time and money into monitoring up-and-coming local rap artists solely to see whether they were up to no good, often partaking in racial stereotyping.<sup>76</sup> “Hip-hop units” were far from the first time police had been illegally predatory towards rap artists. In the late 1980s, as gangsta rap was gaining prominence, police would occasionally show up to concerts and arrest rappers on stage for obscenity with respect to their lyrics.<sup>77</sup> These bogus charges rarely stuck, but they cost the artist a concert with no repercussions for the arresting officers.<sup>78</sup> Rap artists have criticized police for harassing the artist’s crew and fans backstage for something as innocuous as signing autographs for fans.<sup>79</sup>

In an article for the American Prosecutors Research Institute, Alan Jackson gave advice to practicing prosecutors on how best to paint defendants in a negative light to secure a conviction from juries and lengthy sentences from judges and, in the article, he specifically recommends using a defendant’s musical lyrics:

The real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing the jury to that person. Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant’s true personality. Gang

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<sup>74</sup> *Id.* at 802.

<sup>75</sup> Dasun Allah, *NYPD Admits to Rap Intelligence Unit*, VILLAGE VOICE (Mar. 16, 2004), <https://www.villagevoice.com/2004/03/16/nypd-admits-to-rap-intelligence-unit/> [<https://perma.cc/7T5C-PREZ>].

<sup>76</sup> *See id.*

<sup>77</sup> Hunter Schwarz, *25 Years Ago, 2 Live Crew Were Arrested for Obscenity. Here’s the Fascinating Back Story.*, WASH. POST (June 11, 2015, 1:54 PM), [washingtonpost.com/news/the-fix/wp/2015/06/11/25-years-ago-2-live-crew-were-arrested-for-obscenity-heres-the-fascinating-back-story/](http://www.washingtonpost.com/news/the-fix/wp/2015/06/11/25-years-ago-2-live-crew-were-arrested-for-obscenity-heres-the-fascinating-back-story/) [<https://perma.cc/9AYE-XQNS>].

<sup>78</sup> *Id.*

<sup>79</sup> *See* Allah, *supra* note 75.

investigators should focus on these items of evidence during search warrants and arrests.<sup>80</sup>

## II. RAP LYRICS USED AS CRIMINAL EVIDENCE

Congress enacted the Federal Rules of Evidence in 1975 to codify the evidence law that applies in United States federal courts.<sup>81</sup> Many states quickly adopted these Rules or revised their rules to be similar to the Federal Rules.<sup>82</sup> Between 1991 and 2013, prosecutors attempted to introduce rap lyrics as evidence in criminal cases with varying degrees of success. In 2014, the Supreme Court of New Jersey decided *New Jersey v. Skinner*, a case that many future courts would grapple with when deciding whether to permit rap lyrics as evidence against a criminal defendant.<sup>83</sup> In *Dawson v. Delaware*, the Supreme Court raised the standard for courts to admit artistic works as evidence.<sup>84</sup> However, courts consistently admit rap lyrics in violation of that standard. Several famous artists have had their lyrics used against them in court.

### A. FEDERAL RULES OF EVIDENCE

In 1975, Congress passed the Federal Rules of Evidence to guide courts when discerning whether to admit certain evidence into the courtroom.<sup>85</sup> Rule 403 and Rule 404(b) help regulate the evidence that a court may allow a jury to hear to assist in reaching a verdict.<sup>86</sup> These Rules placed more trust in jurors' hands to hear questionable evidence and encouraged admitting evidence in close cases.<sup>87</sup>

#### 1. RULE 403

Federal Rule of Evidence 403 states in part:

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<sup>80</sup> Alan Jackson, *Prosecuting Gang Cases What Local Prosecutors Need to Know*, AM. PROSECUTORS RSCH. INST. at 16 (April 2004), [https://ndaa.org/wp-content/uploads/gang\\_cases1.pdf](https://ndaa.org/wp-content/uploads/gang_cases1.pdf) [<https://perma.cc/VB83-NTGF>].

<sup>81</sup> LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 382 (Oxford Univ. Press, 4<sup>th</sup> ed. 2019).

<sup>82</sup> *Id.*

<sup>83</sup> *State v. Skinner*, 218 N.J. 496 (2014).

<sup>84</sup> *Dawson v. Delaware*, 503 U.S. 159 (1992).

<sup>85</sup> Friedman, *supra* note 81, at 382.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

The court may exclude relevant evidence if its *probative value* is *substantially outweighed* by a danger of one or more of the following: *unfair prejudice*, confusing the issue, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.<sup>88</sup>

This rule gave courts a balancing test to determine whether the probative value of the evidence outweighs these other negative factors. Unfair prejudice is the most relevant factor for courts to weigh when considering rap lyrics.

## 2. RULE 404(B)

Federal Rule of Evidence 404(b) states in part:

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*... This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.<sup>89</sup>

## B. EARLY CASES OF RAP LYRICS AS EVIDENCE

From 1991 to 2013, courts across America inconsistently decided to allow or deny the use of rap lyrics as evidence in a way that seemed contrary to the Federal Rules of Evidence.

### 1. *U.S. v. FOSTER*

*U.S. v. Foster* is the first recorded case of an American court using a defendant's rap lyrics as evidence against him in a criminal case.<sup>90</sup> After acting suspicious while getting off a train, police searched Derek Foster's luggage and discovered a large amount of cocaine.<sup>91</sup> Police also found a notebook with lyrics Foster had written for a rap song he planned on recording:

Key for key, pound for pound,  
I'm the biggest dope dealer and I serve all over  
town.<sup>92</sup>

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<sup>88</sup> FED. R. EVID. 403 (emphasis added).

<sup>89</sup> FED. R. EVID. 404(b) (emphasis added).

<sup>90</sup> See *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991).

<sup>91</sup> *Id.* at 449.

<sup>92</sup> *Id.*

When the prosecution attempted to use these lyrics as evidence, Foster argued the lyrics were fictional and would cause undue prejudice from the jury.<sup>93</sup> The Seventh Circuit held that the lyrics exhibited knowledge and motive and, therefore, the probative value of the lyrics outweighed any undue prejudice.

## 2. *STATE V. CHEESEBORO*

Prosecutors charged Felix Cheeseboro with armed robbery and murder.<sup>94</sup> While he awaited trial, Cheeseboro wrote a song called *The Ruckus*:

Ruckus, I believe you're a perpetrator, gold and  
platinum hater,  
Cuz me and J.D. is a force like Dark Vador.  
Like the 4<sup>th</sup> 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.**<sup>95</sup>

The trial court allowed these lyrics to be used as evidence. However, the Supreme Court of South Carolina found that Cheeseboro's lyrics, unlike those in *Foster*, were "too vague in context" and, therefore, the minimal probative value was far outweighed by their prejudicial impact as evidence of Cheeseboro's bad character.<sup>96</sup>

## 3. *COOK V. STATE*

The same year *Cheeseboro* was decided, the Supreme Court of Arkansas came to a different decision with quite similar facts.<sup>97</sup> In Keyono Cook's aggravated robbery trial, his lyrics were used as evidence against him:

Look out for this motherf\*\*\*ing killa,  
on the for real n\*\*\*a, you bets to give up the strilla.  
Or getta, motherf\*\*\*ing slug assigned to you ass,

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<sup>93</sup> *Id.*

<sup>94</sup> *State v. Cheeseboro*, 552 S.E.2d 300, 302 (S.C. 2001).

<sup>95</sup> *Id.* at 312.

<sup>96</sup> *Id.* at 313.

<sup>97</sup> *Cook v. State*, 45 S.W.3d 820, 822 (Ark. 2001).

Or you can do the shit the easy way, give up the cash.<sup>98</sup>

The Supreme Court of Arkansas upheld the use of these lyrics because they described an aggravated robbery, despite no specifics or identifying information about the facts of the crime in question.<sup>99</sup>

#### 4. *GREENE V. COMMONWEALTH*

As the introduction of this paper posits and as will be fully argued later, many courts do not correctly factor in how unduly prejudicial rap lyrics are, or overstate their probative value, or both. It is worth recognizing, then, that there certainly are examples of lyrics wherein the rules of evidence—and common sense—dictate that the lyrics should be introduced as evidence.

A month after his wife's throat was slashed, Dennis Greene released a song that included the following lyrics:

B\*\*\*h made me mad, and I had to take her life.  
My name is Dennis Greene and I ain't got no  
f\*\*\*ing wife,  
I knew I was gonna be givin' it to her... when I got  
home,  
I cut her mother\*\*\*in' neck with a sword.<sup>100</sup>

The Supreme Court of Kentucky ruled that these lyrics established premeditation and motive, which outweighed any risk of prejudice.<sup>101</sup> This makes perfect sense, as Greene's lyrics not only attach internal motive to the act, but also describe in grisly detail the facts of the crime.

#### 5. *HANNAH V. STATE*

In *Hannah v. State of Maryland*, a Maryland appellate court found that the following lyrics were too vague and prejudicial to be admitted because they were only presented to show that Hannah was a “violent thug” with a propensity to commit violent crimes:

One, two, three shot ya ass just got got drop,  
I ain't got guns got a duz unda da seat.  
Ya see da tinted cum down n out come da glock,  
Ya just got jacked, we leave da scene in da lime  
green.  
So you betta step ta me before I blow off ya feet,

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 826.

<sup>100</sup> *Greene v. Commonwealth*, 197 S.W.3d 76, 85 (Ky. 2006).

<sup>101</sup> *Id.* at 87.

Bring da whole click, we put em permanently sleep.  
 Wa you think, I ain't got burners, got a duz unda da  
 seat,  
 So pull your f\*\*\*in' trigga n\*\*\*a go pop, pop,  
 One, two, three shot ya ass just got drop.  
 I'll put you in a funeral.<sup>102</sup>

### C. THE KEYSTONE CASE: *NEW JERSEY V. SKINNER*

Up to this point, there was not much consistency with respect to the analysis conducted for whether courts should admit lyrical evidence. In 2014, the Supreme Court of New Jersey issued a ruling marking it as the keystone case that seemingly every future court would reconcile with when determining whether to admit lyrical evidence.

Vonte Skinner was convicted in 2008 for attempted murder.<sup>103</sup> At his trial, the prosecutor read 13 pages of lyrics of his songs, which mostly included vague, general descriptions of crimes, such as:

In block wars I'm a vet. **In the hood, I'm a threat.**  
 It's written on my arm and **signed in blood on my**  
**Tech.**  
 I'm in love with you, death.<sup>104</sup>

After serving six years, Skinner's conviction was overturned by the Supreme Court of New Jersey.<sup>105</sup> Citing Rule 404(b), the court explained that to be admitted as evidence, lyrics must: 1) have a *strong nexus* to the facts of the case; *and* 2) have probative value that outweighs the prejudicial impact.<sup>106</sup>

In an often-cited passage, the court reasoned, "One would not presume that . . . Edgar Allen Poe buried a man under his floorboards, as depicted in his short story 'The Tell-Tale Heart.'" <sup>107</sup> The court accurately described the phenomenon observed in Dr. Carrie Fried's 1996 study that concluded people are more likely to interpret rap lyrics as autobiographical confessions instead of fictional expressions of art.<sup>108</sup>

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<sup>102</sup> *Hannah v. State*, 23 A.3d 192, 195-196 (Md. 2011)

<sup>103</sup> *State v. Skinner*, 95 A.3d 236, 242 (N.J. 2014)

<sup>104</sup> *Id.* at 241.

<sup>105</sup> *Id.* at 252.

<sup>106</sup> *Id.* at 238-39.

<sup>107</sup> *Id.* at 251.

<sup>108</sup> Fried, *supra* note 4, at 2141-44.

## D. RECENT CASES OF RAP LYRICS AS EVIDENCE

The second prong of the *Skinner* test is in essence a rewording of Rule 404(b), but the first prong, that the lyrics must have a strong nexus to the facts of the case, was significant in clarifying another hurdle for lyrics to enter evidence. Lyrics without a strong nexus to the facts of the case, such as those lyrics Cook was convicted for, would not come in under the *Skinner* test. Though the *Skinner* court only holds *stare decisis* for state courts within New Jersey, courts across the country since *Skinner* have applied this two-prong test.

### 1. *COMMONWEALTH V. TALBERT*

One year after *Skinner*, a Pennsylvania appellate court upheld the use of rap lyrics in a murder case. Zaiee Talbert was convicted after the following lyrics were presented at his trial:

Running and running the Badlands like an Afghan,  
Choppers on deck, slide up in the caravan.  
Hit ya legs up, turn that n\*\*\*\*a into half a man.<sup>109</sup>

Here, the Pennsylvania court found the lyrics to carry probative value that outweighed the risk of prejudice, and distinguished *Skinner* by noting these lyrics had a strong nexus to the facts of the case, while the lyrics in *Skinner* did not.<sup>110</sup> It is worth inspecting, however, the strength of the nexus to the facts of the case.

The court pointed to “Badlands,” the area of Philadelphia where the crime occurred; but thousands of people live in the Badlands, and tens of thousands travel through it on a regular basis.<sup>111</sup> The court pointed to “choppers,” or AK-47s, being the weapon of the crime, but many rap songs incorporate choppers into their storytelling.<sup>112</sup> The court also noted the word “caravan,” and pointed out that a van was the getaway car; however, a caravan, by definition, can be any getaway vehicle and does not have to be a van at all.<sup>113</sup> So, while Talbert’s lyrics might provide a stronger nexus to the facts of the crime than those in *Skinner*, it is debatable whether that nexus was so much stronger to warrant a different outcome.

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<sup>109</sup> *Commonwealth v. Talbert*, 129 A.3d 536, 540 (Pa. Super. Ct. 2015).

<sup>110</sup> *Id.* at 541-42.

<sup>111</sup> *Id.* at 540.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

## 2. *WARD V. INDIANA*

More understandable is an Indiana appellate court's reasoning for distinguishing from *Skinner* in *Ward v. Indiana*.<sup>114</sup> Troy Ward released a remix to 2-Chainz's "I'm Different" on SoundCloud, which featured the following opening bar:

I creep up to the door silently and slow,  
I opened up that b\*\*\*h and now we clashing poles.  
**Two shots to the body, two shots to the dome,**  
Finesse the f\*\*\*ing stash and then I took it home.<sup>115</sup>

The Indiana court distinguished *Skinner* because Ward's lyrics described details of the case that were only known to police at the time of the song's release, particularly "two shots to the body, two shots to the dome."<sup>116</sup>

## 3. *MONTAGUE V. MARYLAND*

More baffling is the way a Maryland appellate court recently distinguished *Skinner*. Lawrence Montague was charged with second-degree murder and, while he awaited trial, he released a song with the following lyrics:

I be playin the block b\*\*\*h,  
And if you ever play with me, I'll give you a dream,  
**a couple shots snitch.**  
It's like hockey pucks the way I dish out this,  
**It's a .40** when that b\*\*\*h goin' hit up shit.<sup>117</sup>

The court distinguished from *Skinner* in two ways. First, it concluded the lyrics held a strong nexus to the facts of the case: particularly that a .40 caliber gun was the weapon used and that "a couple shots snitch" could be Montague's way of threatening any potential witnesses who might testify against him.<sup>118</sup> Second, the court noted that while *Skinner*'s lyrics were from songs released before the crime in question occurred, Montague released this song *after* he had been charged with the crime.<sup>119</sup>

While these facts *are* different than the facts in *Skinner*, Judge Shirley Watts, the sole Black judge on the court, wrote a compelling dissenting opinion. She reasoned it was "pure fiction" to interpret

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<sup>114</sup> Ward v. State, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Montague v. State, 243 A.3d 546, 554 (Md. Ct. App. 2020).

<sup>118</sup> *Id.* at 567-68.

<sup>119</sup> *Id.*

the lyrics of Montague's song as sharing a nexus to the facts of the case, and that the violence described in the song could apply to any type dispute between parties because there were no specific indications in the lyrics that connected the song to the facts at hand.<sup>120</sup> She further argued the majority's focus on the lyrics mentioning "snitches" and determining that he must be threatening potential witnesses was unfounded and irrelevant to the question of whether the lyrics have a strong nexus to the facts of the crime.<sup>121</sup> Finally, Judge Watts argued the majority was underselling just how damaging the prejudice of rap lyrics could be to a Black defendant.<sup>122</sup>

## E. THE FIRST AMENDMENT

Along with questionable analysis with respect to the Federal Rules of Evidence, several courts are allowing rap lyrics to be admitted as evidence in violation of a defendant's First Amendment rights as protected in *Dawson v. Delaware*.<sup>123</sup>

### 1. *DAWSON V. DELAWARE*

While trying him for murder, the prosecution introduced David Dawson's tattoo as evidence that he was in a white supremacist, Aryan gang.<sup>124</sup> The Supreme Court vacated Dawson's sentence, ruling it was unconstitutional to use protected speech as evidence when that speech is irrelevant to the underlying crime.<sup>125</sup> This decision heightened the evidentiary standard when it comes to forms of art.<sup>126</sup>

The key question under *Dawson* is how relevant the lyrics are to the facts of the case. It is worth noting that under this standard, the lyrics from *Greene v. Commonwealth* would certainly get in, because they are *very* relevant to the facts of the case.<sup>127</sup>

However, many courts view all rap lyrics as inherently factual statements, which removes them from being defined as what they are: pieces of art. In fact, the American Civil Liberties Union has argued in amicus briefs that rap music's central placement to Black identity, social commentary, use as protest music, and expression of the lower class distinguishes it from other genres of music in such a

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<sup>120</sup> *Id.* at 573 (dissenting).

<sup>121</sup> *Id.* at 573-74.

<sup>122</sup> *Id.* at 575-76.

<sup>123</sup> *Dawson v. Delaware*, 503 U.S. 159, 162 (1992).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 168-169.

<sup>126</sup> See Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent, *supra* note 5.

<sup>127</sup> *Dawson*, 503 U.S. at 160.

way that rap music should be presumed to be political speech.<sup>128</sup> No court has made such a ruling, but doing so would raise the bar for admitting rap lyrics as evidence.

## 2. *TENNESSEE V. BASSETT*

In 2021, Christopher Bassett was convicted for murder after lyrics from one of his songs were used as evidence that Bassett was in a gang.<sup>129</sup>

Bassett argued that, like *Dawson*, admission of such art to prove gang membership is a violation of his First Amendment right.<sup>130</sup> A Tennessee appellate court disagreed and distinguished from *Dawson*. The court noted that in *Dawson*, the tattoo was the *only* evidence that he was in a gang, while Bassett's lyrics were corroborated by witness testimony and text messages which provided further evidence Bassett was in a gang.<sup>131</sup>

While this is a factual difference, the Court in *Dawson* did not cite lack of corroborative evidence as the reason for its ruling; it merely said that using Dawson's tattoo to prove he was in a gang was a violation of his First Amendment rights because his gang membership was irrelevant to the crime.<sup>132</sup> Similarly, the murder Bassett was charged with was not alleged to be gang-related by any means, and gang membership was not an element of the crime.<sup>133</sup> Therefore, the court should not have admitted Bassett's lyrics because they were only being presented to prove his gang membership and, thus, to disparage his character in a way irrelevant to the crime. It is worth reiterating that David Dawson was white, and Christopher Bassett is Black.

## F. FAMOUS ARTISTS

Famous rap artists have had their lyrics used as evidence against them as well, sometimes in egregious ways.

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<sup>128</sup> Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent, *supra* note 5, at 16.

<sup>129</sup> Brief for American Civil Liberties Union and American Civil Liberties Union of Tennessee as Amici Curiae Supporting Appellant, *Tennessee v. Bassett*, (Tenn. Crim. App. 2020) (No. E2019-02236-CCA-R3-CD), [<https://perma.cc/PRR2-EPGG>].

<sup>130</sup> *Id.* at 3.

<sup>131</sup> *Id.* at 8.

<sup>132</sup> *Dawson v. Delaware*, 503 U.S. 159, 162 (1992).

<sup>133</sup> Brief for American Civil Liberties Union and American Civil Liberties Union of Tennessee as Amici Curiae Supporting Appellant, *supra* note 129.

# 1. BOBBY SHMURDA

In 2014, Bobby Shmurda blew up as one of the bigger rap successes of the year with the release of *Hot N\*\*\*a*.<sup>134</sup> As Craig Jenkins of Pitchfork wrote, “The beat’s fierce, the dance is hilarious, and the hat never lands. A star is born.”<sup>135</sup>

I been selling crack since like the fifth grade...  
...Mitch caught a body about a week ago[!]<sup>136</sup>

Shmurda’s breakout single not only put him on the top of streaming charts, but also caught the attention of the NYPD who was relatively transparent that the popularity of Shmurda’s music is what compelled them to look into the young rapper’s activity.<sup>137</sup> After charging him with weapons and conspiracy charges, the lyrics to *Hot N\*\*\*a* were read at Shmurda’s indictment.<sup>138</sup> NYPD’s James Essig said Shmurda’s songs were “almost a real life document of what they were doing on the street.”<sup>139</sup>

Shmurda ended up taking a plea deal, so his lyrics were never read at trial, but there was a possibility prosecutor would have sought to admit his lyrics, citing to the press an interview with New York Magazine in which Shmurda boasted, “My music is straight facts.”<sup>140</sup> Shmurda later contradicted himself, stating that his lyrics were fake.<sup>141</sup>

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<sup>134</sup> *The 100 Best Tracks of 2014*, PITCHFORK (Dec. 15, 2014), <https://pitchfork.com/features/lists-and-guides/9555-the-100-best-tracks-of-2014/?page=7> [<https://perma.cc/AW5V-EH69>].

<sup>135</sup> *Id.*

<sup>136</sup> BOBBY SHMURDA, *Hot N\*\*\*a*, on SHMURDA SHE WROTE (Epic Recs. 2014).

<sup>137</sup> See James C. McKinley Jr., *Rapper Bobby Shmurda Takes 7-Year Plea Deal in Gang Case*, N.Y. TIMES (Sept. 9, 2016), <https://www.nytimes.com/2016/09/10/nyregion/rapper-bobby-shmurda-takes-7-year-plea-deal-in-gang-case.html> [<https://perma.cc/7PZN-25NA>].

<sup>138</sup> *Id.*

<sup>139</sup> Aron A., *Music on Trial Bill & YSL Indictment*, HOT NEW HIP-HOP (July 11, 2022, 5:00 PM), <https://www.hotnewhiphop.com/415967-bobby-shmurda-speaks-on-rap-music-on-trial-bill-and-ysl-indictment-news> [<https://perma.cc/3HCQ-RU9H>].

<sup>140</sup> McKinley Jr., *supra* note 137; *Bobby Shmurda Pleads Not Guilty to Gun, Drug Charges*, BILLBOARD (Dec. 18, 2014), <https://www.billboard.com/music/rb-hip-hop/bobby-shmurda-pleads-not-guilty-gun-drug-charges-6413836/> [<https://perma.cc/L3TA-ABGG>].

<sup>141</sup> Chris Deville, *Bobby Shmurda Says His Lyrics Are Fake and Epic Records Should Pay His Bail*, STEREOGUM (Feb. 23, 2015, 4:28 PM), <https://www.stereogum.com/1782825/bobby-shmurda-says-his-lyrics-are-fake-and-epic-records-should-pay-his-bail/news/> [<https://perma.cc/LP78-HGZT>].

Though outside the scope of this paper, it is worth mentioning the degree to which New York's gang laws were used against Shmurda and his rap group, particularly in order to charge Shmurda with crimes for which he was not even present.<sup>142</sup>

## 2. *DRAKEO THE RULER*

Before his untimely death in 2021, Drakeo the Ruler spent the last several years of his life gradually gaining a reputation as one of the most unflinching, skilled, and lyrically dense West Coast rappers of his generation.<sup>143</sup> Unfortunately, he also dealt with tremendous legal issues that stemmed from bad faith state actors.

In 2017, the police arrested Drakeo for a shooting at a party at which he was not even present and used the lyrics from his song *Flex Freestyle* as evidence he was guilty, despite the song seemingly sharing no nexus to the facts and, if anything, narrowly describing a completely different situation:

Sheesh, everything I state is facts,  
I'm not these other street n\*\*\*s, b\*\*\*h I can really  
rap.  
I'm ridin' round town with a tommy gun and a Jag,  
And you can disregard the yelling, RJ tied up in the  
back.<sup>144</sup>

The "RJ" referenced in these lyrics refer to rival rapper RJ.<sup>145</sup> Neither Drakeo nor RJ was at the scene of the crime; a tommy gun was not the weapon used at the crime; a Jaguar was not the getaway car.<sup>146</sup> The State's theory was, inexplicably, that since members of

<sup>142</sup> McKinley Jr., *supra* note 137; Sidney Madden & Rodney Carmichael, *Montage of a Dream Deferred*, NPR (Nov. 28, 2020), <https://www.npr.org/2020/11/28/933436082/bobby-shmurda-authenticity-conspiracy-flatbush-dream-deferred> [<https://perma.cc/8PXZ-9RPE>].

<sup>143</sup> Grant Rindner, *Time to Take Over the World: An Interview with Incarcerated Rapper Drakeo the Ruler*, COMPLEX (June 14, 2018), <https://www.complex.com/pigeons-and-planes/2018/06/drakeo-the-ruler-interview> [<https://perma.cc/8QY9-RXHJ>].

<sup>144</sup> Eddie Fu, *Drakeo The Ruler Acquitted of All Murder & Attempted Murder Charges*, GENIUS (July 25, 2019), <https://genius.com/a/drakeo-the-ruler-acquitted-of-all-murder-attempted-murder-charges> [<https://perma.cc/P9W5-SK34>].

<sup>145</sup> Jeff Weiss, *The Assassination of Drakeo the Ruler*, L.A. MAG. (Jan. 13, 2022), <https://www.lamag.com/culturefiles/the-assassination-of-drakeo-the-ruler/> [<https://perma.cc/PVU7-FDM6>].

<sup>146</sup> Fu, *supra* note 144.

Drakeo's rap crew were at the scene of the crime, the shooting was an effort to target RJ as directed by Drakeo, but the shooters, thinking RJ would be there, got the wrong person.<sup>147</sup> RJ himself would later dismiss the prosecution's theory as fanciful, stating the party in question never even crossed his radar and that he never felt threatened by *Flex Freestyle*.<sup>148</sup>

It is hard to overstate the level of police misconduct in this case. In the 48 hours after the crime occurred and police learned that members of Drakeo's rap crew had been at the party, officers spent dozens of hours watching Drakeo's music videos before arresting him.<sup>149</sup> While arresting him, Detective Francis Hardiman told Drakeo his music would be the "soundtrack of his trial," and that "jurors don't like to see that stuff . . . your rap videos of you[.]"<sup>150</sup>

The police told prosecutors that Drakeo's music group was a front for a criminal street gang and his stage name "the Ruler" indicated he was the leader of the gang.<sup>151</sup> The police later tried to convince the prosecution that they could attach bullets they saw in music videos to the ballistics of the crime scene, a truly ludicrous proposition that the prosecution did not attempt to pursue.<sup>152</sup> While awaiting trial, Drakeo had his friend tweet from his personal account that he was quitting music and would have his songs removed from streaming services since "DETECTIVE HARIDMAN TRYNA USE MY LYRICS AGAINST ME."<sup>153</sup> Hardiman would subsequently have Drakeo placed in solitary confinement for eight months, alleging the tweet was a threat to his life.<sup>154</sup> At trial, the judge dismissed jurors from the case on three different occasions for referring to Detective Hardiman as "Detective Fuhrman," a reference to the racist officer in the O.J. Simpson trial.<sup>155</sup>

While awaiting trial, Drakeo was given a gag order from the judge that prohibited him from posting on social media or releasing

<sup>147</sup> *Id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.*

<sup>150</sup> Sam Levin, *The Jailed LA Rapper Whose Songs Were Used to Prosecute Him*, GUARDIAN (Oct. 2, 2019, 1:00 PM), <https://www.theguardian.com/us-news/2019/oct/01/drakeo-the-ruler-los-angeles-rapper-songs> [<https://perma.cc/J8NW-UX3A>].

<sup>151</sup> Ashwin Rodrigues, *Why Drakeo the Ruler's Legal Battle Should Concern Us All*, VICE (Dec. 2, 2020, 12:49 PM), <https://www.vice.com/en/article/dy8vmz/why-drakeo-the-rulers-legal-battle-should-concern-us-all> [<https://perma.cc/6MQH-RFVX>].

<sup>152</sup> Levin, *supra* note 150.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Weiss, *supra* note 145.

music—many would argue this violated his First Amendment rights.<sup>156</sup> In an amazing act of defiance, Drakeo found time to secretly rap into a jail phone while his collaborator JoogSzn recorded him on the other end.<sup>157</sup> This series of recordings would be released as an album titled *Thank You for Using GTL*, a reference to the telephone company that connects inmates to callers on the outside.<sup>158</sup>

*Thank You for Using GTL* was met with widespread critical acclaim as one of the most proficient, ambitious, and socially conscious rap albums in years.<sup>159</sup> Daniel Bromfield of Spectrum Culture praised the album's themes on "the carceral state, capitalism, the prison-industrial complex, the U.S. criminal justice system's targeting of rap and rappers, and the ongoing game of real vs. fiction taking place within hip[-]hop itself."<sup>160</sup> On the closing song on the album, *Fictional*, Drakeo raps about the disparity in how rap is perceived compared to other genres, and the injustice of his lyrics being used against him:

It might sound real, but it's fictional  
 I love that my imagination gets to you...  
 ... This shit crazy, man  
 It's not real, like, n\*\*\*a.  
 Like, this is the only way I can do music, like...  
 ...I'm not gonna shoot up a sc'ool, I'm not gonna  
 shoot nobody in front of the police sta'ion.  
 I'm not gonna shoot nobody on camera.  
 If I say something in a 'ap, it's not real  
 My Id is... I have a lot of imag'nation  
 It's fictional'  
 So I don't want my words misinterpreted or any of  
 that misconstr'ed  
 If you're gonna use my music against me, I expect  
 you use it the same way yoI would...  
 (This call is being recorded)

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<sup>156</sup> *Id.*

<sup>157</sup> Matthew Ismael Ruiz, *Thank You for Using GTL*, PITCHFORK (June 10, 2020), <https://pitchfork.com/reviews/albums/drakeo-the-ruler-thank-you-for-using-gtl/> [perma.cc/K4LU-CDZW].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Daniel Bromfield, *Drakeo the Ruler: Thank You for Using GTL*, SPECTRUM CULTURE (June 16, 2020), <https://spectrumculture.com/2020/06/16/drakeo-the-ruler-thank-you-for-using-gtl-review/> [perma.cc/8DRF-BZ4G].

...Country music, punk rock, metal,  
 Jazz, whatever, Blues, whatever,  
 Treat rap the same way that you're gonna treat any  
 oth'r genre.  
 You're not gonna hold Denzel Washington  
 accountable for his role in Training Day,  
 So don't do the same thing with m' music.'That's  
 all I'm saying.<sup>161</sup>

Even though the lyrics to *Flex Freestyle* were used against him at trial, Drakeo was found not guilty.<sup>162</sup> Drakeo said about the investigation:

The whole point of me starting to rap is I get to rap  
 and talk about these things and not *do* these things.  
 And would you rather, me rapping about stuff that  
 I'm not actually doing, or out there doing it? It's  
 not real. Rapping is rhyming and pretending. It's a  
 persona. How are you gonna tell me what *I*  
 mean?<sup>163</sup>

### 3. TAY-K

In 2017, blog rap, a new phenomenon in which rappers have found viral success by taking advantage of nearly every possible internet vehicle, had its own version of the O.J. Simpson Bronco chase when Tay-K released the song *The Race* and its accompanying music video. Tay-K was out on bail and awaiting trial for a home invasion and felony murder when he went on the run and spent weeks evading law enforcement.<sup>164</sup> In the song, he brags about how police are unable to catch him; authorities would capture him less than 20 hours later.<sup>165</sup>

F\*\*\* a beat, I was tryna beat a case,  
 But I ain't beat the case, b\*\*\*h I did the race.<sup>166</sup>

The music video sparked immediate buzz on social media, as the footage was essentially a live look behind the scenes from a

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<sup>161</sup> DRAKEO THE RULER & JOOGSZN, *Fictional, on THANK YOU FOR USING GTL* (Drakeo the Ruler, 2020).

<sup>162</sup> Weiss, *supra* note 145.

<sup>163</sup> Levin, *supra* note 150.

<sup>164</sup> Nerisha Penrose, *Viral Rapper Tay-K: A Rundown of the Tumultuous Journey of 'TheRace,'* BILLBOARD (Aug. 16, 2017), <https://www.billboard.com/music/rb-hip-hop/viral-rapper-tay-k-the-race-story-jail-co-signs-7905178/> [perma.cc/QX34-KS7P].

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

famous artist on the run from law enforcement.<sup>167</sup> The video garnered over 100 million views on YouTube within the first week of its release.<sup>168</sup> Making it all the more uncanny was the artist's physical appearance; though 19 years old, he resembled something closer to a 13-year-old than a fully grown adult.

The lyrics to *The Race* and the accompanying video was presented to jurors at Tay-K's trial, even though the lyrics describe his act of going on the run and not the facts of the home invasion for which he was on trial.<sup>169</sup> Tay-K was convicted and sentenced to 55 years in prison.<sup>170</sup>

#### 4. *MAYHEM MAL*

Rap lyrics can be used in a trial for reasons aside from just evidence. For example, Mayhem Mal was charged and convicted for the following lyrics in his song F\*\*\* the Police:

Takin' money from the Beaz and all that shit away  
from me?  
**Well your shift over at 3,**  
**And I'm gonna f\*\*\* you up where you sleep.**<sup>171</sup>

The lyrics were interpreted to be real threats against the officers, and Mayhem Mal was convicted and sentenced to three years in prison for making terrorist threats.<sup>172</sup>

#### 5. *YNW MELLY*

YNW Melly ("Melly"), an artist on trial for double-murder, provides another example of a famous rapper's lyrics being used

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Convicted Murderer, *Teen Rapper Taymor McIntyre Has Hit Song Used as Evidence Against Him in Sentencing Phase*, CBS News (July 22, 2019, 7:08 PM), <https://www.cbsnews.com/texas/news/convicted-murderer-teen-rapper-taymor-mcintyre-hit-song-evidence-sentencing-phase/> [<https://perma.cc/UDC9-4FJN>].

<sup>170</sup> *Id.*

<sup>171</sup> GHETTO SUPERSTAR COMMITTEE, *FUCK THE POLICE* (FT. SOULJA BEAZ & MAYHEM MAL) (2012); see Taylor Hosking, *Rappers Are Defending Their Right to Anti-Cop Lyrics in the Supreme Court*, Vice (Mar. 7, 2019, 1:58 PM), [https://www.vice.com/en/article/zma8ax/rappers-are-defending-their-right-to-anti-cop-lyrics-in-the-supreme-court?utm\\_source=vicetwitterus](https://www.vice.com/en/article/zma8ax/rappers-are-defending-their-right-to-anti-cop-lyrics-in-the-supreme-court?utm_source=vicetwitterus) [<https://perma.cc/7TU6-MRMW>].

<sup>172</sup> Hosking, *supra* note 171.

against him.<sup>173</sup> The judge has already ruled that Melly's tattoos may be presented as evidence in spite of *Dawson*.<sup>174</sup> The lyrics to Melly's breakout single *Murder on My Mind* were used against him when he broke probation as a 16-year-old in 2017, and legal experts expect prosecutors to attempt to use them again at his new trial even though *Murder on My Mind* was released before the night in question.<sup>175</sup>

I didn't even mean to shoot him, he just caught me  
by surprise,  
I reloaded my pistol, cocked it back, **and shot him  
twice.**<sup>176</sup>

### III. STATUTORY INTERVENTION

The all-too-common theme in many of these cases is that courts are not properly weighing the prejudice that accompanies the presentation of rap lyrics to juries. Because the public interprets rap lyrics as significantly more literal than other genres and people view violent rap lyrics as more threatening than an actual charge of a violent crime, the minimal probative value of reading to the jury the musician's work of art is rarely worth it. In addition to violating the Federal Rules of Evidence, many admissions of lyrical evidence are roughhousing artists' freedom of speech under the *Dawson* test.

This dissonance is exemplified in the massive disparity in the number of cases where lyrics are used as evidence. There are over 500 examples of a prosecutor using a defendant's rap lyrics against him in court—over 1,000 including indictments—and judges have admitted such evidence well over 50% of the time.<sup>177</sup> There is exactly one example on record of lyrics of a different music genre being used against a defendant.<sup>178</sup> Until courts can consistently and more soundly account for the great prejudice and constitutional

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<sup>173</sup> Bill Donahue, *YNW Melly Takes Death Penalty Question to Florida Supreme Court*, BILLBOARD (Feb. 8, 2023), <https://www.billboard.com/pro/rapper-ynw-melly-death-penalty-question-florida-supreme-court/> [https://perma.cc/8JEU-U4ZL].

<sup>174</sup> Jordan Darville & Raphael Helfand, *YNW Melly's Tattoos May Be Used as Evidence in Murder Trial*, FADER (April 12, 2022), <https://www.thefader.com/2022/04/12/ynw-mellys-tattoos-may-be-used-as-evidence-in-murder-trial> [https://perma.cc/7BAH-WAEB].

<sup>175</sup> *Id.*

<sup>176</sup> YNW MELLY, *Murder on My Mind*, on I AM YOU (P2018, 2018) (emphasis added).

<sup>177</sup> ERIC NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 8-10 (2019).

<sup>178</sup> *Id.* at 2-3.

issues of admitting a defendant's rap lyrics as evidence, states can pass legislation to better guide courts in conducting Rule 403 and Rule 404(b) inquiries for admitting lyrical evidence.

In early 2022, New York's legislature proposed such a bill. The language of the bill reads in part:

1. Evidence of a defendant's creative or artistic expression, whether original or derivative, may not be received into evidence against such defendant in a criminal proceeding unless such evidence is determined by the court to be relevant and admissible, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and an on-the-record statement by the court of the findings of fact essential to its determination.

2. In order to overcome the presumption of inadmissibility of evidence of defendant's creative expression, the proffering party must affirmatively prove by clear and convincing evidence:

(a) literal, rather than figurative or fictional, meaning and, where the work is derivative, that the defendant intended to adopt the literal meaning of the work as the defendant's own thought or statement;

(b) a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged;

(c) relevance to an issue of fact that is disputed; and

(d) distinct probative value not provided by other admissible evidence.<sup>179</sup>

Many famous artists have signed their support for the bill, including but not limited to Meek Mill, Kelly Rowland, Jay-Z, Killer Mike, Robin Thicke, Fat Joe, and Big Sean.<sup>180</sup> Notable

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<sup>179</sup> S.B. 7527, § 1 Reg. Sess. (N.Y. 2021).

<sup>180</sup> Shirin Ali, *Jay-Z, Other Artists Call to Ban Using Rap Lyrics as Criminal Evidence*, The Hill (Jan. 19, 2022), <https://thehill.com/changing-america/enrichment/arts-culture/590381-jay-z-other-artists-call-to-ban-using-rap-lyrics-as/> [<https://perma.cc/5H3Y-NGB9>].

activists like *The New Jim Crow* author Michelle Alexander also signed her support for the bill.<sup>181</sup>

These artists and activists argue musicians will be afraid to tell their stories if their lyrics can be held against them in a criminal trial.<sup>182</sup> Rap music often possesses a cinematic storytelling element that appeals to the listener. For those living in similar situations, the lyrics can be relatable, while those detached from such a lifestyle see it as a voyeuristic getaway. Artists also cite the immense racial undertones accompanying such prosecution of rappers for their lyrics, and cite the research referenced earlier regarding the public's perception of rap versus other genres, Black defendants to white defendants, and how these phenomena have played out in the courtroom.<sup>183</sup> Finally, artists feel that treating lyrics as autobiographic confessions instead of music with the purpose of entertaining and providing social commentary removes it from being defined as art, which is first and foremost what rap is.<sup>184</sup> As *Genius News*' Jacques Morel says, "At times, but of course not in all cases, hip-hop can be more like the WWE than the UFC."<sup>185</sup>

The sponsors of New York's "Rap on Trial" bill hope this bill will establish a presumption of inadmissibility with respect to lyrical evidence. If passed, this bill would likely direct New York courts to apply the standard laid out in *Skinner*. It is worth noting that not all lyrics would come in under this test. Dennis Greene's lyrics about murdering his wife, for example, possess a literal connection to the facts of the case such that a New York judge would likely find they clear the standard this bill proposes.

New York's "Rap on Trial" bill can successfully guide courts in conducting a proper *Skinner* analysis when evaluating the admissibility of rap lyrics as criminal evidence. By narrowing the instances in which juries hear rap lyrics as evidence, laws like this

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<sup>181</sup> Jay-Z, *Fat Joe, Killer Mike and Michelle Alexander Urge NY Legislature to Pass "Rap Music on Trial" Legislation*, HARLEM WORLD MAG., <https://www.harlemworldmagazine.com/jay-z-fat-joe-killer-mike-and-michelle-alexander-urge-ny-legislature-to-pass-rap-music-on-trial-legislation/> [https://perma.cc/NG5T-B5C3].

<sup>182</sup> Ali, *supra* note 180.

<sup>183</sup> Safia Samee Ali, *Black Rappers Call Out Double Standard of Using Hip-Hop Lyrics as Evidence in Rapper Young Thug's Criminal Trial*, NBC NEWS (Jan. 13, 2023), <https://www.nbcnews.com/news/us-news/black-rappers-call-double-standard-using-hip-hop-lyrics-evidence-rappe-rcna65529> [https://perma.cc/R2VH-DUGV].

<sup>184</sup> See Ali, *supra* note 180.

<sup>185</sup> Genius News, *How Rap Lyrics Are Landing Rappers in Jail*, YOUTUBE (Oct 1, 2018) <https://www.youtube.com/watch?v=HlMS0IS0ivU&t=7s> [https://perma.cc/3ZPH-MY8G].

will preserve the purpose of the Federal Rules of Evidence, strike a more optimal balance between the minimal probative value that many rap lyrics bring to a trial and the undue prejudice that inherently comes with being associated with rap songs, and better protect artist's First Amendment rights.

## CONCLUSION

From its earliest years, rap has had a negative reputation among the general public, and rappers have been illegally targeted by law enforcement. Despite its recent rise to the forefront of American popular music, the racial biases and the disparate treatment between rap music and other genres remain. These charged views of rap leave its lyrics particularly susceptible to causing undue prejudice when presented to juries.

Courts should better account for this phenomenon when conducting their Rule 403 and Rule 404(b) analyses to determine if rap lyrics should be admitted as evidence. Often, the probative value of a jury hearing the musical work of the defendant does not shine much light on the facts of the case, and the prejudice that such lyrics inflict on the members of the jury significantly outweighs such probative value.

Several admissions of rap lyrics as evidence additionally violate the defendant's First Amendment right as established under the *Dawson* standard. Like the defendant's tattoo in *Dawson*, rap lyrics are being presented for the primary purpose of establishing that defendants are members of a gang, even when the crime that is being charged is not an alleged gang-related event.

Until courts change to better account for these factors in a consistent manner, legislation such as New York's proposed bill can protect an artist's right to rap without fear of the lyrics being used as evidence of guilt in a court of law.

