

FROM RHYMING BARS TO BEHIND BARS: THE PROBLEMATIC USE OF RAP LYRICS IN CRIMINAL PROCEEDINGS

Lucy J. Litt*

I. INTRODUCTION

The use of rap lyrics as evidence in criminal proceedings distorts the art form and heightens the risk of wrongful prosecutions. Rap music is complex and sophisticated; it is an art form with its own history, norms, and conventions. Like other art forms (e.g., spy novels by John le Carré; ballets by George Balanchine; the Big Apple Circus; Shakespeare's tragedies; Marvin Hamlisch and Edward Kleban's "A Chorus Line;" or songs by Johnny Cash),¹ it serves as a creative outlet and can be a form of critical public commentary. Rap is an art form that often distorts or exaggerates reality. Unlike other fictional art forms (e.g., murder mysteries, TV crime show scripts), however, prosecutors increasingly introduce

* JD, Harvard Law School '22; previously held positions include middle and high school boys' special education teacher at Horizon Juvenile Detention Center (South Bronx, NY), corrections oversight research assistant for Professor Michele Deitch (University of Texas at Austin School of Law), and program officer working with and on behalf of adults who were sexually abused in custody at Just Detention International. Also of note, given that art is central to this article, my first career was as a professional dancer who had the privilege of training for years at the historically-Black Alvin Ailey school. My classmates and teachers there sparked my interest in this field and earliest sense of the injustices plaguing low-income communities of color. The people I acknowledge below do not necessarily endorse the views I present in this Article, and they did not all work with me as I wrote it. Still, their influence and faith in me have been invaluable. First, this project initially took shape because Professors Martha Minow and Jon Hanson provided the opportunity for me to work on it as their student. I am grateful to Professors Andrea Armstrong; James Baker; Susannah Barton-Tobin, Philip Burling, Michele Deitch, Sharon Dolovich, Jack Goldsmith, Justin Hansford, Fareed Nassor Hayat, Babe Howell, James Kraska, Andy Lass, Bruce Mann, Daniel Medwed, Lynn Morgan, Lynn Pasquerella, Preston Smith II, Forrest Stewart, Ronald Sullivan, Scott Westfahl, David Wilkins, Lucas Wilson, Judge John Gleeson, the HLS librarians, and Dean John Manning for their mentorship, support, and example. Special thanks to my family, including Seth and Angela, for their love, generosity, and willingness to learn alongside me; to C.S. for indispensable patience and suggestions throughout my writing process; and to D.W. for thought partnership since my first detention center internship in 2010. I have the utmost appreciation for the *UMKC Law Review* editors, who gave me this opportunity and provided exceptionally thoughtful feedback (especially my fantastic point person, Rhiannen Schneider). Credit is also due to my Justice Initiative community; Woody Clift; Stephen Wilder; William McField; Shareef Rashid; Cami Anderson; Maria Meinerding; Margaux Zanelli; Lovisa Stannow; Leelyn Aquino-Shinn; Amalia Robinson Andrade; Christian Vien; Kris Mady; Kristi Jobson; Alex Feinson; Michelle Kim Hall; Hannah Makowske; Kaitlynn Milvert; Stacey Menjivar; Tanya Williams; Elaine Brigham; the H.P. Core Team; Bailey Crawford; Caroline Grueskin; and several others for their inspiration, insight, and support. Most importantly, I am indebted to my former students, clients, and their loved ones for their trust, allowing me into their worlds, and teaching me so much—this Article, like my last one, is dedicated to them, and they drive all that I do.

¹ For analysis comparing the use of rap lyrics in criminal proceedings with the use of country and heavy metal music respectively, see ERIK NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* (2019) at 89–93.

rap lyrics as evidence in criminal proceedings, where the real-life stakes can be very high.²

In 1987, the Washington Court of Appeals considered, and denied, the admissibility of violent writings as evidence³; however, courts did not consider the specific question of rap lyrics until the United States Court of Appeals for the Seventh Circuit heard *United States v. Foster* in 1991⁴ and concluded that the rap lyrics⁵ in question were admissible as evidence against the defendant rap artist. In the years since 1991, state and federal prosecutors have continued their practice of introducing rap lyrics and rap music videos in criminal proceedings against rappers (and even sometimes their friends and fans).⁶ Scholars and commentators who focus on these practices refer to the phenomenon as “rap on trial.” The courts vary in their decisions regarding rap on trial, with most courts and prosecutors having persistently failed to grapple with the complexity of the issues presented by its use.

Troublingly, in the ensuing three decades, prosecutors, judges, and others in the legal profession have not sufficiently scrutinized the reliability of rap lyrics and the constitutional issues inherent in their misuse, in spite of studies that have shown that the introduction of rap lyrics as evidence infuses a heightened likelihood of unfair prejudice into the criminal legal process.⁷ Rap is a form of creative expression that was predominantly cultivated by Black and Brown men,

² This includes capital cases (see, e.g., *United States v. Wilson*, 493 F. Supp. 2d 484, 488 (E.D.N.Y. 2006)).

³ *State v. Hanson*, 731 P.2d 1140, 1144-45 (Wash. Ct. App. 1987) (holding, on appeal of a conviction for first degree assault, that violent fictional writings were not probative, due to insufficient showing that the writings were similar enough to the crime to be relevant to establishment of identity; writings were also considered highly prejudicial) (“[W]e hold that his writings were irrelevant to rebut this character evidence. Without some further foundation, the defendant's writings were simply not probative. A writer of crime fiction, for example, can hardly be said to have displayed criminal propensities through works he or she has authored....”). In this case, the State never indicated how the defendant's writings were logically relevant under ER 404(b). There was no attempt to show, for example, that Hanson wrote about an incident so similar to the crime charged that his writings were relevant to the question of identity. Even if we were to assume that Hanson's writings were probative of his character, any probative value would be overwhelmed by the danger of unfair prejudice.

⁴ See *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991). Another foundational case in which prosecutors established the practice of introducing rap lyrics during criminal proceedings is *People v. Olguin*, 31 Cal. App. 4th 1355, 37 Cal. Rptr. 2d 596 (1994) (holding that the lyrics presented against the defendant were not unduly inflammatory); see also *United States v. Stuckey*, 253 F. App'x 468, 474 (6th Cir. 2007); see also *Holmes v. State*, 129 Nev. 567, 574 (2013).

⁵ Throughout this paper, I will primarily refer to “rap lyrics,” but prosecutors increasingly use rap music videos in court as well. I do not conduct an in-depth analysis of rap videos in this article, except to argue that prosecutors should not pursue everyone in a video as additional suspects purely because of their participation in the video; however, sociologist and Professor Forrest Stuart discusses rap music videos in depth in his book (see generally FORREST STUART, *BALLAD OF THE BULLET: GANGS, DRILL MUSIC, AND THE POWER OF ONLINE INFAMY* (2020)).

⁶ Often, rap artists are the lyricists of their songs. However, prosecutors have also incorrectly attributed lyrics to defendants in some cases see, e.g., *Commonwealth v. Patterson*, 625 Pa. 104, 138 (Pa. 2014). Prosecutors have also made mistakes about the contents of photos belonging to rap artists (see, e.g., NIELSON & DENNIS, *supra* note 1, at 133-34 (describing *United States v. Gerald Johnson* (2015) and *United States v. Johnson*, 280 F. Supp. 3d 772 (D. Md. 2017)) and relied upon faulty information from their own “gang experts,” who are usually law enforcement officers (see, e.g., NIELSON & DENNIS, *supra* note 1, at 134-35 (describing *State v. Christopher Bassett* (2017))).

⁷ See *infra* Part VIII.

and it has its origins in marginalized urban areas. The art form and its creators often invoke unsupportable negative stereotypes among jurors, and even judges.

Prior legal and interdisciplinary scholarship, by experts such as Professors Andrea L. Dennis and Erik Nielson,⁸ has addressed the practice of, and problems presented by, “rap on trial.” Social science scholarship, such as Stanford University Sociology Professor Forrest Stuart’s *Ballad of the Bullet*,⁹ has explored the culture surrounding rap music and how that culture comes into tension with racially biased law enforcement and uninformed members of the general public. The scholarship that exists in this area tends to draw upon the convergence of these issues to propose holistic approaches to proposed reforms.¹⁰

This paper challenges prosecutors’ use of rap lyrics (and, by extension, rap music videos) as evidence against defendants in criminal legal proceedings: this practice often violates and undermines fundamental values of the United States justice system, the rules of evidence, and the Constitution; the practice also threatens to harm defendants, their loved ones, and their communities.

I propose a three-pronged framework for the categorizing of rap lyrics when prosecutors introduce them during criminal proceedings: (1)¹¹ likely admissible lyrics that have either (a) a sufficient nexus of specificity and proximity to qualify as a “true threat”¹² that is exempt from First Amendment¹³ protections¹⁴ (as in *Commonwealth v. Knox* (Pa. 2018)),¹⁵ or (b) specificity that is clearly and convincingly linked to a previously-committed offense for which prosecutors already have substantial independent evidence linking the rap artist defendant to the alleged offense(s) (e.g., as in *Greene v. Commonwealth* (Ky. 2006));¹⁶ (2) lyrics that should not be admissible because they lack the qualities described in the first category, yet prosecutors use them to invoke biased juror and judge perceptions of defendants, where the prosecutors lack a significant body of independent evidence linking the defendants to the alleged offense(s); and (3) lyrics or videos that should

⁸ See, e.g., NIELSON & DENNIS, *supra* note 1.

⁹ See generally STUART, *supra* note 5.

¹⁰ See Lucy Litt, *RICO: Rethinking Interpretations of Criminal Organizations*, 26 BERKELEY J. CRIM. L. 71, 138 n.209 (2021), <https://doi.org/10.15779/Z38W37KW7T> for discussion of the decision to use the term “reform” in scholarship focusing on criminal law, procedure, and practice. The use of the term “reform” throughout this paper should not be construed to undermine the work of abolitionists. Some activists argue that reforms stall radical change by masking the severity of systemic injustices, especially racism throughout the criminal legal system. The discussion and proposals herein are meant to address the crisis currently facing the young Black and Brown men who are at high risk of being mischaracterized, or at least unfairly disadvantaged, by prosecutors who introduce their rap lyrics or rap videos during their criminal legal proceedings.

¹¹ This category is helpful for the purpose of this paper, but opponents of the use of rap lyrics during criminal proceedings say that even when lyrics seem to closely align with a crime, they still should not be considered to be a confession.

¹² See *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (holding that “true threats” exceed the protection of the First Amendment); see *Virginia v. Black*, 538 U.S. 343, 360 (2003) (holding that the elements of “true threats” are (1) speaker intended to communicate a threat, and (2) there existed a serious intent to cause harm).

¹³ U.S. CONST. amend I.

¹⁴ See *Watts*, 394 U.S. at 707.

¹⁵ *Commonwealth v. Knox*, 190 A.3d 1146, 1149 (Pa. 2018).

¹⁶ *Greene v. Commonwealth*, 197 S.W.3d 76, 86-87 (Ky. 2006).

be absolutely inadmissible, which are used to implicate swaths of people who might have some connection to a rap artist, such as appearing in a video,¹⁷ without a substantial body of independent evidence linking *each individual suspect* to the alleged offense(s). In the pages that follow, I analyze these issues and propose reforms; most notably, I urge practicing lawyers and judges to uphold these distinctions in their work and legislators to address them in theirs. For example, I note a bill currently under consideration by the New York State Legislature that would limit the use of rap lyrics during criminal proceedings; I also encourage heightened judicial scrutiny at various points of criminal proceedings, including when judges evaluate expert witness qualifications and assess the admissibility of evidence under Federal Rules of Evidence 403,¹⁸ 404(b),¹⁹ and 901²⁰ (or their state court equivalents).

I approach the issue as one of racial bias with First Amendment elements, as opposed to treating it as a First Amendment issue with racial bias elements.²¹ I do not believe that the "slippery slope" argument (i.e., if one form of expression is suppressed or criminalized, then everyone should care because it could eventually lead to the suppression and criminalization of speech they care about, too) is the most relevant or helpful argument in favor of addressing this issue because it is not a foregone conclusion. Rap music in the United States is continually criminalized in ways that other art forms have never been; this is rooted in both the history of the genre and the perpetuation of systemic racism in the U.S.²²

¹⁷ See, e.g., Charles Holmes, *20 Arrested on Gun Charges Stemming from Houston Rappers' Video*, ROLLING STONE (Dec. 12, 2018), <https://www.rollingstone.com/music/music-news/20-arrested-gun-charges-maxo-kream-video-768302/>. Sometimes these videos initially result in law enforcement entering video participants into a gang database, but when someone is added to a gang database, that person becomes more likely to be included in subsequent mass arrests and mass indictments (see generally, Nick Pinto, *NYPD Added Nearly 2,500 New People to Its Gang Database in the Last Year*, INTERCEPT (June 28, 2019), <https://theintercept.com/2019/06/28/nypd-gang-database-additions/>; Litt, *supra* note 10; NIELSON & DENNIS, *supra* note 1, at 149-151 (describing the case of Brandon Duncan ("Tiny Doo"))).

¹⁸ FED. R. EVID. 403.

¹⁹ FED. R. EVID. 404(b).

²⁰ FED. R. EVID. 901 concerns the authentication of evidence, and FED. R. EVID. 901(b) provides a non-exhaustive list of examples of evidence that satisfies the authentication requirement.

²¹ For an example of the First Amendment argument that prosecuting rap lyrics could "chill" speech and violates the First Amendment, see, e.g., Deborah C. England, *Rap Lyrics in Evidence: Is it a Crime to Rhyme?*, NOLO, <https://www.criminaldefenselawyer.com/resources/rap-lyrics-evidence-is-it-a-crime-rhyme.htm> (last visited March 12, 2022). A 2015 Supreme Court case, *Elonis v. United States*, 135 S. Ct. 2001 (2015), raised this issue, but the Court ultimately evaluated the case on statutory grounds, leaving the First Amendment issue unresolved. Consequently, courts remain unclear as to whether there is a heightened mental state required for the First Amendment's "true threats" exception to free speech. For more on *Elonis v. United States*, see generally Jessica L. Opila, *How Elonis Failed to Clarify the Analysis of "True Threats" in Social Media Cases and the Subsequent Need for Congressional Response*, 24 MICH. TELECOM & TECH L. REV. 95 (2017).

²² The history of the American law enforcement and criminal legal systems is beyond the scope of this paper; however, numerous scholars and abolitionists have argued that these systems have never worked for marginalized people or communities and never will. For resources on this issue, see generally POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, (Angela J. Davis ed., Pantheon Books 2017); MARIAME KABA & NAOMI MURAKAWA, WE DO THIS 'TIL WE FREE US

At the outset, it is important to note that the limited available data about the use of rap lyrics and videos during the criminal legal process makes it difficult to assess the frequency and prevalence of this practice with certainty. Experts in the field, such as Professor Andrea L. Dennis, have discovered approximately 500 cases involving “rap on trial” across the major legal databases (such as LexisNexis and Westlaw); however, the U.S. lacks a central repository of all cases and (especially) all plea negotiations that occur throughout the nation each day.²³ Attempting to remedy some of these lacunae, experts have turned to word of mouth and other forms of research, in addition to traditional legal research methods. These supplemental strategies have identified a serious underrepresentation of rap-on-trial frequency across the major legal databases.

My approach to this issue aligns with that described by Professors Nielson and Dennis in their book: “We aren’t claiming that everyone in [the rap scene] is innocent of every crime they’re accused of. Our goal is more basic than that. It’s to demonstrate that in courtrooms across the nation, people are being denied a fair trial in a particularly insidious way.”²⁴ That insidiousness, as I will discuss, is a manifestation of systemic racism, and it undermines the legitimacy of law

(Tamara K. Nopper ed., Haymarket Books 2021); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006); KIMBERLÉ CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Inés Valdez, Mat Coleman & Amna Akbar, *Law, Police Violence, and Race: Grounding and Embodying the State of Exception*, PROJECT MUSE: THEORY & EVENT 23 (2020) 902, muse.jhu.edu/article/767874; Justin Hansford, *The Whole System is Guilty as Hell*, HARV. J. AFR. AMER. PUB. POL’Y (Apr. 26, 2015), <https://hjaap.hkspublications.org/2015/04/26/the-whole-system-is-guilty-as-hell/>; Fareed Nasser Hayat, *Two Bites at the Apple: Requiring Double Jeopardy Protection in Gang Cases*, 73 RUTGERS L. REV. 1463 (2021); Fareed Nasser Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. DISC. 18, 20 n.1 (2021), <https://www.uclalawreview.org/killing-due-process-double-jeopardy-white-supremacy-and-gang-prosecutions/>; Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1 (2021).

²³ Unlike case law and related filings, records of plea negotiations and agreements are not publicly available. Since much of the plea-bargaining process occurs outside of public scrutiny, oversight and accountability issues abound. For more on plea bargaining, including its relationship to mass incarceration, see generally Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action* 90 FORDHAM L. REV. 1999 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4003440; Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303 (2018), available at <https://columbialawreview.org/content/the-hidden-law-of-plea-bargaining/>; Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973 (2021), available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/2/>; Joan Wong, *Prisons are packed because prosecutors are coercing plea deals. And, yes, it’s totally legal.*, NBC NEWS (Aug. 8, 2019), <https://www.nbcnews.com/think/opinion/prisons-are-packedbecause-prosecutors-are-coercing-plea-deals-yes-ncna1034201> (paraphrasing the Pew Research Center: “of the roughly 80,000 federal prosecutions initiated in 2018, just two percent went to trial. More than 97 percent of federal criminal convictions are obtained through plea bargains, and the states are not far behind at 94 percent.”).

²⁴ NIELSON & DENNIS, *supra* note 1, at 10.

enforcement and the criminal legal system writ large.²⁵ In Part II, I will discuss three potential categories for rap lyrics used during criminal proceedings; in part III, I provide relevant historical context for analyzing the issues discussed throughout this article, including a history of rap as an art form; in Part IV, I discuss the development and social significance of rap music; in Part V, I delve into the conventions of rap music as an art form; in Part VI, I consider the motivations behind prosecutors' use of rap lyrics during criminal proceedings; in Part VII, I discuss the racially biased effect of rap on trial; in Part VIII, I explore the relationship between evidentiary rules in criminal proceedings and rap on trial; in Part IX, I address anticipated criticisms of the arguments presented in this article; and in Part X, I propose reforms that could begin to address the issues discussed herein before concluding in Part XI.

II. THE THREE CATEGORIES OF RAP LYRICS ON TRIAL

An understanding of the three categories into which I sort the rap lyrics used against rappers (and others) in criminal proceedings will provide a useful lens through which to evaluate the analysis in the rest of this article. The three categories are as follows: (1) lyrics that are most likely to be admissible in court; (2) lyrics that, ideally, should not be admissible in court; and (3) lyrics and videos used to charge entire groups of people, which I argue are the most dangerous and misleading of all. In this Part, I will discuss each category, from most admissible to least admissible. These categories are not intended to oversimplify the issue; instead, given the increasing pervasiveness of rap on trial, these categories can provide a baseline from which advocates against the practice can pursue change.

A. First Category

Rap lyrics such as those in *Commonwealth v. Knox*²⁶ are those most likely to be admissible in court. Mr. Knox wrote lyrics that explicitly named law enforcement officers and made threats that contained specific details, such as threatening to harm the officers when their shift ended at 3:00 pm.²⁷ Whether or not the details of the officers' shift end times were accurate, the specificity of those lyrics could put officers in danger, or at least reasonably in fear of danger, and courts might understandably interpret them as "true threats" that are exempt from First Amendment protections. *Knox* leaves many questions unresolved, including the extent of proximity to the threatened party necessary for lyrics to be considered a threat and whether this interpretation also applies to lyrics threatening civilians in detail. I do not resolve all of those questions here, but they warrant further study. In short, the specificity of these lyrics makes them likely to be admissible in court.

Another example of lyrics on this end of the spectrum would be lyrics like those written by defendant Dennis R. Greene, which were reviewed in *Greene v.*

²⁵ See *supra* note 23.

²⁶ *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018).

²⁷ *Id.* at 1149.

Commonwealth, 197 S.W.3d 76 (Ky. 2006).²⁸ In that case, Mr. Greene was charged with the murder of his wife, which he allegedly carried out by cutting her throat. Between the murder and his arrest, Mr. Greene rapped in a video about cutting his wife's neck with a sword. In his case, the court admitted the lyrics as evidence of premeditation, motive, and Mr. Greene's emotional state after he had murdered his wife. Rap lyrics that detail a crime already committed, in the form of boasting or a confession, *and* for which prosecutors have a significant body of independent evidence linking the rap artist to the crime, are justifiably admissible in court.

B. Second Category

The second category of lyrics should not be admissible in court. These lyrics lack the qualities described in the first category, prosecutors typically use them to invoke biased juror and judge perceptions of defendants, and prosecutors lack a significant body of independent evidence linking the rap artist to the alleged offense(s). Three examples²⁹ demonstrate the injustice inherent in these types of cases: the cases of (1) Torrance Hatch; (2) Nykees Earl Campbell; and (3) Vonte Skinner.

Torrance ("Lil Boosie") Hatch is a rapper from Louisiana. In 2012, Mr. Hatch received a unanimous not-guilty verdict in Louisiana's 19th Judicial District in his trial for murder, having been accused of paying \$2,800 to Michael "Marlo Mike" Louding³⁰ to kill Terry Boyd on October 20th, 2009.³¹ The prosecutors had neither DNA evidence nor eyewitnesses to the shooting. Instead, the prosecution based its case on a taped confession from Mr. Louding (who was in custody during the confession) and telephone records showing that Mr. Louding contacted Mr. Hatch's recording studio during the hours before and after Mr. Boyd's death. Additional evidence presented by the prosecution included (1) a tattoo that Mr. Louding obtained weeks after the incident, which pictured an AK-47 and the words "Yo Boosie. Who's Next?"; and (2) lyrics, isolated from their musical beats and context, from Mr. Hatch's songs, entitled "187" and "Bodybag," which a forensic computer expert claimed were recorded during the hours surrounding Mr. Boyd's murder.³² The case primarily hinged upon three words from Mr. Hatch's lyrics: "187," "murk," and "cake." Despite a law enforcement officer testifying as an

²⁸ *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006).

²⁹ See also NIELSON & DENNIS, *supra* note 1, at 1–7 for the additional story of McKinley Phipps, which illustrates this problem in greater detail.

³⁰ Mr. Louding was convicted. For more on his trial, see *State v. Louding*, No. 2014 KA 1642, 2015 La. App. Unpub. Lexis 290, 2015 WL 3613194 (La. App. 1 Cir. 2015) (Appealed from the 19th Judicial District Court, in and for the Parish of East Baton Rouge, Louisiana. Trial Court No. 06-10-0234. Honorable Trudy White, Judge.).

³¹ *Id.* at 1. Records for this trial were unavailable at the time of this writing, but the trial in note 22, above, stems from the same incident.

³² See Jeff Weiss, *Inside Louisiana Rapper Lil Boosie's Grisly Murder Trial*, ROLLING STONE (May 9, 2012), <https://www.rollingstone.com/music/music-news/inside-louisiana-rapper-lil-boosies-grisly-murder-trial-205013/>; Jeff Weiss, *Lil Boosie Found Not Guilty in Murder Trial*, ROLLING STONE (May 11, 2012), <https://www.rollingstone.com/music/music-news/lil-boosie-found-not-guilty-in-murder-trial-200049/>.

“expert” that those words added up to a confession, the jury found the prosecution’s evidence insufficient. Mr. Hatch was fairly well-known, and he might have also benefitted from that status; amateur rappers tend to fare worse than more famous rappers when their lyrics are presented during criminal proceedings.³³

Nykees Earl Campbell (“YNB NyNizzle”) is a lesser-known rapper whose Dallas, Texas judge (District Judge Barbara Lynn) doubled his sentence for cocaine distribution based on prosecutors’ allegations that some of his rap lyrics aligned with a robbery for which he was also (separately) a suspect.³⁴ The lyrics had nothing to do with his original case, but they affected his sentence anyway.³⁵

In 2008, Vonte Skinner was tried for attempted murder of a fellow drug dealer in New Jersey.³⁶ Prosecutors lacked strong evidence linking Mr. Skinner to the crime—they only had witnesses who frequently changed their testimony—except for one thing: Mr. Skinner’s rap lyrics, which were in one of his notebooks when he was arrested. Needless to say, the prosecutors were determined to use the rap lyrics as evidence showing Mr. Skinner’s state of mind at the time of the murder. Despite objections from the defense, the judge allowed prosecutors to read aloud thirteen pages of the lyrics during the jury trial; however, Mr. Skinner wrote all of the lyrics prior to the murder (some lyrics were months and even years old by the time of the shooting), and the lyrics mentioned neither the alleged crime nor the victim. Still, the jury convicted Mr. Skinner, and he received a thirty-year prison sentence. Four years later, the appellate court overturned Mr. Skinner’s

³³ NIELSON & DENNIS, *supra* note 1, at 16-17.

³⁴ Eddie Fu & Max JR Miller, *A Dallas Rapper’s Prison Sentence Was Doubled Because of His Lyrics*, GENIUS (July 24, 2018), <https://genius.com/a/a-dallas-rapper-s-prison-sentence-was-doubled-because-of-his-lyrics>.

³⁵ This is discussed further in a subsequent Northern District of Texas decision regarding Mr. Campbell’s challenge of his conviction and sentence. See *Campbell v. United States*, No. 3:17-CR-567-M(1), 2023 WL 3395135, at *4 (N.D. Tex. Apr. 12, 2023), *report and recommendation adopted*, No. 3:17-CR-567-M(1), 2023 WL 3400495 (N.D. Tex. May 11, 2023) (“The record shows that the Government moved for an upward departure under the sentencing guidelines based on the physical injuries of the cocaine dealer robbed by Movant during the commission of the charged offense, the weapon used, and extreme conduct; it alternatively sought an upward variance based on the § 3553(a) sentencing factors, which require the Court to consider, among other things, ‘the nature and circumstances of the offense and the history and characteristics of the defendant,’ and the need ‘to protect the public from further crimes of the defendant.’” 18 U.S.C. § 3553(a)(1), (a)(2)(C); (see doc. 343.). The evidence of Movant’s rap videos and lyrics, social media posts, and radio interviews presented at sentencing related to his conduct in connection with the charged offense, and was also relevant to his history, characteristics, and potential future dangerousness to the community. It could therefore be, and was in fact, considered by the Court during sentencing for these reasons, and Movant fails to show that counsel had a valid First Amendment objection to make to the evidence or the Court’s consideration of it. (See doc. 464 at 79-85); see also *Tampico*, 297 F.3d at 403; *Boyle*, 93 F.3d at 184. Because counsel is not deficient for failing to raise a meritless argument, Movant fails to satisfy the first prong of *Strickland*. See *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) (holding that counsel is not deficient for failing to raise a meritless argument); *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995) (“Counsel cannot be deficient for failing to press a frivolous point.”). Even assuming for purposes of this motion only that counsel rendered deficient performance by failing to further object to the upward departure on First Amendment grounds, as alleged, deficient performance alone is insufficient to establish relief[.]”).

³⁶ *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

conviction. The appellate court disagreed with the lower court's decision to admit Mr. Skinner's lyrics and raised concerns that the jurors might not have convicted Mr. Skinner had they not been exposed to the lyrics. Two years thereafter, the New Jersey Supreme Court upheld the 2012 decision of the New Jersey Court of Appeals.

Among cases in the second category, those of Mr. Hatch and Mr. Skinner are the exception; Mr. Campbell's experience is more reflective of the norm.³⁷ As Professors Dennis and Nielson explain:

In the vast majority of cases, rap lyrics are admitted, and appeals are unsuccessful. The [ACLU] found that in cases where various courts considered the admissibility of rap lyrics...they were allowed nearly 80 percent of the time.... Our research, which has the benefit of a much larger sample of cases, leads us to the conclusion that the number is significantly higher, [and] appealing the use of rap music as evidence virtually never works.³⁸

This assessment, while striking, does not even address the use of rap music in plea bargaining, which occurs outside of the judicial and public purview.

C. Third Category

The third category has less significance in this article, but it is still relevant to the broader analysis of this issue. The use of lyrics and videos in this category should be absolutely inadmissible. Here, law enforcement uses videos and lyrics to identify, investigate, and potentially indict groups of people who have some connection to a rap artist, such as appearing in a video or following/interacting with a particular artist on social media,³⁹ without a substantial body of independent evidence linking *each individual in the group* to an alleged offense. Professor Stuart explains, "[s]ome [major] cities have [launched] 'social media policing units,' arresting young people based (sometimes solely) on their social media activity. National intelligence agencies, including the FBI, are developing artificial intelligence (AI) and digital surveillance tools to aggressively investigate and incarcerate them."⁴⁰

³⁷ For another example, see NIELSON & DENNIS, *supra* note 1, at 1-7 (describing the tragic story and criminal proceedings of McKinley Phipps in New Orleans, Louisiana).

³⁸ NIELSON & DENNIS, *supra* note 1, at 19-20 (citing Brief for the ACLUNJ as Amicus Curiae, *State v. Skinner*, 95 A.3d 236 (N.J. 2014)).

³⁹ See, e.g., Holmes, *supra* note 17; see generally Pinto, *supra* note 17; Litt, *supra* note 10, at 127; NIELSON & DENNIS, *supra* note 1, at 148-51 (describing the case of Brandon Duncan ("Tiny Doo")); Meredith Broussard, *When Cops Check Facebook*, ATLANTIC (Apr. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882/>.

⁴⁰ STUART, *supra* note 5, at viii.

III. RELEVANT HISTORICAL CONTEXT

Hip hop grew out of the South Bronx, New York, in the 1970s and 1980s. It emerged as a movement in response to the violence, fear, abandonment, and horrific conditions residents (who were almost entirely Black and Brown) faced at that time.⁴¹ Quality of life in the South Bronx declined during that era for several reasons, including (1) construction of the Cross Bronx Expressway, which displaced many people and businesses and isolated the South Bronx from Manhattan, and (2) economic changes throughout the 1960s, which led to a reduction of manufacturing jobs in the Bronx by hundreds of thousands.⁴² As a result of these disruptions to life in the South Bronx, violence and unemployment increased exponentially.

As the South Bronx grew increasingly destitute, public figures, such as Ronald Reagan and Mother Theresa visited so they could witness the crisis themselves. Despite their public acknowledgment that the South Bronx was in crisis, they did little to address what was happening. The city also pulled resources and services out of the South Bronx. Gangs eventually played a role in creating some order in the absence of law enforcement, but that was inconsistent at best; some gangs were ruthlessly violent, while others were less so.

It was during this difficult time that hip hop began to emerge. As Professors Dennis and Nielson explain:

Hip hop is generally defined as an artistic and cultural movement comprised of a number of elements, including graffiti, break dancing, and eventually rap music. In reality, it was bigger than that; it came to represent a fundamental shift in the way many young people in the Bronx, and across the city, viewed themselves and their community. For many of the city's most marginalized residents, hip hop was a voice, a form of self-expression that was uniquely theirs.⁴³

Hip hop began to compete with street gang culture, with some known gang members and leaders shifting from gangs to roles like being Disk Jockeys ("DJs"). Those who immersed themselves in the hip hop world found similar "territoriality and competitiveness"⁴⁴ to that which was central to gangs, but hip hop battles were metaphors for the physically violent feuds between gangs, with battles that were

⁴¹ For a more extensive discussion of the history of rap music, see Ryan J. Bennett, *Rappers' Rhymes Are Not Admissions to Crimes: Eliminating the Unlawful Use of Rap Lyrics against Rappers in Criminal Proceedings*, 48 OHIO N.U. L. REV. 1, 7–8 (2021).

⁴² Also, as New York City closed the multiple midtown-Manhattan hotels that housed homeless individuals and families, because the optics of so much poverty reflected poorly on elected officials, it moved those people, many of whom were struggling with drug addiction, mental illness, HIV, and other issues, to the South Bronx. Although this largely occurred in the late 1980s, the Bronx was already in terrible condition when the mass migration began—that was part of what made it easier for New York City officials to move many homeless people to the South Bronx in the first place. See generally JONATHAN KOZOL, *FIRE IN THE ASHES: TWENTY-FIVE YEARS AMONG THE POOREST CHILDREN IN AMERICA* (2012).

⁴³ NIELSON & DENNIS, *supra* note 1, at 30.

⁴⁴ *Id.*

artistic rather than violent.⁴⁵ Many attribute the decline in New York City's violent gangs during the mid-to-late 1970s to hip hop, rather than to politicians or law enforcement.⁴⁶

From its earliest days, hip hop (often memorialized in graffiti) became a heavily scrutinized law enforcement target. One example is the "war on graffiti" in the 1980s:

Police established a special "vandal squad," which began making thousands of arrests, surveilling high-traffic graffiti areas, and developing an extensive database of known or suspected graffiti artists. It also began monitoring the activities of various crews, interrogating graffiti suspects, and raiding writers' homes. One officer on the squad ... said, "We infiltrate.... We know where they live, how they live, what schools they go to, where they work: we keep files."⁴⁷

Police surveillance and confrontation turned into police brutality targeting people of color in New York City.

Black Arts poets of the 1960s and 1970s, who were affiliated with the Black Power movement, were intentionally provocative and openly critical of white norms. These poets centered the concerns, challenges, and experiences of low-income Black people in their work. They emphasized the harm caused by racism and celebrated the strength and power embodied by Black people. Black Arts poets were some of rap's predecessors, but that influence was not truly evident until the mid-1980s, when rap gained popularity and the struggles of low-income urban communities worsened. Rap artists started explicitly criticizing the centers of power and privilege in the United States during this period. Two rap groups, Public Enemy and N.W.A., released particularly critical albums in 1988. N.W.A., in particular, set the growth of "gangsta rap" in motion. As "gangsta rap" became more popular and part of the mainstream, it "pushed the [rap] genre as a whole toward the violent, sexually explicit lyrics that prosecutors would begin to target."⁴⁸

Throughout the 1970s, 1980s, 1990s, and beyond, rap music has reflected the changing obstacles facing marginalized people of color. From the so-called "War on Drugs," to the Rodney King Riots, to early years of the mass incarceration of Black and Brown men, to "Operation Hammer," "Operation Crew Cut,"⁴⁹ and the nation's collective reckoning with racism and police killings of Black people, rap has been there to tell the stories of the people directly harmed and often

⁴⁵ For more on these battles and the role of hip hop in the reclaiming of public space by New York City's young people living in low-income neighborhoods, see TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA*, at 22 (1994).

⁴⁶ NIELSON & DENNIS, *supra* note 1, at 30–31.

⁴⁷ *Id.* at 32–33.

⁴⁸ NIELSON & DENNIS, *supra* note 1, at 39.

⁴⁹ See Babe Howell, *Gang Narratives and Race-Based Policing and Prosecution in New York City*, in ROUTLEDGE INT'L HANDBOOK OF CRITICAL GANG STUD. 177 (David C. Brotherton & Rafael Jose Gude eds., 2021).

silenced.⁵⁰ Rap is many things, but it has served the crucial functions of documenting the experiences of people living in poverty, especially people of color, and protesting the conditions in which people in poverty live their daily lives.

IV. THE DEVELOPMENTAL AND SOCIAL SIGNIFICANCE OF RAP

It is true that rap music, such as the drill music genre of rap that has emerged in recent years, can recount or fuel violence. It is also true that rap artists often assume a significant risk of violence as their work gains attention, and that risk can lead them to take serious precautions. Professor Stuart describes multiple instances in which rap artists also see the risks they assume ensnare people close to them. Some rap artists have called out local government officials by name and issued what can sound like detailed threats of violence in their music,⁵¹ while impressionable young consumers might try to emulate what they see in videos or hear in lyrics. I do not contest any of those facts or assertions in this article, and I do not claim to resolve them; however, I note that rap music also can play an enormous and positive role in the lives of rappers and their fans—in entire communities; understanding that role is essential to appreciating the urgent problem presented by rap on trial.

Rap music can actually play an important role in the prosocial development of adolescents and young adults. Not only is rap a powerful creative outlet; it can also be a source of positive identity development and serve as a medium through which to express and process emotions. Professor Stuart describes in his book how one young person in the Chicago drill⁵² music scene explained the emotional appeal of some popular videos he and his friends created:

White people, Mexicans, [women]—all those people that don't *live* the life, they love *hearing* about the life.... Like, say there's this boy. He had everything he wanted. He never had to struggle...[n]ever had to rob nobody [sic].... He hear [rap music about] it, and that's *exciting* to him. He gets a kind of emotion off that.... Then you got the [people on the streets] who done some of that.... He's listenin' 'cause he feel like he can relate. He been though some [of the things] you rappin' 'bout. At the end of the day, *everybody* really just listenin' based off their *feelings*.⁵³

Professor Stuart defines drill music as:

[A]n emerging genre of hyperviolent, hyperlocal DIY-style gangsta rap that claims to document street life... '[D]rillers' [] compete on a global stage to prove that they're more ruthless, more delinquent, and more

⁵⁰ For more on the history of some of the events listed, see NIELSON & DENNIS, *supra* note 1, at 40–48.

⁵¹ See, e.g., *Commonwealth v. Knox*, 190 A.3d 1146, 1149 (Pa. 2018).

⁵² Drill music is a genre of rap music (see STUART, *supra* note 5, at 3 n.1).

⁵³ STUART, *supra* note 5, at 57 (see also 117, 183).

authentic than their competitors... [A] select few [of those who succeed receive] a ticket out of poverty.⁵⁴

The developmental and prosocial value of rap music is evident both in educational⁵⁵ and therapeutic⁵⁶ settings. Drill music consumers who reside in similar circumstances to those described in the music rely on it when processing trauma, to form bonds, and in exploring their identities; indeed, drillers have been known to use their explicitly violent lyrics and drill music personas as part of a larger strategy for *avoiding* physical violence in their daily personal lives.⁵⁷ Professor Stuart explains:

[Y]oung men also gravitate to the attention economy [the forum within which drillers expand their fanbases and earn money] because they perceive it as carrying a relatively lower risk of arrest, incarceration, and death than drug dealing, robbery, and other illegal pursuits. In fact, quite a few [young men I met] first began displaying and representing violent criminality on the internet as part of their efforts to reduce their involvement in such behavior in their offline lives. They saw digital production as a means to escape street life.⁵⁸

Young people living in poverty can perceive rap music as a lawful career path that could improve their financial situation (and even that of their loved ones). Young Black and Brown men in low-income communities often attend underperforming schools, have limited access to the resources and opportunities available to their less financially challenged (usually white) peers,⁵⁹ and must

⁵⁴ *Id.* at 3.

⁵⁵ See, e.g., BETTINA L. LOVE, GET FREE: HIP HOP CIVICS EDUCATION, <http://getfreehiphopcivics.com> (last visited Mar. 20, 2022).

⁵⁶ See SUSAN HADLEY & GEORGE YANCY, THERAPEUTIC USES OF RAP AND HIP HOP (2011); Shanice N. Armstrong & Richard J. Ricard, *Integrating Rap Music into Counseling with Adolescents in a Disciplinary Alternative Education Program*, 11 J. CREATIVITY IN MENTAL HEALTH 423 (2016), <https://doi.org/10.1080/15401383.2016.1214656>; Ahmad Rashad Washington, *Integrating Hip-Hop Culture and Rap Music into Social Justice Counseling with Black Males*, 96 J. COUNSELING & DEV. 97 (2018); cf. Raphael Travis, Jr., *Rap Music and the Empowerment of Today's Youth: Evidence in Everyday Music Listening, Music Therapy, and Commercial Rap Music*, 30 CHILD & ADOLESCENT SOC. WORK J. 139 (2013).

⁵⁷ See, e.g., STUART, *supra* note 5, at 179, 184-85.

⁵⁸ STUART, *supra* note 5, at 39. Later in the book, Professor Stuart reveals that drillers are actually engaging in a world that *increases* their likelihood of arrest, but they generally do not realize this in time to make the necessary changes in their lives.

⁵⁹ See Laura Meckler, *Study Finds Black and Latino Students Face Significant 'Funding Gap,'* WASH. POST (July 22, 2020, 7:31 AM), https://www.washingtonpost.com/education/study-finds-black-and-latino-students-face-significant-funding-gap/2020/07/21/712f376a-caca-11ea-b0e3-d55bda07d66a_story.html; Lynette Guastaferrero, *Why Racial Inequities in America's Schools are Rooted in Housing Policies of the Past*, USA TODAY (Nov. 2, 2020, 6:00 AM), <https://www.usatoday.com/story/opinion/2020/11/02/how-redlining-still-hurts-black-latino-students-public-schools-column/6083342002>; *Dismissed*, EdBUILD, <https://edbuild.org/content/dismissed>; Mark Keierleber, *America's \$23 Billion School Funding Gap: Despite Court Rulings on Equity, New Report Finds Startling Racial Imbalance*, THE 74 (Feb. 26,

content with fewer readily available and legitimate options for employment and economic mobility;⁶⁰ becoming a professional rap artist is a reasonable⁶¹ and justifiable career goal. Some might feel that they do not have any other career path available. As one young man explained to Professor Stuart in response to his inquiry about what the young man planned to do if his drill music career did not work out, “I ain’t got nothing else, bro.... I *gotta* make it. I ain’t even tryna’ think about ‘what if.’”⁶²

Still, young people who produce or listen to rap music are often perceived as deviant or dangerous, and this aligns with the adultification and criminalization of young Black and Brown people; indeed, systemic racism in the United States socializes Americans, especially white and privileged Americans, to associate crime and gang activity primarily with young Black and Brown men.⁶³ Throughout the U.S., many prosecutors (and judges) share this mindset as they pursue convictions—they read rap lyrics into the record during criminal legal proceedings without regard for the context and artistic complexities surrounding the lyrics or the socio-economic pressures that encouraged their creation.

2019), <https://www.the74million.org/americas-23-billion-school-funding-gap-despite-court-rulings-on-equity-new-report-finds-startling-racial-imbalance/>.

⁶⁰ See Tracy Hadden Loh, Christopher Coes & Becca Buthe, *The Great Real Estate Reset*, BROOKINGS (Dec. 16, 2020), <https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/>; NEIGHBORHOOD POVERTY, NAT’L EQUITY ATLAS, https://nationalequityatlas.org/indicators/Neighborhood_poverty (last visited Dec. 3, 2021).

⁶¹ See, e.g., STUART, *supra* note 5, at 38, 43 (“When the Corner Boys weren’t making music videos, they were watching music videos. And when they weren’t doing that, they were scrolling through the tweets, Instagram photos, and other content produced by the most successful drillers.... There was a common formula to this new avenue for upward mobility.”) (“These young people aren’t naïve. Far from it. They know full well that only a handful of drillers will ever reach the micro-celebrity necessary for real and meaningful upward mobility. But for them, this slim success rate is still better than the odds offered by their other options. They’ve watched as their most determined neighbors failed to get ahead via conventional means. They’ve witnessed uncles and cousins toil for years without promotions in low-skill, minimum-wage jobs. They’ve watched older brothers and sisters pour energy into school assignments that are designed more to increase standardized test scores than prepare them for higher education. We shouldn’t lose sight of the fact that a mere 8 percent of students in Chicago’s notoriously under-resourced school system go on to attain a four-year college degree—a credential demanded of anyone hoping to enter the white-collar world. Considering statistics like these, is the turn to [careers as rap artists] really that irrational? For these young men, if anyone is naïve, it’s their neighbors who still buy in to the conventional mythology. Besides, [a rap career] is the only one that treats their background as an asset rather than a deficit.”) (internal citations omitted).

⁶² STUART, *supra* note 5, at 43.

⁶³ See THE MOVEMENT FOR BLACK LIVES, END CRIMINALIZATION OF YOUTH POLICY BRIEF (May 2020), <https://m4bl.org/wp-content/uploads/2020/05/End-Criminalization-of-Youth-Policy-Brief.pdf>; see generally KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH (2021); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 162–65, 190, 199–200 (2010).

V. CONVENTIONS OF RAP AS AN ART FORM

Rap artists, regardless of their style or skill level, work to abide by complex rules of the genre.⁶⁴ At its most fundamental level, rap revolves around rhyming and beats. Beyond those two basic tenets, rap music frequently follows 4/4 time. To conform to these conventions, rappers often choose particular words or phrases in part simply because they work within the broader scheme.

Rappers have diverse styles, in both their composition and performance of rap, but they almost uniformly rely on symbolism, metaphors, and storytelling—not unlike other poets. The violence described in rap lyrics is often a reflection of the challenges plaguing communities in which many young Black and Brown men live; it is rarely pure autobiography—that is part of why the genre is so relatable to listeners facing similar challenges in their own communities. Professor Nielson interrogates the disconnect between how people perceive this kind of storytelling as being different from other forms:

Rappers are creating characters, not writing diaries.... There is an author and a narrator. We seem to be able to grasp that concept with every other art form that uses the first-person narrative, but [with] rappers, who go the extra mile to signal that they are inventing a narrator with the use of a stage name, we still revert back to this idea that they're the same; we conflate the two.⁶⁵

Professor Stuart complicates this perspective by explaining how hard drillers work to prove that they are authentically as tough and street-credible as they claim to be (because to be discovered lying would be detrimental to a driller's credibility), but the fact that they have to *work* at it at all suggests that they are not violent or engaged in illegal acts all the time; indeed, behind the scenes, most drillers work tirelessly on their craft and public image—that is their top priority. Professor Nielson compares rappers to professional wrestlers, who also often stay in character when their “performance” or recording session ends. He and Professor Dennis also explain in their book the importance of projecting authenticity, likening the environments and conditions rappers depict to a “canvas of sorts, on top of which rappers are free to paint whatever they want.” This process, they elaborate, is akin to writing historical fiction, reminding people inclined to take rap lyrics literally that “you wouldn’t replace a textbook with a historical fiction novel to teach a high school history class.”⁶⁶

Antwain Steward (“Twain Gotti”) is an aspiring rapper from Virginia who was convicted in 2014 of two firearms charges that he says he did not commit and is currently serving a 21-year prison sentence. In 2007, he was also tried for, and acquitted of, killing two men. The murder charges stemmed from a YouTube video

⁶⁴ For more on these conventions, see NIELSON & DENNIS, *supra* note 1, at 48-58; SOMETHING FROM NOTHING: THE ART OF RAP (JollyGood Films 2012); JAY-Z, DECODED (2010).

⁶⁵ PBS NewsHour, *Should Rap Lyrics be Used as Evidence in Court?*, YOUTUBE (June 29, 2014), <https://www.youtube.com/watch?v=7bAV4nfglw>.

⁶⁶ NIELSON & DENNIS, *supra* note 1, at 55-56.

law enforcement officers found of Mr. Steward's song, "Ride Out." Prosecutors interpreted Mr. Steward's lyrics as a confession in which he was boasting about the two murders, but his lyrics did not mention either of the two victims and discussed choking and stabbing only, whereas the two victims died of gunshot wounds. Ultimately, the prosecutors in Mr. Steward's trial made a last-minute decision against introducing the rap lyrics. Professor Nielson believes that decision was determinative: "We do know, based upon our research, that when those lyrics come in they often do secure a conviction.... And the prosecutor's decision at the last second to veer away has a lot to do with why Antwain Steward was found not guilty on both of the murders."⁶⁷ When asked about his decision to rap about violent acts in the first place, Mr. Steward replied: "That's my lane. I'm in the lane of hardcore rap. I got to keep building my brand until I get to where I want to be.... I found something that I'm talented at, and [I] found a way to make money off of [it]."⁶⁸

Wordplay also figures prominently; Harvard Professor Henry Lewis Gates, Jr., has explained that rap is replete with layered meanings and "complicates or even rejects literal interpretation."⁶⁹ Rappers use slang throughout their lyrics, and that slang evades precise, static definitions—this is partly intentional; it is a way to keep outsiders, such as law enforcement, out of the knowledge loop. That is one reason why law enforcement "experts" on rap lyrics, who often do not share the background or music tastes of the rap artists against whom they are testifying, tend to be especially poor sources of reliable information and interpretations. In addition to coded language, the wordplay can manifest itself in other ways that accommodate the rhyme scheme of a particular song. Professors Nielson and Dennis quote in their book an example that rapper Eminem provided during his 2010 television appearance with Anderson Cooper: "I put my orange *four-inch door hinge* in storage and ate porridge with George."⁷⁰ As numerous experts note, this complex wordplay, in its several forms, makes rap music especially ripe for misinterpretation; as an art form that is meant to be heard, not read, those layered meanings can get lost during literal analysis by prosecutors and judges.

Hyperbole, bravado, and extreme language figure prominently in rap music. In 2014, Ronald Herron ("Ra Diggs") was tried in Brooklyn, New York, for over twenty murder and drug trafficking charges.⁷¹ Prosecutors introduced some of his rap lyrics as evidence of illegally obtained wealth and violent behavior. However, a collaborator of Mr. Herron's disputed the image prosecutors had constructed when he testified on Mr. Herron's behalf. He described how Mr. Herron occasionally missed recording sessions because he could not afford

⁶⁷ Victoria M. Walker, *Anything You Can Spit Can Be Used Against You*, NPR (Aug. 3, 2014, 2:33 PM), <https://www.npr.org/sections/codeswitch/2014/08/03/336344620/anything-you-can-spit-can-be-used-against-you>.

⁶⁸ PBS NewsHour, *supra* note 65.

⁶⁹ Henry Louis Gates, Jr., *Foreword* to THE ANTHOLOGY OF RAP, at xxv (Adam Bradley & Andrew DuBois eds., 2010).

⁷⁰ NIELSON & DENNIS, *supra* note 1, at 52.

⁷¹ See *United States v. Herron*, No. 10-CR-0615, 2014 WL 1871909, at *1 (E.D.N.Y. 2014).

transportation and noted that Mr. Herron could not afford the full recording studio rate or to go out at night. Nonetheless, a jury convicted Mr. Herron on all counts.⁷²

VI. PROSECUTOR MOTIVATIONS FOR USING RAP ON TRIAL

Prosecutors point to rap lyrics as: (1) confessions; (2) circumstantial proof of alleged illegal acts; (3) evidence of intent or motive; (4) evidence of gang involvement.⁷³ Prosecutor training manuals promote the use of rap lyrics on trial, in part because they help convince jurors and judges in cases where prosecutors might have little other evidence upon which to secure a conviction.⁷⁴ Studies have also shown that rap lyrics have high prejudicial value, often influencing jurors and judges alike to rule against rapper defendants.⁷⁵ Finally, prosecutors can use so-called “gang experts” or “rap experts” to bolster their cases through “expert” testimony at trial. These “experts” are usually just police officers, or former police officers, who lack expertise tailored to the topics about which they are testifying.⁷⁶ Indeed, their exposure to these topics is usually by way of inaccurate, biased gang databases⁷⁷ and arresting individuals based on the information contained in those flawed databases.

Despite their lack of training—academically, experientially, or in any other form—judges usually permit expert testimony from these “gang experts” or “rap experts”; such witnesses offer a means of getting rap lyrics into the trial, even if they would not otherwise be permitted (i.e., the experts are still reading the lyrics into the record and discussing terms and locations mentioned in the lyrics). Professor Nielson, who has served as an expert for the defense in cases where rap lyrics are introduced against a defendant, has witnessed experts for the prosecution expressing their dislike for rap music⁷⁸ or offering entirely incorrect information about rap music in general and rap lyrics in particular.⁷⁹

Another compelling incentive for prosecutors to use rap lyrics at trial is that the lyrics (and their associated music videos) simplify their process of establishing connections between individuals; this allows prosecutors to claim that people who have some connection to the defendant (e.g., people who are named in the defendant’s song, rap a verse in the defendant’s song, or appear in the defendant’s rap videos) are members of a gang.⁸⁰ In short, prosecutors can use

⁷² NIELSON & DENNIS, *supra* note 1 at 53–54; Josmar Trujillo & Alex S. Vitale, *New York City’s Decision to Criminalize Gangs*, ROUTLEDGE INT’L HANDBOOK OF CRITICAL GANG STUD. 225, 230–31 (David C. Brotherton, & Rafael Jose Gude eds., 2021).

⁷³ NIELSON & DENNIS, *supra* note 1, at 13–15. These appear to be the primary uses, although there may be more.

⁷⁴ See Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 2, 5, 27 (2007), https://digitalcommons.law.uga.edu/fac_artchop/962.

⁷⁵ See *infra* Part VII.

⁷⁶ See NIELSON & DENNIS, *supra* note 1, at 121–40.

⁷⁷ See generally Litt, *supra* note 10 for discussion of inaccurate police department gang databases.

⁷⁸ See NIELSON & DENNIS, *supra* note 1, at 134.

⁷⁹ See *id.* at 121–40.

⁸⁰ See, e.g., Genius, *How 6ix9ine’s “GUMMO” Lyrics Were Used In Court*, YOUTUBE (Sep. 20,

these materials to establish that conduct in a song, or portrayed in a music video, is criminal activity in which a gang has engaged, and that people connected in some way to that song (e.g., in the background of a rap music video that displays firearms) are also culpable. In addition, prosecutors can claim that certain names, colors, clothing, or locations featured in a song or music video implicate additional suspects. Prosecutors are incentivized to pursue these avenues because if they can convince the court that defendants engaged in illegal actions as part of a gang, then the court can add gang enhancements onto their convictions. Gang enhancements can expand prosecutors' cases and extend the sentences imposed on defendants.⁸¹

Courts do not give similar treatment to the lyrics of "West Side Story" or "Hamilton," which have elements and themes similar to many rap songs; yet performing in a high school production of one of these shows would not be introduced into evidence if one or more of the leading cast members were accused of gang-related or violent crime. The same could be said of Edgar Allen Poe's description of a body beneath the floorboards⁸² or Bob Marley's "I Shot the Sheriff."⁸³ As rapper Ice-T said during the period of controversy over his song, "Cop Killer": "I'm singing in the first person as a character who is fed up with police brutality. I ain't never killed no cop [sic].... If you believe that I'm a cop killer, you believe David Bowie is an astronaut."⁸⁴

VII. THE RACIAL BIAS EFFECT OF RAP ON TRIAL

Prosecutors use rap lyrics to associate defendants with illegal acts, violence, and gangs. Most times, they do this by misinterpreting the lyrics and invoking racial stereotypes about people of color and rap music among judges and jurors. Regardless of whether the racial bias triggered by prosecutors' introduction of rap lyrics is explicit or implicit, studies show that it can have serious consequences for defendants.⁸⁵ Indeed, this is exactly what prosecutors are trained to do: gang prosecution training manuals encourage investigators to prioritize rap lyrics during arrests and when executing on search warrants; they also encourage prosecutors to employ rap lyrics throughout criminal legal proceedings with the goal of "evad[ing] and exploit[ing] the defendant's true personality."⁸⁶

The perception of Black men, and rap music by extension, as dangerous is part of the fabric of racism in the U.S. Such stereotypes have been offered as the rationale for all manner of state-sanctioned violence and discrimination against Black people. Research in the field of racial bias and stereotyping demonstrates

2019), <https://www.youtube.com/watch?v=rqNtBorIUis>; Holmes, *supra* note 17; *see also* NIELSON & DENNIS, *supra* note 1, at 121–130.

⁸¹ *See* NIELSON & DENNIS, *supra* note 1, at 130–39.

⁸² EDGAR ALLEN POE, *THE TELL-TALE HEART* (1843).

⁸³ BOB MARLEY, *I SHOT THE SHERIFF*; *see also* ERIC CLAPTON, *I SHOT THE SHERIFF* (1974).

⁸⁴ NIELSON & DENNIS, *supra* note 1, at 47 (quoting ICE-T & DOUGLAS CENTURY, *ICE: A MEMOIR OF GANGSTER LIFE AND REDEMPTION—FROM SOUTH CENTRAL TO HOLLYWOOD* 142 (2011)).

⁸⁵ *See, e.g.*, Adam Dunbar, Chris E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 *PSYCH., PUB. POL'Y & L.* 280 (2016).

⁸⁶ Alan Jackson, *Prosecuting Gang Cases; What Local Prosecutors Need to Know*, AM. PROSECUTORS RSCH. INST. 15-16 (2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf.

that these perceptions still affect many people, including possibly judges and jurors today.⁸⁷ The accuracy of the information on which stereotypes are based is not always negative, but studies show that the information informing stereotypes about Black men is often inaccurate and can have massive negative consequences for their lives.⁸⁸

In 2002, researchers had participants in their study play a videogame in which they had a suspect as their target. Participants were asked to make a preliminary determination as to whether their target was armed and then to shoot if they answered in the affirmative. When the researchers presented targets who were white and Black, they measured the time it took for participants to decide whether to shoot. Ultimately, the researchers discovered that people shot Black armed targets relatively more quickly and decided against shooting white targets relatively more quickly.⁸⁹ This 2002 study aligns with other research suggesting the heightened likelihood that people associate Black people with weapons and certain kinds of crimes.⁹⁰

Similarly, Black people have been found to receive disparately harsh sentences relative to other groups, especially in cases where the victims were white.⁹¹ Indeed, the more stereotypically Black someone appears, the more likely that person is to receive a death sentence.⁹²

A study by psychologist Stuart Fischhoff, published in 1999, applied these hypotheses to the question of whether rap music could negatively influence a jury.⁹³ Fischhoff divided participants into four groups and presented them with information about a hypothetical Black man. Select groups then received additional information (e.g., the man is a rapper or charged with murder). In particular, the group that received the additional rap-related information also had access to the hypothetical man's lyrics. When asked for their ideas about the Black man's personality (e.g., dangerous; caring), Fischhoff discovered that participants who had seen the rap lyrics were highly prejudiced. Those who knew the hypothetical man to be a rapper attributed negative personality traits to him; and, indeed, the people who had seen the lyrics had an even more negative impression of the man than those who had learned of his murder charge.⁹⁴

⁸⁷ See Dunbar, Kubrin, & Scurich, *supra*, note 85.

⁸⁸ NIELSON & DENNIS, *supra* note 1, at 82.

⁸⁹ Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314 (2002) (discussing a study on the effect of ethnicity on shoot/don't shoot decisions).

⁹⁰ See, e.g., Mahzarin R. Banjali & R. Bhaskar, *Implicit Stereotypes and Memory: The Bounded Rationality of Social Beliefs*, MEMORY, BRAIN, AND BELIEF 139 (Daniel L. Schacter & Ellaine Scarry, eds., 2000).

⁹¹ See GLENN R. SCHMITT ET AL., U.S. SENT'G. COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017).

⁹² Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

⁹³ Stuart Fischhoff, "Gangsta" Rap and a Murder in Bakersfield, 29 J. APPLIED SOC. PSYCH. 795 (1999).

⁹⁴ Similar findings have emerged from studies using folk or country music lyrics where one group was instead told the lyrics were from rap music (See, e.g., Erik Nielson & Andrea L. Dennis, *Rap on*

VIII. EVIDENTIARY RULES AND RAP ON TRIAL

A. Admissibility

Prosecutors wishing to have rap lyrics admitted into evidence must establish that the lyrics are (1) not inadmissible hearsay;⁹⁵ (2) relevant evidence of a confession or crime;⁹⁶ or (3) evidence of other acts as articulated in the Federal Rules of Evidence.⁹⁷ Prosecutors often manage to bypass various evidentiary hurdles and get rap lyrics admitted in court.

1. Hearsay and Statements by a Party-Opponent

Federal Rule of Evidence 802 bars the admission of hearsay in court. When prosecutors use lyrics written after an event as a confession, they are offering out-of-court statements to prove the truth of the matter asserted. Prosecutors applied this strategy in the previously discussed case of Torrance Hatch (“Lil Boosie”).⁹⁸ While the defense might argue that this is hearsay, as defined in Federal Rule of Evidence 801,⁹⁹ and therefore prohibited under Federal Rule of Evidence 802,¹⁰⁰ prosecutors rebut that assertion by claiming that the lyrics are instead admissible as an admission by a party opponent; specifically, prosecutors point to Rule 801(d)(2)(A) to argue that a party’s own past statements, such as rap lyrics, are admissible in court.¹⁰¹ In other words, when lyrics are written

Trial, BOS. REV. (Nov. 8, 2019), <https://bostonreview.net/articles/erik-nielson-andrea-l-dennis-rap-trial/>).

⁹⁵ FED. R. EVID. 802.

⁹⁶ FED. R. EVID. 401.

⁹⁷ FED. R. EVID. 404(b).

⁹⁸ Lauren Savage, *Lil' Boosie's Rap Lyrics Can Be Used in Murder Trial*, BILLBOARD (Apr. 25, 2012), <https://www.billboard.com/music/music-news/lil-boosies-rap-lyrics-can-be-used-in-murder-trial-490631/>.

⁹⁹ Federal Rule of Evidence 801 defines hearsay as consisting of (a) a statement (“a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion”); (b) a declarant (“the person who made the statement”); and (c) hearsay itself (“a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement”). FED. R. EVID. 801.

¹⁰⁰ FED. R. EVID. 802 (“Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”).

¹⁰¹ FED. R. EVID. 801(d)(2) (“An Opposing Party’s Statement: the statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.”). This is one of many exceptions to the hearsay exclusionary rule. A statement by a party-opponent is anything a party has communicated (orally, in writing, etc.) that is being sought to be introduced at trial and used against the party who made the statement. All the party seeking to introduce the opposing party’s out-of-court statement must demonstrate is that (1) the opposing party, at some time, made the statement, and (2) the

by a defendant and offered by the prosecution in court against that defendant, they circumvent the hearsay exclusionary rule because they are not considered hearsay and are admissible as the statement of an opposing party.

2. Relevance

The Federal Rules of Evidence state that only relevant evidence is admissible at trial;¹⁰² however, the standard for establishing relevance is a low bar. Evidence satisfies the relevance requirement, and is likely admissible, if it has: “[a] tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”¹⁰³ Courts generally find rap lyrics relevant and admissible as (1) confessions of a crime;¹⁰⁴ (2) the instrumentality of the crime;¹⁰⁵ or (3) suggestive of knowledge, motive, or intent.¹⁰⁶

statement is relevant to the trial. One justification for this exception is that it holds people accountable for their previous statements and promises; a second justification is that the statement was made by the opposing party, therefore reducing the likelihood of attenuated inferences about statements made by others (who are not the opposing party), which the rule against hearsay seeks to prevent. Given that five categories of statements fall within the Rule 801(d)(2) definition of an opposing party’s statements, a party’s own previous statements (Rule 801(d)(2)(A)) are the most obvious example, especially in the context of rap lyrics on trial.

¹⁰² FED. R. EVID. 401.

¹⁰³ FED. R. EVID. 401(a)–(b).

¹⁰⁴ See, e.g., Greene, 197 S.W.3d at 86–87 (holding that detailed rap lyrics about murdering defendant’s wife, which accurately described the manner of killing, were admissible as defendant’s confession). But see State v. Cheeseboro, 552 S.E.2d 300, 312–13 (S.C. 2001) (holding that rap lyrics about fingerprints and violence were too vague to have been properly admitted as a confession by defendant).

¹⁰⁵ See, e.g., Jones v. State, 64 S.W.3d 728, 730, 736–37 (Ark. 2002) (holding that rap lyrics about a classmate were a “true threat” and therefore unprotected by the First Amendment). But see *Elonis v. United States*, 575 U.S. 723 (2015) (reversing defendant’s conviction of interstate threat communication, via rap lyrics about his ex-wife, on separate grounds). These cases usually involve “true threats,” wherein the lyrics are the actual crime. Rap on Trial experts claim that these kinds of cases have become more common since the enactment of post-9/11 state anti-terrorism statutes designed to resemble, and often exceeding the limits of, the federal PATRIOT Act (see, e.g., Ill. Comp. Stat. Ann. 5/29D-10(1)). For a case in which prosecutors applied anti-terrorism laws to a rap artist, see *People v. Oduwole*, 985 N.E.2d 316, 321, 323 (2013) (reversing for insufficient evidence defendant’s conviction of attempted terroristic threat, which was based on rap lyrics discussing a school shooting).

¹⁰⁶ See, e.g., *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991) (holding that defendant’s rap lyrics, which described working in the drug trade, were admissible to demonstrate the defendant’s knowledge of the trade and intent to participate in it); *United States v. Herron* 762 F. App’x 25, 30 (2d Cir. 2019) (holding that lyrics about violence, drugs, and specific gangs were admissible to demonstrate defendant’s gang membership, as well as knowledge of and participation in alleged illegal activities); *United States v. Price*, 418 F.3d 771, 783 (7th Cir. 2005) (holding that rap lyrics were admissible as evidence of defendant’s knowledge of the drug trade and related “jargon”); *Bryant v. State*, 802 N.E.2d 486, 498–99 (Ind. Ct. App. 2004) (holding that detailed rap lyrics about murder were admissible to establish defendant’s intent to carry out a murder in the manner described); *United States v. Moore*, 639 F.3d 443, 448 (8th Cir. 2011) (holding that rap lyrics about drugs were

a. Confession to a Crime

In some cases, courts admit rap lyrics as relevant evidence to establish that a defendant has confessed to the alleged crime. Confessions play a powerful role at trial, and rap lyrics composed by a defendant that describe a situation similar to the one at issue in their trial can be especially powerful.

As noted in Part II of this article, *Greene v. Commonwealth* serves as a vivid example of a case in which the defendant's rap lyrics were interpreted as a confession. In Mr. Greene's case, his rap lyrics described the exact way in which his wife was actually murdered, and he talked about killing her in the same song. Conversely, in *State v. Cheeseboro*, Mr. Felix Cheeseboro faced charges for armed robbery and three counts of murder. During the time between when Mr. Cheeseboro was charged and his trial, he wrote rap lyrics about not leaving fingerprints, leaving pools of blood, and running from ten murder cases. However, the lyrics were vague and did not mention anything specific to the murders for which Mr. Cheeseboro was charged. While the South Carolina trial court admitted the lyrics, the Supreme Court of South Carolina concluded that Mr. Cheeseboro's lyrics were too vague, and that their probative value was outweighed by their potential for unfair prejudicial effect.¹⁰⁷ The court still affirmed his conviction, given the high standard of review, but the vagueness distinction provided valuable rap-on-trial precedent.

Courts engage in a fact-specific inquiry when considering rap lyrics that might serve as evidence of a confession; still, courts vary in their acknowledgment of the line between lyrics that are specific enough to be admissible and lyrics that are too vague or hyperbolic to be admissible.

b. Threats

Courts have also admitted lyrics when the lyrics themselves could constitute a crime (usually in the form of threats).¹⁰⁸ In *Jones v. State*, a teenager named Blake Jones wrote a series of notes to a girl in his class. The girl never responded, so Mr. Jones wrote a rap in which he talked about his plans to kill her, chop her up, and generally take his anger out on her. Mr. Jones then gave the lyrics directly to the girl, and prosecutors charged him shortly thereafter with making a terroristic threat, which was a felony under Arkansas state law. A juvenile court convicted Mr. Jones; on appeal, the Supreme Court of Arkansas held that Mr.

admissible to establish defendant's fluency in coded language of the drug trade). *But see* *State v. Skinner*, 95 A.3d 236, 238–39, 41 (N.J. 2014) (holding that graphic and violent rap lyrics were improperly admitted as evidence of defendant's motive and intent); *Hannah v. State*, 23 A.3d 192, 196–200 (Md. 2011) (holding that rap lyrics about guns were improperly admitted to establish defendant's knowledge of guns).

¹⁰⁷ *See* *Cheeseboro*, 552 S.E.2d at 313.

¹⁰⁸ *See, e.g., Jones*, 64 S.W.3d at 730, 736 (holding that rap lyrics about a fellow student were a "true threat" and therefore unprotected speech). *But see* *Oduwole*, 985 N.E.2d at 326; *Elonis*, 135 S. Ct. at 2005-07, 2012.

Jones' rap lyrics fell within the "true threats" exception to the First Amendment, rendering the lyrics unprotected speech.¹⁰⁹

The First Amendment question about the extent to which rap lyrics are or should be protected largely exceeds the scope of this paper. Still, it provides important context about cases at the extreme end of the three-pronged admissibility spectrum of rap lyrics on trial that I proposed at the beginning of this article.

c. Other Acts: Knowledge, Motive, and Intent

Courts frequently admit rap lyrics as evidence falling within Federal Rule of Evidence 404(b)(2), which outlines the permitted uses of character evidence demonstrating "Other Crimes, Wrongs, or Acts."¹¹⁰ The Rule describes the permitted uses as follows: "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."¹¹¹ This is often referred to as the anti-propensity-evidence rule. Essentially, evidence about a defendant's character is prohibited when offered to suggest that the defendant acted in conformity with his character when committing an alleged crime; however, courts can admit this kind of evidence where it will be used for a different purpose. Rule 404(b) outlines uses of character evidence that do not violate the propensity ban. Thus, prosecutors can present evidence of the past conduct of a defendant if they are using it to suggest inferences other than those about a defendant's character, even if that is still, unavoidably, a result.

When a party justifies the introduction of evidence with non-character reasoning, the court is left to determine whether the party is simply trying to present unfavorable character evidence by masking it in the terminology of the non-character exception.¹¹² In such a situation, the court's determination might be based on a Rule 403 analysis of whether the probative value of the evidence, if

¹⁰⁹ See Jones, 64 S.W.3d at 730–37. The U.S. Supreme Court almost addressed the question of whether, and when, threatening rap lyrics can be protected speech in *Elonis*, 135 S. Ct. at 2008, but it instead focused on a statutory interpretation issue and left unaddressed whether the violent statements Mr. *Elonis* had made about his wife, colleagues, and others were protected speech. The "true threat" exception to the First Amendment is further explained in *Virginia v. Black*, 538 U.S. 343, 359–60 (defining "true threats" as "encompass[ing] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

¹¹⁰ FED. R. EVID. 404(b).

¹¹¹ FED. R. EVID. 404(b)(2).

¹¹² See, e.g., *United States v. Dimora*, 750 F.3d 619, 630 (6th Cir. 2014) ("Rule 404(b) precludes the use of other-acts evidence to 'prove a person's character,' but it allows such evidence for other purposes, such as proving intent. Before admitting other-acts evidence for such a non-character purpose, however, the district court must decide whether the evidence is probative of that limited purpose. *United States v. Jenkins*, 345 F.3d 928, 937 (6th Cir.2003). *Dimora's* evidence does not hit the target. All it would have shown is that, in situations unrelated to the charges, *Dimora* did favors for people who did not pay him bribes. For the same reason that prior 'bad acts' may not be used to show a predisposition to commit crimes, prior 'good acts' generally may not be used to show a predisposition not to commit crimes."); see also *United States v. Akers*, No. 7:19-CR-7-REW-EBA, 2019 WL 4934948, at *6–7 (E.D. Ky. Oct. 7, 2019).

admitted, “is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹¹³ In rap on trial cases, courts rarely assume this defendant-protective stance; instead, they tend to admit rap lyrics as, among other things, evidence of a defendant’s other acts, knowledge, motive, or intent under Rule 404(b)(2).

This route to admissibility of rap lyrics under Rule 404(b) is also controversial. Opponents of this practice claim that the evidence, when admitted, has the same prejudicial effect as propensity evidence; consequently, they urge judges to exercise greater skepticism when conducting their 403 and 404(b) analyses.¹¹⁴ Notably, the Federal Rules Advisory Committee has explicitly acknowledged the significant risk the Rule is designed to mitigate, if properly implemented: “Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion.”¹¹⁵ Given proven negative bias against rap music, the admission of rap lyrics carries a high risk of prejudice, and lyrics outside of the first, most detailed, category of lyrics likely provide minimal probative value, at best. In short, Rules 403 and 404(b) should exclude most rap lyrics from coming into court.¹¹⁶

Rap on trial cases that have permitted such evidence to establish knowledge demonstrate where the grey area begins. These cases are not like the “confession” cases—rather, they involve imprecise, general lyrics to which prosecutors have pointed in an attempt to establish that the lyrics were representations of the defendants’ experiences and lives. These cases include: *United States v. Foster*,¹¹⁷ *United States v. Moore*,¹¹⁸ and *United States v. Price*.¹¹⁹

In *United States v. Foster*, the court admitted rap lyrics written in a notebook that was found in the defendant’s luggage at the time of his arrest. The lyrics included references to being the “biggest dope dealer” and terminology associated with the sale of drugs. The evidence was admitted during Mr. Foster’s

¹¹³ FED. R. EVID. 403.

¹¹⁴ See Ashley G. Chrysler, *Lyrical Lies: Examining the Use of Violent Rap Lyrics as Character Evidence under FRE 404(b) and 403*, DIGITAL COMMONS MICH. ST. UNIV. C.L., at 1–2, 7 (2015), available at <https://www.law.msu.edu/king/2014-2015/Chrysler.pdf> (citing Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1556–57). See also FED. R. EVID. 404(a)(1) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”); Bryant, 802 N.E.2d at 498.

¹¹⁵ FED. R. EVID. 404(a) Advisory Committee Note on 1972 proposed rule.

¹¹⁶ Some courts have held impermissible the use of rap lyrics to show knowledge, motive, or intent, but such cases appear to be in the minority of rap on trial cases (and the majority of cases does not include the plea negotiations or sentencing hearings in which rap lyrics are used). Notably, both examples in this footnote are cases in which the trial court originally admitted the evidence; it was only on appeal that the admission was deemed impermissible, which means that the defendant had likely already spent time in custody or under electronic supervision. Moreover, given the standard of review, such appellate decisions do not always reverse convictions, even if they find error in the admission of evidence. See, e.g., Skinner, 95 A.3d at 240–42; Hannah, 23 A.3d at 196–97.

¹¹⁷ 939 F.2d 445, 455 (7th Cir. 1991).

¹¹⁸ 639 F.3d 443, 448 (8th Cir. 2011).

¹¹⁹ 418 F.3d 771, 783 (7th Cir. 2005).

trial as “other acts” evidence and used to suggest that Mr. Foster had knowledge of the drug trade and the intent to sell drugs. In *United States v. Moore*, the defendant faced charges for conspiracy to distribute cocaine. In a similar fashion to *Foster*, the court admitted evidence of the defendant’s rap lyrics to establish that he had knowledge of the drug trade. In a third example of this trend, *United States v. Price*, the court interpreted the defendant’s rap lyrics to demonstrate his knowledge of drug trade terminology, and that served as part of the basis for his conviction. In all three cases, the “other acts” exception to the ban on propensity evidence allowed courts to rely on a defendant’s alleged knowledge of aspects of an offense in order to convict him; however, anybody growing up in urban poverty arguably has familiarity with these terms,¹²⁰ simply from walking past conversations, listening to rap music, or even hearing law enforcement officers in their neighborhoods use the same language.

B. A Note About Gang Prosecutions

Gang policing and prosecution is notoriously inaccurate, racially biased, and harmful, especially as applied to young Black and Brown men in low-income communities.¹²¹ The practice among prosecutors of exploiting the “other acts”

¹²⁰ See, e.g., STUART, *supra* note 5 at xi, 2–3 (“[T]hese young men brazenly celebrate crime and violence [in their drill music and videos], but they’re doing it for reasons we don’t often consider. Behind their online bravado is a desperate attempt to build a better future for themselves, to feel loved, to be seen as someone special. In that respect, they’re flocking to social media for some of the same reasons as everyone else. They’re just doing it under drastically different conditions—conditions that should provoke our consternation more than these young people do. Their online behaviors are inseparable from an offline world scarred by immense structural violence. Like all youth, they’re just trying to live their lives within the possibilities and limits of the world we’ve created for them.”) (“In Taylor Park, viable options in both the formal and informal economies are steadily drying up. But in the void, young residents...have developed new, creative, *online* strategies for making ends meet. Specifically, they’ve learned to exploit the unique affordances provide by digital social media to capitalize on a burgeoning market for urban gang violence (or, more accurately, a market for the *representation* of urban gang violence). They’re doing so through the creation and dissemination of what has become known as ‘drill music.’ Drill music...is an emerging genre of hyperviolent, hyperlocal DIY-style gangsta rap that claims to document street life... ‘[D]rillers’ [] compete on a global stage to prove that they’re more ruthless, more delinquent, and more authentic than their competitors. In a perverse system of benefits, the victors receive a range of spoils, including cash, housing...and, for a select few, a ticket out of poverty. The rest, however, can end up behind bars, seriously injured, or dead. Known for little else but their stigma, these young men have found an innovative way to package and sell it all in the hope of escaping their desperate conditions.”).

¹²¹ See generally Litt, *supra* note 10; BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS “GANG” PROSECUTION 14, THE BRONX 120 PROSECUTION (2019), <https://bronx120.report/the-report>; Alice Speri, *The Largest Gang Raid in NYC History Swept Up Dozens of Young People Who Weren’t in Gangs: The Prosecution of the Bronx 120 Raises Serious Questions About Due Process and the Abuse of Federal Conspiracy Charges*, INTERCEPT (Apr. 25, 2019), <https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecution-rico/>; Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991 (2019), <http://cardozolawreview.com/conspiracy-contemporary-gang-policing-and-prosecutions>; JOSMAR TRUJILLO & ALEX S. VITALE, BROOKLYN COLL. POLICING & SOC. JUST. PROJECT, GANG

exception in order to introduce rap lyrics that establish a defendant's familiarity with the drug trade or some other illegal activity is especially problematic in gang cases.¹²² In these cases, such as *United States v. Herron*,¹²³ prosecutors are expected to prove that a defendant has participated in illegal activities that are affiliated in some way with an alleged gang.¹²⁴ In *Herron*, Mr. Herron was charged with multiple offenses under the Racketeer Influenced and Corrupt Organizations Act ("RICO").¹²⁵ In order to prove its case, the prosecution introduced, and the court admitted, some of Mr. Herron's rap videos, alleging that the content established his position as a gang leader.¹²⁶ Within the context of RICO gang prosecutions, which offer significant evidentiary and procedural advantages to prosecutors, the introduction of unreliable and highly subjective rap lyrics is especially concerning.

IX. RESPONSES TO ANTICIPATED CRITICISMS

It could be argued that rap on trial, while often imperfectly applied to young Black and Brown men from flawed gang databases, still enables law enforcement to reduce crime because some young men who might not have done exactly what they rap about or whose rap lyrics do not explicitly depict the crime at issue in a criminal proceeding are nonetheless more easily convicted for lesser offenses. This theory (compounded by erroneous gang databases and high rates of largely unsupervised plea bargaining) undermines the legitimacy of the criminal legal system. It contravenes the foundational values upon which our justice system

TAKEDOWNS IN THE DE BLASIO ERA: THE DANGERS OF 'PRECISION POLICING' 6 (2019), <https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf>; Josmar Trujillo, *Probe NYPD Gang Tactics*, AM N.Y. (Sept. 17, 2018), <https://www.amny.com/opinion/probe-nypd-gang-tactics-1-21008637>; TRUJILLO & VITALE, *supra* note 72; LAILA L. HLASS & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 7 (2018), <https://www.immigrationresearch.org/report/immigrant-legal-resource-center/deportation-any-means-necessary-how-immigration-officials-are>; HOWELL, *supra* note 49; Fareed Nassor Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 138 (2019); Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 202 (2021); Fareed Nassor Hayat, *Two Bites at the Apple: Requiring Double Jeopardy Protection in Gang Cases*, 73 RUTGERS L. REV. 1463, 1487 (2021); Fareed Nassor Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. DISC. 18, 20 n.1 (2021), <https://www.uclalawreview.org/killing-due-process-double-jeopardy-white-supremacy-and-gang-prosecutions/>; Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the 13th Amendment: Reparation for the People*, WASH. & LEE L. REV. (forthcoming), abstract available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3981955.

¹²² See Reyna Araibi, "Every Rhyme I Write": Rap Music as Evidence in Criminal Trials, 62 ARIZ. L. REV. 805, 832 (2020).

¹²³ See generally *Herron*, 762 F. App'x 25.

¹²⁴ See Litt, *supra* note 10, at 112–121.

¹²⁵ *Herron*, 762 F. App'x 25; See 18 U.S.C. §§ 1961–1968. For a summary of the RICO Act, see CONG. RSCH. SERV., RICO: A BRIEF SKETCH 96-950 (2021), <https://fas.org/sgp/crs/misc/96-950.pdf>.

¹²⁶ 762 F. App'x at 27–28.

is constructed, and which law enforcement purports to uphold. Under this theory, rap artists, and even their fans and acquaintances, suffer a presumption of guilt and are only investigated *ex post facto* and without the benefit of a presumption of innocence.

People have been convicted of crimes they did not commit throughout America's history (and this is especially true for men of color).¹²⁷ The severity of the charges faced by many of the defendants in cases where rap lyrics are introduced as evidence would (and likely already does) force those charged to choose between: (1) risking an extreme sentence by going to trial,¹²⁸ or (2) pleading guilty and reducing the likely sentence. Most defendants justifiably choose the second option,¹²⁹ even if they are innocent or at least not guilty of the offense for which they would be tried.¹³⁰ Once someone accepts a plea deal, their case does not go before a judge or a jury—plea bargains thus circumvent critical checks on law enforcement. Therefore, the “success” of this practice would not suggest that courts have found those who are convicted to be guilty—rather, the defendants simply chose between two bad options and negotiated their sentences behind closed doors, with no court involvement or oversight.

Critics might also argue that because the crime rate is allegedly rising in many cities, this is an inopportune time to address the issue of rap on trial. When rising crime is the dominant narrative, the political and funding pendulums tend to swing towards “tough-on-crime” tools and increased policing. Rap on trial is viewed as a “tough-on-crime” method employed by prosecutors to pursue convictions that frequently lack sufficient substantive evidence to support them beyond mere rap lyrics. Invariably, reforms recede when resources and attention shift in the opposite direction.

¹²⁷ See DANIELE SELBY, INNOCENCE PROJECT, 8 FACTS YOU SHOULD KNOW ABOUT RACIAL INJUSTICE IN THE CRIMINAL LEGAL SYSTEM (Feb. 5, 2021), <https://innocenceproject.org/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month/>; SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

¹²⁸ See, e.g., Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC (Dec. 24, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074/>.

¹²⁹ See RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING (Sept. 2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>, at iii (“Only 2 percent of federal criminal cases—and a similar number of state cases—are brought to trial. More than 90 percent of convictions, at both federal and state levels, are the result of guilty pleas. Plea bargaining is so fundamental to the system that even in 1970, Chief Justice Warren Burger of the U.S. Supreme Court estimated that a 10 percent reduction in guilty pleas would require doubling the amount of judicial capacity in the system.”).

¹³⁰ For more about factors that influence Black and Brown people to accept plea deals, as opposed to going to trial (e.g., Black people are more likely to be held in pretrial detention than white people), see generally *id.*; WENDY SAWYER, PRISON POLICY INITIATIVE, HOW RACE IMPACTS WHO IS DETAINED PRETRIAL (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/; SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sep. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.

Pro-police fearmongering often conflates homicide rates with overall crime rates (e.g., sexual assaults, burglaries, fraud, etc.), causing the public to become increasingly misinformed and frightened. Despite police-fueled rhetoric suggesting otherwise, alternative measures have successfully improved public safety.¹³¹ For example, successful non-police measures in New York City and Philadelphia have included improved street lighting; clearing of vacant lots; Medicaid expansion; and greater access to employment opportunities, drug treatment, and mental health care.¹³²

When police always win, low-income communities often lose. The people most intimately acquainted with this disparity tend to be the very community members ignored by law enforcement and political leaders attempting to prove that they are “tough on crime.”

Critics of “tough on crime” methods note that heightened policing puts a strain on low-income communities because low-level offenses still lead to fines, fees, court appearances, and even detention for a period of time.¹³³ Tough, discriminatory bail laws further disrupt the lives and livelihoods of people who are already struggling to make ends meet.¹³⁴ Those strains, in addition to the trauma of any time spent in custody (for the person detained and that person’s loved ones) can make communities less safe because people lose their jobs, lose housing, and need additional money to cover court-related expenses.

X. PROPOSED REFORMS

Several proposals could serve as a foundation from which to address the harm caused, and risks created by, the inappropriate use of rap lyrics and videos in criminal legal proceedings.

At a minimum, defense attorneys should be supported in developing the same level of expertise in these practices as prosecutors who are trained in the benefits of using rap lyrics in trials. They should also use rap experts, such as Professor Erik Nielson, whenever possible. Public defender offices would benefit from identifying a few such experts with whom to partner on a regular basis. Some

¹³¹ Shaila Dewan, ‘Re-Fund the Police’? Why It Might Not Reduce Crime., N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/11/08/us/police-crime.html?searchResultPosition=3>.

¹³² See, e.g., Aaron Chalfin, Benjamin Hansen, Jason Lerner & Lucie Parker, *Reducing Crime Through Environmental Design: Evidence from a Randomized Experiment of Street Lighting in New York City*, J. QUANTITATIVE CRIMINOLOGY (2022), available at <https://link.springer.com/article/10.1007/s10940-020-09490-6>; Claire Sasko, *Philly Study: Cleaning Vacant Land Can Significantly Reduce Crime*, CITY LIFE (Feb. 28, 2018), available at <https://www.phillymag.com/news/2018/02/28/vacant-lots-crime-philly/>. See also Maria Cramer, *What Happened When a Brooklyn Neighborhood Policed Itself for Five Days*, THE N.Y. TIMES (June 4, 2023), available at <https://www.nytimes.com/2023/06/04/nyregion/brooklyn-brownsville-no-police.html>.

¹³³ Chris Mai & Maria Rafael, *The High Price of Using Justice Fines and Fees to Fund Government*, VERA INST. JUST. (Dec. 2020), <https://www.vera.org/publications/the-high-price-of-using-justice-fines-and-fees-to-fund-government>.

¹³⁴ LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 2 (Apr. 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

potential experts, including professors, researchers, and professionals within the music industry, might not yet realize that they can testify in this capacity, so defense attorneys should feel empowered to contact anyone they think might have the right credentials to serve in this capacity. These attorneys will also want to provide training and support for expert witnesses who might not initially feel comfortable being questioned by expert prosecutors.

“Rap shield” statutes:¹³⁵ law enforcement, prosecutors, and judges have not thus far demonstrated collective commitment to scrutinizing the admissibility and appropriateness of rap on trial; to the contrary, they have largely been unwilling to engage with, and learn about, hip hop as a sophisticated musical genre. Judicial deference to law enforcement “experts” who actually lack any expert knowledge of hip hop is harmful, and prosecutors lack incentives to limit their own exploitation of a flawed tool that helps secure convictions. Thus, legislative action might be needed. Although perhaps politically aspirational, legislators should work towards enacting rap shield rules, which would ban, or at least seriously restrict, the use of rap lyrics, rap videos, and related evidence during certain kinds of criminal legal proceedings. Tightening the availability of exceptions to evidentiary rules could help make it more difficult for prosecutors to introduce this evidence in court. The three categories of cases I outline in this paper might also serve as a useful guide when determining the best way to allocate restrictions on this practice.¹³⁶ Support by the judiciary could be determinative in making such aspirations a reality.

Heightened protections for expressive and political speech: Congress should also enact additional rules to ensure that rap lyric and video evidence receives strict First Amendment protection. The U.S. Constitution and Federal

¹³⁵ This term was first introduced in NIELSON & DENNIS, *supra* note 1 at 157. Examples of this include: Cal. Evid. Code § 352.2; New York Senate Bill S7527; and H.R. 8531, 117th Cong. (2022). See also Natalie Neysa, *California Governor Gavin Newsom Signs Bill Limiting Use of Rap Lyrics as Evidence in Court*, USA TODAY (Oct. 3, 2022); Kelly McGlynn, Jacob Schriner-Briggs, and Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutors*, AM BAR. ASSOC. (Jan. 11, 2023), available at https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/; Brittany Kriegstein, *Rap on trial: NY lawmakers move to limit use of lyrics in criminal trials*, GOTHAMIST (June 6, 2023), available at <https://gothamist.com/news/rap-on-trial-ny-lawmakers-move-to-limit-use-of-lyrics-in-criminal-trials>.

¹³⁶ See, e.g., Brad Hoylman, *Senators Brad Hoylman & Jamaal Bailey Introduce “Rap Music on Trial” Legislation to Prevent Song Lyrics From Being Used As Evidence In Criminal Cases*, NEW YORK STATE SENATE (Nov. 17, 2021), <https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/senators-brad-hoylman-jamaal-bailey-introduce-rap-music-trial> (“...Senator Brad Hoylman (D/WFP-Manhattan) and Senator Jamaal Bailey (D-The Bronx) introduced “Rap Music on Trial” legislation (S.7527) to enhance the free speech protections of New Yorkers by banning the use of art created by a defendant as evidence against them in a courtroom. The legislation will protect all artists and content creators, including rappers, from having their lyrics wielded against them by prosecutors.”); Ben Beaumont-Thomas, *Stars Including Jay-Z Call for End to Use of Rap Lyrics as Criminal Evidence*, GUARDIAN (Jan. 19, 2022), <https://www.theguardian.com/music/2022/jan/19/stars-including-jay-z-call-for-end-to-use-of-rap-lyrics-as-criminal-evidence>; S. 7527, 2021-2022 Leg., Reg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/s7527> (last accessed Feb. 27, 2022).

Rules of Evidence rely on the principle that some evidence, even if probative, should be excluded because its probative value is outweighed by the social policy value placed on categories including (1) the privileged relationships that surround certain communications, (2) political commentary, and (3) artistic expression. The current use of rap lyrics in criminal legal proceedings likely has a growing chilling effect on what is fundamentally a form of constitutionally protected speech.

Enhanced judicial oversight: judges play a crucial gatekeeping role when they determine the admissibility of expert testimony and each piece of evidence presented in a case. When assessing the admissibility of expert witnesses, judges could more scrupulously evaluate persons claiming to be “gang experts” or “rap experts.” Federal Rule of Evidence 702 requires judges to ensure that each expert in a trial has the appropriate level of training and expertise to testify; the law enforcement officers serving as rap experts for the government are unlikely to be able to satisfy such a standard. Admittedly, judges take a greater risk of failure to convict someone who is guilty of the crime for which they are being tried when judges decide to exclude an expert witness, but it is irresponsible to simply pass off that screening role to jurors with far less experience in the matter, especially when the stakes are high—which they usually are in these cases. Indeed, judges have the option, under Federal Rule of Evidence 706, to appoint their own experts, and they even have this authority when parties do not use experts. These measures might require additional training for judges, but that would likely improve the quality of our adversarial system, defendant protections, and perhaps even the independence of these government witnesses. Training for judges on this matter, as well as training emphasizing the importance of exercising caution when considering and applying Federal Rules of Evidence 403,¹³⁷ 404(b),¹³⁸ and 901(b)¹³⁹ (or their state equivalents), could include exposure to rap music as a creative and sophisticated form of expression that is grounded in history and culture, developed by dedicated artists who constantly contend with evolving industry and commercial demands.

¹³⁷ FED. R. EVID. 403.

¹³⁸ FED. R. EVID. 404(b).

¹³⁹ FED. R. EVID. 901. As noted *supra* in note 20, FED. R. EVID. 901 concerns the authentication of evidence, and FED. R. EVID. 901(b) provides a non-exhaustive list of examples of evidence that satisfy the authentication requirement. While I did not discuss Rule 901 in detail, it could have relevance for cases involving handwritten lyrics or lyrics that are not, in fact, written by a given defendant. Moreover, Rule 901 could serve as a valuable check in cases like *United States v. Johnson*, 280 F. Supp. 3d 772 (D. Md. 2017) (a case discussed in NIELSON & DENNIS, *supra* note 1 at 133–34, wherein federal prosecutors, during a 2017 retrial of a 2015 trial in which Mr. Johnson had been acquitted, “introduced a photo they took from Johnson’s phone, which they alleged was a recent photo of a key gang member related to the case. Not quite. It was a photo of rapper Notorious B.I.G. standing next to fellow rapper Craig Mack (authorities believed Mack was the key gang member). The photo, widely circulated online, had been taken decades earlier. Johnson had it on his phone because, like just about every aspiring rapper, he admired Notorious B.I.G. (who died in 1997). Anyone with even a passing knowledge of hip hop would recognize a picture of Notorious B.I.G. Johnson was found guilty and sentenced to life in prison without parole. At the sentencing, the judge said Johnson posed ‘perhaps the greatest danger of any defendant the court had ever sentenced,’ a view that was very different from the Baltimore jury that had acquitted him.”).

Jury instructions could also be developed or refined to account for the heightened risk of prejudice when rap lyrics are presented at trial. Improved instructions would reiterate the limited purpose for which the lyrics are being admitted, as well as standards for evaluating the expertise of witnesses proffered as experts.

The practice of rap on trial effectively punishes some (often young) people for pursuing the only legitimate career option they believe will improve their financial situation. Artistic, social, cultural, and developmental values aside, to strip rappers of this occupation without offering meaningful alternatives for upward mobility, safety, creativity, and expression is cruel. Elected officials and ordinary citizens alike should collectively pursue means of providing more resources and opportunities to people growing up in poverty and exposed to violence.

XI. CONCLUSION

The prosecutorial practice of using rap lyrics in criminal proceedings raises constitutional and procedural questions; studies proving racial bias, and bias against rap music in particular, also likely raise equal protection and due process concerns. While some rap lyrics might possess a sufficient nexus of proximity and similarity to be justifiably used at particular trials, most trials involving rap lyrics, and most rap lyrics, do not fall within that category.

Rap music originated as a response to conditions in the underserved and low-income communities in which these artists and many of their fans reside; rappers are engaged in a form of creative storytelling about what is happening to people in their communities—problems many Americans do not encounter in their daily lives. Rap is one mode through which these otherwise potentially invisible problems are made visible, and in its way, it may be essential to building a fairer, more just, and more equal nation. Rap is a form of artistic expression, a form of political and social commentary, and a career aspiration for many young people seeking a legal means of upward financial mobility. To criminalize rap lyrics and permit them to be used as evidence in court is an unfair and potentially unconstitutional injustice that warrants further examination and action.