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Rap Rhyme, Prison Time: How Prosecutors Use Rap Evidence in Gang Cases

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INTRODUCTION

The phrase “rap on trial” signifies a tactic used by prosecutors to introduce a defendant’s rap lyrics and videos as evidence of criminality at trial.¹ Rather than treat rap as a form of artistic expression, prosecutors claim the lyrics are either autobiographical confessions of illegal behavior or evidence of motive or intent with respect to an alleged crime.² Beyond First Amendment concerns, putting rap on trial raises the specter of discrimination in the courtroom, as experimental research finds that individuals hold negative stereotypes about rap music and

* We thank Kyle Adams, Evan Kuluk, Jack Lerner, and Jonathan Markovitz for comments on an earlier draft. Please direct correspondence to: Charis Kubrin, ckubrin@uci.edu.

¹ Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE AND JUST. 185, 185 (2014).

² *Id.* at 186.

rap artists, most of whom are young men of color.³ Notably, this practice occurs almost exclusively for defendant-authored *rap* lyrics and videos, even as other music genres contain references to violence or crime.⁴

In rap on trial cases, prosecutors frequently introduce lyrics and videos as evidence of gang association, membership, or participation to help secure convictions and gang enhancements⁵—a practice we call *gang affiliation through rap misrepresentation*. For the accused, the consequences of this practice can be severe: Gang enhancements can substantially increase the length of sentences, including the imposition of indeterminate life sentences or, in first degree murder cases, life without the possibility of parole and even the death penalty.

In this Article, we call for greater nuance and careful treatment of rap-related evidence in the courtroom, which includes recognizing rap's history, conventions, and practices generally, and acknowledging rap's complicated and complex intersection with gangs specifically. Greater nuance and more careful treatment will enable courtroom members, including judges and jurors, to make better informed evaluations regarding whether rap evidence, despite being prejudicial, is sufficiently probative and if so, what relevance it may have to the case. We preface this argument with a review of punitive policies and practices associated with gangs in the criminal justice system, and with a discussion of how prosecutors use rap evidence in actual gang-related rap on trial cases. We conclude with recommendations. While *gang affiliation through rap misrepresentation* is prevalent throughout the United States, its epicenter is California—our focus in this Article.

³ See, e.g., Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. OF EXPERIMENTAL CRIMINOLOGY 507, 521 (2018); Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280, 289 (2016); Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 803 (1999); Carrie B. Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705, 715 (1999).

⁴ Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 RACE AND JUST. 330, 333 (2018).

⁵ See Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 93–94 (2019).

I. GANGS IN THE CRIMINAL JUSTICE SYSTEM

A central component of the “tough on crime” policy movement of the 1980’s and 1990’s was the targeting of street gangs and their members. Developing from the Racketeer Influenced and Corrupt Organizations (“RICO”) Act of 1970 to combat criminal enterprises, California’s Street Terrorism Enforcement and Prevention (“STEP”) Act of 1988 was the first act to establish a broad set of gang laws and enhancements targeting “criminal street gang[s].”⁶ Other states followed suit with their own legislation. As of 2020, all fifty states, the District of Columbia, and the United States federal government have enacted some form of gang legislation.⁷ Although legal definitions of criminal street gangs vary from state to state, most are similar to the one utilized in California,⁸ which defines a criminal street gang as follows:

[A]n ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.⁹

While definitions like this seem straightforward at first glance, they are problematic in practice given challenges associated with identifying who is (and is not) a gang member, and with defining what constitutes gang activity. Scholars argue that “there is no generally accepted methodology for identifying gangs, gang members, or gang[-]related crime,”¹⁰ resulting in little to no agreement among researchers on the “true” definition of a gang.¹¹ Yet, definitional issues have not thwarted efforts by law enforcement to establish a network of databases to label and track gang activity, including in California.

⁶ Beth Bjerregaard, *Legislative Approaches to Addressing Gangs and Gang-Related Crime*, in THE HANDBOOK OF GANGS 345, 348, 353 (Scott H. Decker & David C. Pyrooz eds., 2015).

⁷ See *Highlights of Gang-Related Legislation*, NAT’L GANG CENTER, <https://nationalgangcenter.ojp.gov/legislation/highlights> [https://perma.cc/679C-95UT] (last visited Feb. 22, 2024).

⁸ Bjerregaard, *supra* note 6, at 356.

⁹ CAL. PENAL CODE § 186.22(f) (West 2024).

¹⁰ Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 106 (2000).

¹¹ See Rebecca D. Petersen, *Definitions of a Gang and Impacts on Public Policy*, 28 J. OF CRIM. JUST. 139, 142 (2000).

Entry into California's CalGANG Database includes ten criteria that require officers to label individuals as "gang members." Among them are: being observed to associate with gang members, writing about gangs, wearing clothing believed to be gang-related, being identified as a gang member by a reliable source, and being photographed with known gang members.¹² For a gang database to be effective, it must be accurate, with clear definitions, a formal documentation process, and strong administrative oversight.¹³ Yet, the process for being entered into a gang database is determined by officer discretion, and often lacks administrative review. In the worst-case scenario, an officer "decides someone is a gang member and writes it on a card[.]"¹⁴ As such, "local and state gang databases have been found to be rife with misinformation, fabricated evidence, and unjustifiable entries on mostly Black and Latino men."¹⁵ While efforts such as the Fair and Accurate Gang Database Act of 2017, which shifts oversight of CalGANG to the California Department of Justice, seek to provide critical oversight, concerns remain.¹⁶ In 2020, the Los Angeles Police Department (LAPD) suspended use of the database following an investigation of "at least 20 officers accused of framing innocent people" and of entering "incorrect data about individuals they questioned into the database to boost statistics."¹⁷ Nebulous definitions coupled with officer discretion underscore the potential for stereotypes and prejudice to impact who is ultimately named in a gang database.

Stereotypes surrounding race, place, gender, and socio-economic status influence who is likely to wind up in a gang database, or whose social group is likely to be labeled as a "gang." Not surprisingly, young men of color living in disadvantaged

¹² See Rebecca Rader Brown, *The Gang's All Here: Evaluating the Need for National Gang Database*, 42 COLUM. J.L. & SOC. PROBS. 293, 307 (2009).

¹³ See *id.* at 318–19.

¹⁴ See ANA MUÑIZ, BORDERLAND CIRCUITRY 41 (2022).

¹⁵ See *id.* at 43; see also 10News Digital Team, *Toddler Gangsters? Audit Finds Flaws in State-Run Gang Database*, ABC 10NEWS SAN DIEGO (Aug. 16, 2016, 6:13 PM), <https://www.10news.com/news/audit-baby-gangsters-show-flaws-in-database> [<https://perma.cc/6AMV-TMLK>].

¹⁶ See Lauren M. Pittman, *Constructing a Compromise: The Current State of Gang Database Legislation and How to Effectuate Nationwide Reform*, 106 IOWA L. REV. 1513, 1523–24 (2020).

¹⁷ See Kristina Bravo, *LAPD Suspends Use of CalGang Database Months After Announcing Probe of Officers Accused of Falsifying Information*, KTLA 5 NEWS (Jun. 20, 2020, 11:42 AM), <https://ktla.com/news/local-news/lapd-suspends-use-of-calgang-database-months-after-announcing-probe-of-officers-accused-of-falsifying-information/> [<https://perma.cc/2QSQ-4JLG>].

urban areas are disproportionately represented, in part because the process involved in identifying gang members emphasizes the cultural styles of Black and Hispanic individuals. Gang “uniforms,” for example, include baggy clothing, baseball caps, and other styles common among young men of color.¹⁸ These stereotypes generate troubling statistics.

In 1992, only four years after the STEP Act was initiated, “Los Angeles police classified 47% of the young African American males in the city as belonging to a gang”¹⁹—a percentage far out of alignment with the population percentage for this group. In 2000, the CalGANG database classified 112,000 individuals as gang members with approximately 66% identified as Hispanic, 33% identified as Black, and only 2% identified as white,²⁰ reflecting significant racial and ethnic disparities and leading to the conclusion that “gang enhancement statutes criminalize entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.”²¹ Research, in contrast, finds that gang membership is a rare occurrence for all races and ethnicities; the National Longitudinal Study of Youth self-report survey finds that only “2.8% of Blacks, 2.9% of Hispanics, and 1.3% of Whites responded that they had belonged to a gang.”²² The high levels of racial and ethnic disparity found in gang databases suggest labels of gang membership act “as a proxy for low-income urban [B]lack and Latinos” and “criminalize not just a select group of alleged gang members but entire racial groups.”²³ Policies and practices that result in lengthy prison terms, including civil gang injunctions and gang enhancements, exacerbate these disparities.

¹⁸ See Linda S. Beres & Thomas D. Griffith, *Gangs, Schools and Stereotypes*, 37 LOY. L.A. L. REV. 935, 949 (2004); see also MUÑIZ, *supra* note 14, at 41–42; Nicholas Espiritu, (E)Racing Youth: The Racialized Construction of California’s Proposition 21 and the Development of Alternate Contestations, 52 CLEV. ST. L. REV. 189, 189–90 (2004).

¹⁹ Beres & Griffith, *supra* note 18, at 951.

²⁰ Anne Marie O’Connor, *Massive Gang Member List Now Clouded by Rampart*, L.A. TIMES (Mar. 25, 2020), <https://www.latimes.com/archives/la-xpm-2000-mar-25-mn-12570-story.html> [https://perma.cc/LR68-FWNP].

²¹ See Assemb. B. 333, 2021 Reg. Sess. (Cal. 2021); see also K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 2–5 (2015).

²² Beres & Griffith, *supra* note 18, at 952.

²³ See ANA MUÑIZ, POLICE, POWER, AND THE PRODUCTION OF RACIAL BOUNDARIES 38 (Rutgers Univ. Press ed., 1984).

A. Injunctions, Prosecutions, and Enhancements

In response to street gangs, California utilizes a “two-pronged attack,” including gang injunctions and criminal gang enhancements.²⁴ City attorneys seek gang injunctions to target specific neighborhoods and gangs within those neighborhoods in an attempt to reduce gang-related criminal activity.²⁵ Injunctions prohibit gang members from engaging in otherwise “legal activities, such as associating together in public, possessing a beeper, or using a cellular phone”²⁶ and even “standing, sitting, walking, driving, gathering or appearing anywhere in public view’ with any other defendant or gang member.”²⁷ In 2013, Los Angeles had forty-six active gang injunctions that targeted seventy-two neighborhoods with measures that restricted the activities of gang members, or more accurately, that restricted the activities of residents labeled as “gang members.”²⁸ Individuals in gang databases are more likely to find themselves listed on injunction lists. Yet given definitional challenges and discretion,²⁹ individuals can have their freedom restricted without notification based on vague, broad assumptions of gang association—potentially violating their constitutional rights.³⁰ Although recent reforms in California limit gang injunctions, permitting them jurisdiction only over specifically-named individuals (versus entire neighborhoods) who have had an opportunity to appeal the decision,³¹ such efforts do little to prevent individuals from being listed in gang *databases*. This makes it easier for defendants to find themselves on gang injunction lists and for gang experts to identify them as gang members in court, where they face more severe penalties if criminally convicted.

²⁴ See Raffy Astvasadoorian, *California’s Two-Prong Attack Against Gang Crime and Violence: The Street Terrorism Enforcement and Prevention Act and Anti-Gang Injunctions Note*, 19 J. JUV. L. 272, 272–73 (1998).

²⁵ *Id.* at 286.

²⁶ *Id.* at 273.

²⁷ *Id.* at 287 (quoting *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 3 (Cal. Super. Ct. filed Mar. 30, 1994)).

²⁸ See Ana Muniz, *Maintaining Racial Boundaries: Criminalization, Neighborhood Context, and the Origins of Gang Injunctions*, 61 SOC. PROBS. 216, 216 (2014).

²⁹ See Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 115 (2005).

³⁰ *Id.*

³¹ See James Queally, *Los Angeles Must Change Use of Gang Injunctions Under Court Settlement*, L.A. TIMES (Dec. 26, 2020, 6:00 AM) <https://www.latimes.com/california/story/2020-12-26/los-angeles-gang-injunctions-must-change> [<https://perma.cc/CX4B-CCTF>].

California doubled down on its tough-on-gang approach by enacting the Gang Violence and Juvenile Crime Prevention (“GVJCP”) Act of 1998. The GVJCP Act made it easier for juveniles engaged in gang activity to be prosecuted in adult court.³² At the national level, the implementation of the federal Gang Abatement and Prevention (“GAP”) Act of 2007 expanded who can be penalized for gang activity, broadened enhancement penalties, and created a national gang database run by the U.S. Department of Justice.³³ Under the GAP Act’s definition of gang activity, a “guilt by association” standard is utilized, which “can have the effect of sweeping entire neighborhoods into a gang database.”³⁴ Once in a database, individuals can face severe consequences, including being more likely to be subjected to excessive police force, loss of employment, and having their database status used to prove motive or enhancements in court.³⁵ In court, prosecutors need not “prove that the person is a member of the criminal street gang” to secure a gang enhancement,³⁶ yet the consequences of a gang-enhanced conviction are severe.

Per the California Penal Code, “a person who is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members” is subject to an additional two to four years in prison beyond the standard sentence.³⁷ If the felony is classified as serious or violent, the term increases by five and ten years, respectively. Gang enhancements for certain felony convictions, including but not

³² See Sarah Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California’s Juvenile System and Reasons to Repeal It*, 30 GOLDEN GATE U.L. REV. 233, 258-60 (2000); see generally Thomas F. Geraghty, *Justice For Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190 (1997).

³³ See Brown, *supra* note 12, at 312–13.

³⁴ *Id.* at 317; see also Gang Abatement and Prevention Act of 2007, S.456, 110th Cong. § 521 (2007) (amending U.S. Code 18 § 521 to define a gang as “a formal or informal group, organization, or association of 5 or more individuals,” making it “unlawful for any person, for the purpose of gaining entrance to or maintaining or increasing position in, or in furtherance of, or in association with, a criminal street gang, or as consideration for anything of pecuniary value to or from a criminal street gang, to knowingly commit or threaten to commit against any individual a crime of violence” and allowing the Attorney General for each state to designate “high intensity gang activity areas” for federal assistance to create “criminal street gang enforcement teams, consisting of Federal, State, tribal, and local law enforcement authorities, for the coordinated investigation, disruption, apprehension, and prosecution of criminal street gangs and offenders in each high intensity gang activity area.”).

³⁵ See Wright, *supra* note 29, at 117–18.

³⁶ CAL. PENAL CODE § 186.22.

³⁷ See *id.*

limited to carjacking or discharge of a firearm, add an indeterminate life sentence to a previously determinant sentence.³⁸ Gang membership is also considered a special circumstance for first degree murder charges, making the defendant eligible for life without parole (“LWOP”) or the death penalty.³⁹

Definitional challenges, stereotyping and bias, and prosecutorial discretion combine to create the perfect storm in gang rap on trial cases, where prosecutors routinely secure convictions and enhancements by introducing a defendant’s rap lyrics or videos as evidence to establish gang association, membership, participation, and motive—with troubling consequences.

II. RAP ON TRIAL, CONVICTIONS, AND ENHANCEMENTS IN GANG CASES

How common are cases where prosecutors allege gang affiliation using rap evidence? One content analysis of 160 state and federal rap on trial cases between 2012 and 2017 finds that in more than one in five cases (22.5%), rap lyrics were utilized to establish gang affiliation for the purpose of sentencing enhancements.⁴⁰ Research in California suggests these findings are conservative. Our analysis of 105 rap on trial cases across the state between 2010 and 2020 finds that in fully seventy-one cases (67.6%), rap was used to help prove gang affiliation.⁴¹ With either estimate, cases alleging gang affiliation comprise a significant portion of all rap on trial cases.

In what ways are prosecutors introducing rap lyrics and videos as evidence in these cases? Prosecutors use rap evidence to: (1) show a defendant is associated with a gang or involved in gang activity; (2) show a defendant is actively involved in gang activity if recent activity is in question; (3) claim the motive for a crime is gang related or committed for the benefit of a gang; and (4) establish the existence of, or provide information about, a specific gang. Below we present examples highlighting the diverse ways that prosecutors incorporate rap evidence to establish gang affiliation as they seek convictions and enhancements in criminal trials.

³⁸ See *id.*

³⁹ See CAL. PENAL CODE § 190.2.

⁴⁰ See Lutes et al., *supra* note 5.

⁴¹ Kyle Winnen, Prosecutor Narratives and Race Constructions in Rap on Trial Cases (May 22, 2023) (M.A. Thesis, University of California Irvine) (on file with author).

In the case of rapper Tiny Doo, whose real name is Brandon Duncan, prosecutors used his rap lyrics to allege he was connected to a series of shootings by the Lincoln Park Bloods in the San Diego area in 2013 to 2014.⁴² Duncan, who had no prior criminal record and no knowledge of—or involvement in—the alleged shootings, was charged with nine felonies and associated gang enhancements.⁴³ Duncan’s only official link to the Lincoln Park Bloods was a 1997 entry in a gang database.⁴⁴ Prosecutors admitted that Duncan did not purchase or fire any of the weapons, and that he was not at the scene of the shootings in question.⁴⁵ Rather, the primary piece of evidence against him was his rap mixtape, *No Safety*, which despite featuring a picture of a loaded revolver on the cover, makes no mention of the shootings.⁴⁶ Duncan found himself facing up to twenty-five years to life in prison because prosecutors argued the shooting gained status for Duncan’s alleged gang, allowing him to sell more albums.⁴⁷ Duncan’s attorney maintained that the “shootings are unsolved and so they do not actually know who did the shootings.”⁴⁸ Rather, they’re choosing to focus their resources on taking Brandon Duncan and his rap music off the streets and prosecuting the person who says the word gun rather than going after the person that actually uses the gun.”⁴⁹ After being incarcerated for seven months, Duncan’s charges were eventually dismissed by a judge.⁵⁰

⁴² See R. Stickney, Steven Luke & Andie Adams, *Judge Dismisses Gang Conspiracy Charges Against Rapper Tiny Doo*, NBC 7 SAN DIEGO (Mar. 16, 2015), <https://www.nbcsandiego.com/news/local/san-diego-tiny-doo-rapper-gang-conspiracy-case/1991951/> [<https://perma.cc/VN2X-2DK9>]; see also Kristina Davis, *Rapper “Tiny Doo” and College Student Arrested Under Controversial Gang Law Get Day in Court Against Police*, SAN DIEGO UNION-TRIBUNE (May 23, 2018), <https://www.sandiegouniontribune.com/news/courts/sd-me-tiny-doo-20180522-story.html> [<https://perma.cc/HL9U-S8D6>]; *Jailed for Rap Lyrics: Is Rapper Tiny Doo a Murderer or a Musician?* (2015), <https://www.youtube.com/watch?v=mHNgoZeQ1Sw>; Peter Holslin, *A Jailhouse Interview with Tiny Doo, the Rapper Facing a Life Sentence for Recording an Album*, VICE (Dec. 1, 2014), <https://www.vice.com/en/article/6959q7/tiny-doo-interview-jail-no-safety-faces-life-in-prison-for-recording-album> [<https://perma.cc/87UK-XJTP>]; *Brandon Duncan w/ Attorney Brian Watkins on CNN* (2015), https://www.youtube.com/watch?v=sp2CNA_88fA [<https://perma.cc/5CJ6-8X9C>].

⁴³ See sources cited *supra* note 42.

⁴⁴ See sources cited *supra* note 42.

⁴⁵ See sources cited *supra* note 42.

⁴⁶ See sources cited *supra* note 42.

⁴⁷ See sources cited *supra* note 42.

⁴⁸ See sources cited *supra* note 42.

⁴⁹ See *Brandon Duncan w/ Attorney Brian Watkins on CNN*, YOUTUBE (2015), https://www.youtube.com/watch?v=sp2CNA_88fA [<https://perma.cc/5CJ6-8X9C>].

⁵⁰ See sources cited *supra* note 42.

In 2012, Laz Tha Boy, whose real name is Deandre Mitchell, was indicted for his alleged role in two gang-related shootings.⁵¹ Despite conflicting eyewitness testimony and no physical evidence connecting him to the shooting, prosecutors introduced Mitchell's rap lyrics not only as evidence of criminal behavior but as evidence of gang association, even as they contained no specific details about the shooting.⁵² In their argument, prosecutors ignored the basic distinction between author and narrator, inviting the grand jury to conflate Deandre Mitchell with his music persona, Laz Tha Boy, and asking jurors to view his raps as literal statements or confessions.⁵³ Mitchell was indicted on all counts, although his case was dismissed after he spent nearly two years in jail.⁵⁴

Laz Tha Boy and Tiny Doo are well-established rappers, yet most artists involved in gang rap on trial cases are less well-known. In the case of *People v. Espinoza*, where the prosecutor used rap lyrics to help prove gang affiliation, Gilbert Espinoza was charged and tried for multiple counts, including three counts of attempted murder.⁵⁵ Each count included gang enhancements.⁵⁶ In his first trial, the jury was unable to reach a unanimous verdict, and a mistrial was declared.⁵⁷ Between his first and second trial, Espinoza's jail cell was searched, and authorities found rap lyrics about the "gangster lifestyle."⁵⁸ Per the appellate decision, the trial court ruled the lyrics were "'fair game' if Espinoza took the stand."⁵⁹ Espinoza claimed that "he is a 'rap artist' who writes about the 'gangster lifestyle'"—not an active gang member.⁶⁰ The prosecutor was allowed to present the lyrics to the jury under the

⁵¹ See Peter Hart, *Treating Rhymes as Crimes: The War on Hip-Hop*, NAT'L COAL. AGAINST CENSORSHIP (Apr. 23, 2015), <https://ncac.org/news/blog/treating-rhymes-as-crimes-the-war-on-hip-hop> [<https://perma.cc/G57G-M94F>]; see also *Killer or Artist? Why Rap is on Trial*, REASON.COM (Nov. 13, 2014), <https://reason.com/video/2014/11/13/killer-or-artist-why-rap-is-on-trial/> [<https://perma.cc/EA5K-4RWG>]; Charis E. Kubrin & Erik Nielson, *A New California Trend—Prosecuting Rap*, L.A. TIMES (2014), <https://www.latimes.com/opinion/la-xpm-2014-apr-07-la-oe-kubrin-and-nielson-rap-prosecution-20140408-story.html> [<https://perma.cc/FLE6-FVZ8>]; *Rap's Poetic License: Revoked*, E. BAY EXPRESS (Apr. 29, 2015), <https://eastbayexpress.com/raps-poetic-license-revoked-2-1/> [<https://perma.cc/H3Y4-HHMR>].

⁵² See sources cited *supra* note 51.

⁵³ See sources cited *supra* note 51.

⁵⁴ See sources cited *supra* note 51.

⁵⁵ See *People v. Espinoza*, No. B210956, 2010 WL 1509797, at *1, *11 (Cal. Ct. App. Apr. 16, 2010).

⁵⁶ See *id.* at *1.

⁵⁷ See *id.*

⁵⁸ *Id.* at *11.

⁵⁹ *Id.*

⁶⁰ *Id.*

ruling that it was “a question for the jury to decide whether or not what [Espinoza’s] doing is make believe [sic].”⁶¹ Espinoza was convicted on all counts in his second trial, with both gun and gang enhancements.⁶² He was sentenced to three concurrent fifty year-to-life sentences, each broken down as “life in state prison with a minimum parole eligibility date of 15 years, based on a true finding on the gang enhancement . . . plus a consecutive 25 years to life for the firearm enhancement . . . plus a consecutive 10 years for the gang enhancement.”⁶³

In some cases, a defendant’s gang associations are not in question, but whether he is still an active gang member—as opposed to a former gang member—is in question. In *People v. Corswell*, prosecutors utilized Paul Corswell’s binder containing roughly fifty pages of rap lyrics “to impeach [the] defendant’s claim that he was no longer involved in any gang-related activity.”⁶⁴ Corswell testified that he was a former gang member, having joined at the age of thirteen, but had since turned his life around, claiming he hadn’t been active in the gang since his release from prison for a robbery.⁶⁵ He further testified that at the time of his arrest he was living with his wife and three sons, was working as a film editor, and was in the process of having his gang-related tattoos removed or modified.⁶⁶ Corswell’s rap lyrics were enough to convince a jury that he was still actively participating in gang activity.⁶⁷ He was sentenced to fifty-five years to life for attempted murder, the sentence determined in large part by gang enhancements.⁶⁸

While gang enhancements incentivize prosecutors to include rap lyrics and videos at trial, rap evidence can be introduced absent enhancements. In *People v. Stone*, for example, prosecutors introduced Malachite Stone’s lyrics to show that he was a member of the Crips, even as no gang enhancements were sought.⁶⁹ The lyrics included the defendant’s rap persona, “Shady,” as well as the words “cuz” and “Crip smashing.”⁷⁰ At trial, the state called a police detective as a gang expert, who testified that the term “cuz”

⁶¹ *Id.*

⁶² *See id.* at *1.

⁶³ *Id.*

⁶⁴ *See People v. Corswell*, No. B244154, 2014 WL 3895644, at *6 (Cal. Ct. App. Aug. 11, 2014).

⁶⁵ *Id.* at *3.

⁶⁶ *See id.*

⁶⁷ *See id.* at *1 n.1.

⁶⁸ *See id.*

⁶⁹ *See People v. Stone*, No. C071315, 2014 WL 470406, at *1, *2 (Cal. Ct. App. Feb. 6, 2014).

⁷⁰ *See id.* at *2.

is “synonymous with being a Crip gang member,” as “the Bloods gang did not use that term.”⁷¹ While the defense countered that the term is a popular “part of hip[-]hop culture,” the court relied on Urban Dictionary—an online crowd-sourced site that defines slang language—to inform the matter.⁷² The court found that “[t]he first definition was: ‘cousin, friend, brotha, homie/homey, and wuddup cuz’” while the second was “a word Crips use for gang banging purposes.”⁷³ Based on this information, the court admitted the rap lyrics as gang evidence.⁷⁴ The appellate court disagreed with the trial court ruling, arguing that “potential prejudice of the gang evidence substantially outweighed its limited probative value. The trial court erred in admitting it.”⁷⁵ However, the appellate court also ruled that the error was harmless, affirming Stone’s conviction and sentence.⁷⁶ Stone was sentenced to forty-four years and eight months for two counts of robbery.⁷⁷

Appellate courts affirming convictions despite finding error with trial courts for the admission of evidence is not uncommon. In *People v. Edwards*, Michael Edwards, a juvenile at the time of his alleged crime, was charged with four counts, including murder, two counts of shooting at an inhabited dwelling, and assault with a firearm—each including a gang enhancement charge.⁷⁸ During trial, the prosecution used rap videos to help establish the existence of the Taliban gang. The gang expert, a police detective, “described the video as showing the Taliban’s territory, activities, gang signs, clothing, tattoos, and logos. Rap lyrics accompanying the video described threats of violence and shootings.”⁷⁹ While the Detective testified at length about the meaning of other Taliban-related rap songs, describing their lifestyle and criminal activities,

[o]n cross-examination, [Detective] admitted that defendant did not appear in the video, the rap songs, or any of the MySpace photos the prosecution presented. [Detective] also testified that, in all of the conversations he had with gang members over the years, none of them had ever mentioned defendant. Defendant had no gang-related tattoos, and [Detective] had never seen defendant throw a gang sign, either in person or in photos. [Detective] could not locate any gang “field identification cards” connected

⁷¹ *Id.*

⁷² *Id.* at *3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at *4.

⁷⁶ *See id.* at *6.

⁷⁷ *See id.* at *1.

⁷⁸ *See People v. Edwards*, 193 Cal.Rptr.3d 696, 712, 722 (Cal. Ct. App. 2011).

⁷⁹ *Id.* at 720.

with defendant. And he had never seen defendant making or standing near gang graffiti. [Detective] was not aware of any moniker connecting defendant to the Taliban, and he had never seen defendant, in person or in photos, wearing camouflage clothing.⁸⁰

Despite this, the jury found Mr. Edwards guilty of second degree murder and one count of shooting at an inhabited dwelling while hanging on the other two counts and “returned no findings on any of the enhancements.”⁸¹ Despite multiple errors in the trial court regarding the gang evidence testimony, the appellate court deemed the errors harmless, suggesting their “analysis would be different if the jury had returned a true finding on any of the gang enhancements.”⁸² This indicates that while the court believed the gang and rap evidence was prejudicial, it was not unduly so. Tried as an adult, Mr. Edwards was sentenced to twenty-two years to life.⁸³

One concerning pattern in the cases presented thus far is the use of a purported gang expert, typically someone in law enforcement, to testify on the meaning and significance of rap lyrics and videos absent qualification to do so. As our discussion in the following section reveals, an understanding of rap requires being educated on the genre’s complex history, conventions, and practices, especially as they relate to the rap-gang intersection. Yet almost uniformly, these “experts” treat rap lyrics as literal accounts of a defendant’s associations, feelings, intentions, or actions. In *People v. Renteria*,⁸⁴ for example, German Renteria was convicted of assault with a firearm and sentenced to sixteen years in prison, with ten of those years resulting from gang enhancements.⁸⁵ During his trial, the gang expert, a police officer, testified that Renteria’s rap lyrics “demonstrated his membership in [the gang], his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the [assault].”⁸⁶ Similarly, in *People v. Blacknell*,⁸⁷ the gang expert, a police officer, interpreted Joseph Blacknell’s lyrics in strictly literal terms, offering testimony that “[h]ead leaking’ refers to ‘an assault on somebody and their head is leaking fluids’” and that

⁸⁰ *Id.* at 721.

⁸¹ *Id.* at 712.

⁸² *Id.* at 747.

⁸³ *See id.* at 712.

⁸⁴ *See* *People v. Renteria*, No. B262367, 2016 WL 4440406, at *1 (Cal. Ct. App. Aug. 23, 2016).

⁸⁵ *Id.*

⁸⁶ *See id.* at *1–2, *6.

⁸⁷ *See* *People v. Blacknell*, No. A135721, 2018 WL 1905452, at *6 (Cal. Ct. App. Apr. 23, 2018).

“smacking shit” means committing an assault.”⁸⁸ As we discuss below, such a narrow interpretation by a non-rap expert can be problematic because non-rap experts often lack critical knowledge about rap music’s artistic conventions and complex and subversive use of language.⁸⁹

Some courts acknowledge the prejudicial effect of rap evidence in criminal trials. In *People v. Charles*, Roshawn Charles was initially convicted of criminal threats and assault, resulting in a sentence of nine years, six of which stemmed from gang enhancements.⁹⁰ At trial, the prosecution presented two rap videos from the Bloods on Point (“B.O.P.”) gang.⁹¹ The rap videos had no relation to the crimes being charged, and Mr. Charles did not appear in the videos or assist in their production.⁹² The appellate court ultimately ruled that the rap videos were unnecessarily cumulative to establishing the existence of the B.O.P. gang while being “unduly prejudicial relative to their probative value.”⁹³ The conviction was reversed—something that occurs in only a very small number of *gang affiliation through rap misrepresentation* cases.⁹⁴

The takeaway from this discussion is simple: rap lyrics and videos are too frequently and often erroneously introduced in criminal cases to prove gang affiliation. The consequences of this practice are potentially severe, including additions of indeterminate life sentences or special circumstances to justify sentences of life without parole and death penalty judgments in first degree murder charges for defendants. More broadly, this practice denies rap the status of art, raises critical First Amendment concerns, and increases the probability that aspiring rappers—most of whom are young men of color—may not receive a fair trial, contributing to racial and ethnic disparities so often documented in the criminal justice system.

How can we minimize these detrimental effects? We argue that what is needed is greater nuance and careful treatment of rap-related evidence in the courtroom, which includes recognizing

⁸⁸ *Id.* at *6, *8.

⁸⁹ See David Greenwald, *Rap Star or Gang Member?*, DAVIS VANGUARD (Oct. 21, 2010), <https://www.davisvanguard.org/2010/10/rap-star-or-gang-member/> [<https://perma.cc/7Q5M-MXP5>].

⁹⁰ See *People v. Charles*, No. B250051, 2015 WL 1951887, at *1, *6 (Cal. Ct. App. Apr. 30, 2015).

⁹¹ See *id.* at *12.

⁹² See *id.* at *4, *12–13.

⁹³ See *id.* at *13–14.

⁹⁴ See *id.* at *15.

rap's history, conventions, and practices more generally, and acknowledging rap's complicated and complex intersection with gangs more specifically. This will enable courtroom members, including judges and jurors, to make better informed evaluations regarding whether or not rap evidence, despite being prejudicial, is sufficiently probative to be included and if so, what relevance it may have to the case. The following section seeks to provide rap's necessary history and context.

III. THE RAP-GANG INTERSECTION: A CALL FOR GREATER NUANCE

A. Origins and History

At the core of our argument is a recognition of rap's history and origins. “[R]ap is part of a tradition of oral recitation that originated in Africa many centuries ago.”⁹⁵ While a music genre in its own right, rap has musical similarities with earlier American genres including blues, country, gospel, soul, rock and roll, and rock.⁹⁶ Like any music genre, rap has subgenres, including “gangsta rap”⁹⁷ and drill, which have been the focus of extensive criticism,⁹⁸ yet are misunderstood on many fronts. This misunderstanding contributes to the problematic treatment of rap evidence in criminal courts. Among the criticisms are that these subgenres are responsible for crime and violence in disadvantaged communities.⁹⁹ Yet rap's origin story, in fact, reveals it began as an alternative to violence that was, and still is, considered by many as a means to escape the dire conditions of disadvantaged communities—rather than exacerbate them.¹⁰⁰

Early on, rap redirected gang activity into positive social action, replacing gun battles with rap battles, the winner being the artist with the “dopest” verse. Rap battles brought violence off the

⁹⁵ Catherine Tabb Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. NEGRO EDUC. 245, 245–46 (1991).

⁹⁶ See Stoia et al., *supra* note 4, at 12.

⁹⁷ This term is increasingly recognized as pejorative and discriminatory, and may erroneously associate the defendant with gangs and criminality, skewing the perspective of judges and jurors. See JACK I. LERNER & CHARIS E. KUBRIN ET AL., *RAP ON TRIAL: A LEGAL GUIDE* 29 (2d ed. 2024).

⁹⁸ See Stoia et al., *supra* note 4, at 3; see also FORREST STUART, *BALLAD OF THE BULLET: GANGS, DRILL MUSIC, AND THE POWER OF ONLINE INFAMY* 2–3 (Princeton Univ. Press 2020).

⁹⁹ See Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 360–61 (2005); see also STUART, *supra* note 98, at 13.

¹⁰⁰ See EMMETT G. PRICE III, *HIP HOP CULTURE* 12–13 (ABC-CLIO, Inc., 2006).

streets, as did break dancing.¹⁰¹ Whereas gangs had long claimed territory through fighting, rap “posses” or “crews”—often comprised of former gang members—sought an alternative to violence. In this way, rap helped erode the violent gang culture that, during the 1980s, consumed places like the Bronx.¹⁰²

Another reality often overlooked by the public is that disadvantaged neighborhoods, which are home to many rappers, offer limited (legitimate) opportunities to gain status and success, making rapping an appealing enterprise. This was especially true in cities throughout the 1980s and 1990s where, for example, “[t]he limited economic opportunity in South Central, Los Angeles, left young, uneducated African American men with three choices: join a gang, sell drugs, or join the music industry.”¹⁰³ Even today, “for many [B]lack and Latino working-class youth who turned to hip-hop music, rapping, DJing, and producing are ways to avoid low-wage labor or, possibly, incarceration.”¹⁰⁴ Rappers routinely recognize this in their lyrics: “In the heart of the city you was born and bred / You grew up smart or you wound up dead / Things move fast, but you knew the scoop / And your savior was a rhyme and a beat and a rap group.”¹⁰⁵ In fact, artists devote entire songs to celebrating the fact that rap, and hip-hop more generally, “saved [their] life,” as does Lupe Fiasco:

One you never heard of, I
 Push it harder, further, the
 Grind might feel like murder, but
 Hip-Hop, you saved me
 One you never heard of, I
 Push it harder, further, the
 Grind might feel like murder, but
 Hip-Hop you saved my life¹⁰⁶

¹⁰¹ See Powell *supra* note 95, at 247.

¹⁰² See *id.* at 246–47.

¹⁰³ See David A. Canton, *The Political, Economic, Social, and Cultural Tensions in Gangsta Rap*, 34 REVS. AM. HIST. 244, 247 (2006).

¹⁰⁴ See Robin D. G. Kelley, *Kickin' Reality, Kickin' Ballistics: "Gangsta Rap" and Postindustrial Los Angeles*, in DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 117, 130 (William Eric Perkins ed., 1996).

¹⁰⁵ See 3RD BASS, *Product of the Environment*, on THE CACTUS ALBUM (Def Jam Recordings 1989).

¹⁰⁶ See LUPE FIASCO (FT. NIKKI JEAN), *Hip-Hop Saved My Life*, on LUPE FIASCO'S THE COOL (Atl. Recording Corp. 2008).

The irony, of course, is that given its roots in communities marred by pervasive crime and violence, rap has long been misconstrued as an extension of urban dysfunction rather than a response to it—an irony not lost on rappers. In an interview with rapper Marco Pave, he stated:

Growing up in a community where several people whom I knew and had been friends with were killed before my first year of high school was over, music was my saving grace. Now, it is my bread and butter. Although hip-hop gets a bad rap (no pun intended) for promoting violence, most times hip-hop artists are only aiming to shine the light on the negative situation that inner-city youth face. Through my art I speak about issues that affect people of color in a global community. The music isn't vulgar, the situations I am describing are vulgar, and I'm advocating to change them.¹⁰⁷

Rappers create music, not only to escape disadvantaged communities, but to navigate the challenges associated with neighborhood gangs, including finding ways to escape gang life. Geoff Harkness, author of *Chicago Hustle and Flow*, finds evidence of this in his ethnography of the symbiotic relationship between “gangsta rap” and street gangs in the city of Chicago, which has one of the largest underground music scenes in the nation.¹⁰⁸ Through six years of fieldwork, including in-depth interviews with 135 rappers, Harkness creates a window into the heart of an underground teeming with artists trying to launch careers in the music industry, hoping to be the next big name out of Chicago.¹⁰⁹ Among his key findings is that for some of his subjects, one “risk management strategy was to extract oneself from the gang lifestyle and use rap as a justification for doing so. This technique enabled rappers to remove themselves from gang-related violence and criminal activity without losing face.”¹¹⁰ And many did want out, for reasons not difficult to grasp. According to Gumbo, a rapper that Harkness interviewed:

It's only so long you can do illegal shit before you get caught up. I don't care how good you think you are. It's a numbers game. The more time that go by, the more dudes know about you, the more haters there are, somebody gonna say something, some shit gonna happen, you gonna get locked up. So real hustlers, real Gs, go legal at some point and get a legal hustle.¹¹¹

¹⁰⁷ Interview with Marco Pave, Rapper (on file with author).

¹⁰⁸ See GEOFF HARKNESS, *CHICAGO HUSTLE AND FLOW: GANGS, GANGSTA RAP, AND SOCIAL CLASS 4*, 179 (Univ. of Minn. Press, 2014).

¹⁰⁹ See *id.* at 16, 19.

¹¹⁰ See *id.* at 185.

¹¹¹ See *id.* at 177.

For many in Harkness's study, that legal hustle was pursuing a career as a rap artist.

Jooyoung Lee, author of *Blowin' Up: Rap Dreams in South Central*, also finds this in his ethnography of aspiring rappers in South Central, Los Angeles.¹¹² From Dr. Dre to Snoop Dogg to Ice Cube, some of rap's biggest stars made their careers in Los Angeles. According to Lee, there is a new generation of young, mostly Black, men creating rhymes and hoping to one day find themselves "blowin' up," or getting signed to a record label and becoming famous. Lee finds many of these aspiring rappers get their start in the legendary hip-hop open-mic workshop, Project Blowed. Researching the project and its participants, Lee is able to see hip-hop in the making.¹¹³ On the rap-gang intersection, similar to Harkness, Lee finds, "[Project Blowed] was where they learned how to rhyme and where they created friendships with other rappers. For many, it was a creative sanctuary away from gangs, a neutral zone where youth from different neighborhoods could get together around their shared love of hip-hop."¹¹⁴ These men worked hard to blow up as recording artists because, "[c]ompared to the unattractive options in front of them—as gang members or in the low-wage labor market—rapping and pursuing their creative talents seemed like a better way to spend their time."¹¹⁵ Lee shares the observations of aspiring rapper Choppa, who explains this in simple terms: "What hip[-]hop did for me was provide me an outlet where I could be the coolest motherfucker and didn't have nothing to do with that bullshit, being in a gang."¹¹⁶ As Lee explains, "Hip[-]hop was a world where Choppa could make a name for himself, a 'creative alternative' to gangs."¹¹⁷ In short, rap allowed aspiring artists in Lee's study to navigate gangs, and the violence associated with them, in their communities. "In this way, [rap] functions like sports and other extracurricular activities, providing young people with an alternative way to construct a 'cool' identity outside of gangs[:]"¹¹⁸

Hip[-]hop was a creative alternative for the men in this book. For some, it represented an alternative masculinity. Rappers could still be cool

¹¹² See JOOYOUNG LEE, *BLOWIN' UP: RAP DREAMS IN SOUTH CENTRAL*, at x (Univ. of Chi. Press, 2016).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 10.

¹¹⁶ *Id.* at 25.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 33.

and respected on the streets even if they weren't in gangs. Others were indirectly shielded from gangs through their participation in hip[-]hop, as family members, friends, and other mentors inspired their creative interests. Still others were directly exempted, getting a pass from gangs to develop their talents and pursue their rap dreams.¹¹⁹

Recent ethnographies, including of drill rappers in Chicago, similarly document aspiring artists' desire to blow up as they capitalize "on a burgeoning market for urban gang violence" and convert negative stereotypes "into a new form of capital that they exchanged for financial success."¹²⁰

B. Artistic Conventions and Practices

While acknowledging rap's origins and history is critical to any analysis of rap evidence in the courtroom, including in situations when such evidence is introduced to establish gang association, membership, participation, and motive, it is also necessary to understand the genre's artistic conventions and practices. Every music genre is defined by certain artistic conventions, including common themes. Rap is no exception. Charis Kubrin's content analysis of over 400 rap songs identifies the following common themes: respect, material wealth, misogyny, nihilism, and violence or the threat of violence.¹²¹ Most relevant to *gang affiliation through rap misrepresentation* cases, Kubrin finds that violent lyrics and imagery are pervasive in rap, documenting that nearly sixty-five percent of the songs sampled reference some aspect of violence, with many graphic in their violent depictions.¹²²

Why does rap favor these themes, especially violence and the threat of violence? What are rappers' motivations as they create music? In rap on trial cases, prosecutors maintain that rappers brag or confess to crimes in their lyrics. In gang rap on trial cases specifically, they claim that rappers use lyrics and videos to intimidate opposing gang members or issue threats. In fact, there are many reasons behind rap's thematic content, and they have little to do with the claims of prosecutors.

For many, rapping empowers men in powerless positions.¹²³ The rapper Murs explains, "When you're a young, black male in

¹¹⁹ *Id.* at 44.

¹²⁰ STUART, *supra* note 98, at 2, 6.

¹²¹ See Kubrin, *supra* note 99, at 360–61; see also Charis E. Kubrin, "I See Death Around the Corner": Nihilism in Rap Music, 48 SOCIO. PERSPS. 433, 434 (2005).

¹²² See sources cited *supra* note 121.

¹²³ See Ronald Weitzer & Charis E. Kubrin, *Misogyny in Rap Music: A Content Analysis of Prevalence and Meanings*, 12 MEN & MASCULINITIES 3, 5–6 (2009).

America, you feel powerless—you feel like you don't have a voice, you're disenfranchised—so when you get the microphone, you wanna just pump yourself up. I think that's where all the bravado comes from, where all the braggadocio comes from.”¹²⁴

Rapping is also a form of therapy or anger management. In NF's song “Therapy Session” he raps:

I am aware, it's aggressive
 I am not here for acceptance
 I don't know what you expected
 But what you expect when you walk in a therapy session, huh?
 . . .
 When I feel something, whether it's anger
 Um, it's a passion about something—or frustration
 Like, this is where I go
 This is—this is—that's the whole ‘NF Real Music’ thing, man
 This is real for me—I need this
 This is a therapy for me.¹²⁵

Rappers also view their artistic expression as a form of street journalism, “an alternative voice to mainstream journalists and social scientists.”¹²⁶ When rapper Ice Cube was with N.W.A., he explained, “We call ourselves underground street reporters. We just tell it how we see it, nothing more, nothing less.”¹²⁷ And “[w]hen hip[-]hop artist 50 Cent was asked about the violent content in his music . . . he responded by saying, ‘hip[-]hop's a reflection of the environment that we grew up in, it's the harsh realities that end up in the music.’”¹²⁸ Importantly, “[l]isteners know that these lyrics do not represent autobiographical accounts of the singers' lives. Rather, they reflect the general circumstances in the lives of their audience.”¹²⁹

Finally, violent lyrics and imagery are pervasive in rap because they help boost record sales.¹³⁰ As rap became excessively

¹²⁴ Stoia et al., *supra* note 4, at 343.

¹²⁵ NF, *Therapy Session*, on THERAPY SESSION (Capitol Christian Music Grp. 2016).

¹²⁶ KELLEY, *supra* note 104, at 121.

¹²⁷ *Id.*

¹²⁸ Desmond Upton Patton, Robert D. Eschmann & Dirk A. Butler, *Internet Banging: New Trends in Social Media, Gang Violence, Masculinity and Hip Hop*, 29 *COMPUTS. HUM. BEHAV.* A54, A58 (2013).

¹²⁹ Stoia et al., *supra* note 4, at 337.

¹³⁰ See BAKARI KITWANA, *THE RAP ON GANGSTA RAP* 23–24 (Third World Press 1994); see also Weitzer & Kubrin, *supra* note 123, at 7.

commercialized, record companies exaggerated violence as a marketing ploy.¹³¹ Nowhere is this more apparent than with “gangsta rap,” which “intentionally used sexually charged language to sell records and to create [a] unique style.”¹³² Nicholas Stoia, Kyle Adams, and Kevin Drakulich explain:

One of the early shifts was from the “righteous” to the “real” or from more politically oriented music to “cynical street tales.” The marketplace, guided by these actions of music industry executives, rewarded not only street tales of involvement in violence and crime but also authenticity . . . in which aspiring rappers represented themselves as authentic gangsters, even in the many cases where such claims were not true.¹³³

For example, Cliff Blodget, a (white) partner in Rap-A-Lot Records, encouraged the Geto Boys of Houston’s Fifth Ward to incorporate violent lyrics when he realized that “the consumer market wanted to hear bloody tales from the hood.”¹³⁴ In response, the Geto Boys referenced popular antiheroes of the period in their lyrics, including Jason Vorhees from the *Friday the 13th* movies and Chucky, the murdering child doll.¹³⁵

This dynamic raises questions about rap’s “authenticity,” a focal point in rap on trial cases, including gang cases. Prosecutors frequently make claims such as, “[w]e know the defendant believes in what the gang’s rules are because he says so in his rap lyrics”¹³⁶ and “that’s what he is. Gangster doing gangster things, doing Real N[***]a Shit. [The rap] [v]ideo tells it all.”¹³⁷ Yet the discussion above underscores why these claims are problematic, as does another rap convention: the use of stage names. Among rappers, it is critical to distinguish between person and persona, or artist and character.¹³⁸ Nearly all rappers utilize stage names that reflect larger-than-life characters, akin to actors like Al Pacino (Scarface) and Arnold

¹³¹ See Kitwana, *supra* note 130, at 24.

¹³² See Canton, *supra* note 103, at 250.

¹³³ See Stoia et al., *supra* note 4, at 342 (quoting DAN CHARNAS, *THE BIG PAYBACK: THE HISTORY OF THE BUSINESS OF HIP-HOP* 408 (New Am. Libr. 2011)).

¹³⁴ See Canton, *supra* note 103, at 250.

¹³⁵ *Id.*

¹³⁶ For a transcript of the prosecutor’s closing argument, see Transcript of Record at 2126, *People v. Espinoza*, No. YA066625 (Cal. Super. Ct. Feb. 15, 2007) (on file with author).

¹³⁷ For a transcript of the prosecutor’s closing argument, see Transcript of Record at 471, *People v. Taylor*, No. RIF1506402 (Cal. Super. Ct. filed Oct. 20, 2015) (on file with author).

¹³⁸ See Kubrin & Nielson, *supra* note 1, at 197.

Schwarzenegger (The Terminator).¹³⁹ The fictional characters portrayed in rap are often a far cry from the true personalities of the artists behind them, which is why it is dangerous to assume that a rapper's persona reflects the artist's true character. Conrad Tillard, "The Hip Hop Minister," captured this sentiment perfectly when he said, "Every [B]lack man who goes into the studio, he's always got two people in his head; him, in terms of who he really is, and the thug that he feels he has to project."¹⁴⁰ Indeed, some rappers fashion themselves as actors; when asked about a correlation between rapping and acting, Will Smith responded:

Oh absolutely. In rap music, you have to defend yourself. You know, rap music is really aggressive You'll get chewed up and spit out if you're not confident and if you're not strong and assertive And there's something in rappers' eyes, there's something that gets created in the eyes from having been able to create that defense through an offensive posture, and to be able to be in that space where you can sit in a room and feel confident and you don't care what nobody says, and you don't care how they come at you¹⁴¹

These points are relevant in gang rap on trial cases, where prosecutors suggest that lyrics and videos are to be taken literally, as autobiographical accounts of thoughts and behaviors. Yet those who understand rap's conventions recognize that "living like a gangsta did not mean that all those who followed the gangsta image were gang members"¹⁴² and "a singer's lyrics are a highly unreliable guide to his or her offstage behavior."¹⁴³ Ice Cube and Dr. Dre of N.W.A., for example,

were not gang members, nor were they ever in jail, but their first-person narratives convinced audiences that they were gang bangers. Similar to actors who portray gangsters in film, the majority of gangsta rappers were not gang members and some attended college: they were getting paid to talk about a life that they were extremely familiar with, but did not live.¹⁴⁴

Indeed, researchers routinely recognize that many of the pioneering Los Angeles gangsta rappers were not gang members,

¹³⁹ To name a few: Eminem or Slim Shady (Marshall Mathers); Jay-Z (Shawn Corey Carter); 50 Cent (Curtis James Jackson); Dr. Dre (Andre Young); Snoop Dogg (Calvin Broadus Jr.); Busta Rhymes (Trevor Smith Jr.); Childish Gambino (Donald Glover); Xzibit (Alvin Nathaniel Joiner). See Sarai Chinwag, *The Real Names of 108 Famous Rappers*, EXTRA CHILL (Dec. 3, 2023), <https://extrachill.com/rappers-real-names> [<https://perma.cc/KG83-3PCR>].

¹⁴⁰ See Stoia et al., *supra* note 4, at 331.

¹⁴¹ See *id.* at 334.

¹⁴² See Canton, *supra* note 103, at 252–53.

¹⁴³ See Stoia et al., *supra* note 4, at 339.

¹⁴⁴ See Canton, *supra* note 103, at 246–47.

or they had only peripheral associations with street gangs.¹⁴⁵ Most of these fledgling rappers, however, grew up in communities where gang activity was common, and they used this proximity to craft cinematic soundscapes steeped in gang minutiae: “the nuanced hand signs, vocabulary, and gestures, the special clothing and color-coding, and the territorial graffiti.”¹⁴⁶ Thus a “formula”¹⁴⁷ was born, whereby the genre’s pioneers appropriated, interpreted, packaged, and sold the hidden world of street gangs through what appeared to be insider knowledge. Indeed, “part of the significance of N.W.A. was that they realized that rebellious street norms could be exploited for economic gain,”¹⁴⁸ a practice that remains true today in the world of cyber banging.

C. Cyber Banging

The terms “cyber banging” and “internet banging” refer to online gang activity wherein gang-associated youth utilize social media and the internet to “broadcast their gang affiliation, brag about a recent fight or murder and communicate threats.”¹⁴⁹ While cyber banging is a concerning trend, scholars question its connection and translation to real-world violence.¹⁵⁰ Caylin Louis Moore and Forrest Stuart identify two competing theoretical frameworks on cyber banging: a parallelism thesis and a coevolution thesis.¹⁵¹ Scholars adhering to the parallelism thesis, which draws “primarily on self-report surveys, content analyses, and non-gang-involved parties to interpret the meanings”¹⁵² of online gang activity, argue that “the same gang violence mechanisms—intergroup conflict, reciprocity, and status-seeking—

¹⁴⁵ See EITHNE QUINN, NUTHIN’ BUT A “G” THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP 52–53 (2005); see generally JEFF CHANG, TOTAL CHAOS: THE ART AND AESTHETICS OF HIP-HOP (Columbia Univ. Press 2006) (undertaking an intensive exploration of hip-hop aesthetics in relation to identity and multiculturalism).

¹⁴⁶ QUINN, *supra* note 145, at 53.

¹⁴⁷ See DAN CHARNAS, THE BIG PAYBACK: THE HISTORY OF THE BUSINESS OF HIP-HOP 221 (New Am. Libr. 2011).

¹⁴⁸ Geoff Harkness, *Gangs and Gangsta Rap in Chicago: A Microscenes Perspective*, 41 POETICS 151, 155 (2013) (quoting Eric K. Watts, *An Exploration of Spectacular Consumption: Gangsta Rap as Cultural Commodity*, 48 COMM’N STUD. 42, 46 (1997)).

¹⁴⁹ Patton et al., *supra* note 128, at A55.

¹⁵⁰ See Caylin Louis Moore & Forrest Stuart, *Gang Research in the Twenty-First Century*, 5 ANN. REV. CRIMINOLOGY 299, 310–11 (2022).

¹⁵¹ *Id.*

¹⁵² *Id.* at 310.

on the urban street . . . unfold online.”¹⁵³ Gang members can utilize the internet to diss, threaten, antagonize, or call out rival gangs, creating new conflicts and reigniting old ones that then result in real-world violence.¹⁵⁴ These scholars tend to view online gang activity as a literal representation of real-life gang activity.¹⁵⁵

Coevolution scholars argue that more nuance is necessary to understand cyber banging, consistent with our position here. Research suggests that “social media do[es] not independently exacerbate offline violence and, in some cases, may even provide gang-associated individuals and surrounding communities with a historically new means for preventing, de-escalating, and avoiding violence.”¹⁵⁶ Specifically, claims that cyber banging is used for recruitment purposes¹⁵⁷ have not been supported in empirical work.¹⁵⁸ Instead, “the bulk of extant research suggests that the Internet is primarily used for self-promotion and general communication.”¹⁵⁹ Self-promotion is often done through drill music, an “emerging genre of hyperviolent, hyperlocal, DIY-style gansta rap that claims to document street life and violent criminality” through social media and other online platforms.¹⁶⁰

Stuart’s ethnography of the Corner Boys in Chicago reveals that popular understandings of drill music and the rappers that perform

¹⁵³ Desmond U. Patton et al., *Gang Violence on the Digital Street: Case Study of a South Side Chicago Gang Member’s Twitter Communication*, 19 NEW MEDIA & SOC’Y 1000, 1012 (2017) (citation omitted).

¹⁵⁴ See JEFFREY LANE, *THE DIGITAL STREET* 122–24 (2019); see also Richard K. Moule Jr., Scott H. Decker & David C. Pyrooz, *Technology and Conflict: Group Processes and Collective Violence in the Internet Era*, 68 CRIME L. & SOC. CHANGE 47, 50–51 (2017); Desmond U. Patton et al., *When Twitter Fingers Turn to Trigger Fingers: A Qualitative Study of Social Media-Related Gang Violence*, 1 INT’L J. BULLYING PREVENTION 205, 215 (2019).

¹⁵⁵ See Patton et al., *supra* note 128, at A58–59.

¹⁵⁶ Moore & Stuart, *supra* note 150, at 310 (citation omitted); see also LANE, *supra* note 154, at 3; Timothy McCuddy & Finn-Aage Esbensen, *The Role of Online Communication Among Gang and Non-Gang Youth*, in *GANGS IN THE ERA OF INTERNET AND SOCIAL MEDIA* 81 (Chris Melde & Frank Weerman eds., 2020); STUART, *supra* note 98, at 194–95; Marta-Marika Urbanik & Kevin D. Haggerty, *‘It’s Dangerous’: The Online World of Drug Dealers, Rappers and the Street Code*, 58 THE BRITISH J. OF CRIMINOLOGY, 1343, 1343–44 (2018).

¹⁵⁷ See FED. BUREAU OF INVESTIGATION, 2011 NATIONAL GANG THREAT ASSESSMENT 11 (2011), <https://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment> [https://perma.cc/64ZF-HGGY].

¹⁵⁸ See David Décary-Héту & Carlo Morselli, *Gang Presence in Social Network Sites*, 5 INT’L J. OF CYBER CRIMINOLOGY 876, 870–80 (2011); see also David C. Pyrooz, Scott H. Decker & Richard K. Moule Jr., *Criminal and Routine Activities in Online Settings: Gangs, Offenders, and the Internet*, 32 JUST. Q. 471, 476, 490 (2015); McCuddy & Esbensen, *supra* note 156.

¹⁵⁹ McCuddy & Esbensen, *supra* note 156, at 84.

¹⁶⁰ STUART, *supra* note 98, at 3.

it are misunderstood.¹⁶¹ Using an analogy from Bourdieu's *The Rules of Art*, Stuart compares drill rappers to nineteenth-century novelists from lower-class backgrounds who, in order to compete with their upper-class counterparts, "peddled exaggerated stereotypes and parodies that aroused the voyeuristic desires of consumers" and "effectively commodified their stigma, converting negative stereotypes . . . into a new form of capital that they exchanged for financial success."¹⁶² When it comes to drill music and online cyber banging, the internet does not necessarily mirror reality.¹⁶³ Drill rappers are often not involved in the violence or gangs that they rap about, despite their violent, gangster personas.¹⁶⁴ These rappers use their music for self-promotion to gain financial opportunities that would otherwise be unachievable.¹⁶⁵

In a world where views and "going viral" generate profit, drill artists have commodified portrayals of violence, gangs, and "the hood."¹⁶⁶ Portrayals of authenticity are required for success, even though most violent displays in drill are hyperbolic or entirely fabricated.¹⁶⁷ Drill rappers portray themselves as the biggest, the baddest, and the most violent by "demonstrating an expertise with guns, displaying unwavering support from fellow gang members, flaunting close connections to well-known homicide victims, and challenging rivals" in order to gain the clout necessary to become successful.¹⁶⁸ But Stuart's nuanced approach digs past the potential capital gains, and exposes a desire for recognition and dignity in a world where young men from the inner city are otherwise left without. His most poignant example comes from a conversation with a study participant, AJ. Stuart asks AJ why he continues to produce drill music even though he isn't actually involved in the violence or gang activity that he portrays in his music:

"Why am I doing this?" he asked, mostly rhetorically. "If I wasn't doing this, would *you* even be down here in the low-incomes? Would *you* even care that I exist?"

AJ's words hit me hard. My stomach tightened as I searched for an answer. I didn't have one. He had a point. There were hundreds of

¹⁶¹ *See id.*

¹⁶² *See* PIERRE BOURDIEU, *THE RULES OF ART: GENESIS AND STRUCTURE OF THE LITERARY FIELD* (1996).

¹⁶³ *See id.* at 6–7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 76.

¹⁶⁸ *Id.* at 6.

people living in his neighborhood, but I had sought him out *precisely* because he was creating violent online content. This was his goal, after all: to be noticed and seen by the world at large—by classmates, neighbors, out-of-town fans, and perhaps even curious professors—as a noteworthy and exceptional individual. Like the rest of the Corner Boys, AJ was looking for a way to stand out from the crowd, to distinguish himself from what Junior often referred to as “ordinary hood [n****s].”¹⁶⁹

The evolution of drill music is not dissimilar from its predecessor, “gangsta rap.” For this reason, assuming a strong nexus between rap, the internet, and offline gang behavior, is problematic. Whether it’s “gangsta rap,” drill, or trap rap, these subgenres blur the lines of reality with rappers claiming to “keep it real” as they promote their carefully crafted personas. Indeed, some artists purposefully sound “off beat” as they rap in an attempt to “keep it real” and be “authentic.” As one of Stuart’s participants responded after being asked about rerecording a beat that sounded a little off: “It’s *supposed* to sound like that. Like some real street shit. . . . This is hood shit. This is what *real* [n****a] music sound like. You ain’t know about this.”¹⁷⁰ Similar to how influencers portray a charmed but distorted picture of their lives, gaining followers and clout through exaggerated displays of wealth and leisure, rappers’ blending of reality and fiction is intentionally, creatively, and tactically done to gain more views or sell more records—commercialization at its highest.¹⁷¹

D. Commercialization

As just noted, rap involves the creation of a character who is aggressive, bold, and supremely confident. “Seizing on the often[-]violent tendencies of such characters, record companies, beginning in the mid[-]to[-]late 1990’s, helped to create and nurture the gangsta persona, a ‘highly mediated’ representation of what they perceived the listening public to want.”¹⁷² Similar dynamics occur with drill and related subgenres.¹⁷³

A core component of “the listening public” was, and still is, white audiences, who comprise a nontrivial percentage of rap’s consumer base.¹⁷⁴ According to Robin D.G. Kelley, for middle-class whites,

¹⁶⁹ *Id.* at 200.

¹⁷⁰ *Id.* at 66.

¹⁷¹ *See id.* at 2.

¹⁷² Stoia et al., *supra* note 4, at 335.

¹⁷³ *See* STUART, *supra* note 98, at 123.

¹⁷⁴ Stoia et al., *supra* note 4, at 335.

“gangsta rap unintentionally plays the same role as the blaxploitation films of the 1970s It attracts listeners for whom the ghetto is a place of adventure, unbridled violence, and erotic fantasy, or an imaginary alternative to suburban boredom.”¹⁷⁵ Raising the question of why “gangsta rap,” rather than socially conscious rap, appeals to suburban white teenagers, Quinn argues that the former advocated “youth rebellion, entrepreneurial mobility narratives, and masculinist identification. Much of gangsta’s appeal stemmed from shared, youthful, masculine pleasures rather than the ‘othering’ of racial difference,” which is less appealing to white listeners.¹⁷⁶ It is not surprising that “[w]hite male suburban teenagers are less likely to buy rap albums that discuss white male privilege, sexism, homophobia, or social inequality.”¹⁷⁷

This formula made gangsta rap incredibly profitable: “the more rappers were packaged as violent black criminals the bigger the white audience became.”¹⁷⁸ Knowing that white teenagers were the biggest consumers of rap, mega corporations limited the topics and issues rappers were allowed to sing about.¹⁷⁹ “Gangsta rap” that propagated condescending and disparaging stereotypes of African Americans and their values had a greater mass market appeal,¹⁸⁰ resulting in songs where African Americans are typically depicted as “a thug or gang member.”¹⁸¹ In this way, “gangsta rap” is often considered “a ploy by record companies to sell records to infatuated teenagers, a modern kind of minstrelsy.”¹⁸²

For their part, rappers embraced this formula for success, asserting that if most whites think the ghetto is all about drugs, violence, and gang warfare, then this is the story they will get. Jeanita Richardson and Kim Scott note that:

Rather than ignoring the social inequities that persisted in their neighborhoods, rappers became the ultimate capitalists (copying the dominant cultures strategies) by creating and owning a music form designed

¹⁷⁵ KELLEY, *supra* note 104, at 122.

¹⁷⁶ QUINN, *supra* note 145, at 85.

¹⁷⁷ Canton, *supra* note 103, at 249.

¹⁷⁸ HENRY A. RHODES, *The Evolution of Rap Music in the United States*, in 4 THE MINORITY ARTIST IN AMERICA (1993), <https://teachersinstitute.yale.edu/curriculum/units/files/93.04.04.pdf> [<https://perma.cc/43LP-VLYV>].

¹⁷⁹ See KITWANA, *supra* note 130, at 11, 69 n.7; see also TRICIA ROSE, THE HIP HOP WARS 155 (2008); Mtume ya Salaam, *The Aesthetics of Rap*, 29 AFR. AM. REV. 303, 312 (1995).

¹⁸⁰ See JEFFREY OGBONNA GREEN OGBAR, HIP-HOP REVOLUTION: THE CULTURE AND POLITICS OF RAP (2007); see also ROSE, *supra* note 179.

¹⁸¹ Jeffrey Lozon & Moshe Bensimon, *A Systematic Review on the Functions of Rap Among Gangs*, 61 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1243, 1249 (2017).

¹⁸² Stoia et al., *supra* note 4, at 334.

to expose inequities and social contradictions. In an economic sense, what rap and hip-hop artists have done, is apply the capitalistic skills and networks valued by society to catapult themselves into media moguls.¹⁸³

E. Linguistic and Communicative Practices

Rap's artistic conventions described above are rooted in the Black oral tradition of signifying and other communicative practices.¹⁸⁴ Signifying is a way of speaking that involves ritual insult (called "playing the dozens") and double entendre.¹⁸⁵ With signifying, words and phrases have meanings beyond their conventional practices, change over time, and should not be taken literally. Rap is also constructed around the exploitation and subversion of several tenets of language.¹⁸⁶ Rappers privilege figurative, not literal, language, and rely on artistic conventions such as simile, metaphor, and hyperbole in their music and imagery. For example, when Wu-Tang Clan raps, "[s]o stop, the life you save may be your motherfuckin' own / I'll hang your ass with this microphone,"¹⁸⁷ it evokes images of violence as a means to convey the evisceration—on the microphone—of rap opponents. As Stoia, Adams, and Drakulich underscore, "[a]lthough the lyrics may *describe* acts of violence, their sole function is to boast about the MC's rapping prowess versus his contemporaries."¹⁸⁸ According to Kelley:

When the imagery of crime and violence is not used metaphorically, exaggerated and invented boasts of criminal acts should be regarded as part of a larger set of signifying practices. . . . [T]hese masculinist narratives are essentially verbal duels over who is the "baddest motherfucker around." They are not meant as literal descriptions of violence and aggression, but connote the playful use of language itself.¹⁸⁹

¹⁸³ Jeanita W. Richardson & Kim A. Scott, *Rap Music and Its Violent Progeny: America's Culture of Violence in Context*, 71 J. NEGRO EDUC. 175, 184 (2002).

¹⁸⁴ See Geneva Smitherman, "The Chain Remain the Same": *Communicative Practices in the Hip Hop Nation*, 28 J. BLACK STUD. 3, 4 (1997).

¹⁸⁵ CAROL D. LEE, *Intervention Research Based on Current Views of Cognition and Learning*, in BLACK EDUC.: TRANSFORMATIVE RSCH. & ACTION AGENDA FOR NEW CENTURY 73, 83 (Joyce E. King ed., 2005); see also CHERYL L. KEYES, RAP MUSIC AND STREET CONSCIOUSNESS 131–39 (2004).

¹⁸⁶ See MARCYLIENA MORGAN, "Nuthin' but a G thang"; *Grammar and Language Ideology in Hip Hop Identity*, in SOCIOCULTURAL AND HIST. CONTEXTS OF AFR. AM. ENG. 187, 190 (Sonja L. Lanehart ed., 2001).

¹⁸⁷ WU-TANG CLAN, *Clan in da Front*, on ENTER THE WU-TANG (36 CHAMBERS) (Loud Records & RCA Records 1993).

¹⁸⁸ Stoia et al., *supra* note 4, at 346.

¹⁸⁹ Kelley, *supra* note 104, at 121.

This is certainly the case when it comes to rap lyrics that reference gangs and gang banging, as stated by Kelley:

Many of the violent lyrics are not intended literally. Rather, they are boasting raps in which the imagery of gang bangin' is used metaphorically to challenge competitors on the mic—an element common to all hard-core hip[-]hop. The mic becomes a Tech-9 or AK-47, imaginary drive-bys occur from the stage, flowing lyrics become hollow-point shells.¹⁹⁰

On the topic of creative language use, rappers like to invent new words as well as invert the meaning of others. Consider the word “sick.” “Sick” typically means ill or not well.¹⁹¹ Yet in rap culture, it has come to mean the exact opposite; if something is “sick” that means it is really great or amazing.¹⁹² Rappers often describe their lyrical talent as “sick” such as when, for example, Jay-Z raps, “For ‘96, the only MC with a flu / Yeah, I rhyme sick, I be what you’re tryin’ to do.”¹⁹³

At the same time, certain words or phrases may have multiple, even contradictory, meanings. That is, the very same word or phrase may mean different things in different songs, or may change meaning over time. Consider the word “ill.” In rap culture, if something is “ill,” it may be cool or awesome, such as when, for example, Jay-Z raps “On my back the flyest clothes, looking ill as shit.”¹⁹⁴ The related term “illin” however, can mean being uncool or unrelaxed, acting crazy or “wack,” or tripping or bugging as evidenced in Run-D.M.C.’s song, “You Be Illin’,” which describes examples of “wack” behavior such as ordering a Big Mac and french fries at a Kentucky Fried Chicken restaurant, calling out “touchdown!” at a basketball game, repelling a woman at a party with bad breath, and being oblivious to the fact a person is eating dog food for dinner.¹⁹⁵ In other words, at least part of the time while “ill” can mean “wack,” it can also mean the opposite of “wack.” The word “ill” even has other meanings, such as to hang out, relax, and have fun, as in the case of the Beastie Boys’ song “Time To Get Ill,” which they describe as “an exhortation to

¹⁹⁰ *Id.* at 121.

¹⁹¹ *Sick*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sick> [<https://perma.cc/Q2XV-2HZH>] (last visited Apr. 15, 2024).

¹⁹² *Id.*

¹⁹³ JAY-Z (FT. THE NOTORIOUS B.I.G.), *Brooklyn’s Finest*, on REASONABLE DOUBT (Roc-A-Fella Records & Priority Records 1996).

¹⁹⁴ JAY-Z (FT. ANGELA “MECCA” SCOTT), *Feelin’ It*, on REASONABLE DOUBT (Roc-A-Fella Records & Priority Records 1996).

¹⁹⁵ RUN-DMC, *You Be Illin’*, on RAISING HELL (Profile Records 1986).

abandon one's inhibitions."¹⁹⁶ In fact, confusion over the various meanings and uses of these very terms made headlines,¹⁹⁷ revealing the challenges associated with interpreting slang words and phrases in rap music culture.

The discussion in this section reveals a complex latticework of rap's motivations, formulas, and dynamics, which are essential for understanding the genre and interpreting its expressions. Problematically, these motivations, formulas, and dynamics are rarely acknowledged in the courtroom. Even worse, prosecutors can misrepresent rap evidence, maintaining the lyrics and videos reflect the "true personality"¹⁹⁸ of the defendant. The practice of *gang affiliation through rap misrepresentation* can bias juries, leading to unfair trials for defendants.

CONCLUSION

Rap evidence is routinely introduced by prosecutors in gang cases throughout the U.S. In many, the lyrics and videos constitute the central, or even sole, evidence used to show that a defendant is associated with a gang or involved in gang activity; show that a defendant is actively involved in gang activity if the recent activity is in question; claim the motive for a crime is gang-related or committed for the benefit of a gang; and, prove the existence of, or depict information about, a specific gang. A lack of understanding by courtroom actors of rap's history, normative conventions, and complexity when it comes to the rap-gang intersection, coupled with negative stereotypes about the genre, lead to incorrect assumptions and false claims about rap music and rappers, making it difficult for defendants in these cases to receive a fair trial.

Perhaps the most problematic claim is that rappers' lyrics and videos are literal statements that indicate participation in, or association with, gangs and the criminal life. Far too often, prosecutors insist that what one hears in rap lyrics or what one sees in rap videos is true, which is why they suggest that "[t]hrough photographs, letters, notes, *and even music lyrics*, prosecutors can

¹⁹⁶ Steven Hyden, *The Beastie Boys' Mike D Finally Gives an Authoritative Definition of "Illin" on Colbert*, THE A.V. CLUB (Jan. 13, 2012), <https://www.avclub.com/the-beastie-boys-mike-d-finally-gives-an-authoritative-1798229268> [<https://perma.cc/N2PX-6E7N>].

¹⁹⁷ See Deb Amlen, *The Puzzle Master 'Throws Down' on ILLIN'*, N.Y. TIMES: WORDPLAY (Jan. 10, 2012, 10:05 PM), <https://archive.nytimes.com/wordplay.blogs.nytimes.com/2012/01/10/the-puzzle-master-throws-down/> [<https://perma.cc/9ELU-UCQM>].

¹⁹⁸ ALAN JACKSON, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 16 (2004), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/prosecuting-gang-cases-what-local-prosecutors-need-know> [<https://perma.cc/C248-PVV3>].

invade and exploit the defendant's true personality."¹⁹⁹ This advice, from the manual "Prosecuting Gang Cases: What Local Prosecutors Need to Know," published by the Bureau of Justice Assistance, is put to practice in courtrooms across the country.

Erroneous claims about rap music, including by courtroom actors, are nothing new. Decades before "rap on trial" became part of the lexicon, scholars recognized this:

Too many critics have taken the easy way out by reading rap lyrics literally rather than researching actual social relations among young people, in all of their diversity and complexity. And there is no reason in the world to believe that any music constitutes a mirror of social relations that can be generalized for entire groups of people.²⁰⁰

Twenty years later, scholars continue to find that "[C]ourts tend to incorrectly assume that no specialized knowledge is required to interpret lyrics and that lyrics should be interpreted *literally* as reflecting accurate, truthful, and self-referential narratives."²⁰¹ This is certainly apparent in gang cases where rap evidence occupies a central role.

Yet, as we explained in the previous section, this claim—and related others—is problematic when one considers rap's long history and complex genre conventions. To sum up our argument:

Understanding that (1) boasts about one's strength coupled with metaphorical threats against one's enemies have been a defining feature of rap lyrics since the genre's inception and (2) depictions of violence in said lyrics are metaphorical both in origins and in practice, helps both to contextualize the lyrics and to understand the misguidedness of criminal proceedings in which they are presented as evidence.²⁰²

The take-away is clear: rap evidence offers low probative value in gang enhancement cases.

At the same time, there is growing evidence that including rap lyrics and videos as evidence in criminal cases is likely to have a high prejudicial impact. Findings from experimental studies reveal rap's bias. In their study of rap music stereotypes, for example, Travis Dixon and Daniel Linz presented respondents with sexually explicit rap lyrics or sexually explicit non-rap lyrics,

¹⁹⁹ *Id.* (emphasis added).

²⁰⁰ Kelley, *supra* note 104, at 142.

²⁰¹ Stoa et al., *supra* note 4, at 331.

²⁰² *Id.* at 352.

both of which were viewed as equally explicit in a pre-test.²⁰³ They found that the sexually explicit music was considered more “patently offensive” and less artistic when it was labeled as “rap” compared to when it was labeled as “non-rap,” revealing that similar lyrics are evaluated differently depending on the music genre with which they are associated.²⁰⁴

In another experimental study, Carrie Fried examined whether stereotypes about rap music affected how violent lyrics were evaluated.²⁰⁵ Participants read a set of violent lyrics from Kingston Trio’s 1960 folk song, “Bad Man’s Blunder,” and were randomly assigned to be told that they came either from a rap or a country song. After reading the lyrics, participants evaluated them along different dimensions, including the offensiveness of the song, the threatening nature of the song, the need for regulation for the song, and whether the song would incite violence. Fried found that participants were more likely to deem the lyrics threatening and offensive when labeled as “rap” compared to when labeled as “country.” She concluded that “[t]he same lyrical passage that is acceptable as a country song is dangerous and offensive when identified as a rap song.”²⁰⁶

Twenty years later, Adam Dunbar, Charis Kubrin, and Nicholas Scurich replicated and extended this study by first testing whether violent lyrics labeled as “rap” are perceived as more threatening, dangerous, and in need of regulation compared to identical lyrics labeled as “country,” and second by testing whether violent rap lyrics are perceived as more literal or autobiographical compared to identical lyrics labeled as country, in line with claims by prosecutors.²⁰⁷ They found that participants labeled the exact same lyrics as more offensive, in greater need of regulation, and more literal/autobiographical when characterized as rap compared to country, consistent with Fried’s 1999 study.²⁰⁸ In a follow-up study, Dunbar and Kubrin shifted the focus from rap lyrics to rap artists in an attempt to answer the question: Are those who write violent lyrics evaluated more negatively when the

²⁰³ See Travis L. Dixon & Daniel G. Linz, *Obscenity Law and Sexually Explicit Rap Music: Understanding the Effects of Sex, Attitudes, and Beliefs*, 25 J. APPLIED COMMUN. RSCH. 217, 226, 229 (1997).

²⁰⁴ *Id.* at 230.

²⁰⁵ See generally Fried, *supra* note 3.

²⁰⁶ *Id.* at 715–16.

²⁰⁷ See Dunbar et al., *supra* note 3, at 281, 283.

²⁰⁸ *Id.* at 1,

music is characterized as rap compared to other music genres?²⁰⁹ Comparing rap to both country and heavy metal, they found that participants who were told a set of violent lyrics were from a rap song were more likely to assume the songwriter is a member of a gang, is involved in criminal activity, and has a criminal record.²¹⁰

In an experiment that examines rap stereotypes in the context of criminal trials, Stuart Fischhoff explored the biasing effects of “gangsta rap” lyrics on individuals’ perceptions of a defendant’s personality.²¹¹ He presented subjects with biographical information about a hypothetical eighteen-year-old African American man (Offord Rollins, an actual defendant in a murder case), but only some were shown violent, sexually explicit rap lyrics that he had written.²¹² Participants were then asked to judge the young man’s personality and character, including whether they believed he was honest, selfish, sexually aggressive, and capable of murder.²¹³ Fischhoff found that the “results were dramatic in their demonstration that participants viewing violent, misogynist rap lyric samples judged the target male far more negatively than when he was not associated with such lyrics.”²¹⁴ Results also showed that the writing of such rap lyrics was more damning in terms of adjudged personality characteristics than was the fact of being charged with murder.²¹⁵ Stated alternatively, exposure to the rap lyrics evoked a negative reaction in participants that was more intense than the reaction to being told that the young man was on trial for murder.²¹⁶

Finally, in another set of experiments, Dunbar examined how rap lyrics are evaluated when presented in a trial context, and determined whether and how individuals change their evaluations of the lyrics to support their verdict.²¹⁷ In the study, participants were tasked with evaluating rap lyric evidence, both independently and in the context of a trial.²¹⁸ They were then tasked with rendering a

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See Fischhoff, *supra* note 3, at 798.

²¹² *Id.* at 798–99.

²¹³ *Id.*

²¹⁴ *Id.* at 800.

²¹⁵ *Id.* at 800–03.

²¹⁶ See *id.* at 803.

²¹⁷ See Adam Dunbar, *Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases*, 10 RACE & JUST. 320 (2020).

²¹⁸ *Id.*

verdict in the case.²¹⁹ Dunbar found that first, participants constructed a narrative to make sense of multiple pieces of evidence and that rap lyrics were viewed as interdependent with other evidence.²²⁰ Second, he found that participants' evaluations of the lyrics shifted based on their verdict; participants who thought the defendant was guilty were more likely to view the lyrics as an "incriminating confession"²²¹ when they were presented in conjunction with other trial evidence compared to when the lyrics were the sole piece of evidence in a police investigation.²²² And third, Dunbar found that "evaluations of rap lyrics shifted more to support guilty verdicts than verdicts of not guilty."²²³

Our conclusion is that rap evidence in gang cases offers low probative value yet is highly prejudicial—a worrisome combination. Moreover, the potentially error-prone and prejudicial identification of gang members, as described at the outset of this Article, create a cumulative detrimental effect. In light of this, we offer recommendations moving forward.

First, rap evidence should be used sparingly in gang cases, if at all. Direct evidence, including physical and forensic evidence, which has higher probative value and lower prejudicial impact, is preferred. This recommendation is consistent with AB 2799, the Decriminalization of Artistic Expression Act, recently signed into California law.²²⁴ Noting "a substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence," AB 2799 requires "a court, in a criminal proceeding where a party seeks to admit as evidence a form of creative expression, to consider specified factors when balancing the probative value of that evidence against the substantial danger of undue prejudice."²²⁵ The Act establishes the presumption that creative expression such as rap (but also music more generally, dance, performance art, visual art, poetry, literature, film, and other forms of expression) is not probative for its literal truth or as truthful narrative unless that expression meets specified conditions.²²⁶

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 333.

²²² *Id.*

²²³ *Id.*

²²⁴ A.B. 2799, 2021-2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

²²⁵ *Id.*

²²⁶ *Id.*

Second, if rap evidence is introduced in gang cases, defense attorneys should be prepared to challenge its introduction in pre-trial motions, making arguments along the lines advanced in this Article.

Third, if judges allow rap evidence despite such challenges, it is critical to include rap music expert witnesses, especially those well-versed in the genre's conventions and complexities. These experts can challenge erroneous claims, including by gang experts insufficiently knowledgeable about rap music, and provide necessary context and nuance in which to evaluate the rap evidence at hand. Of course, gang experts, especially members of law enforcement, should not be testifying as to the interpretation of rap lyrics to begin with. Practical recommendations along these lines are offered in *Rap on Trial: A Legal Guide*.²²⁷

Finally, in the courts—and beyond—we must stop denying rap the status of art, which is effectively what happens when lyrics and videos are treated as autobiographical confessions of illegal behavior, or as “evidence of a defendant’s knowledge, motive, or identity with respect to an alleged crime.”²²⁸ As Mukasa Mubirumusoke reminds us, “within the critical literature no one contends that the events and crimes described in these lyrics *actually* take place or intimates that they should be used in a court of law. Rap, at the end of the day, is a form of art.”²²⁹

²²⁷ See LERNER & KUBRIN, *supra* note 97.

²²⁸ Kubrin & Nielson *supra* note 1, at 186.

²²⁹ Mukasa Mubirumusoke, *Rapping Honestly: NaS, Nietzsche, and the Moral Prejudices of Truth*, 30 J. SPECULATIVE PHIL. 175, 191 (2016).

