Rhyme and Reason: How Intellectual Property Law Can Inform the Use of Rap Lyrics as Evidence in Criminal Trials

*Amanda Wang**

INTRODUCTION

On November 27th, 2023, the most high-profile criminal case involving rap lyrics to date began.[1] In this case, Jeffrey Lamar Williams, colloquially known as rapper Young Thug, was charged with ordering and overseeing crimes including "murder, attempted murder, armed robbery, witness intimidation and drug dealing" in connection with his record label, Young Stoner Life.[2] One critical component of the prosecutor's case-in-chief against Young Thug and his co-conspirators was rap lyrics.[3] Despite overwhelming objections to the use of these rap lyrics by Young Thug's defense

* J.D. Candidate, Columbia Law School, Class of 2025; B.A.H., Stanford University, Class of 2021. Thank you to my Note advisor, Susan Sturm, who has helped guide me through every part of law school. Thank you as well to the *Columbia Journal of Law & the Arts* staffers for the support and feedback given during the publication process.

1. Joe Coscarelli, *Young Thug's YSL RICO Trial: What To Know*, N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/article/young-thug-ysl-rico-trial.html. [http://web.archive.org/web/20241007023901/https://www.nytimes.com/article/young-thug-ysl-rico-trial.html].

2. *Id.*

3. *Id.*

attorneys, other rap artists, and the public writ large, the presiding judge green-lighted the use of at least seventeen sets of rap lyrics.[4]

While Young Thug ultimately pled guilty in this case on October 31, 2024, Young Thug's case represents a larger growing trend in the United States over the past two decades: the use of rap lyrics as evidence in criminal prosecutions, which has the effect of unfairly prejudicing juries against criminal defendants and violating broader principles of both constitutional and evidence law.[5] The introduction of these rap lyrics into evidence proves especially problematic and dangerous for Black and Latino boys and men who already face systemic oppression, bias, and incarceration, and especially for those who lack the same financial resources, platform, and global visibility as Young Thug.[6] Typically, defense counsel object to the introduction of rap lyrics as evidence based on protections within the U.S. Constitution and the Federal Rules of Evidence.[7]

As the use of rap lyrics in criminal prosecutions has increased, so too have the number of proposed solutions and reforms regarding their use. These solutions call for a range of approaches, including the categorical exclusion of rap lyrics as evidence, mandated use of expert witnesses to dissect the rap lyrics in the context of the genre more generally, and limited admission of lyrics that explicitly discuss the specific crime at issue in the defendant's trial. Because this is such a new and evolving area of the law, these solutions often lack a solid doctrinal foundation. The absence of such a doctrinal foundation is detrimental because it creates a barrier to enacting consistent legislation and places more power into the hands of judges, which leads to prejudicial adjudications.

This Note provides a novel doctrinal basis for understanding how courts should treat rap lyrics, based in intellectual property ("IP") law, and proposes two solutions stemming from well-established IP doctrines that put the onus on trial courts, rather than legislatures, to act. The first solution addresses, as a threshold matter, how to determine whether rap lyrics should be admitted at all. Borrowing from trademark

4. Deena Zaru, *Judge Rules Rap Lyrics Can 'Conditionally' Be Used as Evidence in Young Thug Trial*, ABC NEWS (Nov. 9, 2023), https://abcnews.go.com/US/judge-rules-rap-lyrics-conditionally-evidence-young-thug/story?id=104760646 [https://perma.cc/ZHL7-4GKQ] [http://web.archive.org/web/20241007030317/https://abcnews.go.com/US/judge-rules-rap-lyrics-conditionally-evidence-young-thug/story?id=104760646].

5. Kate Brumback, *Rapper Young Thug Pleads Guilty To Gang, Drug and Gun Charges*, AP NEWS (Oct. 31, 2024), https://apnews.com/article/young-thug-trial-guilty-plea-581c38d53dc37f86d5b038f6c23e4b77 [https://web.archive.org/web/20241124203758/https://apnews.com/article/young-thug-trial-guilty-plea-581c38d53dc37f86d5b038f6c23e4b77]; Jaeah Lee, *This Rap Song Helped Sentence a 17-Year-Old To Prison for Life*, N.Y. TIMES (Mar. 30, 2022), https://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html [http://web.archive.org/web/20241007030827/https://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html].

6. Marmstr3, *Arachnophonia: Rap on Trial*, LISTENING IN: NEWS FROM PARSONS MUSIC LIBR. UNIV. RICHMOND (Feb. 18, 2020), https://blog.richmond.edu/parsons/tag/rap-on-trial/ [https://perma.cc/6P2E-BW6K] [https://web.archive.org/web/20241004140044/https://blog.richmond.edu/parsons/tag/rap-on-trial/] ("In roughly 95 percent of cases involving rap lyrics, the defendant is a young, black or Latino man with a local fan base, if any fan base at all. Because of their social status, amateur rappers, in the eyes of police and prosecutors, are not real artists.").

7. This Note will consider and reference only the Federal Rules of Evidence (hereinafter, "FRE").

law's spectrum of distinctiveness, a similar spectrum of distinctiveness based on the proximity of the rap lyrics to the specific crime at issue in the trial is an effective solution. This spectrum of distinctiveness encompasses the evidence rule against unfair prejudice and should be used by judges, who already have the requisite experience employing a similar spectrum of distinctiveness in trademark cases, and who are themselves unqualified to dissect rap lyrics.

Second, for those limited situations where rap lyrics *are* deemed admissible, judges should either: (1) provide a court-appointed expert to testify and contextualize the rap lyrics; or (2) allow the defense to bring forth their own expert witness. This solution is based on a cautionary tale from copyright law: the infringement by reproduction doctrine, famously and confusingly codified in the Second Circuit case of *Arnstein v. Porter*.[8] In laying out a two-step test for copyright infringement analysis, the *Arnstein* court categorically excluded expert testimony during step two.[9] Rather than use expert witnesses to determine whether an infringing work constituted improper appropriation, the *Arnstein* court instead relied solely on the response of the ordinary lay hearer (i.e., the jury).[10] This holding is "universally repudiated" by legal copyright scholars.[11] Thus, especially when transferred to the criminal context—where the stakes are much higher—the aftermath of *Arnstein* emphasizes the importance of always permitting, and perhaps even mandating, the use of expert testimony when rap lyrics are introduced against criminal defendants.

Part I provides an overview of how rap lyrics are used as evidence in criminal trials, including how prosecutors introduce these lyrics and how defense attorneys commonly respond. Part II discusses the need to control the use of rap lyrics in criminal trials and various efforts made by legal scholars and legislatures to achieve this end. Part III proposes two solutions rooted in well-established IP doctrines, both of which focus on creating explicit and concrete guidelines for trial court judges to use. Ultimately, rap lyrics should only be admitted in those limited circumstances where the lyrics are explicitly tied to the crime at issue in the trial; and even in these circumstances, criminal defendants should have guaranteed access to expert witnesses who can dissect the contents of these lyrics to the jury.

I. PART I: BACKGROUND INFORMATION

A. THE USE OF RAP LYRICS AS EVIDENCE IN CRIMINAL TRIALS

Prosecutors tend to introduce rap lyrics as evidence in one of two ways. First, prosecutors use "lyrics written after the crime . . . as confessions to the alleged criminal

8. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).
9. *Id.* at 468.
10. *Id.*
11. Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 791 (2016).

acts"; that is, as substantive evidence.[12] When introduced as substantive evidence, i.e., for the truth of the matter asserted, the lyrics are inadmissible hearsay.[13] However, prosecutors overcome this objection under the hearsay exception of admissions by party opponents.[14] Second, prosecutors use rap lyrics written prior to the crime "to show intent," i.e., to prove mens rea.[15]

While prosecutors open the door for the introduction of rap lyrics, it is ultimately judges who determine their admissibility and, if admitted, how the lyrics are treated during trial.[16] As such, judges have a significant role to play. Unfortunately, the case law demonstrates that judges often get it wrong.[17] Such judicial error only furthers the need for control and regulation of when and how rap lyrics should be used as evidence in criminal trials.

In the last thirty years, rap lyrics have increasingly been introduced as evidence and used to convict criminal defendants.[18] Andrea L. Dennis, a leading scholar in this topic area, has manually identified over 500 such cases.[19] What stands out most about these cases is the relevance of race. In roughly 95% of these cases, "the defendant is a young, black or Latino man."[20] For Black men specifically, the use of rap lyrics as evidence continues centuries-long patterns of oppression and weaponization of black expression and black art.[21] Beyond the oppression of artistic expression, the use and weaponization of rap lyrics against Black and Latino boys and men is also inextricably linked to another rampant form of oppression in America: incarceration. Even though only 13% of Americans are Black, and 19.1% are Latino, each group accounts for 37% and 29.4% of people in prison or jail, respectively.[22] Accordingly, how courts treat rap lyrics as

12. Briana Carter, Comment, *Lyrics for Lockups: Using Rap Lyrics To Prosecute in America*, 69 MERCER L. REV. 917, 926 (2018).

13. *See* FED. R. EVID. 801(c).

14. *See* FED. R. EVID. 801(d)(2)(A).

15. Carter, *supra* note 12, at 926.

16. *See* FED. R. EVID. 104(a).

17. *See, e.g.*, Jordan v. State, 212 So. 3d 836, 855 (Miss. Ct. App. 2015) (in which the trial court did not even view the rap video prior to admitting it into evidence). *See also* Michael Conklin, *The Extremes of Rap on Trial: An Analysis of the Movement To Ban Rap Lyrics as Evidence*, 95 IND. L.J. 50, 60–61 (2020) (discussing how testimony from experts deemed qualified by judges often does "not even rise to the level of average rap consumer").

18. Lee, *supra* note 5.

19. ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS AND GUILT IN AMERICA (2019).

20. Marmstr3, *supra* note 6.

21. NIELSON & DENNIS, *supra* note 19, at 22 ("From slave drumming and songs to Jim Crow-era ballads, in cabarets and jook joints, and during the civil rights and black nationalist eras, black art and artists have always been criminally regulated.").

22. *Race and Ethnicity*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/research/race_and_ethnicity/ [https://perma.cc/DQX9-66XF] [https://web.archive.org/web/20241009020806/https://www.prisonpolicy.org/research/race_and_ethnicity/] (last visited Oct. 10, 2024); *Hispanic Heritage Month: 2023*, U.S. CENSUS BUREAU (Aug. 17, 2023), https://www.census.gov/newsroom/facts-for-features/2023/hispanic-heritage-month.html [https://perma.cc/UB4K-TEUA] [https://web.archive.org/web/20241008023939/https://www.census.gov/newsroom/facts-for-features/2023/hispanic-heritage-month.html]; *Inmate Ethnicity*, FED. BUREAU OF PRISONS (Oct. 25, 2024),

evidence directly implicates the broader systems of oppression and incarceration that exist throughout the United States.

1. Common Objections Raised To the Use of Rap Lyrics

This Section will discuss the three primary objections made by defense attorneys to object to the admission of rap lyrics as evidence: The First Amendment, which protects the right to artistic expression; evidence rules prohibiting the admission of character-for-propensity evidence; and evidence rules that shield criminal defendants from admission of evidence that is unfairly prejudicial. In practice, defense attorneys have found more success with the latter two objections rooted in evidence law.

a. The First Amendment

The First Amendment objection to the introduction of rap lyrics as evidence is seemingly straightforward: The admission of rap lyrics as evidence violates the First Amendment protection of artistic expression.[23] This First Amendment objection was addressed by the Supreme Court in the case of *Elonis v. United States*.[24] There, the Supreme Court held that the true threat exception to First Amendment protections requires proof of a defendant's *intent* to cause actual harm, and language alone cannot constitute such a threat, regardless of how the language makes a victim feel.[25] Despite the success of this argument for the defendant in *Elonis*, he was "not accused of committing an actual crime."[26] This has made subsequent courts reluctant to extend *Elonis*'s holding to criminal contexts where defendants *are* accused of committing an actual crime.[27]

In the context of rap lyrics, courts have been especially "dismissive" of defense attorneys who raise a First Amendment objection.[28] This stems from the fact that "rapper defendants are not considered legitimate artists and rap music does not merit the artistic recognition granted to other forms of art."[29] Thus, efforts to reform the prejudicial use of rap lyrics in criminal prosecutions are more likely to succeed if they are grounded in other, non-constitutional principles.

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https://www3.fed.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp [https://perma.cc/G4MV-U56F].

23. U.S. CONST. amend. I.

24. Elonis v. United States, 575 U.S. 723 (2015).

25. *Id.* at 739–40.

26. Donald F. Tibbs & Shelly Chauncey, *From Slavery To Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U.J.L. & POL'Y 33, 59 (2016).

27. *See, e.g.*, United States v. Wilson, 880 F.3d 80, 86–87 (3d Cir. 2018) (reading *Elonis* as applying "only to the extent necessary to prevent criminalizing otherwise innocent conduct and concluding that" *Elonis* was not applicable because the statute at issue "criminaliz[ed] acts knowingly undertaken to deprive someone of property," and thus provided "sufficient mens rea to avoid the risk of making lawful conduct unlawful.").

28. NIELSON & DENNIS, *supra* note 19, at 113.

29. *Id.* at 114.

b. FRE 404: Impermissible Character Evidence

Objections rooted in evidence law have been relatively more utilized and successful in practice. One such evidence rule is FRE 404, which outlines parameters for the use of character evidence. Under FRE 404(a)(1), "[e]vidence of a person's character . . . is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[30] This ban is rooted in fairness to defendants. As the Supreme Court explained in *Michelson v. United States*, character evidence is unquestionably relevant; however, the risk of it influencing the jury such that jury members "prejudge [a defendant] with a bad general record and deny him a fair opportunity to defend against a particular charge" justifies its exclusion.[31] Otherwise put, the rule is justified in two ways: (1) to prevent "inferential error prejudice"; and (2) to prevent "nullification prejudice."[32] In the context of rap lyrics, defense attorneys argue that rap lyrics are being introduced for impermissible character purposes. The problematic logic goes: Because the defendant wrote violent lyrics, the defendant has a propensity for violence, and therefore, was more likely to have committed the crime at issue in accordance with their violent character.

Unfortunately, the on-its-face logic and strength of the 404(a) argument is undermined by FRE 404(b)(2), which states that character evidence "may be admissible for another purpose."[33] The statute provides an expansive, non-comprehensive list of such purposes, including capacious concepts like "identity" and "intent."[34] The breadth of these *permissible* purposes enables prosecutors to mask their *true* purpose for introducing the lyrics (i.e., convincing the jury of the defendant's propensity to be violent) by having the lyrics put before the jury under the permissible guise of 404(b). Procedurally, prosecutors do so by requesting a limiting instruction from the judge. Limiting instructions enable courts to "routinely assure defendants" that the jury is *only* going to consider the rap lyrics for the permissible purpose, and not the impermissible character evidence purpose.[35] However, limiting instructions have been routinely criticized as ineffective legal fictions that even the Supreme Court has deemed

30. FED. R. EVID. 404(a)(1).

31. Michelson v. United States, 335 U.S. 469, 476 (1948).

32. Ashley G. Chrysler, *Lyrical Lies: Examining the Use of Violent Rap Lyrics as Character Evidence Under FRE 404(b) and 403*, Michigan State University College of Law (2015), https://www.law.msu.edu/king/2014-2015/Chrysler.pdf [https://web.archive.org/web/20230531210700/https://www.law.msu.edu/king/2014-2015/Chrysler.pdf].

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

34. *Id.*

35. Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 11 (2007). *See, e.g.,* United States v. Foster, 939 F.2d 445 (permitting prosecutors to introduce lyrics as evidence of the defendant's knowledge and intent).

untrustworthy.[36] Thus, these assurances are questionable at best, and wholly ineffective at worst.[37]

c. FRE 403: Unfair Prejudice

Even in situations where evidence is relevant, or admissible under a FRE 404(b) non-character-for-propensity evidence rationale, FRE 403 grants judges the discretion to exclude evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice."[38] Probative value is tied to relevance in evidence law; both require a determination of whether the evidence "make[s] the fact in issue more or less likely to happen [or to have occurred], no matter how slight its probability is."[39] However low a bar this is, FRE 403 asks not just whether the evidence *has* probative value, but how *much* it has relative to the risk of unfair prejudice. Given all evidence is prejudicial to some extent, the case law makes clear that FRE 403 is only about the avoidance of "*unfair* prejudice."[40] Like many other facets of evidence law, the opaqueness of a term like unfair only reinforces the notion that judges retain ultimate discretion.

In the context of rap lyrics, FRE 403 grants a judge the discretion to weigh the lyrics' probative value (i.e., how helpful the lyrics are in proving a relevant fact in issue is true or not) against their prejudicial effect (i.e., the lyrics' potential to unfairly bias a jury). Much like other forms of artistic expression and music genres, rappers "often write under fictional personas, reference events in the news . . . and employ lyrical hyperbole."[41] Thus, "[t]he probative value of rap lyrics is highly questionable," and in many cases, very low.[42] Weighing this against the pervasive biases that exist against rap music and the Black and Latino artists often behind the music, rap lyrics are especially likely to lead a jury to "declar[e] guilt on an improper basis rather than on proof specific to the offense charged."[43]

36. *See* Minn. L. Rev. Ed. Bd., *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264 (1966). *See also* Peter J. Smith, *New Legal Fictions*, 95 GEO. WASH. L.J. 1435 (2007); United States v. Stephenson, 550 F. Supp. 3d 1246, 1253 (M.D. Fla. 2021) (explicitly acknowledging that the "likely curative effect of any limiting instruction is minimal at best" with respect to the admission of defendant's rap lyrics).

37. The distinction between permissible and impermissible character evidence is particularly unclear in the context of rap lyrics. *See* Reyna Araibi, Note, *"Every Rhyme I Write": Rap Music as Evidence in Criminal Trials*, 62 ARIZ. L. REV. 805, 832 (2020) ("[T]he normal subject matter of rap music makes it complicated to meaningfully determine if the lyrics demonstrate [purposes like] actual knowledge, motive, or intent, or if they simply talk about guns, drugs, gangs, and violence because of the genre.").

38. FED. R. EVID. 403.

39. *Probative Value*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/probative_value [https://perma.cc/96H2-ZBKD] [https://web.archive.org/web/20240117192008/https://www.law.cornell.edu/wex/probative_value] (last visited Oct. 10, 2024).

40. United States v. Mehanna, 735 F.3d 32, 64 (1st Cir. 2013) (internal citation omitted) (emphasis in original).

41. Kelly McGlynn, Jacob Schriner-Briggs & Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutions*, 38 COMMC'NS LAW. 10, 11 (2023).

42. *Id.*

43. Old Chief v. United States, 519 U.S. 172, 172 (1997).

2. Notable Case Law: Treatment of Rap Lyrics in Practice

In the 1991 case *United States v. Foster*, prosecutors introduced rap lyrics as evidence to help convict a criminal defendant for the first time.[44] Since then, cases which employ rap lyrics as evidence track the objections outlined in Part II.B and illustrate the expanded use of objections by defense attorneys—from the ultimately discretionary FRE 403 objection to more concrete constitutional objections. Despite these efforts, judges remain reluctant to exclude rap lyrics. *State v. Skinner* marked a rare victory for a criminal defendant, which now poses the question: How can we make the outcome of *Skinner* a norm, rather than an exception?

a. United States v. Foster

United States v. Foster marks the first known case where prosecutors introduced and used rap lyrics to convict a criminal defendant, thereby "ignit[ing] a trend across the country in which prosecutors use defendant-authored rap music as evidence at trial."[45] Defendant Derek Foster faced criminal charges for possession with intent to distribute cocaine and phencyclidine.[46] The prosecution sought to introduce a verse written by the defendant, including the lines, "Key for Key" and "I'm the biggest Dope Dealer and I serve all over town," as evidence rebutting Foster's claim of naivete.[47] Defense counsel for Foster objected under FRE 403, arguing that "the prejudice from admitting the verse clearly outweighed its minimal relevance to the issue of knowledge" about the suitcases containing drugs.[48]

The Seventh Circuit held that the district court properly admitted the verse because "it [was] sufficient that the verse made it more probable that Foster had knowledge" based on the verse's indication "that Foster was familiar with drug code words and . . . narcotics trafficking, [which] made it more probable that he knew that he was carrying illegal drugs."[49] While the court explicitly acknowledged that these lyrics were a work of fiction, not autobiography, they held that "in writing about this 'fictional' character, Foster exhibited knowledge of an activity that is far from fictional," and therefore, it was relevant.[50] The court rejected defense counsel's argument of unfair prejudice, merely deferring to the judgment of the district court, which found that the verse was not unfairly prejudicial. Such deference in the context of evidence rules is typical of evidence law and underscores the need to target reform at the trial court level.

44. United States v. Foster, 939 F.2d 445 (7th Cir. 1991).

45. Araibi, *supra* note 37, at 805.

46. *Foster*, 939 F.2d at 449.

47. *Id.*

48. *Id.* at 455; *see also* FED. R. EVID. 403 (providing courts the discretion to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice").

49. *Foster*, 939 F.2d at 455.

50. *Id.* at 456.

b. People v. Olguin

People v. Olguin is heralded as "the seminal [California] case allowing rap lyrics as evidence," which has informed and emboldened prosecutors across the country and acted as convincing precedent for lower courts to admit rap lyrics into evidence.[51] Three weeks following the crime at issue in the case, police found handwritten rap lyrics when searching one of Defendant Olguin's co-defendant's homes.[52] These lyrics included references to certain gang membership and "*could* be interpreted as referring to disk-jockeying, a part-time employment of [co-Defendant]."[53] Unlike defense counsel in *Foster*, who objected solely under the discretionary FRE 403 unfair prejudice rule, Olguin's defense counsel further objected to the admission of the lyrics under more concrete bases: impermissible character evidence and the Sixth Amendment right to confrontation.[54]

Similar to *Foster*, the court held that "[t]he mere fact the lyrics might be interpreted as reflective of a generally violent attitude" did not make them unduly prejudicial under FRE 403.[55] On the more concrete character evidence objection, the court held that the lyrics were not impermissible character evidence because of the proper limiting instruction provided to the jury.[56] Given concerns about the effectiveness of limiting instructions, in practice, this holding permitted the jurors to consider the rap lyrics in their entirety for any reason.[57] Finally, the court rejected the *Bruton* Sixth Amendment confrontation clause argument, holding that the lyrics did "not inculpate Olguin any more than they would inculpate any of a hundred other [gang members]."[58]

c. United States v. Wilson

United States v. Wilson illuminates the progression of the jurisprudence on the admission of rap lyrics as evidence, specifically with respect to the treatment of expert witnesses.[59] One of Defendant Wilson's criminal charges was "causing death through

51. Charis E. Kubrin & Erik Nielson, *Op-Ed: A New California Trend—Prosecuting Rap*, L.A. TIMES (Apr. 7, 2014), https://www.latimes.com/opinion/op-ed/la-oe-kubrin-and-nielson-rap-prosecution-20140408-story.html [https://perma.cc/BH4W-SPH6] [https://web.archive.org/web/20241004135836/https://www.latimes.com/opinion/op-ed/la-oe-kubrin-and-nielson-rap-prosecution-20140408-story.html] (further stating that nowadays, "prosecutors in gang cases nationwide are encouraged to follow California's lead . . . so they can, in the words of former Los Angeles Deputy [District Attorney] Alan Jackson, 'invade and exploit the defendant's true personality.'").

52. People v. Olguin, 31 Cal. App. 4th 1355, 1372 (1994).

53. *Id.* (emphasis added).

54. *Id.* at 1373.

55. *Id.*

56. *Id.* at 1374.

57. Minn. L. Rev. Ed. Bd., *supra* note 36, at 264, 267.

58. *Olguin*, 31 Cal. App. 4th at 1374–75; *see* Bruton v. United States, 391 U.S. 123, 126 (1968) (holding that a non-testifying co-defendant's confession, which incriminates another co-defendant, violates the inculpated co-defendant's confrontation clause right and is therefore inadmissible as evidence, even with a proper limiting instruction).

59. United States v. Wilson, 493 F. Supp. 2d 484, 486 (E.D.N.Y. 2006).

use of a firearm."[60] The prosecution sought to introduce rap lyrics that Wilson had written in the days following the death of the victims, including the line, "Leavea 45 slogs in da back of ya head cause I'm getting dat bread I ain't goin stop to I'm dead."[61] To the prosecution, these rap lyrics "constitute[d] a direct and damning admission of Wilson's guilt."[62] To combat the prosecution's claim, the defense sought to introduce an expert "to testify about the common use of lyrics suggesting/depicting violence as a defining feature of gangsta rap."[63]

The court held that while such "expert testimony about hip hop culture" has been helpful to the jury in copyright and trademark cases, that is not the case in criminal cases.[64] In the court's words:

> If Wilson wishes to argue that the lyrics are impressionistic and therefore carry little weight, he may do so. It is the jury's job to determine whether to believe such an argument, however, and it would be counterproductive to permit an expert to function as a "'thirteenth juror'" in resolving this issue. [65]

The significance of this holding is two-fold. First, it effectively closes the door on expert witnesses brought forth by criminal defendants with respect to rap lyrics, thereby leaving the lyrics' interpretation up to jury's own lay opinions, or experts brought forth by the prosecution. Second, it highlights the implicit biases of judges evident when they themselves consider rap lyrics. Judge Garaufis's above quote assumes that the rap lyrics are not "impressionistic," and are instead, realistic and autobiographical.[66] This creates a presumption disfavoring the defendant in any given case and undermines the artistic characteristics of rap as a music genre altogether.

d. State v. Skinner

State v. Skinner exemplifies a rare, modern win for criminal defendants.[67] The court established a new, heightened standard for the admission of rap lyrics as evidence against criminal defendants and ultimately held that the rap lyrics were inadmissible.[68] Defendant Skinner was charged with "attempted murder and related charges."[69] To convict Skinner, the prosecution had a testifying police officer read thirteen pages of rap lyrics found in Skinner's car.[70] Despite the prosecution's concessions that the "verses

60. *Id.* at 485.
61. *Id.* at 489.
62. *Id.* at 490.
63. *Id.* at 486.
64. *Id.* at 489–90.
65. *Id.* at 490.
66. *Id.*
67. State v. Skinner, 95 A.3d 236, 238 (N.J. 2014).
68. *Id.* at 238–39.
69. *Id.* at 238.
70. *Id.* at 241 (including lyrics like "You pricks goin' to listen to Threat tonight. 'Cause feel when I pump this P–89 into your head like lice. Slugs will pass ya' D, like Montana and Rice, that's five hammers, 16 shots to damage your life, leave you f* * * * *s all bloody.").

were in any way revealing of some specific factual connection that strongly tied defendant to the underlying incident," and that many of the lyrics had been written far before the events in question, they argued that the lyrics revealed the defendant's "motive and intent."[71]

The New Jersey Supreme Court excluded the lyrics, acknowledging that "[n]ot all members of society recognize the artistic or expressive value in graphic writing about violence and a culture of hate and revenge," and thus, the potential for unfair prejudice outweighed any probative value.[72] Taking its holding one step farther, the court established a new rule: "Fictional forms of inflammatory self-expression," including rap lyrics that depict "bad acts, wrongful acts, or crimes," are inadmissible unless there is "a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense."[73] Further, even in situations where such a nexus exists, courts must take into account the availability of other evidence that could "make the same point."[74] While the ultimate rule is still one of discretion for trial courts—determining what constitutes a strong nexus—it is the most notable of its kind in limiting the admission of rap lyrics as evidence against criminal defendants.

Altogether, these cases are instructive in a few respects. First, judges are provided an extraordinary amount of discretion about the admission or exclusion of rap lyrics as evidence. Second, this designation is one worthy of skepticism, given many judges' own biases and lack of understanding of rap music as a genre. Third, prosecutors are eager to introduce rap lyrics as an alternative means for the jury to declare a defendant's guilt, whether or not the rap lyrics are actually relevant to the crime at issue in any given case.

II. PART II: THE NEED TO CONTROL THE USE OF RAP LYRICS IN CRIMINAL TRIALS

A. UNEQUAL TREATMENT AND THE IMPACT OF PROSECUTING RAP

1. The Disproportionate Impact and Consequences of Prosecuting Rap on Black and Latino Boys and Men

The introduction of rap lyrics as evidence against criminal defendants disproportionately impacts Black and Latino boys and men.[75] Further, once a judge deems rap lyrics admissible, the lyrics are put into the discretion and consideration of the jury, whose own biases and flaws can lead to damning convictions.

71. *Id.* at 238.
72. *Id.* at 249.
73. *Id.* at 238–39.
74. *Id.* at 239.
75. *See* Marmstr3, *supra* note 6; *see also* Taifha Natalee Alexander, *Chopped & Screwed: Hip Hop from Cultural Expression To a Means of Criminal Enforcement*, 12 HARV. J. SPORTS & ENT. L. 211, 214 (2021) (describing the relationship between prosecution against rappers and mass incarceration).

One general study about how jurors perceive Black defendants found that "all-white juries are more likely to convict black defendants than white ones, and . . . that prosecutors attempt to exclude younger people from the jury pool."[76] Given the demographic of rappers—predominantly "young, urban, and black"—it is no coincidence that these defendants face disproportionate consequences from the introduction of rap lyrics as evidence.[77] These disproportionate consequences find support in studies specific to rap lyrics, which have found that there is a "substantial jury bias against rapper-defendants" and that "extant negative stigmas surrounding rap music are exacerbated when rap lyrics are admitted into trial."[78]

Much like the origins of rap as a genre, these statistics are deeply connected to mass incarceration in America and its disproportionate impact on Black men. It is a reality of our carceral system that police officers, prosecutors, and jurors are biased against, and often explicitly target, defendants of color.[79] Thus, when a prosecutor seeks to introduce rap lyrics, they do so against defendants who already have the odds stacked against them. The stakes get even higher when considering that rap lyrics are used by prosecutors across the entire spectrum of criminal charges, including ones where the ultimate consequence is capital punishment.[80] Leading scholars have identified at least thirty cases where prosecutors sought to introduce rap lyrics to aid them in securing a death sentence.[81] This is to say that in many cases, a judge's decision to admit or deny rap lyrics can be a matter of life or death.

2. Rap Is Uniquely Targeted Relative To Other Genres of Music

Rap is only one of many music genres that are widely produced and consumed in the United States. Yet, it is uniquely targeted and sought to be introduced by prosecutors as evidence against criminal defendants as compared to other genres of music. In fact, researchers have only been able to document a singular case "involving defendant-authored music lyrics admitted into evidence that did not appear to be rap music."[82]

The canonical genre of comparison is country; for instance, Johnny Cash's *Folsom Prison Blues* where he sings, "I shot a man in Reno just to watch him die."[83] Of course,

76. Lewis Beale, *Can Rap Lyrics Send You To Jail? If You're a Young Black Male, Yes.*, DAILY BEAST (Apr. 6, 2015), https://www.thedailybeast.com/can-rap-lyrics-send-you-to-jail-if-youre-a-young-black-male-yes/ [https://web.archive.org/web/20241005151326/https://www.thedailybeast.com/can-rap-lyrics-send-you-to-jail-if-youre-a-young-black-male-yes]. *See also* Jacinto Gau, *The Impact of Selection Procedures on Diversity in Juries*, CRIME & JUST. RSCH. ALL. (Sept. 21, 2015) (finding that "more than 60% of juries consisted of a majority or all White jurors").

77. Beale, *supra* note 76.

78. Vidhaath Sripathi, *Bars Behind Bars: Rap Lyrics, Character Evidence, and* State v. Skinner, 24 IOWA J. GENDER, RACE & JUST. 207, 220 (2021).

79. *See* Alexander, *supra* note 75, at 226–27.

80. *See, e.g.*, People v. Melendez, 2 Cal. 5th 1, 384 P.3d 1202 (2016); United States v. Wilson, 493 F. Supp. 2d 484 (E.D.N.Y. 2006); Neblett v. Commonwealth, 2014 WL 3714372 (Ky. Ct. App. July 25, 2014).

81. *See* NIELSON & DENNIS, *supra* note 19, at 70.

82. Dennis, *supra* note 35, at 2 n.6.

83. JOHNNY CASH, *Folsom Prison Blues*, *on* I WALK THE LINE (Sun Records 1968).

"[n]o one accused the country legend of murder based on that song."[84] And even if Johnny Cash had been on trial for murder, numerous studies indicate that neither the prosecution nor jury would have sought to use these lyrics against him. A 1999 study had "participants read a violent lyrical passage," after which they were told "that it was either a rap song or a country song."[85] Participants' differences in reactions were statistically significant depending on whether the lyrics were identified as rap or country.[86] Participants perceived lyrics identified as rap much more negatively than those identified as country, despite the identical content.[87] This differential was particularly stark for age groups 40–52, and 53 and over.[88] Similar results appeared in a 2017 study, where participants "deemed identical lyrics more literal, offensive, and in greater need of regulation when they were characterized as rap compared to country."[89] These findings reinforce the notion that there exist societal stereotypes against rap music as a genre that inevitably influence jury decision making. Thus, reforms to how rap lyrics are used as evidence must explicitly consider, and address, this notion.

B. RECENT ACTIVISM

Just as the usage of rap lyrics as evidence in criminal trials has increased over the last few decades, so too has activism condemning this prosecutorial practice.

Social activism has culminated in widespread media attention and public outrage. However, this social activism has primarily focused its attention on famous rappers, who—based on the perceptions of prosecutors and judges—historically lack the need for such protection. Thus, these calls for reform have fallen short by leaving out of the spotlight those whose lives are most commonly at risk: unfamous, amateur rappers.

Another, more concrete form of activism that has begun in the past two years is legislative reform. Both proposed and passed bills have explicitly called out the prejudicial usage and treatment of rap lyrics by prosecutors and judges. However, these legislative efforts also fall short and fail to create the grand scale of change required to address the inequities caused by admitting rap lyrics into evidence. These reforms find themselves incomplete because they lack a solid doctrinal and precedential basis. Given this is a such a new area of the law, legislatures are stuck proposing rough guidelines that sound good in theory. Unfortunately, then, in practice, these bills maintain the same destructive structure that helped create these inequities in the first place: vesting too much discretion with judges.

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84. Martha Neil, *Do Rapper's Lyrics Support Conviction? ACLU Cites Johnny Cash Song, Says Lower Court Was Wrong*, ABA J. (Mar. 27, 2014), https://www.abajournal.com/news/article/rap_music [https://perma.cc/F66N-ALJJ] [https://web.archive.org/web/20241127004221/https://www.abajournal.com/news/article/rap_music].

85. Carrie B. Fried, *Who's Afraid of Rap: Differential Reaction To Music Lyrics*, 4 J. APPLIED SOC. PSYCH. 705, 705 (1999).

86. *Id.*

87. *Id.* at 708.

88. *Id.* at 713.

89. Adam Dunbar, Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making (2017) (Ph.D. dissertation, University of California, Irvine) (eScholarship).

1. Famous vs. Non-Famous Rappers

When famous Atlanta rapper Young Thug was first charged for conspiracy, in part because of rap lyrics that he had written and released, the rap music industry's greatest leaders rallied around him.[90] The outrage culminated in an open letter published by Warner Music Group with signatures of some of the world's most influential rappers, record labels, and streaming services.[91]

While these famous rappers' calls for action have enabled this issue to gain widespread visibility, the reality is that famous rappers rarely see rap lyrics used against them in court. Rather, it is the not well-known, unfamous rappers who have the most to lose. Judges have explicitly drawn a false distinction between famous and unfamous rappers, stating that famous rappers "speak[] to a general audience for the purpose of entertainment," which is substantively different than "speaking in private to an individual."[92] However, this distinction is premised on a fallacious assumption: that famous rappers' lyrics are limited to consumption in large concert, performance settings. To the contrary, in the same way that an amateur rapper's lyrics may be streamed or performed in an intimate setting, so too can a song by any famous rapper. However, this reality of how our judicial system views amateur rappers creates a need for reforms that prioritize rappers without a platform and audience.

2. Recent Legislative Efforts

Just as a California court was the first to admit rap lyrics as evidence against a criminal defendant, so too was California's legislature the first to sign a bill into law limiting their usage.[93] On September 30, 2022, the California legislature officially addended California Evidence Code ("CER") Section 352.2 to establish a more structured procedure for courts to use when deciding whether to admit certain forms of expression, including rap lyrics.[94] As a threshold matter of admission under CER

90. Larisha Paul, *Drake, Megan Thee Stallion, John Legend Sign 'Protect Black Art' Open Letter Defending Creative Expression*, ROLLING STONE (Nov. 1, 2022), https://www.rollingstone.com/music/music-news/drake-megan-the-stallion-sign-protect-black-art-open-letter-1234622613/ [https://perma.cc/6QGM-7Y3S] [https://web.archive.org/web/20240822181310/https://www.rollingstone.com/music/music-news/drake-megan-the-stallion-sign-protect-black-art-open-letter-1234622613/].

91. *Art on Trial: Protect Black Art*, https://www.protectblackart.co/ [https://perma.cc/NKN6-FNQF] [https://web.archive.org/web/20240925183013/https://www.protectblackart.co/] (last visited Oct. 30, 2024).

92. NIELSON & DENNIS, *supra* note 19, at 110.

93. Natalie Neysa Alund, *California Governor Gavin Newsom Signs Bill Limiting Use of Rap Lyrics as Evidence in Court*, USA TODAY (Oct. 3, 2022), https://www.usatoday.com/story/news/politics/2022/10/03/california-rap-lyrics-court-evidence/8167269001/ [https://perma.cc/Q529-BXR9] [https://web.archive.org/web/20240802040551/https://www.usatoday.com/story/news/politics/2022/10/03/california-rap-lyrics-court-evidence/8167269001/].

94. Cal. Evid. Code § 352.2. *See* People v. Venable, 88 Cal. App. 5th 445, 455, 304 Cal. Rptr. 3d 731, 737–38 (2023) (holding that California Evidence Code § 352.2 applied to rap lyrics per the California legislature's explicit intent "to recognize that the use of rap lyrics . . . as circumstantial evidence of motive or

Section 352 (the State code's version of FRE 403), the addendum requires courts to consider the "literal truth" of the expression and the possibility of "inject[ing] racial biases into the proceedings."[95] If the court determines that the expression is admissible, it must then consider the following: testimony describing the social or cultural context of the genre, experimental or social science research "demonstrating that the introduction of [evidence] explicitly or implicitly introduces racial bias into the proceedings," and evidence proffered to rebut the research or testimony.[96]

Despite no other states to date having passed similar bills addressing the use of rap lyrics, various representatives and senators in other states have made efforts to introduce such bills. For instance, on November 17, 2021, New York Senators Brad Hoylman and Jamaal Bailey introduced Bill S7527, which would "prohibit[] prosecutors from using creative expression as criminal evidence . . . without clear and convincing proof that there is a literal, factual nexus between the creative expression and the facts of the case."[97] This very much follows from the rule established by the New Jersey Supreme Court in *State v. Skinner*.[98]

Finally, at the federal level, on July 27, 2022, Georgia Representative Hank Johnson introduced the Restoring Artistic Protection Act of 2022 into the House of Representatives, seeking to amend the Federal Rules of Evidence to include "evidence of a defendant's creative or artistic expression, whether original or derivative" only: (A) "if the expression is original . . . defendant intended a literal meaning"; (B) "if the expression is derivative . . . defendant intended to adopt the literal meaning . . . that the creative expression refers to the specific facts of the crime alleged . . . that the expression is relevant to an issue of fact that is disputed and . . . that the expression has distinct probative value not provided by other admissible evidence."[99] The bill was again reintroduced in 2023, but is still pending in the House.[100]

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intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.").

95. Cal. Evid. Code § 352.2(a).

96. Cal. Evid. Code § 352.2(b).

97. Brad Hoylman-Sigal, *Senators Brad Hoylman & Jamaal Bailey Introduce "Rap Music on Trial" Legislation To Prevent Song Lyrics from Being Used as Evidence in Criminal Cases*, N.Y. STATE SENATE (Nov. 17, 2021), https://www.nysenate.gov/newsroom/press-releases/2021/brad-hoylman-sigal/senators-brad-hoylman-jamaal-bailey-introduce-rap [https://web.archive.org/web/20240720194827/https://www.nysenate.gov/newsroom/press-releases/2021/brad-hoylman-sigal/senators-brad-hoylman-jamaal-bailey-introduce-rap].

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

99. Restoring Artistic Protection Act, H.R. 8351, 117th Cong. (2022).

100. Sofia Lopez, *Congress Reintroduces the Restoring Artistic Protection (RAP) Act, Leading the Federal Efforts To Decriminalize Artistic Expression*, FIRE (May 2, 2023), https://www.thefire.org/news/congress-reintroduces-restoring-artistic-protection-rap-act-leading-federal-efforts [https://perma.cc/EE3F-RFCN] [https://web.archive.org/web/20240802040643/https://www.thefire.org/news/congress-reintroduces-restoring-artistic-protection-rap-act-leading-federal-efforts].

3. These Legislative Efforts Continue To Provide Judges with Too Much Discretion

While the legislative attention aimed at reforming the practice of using rap lyrics as evidence against criminal defendants reinforces the need to change the status quo, these efforts and the substantive content of the proposed bills fall short. Despite mandating that judges take certain factors or considerations into account, these bills continue to provide judges with ultimate decision-making power and discretion to admit or exclude rap lyrics.

The legislative instinct to continue granting such judicial discretion—whether conscious or not—is not without explanation. With respect to the codification of evidence rules, often the legislative course of action is adopting evidence rules after a clear consensus in the common law and courts has emerged.[101] This is logical: legislatures defer to judges (relative experts in the practice of evidence law) to work out the major kinks of the legal procedure over time, and only get involved when this iterative process has ceased. However, with respect to the use of rap lyrics as evidence, legislatures have begun involving themselves relatively early—that is, in an area of law that is newly emerging and evolving, and where there does not yet exist a clear consensus amongst the courts nor any history in the common law. This begs the question: Is there a way for legislatures to get involved in a newly evolving area of law that strips judges of this discretion? And if yes, should they get involved?

The answer to both questions is yes: Legislatures can and should pass bills limiting the admission and use of rap lyrics as evidence against criminal defendants. Their intervention is necessary in this new area of the law where judges, who lack subject matter expertise and possess implicit biases, currently possess a wide latitude of discretion. However, for this intervention to be successful and effectuate real change, it needs to be rooted in a solid doctrinal and precedential basis—some area of the law that has withstood the test of time, and from which concrete solutions naturally flow. This will not only increase the legislation's legitimacy with judicial actors but also allow judges to operationalize the legislation more seamlessly and consistently.

III. PART III: TWO PROPOSED SOLUTIONS TO THE ADMISSION AND USE OF RAP LYRICS INFORMED BY INTELLECTUAL PROPERTY LAW

As explicitly acknowledged by the *Wilson* court, IP law contains intuitive overlap with the questions posed by the use of rap lyrics as evidence in criminal trials.[102] As a basic example, copyright law broadly protects all "original works of authorship,"

101. In fact, the initial Federal Rules of Evidence were only "passed by Congress in 1975, after several years of drafting by the Supreme Court." *2024 Federal Rules of Evidence*, NAT'L CT. RULES COMM., https://www.rulesofevidence.org/ [https://perma.cc/6B7U-GYG3] [https://web.archive.org/web/20241002031203/https://www.rulesofevidence.org/] (last visited Nov. 5, 2024).

102. United States v. Wilson, 493 F. Supp. 2d 484, 489 (E.D.N.Y. 2006) (citing the use of expert witnesses to understand "hip hop culture" in both copyright and trademark contexts).

including musical compositions.[103] Indeed, copyright disputes over music regularly appear in mass media channels and have affected some of the world's most renowned artists.[104] Thus, many of the questions that arise over the substance of rap lyrics in criminal trials also appear in civil IP cases every day.

Beyond the intuitive appeal of IP law, many core IP doctrines possess both statutory and common law clarity, including trademark law's spectrum of distinctiveness and the copyright doctrine of infringement by reproduction. Applying concepts underlying such well-established IP doctrines has the potential to provide a more coherent and consistent path forward for reforms regarding the use of rap lyrics as evidence.

A. INTELLECTUAL PROPERTY PROVIDES AN OPERATIONALIZABLE, DOCTRINAL BASIS FOR HOW COURTS SHOULD TREAT RAP LYRICS AS EVIDENCE

Intellectual property law provides a desirable doctrinal basis for how rap lyrics should be admitted and used as evidence in criminal trials. Two relevant doctrines are the trademark spectrum of distinctiveness and the copyright doctrine of infringement by reproduction, which have existed in their modern forms since 1976 and 1946, respectively.[105] Each arose out of the common law and has remained there since. Therefore, they have been iterated and tested over decades of legal disputes in court such that their strengths and weaknesses are well documented. These IP doctrines have also proven to be adaptable to the rapid societal and technological changes that have occurred since their inception. This sort of stability over time is crucial to the judicial treatment of rap lyrics, as the advent of social media and independent labels projects an increased production and therefore, usage, of rap lyrics in court. Moreover, the fact that these doctrines are well established means that solutions for the treatment of rap lyrics rooted in IP law will not create a large learning curve for judges, who are already familiar with and tasked with operationalizing these IP doctrines in court.

Notwithstanding the sheer length of time that these IP doctrines have existed, they also stand to solve another important part of the current problem with the treatment of rap lyrics as evidence: cabining judicial discretion. Whether by requiring judges to make a declaration of which of four categories a trademark belongs to, or altogether banning a judge's ability to admit expert testimony at a certain stage in copyright, these IP doctrines provide clear, operationalizable instructions that hold judges accountable. Such clarity in the doctrine and accountability for judges who deviate are especially

103. *What Does Copyright Protect?,* COPYRIGHT.GOV, https://www.copyright.gov/help/faq/faq-protect.html [https://perma.cc/V5AD-TSLF] (last visited Feb. 21, 2024).

104. *See* Thania Garcia, *Famous Music Copyright Cases Revisited: Ed Sheeran, Led Zeppelin, Katy Perry and More*, VARIETY (Apr. 27, 2023), https://variety.com/lists/song-copyright-infringement-cases-ed-sheeran-historic/robin-thicke-pharrell-williams-vs-marvin-gaye-estate-for-blurred-lines/ [https://perma.cc/U6Y5-QJS2] [https://web.archive.org/web/20240208174247/https://variety.com/lists/song-copyright-infringement-cases-ed-sheeran-historic/robin-thicke-pharrell-williams-vs-marvin-gaye-estate-for-blurred-lines/].

105. *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976) (establishing the trademark spectrum of distinctiveness); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (establishing the modern doctrine of infringement by reproduction).

desirable in the context of rap lyrics, given judges' implicit biases and prosecutors' explicit efforts to exploit juror biases.[106]

Finally, while the most glaring difference and therefore, criticism of applying IP law to the treatment of rap lyrics is that IP law covers civil disputes, while the use of rap lyrics occurs most often in criminal cases, the root of the problem—overwhelming judicial discretion and juror biases—are not specific to either civil or criminal law. Further, there are stark similarities that justify IP's application. For starters, often IP disputes, specifically in copyright law, are about music, including rap.[107] The result is that naturally similar questions arise. For instance, in the criminal case of *United States v. Wilson*, the court acknowledged that the same question of "expert testimony about hip hop culture" at issue before it had been helpfully permitted in copyright and trademark cases.[108] While the court in *Wilson* ultimately differentiated from the civil IP cases, stating that the defendant's lyrics were not being offered "to prove substantial similarity to other lyrics, nor [was] their secondary meaning at issue," why shouldn't we imagine the counterfactual, whereby we *do* consider rap lyrics from these perspectives?[109] That is, what if we *did* ask whether the rap lyrics in question are substantially similar to or hold secondary meaning when compared to industry norms?

B. FROM TRADEMARK LAW TO RAP LYRICS AS EVIDENCE: ESTABLIHSING A RAP LYRIC "SPECTRUM OF DISTINCTIVENESS"

One proposed solution to the prejudicial use of rap lyrics as evidence in criminal trials mirrors the trademark spectrum of distinctiveness. The trademark spectrum of distinctiveness contains four categories which determine whether a trademark is protectable to begin with. In the context of rap lyrics, this Note propose the creation of a rap lyric spectrum of distinctiveness: three categories which determine whether, as a threshold matter, rap lyrics are admissible. This rap lyric spectrum of distinctiveness centers around how closely related and specific the rap lyrics are to the crimes at issue in the case. It in many ways encompasses the evidence rule against unfair prejudice and should be used by judges, who are themselves subject to implicit biases and unqualified to dissect the content of rap lyrics. As further protection against judges' implicit biases

106. *See* Alexander, *supra* note 75, at 231–34. *See also* Abenaa Owusu-Bempah, *Music on Trial: Challenging the Use of Rap as Evidence in Criminal Courts*, LONDON SCH. ECON. & POL. SCI. (Nov. 15, 2022), https://www.lse.ac.uk/research/research-for-the-world/race-equity/music-on-trial-challenging-the-use-of-rap-as-evidence-in-criminal-courts [https://perma.cc/GGB3-NHR3] [https://web.archive.org/web/20240720012420/https://www.lse.ac.uk/research/research-for-the-world/race-equity/music-on-trial-challenging-the-use-of-rap-as-evidence-in-criminal-courts] (summarizing the findings of a study that reviewed over thirty appeal judgments between 2005 and 2020 in England and Wales, which overwhelmingly found rap lyrics "being used as evidence in court to prove acts of criminality.").

107. *See Music Copyright Cases*, MUSICIANS INST. LIBR., https://library.mi.edu/musiccopyright/currentcases [https://perma.cc/5Z4G-YACW] [https://web.archive.org/web/20240901173036/https://library.mi.edu/musiccopyright/currentcases] (last visited Feb. 21, 2024) (providing a list of recent and landmark copyright cases involving music lyrics).

108. United States v. Wilson, 493 F. Supp. 2d 484, 489 (E.D.N.Y. 2006).

109. *Id.* at 490.

and lack of subject matter expertise, it would be most beneficial for rap industry experts and leaders to collaborate and use modern machine learning techniques to create a preliminary rap lyric spectrum of distinctiveness, which could serve as a baseline for judges.

1. Trademark Law's Spectrum of Distinctiveness

The *sine qua non* of trademark law is distinctiveness: "[T]rademarks are protectable only if they are distinctive."[110] A trademark's distinctiveness is determined by a spectrum of distinctiveness, which categorizes marks into one of four categories which denote their "strength" and "inform[] the scope of protection afforded."[111]

On the farthest end of the spectrum are generic marks, which can never gain protection. Generic marks communicate the "basic nature of articles or services,"[112] rather than the more individualized characteristics of a particular market. Common examples include aspirin and email. The U.S. trademark system does not allow protection of these marks because it would "grant[] a monopoly in the product."[113]

Next are descriptive marks, which have a clear link to and identify some distinct element of a product. Descriptive marks can only gain protection if there is secondary meaning. Secondary meaning requires affirmative proof that the primary significance of the term in the minds of the consuming public is not the product, but the producer. Evidence presented to show secondary meaning typically comes in one of three forms: "a claim of ownership of one or more previous federal registrations for substantially the same mark for similar products or services, five years of substantially exclusive and continuous use, and actual evidence."[114] Actual evidence often takes the form of "consumer surveys, consumer testimony, . . . [or] the amount of customers."[115]

Third on the spectrum are suggestive marks, which *suggest*, rather than describe, some characteristic of the product, i.e. there is *some* link, but consumers must still make

110. *Distinctive Trademark*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/distinctive_trademark [https://perma.cc/8D48-JG2F] [https://web.archive.org/web/20240603184949/https://www.law.cornell.edu/wex/distinctive_trademark] (last visited Oct. 9, 2024) (providing definition of "distinctive trademark").

111. *Trademarks: The Spectrum of Distinctiveness*, DRM (Apr. 18, 2016), https://www.drm.com/articles/trademarks-the-spectrum-of-distinctiveness [https://perma.cc/G99R-XEAX] [https://web.archive.org/web/20240617204804/https://www.drm.com/articles/trademarks-the-spectrum-of-distinctiveness/].

112. *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 11 (5th Cir. 1974).

113. *Generic Terms Legally Excluded from Trademark Protection*, JUSTIA, https://www.justia.com/intellectual-property/trademarks/strength-of-marks/generic-terms [https://perma.cc/U775-XAUW] [https://web.archive.org/web/20241002112447/https://www.justia.com/intellectual-property/trademarks/strength-of-marks/generic-terms/] (last visited Oct. 18, 2024).

114. *Descriptive Trademarks and Service Marks & Their Potential Legal Protection*, JUSTIA, https://www.justia.com/intellectual-property/trademarks/strength-of-marks/descriptive-marks/ [https://perma.cc/8EP3-WE44] [https://web.archive.org/web/20240709103752/https://www.justia.com/intellectual-property/trademarks/strength-of-marks/descriptive-marks/] (last visited Oct. 18, 2024).

115. *Id.*

an inferential leap. A common example is Coppertone, a sunscreen brand. These marks are considered inherently distinctive and therefore, receive protection without any other proof required. Finally, there are arbitrary or fanciful marks that have no relation at all to the product or service, such as Apple, a technology brand that sells personal computers and cellphones.

2. Merits and Critiques of the Trademark Spectrum of Distinctiveness

Overall, the trademark spectrum of distinctiveness forces judges to be explicit about their decision-making by placing the trademark at issue into one of the four aforementioned categories. This benefits all involved parties to the suit, as well as judges, both ex-ante and ex-post. The spectrum of distinctiveness provides courts guidelines based on a catalog of past terms placed into each category, which leads to more consistent adjudications. It similarly provides trademark holders who are parties to a suit the ability to predict how their chosen trademark will be protected in court, which may inform how they choose this trademark in the first place. These same benefits can be expected when applied to a rap lyric spectrum of distinctiveness.

The biggest criticism of trademark law's spectrum of distinctiveness surrounds secondary meaning. For one, it seems that large corporations with resources are easily able to establish secondary meaning by expending advertising resources and conducting consumer surveys, which allow them to gain protection for otherwise unprotectable marks.[116] Additionally, the Supreme Court's recent expansion of secondary meaning "as relevant for the protectability of marks that might potentially be classified as generic" has the undesired effect of "mov[ing] a term that might plausibly be generic into the descriptive category, thus rendering it protectable."[117] Thus, a rap lyric spectrum of distinctiveness must apply this critique, and redefine secondary meaning to eliminate the use of such external lay data on public opinion. The other major criticism of the spectrum of distinctiveness is that it is hard to operationalize in non-verbal contexts, such as trade dress.[118] Because the rap spectrum of distinctiveness focuses explicitly on rap lyrics (rather than, e.g., rap music videos), this criticism is beyond the solution's scope.

3. Proposed Solution: A Rap Lyric Spectrum of Distinctiveness

In the same way that the spectrum of distinctiveness decides, as a threshold matter, whether a trademark can receive protection at all, a three-prong rap lyric spectrum of distinctiveness could determine whether rap lyrics can be admitted as evidence in any

116. *See* Jeanne C. Fromer, *Against Secondary Meaning*, 98 NOTRE DAME L. REV. 211, 211 (Nov. 16, 2022) (discussing the "competitive inequalities secondary meaning creates which hurt smaller and newer businesses").

117. *Id.* at 224.

118. *See, e.g.*, Glenn Mitchell & Rose Auslander, *Trade Dress Protection: Will a Statutorily Unified Standard Result in a Functionally Superior Solution?,* 88 TRADEMARK REP. 472 (1998).

given criminal case. Rather than distinctiveness, the *sine qua non* of a rap lyric spectrum of distinctiveness is the lyrics' proximity to the crime at issue in the case.

The first category of distinctiveness is generic rap lyrics: lyrics and phrases that are commonly used in the genre and have no nexus to the crime at issue. In the same way that generic trademarks never get protection, so too generic rap lyrics should be categorically excluded from use in a criminal trial. The lyrics at issue in *State v. Skinner* provide an example of lyrics that would fall into this category.[119] Some of the lyrics that the prosecution sought to introduce depicted "rape and other violent and demeaning treatment of women."[120] Not only were some of these lyrics commonplace for the genre, they had absolutely no connection to the attempted murder charges at issue.[121] Thus, they were properly excluded by the court under this rap lyric spectrum of distinctiveness.

The second category of distinctiveness is descriptive lyrics: lyrics and phrases that are commonly used in the genre but speak more generally about the crime at issue. These lyrics should be excluded unless the prosecution can prove by clear and convincing evidence that there is secondary meaning indicating that the lyrics show the defendant had first-hand experience with the general crime at issue and is not merely speaking about it in the abstract. Secondary meaning should include considerations of several factors, some of which are explored next.

A court might consider contemporaneity, i.e., how closely in time to the crime the rap lyrics were written. If the lyrics were written directly before or after the crime, that has a higher tendency to show that the defendant was involved in the crime than if the lyrics were written years before or after the crime at issue. Next, a court may consider how the lyrics fit into the defendant's broader rap music portfolio, if it exists. A defendant who raps more regularly, and in different ways, about a specific type of crime is more likely to have experience with that crime than a defendant who has only mentioned the type of crime once. Finally, a court may consider how a defendant has advertised or marketed the rap lyrics in commercial settings. A defendant who has made efforts to advertise their rap lyrics to the public—whether by posting on social media or paying for a billboard—should be taken as having produced the descriptive lyrics under a desire for commercial success, i.e. the lyrics merely encompass "stock lyrical topics and tropes shared by performers," that "imitate the lyric formulas of more successful musicians in the hopes of establishing their own credibility and sharing in that success."[122] Such an explicit consideration is necessary to help ensure that courts

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

120. *Id.* at 241.

121. For instance, one of the admitted lyrics was "f * * k her until tomorrow." *See id.* at 241. Functionally identical lyrics can be found in numerous other rap songs. *See, e.g.*, HELLBXY, *See Ya Tomorrow, on* NIGHT IN PURGATORI (2024); GLORILLA, *Tomorrow, on* TOMORROW (CMG/Interscope Records 2022); FREDDIE DREDD, *Limbo*, *on* FREDDIE'S INFERNO (RCA Records 2022).

122. Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 RACE AND JUST. 1, 3 (2017).

treat rap lyrics like other genres of music, which are automatically presumed as fictional under this same line of reasoning.[123]

Unlike trademark law's secondary meaning jurisprudence, a consideration of rap lyrics' secondary meaning should not allow for the introduction of surveys that would permit lay listeners to provide reactions to the lyrics in question. First, allowing such external lay data would lead to a similar power imbalance as that found in trademark law. Much like wealthy corporations have the power to influence secondary meaning in civil trademark law, prosecutors have relatively unlimited resources to conduct surveys until they, too, reach their desired survey results in criminal law. Second, these surveys are likely to be inaccurate or perpetuate societal biases that the spectrum of distinctiveness' entire purpose is to mitigate.

The third and final category of distinctiveness is arbitrary rap lyrics: lyrics that are so specific to the crime at issue in a case that they are considered *arbitrary* to the generalized genre of rap because they indicate firsthand experience and involvement in the specific crime. These lyrics may include identifying information about the crime, such as exact date, timing, names of those involved, description of the weapon used, and other information that is corroborated by other, independent evidence.

The lyrics at issue in *Commonwealth v. Thomas* help illustrate an application of the second and third categories.[124] In *Thomas,* the defendant was on trial for shooting someone in retaliation for an alleged drug theft.[125] To make their case, the prosecution sought to introduce rap lyrics written by the criminal defendant that told the "story of an individual who is angered that someone stole a brick of cocaine belonging to the narrator and states that 'somebody gonna die on this [corner]. For touching s * * * don't belong to ya.'"[126] In the appellate court's words, because "[t]he lyrics did not mention the victim by name and, standing alone, any connection between the lyrics and the crime is entirely speculative," these lyrics would fall into the second category.[127] Therefore, the lyrics would be inadmissible unless the prosecution could prove clear and convincing independent evidence that the defendant had first-hand experience with the crime at issue. The prosecution did not point out anything to this effect, and therefore, the spectrum of distinctiveness would have come to the same conclusion as the appellate court that the lyrics were inadmissible.[128]

123. *See id.* at 2 (discussing rap in relation to opera where, unlike rap, it is understood that "violent and sexual themes are conventions within the genre and that it would have been bizarre to treat [famous operas] as somehow representing the literal wishes of their composers or to interpret the lyrics penned by their librettists as autobiographical admissions of crimes.") (footnote omitted).

124. Commonwealth v. Thomas, No. 1121 EDA 2013, 2015 WL 6457805 (Pa. Super. Ct. Oct. 2, 2015).

125. *Id.* at *1.

126. *Id.* at *3.

127. *Id.* at *6.

128. *Id.*

3. Rap Industry Experts and Leaders Should Collaborate To Create a Baseline Spectrum of Distinctiveness

While trademark law's spectrum of distinctiveness relies on common-sense, everyday consumer perceptions that judges are equipped to determine and categorize, rap lyrics are more complicated. Therefore, rap industry experts and leaders are uniquely positioned to gather and create a preliminary guide outlining the above-described spectrum of distinctiveness for rap lyrics. Such a starting point—created by piecing together the most common words and phrases used in rap—would provide great guidance to judges making these preliminary determinations.

Empirical efforts to this end are already being made. Matt Daniels and his team at The DataFace have used over twenty-six million words from the top 500 charting artists on Billboard's Rap Chart to determine which words were most used, compared the use of words in rap against other genres, and even mapped the lyrical similarity of rappers in an interactive graph.[129] In a separate evaluation, they ranked rappers by the number of unique words used in their lyrics.[130] With the rise of ChatGPT and machine learning techniques, it is increasingly possible and accessible to create such rough categorizations of popular rap lyrics. By taking this work away from judges, who suffer from implicit biases, and instead, empowering empirical data, criminal defendants face relatively lower risk of unfair prejudice from the admission of their rap lyrics.

C. SOLUTION 2: AVOIDING *ARNSTEIN* AND MANDATING THE USE OF EXPERT WITNESSES IN CASES INVOLVING RAP LYRICS

While the above solution addresses, as a threshold matter, whether to admit rap lyrics at all, the second solution targets how rap lyrics should be treated once they have cleared this first hurdle, and been deemed admissible. For guidance on how rap lyrics should be treated at trial, which often hinges on the use of expert testimony, the copyright infringement by reproduction doctrine—codified in *Arnstein v. Porter*—is illustrative.[131] There, the Second Circuit categorically banned the use of expert testimony at the substantial similarity phase of copyright infringement cases, instead relying solely on the jury's intuition. This doctrine, and particularly the exclusion of expert testimony, has frustrated copyright scholars since its inception.[132]

In the same way that jurors should not be trusted, without the help of experts, to determine whether two pieces of work are substantially similar in copyright law, jurors should not be trusted to weigh and interpret rap lyrics without the help of experts in

129. Matt Daniels, *The Language of Hip Hop*, PUDDING (Sept. 2017), https://pudding.cool/2017/09/hip-hop-words/ [https://perma.cc/VR3Y-6WGJ] [https://web.archive.org/web/20240915214458/https://pudding.cool/2017/09/hip-hop-words/].

130. *Id.*

131. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

132. *See* Balganesh, *supra* note 11; *see also* Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1188–89 (1990); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 719–22 (2010).

criminal cases. Thus, *Arnstein* serve as a cautionary tale justifying the mandated use of expert witnesses in cases involving rap lyrics. When prosecutors introduce rap lyrics, defendants should be given a choice: a court-appointed expert or their own. For indigent defendants, public funding should be provided to allow them to secure their own expert if so desired. This solution will help ensure that otherwise unequal power dynamics between prosecutors and defendants are not exacerbated by the prosecutors' ability to bring forth experts while defendants are left with nothing.

1. Copyright Law: The Cautionary Tale of *Arnstein v. Porter*

One of the most important rights of a copyright holder is the exclusive right "to reproduce the copyrighted work."[133] When a copyright holder seeks to claim an infringement of this right, they must prove two things: (1) actual copying; and (2) substantial similarity. This modern test was established by the Second Circuit in *Arnstein v. Porter*. Each of these steps relies on a jury's ability to distinguish between two similar—and often indistinguishable—works. Because juries are made up of lay people, who are neither experts nor specialists in all areas of copyrightable works, including music, the important question is: How can we empower a jury to make the most informed and unbiased decision?

Step one, actual copying, requires either direct or circumstantial evidence. With respect to circumstantial evidence, a court must look at whether the accused infringer had access to the copyright owners' work, and at the extent of similarity between the two works. The extent of similarity inquiry serves an evidentiary purpose: are the two works similar enough such that it can be implied that one copied the other? The *Arnstein* court reasoned that the factual nature of this inquiry justified the admission of expert testimony to help guide the jury. Thus, in practice, there is an analytical dissection that occurs whereby the work is split into its component parts, and experts advise on which parts are original versus commonly accepted in that particular art. This expert advice helps juries split their evaluation of similarity into two categories: similarity that arose from art-specific themes and tropes versus similarity that likely arose from copying.

Step two, substantial similarity, is a question of whether the infringer improperly appropriated the original work. That is, even if copying did occur, is it substantial enough to qualify as *unlawful*? Like the first step, the *Arnstein* court classified this inquiry as a factual one, i.e., something for the jury to decide. Assuming arguendo that this step of the analysis is correctly classified as a factual one—something legal scholars have debated—it should rely on the same nuances and procedure as the first step. That is, if the best way to guide a jury to determine the extent of similarity is through expert testimony, then experts should also be able to guide juries in their decision of whether the copying was improper. However, the *Arnstein* court held that the test for substantial similarity is the "response of the ordinary lay hearer."[134] In simple terms, this means

133. 17 U.S.C. § 106(1).

134. *Arnstein*, 154 F.2d at 468.

that the jury—with no expert advice—is meant to listen to the two works, side by side, and make its own subjective determinations about whether the accused work seems improperly appropriative of the original work.

2. Critiques of *Arnstein v. Porter*

The second part of the test established by *Arnstein v. Porter*—which mandates that juries alone determine whether a work has unlawfully appropriated the original—has been criticized continuously by legal scholars since its inception.[135] Judge Clark's dissent is a natural starting point for the criticism that has followed. Judge Clark categorizes the two-step analysis as illogical and void of intellect: "one of finding copying which may be approached with musical intelligence and assistance of experts, and another that of illicit copying which must be approached with complete ignorance."[136] The cognitive dissonance inherent in requiring the same jury to consider helpful expert testimony at one stage, then disregard it at the next, has continued to puzzle legal scholars and courts alike.[137]

Beyond the logistical impracticability of the *Arnstein* test, there are serious reasons to doubt its doctrinal soundness and origins. What many legal scholars take for granted is the *Arnstein* court's assertion that the question of substantial similarity is one of fact for the juries, and not one of law for judges. As put by copyright expert Shyamkrishna Balganesh, the second step requires "making a normative judgment about the legality of such conduct," which is more a question of law than fact.[138] While such a consequential mischaracterization by a court—in a test that continues to be applied today—is surprising, the origins of the decision and its author add necessary clarity.

Judge Jerome Frank, author of the majority opinion, was more than just a judge on the Second Circuit; he was also an outspoken legal philosopher.[139] In accordance with his skepticism toward judicial discretion, Judge Frank found himself uncomfortable with the lower court opinion, which relied on the judge's "refus[al] to believe the plaintiff's account of the facts."[140] Based on Judge Frank's correspondence with his fellow judges, the creation of the two-step test in *Arnstein* was much less about substantive copyright law, and much more about his personal views of legal philosophy.[141] Therefore, the *Arnstein* test should not be considered very doctrinally

135. *See* Balganesh, *supra* note 11, at 794 ("Copyright's infringement analysis has been variously described as bizarre, mak[ing] no sense, viscid, and problematic.") (internal citations and quotations omitted).

136. *Arnstein*, 154 F.2d at 476 n.1 (Clark, J., dissenting).

137. *See, e.g.*, Michelle V. Francis, Comment, *Musical Copyright Infringement: The Replacement of* Arnstein v. Porter*—A More Comprehensive Use of Expert Testimony and the Implementation of an "Actual Audience" Test*, 17 PEPP. L. REV. 493, 496 n.26 (1990); *see also* Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127 (1988).

138. Balganesh, *supra* note 11, at 793.

139. *See* Julius Paul, *Jerome Frank's Contributions to the Philosophy of American Legal Realism*, 11 VAND. L. REV. 753 (1958).

140. Balganesh, *supra* note 11, at 798.

141. *Id.*

sound or reliable in copyright or as applied in other legal contexts. Rather, *Arnstein* and its aftermath should serve as a cautionary tale in two respects. First, for how detrimental an exclusion of expert testimony can be, and second, for how susceptible judges are to imposing their own beliefs into any given case at the expense of future parties and the greater doctrine.

3. Proposed Solution: The Mandated Use of Expert Witnesses in Cases Involving Rap Lyrics

In the aftermath of *Arnstein*, two broadly applicable principles have emerged. First, the exclusion of expert testimony—especially in the context of artistic expression and music—leaves a jury up to their own devices, particularly in the context of artistic expression and music. In the context of rap lyrics, where jury biases towards rap music and Black and brown defendants are well documented, this truth is incredibly worrisome.[142] Second, when judges are left to their own devices, the omnipresent risk of them imposing their own biases and beliefs unto the parties before them can lead to dire consequences.

When thinking about the use of rap lyrics in criminal trials, where judges are uniquely at risk of imposing such biases and beliefs, it becomes even more important to cabin judicial discretion. Combining these two principles, the use of expert witness testimony in criminal cases involving rap lyrics should be mandated.[143] Specifically, criminal defendants should always be given a choice: an independent expert employed by the court or the chance to bring their own expert forward. For indigent defendants, public funding should be provided for them to hire their own chosen experts.

With respect to independent experts employed by the court, FRE 706 governs. The court has the discretion to "appoint any expert that the parties agree on and any of its own choosing."[144] Regardless of who brings the expert forward, the court ultimately decides whether the expert is qualified to testify under FRE 702.[145] These qualifications include the type of "specialized knowledge" that the expert possesses, and whether the expert's opinions reflect "a reliable application of the principles and methods to the facts of the case."[146]

When dealing specifically with rap lyrics, the opaqueness of these qualifications has allowed prosecutors to call upon law enforcement officers masked as "gang experts" to testify and "knowingly misrepresent[] rap music to judges and jurors."[147] These experts

142. *See supra* text accompanying notes 76–77.

143. The importance of retaining expert witnesses has been underscored by courts all over the country, including the Supreme Court. *See* Ake v. Oklahoma, 470 U.S. 68 (1985) (holding that an indigent defendant has a constitutional right to a psychiatrist expert to build their defense); *see also* Hinton v. Alabama, 571 U.S. 263 (2014) (finding ineffective assistance of counsel where a public defender failed to request additional funding for qualified experts to counter the prosecution's experts).

144. FED. R. EVID. 706(a).

145. FED. R. EVID. 702.

146. *Id.*

147. Jeremy Wang-Iverson, *Rap on Trial: Conversation with Erik Nielson and Andrea L. Dennis*, VESTO (Apr. 17, 2020), https://vestopr.com/rap-on-trial-conversation-with-erik-nielson-and-andrea-l-dennis/

become especially harmful against indigent defendants who are unable to hire their own experts to rebut false and misleading statements.[148] By providing defendants a guaranteed opportunity to introduce their own experts, the negative impact of law enforcement *experts* can be easily called out. Further, such a mandate continues to take discretion away from trial judges, who would be hard pressed to permit a law enforcement expert, whose only qualifications stem from interacting with gangs on the job, while simultaneously denying a defendant's chosen expert.

One glaring concern with mandating the use of expert witnesses is that this solution assumes an abundance of such experts available and willing to testify. However, in tandem with the first proposed solution, the rap lyric spectrum of distinctiveness will decrease the number of instances where the question of expert witnesses even arises, as more rap lyrics will be deemed inadmissible from the beginning. Further, even taking this second proposal as stand-alone, the mandated use of expert witnesses will create a strong incentive for courts and legislatures to train and make experts available, whether by creating robust training and certification programs, or providing financial incentives. One of the most public and prominent expert witnesses for criminal defendants whose rap lyrics are being used against them is University of Richmond Professor Erik Nielson.[149] As the use of rap lyrics in criminal trials continues to gain public recognition, one lingering hope is that more academic scholars will be willing and available to testify as experts.

Better yet, this second proposal will force prosecutors, judges, and legislatures to more seriously consider whether introducing rap lyrics is a worthy enough goal to justify expending resources and enduring additional procedural hurdles. In other words, it forces these actors to confront the glaring asymmetry in resources between prosecutors and indigent defendants, and either ensure that the asymmetry does not exist in the first place by choosing not to admit the rap lyrics or equalize the advantages by mandating that defendants can call testifying expert witnesses.

IV. CONCLUSION

The use of rap lyrics against defendants in criminal prosecutions has become increasingly common in the last three decades. The problematic nature of their usage can be summarized by looking at an educational pamphlet funded by a grant from the United States Department of Justice, which encouraged prosecutors to use rap lyrics "to introduce the jury to the real defendant," where a real defendant is defined as "a criminal

[https://perma.cc/77UZ-XWJ9] [https://web.archive.org/web/20241005151828/https://vestopr.com/rap-on-trial-conversation-with-erik-nielson-and-andrea-l-dennis/].

148. *See* Dennis, *supra* note 35, at 35–36 (stating that allowing an expert on rap music to testify is the "ideal means by which to challenge the admissibility and credibility of lyrical evidence offered by the prosecution").

149. *See* Wang-Iverson, *supra* note 147 ("Erik has served as an expert witness or consultant in roughly 50 cases involving rap lyrics as evidence.").

wearing a do-rag and throwing a gang sign."[150] The inherent biases and discrimination that inform a prosecutor's choice to introduce rap lyrics, a judge's decision to admit them, and a jury's interpretation of them necessitate reform. However, modern reform efforts have lacked a clear doctrinal basis justifying the proposed changes. Thus, these efforts continue to grant judges too much discretion and disadvantage criminal defendants.

A novel doctrinal basis for the introduction and use of rap lyrics as evidence in criminal trials can be found in IP law, from which two solutions emerge. First, as a threshold matter of admission, drawing on trademark law's spectrum of distinctiveness, a rap lyric spectrum of distinctiveness based on the lyrics' proximity to the crime and specificity about the crime will allow lyrics to be admitted only if the prosecutor has met a high burden of proof or if the lyrics are incredibly specific to the crime. Second, once rap lyrics have been shown to possess a close enough nexus to the crime, defendants should always be given the choice of either having a court-appointed expert or selecting their own to testify about the rap lyrics. In an attempt not to repeat the same mistakes created by *Arnstein*, the use of expert witnesses serves to equalize existing asymmetries between prosecutors and criminal defendants, while simultaneously limiting judges' discretion to admit or deny expert witness testimony.

150. *See* Brennan O'Connor, *Why Are Rap Lyrics Being Used as Evidence in Court?*, VICE (Nov. 3, 2014), https://www.vice.com/en/article/rap-lyrics-as-evidence/ [https://perma.cc/HYW9-BTYG] [https://web.archive.org/save/https://www.vice.com/en/article/rap-lyrics-as-evidence/].