Protecting the Right to a Meaningful Defense: Criminal Trial Storytelling

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If you only hear one side of the story, you have no understanding at all.
—Chinua Achebe

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The widely accepted "Story Model" of jury decision-making acknowledges that juries, in large part, base their decisions not on logical or probabilistic reasoning but on the stories they construct at trial. Storytelling thus plays an important role in guaranteeing a criminal defendant a fair trial, especially where a defendant's race triggers stereotypes that risk the presumption of innocence. In turn, the rules of evidence are effectively rules about how to tell one's story. This Note reveals how the evidence rules constrain defendant storytelling in criminal trials in underexamined ways that harm Black defendants in particular. It examines how prosecutors circumvent the rule against propensity evidence by offering as evidence defendants' rap lyrics, which activate stereotypes that harm Black defendants. Yet, because of the rules' constraints on storytelling, defendants are often unable to meaningfully refute those stereotypes. The unrefuted rap lyrics admitted in criminal trials also stifle storytelling in a less obvious way: by chilling the speech of rappers who otherwise offer a powerful form of storytelling from the Black community. As a case study of these phenomena, this Note analyzes transcripts from a 2017 California trial where evidentiary rulings—including permitting a police officer without any background in rap or hip hop to offer expert opinion on the meaning of the defendant's lyrics, while, at the same time, sustaining many of the prosecution's objections when the defendant attempted to testify about the traditions of rap on which his music relied or offer additional context to refute the state's evidence that he was in a gang—impacted the stories told and not told. Specifically, the findings demonstrate that these evidentiary decisions weakened the defendant's ability to tell his story and counter the prejudicial evidence against him. Finally, this Note offers suggestions for strengthening criminal defendant storytelling and reducing the admission of unduly prejudicial rap lyrics and unreliable prosecution expert testimony in the courtroom.

INTRODUCTION

Effective trial advocacy requires storytelling. In many ways, criminal defense attorneys and prosecutors are professional storytellers.[1] They must weave facts and evidence into stories that resonate with the judges' and juries' common sense and ultimately persuade the decisionmaker in the case.[2] In the context of a criminal trial, the defendant's ability to engage in meaningful storytelling arguably takes on constitutional status, enshrined in the right to present a complete defense.[3] That right protects not just the ability to scrutinize the state's proof and offer one's own witnesses,[4] but also the choice of how to tell a compelling story of innocence.[5]

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1. *See* Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 1–20 (2005).

2. Juries engage in a reasoning process that looks like storytelling. *See* Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133, 151–52 (2012) (describing the "Story Model" theory of jury decision-making).

3. *See* Holmes v. South Carolina, 547 U.S. 319, 331 (2006) (holding that the exclusion of defendant's proffered evidence of third-party guilt violated his constitutional right to "a meaningful opportunity to present a complete defense") (citation omitted).

4. *See* Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."); In re Oliver, 333 U.S. 257, 273 (1948) ("A person's right to . . . an opportunity to be heard in his defense . . . [is] basic in our system of jurisprudence . . . . ").

5. *See* Old Chief v. United States, 519 U.S. 172, 186–88 (1997) (acknowledging the right of the government not just to prove guilt but to prove a morally compelling story of "guiltiness" however it sees fit); United States v. Vallejo, 237 F.3d 1008, 1022–24 (9th Cir. 2001) (reversing and remanding for a new trial because the defendant, who was convicted of transporting drugs in a car, was prevented from presenting evidence that the previous owner of vehicle had used it to transport drugs and thereby

At a criminal trial, evidence rules shape and restrict what stories can be told and how they are told. A judge decides what testimony and physical evidence is and is not admissible,[6] how parties question their witnesses and present evidence,[7] how witnesses can be "impeached" by the other side with evidence that attacks their credibility,[8] and how to instruct juries to use that evidence in deciding the defendant's guilt or innocence.[9]

Especially in cases where a defendant's race triggers stereotypes that put the presumption of innocence at risk, storytelling can be a key part of the fight for a fair trial. That is because storytelling allows defendants to provide individuating information about themselves, which research has shown is valuable in combating stereotypes.[10] Existing case law recognizes the need for parties to tell a story with "evidentiary richness and narrative integrity" that "satisf[ies] the jurors' expectations,"[11] yet criminal defendants are often constrained from doing so by evidentiary rules and the way judges implement them.

This Note builds on storytelling literature to look at how evidence law—as applied by judges who reinforce dominant narratives—uniquely limits the storytelling ability of Black defendants. It considers how Black defendants are often unable to provide individuating information and important context that might alleviate jurors' implicit biases, threatening their right to a fair trial. Defendants' counter-storytelling ability takes on greater importance when prosecutors introduce racialized stereotypes. Specifically, this Note examines how prosecutors use rap lyrics as a form of racialized character evidence and how defendants are often unable to contextualize them due to the way judges

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prevented defendant from "provid[ing] an alternative theory of how the drugs were secreted in [the defendant's] car without his knowledge").

6. *See* FED. R. EVID. 403 (giving courts the discretion to exclude evidence where its probative value is substantially outweighed by the danger of unfair prejudice); FED. R. EVID. 702 (giving courts the discretion to admit expert testimony); *see also* 31A AM. JUR. 2D *Expert and Opinion Evidence* § 26, Westlaw (database updated October 2022) ("The decision of whether to admit expert testimony lies within the discretion of the trial court, and the trial court is given a wide latitude of discretion, or broad discretion, in its determination of admissibility of expert testimony.").

7. *See* FED. R. EVID. 611 (giving courts the discretion to exercise reasonable control over the questioning of witnesses and the presentation of evidence); *see also* Katharine Traylor Schaffzin, *Is Evidence Obsolete?*, 36 REV. LITIG. 529, 564 (2016) (stating that FRE 611(a) "is the basis of all objections to form and entirely discretionary").

8. *See* FED. R. EVID. 609(a) (giving courts the discretion to admit evidence that an accused has been convicted of a crime "punishable by death or by imprisonment for more than one year . . . if the probative value of the evidence outweighs its prejudicial effect to that defendant"); FED. R. EVID. 609(b) (giving courts the discretion to exclude impeachment evidence against witnesses with older convictions).

9. *See* 21A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 5066 (2d. ed. 2022) ("[T]he courts agree that the precise form of the limiting instruction lies within the trial judge's discretion.").

10. *See infra* Part I.A.

11. *See* Old Chief v. United States, 519 U.S. 172, 183, 188 (1997).

apply evidentiary rules. To further understand how often courts exclude defendants' rap lyrics or videos or overturn lower courts' decisions for erroneously admitting them, the Note systematically examines a sample of criminal cases from 2021 involving such rulings. Moreover, it considers how the practice of using rap lyrics as evidence against a criminal defendant is prejudicial to defendants not only inside the courtroom but indirectly over time outside the courtroom as well by creating a chilling effect on cultural expression.

As a case study of these phenomena, this Note examines the trial transcripts in the 2017 trial of Gary Bryant, Jr. in California, a case where the prosecution used rap lyrics as evidence to prove the gang enhancements. Mr. Bryant is a Black man who was ultimately convicted of murder, among other charges, and given a sentencing enhancement for murder committed for the benefit of a street gang. In October 2022, a California superior court judge vacated Mr. Bryant and his co-defendant's convictions and granted their motion for a new trial, finding that the prosecution's use of rap lyrics injected racial bias into the trial in violation of the California Racial Justice Act of 2020 (CRJA).[12] After examining Mr. Bryant's and the gang expert's testimonies at trial and the CRJA briefs, this Note argues that the existing legal discourse on the case and cases like it miss another key point: the judge's decisions and application of the evidentiary rules implicitly restrict the accused's opportunity to provide the jury with an alternative narrative.

This Note proceeds in four parts. Following this Introduction, Part I discusses the importance of storytelling inside the courtroom, both because it is the way that jurors make decisions and because it offers criminal defendants opportunities to individuate themselves. It also examines how evidence law, as applied by judges reinforcing dominant narratives, often stands in the way of defendant storytelling in the courtroom, leaving defendants unable to meaningfully counter the prosecution's case. Part II explains how prosecutors are routinely able to circumvent the rule against propensity evidence and bring in defendants' rap lyrics at criminal trials and how jurors' entrenched assumptions about rap music create a default narrative about the defendant. It shows that even when rap music is erroneously admitted, there is little hope of a remedy as appellate courts rarely rule that the error prompts reversal. Moreover, it argues that the routine admission of prejudicial rap lyrics also stifles counter-

12. *See generally* People v. Bryant, No. 05-152003-0 (Cal. Super. Ct. 2022). Moreover, during the editing process of this Note, in September 2022, California became the first state to pass a law restricting the use of rap lyrics in trial. *See* Assemb. B. 2799, 2021-2022 Reg. Sess. (Cal. 2022); Kim Bellware, *California Makes It Harder to Use Lyrics as Evidence Against Rappers*, WASH. POST (Oct. 2, 2022, 9:00 AM EDT), https://www.washingtonpost.com/lifestyle/2022/10/02/california-rap-lyrics-law/ [https://perma.cc/9UPX-4HJV] ("Now, California has become the first state to put guardrails on introducing a party's 'creative output'—such as a rapper's lyrics or videos—into evidence during a criminal proceeding.").

storytelling in a less obvious and more indirect way: by chilling the speech of rappers who otherwise offer a unique and powerful form of storytelling from the Black community. Part III offers a case study of these issues, and of the benefit of a storytelling lens, by analyzing the admission of rap lyrics in Mr. Bryant's trial. The analysis finds that the judge thwarted Mr. Bryant's ability to provide a rich narrative and counter the prejudicial effect of the rap lyrics. Part IV offers suggestions for enhancing the accused's ability to construct a persuasive story of innocence.

I.
WHAT A STORYTELLING LENS BRINGS TO EVIDENCE LAW CRITIQUES

This Section explains the importance of storytelling in criminal trials to demonstrate that evidence law, including the right to present a complete defense, cannot fulfill its goals if it ignores the importance of trial storytelling. It reviews the widely accepted "Story Model" of jury decision-making and the under-used premise of *Old Chief v. United States*, a U.S. Supreme Court case that acknowledges the importance of storytelling for a fair trial. It argues that storytelling is especially important for Black defendants as a tool for overcoming implicit biases.

This Section then shows how current evidence doctrine overlooks the weight of storytelling and the disparate burdens that criminal defendants face in presenting stories under evidence law. In particular, evidence laws and their application constrain storytelling in the following ways: (1) judges base their rulings on what they believe is relevant and prejudicial, but their decisions reflect their own lived realities and do not sufficiently consider defendants' need to provide extra context because of stereotypes against them; (2) impeachment by prior conviction deters defendants from taking the stand, constraining defendants from providing a story of innocence and meaningfully countering the state's evidence; and (3) prosecutors have police at their fingertips as experts, whereas defendants face serious barriers in accessing expert testimony, again thwarting criminal defendants from constructing an alternative narrative that counters the state's evidence.

A. The Importance of Storytelling in Criminal Trials

In theory, criminal trial jurors assess only the evidence presented at trial and decide the facts of the case after rationally evaluating that evidence. To reach a verdict of "guilty" or "not guilty," they then determine if those facts fit the elements of the crime. However, in practice, juries make their decisions primarily based on stories.[13] Nancy Pennington and Reid Hastie, who developed

13. *See* Brian J. Foley, *Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science with Storytelling*, 43 TULSA L. REV. 397, 398 (2007) ("Juries organize evidence into story

the "Story Model" of jury decision-making, contend that jurors consider not only the evidence admitted at trial but also their prior experiences and stock stories to decide which party's story is more persuasive.[14]

According to the "Story Model," jurors create competing explanations of the evidence and events presented at trial.[15] Typically, jurors use three criteria to develop the most acceptable narrative: coverage, coherence, and uniqueness.[16] "Coverage" refers to how well the story explains the evidence presented.[17] "Coherence" refers to the story's (1) internal consistency, (2) plausibility, and (3) completeness.[18] A consistent story does not contain internal contradictions with the evidence considered to be true or the rest of the explanation.[19] A plausible story is one that corresponds to the decisionmaker's knowledge of what happens typically in the world and does not contradict it.[20] A complete story is one where the structure "has all of its parts."[21] "Uniqueness" refers to the extent to which there is just one story that is coherent and accounts for all the evidence at trial.[22] If the other competing stories offer comparable levels of coverage and coherence, jurors have less confidence in their decision-making.[23]

In developing these stories, jurors draw upon three types of knowledge.[24] First, jurors use case-specific information from the prosecution and defense witness testimonies.[25] Second, jurors draw on the normal experiences in their

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form."); John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1088 (2006) ("[J]urors organize and interpret trial evidence as they receive it by placing it into a story format . . . ."); Jennifer Sheppard, *What if the Big Bad Wolf in all Those Fairy Tales was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that are Harmful to Your Client's Case*, 34 HASTINGS COMMC'NS & ENT. L.J. 187, 188–89 (2012) ("[A] lawyer who relies only on analytical reasoning will not be as effective in persuading a legal audience as the lawyer who incorporates stories into his or her strategy. Lawyers are trained to value logical argumentation; laypersons are not. Consequently, narrative is a powerful tool for persuasion."); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 285 (2013) ("[T]here are points at which particular types of stories can override doubts, even though those doubts, considered dispassionately, have a stronger basis in the evidence . . . ."); ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 7–8 (1999) ([J]ury reasoning is story-based. Juries convert evidence into familiar stories, filling in gaps in the evidence where needed to craft a coherent tale.").

14. Nancy Pennington & Reid Hastie, A *Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521–25 (1991).

15. Griffin, *supra* note 13, at 285.

16. Pennington & Hastie, *supra* note 14, at 527.

17. *Id.* at 527–28.

18. *Id.* at 528.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Clem Turner, *What's the Story? An Analysis of Juror Discrimination and A Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289, 299 (1996).

25. *Id.*

community and compare them to those being contested at trial.[26] Third, each juror uses their general expectations about what makes for a complete story to fill out the story's structure.[27] The literature is vast and shows that the side that can offer a narrative closest to the jurors' own will win.[28]

Because juries make decisions largely through the process of constructing stories, each party must be able to tell plausible and complete stories to the jury. In *Old Chief v. United States*, the U.S. Supreme Court underscored that judges must recognize the importance "of the offering party's need for evidentiary richness and narrative integrity in presenting a case."[29] Evidentiary offerings are to be treated as having a "force beyond any linear scheme of reasoning" because of the special "persuasive power of the concrete and particular."[30] Jurors who "hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters . . . [A]n assurance that the missing link is really there is never more than second best."[31] Thus, the scope of relevant evidence includes that which satisfies the expectations "about what proper proof should be."[32] Though the *Old Chief* opinion focused on the prosecution's ability to use evidence to tell "a

26. *Id.*

27. *Id.*; *see also* Griffin, *supra* note 13, at 294 ("When stories conflict and jurors must privilege one to reach a verdict, they do not rely only on 'case-specific information acquired during the trial,' but also on their experience and values and on 'generic expectations about what makes a complete story.' Triers of fact look for a story that both 'has all of its parts' and corresponds to their 'knowledge about what typically happens in the world.'"); MICHAEL E. TIGAR, EXAMINING WITNESSES 5 (1993) ("People, including judges and jurors, understand and restate events in terms of stories. They take the available evidence and weave it into a coherent whole. If pieces are missing, they will fill in the gaps based on intuition, probability, or prejudgment . . . . ").

28. *See, e.g.*, Pennington & Hastie, *supra* note 14, at 521, 523 (arguing that "jurors impose a narrative story organization on trial information" and "[t]he story that is accepted is the one that provides the greatest coverage of the evidence and is the most coherent"); Blume et al., *supra* note 13, at 1089 ("The jurors then compare their own stories with those offered by the parties. The side who can offer a story which the juror accepts as the 'best' explanation of the evidence presented, and the closest match to his or her own narrative, will win the juror's vote in the end."); Kenworthey Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 435 (2010) (stating that "most people process information by assembling it into plausible 'stories,' and then draw their final conclusions according to which of a set of possible stories makes the most narrative sense").

29. 519 U.S. 172, 183 (1997). Even while recognizing the importance of storytelling, the majority ultimately concluded that the trial court erred by admitting the defendant's full record after he requested to stipulate to his status as a convicted felon. This was because the unfair prejudice of the full record of the defendant's prior conviction outweighed its very limited probative value. The only "story" to be drawn from information of the prior felony was one based on forbidden propensity logic. *See id.* at 190–91.

30. *Id.* at 187.

31. *Id.* at 189.

32. *Id.* at 188.

coherent narrative" to satisfy the expectations of the jurors,[33] defendants likewise require this.[34]

The need for "evidentiary richness" and "narrative integrity" for criminal defendants is arguably even more important because of defendants' constitutional right to meaningfully present a complete defense.[35] The Supreme Court has repeatedly held that rules of evidence and criminal procedure should yield to that important right.[36] Despite the robust protection that the right to present a defense is supposed to offer, defendants' narratives are often constrained by trial judges who decide to exclude important and relevant evidence and appellate judges who validate those decisions on review.[37] In many cases where the accused was later shown to be wrongfully convicted, there were serious problems with withheld, suppressed, and misleading evidence, and, in most of those cases, those issues were never squarely addressed on direct appeal.[38]

Moreover, since prosecutors go first and last, it is even more crucial for the accused to offer a rich narrative and capitalize on their time with the jury. Jurors

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33. *Id.* at 188, 192.

34. *See, e.g.*, United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001) (holding it was error to exclude defendant's evidence because of the need to satisfy juror expectations, explaining: "Vallejo claimed he did not know there were drugs in the car, but he was not allowed to provide an answer for the jurors' question: 'If defendant did not know there were drugs in the car and did not place them there himself, who did?'"); United States v. Beard, 354 F.3d 691, 693 (7th Cir. 2004) ("[T]he duty of a criminal defendant's lawyer to investigate is not satisfied just by looking for ways of poking holes in the government's case. There must also be a reasonable search for evidence that would support an alternative theory of the case.").

35. *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citation omitted).

36. *See, e.g.*, *id.* at 319–20 (finding that a criminal defendant's right to a "meaningful opportunity to present a complete defense" is violated by "evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve") (citations and internal quotation marks omitted); Rock v. Arkansas, 483 U.S. 44, 57 (1987) (striking down a state's per se ban on the admission of post-hypnotically refreshed testimony, finding that it had an adverse effect on the petitioner's ability to testify); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically"). Nevertheless, the right to present a defense is not absolute, and the Supreme Court has affirmed certain limitations on the right. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); *Holmes*, 547 U.S. at 326–27 (explaining that excluding testimony that is only "marginally relevant" would not violate a defendant's right to present a complete defense).

37. *See* Kara MacKillop & Neil Vidmar, *Decision-Making in the Dark: How Pre-Trial Errors Change the Narrative in Criminal Jury Trials*, 90 CHI.-KENT L. REV. 957, 963 (2015) (indicating that "historically there have been admissibility issues (e.g., prejudicial and irrelevant evidence allowed into the trial or important and relevant evidence excluded) that were . . . rubber stamped on appeal" and that, in these situations, "the jury is left with an incomplete or misleading set of facts that require them to apply their own experiences and beliefs to complete the narrative and render a verdict").

38. *See id.* at 962–63 ("A number of exonerations have shown astonishingly consistent problems with withheld, suppressed, and misleading evidence, the vast majority of which were not seriously considered on direct appeal.").

start to create stories early in a case and then focus on information that supports their stories and ignore other information that might be highly relevant.[39] Studies consistently show juries are more likely to remember information presented at the beginning (primacy) and the end (recency) than information presented in the middle.[40] Prosecutors have the advantage of primacy because they go first during opening arguments and are able to frame the issues and preempt defense arguments.[41] They also present their case-in-chief and closing arguments first. Additionally, prosecutors have the advantage of recency in that they offer a rebuttal during closing arguments, but defendants do not,[42] leaving defendants without the opportunity to counter the prosecution's arguments. Thus, the accused must already overcome these cognitive hurdles to persuade the jury.

Because of the way our evidence code is written, juries are often deprived of one of the most crucial pieces of information, if not the most crucial piece of information, in their decision-making process: the defendant's own story.[43] Under Federal Rule of Evidence (FRE) 609 and its state analogues, a criminal defendant's previous convictions may be admitted as impeachment evidence when they testify.[44] Prior convictions are extremely prejudicial, so many defendants with prior convictions stay silent.[45] As a result, the accused often has no opportunity to tell their own story to the jury, including their stories of innocence.[46]

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39. *See* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 303 (1989) (describing how the cognitive phenomenon of "belief perseverance" makes it difficult for jurors to change their mind once they have reached tentative conclusions).

40. *See, e.g.*, James L. Farr, *Response Requirements and Primacy-Recency Effects in a Simulated Selection Interview*, 57 J. APPLIED PSYCH. 228 (1973); James L. Farr & C. Michael York, *Amount of Information and Primacy-Recency Effects in Recruitment Decisions*, 28 PERSONNEL PSYCH. 233 (1975); Norman Miller & Donald T. Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORMAL & SOCIAL PSYCH. 1 (1959).

41. John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 169–71 (2000).

42. *See generally id.* at 174–94 (discussing the advantages of rebuttal); *see also* Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards That Govern Summations in Criminal Trials*, 38 HASTINGS CONST. L.Q. 915, 917–18 (2011) ("The chance for rebuttal argument allows prosecutors to inflict a knockout blow on the cusp of jury deliberations by reinforcing their basic themes as well as responding to novel contentions raised by the defense. Psychological studies indicate that last words are long remembered by listeners. And prosecutors can choose these last words essentially as they see fit.").

43. *See* Rock v. Arkansas, 483 U.S. 44, 52 (1987) ("In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony."); Ferguson v Georgia, 365 U.S. 570, 582 (1961) ("[D]ecades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case."); *see also infra* Part I.B.2.

44. FED. R. EVID. 609; *see infra* Part I.B.2.

45. *See infra* Part I.B.2.

46. *See id.*

For Black defendants, storytelling is especially important as it can help them individuate themselves and combat harmful stereotypes that disproportionately affect them. Research demonstrates that implicit racial bias is practically a universal phenomenon[47] and that people in the United States tend to implicitly associate Black skin with criminality.[48] In studies involving mock juries, mock jurors required less evidence to convict Black defendants than White defendants, tended to resolve ambiguities in favor of the prosecution in cases involving Black defendants, and were more likely to give White defendants the benefit of the doubt.[49] Moreover, prosecutors' narratives often appeal to both explicit and implicit racial bias, yet courts rarely sanction such behavior.[50]

For example, prosecutors have repeatedly compared Black defendants to animals in the courtroom.[51] According to one author, a prosecutor in an Oklahoma capital case introduced an image of an ape on a greeting card that had a caption that said, "patience my a**, I'm going to kill something," and while showing the image to the jury, the prosecutor said "that's [the defendant] in a

47. *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 887 (2019) (stating that social cognition research shows that implicit bias is practically universal); Dotun Ogunyemi, *A Practical Approach to Implicit Bias Training*, 13 J. GRAD. MED. EDUC. 583, 583 (2021) (explaining that implicit bias is universal).

48. *See* Andrew R. Todd, Kelsey Thiem & Rebecca Neel, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCH. SCI. 384, 391 (2016) (finding that after seeing Black faces, White participants had less difficulty identifying threatening stimuli and more difficulty identifying non-threatening stimuli); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 881, 883, 887–88 (2004) (finding that participants were more likely to notice crime-relevant objects when they were presented with Black faces and that participants primed to think about crime were more likely to notice Black faces).

49. *See* Denis Chimaeze E. Ugwuegbu, *Racial and Evidentiary Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCH. 133, 141–45 (1979) (finding that White mock jurors were more likely to resolve ambiguities concerning Black defendants in favor of the prosecution, whereas White defendants were more likely to receive the benefit of the doubt); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 331–39 (2010) (finding that the study's participants who watched the same surveillance video but saw photos of the perpetrator's forearm and hand with dark skin, compared to participants who saw photos showing the perpetrator's forearm and hand with light skin, were more likely to judge ambiguous evidence as indicating guilt).

50. *See* Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 474–75 (2021) (describing how prosecutors regularly use negative stereotypes and dehumanizing rhetoric in trials to persuade juries to convict).

51. *See* Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3106 (2018) (discussing how prosecutors repeatedly compare Black defendants to apes in their summations); Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RSRV. L. REV. 39, 43 n.19 (2020) (discussing how California state courts have repeatedly upheld the prosecutorial rhetoric of analogizing Black defendants to animals); Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 403–04 (2012) (discussing a Louisiana case where "the prosecution referred to the [B]lack capital defendant as '[a]nimals like that (indicating)' and implored the jury to 'be a voice for the people of this Parish' and to 'send a message to that jungle.'") (discussing State v. Harris, 820 So. 2d 471 (La. 2002)).

nutshell."[52] The trial court overruled defense counsel's objection, and the court of appeals determined there was no error and that the prosecutor had no racist intent.[53] Similarly, in *Darden v. Wainwright*, the U.S. Supreme Court considered a case in which the prosecutor referred to the defendant as an "animal" that "shouldn't be [let] out of his cell unless he has a leash on him."[54] Nevertheless, in a 5-4 decision, the Court held that although these comments were improper, they did not deprive the defendant of a fair trial.[55]

Animal imagery is not only dehumanizing, potentially reducing the listener's empathy for the defendant, but it also conjures up violent images about the defendant.[56] When prosecutors trigger the deeply embedded stock story that Black people in the United States are more likely to engage in criminal and violent activity,[57] jurors may fill in gaps in the prosecution's evidence with their pre-existing stereotypes, rather than consider those gaps as "reasonable doubt."[58] Various studies have indicated that information that "individuates" the person being judged—for instance, by providing information about that person's background—can lessen the influence of stereotypes on the decisionmaker's impression formation.[59] Thus, trial court judges should be especially considerate

52. Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 342 (2006) (discussing Allen v. State, 871 P.2d 79, 97 (Okla. Crim. App. 1994)).

53. *Id.*

54. 477 U.S. 168, 179, 180 n.12 (1986).

55. *Id.* at 180–81.

56. *See* Prasad, *supra* note 51, at 3105–06.

57. *See* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 864 (2016) ("Research suggests the existence of implicit stereotypes connecting African Americans with violence, weaponry, hostility, aggression, and immorality."); *see also* Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L REV. 1541, 1559 (2012) ("Race-based out-grouping has predictable implications . . . (such as [W]hites perceiving [B]lacks as presumptively dangerous and culpable), but also some less well-recognized consequences. For instance, people tend to notice the unique and individual characteristics of familiar, in-group members, whereas they are prone to focus on the stereotypical, group-based characteristics of out-group individuals. When a [W]hite person encounters another [W]hite, he or she does not focus on the other's race, but instead processes the unique, individuating attributes (both physical and personal) of the other person. By contrast, when a [W]hite interacts with a [B]lack stranger (or vice versa), psychological processing of the other is much more likely to emphasize race and attributes that are implicitly associated with race (such as "threat"), and to downplay personal traits that do not conform to racial stereotypes.").

58. Conway, *supra* note 50, at 486–87 ("Jurors may fill in gaps in the State's evidence—what might otherwise be reasonable doubt—with their understanding of a particular stereotype.").

59. *See* Roberts, *supra* note 57, at 875–77 (collecting studies); *see also* Ziva Kunda, Paul G. Davies, Barbara D. Adams & Steven J. Spencer, *The Dynamic Time Course of Stereotype Activation: Activation, Dissipation, and Resurrection*, 82 J. PERSONALITY & SOC. PSYCH. 283, 295 (2002) (finding that continued exposure to an individual helps dissipate negative stereotypes); Wayne Chan & Gerald A. Mendelsohn, *Disentangling Stereotype and Person Effects: Do Social Stereotypes Bias Observer Judgment of Personality?*, 44 J RSCH. PERSONALITY 251, 256 (2010) (noting that providing study's participants with details of an individual's behavior reduced the participants' stereotypes, and participants "anchor[ed] on the individual in making their judgments"); Ziva Kunda & Paul Thagard,

of allowing Black defendants, who are most often the target of harmful stereotypes, to provide individuating information. For instance, as Professor Anna Roberts suggests, trial judges should prioritize a defendant's testimony and be more cautious about admitting a defendant's prior convictions.[60] This form of impeachment evidence deters Black defendants with prior convictions from taking the stand, thereby preventing them from providing individuating information that can help combat racial stereotypes.[61]

Some scholars have expressed concern that defendant storytelling could inadvertently shift the burden of proof because jurors may compare each side's story and select the one that best matches their own, rather than subject the prosecution's evidence to its high burden of proving the defendant's guilt beyond a reasonable doubt.[62] Therefore, the thought is that, where the defense can only offer a weak counter-story, it should not present its own evidence and should instead merely poke holes in the prosecution's case. For example, Professor Hastie, who co-developed the "Story Model," posits that "a weak defense story is worse than no story at all."[63] He cites the results of his experiments, which indicate that a weak defense story resulted in slightly higher conviction rates (48 to 54 percent) compared to no defense story (42 to 45 percent), but he notes that the data in his study was not statistically significant.[64] It would, of course, be helpful to have more empirical data on this issue, but it is difficult to come by. Nevertheless, there are also clear benefits to the defense presenting the defendant's and other witnesses' testimony, even beyond telling a story that directly counters the prosecution's. For one thing, there is a "silence penalty" when defendants do not testify: jurors infer guilt from silence, even though they

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Forming Impressions from Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory, 103 PSYCH. REV. 284, 291–92 (1996) (finding that stereotypes that would impact study participants' impressions of an individual's character traits "typically have no such effects when the individual is . . . known to have engaged in an unambiguous behavior that is clearly" relevant to the judgment in question).

60. *See* Roberts, *supra* note 57, at 891 ("If courts consider the importance of the defendant's testimony as a means of combating implicit stereotypes, both truth-finding and the presumption of innocence become a little more achievable.").

61. *See generally id.* (discussing how the use of past conviction evidence to impeach the accused inhibits critical testimony and perpetuates implicit bias and stereotyping).

62. *See, e.g.*, Toni Messina, *Why Defendants Rarely Testify*, ABOVE THE LAW (Sept. 30, 2019, 12:44 PM), https://abovethelaw.com/2019/09/why-defendants-rarelytestify/ [https://perma.cc/CFT3-NGZX] (stating that criminal defendants often do not testify because doing so can shift the burden of proof); Melissa Chan & Madeleine Carlisle, *From Ghislaine Maxwell to Kim Potter, It's the Risk Every Defendant Weighs*, TIME (Dec. 29, 2021, 5:50 PM), https://time.com/6129830/high-profile-defendants-testifying-ghislaine-maxwell-kim-potter/ [https://perma.cc/LZH7-J4A6] (noting that when criminal defendants testify, they run the risk of shifting the burden of proof).

63. Reid Hastie, *The Role of "Stories" in Civil Jury Judgments*, 32 U. MICH. J.L. REFORM 227, 232 (1999).

64. *Id.* at 232 n.35.

are not supposed to.[65] Even defendants who take the stand but add no additional information fare better than those who choose to stay silent.[66] Though defendants who have prior convictions may face a parallel impeachment penalty, as discussed in more detail below, the benefits of testifying for defendants without priors are strong.[67]

B. Challenges to Storytelling in the Courtroom

1. Judge Biases Impact Their Evidentiary Rulings

Judges have considerable power to shape what stories the defendants can tell. By applying the rules of evidence, judges decide "which stories matter (relevancy), which stories are unreliable (hearsay and authentication) . . . which stories are private (privileged),"[68] as well as which stories are too damaging (prejudice) and whether certain people are qualified to tell those stories (expertise).

One of the ways trial judges shape defendants' stories is by determining what evidence is relevant and prejudicial. FRE 401 provides that evidence is relevant if it has any tendency to make a material fact more or less likely than it would be without the evidence.[69] FRE 402 sets forth the general rule that all relevant evidence is admissible except as otherwise provided by rule, statute, or constitution, and irrelevant evidence is inadmissible.[70] FRE 401's concept of relevance is very broad, while FRE 403 narrows it by excluding the evidence if the considerations of unfair prejudice, time waste, or confusion of the issues substantially outweigh the probative value of the evidence.[71] Again, the judge is the one who gets to determine this balance. Even though relevance is not discretionary,[72] appellate courts give the lower courts great deference.[73]

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65. *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 426 (2018); *infra* Part I.B.2. However, as I discuss in more detail below, defendants face a parallel penalty if they testify and have a prior conviction that will impeach them: jurors will use their prior conviction to infer guilt. *See infra* Part I.B.2; Bellin, *supra* note 65, at 426.

66. Bellin, *supra* note 65, at 414 ("Respondents convicted 76% of the defendants who remained silent, but only 62% of equally situated defendants who testified (but added no facts).").

67. *See infra* Part I.B.2.

68. Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J. L. & GENDER 183, 193 (2017); *see also* Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 16, 19–20 (Peter Brooks & Paul Gewirtz eds., 1996) ("All the rules of evidence, including the much-debated exclusionary rule, touch on the issue of rule-governed storytelling.").

69. FED. R. EVID. 401.

70. FED. R. EVID. 402.

71. FED. R. EVID. 403.

72. *See* Myrna S. Raeder, *Irrelevancy: It's All in the Eyes of the Beholder*, 34 HOUS. L. REV. 103, 104–05 (1997).

73. *See, e.g.*, Dunn v. Custer, 162 N.C. App. 259, 266 (2004) ("Although 'the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.'") (quoting

Moreover, judges tend to make their decisions based on FRE 403 because it allows them to use their discretion and avoid the hard issues embedded in FREs 401 and 402.[74] Judges are not required to assume that the jury will misuse the evidence to exclude it under FREs 401, 402, and 403. Instead, the FREs allow judges to exclude evidence if it has insufficient probative value to justify the cost of admitting it. To be sure, the court has a legitimate interest in the considerations listed under FRE 403, such as preventing time from being wasted on irrelevant matters. But judges sometimes dismiss relevant defense evidence as irrelevant too quickly, and it can be very difficult for defendants to get a reversal on that basis.[75]

Judges have implicit biases shaped by their identity and experiences. Because the lived experiences of judges and indigent criminal defendants often differ, not only may the judges be unaware of those defendants' realities, but judges may even assume that all people have comparable experiences.[76] To illustrate how judges' and defendants' realities can differ, Professor Jasmine Gonzales Rose points to situations where Black defendants have fled from law enforcement and White judges must decide the relevance of that flight.[77] Instead of considering the issue from the standpoint of those Black defendants—for example, that the Black defendant may have fled from the police due to racially targeted policing—White judges tend to interpret defendants' actions through their own lived experiences.[78] That is, they often assume that fleeing is probative of a guilty conscience.[79] Additionally, scholars suggest that many judges have a pro-prosecution bias that strongly influences their decision-making on a wide

State v. Wallace, 104 N.C. App. 498, 502 (1991)); *see also* Walker v. State, 301 Ark. 218, 221 (1990) (stating that "[a] trial court's ruling on relevancy is entitled to great deference").

74. *See* Raeder, *supra* note 72, at 104–05.

75. *See id.* at 110–11 (discussing how "some judges are too quick to exclude evidence as irrelevant" and that "reversals for exclusion of relevant evidence are not guaranteed").

76. Judges bring their own backgrounds into their decision-making process. For example, Professor Neitz argues that "[b]ecause judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities and those of poor people," and discusses several Fourth Amendment cases where judges were either unaware or ignored the fact that their decisions created a two-tiered structure of privacy rights. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013). When under the "unrelenting pressure of judicial economy," judges can unintentionally substitute a litigant's story with their own stock stories. Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHOENIX L. REV. 457, 467–68 (2012); *see also* Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 43–44 (1984) ("Unusual stories told by disputants (or by the circumstance itself) are not easily processed when there is neither time nor room for doubt or for further reflection and investigation.").

77. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L REV. 2243, 2280–82 (2017).

78. *See id.* at 2252–54 (describing how White normativity and the tendency for White people not to think about whiteness play a role in admissibility determinations).

79. *See id.* at 2253, 2280; *see also* Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (deeming unprovoked flight in a high crime area to be sufficient to justify a *Terry* stop).

range of evidentiary and other matters, such as discovery disputes and suppression motions.[80]

Because defendants are often relegated to poking holes in prosecutors' narratives and judges do not expect them to provide their own stories, it can be difficult for defendants to find "relevant" reasons for bringing in certain facts.[81] Judges will tend to consider defendants' proffered facts to be irrelevant when they are not closely connected with a legal element of the charges.[82] As Professor Binny Miller points out, this treatment "ignores context and misconceives the power of important facts — especially the client's life facts."[83] Judges may fail to consider the unique need for Black defendants to individuate themselves (for example, by providing background information) so as to rebut racial stereotypes.

In making their evidentiary rulings, judges should consider that juries make decisions based on stories. According to the "Story Model" theory, jurors do not simply count up the evidence when determining whether the government has proven every element of the crime beyond a reasonable doubt.[84] Rather, jurors apply the law to the stories they have constructed.[85] Therefore, in protecting defendants' right to present a meaningful defense, judges must understand that information defendants present to a jury should not just be deemed relevant for disputing the legal elements but also for crafting a compelling story of innocence.

2. *Impeachment by Prior Conviction Deters Defendants from Taking the Stand*

A significant barrier for defendants being able to paint their own narrative to the jury is that the evidence rules, as currently applied, frequently deter them from taking the stand in their defense. Under FRE 609, a prosecutor can admit "recent" prior convictions of the defendant[86] to undermine their credibility if the

80. *See, e.g.*, Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 532, 539 (2007) (arguing that many state court judges have a pro-prosecution bias that affect their rulings).

81. *See* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 498–500 (1994) (describing how the defense practice of poking holes in the prosecution's narrative creates relevancy problems for certain facts).

82. *See id.* at 500; *see also* Robert P. Burns, *Studying Evidence Law in the Context of Trial Practices*, 50 ST. LOUIS U. L.J. 1155, 1158 (2006) ("[T]he narrative theory of the case—itself legally sufficient to establish the elements of a crime or claim (or, for the defense, to negative at least one of them)—will channel all of the relevancy determinations the court will make."); Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34, 34 (Harold J. Berman ed., 1971) ("[F]or without some tentative theory of the case there is no standard of relevance by which testimony may be measured.").

83. Miller, *supra* note 81, at 498–99.

84. *See* Susan N. Herman & Lawrence M. Solan, *The Jury in the Twenty-First Century: An Interdisciplinary Conference - Introduction*, 66 BROOK. L. REV. 971, 975 (2001) (explaining that juries do not "tally" evidence, but instead "apply the law to narratives that they have created").

85. *Id.*

86. By "recent" prior convictions, I mean convictions that are no more than ten years old. *See* FED. R. EVID. 609(b).

defendant decides to testify, including any felony conviction if the judge deems it more probative than prejudicial and any conviction involving a crime of dishonesty, however prejudicial it may be.[87] Prosecutors can also admit evidence of the defendant's prior convictions that are older than ten years if the probative value substantially outweighs the prejudicial effect, which is a more demanding standard.[88] Previous criminal convictions are extremely prejudicial because, although FRE 609 is supposed to be about one's character for truthfulness,[89] jurors tend to assess prior convictions as evidence that the accused has a criminal character in general (not just for truthfulness on the witness stand) and that they are therefore likely to be guilty of the crime charged, despite instructions not to do so.[90] For example, imagine you are a juror and you are told that the defendant

87. FED. R. EVID. 609(a).

88. FED. R. EVID. 609(b).

89. FED. R. EVID. 609(a) ("The following rules apply to attacking a witness's character for truthfulness.").

90. *See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408 (2013) ("There are two well-known facts about evidentiary instructions of both [limiting and instruction-to-disregard] varieties. The first is that our system relies heavily on these instructions. The second is that they do not work."); Carta H. Robinson, *Assessment of Federal Rule of Evidence 609 and the Necessity of a Deeper Collaboration with the Social Sciences for Racial Equality*, 7 IND. J. L. & SOC. EQUAL. 312, 320 (2019) ("It has been proven that jurors cannot manage evidence of a person's prior convictions: they use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions."); Kathryn Stanchi & Deirdre Bowen, *This Is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?*, 89 WASH L. REV. 901, 911 (2014) ("Most studies show that admission of a defendant's prior conviction leads to more guilty verdicts in criminal trials, regardless of whether the jurors receive a limiting instruction."); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1358 (2009) ("Most of the experimental studies show that knowledge of a defendant's criminal record has statistically significant biasing effects on jurors' guilt perceptions and verdicts."); Robert D. Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 23 N.C. CENT. L. REV. 14, 15 (1997) ("[W]hen the prosecution uses the evidence only as it reflects on the defendant's credibility, such evidence should not be used to infer the defendant's propensity to commit crimes makes it probable he or she committed this crime. Nevertheless, such limiting instructions are not likely to have any effect on jurors. It is widely accepted that in all likelihood a jury will consider the evidence for improper purposes."); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 71–73 (1995) (summarizing a mock jury study that found that, during a bank robbery trial, jurors' likelihood of convicting the defendant increased from 17 to 40 percent when they learned about the defendant's prior burglary conviction); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 240, 242, 247–49 (1975) (discussing a study concluding that the groups with knowledge of the defendant's prior conviction rarely used it in weighing his credibility and instead used it to infer that the defendant was more likely to be guilty of the current crime, despite being given an instruction not to do so); Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 95 (1972) (concluding from a mock jury study that jurors' awareness of a defendant's prior convictions increased the likelihood of conviction and that judicial "instructions to disregard the evidence will not counteract the damaging 'halo' effect of the previous convictions"); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (citation omitted).

had committed a prior burglary. This information might make it easier for you to believe that the defendant committed this burglary because you know they are capable of doing so, having done it once before. But the prosecution's duty isn't to show that the defendant is inclined to burglarize; they must show that the defendant committed *this* burglary. The rule against this sort of "propensity" evidence is based not only on a concern that the jury will overvalue such evidence, but that the jury will preventively convict the defendant to punish them for their past, whether or not the jury believes them to be guilty of the instant offense.

In the twentieth century, courts began to recognize the importance of the defendant's testimony. In 1918, the U.S. Supreme Court in *Rosen v. United States*[91] abolished the common law rule that barred a witness from testifying if they had a prior felony conviction. In doing so, the Court recognized the imperative of the defendant's testimony, explaining:

> [T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . .[92]

Until 1975, when Congress enacted the FRE, federal common law determined the admissibility of prior convictions for impeachment in all federal circuits except the District of Columbia, which had a statute governing the issue.[93] Those federal circuits agreed that a court had no discretion to exclude evidence of a prior felony conviction for impeachment.[94] Two District of Columbia Circuit decisions—*Luck v. United States*[95] and *Gordon v. United States*[96]—signaled dissent from the practice of automatic admission. In doing so, they placed heavy weight on whether the prior convictions would chill a defendant's testimony.[97] In *Luck*, the court interpreted a District of Columbia

91. 245 U.S. 467 (1918).

92. *Id.* at 471.

93. Christian A. Bourgeacq, *Impeachment with Prior Convictions Under Federal Rule of Evidence 609(A)(1): A Plea for Balance*, 63 WASH. U. L. Q. 469, 472 (1985); D.C. CODE ANN. § 14-305 (1961) ("No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters . . . .").

94. *See* Bourgeacq, *supra* note 93, at 472.

95. 348 F.2d 763, 769 (D.C. Cir. 1965).

96. 383 F.2d 936, 940 (D.C. Cir. 1967).

97. Roberts, *supra* note 57, at 842–45 (describing how two key cases underlying FRE 609—*Lucky v. United States* and *Gordon v. United States*—emphasized that courts should be alert to the risk that granting motions to impeach by prior convictions might deter defendant testimony and deprive the fact finder of valuable information. The opinions considered this factor as one of the most important to weigh).

statute[98] as giving trial judges the discretion to exclude evidence of a witness's prior convictions if the prejudicial effects of such evidence far outweighed its probative value in determining credibility.[99] The court examined a number of factors relevant to such a determination, but stressed that the principal consideration should be the extent to which it was "more important to the search for truth . . . for the jury to hear the defendant's story than to know of a prior conviction."[100] Likewise, in *Gordon*, the court emphasized that when determining the admission of a defendant's prior convictions, judges should consider the effect if the defendant does not testify out of fear of being prejudiced by their prior convictions.[101] Even though the prosecution might otherwise prevail after the balancing of the prejudice and probative value, according to *Gordon*, the need to avoid chilling defendant testimony could still trump:

> Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.[102]

In 1970, a few years after *Luck* and *Gordon*, Congress amended the statute to strip District of Columbia judges of all discretion to exclude evidence of former felony convictions.[103] Nevertheless, the *Luck* and *Gordon* decisions still had significant influence, with many federal circuits that were not subject to this statute judicially adopting the *Luck-Gordon* approach in assessing the admissibility of prior convictions.[104]

In contrast to earlier case law in the wake of *Luck* and *Gordon*, courts today are far more likely to admit prior convictions with little to no meaningful consideration of how the conviction might prejudice or impair the defendant's ability to testify.[105] When FRE 609 was enacted in 1975, it was a compromise between "two diametrically opposed positions" of the anti-impeachment House

98. D.C. CODE ANN. § 14-305 (1961).

99. *See* 348 F.2d at 767–68 (highlighting the fact that the statute was written in permissive rather than mandatory terms).

100. *Id.* at 769.

101. 383 F.2d at 940 (stating that an "important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions").

102. *Id.*

103. D.C. CODE ANN. § 14-305 (1970); Leslie Lawlor Hayes, *Prior Conviction Impeachment in the District of Columbia: What Happened When the Courts Ran Out of Luck?*, 35 CATH. U. L. REV. 1157, 1160–61 (1986).

104. Hayes, *supra* note 103, at 1161; Donald H. Zeigler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003 UTAH L. REV. 635, 650 (2003).

105. *See* Roberts, *supra* note 57, at 837–38.

and pro-impeachment Senate positions during that time.[106] However, in contrast to the pre-*Luck-Gordon* practice of automatically admitting the prior convictions, the enacted Rule provided substantial protection for the defendant.[107] Unlike FRE 403, where the burden of establishing that relevant evidence should be excluded falls on the opponent of the evidence, FRE 609 protects the defendant by placing the burden of demonstrating the admissibility of a defendant's convictions on the prosecution, thus indicating "an intent on the part of [Congress] that 'close cases' should be decided in favor of the defendant."[108] Following the enactment of FRE 609 in 1975, the Seventh Circuit in *United States v. Mahone* interpreted FRE 609 and used a simplified version of the factors described in *Gordon*.[109] The *Mahone* factors are:

(1)The impeachment value of the prior crime.

(2)The point in time of the conviction and the witness' subsequent history.

(3)The similarity between the past crime and the charged crime.

(4)The importance of the defendant's testimony.

(5)The centrality of the credibility issue.[110]

Commentators have noted that *Mahone* is inherently flawed because the fourth and fifth factors lacked explicit legislative authorization, relying on the pre-FRE 609 decision *Gordon*, and because the balancing test could not be practiced in a "principled" manner because the fourth and fifth factors cancel each other out.[111] If the defendant's testimony is "important," their credibility becomes "central" in equal measure, consequently leading to an equilibrium between the two factors.[112] However, in cases where the defendant's testimony is of less importance, the importance of their credibility is reduced, again creating a standstill.[113] Even though the text of FRE 609, if anything, supports a presumption against admissibility, courts have interpreted *Mahone*'s last two judicial factors as giving rise to a legal presumption that the testifying defendant's prior convictions are admissible.[114]

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106. *See* Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the 'Balancing' Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 920 (1980) (discussing the diametrically opposed positions).

107. *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 306–08 (2008).

108. *Id.* at 310 (citing Surratt, *supra* note 106, at 924).

109. *See* 537 F.2d 922 (7th Cir. 1976); *see also* Roberts, *supra* note 57, at 845.

110. *Mahone*, 537 F.2d at 929.

111. Bellin, *supra* note 107, at 318 (noting commentator critiques).

112. *Id.*

113. *Id.*

114. *Id.* at 330; Roberts, *supra* note 57, at 847, 849 (arguing that federal and state judges often ignore or minimize "the importance of the defendant's testimony" factor and instead "invert the meaning of the factor, ignore it in application, merge it with the fifth factor (the 'centrality of the credibility issue'), or declare that it and the fifth factor cancel each other out").

Although jurors are not supposed to infer guilt from the accused's choice not to take the stand, the data shows that silence comes at a price. Professor Jeffrey Bellin found that jurors punish defendants with a "silence penalty" if they do not testify and that this penalty is nearly as damaging as the prior offender impeachment penalty.[115] He examined the data from both real trials and a mock juror study, and he found that, in real trials, when defendants with priors testified, jurors convicted them 77 percent of the time, but when they did not testify, jurors convicted them 72 percent of the time.[116] When defendants without prior convictions testified, jurors convicted them 41 percent of the time, but when they did not testify, their conviction percentage shot up to 70 percent.[117] The mock juror study also confirmed the "silence penalty."[118] This data suggests that if defendants were able to take the stand in their defense without having to worry about impeachment by prior convictions, there would be significantly fewer convictions.

Because of the way FRE 609 and its state equivalents are applied, many defendants with prior convictions forgo the opportunity to explain their innocence or give their side of events on the witness stand.[119] A 2008 study of DNA exonerees who were wrongfully convicted revealed that 91 percent of those who had prior convictions decided not to testify at trial.[120] According to their counsel, in almost all instances, the reason for doing so was the impact of impeachment by a prior conviction.[121] On the other hand, in jurisdictions that prohibit impeachment by convictions, all the wrongfully convicted defendants decided to testify.[122]

Though FRE 609 uses race-neutral language, it has a disparate impact on Black people.[123] Black people in the United States are disproportionately impacted by the rule because of racial profiling in police traffic stops and stop and frisk, the over-policing of minority neighborhoods, the war on drugs, criminal charging disparities, and other biased investigative and prosecutorial techniques, all of which lead to disparate convictions and sentencing.[124] In turn, racial disparities in criminal convictions and sentences translate into racial disparities in impeachment based on convictions with a sentence of over a year or any crime of dishonesty, even if it is a misdemeanor or would otherwise violate FRE 403. Moreover, because defendants who have prior convictions will

115. Bellin, *supra* note 65, at 426.
116. *Id.* at 421.
117. *Id.* at 420.
118. *Id.* at 413–14.
119. Robinson, *supra* note 90, at 332.
120. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 491 (2008).
121. *Id.*
122. *Id.*
123. *See* Gonzales Rose, *supra* note 77, at 2272.
124. *See id.*

often forgo the opportunity to give their side of events on the witness stand, this rule often prevents Black defendants from having the opportunity to fight against implicit stereotypes by individuating themselves.[125]

3. Disparities in Offering Contextual Information Through Expert Witnesses

Expert testimony can play various important storytelling functions during a criminal trial. Experts can be used at trial to tell virtually the entire story; fill in gaps in a story; provide the jury with a story plot; synthesize relevant literature; and explain the testimony of a particular witness, such as by explaining the deficiencies of human information processing.[126] There is, however, a serious disparity when it comes to presenting expert witnesses at criminal trials. During trials, prosecutors have police witnesses at their fingertips and courts frequently admit them as experts without applying stringent admission standards. In contrast, the defense often lacks expert witnesses both because of the high cost and because courts often exclude them.

The way the expert rules are applied undermines truth and the presumption of innocence. While *Frye v. United States*,[127] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, [128] and *Kumho Tire Co. v. Carmichael* [129] are supposed to keep out unreliable expert testimony, many have commented that, despite these standards, unreliable expert testimony for the prosecution is regularly admitted, often without much resistance, while judges frequently exclude reliable expert testimony for the defense.[130] In cases where the defendant's membership in a gang is at issue, the prosecution will commonly present "expert" police officer testimony. In gang prosecutions, state courts almost always admit police officers as experts, yet they rarely apply the stringent expert standards in admitting them.[131] Police officers, although rarely scientists, often offer sociological and psychological expert testimony against criminal

125. *See* Roberts, *supra* note 57, at 858–863 (discussing how many defendants, even those who have stories of innocence, choose not to testify rather than risk being impeached with their prior convictions. As African American defendants are already overrepresented in the criminal justice system, this rule disproportionately impacts them, especially in light of the tendency of factfinders to fall back on implicit racial stereotypes when they do not hear from African American defendants).

126. *See* Richard Lempert, *Experts, Stories, and Information*, 87 NW. U. L. REV. 1169, 1175–78 (1993).

127. 293 F. 1013 (D.C. Cir. 1923).

128. 509 U.S. 579 (1993).

129. 526 U.S. 137 (1999).

130. *See, e.g.*, Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L. REV. 1265, 1307–08 (2018); Margaret A. Berger, *Expert Testimony in Criminal Proceedings: Questions* Daubert *Does Not Answer*, 33 SETON HALL L. REV. 1125, 1125 (2003); Peter J. Neufeld, *The (Near) Irrelevance of* Daubert *to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107 (2005); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 143–49 (2000).

131. Fareed Nassor Hayat, *Preserving Due Process: Require the* Frye *and* Daubert *Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 196 (2021).

defendants, even though there is no valid scientific basis for their opinions.[132] The result is that jurors are exposed to, and may put great weight on, unvetted junk science.[133]

In many cases, gang experts are allowed to opine about rap or hip hop even when they have no training or experience in these fields.[134] As discussed further in the next Section, rap is an art form that has its own artistic conventions.[135] It is the trial judge's responsibility to closely examine the qualifications of experts as well as the data, principles, and methods that those experts have used in forming their opinions.[136] But trial judges are too often not doing their jobs to keep out police experts who testify without any knowledge of the artistic conventions of rap.[137]

While prosecutors have state-funded police experts, criminal defendants often face barriers in presenting expert testimony. Because defendants may not want to testify and open themselves up to FRE 609 prior conviction impeachment, experts can be an important way of rebutting the prosecution's narrative and offering more nuance to the defense's theory of the case. But expert fees are extremely costly. In 2021, the average hourly fee for expert witness testimony was $550, and the average hourly fee for expert file review and case preparation was $422.[138] Public defense budgets are often insufficient to obtain expert witnesses for the volume of cases.[139] To be sure, the federal system and most states have enacted statutes and rules requiring that the government pay for expert assistance to the defense if it is necessary to a fair trial.[140] For example, 18 U.S.C.A. § 3006A(e) provides that counsel may incur up to $800 in such expenses without prior approval and pay a maximum of $2,400 to an expert, with the judge's approval.[141] But many judges are reluctant to approve experts for the defense ostensibly out of concern for safeguarding public funds.[142] Thus far, when such denials have been appealed for abuse of discretion, appellate courts have given great deference to the trial judges' judgments.[143] Consequently,

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132. *Id.*

133. *Id.*

134. ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 133 (2019) (ebook).

135. *See infra* Part II.A.

136. FED. R. EVID. 702; *see generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

137. *See* NIELSON & DENNIS, *supra* note 134, at 137.

138. JAMES J. MANGRAVITI, JR., KELLY J. WILBUR & NADINE NASSER DONOVAN, 2021 SEAK, INC., SURVEY OF EXPERT WITNESS FEES 2 (2021).

139. Gonzales Rose, *supra* note 77, at 2288.

140. BARBARA E. BERGMAN, THERESA M. DUNCAN & MARLO CADEDDU, 3 WHARTON'S CRIMINAL PROCEDURE § 16:2 (14th ed. 2021).

141. 18 U.S.C.A. § 3006A(e).

142. *See* Stephen A. Saltzburg, *The Duty to Investigate and the Availability of Expert Witnesses*, 86 FORDHAM L. REV. 1709, 1720 (2018).

143. *Id.* at 1723.

though defendants could theoretically hire an expert witness to provide important context to the jury, indigent defendants (or poor defendants who can barely afford an attorney) will often lack access to such expertise.

Even when defendants are able to hire experts to testify, judges frequently exclude them. A review of federal criminal court decisions discovered that while 92 percent of prosecution experts survived challenges by the defense, only 33 percent of defense experts survived challenges by the prosecution.[144] Another study looking at the admission of experts found that judges admitted prosecution experts far more frequently at trial, with 95.8 percent of prosecution experts admitted compared to only 7.8 percent of defense experts.[145] The result is that many trials have an expert on the prosecution side (even unreliable ones) but none on the defense.

II.
THE DANGERS OF USING RAP LYRICS IN CRIMINAL TRIALS: UNDUE PREJUDICE AND THE CHILLING EFFECT ON COUNTER-STORYTELLING

The previous Section discussed how application of evidence law often impedes defendants' abilities to present a "coherent narrative," despite research and case law recognizing the "need for evidentiary richness and narrative integrity in presenting a case."[146] This Section analyzes how prosecutors are routinely able to circumvent the rule against propensity evidence and bring in defendants' rap lyrics at criminal trials and how jurors' entrenched assumptions about rap music create a default narrative about the defendant. In turn, because evidence rules strongly discourage many defendants from testifying, defendants rarely have a meaningful opportunity to counter this default narrative. As this Section explains, the routine admission of prejudicial rap lyrics also stifles counter-storytelling in a less obvious and more indirect way by chilling the speech of rappers who otherwise offer a unique and powerful form of storytelling from the Black community.

A. Rap as Counter-Storytelling to Challenge White Dominance

Critical Race Theory (CRT) suggests the use of storytelling as a method to give voice to marginalized populations. Richard Delgado, one of the co-founders of CRT, encourages marginalized groups to use counter-storytelling as an

144. *See* D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock*, 64 ALB. L. REV. 99, 109–10 (2000) (noting that his data reveals that "rarely has a federal prosecutor had proffered expertise excluded on dependability grounds").

145. Jennifer L. Groscup, Steven D. Penrod, Christina A. Studebaker & Matthew T. Huss, *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCH. PUB. POL'Y & L. 339, 346 (2002).

146. Old Chief v. Unites States, 519 U.S. 172, 183, 192 (1997).

advocacy strategy,[147] arguing "stories can shatter complacency and challenge the status quo."[148] Counter-storytelling involves people from subordinated groups whose voices have historically been silenced and marginalized telling stories.[149] According to CRT, these stories can facilitate social transformation because they educate people about the ways racism and subordination operate; as a result, they can provide a guide for tearing down unfair structures and constructing more equitable institutions.[150] In educating readers about events, people, and places with which they are not familiar, the contextual narrative can help listeners from the majority group to empathize with the outside group.[151] Storytelling is, accordingly, one of the main methodological tools of CRT legal scholarship.[152]

Like CRT, the hip hop movement was born in the 1970s, and it shares a discontent with the state of racial inequities.[153] And just as CRT scholars employ storytelling in legal scholarship to reveal the cruelty of the majoritarian rule, hip hop artists have used storytelling to enlighten listeners about the racial injustices experienced by minorities.[154] Though it originated in the South Bronx as party music, hip hop has since evolved into many subgenres and is now one of the most popular music genres across the world.[155] In the mid-1980s, rap music, flowing out of hip hop, began to take on a new tone, inspired by the Black Arts tradition.[156] Rejecting then-commercially dominant Black art forms that Black Arts poets considered to be overly dependent on White America and too uncritical of it, many Black Arts poets during the 1960s and 1970s used explicit, provocative, and violent rhetoric.[157] Central aspects of the Black Arts tradition include its open rejection of White norms, its depiction of the suffering experienced by poor and working-class African Americans due to poverty and systemic racism, and its embodiment of Black storytelling traditions and the Black vernacular.[158] Following this tradition, rap artists in the mid-1980s became more confrontational.[159] Groups including N.W.A. and Ice-T on the West Coast

147. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989).

148. *Id.*

149. *See id.* at 2412.

150. Reginald Oh & Thomas Ross, *Judicial Opinions as Racial Narratives: The Story of* Richmond v. Croson, *in* RACE LAW STORIES 381, 389 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

151. *Id.* at 390.

152. Richard A. Jones, *Philosophical Methodologies of Critical Race Theory*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17, 22 (2008).

153. andré douglas pond cummings, *Richard Delgado and Ice Cube: Brothers in Arms*, 33 L. & INEQ. 321, 321–22 (2015).

154. *Id.* at 326.

155. Abenaa Owusu-Bempah, *The Irrelevance of Rap*, 2 CRIM. L.R. 130, 130 (2022).

156. NIELSON & DENNIS, *supra* note 134, at 36–37.

157. *Id.* at 35–36.

158. *Id.* at 36.

159. *Id.* at 37.

and Public Enemy and Boogie Down Productions on the East Coast used rap as a way to attack institutions of power in the United States.[160]

Rap music is used both as a means of cultural expression as well as a discursive resistance to structures of domination.[161] Rapper Killer Mike writes:

> [A]s an art form, it serves as a safe space where we can celebrate our blackness and each other—and be comfortable in our own skin while we do it. It has offered us a kind of therapy as well, a place to express even our rawest feelings. And it has given us a way to say just things in unjust times.[162]

Rap music often challenges the status quo that harms Black people. For example, N.W.A.'s 1998 hit [*F*ck*] *tha Police* echoes the same message coming out of the Black Lives Matter movement: opposition to police brutality and racial profiling. In the song, N.W.A. raps:

> A Young [n****] got it bad 'cause I'm brown
>
> And not the other color so police think
>
> They have the authority to kill a minority
>
> [F*ck] that [sh*t], 'cause I ain't the one
>
> For a punk [motherf*cker] with a badge and a gun
>
> To be beatin' on, and thrown in jail[163]

Often, rap uses more discrete ways of criticizing power structures. As one sociologist reflects:

> Rap music is, in many ways, a hidden transcript. Among other things it uses cloaked speech and disguised cultural codes to comment on and challenge aspects of current power inequalities. Not all rap transcripts directly critique all forms of domination; nonetheless, a large and significant element in rap's discursive territory is engaged in symbolic and ideological warfare with institutions and groups that symbolically, and materially oppress African Americans. In this way, rap music is a contemporary stage for the theater of the powerless.[164]

On this "stage," rappers perform inversions of the status hierarchy, tell stories from their community about their interactions with law enforcement and the education system, and paint portraits of experiences with dominant groups.[165]

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160. *Id.*

161. TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 124 (1994).

162. NIELSON & DENNIS, *supra* note 134, at ix.

163. N.W.A., *Fuck tha Police*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records/Priority Records/EMI Records 1988), lyrics available at http://www.lyricsdepot.com/n-w-a/fuck-tha-police.html [https://perma.cc/36D7-RHJX].

164. ROSE, *supra* note 161, at 100–101.

165. *Id.* at 101.

Narrative storytelling is prevalent in rap. West Coast "gangsta rap" originated in the Black working-class communities of Los Angeles and is known "for its rich descriptive storytelling laid over heavy funk samples."[166] It is also known, and controversial, for lyrics that are misogynistic and glamorize violence and drugs.[167] Some of the earliest gangsta rap artists depicted their own lived experiences in gangs.[168] However, according to many artists and scholars of rap, many songs in the genre are not intended to have a literal meaning.[169] As American historian and academic Robin D.G. Kelley put it:

> Many of the violent lyrics are not intended to be literal. Rather, they are boasting raps in which the imagery of gang bangin' is used metaphorically to challenge competitors on the microphone—an element common to all hard-core hip hop. The mic becomes a Tech-9 or AK-47, imagined drive-bys occur from the stage, flowing lyrics become hollow-point shells.[170]

Kelley explains that "exaggerated and invented boasts of criminal acts" by the narrator are often intended to be comical and unbelievable, "essentially verbal duels over who is the 'baddest [motherf*cker] around'" which are "not meant as literal descriptions of violence and aggression, but connote the playful use of language itself."[171] Artists themselves have described rap in similar nonliteral terms. Ice Cube, a prominent gangsta rap artist, appeared on the Charlie Rose show in 1998 and said that his music is "done in a storytelling, *theatrical* way."[172] Ice-T, a pioneer of gangsta rap, composed lyrics that were sometimes semi-autobiographical, but he would also draw on things he had witnessed or heard about that had not literally happened to him in particular.[173] He states,

> I couldn't possibly have lived all the things that Ice-T on the records lived . . . . I did what I called 'faction.' It was like factual situations—not always from me—put into fictional settings. That way I could create these great adventures and these great stories.[174]

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166. ROBIN D.G. KELLEY, RACE REBELS: CULTURE POLITICS, AND THE BLACK WORKING CLASS 189, 186–89 (1996).

167. *Rap*, ENCYC. BRITANNICA, https://www.britannica.com/art/rap [https://perma.cc/S843-4VJZ] (last visited Feb. 26, 2023).

168. Nathan Abrams, *Gangsta Rap*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/gangsta-rap [https://perma.cc/ZW7H-5V6Q].

169. KELLEY, *supra* note 166, at 189–90.

170. *Id.* at 189–90.

171. *Id.* at 190.

172. ANNETTE SADDIK, CONTEMPORARY AMERICAN DRAMA 94 (Martin Halliwell & Andy Mousley, eds., 2007) (emphasis added).

173. KELLEY, *supra* note 166, at 188.

174. NAT'L PUB. RADIO, *Ice-T, From 'Cop Killer' To 'Law & Order'* (Apr. 27, 2011, 2:04 PM ET), https://www.npr.org/2011/04/27/135771115/ice-t-from-cop-killer-to-law-order [https://perma.cc/3NTX-JABM].

This use of playful, nonliteral narrative storytelling is not specific to West Coast gangsta rap, but is typical of hip hop and rap music more generally, with many rappers drawing on stories from their neighborhood without it necessarily being their own story or taking on characters from popular culture.[175]

The observation that rap is often fictional is not meant as an apology for its sometimes-misogynistic content. Slurs towards women in lyrics have potentially harmful effects, even when playful or used metaphorically.[176] Instead of examining critiques of the art form itself, however, this Note problematizes how prosecutors cherry-pick offensive content to vilify criminal defendants and how the evidentiary rules impede criminal defendants from countering such misleading evidence effectively. Even misogynistic or otherwise offensive lyrics can be better understood with context and knowledge of their authors' motivations. Allowing the state to selectively quote from violent, misogynistic, or otherwise offensive rap lyrics without allowing the defense to offer a fuller context or counter-narrative skews how jurors perceive the defendant, leaving jurors with inaccurate and incomplete information and unrefuted racial stereotypes.

B. Rap Lyrics as a Means of Facilitating Criminal Prosecution

1. Law Enforcement Targets Rap Lyrics to Use as Evidence

Prosecutors have increasingly turned to rap lyrics as evidence against the accused in criminal prosecutions, a practice that disproportionately impacts Black men, who are the primary performers of this music genre.[177] In the 1990s, rap lyrics were used in this way for the first time, and since then, using rap lyrics

175. *See* Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 23 (2007) (discussing how "role-playing is a crucial facet of narrative" in rap).

176. Exposure to misogynist music has been shown to "increase hostile and aggressive thoughts," which may correlate to "more permanent hostility toward women." *See* Nancy F. Russo & Angela Pirlott, *Gender-Based Violence: Concepts, Methods, and Findings*, N. Y. ACAD. OF SCIS., 178, 190 (2006).

177. *See* 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 [https://perma.cc/2ADQ-V5XM] ("We found more trials involving rap lyrics in the past decade than during the heyday of the war on crime in the 1990s, which suggests that the practice has become more prevalent despite a broader awareness of racial disparities in the courts and the need for reform. We identified about 50 defendants who were prosecuted using rap between 1990 and 2005, but we found more than double that number in the 15 years that followed."); Erik Nielson, *Prosecuting Rap Music*, HUFFINGTON POST (May 26, 2013 4:41 PM), https://www.huffpost.com/entry/prosecuting-rap-music_b_2956658 [https://perma.cc/7X2X-ZT6L] ("Indeed, the image rappers project is one that maps perfectly to the stereotypes about [B]lack men, the primary performers of rap, that have hardened as fact among many Americans. Rather than see an artist at work, juries may see the commonly-perpetuated caricature of a violent and dangerous man who is deserving of punishment.").

as evidence has become common practice.[178] In a 2004 publication, Alan Jackson, a former prosecutor at the Los Angeles County District Attorney's Office, advises prosecutors to introduce juries to the "real defendant" by using the defendant's lyrics.[179] He states:

> [B]y the time the jury sees the defendant at trial, his hair has grown out to a normal length, his clothes are nicely tailored, and he will have taken on the aura of an altar boy. But the real defendant is a criminal wearing a do-rag and throwing a gang sign.[180]

Among other things, Jackson advises prosecutors to use music lyrics to "invade and exploit the defendant's true personality."[181] In essence, Jackson suggests that prosecutors should use the music as character evidence, which is prohibited unless the defendant injects character into the trial by presenting "good" character evidence about themself or "bad" character evidence about the victim.[182] Moreover, the defendant that Jackson had in mind is clearly Black, with durags most commonly being associated with Black men.[183]

Perhaps the reason rap music is often referred to nowadays in criminal prosecutions is because law enforcement assumes the lyrics are reflective of the truth. In 2006, the U.S. Attorney's Office published a bulletin stating: "In today's society, many gang members compose and put their true-life experiences into lyrical form. . . . Law enforcement officials must remain mindful of . . . the opportunities to obtain inculpatory evidence in gang-related investigations and cases."[184] The bulletin recommends that law enforcement look for rap lyrics when searching homes and jail cells, stating: "Many gang members compose hip hop lyrics that reflect true-life experiences. Search warrants of homes and jail cells often net such writings."[185] Despite endorsing the idea that rap lyrics are representative of real-life occurrences, the bulletin fails to cite any research that indicates rap music generally reflects reality, nor does it cite any examples of the types of lyrics that supposedly reflect "true life."

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178. Reyna Araibi, *"Every Rhyme I Write": Rap Music as Evidence in Criminal Trials*, 62 ARIZ. L. REV. 805, 807–08 (2020).

179. ALAN JACKSON, BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, AMERICAN PROSECUTORS RESEARCH INSTITUTE, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 15–16 (2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf [https://perma.cc/9XU3-4ZZA].

180. *Id.*

181. *Id.* at 16.

182. *See* FED. R. EVID. 404(a)(2)(A)–(B).

183. *See generally* Brian Josephs, *Who Criminalized the Durag?* GQ (Mar. 2, 2017), https://www.gq.com/story/who-criminalized-the-durag [https://perma.cc/4GRB-EF5N] (discussing the relationship between durags and Blackness, and how the criminalization of this relationship is part of an ongoing trend of punishing Black expression).

184. Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, 54 U.S. ATTY'S BULL. 1 (2006).

185. *Id.* at 8.

To clarify, I am not arguing against the admission of rap lyrics with a close connection to the case at hand. The mere fact that a confession is in lyrical form should not shield the lyric from coming in at trial. Rather, my argument is that lyrics bragging about previous exploits unrelated to the crimes charged, whether real or not, are propensity evidence that should be inadmissible at trial. Moreover, judges should not admit rap lyrics when there are only vague similarities between the crimes charged and the lyrics.

2. *Rap Lyrics Reinforce Racial Stereotypes and Are Often Unduly Prejudicial*

The use of rap lyrics as evidence of guilt presents unique problems, with the lyrics being likely to trigger racial stereotypes and produce undue prejudice in jurors unfamiliar with the genre.[186] In a 2007 Pew Research Center poll, more than 70 percent of Americans assessed rap music negatively, with 71 percent of Black people and 74 percent of White people believing that rap had an overall negative impact on society.[187] Rap lyrics have been found to elicit emotions that increase the prejudice of people deciding another's guilt. For example, participants in one experimental research study who were shown a defendant's violent and misogynistic rap lyrics were considerably more likely to think that the defendant committed the murder than participants who were not exposed to the lyrics.[188] The lyrics in the study invited negative inferences "that nice males don't write ugly lyrics and that males who do are definitely not nice."[189] In fact, the lyrics had a greater negative impact on the participants than the knowledge that the defendant was on trial for murder.[190] While it could theoretically be true that a person who writes lyrics with violent imagery is more likely to commit murder than someone who has never written such lyrics, that sort of evidence is inadmissible. It is inadmissible not because it is irrelevant (relevance is a low bar), but because it is unduly prejudicial character evidence that might cause the jury to overvalue the evidence or convict the defendant for their character for violence instead of what they are charged with.

In contrast to violent lyrics from other music genres, rap music creates a disproportionately strong negative bias and perception that the lyrics are threatening and true. For example, in one study, individuals were read the same

186. *See* Luke Walls, *Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics to Prove Defendants' Character*, 48 SW. L. REV. 173, 191–93 (2019).

187. PEW RESEARCH CTR., OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS 43–44 (2007), https://www.pewresearch.org/wp-content/uploads/sites/3/2010/10/Race-2007.pdf [https://perma.cc/32S5-ZHXB].

188. *See* Stuart P. Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 795 (1999).

189. *Id.* at 803.

190. *Id.*

lyrics and told they were from country music, heavy metal, or rap.[191] When the identical music lyrics were presented as rap, participants were more likely to think that the songwriter had a criminal record and was involved in a gang and criminal activity.[192] Participants who imagined the songwriter to be Black judged him more negatively than participants who imagined he was White.[193]

Moreover, in determining lyrics' admissibility, courts tend to make assumptions about rap lyrics that are not research-based and that harm the accused's ability to provide a counter-narrative. Professor Andrea Dennis's research finds that courts assume that rap lyrics are (1) a subject of common knowledge, (2) subject to literal interpretation without reference to artistic constraints, where their probative value depends on a literal interpretation, and (3) autobiographical in nature.[194] These assumptions not only skew judicial rulings in favor of admissibility, but they also limit the accused's own opportunity to provide a counter-narrative. For example, Dennis explains that because lyrics are considered to be a subject of common knowledge, courts generally do not view the interpretation of rap lyrics as requiring specialized or expert knowledge.[195] Some courts even reject the testimony of defendants' expert witnesses.[196] In such cases, the defense's ability to describe the deeper meaning of the lyrics—for instance, that they utilize certain artistic conventions (such as metaphor and hyperbole)—is hamstrung, especially if the accused does not testify.

Ultimately, prosecutors' use of rap lyrics in trials is flawed because of its negative impact on both the jury and judge. The music genre itself not only has a reputation associated with violence amongst the general populace and, by extension, the jury, but it also fares poorly with judges when courts decide on lyrics' admissibility. This culmination of factors paints an alarming picture regarding prosecutors' use of rap music as evidence in trials.

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191. *See* Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 516–17 (2018).

192. *Id.* at 518.

193. *Id.* at 519–21 (however, when race was provided, it did not affect judgments).

194. Dennis, *supra* note 175, at 13–16.

195. *Id.* at 13.

196. *Id.* (discussing *United States v. Wilson*, in which the court "rejected the testimony of the defendant's expert witness and implied that the interpretation of rap music lyrics would not be a subject worthy of expert testimony") (citing 493 F. Supp. 2d 484 (E.D.N.Y. 2006)). *But see* United States v. Herron, No. 10-cr-0615 NGG, 2014 WL 1871909, at *7 (E.D.N.Y. May 8, 2014) (finding that the expert would provide useful context for the jury, especially jurors unfamiliar with hip hop or rap, about the truthfulness or authenticity of statements made in gangsta rap lyrics), *aff'd*, 762 F. App'x 25 (2d Cir. 2019)

3. How Unduly Prejudicial and Irrelevant Lyrics Come in at Trial

Despite the music's prejudicial effects and the general inadmissibility of character-for-propensity evidence in trials, prosecutors admit lyrics through various ways. In a content analysis of 160 state and federal criminal cases over a five-year period between 2012 and 2017, scholars Erin Lutes, James Purdon, and Henry Fradella found five main ways prosecutors get rap music in at trial: "(1) to prove gang affiliation for sentencing enhancement purposes; (2) as evidence of the commission of the *actus reus* of a crime; (3) as direct evidence of having communicated a threat; (4) to prove motive, knowledge, intent, identity, or character; or (5) to establish what incited the commission of a crime."[197]

In theory, the judge must weigh the relevance of potentially inflammatory lyrics against the possibility that jurors will make impermissible inferences from it, and the judge should exclude the lyrics if they are substantially more prejudicial than probative. Under this test, judges should presumably exclude many lyrics, given the evidence that jurors tend to interpret and misuse lyrics as propensity evidence.[198] In practice, however, courts typically give prosecutors a lot of leeway to use rap lyrics for the "legitimate" purposes described above, ruling, without citing research, that jurors will be able to give the lyrics their appropriate weight. Thus, these methods can allow prosecutors to circumvent the rule against character or propensity evidence under the guise of a permissible legal reason, and jurors end up "forming an impermissible chain of inferences in their minds," such as "this person writes violent rap, so they are of bad character, so they are guilty."[199]

Despite First Amendment protection for rap music and the prohibition of using irrelevant lyrics at trial because it is protected speech,[200] prosecutors often successfully introduce irrelevant lyrics that prejudice the defendant through filing gang enhancements.[201] While the rap lyrics are perhaps relevant to prove gang membership, they might not be relevant to the actual charges.[202] It appears

197. Erin Lutes, James Purdon & Henry 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, 91 (2019).

198. *See infra* Part II.B.2.

199. *See* Jason Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 482 (2009).

200. The Supreme Court has held that courts should not "sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects." Street v. New York, 394 U.S. 576, 594 (1969). The First Amendment does not "prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993). However, it is unconstitutional to use protected speech when the speech is irrelevant to the case. *See* Dawson v. Delaware, 503 U.S. 159, 267 (1992) (holding that evidence of the defendant's Aryan Brotherhood tattoo violated his First Amendment right because the prosecution failed to show that the tattoo was relevant or that it proved anything more than the defendant's "abstract beliefs").

201. Lutes et al., *supra* note 197, at 129.

202. *See id.*

some prosecutors may know and even intentionally exploit this. Indeed, Jackson's manual advises prosecutors to use gang enhancements, saying, "The easiest way to get gang evidence admitted in trial is by filing a substantive gang crime or gang enhancement allegation."[203] Thus, unless the judge bifurcates the trial, the rap lyrics—which are admitted through the gang enhancement filing—are introduced before the defendant has been convicted of the underlying crime. Consequently, when evaluating whether the defendant is guilty of the underlying offense, the jurors have already been exposed to evidence that would have been inadmissible as irrelevant and unduly prejudicial character evidence had the gang enhancement not been filed.[204] Moreover, Jackson's strategy raises the specter of prosecutors making charging decisions based on a desire to get evidence in at trial, rather than on whether such enhancements will lead to a sentence that aligns with legitimate purposes of punishment.

Even if a criminal defendant's past actions cannot be introduced to show that they had a bad character and acted consistently with that bad character on a particular occasion, prosecutors are able to admit character evidence under the exceptions listed in FRE 404(a)(2) and (b)(2).[205] Lutes et al. observed that in nearly 43 percent of the cases where rap lyrics were admitted, they were introduced as an exception for use as character evidence because the defendant "opened the door," or because the evidence demonstrated motive, intent, means, opportunity, identity, or the like.[206] Prosecutors can admit prejudicial lyrics at trial as character evidence to rebut the defendant's evidence of good character.[207] For example, in *Commonwealth v. Hawkins*, the court determined that the defendant put his reputation for peacefulness at issue by testifying that he avoids conflict and violence.[208] The court allowed the prosecution to enter a video depicting the defendant "performing a song that extols conflict and bloodshed."[209] Thus, the court used the defendant's artistic expression as a proxy for the defendant's character, insisting that the video had "high probative value as character evidence."[210] Nowhere in the opinion did the court engage in a determination of whether the lyrics had a close connection to the crime. Rather, the lyrics were simply permitted as character evidence. Admission of lyrics in this fashion is highly concerning because it allows the decisionmaker to infer a bad character, not from evidence that the defendant engaged in morally

203. JACKSON, *supra* note 179, at 21.

204. *See* Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 146 (2019) (discussing how state gang statues deprive criminal defendants of their due process rights by allowing prosecutors to admit otherwise inadmissible character evidence in criminal trials).

205. *See* Lutes et al., *supra* note 197, at 108–21; FED. R. EVID. 404(a)(1), (b)(2).

206. Lutes et al., *supra* note 197, at 108–21.

207. *See id.* at 120–21; FED. R. EVID. 404(a)(2)(A).

208. No. 1184 MDA 2012, 2014 WL 10986149, at *12 (Pa. Super. Ct. Feb. 7, 2014).

209. *Id.*

210. *Id.* at *13.

reprehensible acts, but from the mere fact that the defendant rapped about such acts.

To further understand how often courts exclude defendants' rap lyrics or videos or overturn lower courts' decisions for erroneously admitting them, I examined a systematic sample of criminal cases in the year 2021 involving such rulings.[211] My analysis found no cases in which an appeals court overturned a lower court's decision to admit a defendant's irrelevant lyrics. In eight decisions, appellate courts explicitly addressed why the lower courts did not abuse their discretion in holding that the rap lyric evidence was properly admitted.[212] In an

211. I examined criminal cases, both published and unpublished, in the United States' state and federal courts from January 1, 2021 to January 1, 2022, collecting all cases run from the following search in Westlaw: adv: (rap /5 lyric! video!) /p admiss! relev! prej! The search yielded a total of thirty-eight cases. I excluded sixteen of these cases because those opinions either did not analyze whether the music videos or lyrics were admissible, or they were analyzing the use of the rap lyrics at a different stage, such as in the punishment stage, rather than at the trial. *See* Jason B. Binimow, Annotation, *Admissibility of Rap Lyrics or Videos in Criminal Prosecutions*, 43 A.L.R. 7th Art. 1 (2019) (suggesting the use of these search terms for reviewing cases addressing the admissibility of rap lyrics or videos in criminal prosecutions).

212. *See* United States v. Sims, 11 F.4th 315, 324 (5th Cir. 2021) (finding, for example, that the probative value of rap videos depicting the defendant flashing guns and money while rapping about violence and pimping, talking about "selling [W]hite [b*tches]" and how rich and famous performers were, and depicting drug use and weapons was not substantially outweighed by their prejudicial effect, where, although the videos spoke only generally to the pimping lifestyle and were cumulative of the testimony in that regard, the violence and weapons depicted in the videos were relevant to the force charge and the videos were not harmful to the defense), *cert. denied*, No. 21-6433, 2022 WL 89626 (U.S. Jan. 10, 2022); People v. Follings, No. A157571, 2021 WL 5896014, at *10–11 (Cal. Ct. App. Dec. 14, 2021) ("The video was clearly relevant to the gang allegations charged against both defendants and whether their actions were committed for the benefit of and in association with a criminal street gang. Moreover, the probative value of this evidence was not substantially outweighed by the probability that its admission would unduly prejudice or confuse the jury. . . . Nor was the gang video evidence likely to evoke an emotional response against the defendants."); People v. Hicks, No. A159863, 2021 WL 3878611, at *16 (Cal. Ct. App. Aug. 31, 2021) (holding that the trial court did not abuse its discretion in allowing a rap YouTube video to be played silently in light of its probative value to corroborate eyewitness testimony, its relatively non-inflammatory content, and because there was other evidence of the defendant associating with people who carry guns), *review denied* (Nov. 10, 2021); People v. Namauu, No. H046070, 2021 WL 1526755, at *26 (Cal. Ct. App. Apr. 19, 2021) (rejecting the defendant's challenge to the admission of his rap lyrics, finding, for example, that the defendant's "relationship to the gang was a disputed factual question, for which [the defendant's] rap lyrics held probative value"), *review denied* (June 30, 2021), *cert. denied sub nom.* Thomas v. California, 142 S. Ct. 600 (2021); People v. Rizo, No. C088543, 2021 WL 3721410, at *13, *15 (Cal. Ct. App. Aug. 23, 2021) (holding that the trial court's admission of the defendant's rap lyrics was proper as the lyrics were "relevant to prove motive and intent" regarding his membership in a gang and that the lyrics "were neither cumulative nor particularly inflammatory"); People v. Hines, 2021 COA 45, ¶ 44 (Colo. App. 2021) ("[T]estimony that Hines had posted a video of a recording entitled 'ImaPimp' on his Facebook page was admissible as direct evidence that Hines was a pimp. True, as Hines points out, a witness testified that the word 'pimp' is a common term used in rap music. But we disagree that this fact made the evidence irrelevant or unduly prejudicial."), *cert. denied*, No. 21SC360, 2022 WL 103337 (Colo. Jan. 10, 2022); People v. Bowie, No. H045010, 2021 WL 4841308, at *8 (Cal. Ct. App. Oct. 18, 2021) (holding that the trial court did not abuse its discretion in admitting the defendant's rap lyrics—which stated "I do do this shit I rap about"—explaining that the evidence "was relevant to support an inference that defendant was a gang member who was willing to engage in violence for the gang, and explained why defendant might shoot someone who was fighting with his friend"), *review denied* (Dec. 29, 2021);

equal number of decisions, the court simply affirmed the trial courts' judgments, determined that the claims were procedurally barred, or found that the defendant did not meet their burden of demonstrating prejudice, all without stating whether the lyrics were improperly admitted.[213] Though there were three cases where appellate courts determined lyrics were not relevant or were unduly prejudicial, they did not reverse, deeming the errors to be harmless.[214] Moreover, my analysis

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People of California v. Mendoza, No. A157489, 2021 WL 302739, at *7 (Cal. Ct. App. Jan. 29, 2021) ("[T]here is a clear nexus between the rap lyrics written by Mendoza prior to DelToro's murder and the circumstances of the charged offenses, and thus a persuasive basis exists for considering them at face value as a reflection of Mendoza's true motive and intent."), *review denied* (Apr. 14, 2021).

213. *See* United States v. Gilbert, 855 F. App'x 228, 229 (5th Cir. 2021) ("Gilbert's assertion that his rap song should have been excluded under Federal Rule of Evidence 403 because it was unfairly prejudicial, is unavailing. Even if we assume the district court abused its discretion, any error was harmless."); Commonwealth v. Beverly, 251 A.3d 1273, 1273 (Pa. Super. Ct. 2021) (affirming the trial court's decision to admit the defendant's rap video without legal analysis to the issue, stating: "The trial court aptly addressed Appellant's evidentiary . . . issues in its . . . opinion. We thus rely on the trial court's opinion in concluding that these issues lack merit"); Dunn v. State, 312 Ga. 471, 479–80 (2021) ("Although we are doubtful that Dunn's Sixth Amendment rights were violated since he points to no testimonial statement in the video, we need not determine whether the trial court erred in admitting the video on any of the grounds Dunn raises because we conclude that any error in the admission of the video was harmless."); People v. Noble, 2020 IL App (1st) 190409-U, ¶ 94 (Ill. App. Ct. 2021) ("As the state points out, defendant objected to the introduction of the video at trial based on relevancy and prejudice; not hearsay as he raises in this appeal. The failure to object to an alleged error at trial and preserve it in a posttrial motion, results in forfeiture of the issue on appeal."), *appeal denied*, 184 N.E.3d 1007 (Ill. 2022); State v. Davis, 965 N.W.2d 180 (Table), 2021 WL 3627742, at *1 (Wis. Ct. App. Aug. 17, 2021) (affirming trial court's denial of the appellant's motion for postconviction relief wherein he argued that that trial court erred in allowing the admission of violent rap lyrics possessed by the petitioner, finding that the claim was procedurally barred), *review denied*, 2022 WI 93, 2021 WL 9781532 (Table) (Wis. 2021); Davis v. Payne, No. 4:18-cv-01534-SEP, 2021 WL 4504379, at *4, *5 (E.D. Mo. Sept. 30, 2021) (rejecting habeas relief on the petitioner's claim that the trial court erroneously admitted the detective's testimony about the petitioner's YouTube rap video he recorded before the assault because it was highly prejudicial and irrelevant, finding that the petitioner had "failed to meet his burden of showing that the admission of Detective Buchanan's testimony was so prejudicial that it rendered his trial fundamentally unfair"), *certificate of appealability denied*, No. 21-3464, 2022 WL 1322734 (8th Cir. Mar. 11, 2022); Woodson v. Clarke, No. 3:19-cv-899-DJN, 2021 WL 5206670, at *4 (E.D. Va. Nov. 9, 2021) (dismissing the petitioner's ineffective assistance of counsel claim for failing to move to suppress lyrics, finding that the petitioner failed to demonstrate any deficiency or prejudice because he had "not advanced any viable basis upon which counsel could have moved to suppress the paper containing the inculpatory song lyrics"); Jackson v. Trierweiler, No. 2:18-cv-11384, 2021 WL 308112, at *11 (E.D. Mich. Jan. 29, 2021) (stating that "[h]ad the trial proceeded before this Court, admission of such evidence would have given this Court greater pause, treading dangerously close as it does to impermissible character evidence" but nonetheless holding that "the burden on a habeas petitioner is quite high. And federal courts sitting in habeas review are not to substitute their judgments for those of a state jurist's if within the realm of disputable reason, nor can they review a state court's determinations on state evidentiary law. And here, the state court found the lyrics and the Defendants' discussion of it to be more probative than prejudicial. Considering such heightened standards and limited scope of review, Petitioner has not established that the admission of the evidence was erroneous or, more importantly for purposes of habeas review, that it rendered his trial fundamentally unfair.").

214. *See* People v. Silva, No. E069863, 2021 WL 5176836, at *7, *8 (Cal. Ct. App. Nov. 8, 2021) (finding that although the rap video was admissible to contradict the defendant's statement that he did not own a gun, the trial court abused its discretion by admitting the video in its entirety and playing the video with sound because the prosecution could have achieved its objective through showing the jury

found only one case—a federal district court case from Florida, *United States v. Stephenson*—in which a trial court in the first instance excluded a defendant's rap lyrics because the judge determined they were more prejudicial than probative.[215]

Thus, even when rap music is erroneously admitted—being irrelevant or unduly prejudicial—my research affirmed that there is little hope of a remedy as courts rarely, if ever, rule that the error prompts reversal.[216] Interestingly, there were two cases where the court affirmed the exclusion of lyrics. Nevertheless, in both of these cases, the lyrics were not the defendant's. In one case, they were the victim's lyrics offered by the defendant, and in the other case, they were lyrics that the defendant argued were a third-party confession.[217] Thus, my research reaffirmed a double standard noted in the past: when lyrics are sought against a defendant, they are usually admitted; when they are used to bolster a defense, they are excluded.[218]

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screenshots from the video, and that the lyrics were also irrelevant to undisputed evidence that the defendant rapped with Chop Gang, an alleged criminal street gang; nevertheless, it held the error was harmless because evidence of the defendant's guilt was overwhelming), *review denied* (Jan. 26, 2022); State v. Tomlinson, 340 Conn. 533, 570 (2021) (stating that "[e]ven if we assume that portions of the video were relevant for the purposes articulated by the state, the lyrics regarding other, unrelated criminal activity, whether fact or fiction, serve no purpose other than to portray the defendant as violent. These lyrics were irrelevant to the charged offense and did not aid the state in establishing the defendant's relationship to Beason and Ferris, his association with the 150 gang, or his access to the gun"; nevertheless, the court did not reverse, stating, that "on the basis of this record and the arguments presented to this court, we cannot say that the video was crucial, critical and highly significant to the jury's verdict"); DeHart v. State, 2021 WL 4258823, at *16 (Ind. Ct. App. Sept. 20, 2021) (referencing its earlier opinion, which held that "the admission of the recordings and lyrics was erroneous, but that the error was harmless, concluding that 'we are satisfied that there is no substantial likelihood that the erroneously admitted evidence contributed to DeHart's convictions.'"), *transfer denied*, 176 N.E.3d 456 (Ind. 2021).

215. 550 F. Supp. 3d 1246, 1255 (M.D. Fla. 2021).

216. *See* Dennis, *supra* note 175, at 30 n.182.

217. In *Commonwealth v. Scott*, the defendant took issue with the judge's exclusion of violent rap lyrics written by the victim. 100 Mass. App. Ct. 1106, 173 N.E.3d 60 (Table), 2021 WL 3821865, at *2 (2021), *review denied*, 2021 WL 6145797 (Mass. Dec. 21, 2021). The reviewing court decided that the trial court acted appropriately within its discretion when it decided the probative value was outweighed by its prejudicial effect, given that there was already ample evidence that the victim was a gang member, had a violent temper, was a violent person, and had guns. *Id.* In *People v. Cross*, the defendant asked during the motion in limine stage that the rap video made by his cousin be allowed at trial, arguing it was a third-party confession to the shooting of the victim. *See* 2021 IL App (4th) 190114 ¶ 21 (Ill. App. Ct. 2021), *appeal allowed*, 184 N.E.3d 995 (Ill. 2022), *and aff'd*, 2022 IL 127907, *reh'g denied* (Jan. 23, 2023) (Ill. App. Ct. 2021). The court denied defendant's motion, concluding that sufficient indicia of trustworthiness did not exist. *Id.* ¶ 23. Though it was hearsay, the defendant argued (1) the video is admissible as a statement against penal interest and (2) considerable assurance of its reliability existed. *Id.* ¶ 131. The Appellate Court of Illinois for the Fourth District found that the trial court properly excluded the video, noting that its reliability was diminished because it was created as part of an artistic endeavor. *Id.* ¶ 141.

218. *See* Lutes et al., *supra* note 197, at 104 (noting that their content analysis revealed a "double standard in criminal cases": "[w]hen rap lyrics are offered against a defendant for reasons relevant to the case . . . courts generally admit the evidence over the objection of the defense that lyrics are merely a form of artistic expression. But when a criminally accused person seeks to introduce rap evidence to

4. Routine Admission of Rap Lyrics in Criminal Trials Chills Black Storytelling and Expression.

The regular use of rap lyrics as evidence against defendants creates a chilling effect on the hip hop community who fear that their lyrics might be used to convict them.[219] This risk is not just speculative. Rapper Killer Mike writes that the use of rap lyrics as criminal evidence "scares the sh*t out of me" and tells artists, "You have to save yourself. Ask yourself how you can use your imagination to guard against this persecution while still pushing the line on speech."[220] Other rap artists have also alluded to the risk that rapping presents. For example, the duo Mobb Deep rapped, "For every rhyme I write, it's twenty-five to life."[221]

To be sure, the use of rap lyrics in criminal trials does not directly chill rappers' speech or otherwise directly silence Black voices. But to fully appreciate how law enforcement's use of rap evidence in trials may be a new mode of silencing counter-narratives, one should be aware that before prosecutors began using rap music as evidence in criminal trials, law enforcement attempted to censor it. For example, in 1989, Milt Ahlerich, the assistant director of the Federal Bureau of Investigation's (FBI) office of public affairs, sent a letter to Priority Records, which distributed N.W.A.'s album Straight Outta Compton.[222] In the letter, he said that their song *F*ck tha Police* "encourages violence and disrespect" for law enforcement officials.[223] He made clear these were not just his own views, stating, "I wanted you to be aware of the FBI's position relative to this song and its message. I believe my views reflect the opinion of the entire law enforcement community."[224] N.W.A.'s shows were canceled and disrupted at cities across the nation.[225] In Detroit, Michigan, police officers stormed the stage and ended the show when N.W.A. tried to sing *F*ck*

bolster his defense, courts credit the prosecution's claim of rap lyrics being a form of artistic expression such that their probative value is outweighed by their potentially prejudicial effect").

219. *See* Dennis, *supra* note 175, at 5, 40 (noting the "negative impact [that use of rap music as evidence] will have on the production and quality of art"); Powell, *supra* note 199, at 499 (2009) (citing views that "using rap lyrics as evidence will . . . lead to mundane, unprovocative art"); *id.* at 515–16 ("When courts use creative devices as evidence of their creator's knowledge or intent to commit a crime, the result is a chilling effect . . . [including] a chilling effect on the rap music genre."); Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 665–66 (2019) (noting the risk).

220. NIELSON & DENNIS, *supra* note 134, at xi–x

221. MOBB DEEP, *Shook Ones (Part II)*, *on* THE INFAMOUS (Loud, RCA, BMG 1995).

222. Steve Hochman, *Compton Rappers Versus the Letter of the Law: FBI Claims Song by N.W.A. Advocates Violence on Police*, L.A. TIMES (Oct. 5, 1989), https://www.latimes.com/archives/la-xpm-1989-10-05-ca-1046-story.html [https://perma.cc/8E22-PNHX].

223. *Id.*

224. *Id.*

225. *See* Rolf Potts, The *Great Rap Censorship Scare of 1990*, CUEPOINT (May 25, 2016), https://medium.com/cuepoint/the-great-rap-censorship-scare-of-1990-115edc69a62f [https://perma.cc/89P5-7GWN].

tha Police.[226] An officer later told the press "We just wanted to show the kids that you can't say '[f*ck] the police' in Detroit."[227] The turn toward using rap lyrics at criminal trials begs the question: is this another form of silencing Black counter-narratives?

III.
THE CASE STUDY

This Section focuses on the 2017 criminal trial of Gary Bryant, Jr. in order to assess how evidentiary decisions impacted the stories told during that trial.[228] Mr. Bryant is a Black man who grew up in Pittsburgh, California.[229] He was raised in a low-income housing project called El Pueblo, which has the nickname "the Lo."[230] To support himself and his family, Mr. Bryant sold drugs for most of his life.[231] He also worked as a rap and hip hop artist and recorded between fifty to sixty songs.[232] In 2015, he was charged with multiple allegations,[233] including the murder of Mr. Kenneth Cooper and a gang enhancement for committing the crimes for the benefit of the "Broad Day" criminal group. His trial took place in 2017. The jury, containing no Black jurors, found both Mr. Bryant and his co-defendant, Mr. Diallo Jackson, guilty on all counts and enhancements.[234]

The prosecution argued that Mr. Bryant and Mr. Jackson were attempting to rob Mr. Cooper. According to its theory, Mr. Jackson fatally shot Mr. Cooper, and Mr. Bryant shot Mr. Cooper as well but did not fire the fatal shot.[235] The prosecution entered Mr. Bryant's rap lyrics and music videos to prove he

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226. *Id.*

227. *Id.* (internal quotation marks omitted).

228. Because this case took place in California state court, the admissibility of the evidence at trial was governed by the California Evidence Code, which is similar to the Federal Rules of Evidence in many respects.

229. 8 Reporter's Transcript 1465:10–12, Bryant v. Superior Court of California, No. 05-152003-0 (Cal. Super. Ct. 2017) [hereinafter "RT"].

230. 8 RT 1465:7–12; 1467:18–25.

231. *Id.* 1474:12–26.

232. *Id.* 1480:16–17.

233. Brief for Petitioner at 2, Bryant v. Superior Court of California, No. 05-152003-0 (Cal. Super. Ct. 2017) ("Count One charged a violation of Penal Code section 187 (murder) with enhancements alleged pursuant to sections 186.22, subdivision (b) (crime committed for benefit of "Broad Day" criminal street gang) and 12022.53, subdivision (b) and (e)(1) (principal's use of a firearm in gang case). During trial, the court granted a prosecution motion to amend the Information to add a personal and intentional firearm discharge enhancement to Count One under section 12022.53, subdivision (c). Count Two charged a violation of section 245, subdivision (b) (assault with a semiautomatic firearm) with an enhancement alleged pursuant to section 186.22, subdivision (b). Count Three alleged a violation of section 246 (discharging firearm at an occupied vehicle) with enhancements alleged pursuant to sections 186.22, subdivision (b) and 12022.53, subdivisions (b) and (e)(1). Count Four alleged a violation of section 29800, subdivision (a)(1) (possession of a firearm by a felon).").

234. *Id.*

235. *Id.* at 6.

committed the murder for the benefit of "Broad Day," an informal neighborhood gang and an alleged subset of an umbrella gang called "Lo Mob."[236] There was no claim that Mr. Cooper belonged to a rival gang.[237]

Mr. Bryant had prior drug convictions before this case, but he had no history of committing robberies or any violent crimes.[238] Though Mr. Bryant sought to exclude his criminal history, the judge ruled that should Mr. Bryant testify, his prior drug sales convictions would be used against him, and the judge would not sanitize it.[239] Nevertheless, Mr. Bryant decided to testify in his defense, perhaps to provide greater context and a counter-narrative.

To sum up Mr. Bryant's version of how the events unfolded, he testified that he had arranged to sell a small amount of marijuana to Mr. Cooper and another individual.[240] However, Mr. Bryant testified that when he got to the car to ask whether they still wanted the marijuana, the individual with Mr. Cooper pulled a gun on him.[241] Mr. Bryant said that he grabbed the gun to prevent getting shot, and in a tussle for the gun, he was shot first before running away.[242] He testified he had no memory of shooting anyone and had no desire to shoot anyone, but that he may have fired a gun in the state of "panic and being afraid, trying to get away, scrambling for [his] life"[243] after he himself was shot. He further testified that he was not a gang member and had no gang affiliation.[244]

The prosecution relied heavily on the testimony of its gang expert, Antioch police officer Rick Hoffman, who is White, to prove Mr. Bryant's alleged membership in Broad Day.[245] The judge admitted Officer Hoffman as a gang expert over both of the defendants' objections.[246] Officer Hoffman gave opinions on several music videos featuring Mr. Bryant, Mr. Bryant's co-defendant, and other local musicians. However, Officer Hoffman did not have any expertise on hip hop culture, popular culture, the art of rap, African American culture, or African American vernacular English.[247] In short, because he was designated as a gang expert, Officer Hoffman was given wide latitude to offer his unsubstantiated opinions on rap lyrics, in which he had no training or experience.

Officer Hoffman interpreted the lyrics in Mr. Bryant's songs as being much more threatening than the common usage of the words, and he claimed that these lyrics were evidence of his gang affiliation. One of the lyrics from Mr. Bryant's

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236. *Id.* at 6, 7.
237. *Id.* at 7.
238. 8 RT 1476:1–9.
239. *Id.* 1471:2–28; 1472:1–2.
240. *Id.* 1506:11–17.
241. *Id.* 1505:24–28; 1506:1–24.
242. *Id.* 1506:26–27; 1507:8–13; 1513:11–15; 1515:3–5.
243. *Id.* 1516:25–28; 1517:1–11.
244. *Id.* 1525:25–27.
245. 7 RT 1068:1–6.
246. *Id.* 1058:11–16.
247. Brief for Petitioner, *supra* note 233, at 7–8.

songs stated "[b]eing geeked up every day."[248] Interpreting this lyric for the jury, Officer Hoffman acknowledged that "[it] could refer to a number of different things,"[249] but then said, "[t]ypically it can refer to basically being armed with firearms."[250] The prosecutor followed up by asking, "[W]hat else could it mean?"[251] But the gang expert simply replied, "[T]hat's mostly what I've heard it referenced to."[252] However, the more common usage of "geeked up" is to be high on drugs,[253] and Officer Hoffman failed to mention that this was a possible other interpretation. Another one of Mr. Bryant's songs proceeded:

> I'm solo. That's why I ride solo. Waiting for one of you suckas to trip so I can lay a demo. And I'm still rep'ing this real [sh*t]. B's up. You suckas come out and play. I'm hollerin' fuck [n****s] from my hood. You [n****s] ain't got it. But like Master P, y'all [n****s] soft Lo Mob.[254]

Officer Hoffman stated that "laying a demo" is a "slang term for committing a shooting,"[255] even though the more obvious interpretation would be to make a music tape or sample.[256] He claimed that "Lo Mob" in the lyric demonstrates Mr. Bryant's affiliation with Lo Mob gang.[257] He also opined that Mr. Bryant's lyric "Broadday camp [n****]" showed that he was "verbally showing his affiliation with the Broad Day criminal street camp."[258]

Mr. Bryant, on the other hand, testified that to his knowledge there was no gang named Lo Mob or Broad Day.[259] He explained that Lo Mob was related to the area where he grew up and that he used it in his music as a metaphor.[260] He said that "Lo" stood for the members his community lost to death, jail, or bad situations, and "M-O-B" meant "my other brother," or the people he grew up with who shared the same hardships.[261] In fact, several popular hip hop groups

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248. 7 RT 1236:20.
249. *Id.* 1236:21–22.
250. *Id.* 1236:22–23.
251. *Id.* 1236:24.
252. *Id.* 1236:25.
253. *See Geeked Up*, URB. DICTIONARY, https://www.urbandictionary.com/define.php?term=geeked%20up [https://perma.cc/2SW7-VYRY] ("[F]irst of all, you can get geeked up from many differnt [sic] drugs including; meth, cocaine, ecstasy.").
254. 7 RT 1264:1–5.
255. *Id.* 1264:7–16.
256. Declaration of Consulting Expert Andrea L. Dennis at 18, Bryant v. Superior Court of California, No. 05-152003-0 (Cal. Super. Ct. 2017) [hereinafter "Dennis Decl."].
257. 7 RT 1264:11–15.
258. *Id.* 1221:22–23; 1222:2–3.
259. 8 RT 1525:28; 1526:1–2; 1568:14–26.
260. *Id.* 1526:3–25 (discussing "Lo Mob," he said, "It represents the area where me and several other people growing up through certain struggles that we've been through, a place that we're not ashamed of, that build a better character and outcome to art and music that we do now, express through the art of music," explaining that the term had a special connection to music).
261. 8 RT 1526:17–25.

have used the term "mob" in the same manner.[262] Mr. Bryant also explained that Broad Day was a metaphorical term used both in his music and in the community of people with whom he records rap.[263] Indeed, a number of famous rap artists have used the phrase "Broad Day," such as Notorious B.I.G., Tupac, Soulja Boy, Jay-Z, and LL Cool J,[264] which Mr. Bryant identified on direct.[265]

Even though Mr. Bryant testified in his case and was therefore able to directly counter some of the state's evidence, his ability to present a complete defense by telling his own story was limited due to multiple objections sustained by the judge. Mr. Bryant was prevented from talking about his background because the judge sustained many of the prosecutor's relevance objections, preventing that information from being presented to the jury. Such information included his relationship with his mother,[266] what life in El Pueblo was like during his childhood,[267] the racial makeup of the neighborhood,[268] and whether his community was impacted by drugs.[269] Mr. Bryant's attorney asked to be heard concerning the judge's decision to sustain the objection to the drug question, raising concern that questions that would establish important context were not permitted. On the record, but outside the view of the jury, Mr. Bryant's attorney explained to the judge that the defense wanted to establish Mr. Bryant's background and the socioeconomic realities of the neighborhood, including the drug prevalence in the neighborhood.[270] Mr. Bryant was charged with committing crimes in association with a gang, and the defense wanted to establish that even though Mr. Bryant sold drugs, this conduct was not gang-related.[271] Though the judge said he would permit specific questions as to

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262. Dennis Decl., *supra* note 256, at 20 ("Based on my research, I am aware that the term 'Mob' as used in rap music is often an acronym with multiple meanings and has been used by several popular hip-hop groups in the same manner as Gary Bryant's use. Another common usage is 'Money Over Bitches.'").

263. 8 RT 1528:16–21 (asserting that the term "Broad Day" was used to refer to a music group, saying, "We phrase that to music. That's part of our outlet. We never meant to be a gang. There's self groups that we do work with; Broad Day, Pueblo, Family Pack, Heavy Grams, or several people that get together and make music together. We have right now circulating probably over, between those groups over 300 songs"); 1532: 21–26 (discussing Broad Day, he said, "It's just a terminology of certain people. It may be like also I said Family Pack, Pueblo. It's several people that rap inside these groups, and we all continuously do music together. So in a lot of music that I do, I usually say a few of those names because those are the groups that I work with"); 1528: 12–15 ("[W]e used to say it for Broad Day, meaning a B, like this (indicating), as you seen me throw up in pictures, as for shine bright as is the sun, the peak of day, Broad Day.").

264. Dennis Decl., *supra* note 256, at 19 ("[T]he phrase 'Broad Day' is popular in hip hop, and . . . has been used by several famous rap artists, such as Notorious B.I.G., Tupac, Soulja Boy, Jay-Z and LL Cool J.").

265. 8 RT 1529:2–6.

266. *Id.* 1466:10–14.

267. *Id.* 1467:12–16.

268. *Id.* 1468:4–7.

269. *Id.* 1468:9–11.

270. *Id.* 1469:5–9.

271. *Id.* 1469:9–14.

whether the sale of drugs was related to gang membership,[272] he prevented Mr. Bryant from providing additional context or elaboration. The judge stated that "asking about the general social forces that influence Bryant, including his childhood [and] the drug sales in the neighborhood, are not relevant."[273] Additionally, Mr. Bryant wasn't allowed to discuss why he went back to selling drugs after working at a temp agency because the judge determined this was not relevant.[274]

The relevance threshold is supposed to be low, but the judge sustained these objections on relevance grounds, limiting the defense's opportunity to present a persuasive and complete narrative to the jury. As discussed earlier, background information can help individuate a defendant and combat harmful stereotypes. Here, Mr. Bryant wasn't able to add specific, colorful detail that would have helped him show jurors that he was not a member of a gang or provide individuating information that would have helped to humanize him. In short, while the judge allowed questions that were specifically aimed at poking holes in the prosecution's case, Mr. Bryant was at times unable to tell his *own* story to the jury.

Mr. Bryant was also not given sufficient leeway to describe his tattoos, which was important for establishing that they had no gang or criminal connection. In a study conducted by Kelly Brown, Blake McKimmie, and Theodora Zarkadi, participants perceived a defendant with a prison-styled tattoo to be more dangerous and found them more likely to be guilty of various crimes, including an armed robbery, physical and sexual assault, car theft, burglary, drug trafficking, murder, and drive-by shooting.[275] The researchers determined that "some action to reduce the biasing effect of the tattoo" may be needed.[276] To emphasize again, one of the most helpful ways to reduce stereotypes is by offering individualizing information.[277] In Mr. Bryant's case, the defense wanted to address the tattoos head-on to allow him to explain and contextualize them. The questioning proceeded as follows:

Q [defense attorney]: Did you get any tattoos in prison?

A: I got all my ink in prison.

Q: Any of your tattoos have any gang relation?

A: No.

Q: What do your tattoos mean to you?

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272. *Id.* 1472:17–24.

273. *Id.* 1472:13–16.

274. *Id.* 1475:5–16.

275. Kelly Brown, Blake McKimmie & Theodora Zarkadi, *The Defendant with the Prison Tattoo: The Effect of Tattoos on Mock Jurors' Perceptions*, 25 PSYCHIATRY, PSYCH. & L. 386, 391–92 (2018).

276. *Id.* at 400.

277. *See supra* note 59.

A: It's –

Mr. Warpole [prosecutor]: Objection, relevance, Your Honor.

THE COURT: Sustained

Q: Do you have tattoos that represent your family, your hometown?

Mr. Warpole: Objection, relevance, Your Honor.

THE COURT: Sustained.[278]

Officer Hoffman conceded during his testimony that he was "not aware of any gang-related tattoos that Mr. Bryant had"[279]; however, in *Old Chief*, the Court made clear that a party cannot stipulate away important issues.[280] The judge's decision to exclude this testimony prevented Mr. Bryant from being able to challenge possible assumptions that these tattoos were gang-related or had another criminal connection, evidence that the jurors might have needed to move past their implicit biases and construct a plausible alternative narrative. Moreover, it appears that Mr. Bryant wanted to explain how his tattoos were related to his family and hometown, background information that could have individuated him and bolstered the defense's argument that he had a strong connection to his community and that his references to El Pueblo, or the "Lo," did not mean he was in a gang.

The prosecution in this case did what Jackson advised in the prosecution manual: they used gang enhancements to make the rap lyrics relevant, and they showed Mr. Bryant "wearing a do-rag and throwing a gang sign."[281] The rap lyrics evidence was admitted to show Mr. Bryant's membership in a gang, not to prove the murder charge. Moreover, the prosecution showed pictures of Mr. Bryant in a durag and making a "B" hand symbol and argued that such photographs showed he was in the Broad Day gang.[282] Because Mr. Bryant testified, he was able to give his own explanation as to why he used the term "Broad Day" in his lyrics and why he was making a "B" sign in the photographs.[283] In this way, at least to a certain extent, he was able to counter the prosecution's evidence against him.

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278. 8 RT 1479:19–27; 1480:2–6.

279. 7 RT 1269:19–20.

280. 519 U.S. 172, 198 (1997) (O'Connor, J., dissenting) ("The Court reasons that, in general, a defendant may not stipulate away an element of a charged offense because, in the usual case, 'the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story.'").

281. JACKSON, *supra* note 179, at 16.

282. *See* Dennis Decl., *supra* note 256, at 6 (stating that the prosecution introduced "Gary Bryant's rap music lyrics, and that of his codefendant, as well music videos and Facebook photographs of Gary Bryant, including one in which he is shirtless, making a 'B' hand symbol, and literally wearing a 'do rag,' (People's Exhibit 165)").

283. Q [defense attorney]: So when you use the term "Broad Day," what does that mean to you?
A: It's a music. It's behind the music. Originally when I came home and people were talking -- it was a popular phrase at first, and we used to say it for Broad Day, meaning a B, like this (indicating), as you seen me throw up in pictures, as for shine bright as is the sun, the peak of the day. Broad Day. We phrase that to music. That's part of our outlet. We never meant to

However, Mr. Bryant was often not allowed to answer certain questions about his involvement in the music scene or provide critical context on the musical traditions upon which his lyrics were based.[284] Mr. Bryant could not answer his attorney's question, "What does being involved in the music scene mean to you?," because the judge sustained the prosecutor's relevance objection.[285] Frequently, Mr. Bryant was unable to testify about the culture and context of hip hop due to the prosecution's multiple "expert" and "foundation" objections, which the court sustained.[286] For example, consider the following interaction:

> Q [defense attorney]: And are you aware of people who have written rap songs describing violent crime that you know for certain they did not actually commit?"
>
> Mr. Warpole [prosecutor]: Objection, foundation again, Your Honor.
>
> The Court: Sustained.
>
> Q: Are you influenced by main stream popular rap and hiphop that uses this dynamic of violent imagery that may not be actually genuine?
>
> Mr. Warpole: Objection, foundation and relevance.
>
> The Court: Sustained.[287]

Mr. Bryant attempted to explain why in his music he wrote about violence and crimes that he did not actually commit, stating, "There's a real popular thing right now called drill music where people do talk about violent imagery . . . "; in response, the prosecutor made a foundation objection, which the court sustained.[288] In effect, Officer Hoffman was able to testify about rap and hip hop culture, despite having no special background or

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> be a gang. There's self groups that we do work with; Broad Day, Pueblo, Family Pack, Heavy Grams, or several people that get together and make music together. We have right now circulating probably over, between those groups over 300 songs.
>
> Q: All coming out of the El Pueblo neighborhood?
>
> A: Yes.

8 RT 1528:8–23.

284. Brief for Petitioner, *supra* note 233, at 12–13 (providing various examples of where Mr. Bryant was unable to answer the defense attorney's questions due to multiple prosecutor objections that were sustained by the court. These included: "'[H]ave you seen in popular culture the use of mob in relation to communities or music?' . . . ; 'And is Broad Day a term that is unique to The Lo or is it a term used in popular music culture?' . . . ; 'Do you know anyone who has made substantial money, risen basically out of the low income neighborhood, through music?' . . . ; 'And his group using the term 'Mob Figgas,' is that a gang reference or what we're talking about earlier the use in music of that terminology?' . . . ; 'And are you aware of people who have written rap songs describing violent crime that you know for certain they did not actually commit?' . . . ; 'Are you influenced by mainstream popular rap and hip hop that uses this dynamic of violent imagery that may not be actually genuine?' . . . ; 'There's a real popular thing right now called drill music where people do talk about violent imagery. . . .'").

285. 8 RT 1535:27–28; 1536:1–9.

286. *See* Dennis Decl., *supra* note 256, 21.

287. 8 RT 1539:21–28; 1540:1–5.

288. *Id.* 1540:15–23.

training in rap or hip hop conventions; in contrast, Mr. Bryant often was unable to testify about rap or hip hop culture, even when he was attempting to describe how his *own* music draws from those traditions.[289] These sustained objections prevented Mr. Bryant from providing crucial context. Considering the negative racial stereotypes that rap music triggers and the broad leeway given to Officer Hoffman to speak to the meaning of Mr. Bryant's lyrics coupled with the constraints on Mr. Bryant's testimony, it is likely the jury was left with an inaccurate, incomplete, and racially biased interpretation of the lyrics.[290]

In addition, by eliminating Black jurors who may have had different views of the justice system, the prosecution unduly thwarted the stories that jurors could develop by having a more racially diverse group, which may have resulted in a more favorable verdict or at least a fairer trial for Mr. Bryant. Diverse juries change the stories that jurors construct.[291] Indeed, research has shown that racially diverse juries reduce deliberation inaccuracies and racially discriminatory decision-making.[292] In Mr. Bryant's case, the prosecution was able to strike all six Black jurors in the jury pool by using a challenge for cause against two and using peremptory challenges against the other four.[293] Mr. Bryant appealed based on violations of *Batson v. Kentucky*[294] and *People v. Wheeler*,[295] claiming that the prosecution excluded African American jurors based on their race.[296] The prosecutor justified one challenge for cause and all peremptory challenges against the Black prospective jurors by citing their experiences with or attitudes toward law enforcement and the justice system.[297] Ultimately, the appellate court found the prosecutor's exclusion of the Black

289. *See* Brief for Petitioner, *supra* note 233, at 7–8.

290. *See* Dennis Decl., *supra* note 256, 21–22.

291. Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 571 (1991) ("A major cause of different juror stories is the different background information that jurors bring to their deliberations.").

292. *See* Diana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & HUM. BEHAV. 232, 232 (2019) (finding that jury diversity reduced the racial disparity in the quality of deliberation between White and Black defendants); Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 897–98 (2015) ("Diverse juries find the facts more accurately than homogeneous juries, as they scrutinize the evidence from multiple points of view, exchange more information, consider more possibilities, and catch errors more frequently. Representative juries also find a community's norms more democratically, by virtue of bringing to bear diverse views on crucial value-laden constructions of what the law means by 'reasonable doubt' or 'due care' or 'reckless disregard.'"); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006) (finding that diversity in mock juries resulted in longer deliberation, more discussion of case facts, more corrections, and more discussion about racism's potential influence on case outcomes than non-diverse juries).

293. People v. Bryant, 40 Cal. App. 5th 525, 543–44 (2019), *review denied* (Jan. 29, 2020).

294. 76 U.S. 79 (1986).

295. 22 Cal. 3d 258 (1978).

296. Bryant, 40 Cal. App. 5th at 530.

297. *Id.* at 547.

potential jurors lawful under the applicable legal framework.[298] However, in his concurring opinion, Judge Jim Humes wrote that the *Batson* procedure, which is limited to acts of intentional discrimination, "plainly fails to protect against—and likely facilitates—implicit bias."[299] This is because "[b]y focusing on the genuineness or credibility of an attorney's justification for exercising a peremptory challenge, the framework ignores the essential nature of implicit bias, 'which may be invisible even to the [attorney] exercising the challenge.'"[300] Unless states reform their current systems of jury selection, racially discriminatory voir dire will likely persist, resulting in jury verdicts that are more likely to be based on inaccurate and incomplete information and implicit racial biases.[301]

IV.
PROPOSALS FOR REFORM

The importance of storytelling has been lost in the evidence doctrine. As shown in this Note, various doctrinal rules expressly limit the accused's ability to offer a counter-story and present a meaningful defense. Recognition of the power of storytelling and how evidentiary decisions that constrain storytelling uniquely impact Black defendants (as well as other minorities subject to harmful stereotypes) is an important first step to restoring the right to present a defense and mitigating harmful racial stereotypes at trial.

Judges. Given their immense control over evidentiary decisions at trial, judges themselves must take active steps to become aware of how they make decisions. Beyond just educating themselves on their pro-prosecution and implicit biases, judges should take steps to change their default behaviors and reflect on their progress. Professor Gonzales Rose suggests, for instance, that instead of taking implicit judicial notice of White norms and racialized beliefs—for example, that flight from authorities is relevant to prove consciousness of guilt—judges could require prosecutors to prove that flight from authorities in that community is abnormal.[302]

Judges should consider how prosecutors trigger negative stereotypes and circumvent the rule against propensity evidence by admitting rap lyrics. In Mr. Bryant's case, the prosecution was able to bring in Mr. Bryant's rap lyrics by charging him with a gang enhancement, presenting a "dual relevancy problem": the lyrics were relevant to the enhancement, but not to the underlying offenses. In such scenarios, Lutes et al. suggest that courts "bifurcat[e] the

298. *Id.* at 543.
299. *Id.* at 545.
300. *Id.* (citations omitted).
301. *Cf. supra* note 292.
302. *See* Gonzales Rose, *supra* note 77, at 2301.

proceedings."[303] By bifurcating the proceedings, judges can prevent prosecutors from introducing lyrics at the guilt phase of a trial that are irrelevant to the underlying crime and trigger racial negative stereotypes and propensity logic such as "the defendant writes violent lyrics; therefore, they are a violent person." In bifurcated proceedings, prosecutors can only admit the rap lyrics and other gang evidence to prove the gang enhancement after they first prove the underlying offense. In California, whether to bifurcate a gang enhancement from the trial is within the trial court's discretion.[304] However, it appears to be a rarely used remedy.[305] It is the defense's burden to demonstrate "a substantial danger of prejudice requiring that the charges be separately tried."[306] Thus, evaluating whether rap lyrics pose a "substantial danger of prejudice" in cases involving rap lyrics and a Black male defendant, defense attorneys should point out, and judges should seriously consider, the findings that rap lyrics activate the harmful stereotypical association between Black men and violence. Bifurcation may not always be appropriate, for example, where the defendant's gang activity is truly inextricably intertwined with the underlying crime such that any prejudice is not undue. However, in cases where the gang evidence does not significantly overlap with the defendant's substantive offense or would otherwise result in undue prejudice, judges should utilize bifurcation as much as possible to protect the defendant's right to a fair trial.

For Mr. Bryant, bifurcation would have meant that the prosecution would not have been able to introduce rap lyric evidence from the gang expert, who had no expertise on hip hop culture, popular culture, the art of rap, African American culture, or African American vernacular English, until the underlying offenses were proven. This would have protected Mr. Bryant's constitutional right to a fair trial by requiring the prosecution to prove the case without tainting the jury with racialized propensity evidence.

Additionally, judges need to examine how their decisions constrain storytelling. When making evidentiary determinations, judges must recognize that juries make decisions based on stories and therefore that they must give greater consideration to defendants' "need for evidentiary richness and narrative integrity in presenting a case."[307] This suggestion doesn't require a change in the law, but rather, it reflects understandings the Supreme Court annunciated in *Old*

303. Lutes et al., *supra* note 197, at 129.

304. *See* People v. Hernandez, 33 Cal. 4th 1040, 1048–51 (2004).

305. Mitchell Eisen, Brenna Dotson, Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2, 16 (2014) (noting that bifurcation in cases involving gang evidence is a rarely used remedy); Erin R. Yoshino, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 137 (2008) (noting that a deputy public defender stated their belief that "gang enhancements are rarely bifurcated because of the prosecutorial advantages of a gang enhancement and because of judges' concerns for judicial efficiency").

306. *Hernandez*, 33 Cal. 4th at 1051 (quoting People v. Bean, 46 Cal. 3d 919, 938 (1988)).

307. *See* Old Chief v. United States, 519 U.S. 172, 183 (1997).

Chief, where the majority emphasized the importance of being able to tell "a colorful story with descriptive richness."[308] In Mr. Bryant's case, he should have had more opportunities to counter the prosecution's narrative and provide individuating information. The judge should have allowed Mr. Bryant to provide a more coherent narrative as to why his conduct and music were not gang-related, for example, by giving him more leeway to discuss his background, music, and tattoos. This was all the more important in his case given the racially prejudicial rap lyrics that were admitted into evidence, the fact that he is a minority who is already predisposed to implicit biases, and the absence of Black jurors. Furthermore, appellate judges must more carefully consider how evidentiary errors bias jury decision-making. The prevalence of harmless error rulings not only allows problematic verdicts to stand but does nothing to deter biased practices.

Also, judges should examine how they treat the prosecution's witnesses' testimony differently from the defense's witnesses. In Mr. Bryant's trial, even assuming the police officer was qualified as a "gang expert," he was certainly not qualified to evaluate rap lyrics, and the judge should have excluded that testimony. By contrast, Mr. Bryant was precluded from testifying in his own case regarding the musical conventions upon which he based his songs because he was not designated an "expert." Trial court judges need to perform their gatekeeping function more aggressively in the first instance to ensure that only qualified experts are permitted to make sociological and psychological judgments in criminal cases.[309] And when rap lyrics are admitted as evidence against a defendant in criminal cases, the defendant must have more freedom to testify about their own music.

Changes to Evidentiary Rules. Although Mr. Bryant elected to testify in his trial, many defendants do not because of their prior convictions' prejudice on the jury. If defendants do not have to worry that juries are going to assess their prior record as evidence of guilt, they are more likely to testify and tell their own stories to the jury. Federal and state legislatures should amend FRE 609 and its state analogues to categorically exclude prior convictions for impeachment purposes unless they are crimes of dishonesty. Felonies unrelated to truthfulness have a tentative link at best to credibility and are extremely prejudicial to the defendant. Such an amendment would be particularly valuable in providing a fair trial to Black defendants, who are over-criminalized and are more often the

308. *Id.* at 187.

309. Various scholars have likewise made this argument. *See, e.g.*, Jacob Guerard, *Police Officers as Gang Experts: A Call for Stricter Standards for Admitting Gang Expert Testimony in the Prosecution's Case-in-Chief*, 38 U. LA VERNE L. REV. 235, 237 (2017) (arguing that "deference to and qualifications of gang experts must be more critically scrutinized"); Hayat, *supra* note 131, at 196 (arguing for a strict application of the *Frye* and *Daubert* expert standards to police officer testimony when offered as experts in state gang prosecutions).

subject of harmful implicit stereotypes, and therefore require a greater need to individuate themselves by taking the stand in their own defense.

Additionally, Congress and state legislatures should take steps to prohibit the use of rap lyrics as character evidence. As discussed earlier in this Note, prosecutors are able to bring in rap lyrics to rebut a defendant's "good character." FRE 404(a)(2)(A) states that "a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it."[310] But someone's art should not affect their credibility as a witness. Moreover, such creative expression should be protected to prevent a chilling effect. Congress should amend the Rule to prevent music and art from being used as character evidence to rebut the defendant's "good character" evidence.

Since Mr. Bryant's trial, there has been a promising development in California law. In September 2022, Governor Gavin Newsom signed the Decriminalizing Artistic Expression Act into law, making California the first state to expressly limit the use of rap lyrics in criminal trials.[311] Now, judges in California must weigh the prejudicial and probative value of such evidence outside the presence of the jury and apply additional considerations. For example, the evidence code now provides that judges shall consider that the probative value of the creative expression for its truth is minimal unless it is "created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available."[312] Additionally, judges must consider that undue prejudice includes the possibility that the trier of fact will treat the expression as propensity evidence or inject racial bias into the proceedings.[313] Although this law could have gone even further—for example, by requiring prosecutors to prove the lyrics' admissibility under a higher burden of proof[314]—it will hopefully give judges greater pause, helping to counter the current default practice of admitting rap lyrics. Moreover, this new California law illustrates growing awareness of this issue, which offers hope for reform on a broader scale.[315]

Defense attorneys. Defense counsel, too, should educate themselves on the "Story Model" of jury decision-making and consider how defendants can offer a compelling counter-story that is complete and plausible. Generally, criminal

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310. FED. R. EVID. 404(a)(2)(A).

311. *See* Assemb. B. 2799, 2021-2022 Reg. Sess. (Cal. 2022) (enacted); Bellware, *supra* note 12.

312. CAL. EVID. CODE § 352.2(a)

313. *Id.*

314. For example, New York lawmakers introduced a bill that would create a presumption in criminal proceedings that a defendant's creative output is inadmissible unless the proffering party can affirmatively prove by "clear and convincing" evidence that the lyrics are literal, have a strong nexus to the specific facts of the alleged crime, are relevant, and have distinct probative value. *See* S.B. 7527, 2023-2024 Leg., 244th Sess. (N.Y. 2021).

315. In July of 2022, Congress introduced a bill to limit the use of rap lyrics by prosecutors in federal criminal proceedings. *See* Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

defense attorneys try to poke holes in the prosecutor's case but rarely present their own witnesses or evidence.[316] But the "Story Model" and empirical research suggest that when defendants can go beyond simply denying or attacking the state's story and can instead offer a strong competing narrative, they should do so. Although defense counsel should consider the possible risks of presenting a weak story and shifting the burden of proof, it is clear that presenting defense witnesses has benefits even beyond countering the state's evidence.

Defense attorneys should take into account the "silence penalty" when giving advice about whether the defendant should take the stand. For example, Professor Bellin's study found that where the defendant took the stand but added no new information, they fared better than defendants who did not take the stand.[317] His research, moreover, suggested that absent some powerful and specific reasons for not doing so, defendants who will not face impeachment by prior convictions or bad acts should tell their own story to the jury by taking the stand.[318] Professor Barbara Babcock notes some of the familiar reasons a defendant without prior convictions might not take the stand, including that "he has no defense . . . or maybe he is unattractive, even scary, or slow and obtuse so that he could hurt, rather than help himself as a witness."[319] But she emphasizes the critical role that defense attorneys can play in helping their clients overcome these barriers and put their testimony in context. For example, those who are well-defended rehearse their testimony with their attorney thoroughly.[320] Even in cases that are less thorough, Professor Babcock suggests that counsel can still contextualize their client's testimony.[321] For example, the defense attorney can demonstrate the "unequal confrontation" between the client and the prosecutor by pointing out the power, knowledge, and skill differentials and emphasize that nevertheless the defendant never "deviate[d] from [their] basic testimony."[322] Defense attorneys can also remind the jury of the burden of proof to help mitigate against the feared "burden-shifting" problem.

Although defendant testimony is an important tool for individuating the defendant, it is not the only tool.[323] Providing individuating and contextual information about the defendant, even if it comes from another person, proves to

316. *See* EDWIN H. SUTHERLAND, DONALD R. CRESSEY & DAVID F. LUCKENBILL, PRINCIPLES OF CRIMINOLOGY 403 (11th ed. 1992).

317. Bellin, *supra* note 65, at 414 ("Respondents convicted 76% of the defendants who remained silent, but only 62% of equally situated defendants who testified (but added no facts).").

318. *Id.* at 426.

319. Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 14–15 (1993).

320. *Id.* at 15.

321. *Id.*

322. *Id.*

323. *See* Roberts, *supra* note 57, at 885–87.

be another means of dispelling harmful stereotypes.[324] Thus, in cases where defendants do not testify, defense attorneys should seek other means to individualize their clients, such as by providing testimony about the defendant through a lay witnesses, or by offering an expert witness who can provide critical context. For example, in criminal cases involving rap lyrics, defense attorneys might consider offering a qualified outside expert to contextualize the lyrics in question. Also, where gang enhancements are filed, the defense may want to hire its own gang expert. Loyola's Independent Forensic Gang Expert College, the first-of-its-kind program, qualifies former gang members who graduate from the program as forensic experts on gangs.[325] The program prepares students to provide testimony about what influences young people to join gangs and provides a different narrative on gangs from the discourse dominated by law enforcement officers.[326] In 2021, graduates of the academy charged around $150 per hour for both testimony and file review, a rate that is significantly lower than the average price of expert testimony at $550 per hour and expert file review at $442 that same year.[327] One of the main benefits of having a former gang member give testimony is that they are likely able to paint a much richer and accurate account given their experiences on the inside.

Furthermore, when defense attorneys do not raise timely objections or make the proper motions, judges are unlikely to do their jobs for them. When judges take implicit judicial notice of certain facts, such as the idea that only the guilty run, defense attorneys may "fail[] to raise proper relevancy objections or provide counterevidence of their clients' racialized realities" due to the attorneys' own implicit biases.[328] To combat the admission of unnoticed racial prejudice at trial, defense attorneys should learn about their own implicit biases. Moreover, in cases like Mr. Bryant's that involve the "dual relevancy" conundrum, it is critical that defense attorneys move for a bifurcated proceeding, or, in the alternative, to exclude the rap lyrics entirely due to their prejudicial effect. Likewise, defense attorneys should include a motion in limine to exclude or limit the prosecution's gang expert witness. Even if denied, a well-drafted motion in limine may increase the likelihood that the trial judge will sustain the attorney's objections at trial.

Jury selection. The "Story Model" recognizes that jurors will draw on the normal experiences in their community and compare them to those being

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324. *See id.* at 886 (noting that "social-cognition research supports the idea that individuation can be accomplished through means other than an individual narrative from a stereotyped individual").

325. *CJLP's Independent Forensic Gang Expert College Celebrates Inaugural Graduates*, LOYOLA LAW SCHOOL (Dec. 11, 2021), https://www.lls.edu/gangscollege/ [https://perma.cc/K3MV-JJ63].

326. *Id.*

327. Working with Defense Gang Experts Zoom Training (Dec. 10, 2021); *see also* MANGRAVITI ET AL., *supra* note 138, at 2.

328. *See* Gonzales Rose, *supra* note 77, at 2286

contested at trial.[329] Therefore, jurors from a similar background to the defendant can help to create a fairer trial. Diversity on the jury also influences the ultimate verdict in a positive way: diverse juries reduce deliberation inaccuracies and racially discriminatory decision-making.[330] Though the jury system is meant to foster a cross-representation of people with different attitudes,[331] courts have lost sight of that goal by allowing peremptory challenges like the ones in Mr. Bryant's case.

Courts should not allow counsel to strike jurors for reasons historically associated with discrimination, such as a distrust of law enforcement. As a model, courts can look to the Washington State Supreme Court, which in 2018 adopted General Rule 37, requiring that trial courts evaluate the reasons for peremptory challenges "in light of the totality of the circumstances" and deny them if "an objective observer could view race or ethnicity as a factor" in their use.[332] The rule specifies that reasons like a potential juror's having had prior contact with law enforcement are presumptively invalid to exclude them, as such reasons may be disproportionately associated with a particular race or ethnicity.[333] Since Mr. Bryant's case, California has implemented legislation that borrows language from Washington's rule and instructs courts to sustain objections against any challenges "if the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor."[334]

Research agenda for scholars. More studies must be done to determine how evidentiary decisions impact the stories juries develop and the ultimate verdicts, and our system should continue to change to reflect these findings. A better understanding of how stories impact jury decision-making would help to overcome the "harmless error" barrier when evidentiary decisions are appealed.

Legislative changes lowering the burden to show racial inequities in law. To tackle racially coded evidence coming in at trial, states should look to California's Racial Justice Act, which was intended to address both explicit and implicit racism in criminal trials.[335] Unlike the usual appeal process, the CRJA does not ask whether the error was "harmless." Although it remains to be thoroughly tested, the CRJA offers a powerful tool to address racial discrimination and racial disparities in the criminal system.

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329. *See* Pennington & Hastie, *supra* note 14, at 528.

330. *See* Peter-Hagene, *supra* note 292, at 232; *see also* Sommers, *supra* note 292, at 606.

331. *See, e.g.*, People *v.* Wheeler, 22 Cal. 3d 258, 276 n.17 (1978) ("The representation on juries of these differences in juror attitudes is precisely what the representative cross-section standard . . . is designed to foster.") (citation omitted).

332. Wash. Ct. R. General Applicability, General R. 37.

333. *Id.*

334. Cal. Civ. Proc. Code § 231.7 (West).

335. Assemb. B. 2542, 2019-2020 Reg. Sess. (Cal. 2020).

CONCLUSION

This Note's thesis is that, to protect defendants' rights to meaningfully present a defense, we must recognize the importance of storytelling in criminal trials and allow defendants to tell their story in the most effective way possible, particularly where that story involves a counter-narrative to a racial stereotype facilitated by existing legal rules. This Note, however, identifies various obstacles that evidence law and its current application place in the way of criminal defendants' ability to construct a complete and plausible story.

Additionally, this Note documents how prosecutors are able to circumvent the rules against propensity evidence and use defendants' rap lyrics in criminal trials, which tend to activate stereotypes that bias jury decision-making. At the same time, the constraints on defense storytelling impede defendants from countering those harmful stereotypes. This practice not only prejudices criminal defendants, but it chills the speech of rappers who offer important stories through their music.

Using a storytelling lens to examine the evidentiary decisions in Mr. Bryant's trial, it became apparent that the admission of his rap lyrics, coupled with the limitations on his testimony, skewed the narrative the jury could construct. Rather than providing context that might challenge the jurors' implicit biases, the evidentiary decisions left Mr. Bryant unable to meaningfully counter the state's evidence, leaving jurors with an inaccurate and incomplete picture that reinforced those biases.

This note offers suggestions for strengthening criminal defendant storytelling and reducing the admission of unduly prejudicial rap lyrics and unreliable police testimony in the courtroom. However, the suggestions are just a start, and scholars should continue to look for solutions to strengthen the accused's ability to construct a persuasive story of innocence and reduce the impact of negative racial stereotypes on jury decision-making based on what cognitive and social science tells us about how juries make decisions.