

“EVERY RHYME I WRITE”: RAP MUSIC AS EVIDENCE IN CRIMINAL TRIALS

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In 1991, the U.S. Court of Appeals for the Seventh Circuit upheld the conviction of Derek Foster, whose prosecution was based in part on rap lyrics he wrote referencing drugs and narcotics trafficking. United States v. Foster ignited a trend across the country in which prosecutors use defendant-authored rap music as evidence at trial. Beginning in the 1970s, Black artists in the United States created rap music as a form of resistance and as a means of expressing uniquely Black identity. This deep connection between rap and race continues to inform how society perceives rap music and its artists. Over the years, social psychologists have observed the distinct prejudicial impact that rap has on the way that people implicitly judge rap artists as violent criminals. These psychologists posit that rap is judged harshly because it is viewed through the lens of racial stereotypes. The relationship between rap and implicit racial bias is particularly concerning in the criminal context in which juries are asked to assess the guilt of a rap artist who is commonly a person of color. This Note is a critical assessment of the use of defendant-authored rap music in criminal trials. It first provides an in-depth study of the history of rap music and its connection to race in the United States. It then examines how rap is used at trial through an analysis of the rules of evidence. Ultimately, it argues that the use of rap music as evidence is unfairly prejudicial. As such, judges should exercise the discretion afforded under Federal Rule of Evidence 403 to exclude rap in the majority of cases because of the serious risk that juries will be improperly influenced by their implicit racial biases, compromising the constitutional guarantee of impartiality and the endeavor to rid the criminal justice system of racial animus.

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INTRODUCTION

Caught you in the morning with another one in my bed.

Don't you care about me anymore?

Don't you care about me? I don't think so.

Six-foot-tall, came without a warning, so I had to shoot him dead.

He won't come around here anymore.¹

A lovers' quarrel ending in a tragic murder. One can imagine the pursuit for justice that must follow such a violent scene. But rather than the real-life actions of an enraged spouse, these words are the catchy and upbeat chorus of the chart-topping pop song "Wake Up Call" by Maroon 5.² If superstar Adam Levine, who coauthored and sang these lyrics, was suddenly charged with homicide, would the words that once earned him fame and fortune be used to convict him at trial, or might they be ignored as meaningless lyrics to a pop song?

Nobody thought Bob Marley gunned down a sheriff.³ Freddie Mercury did not prompt a full-scale investigation when he told the world that he shot a man in

1. MAROON 5, *Wake Up Call*, on *IT WON'T BE SOON BEFORE LONG* (A&M Octone Records 2007).

2. *Id.*; *Chart History Maroon 5*, BILLBOARD, <https://www.billboard.com/music/Maroon-5/chart-history/HSI/2> (last visited Oct. 19, 2019).

3. See BOB MARLEY AND THE WAILERS, *I Shot the Sheriff*, on *BURNIN'* (Tuff Gong, Island 1973) ("I shot the sheriff, but I didn't shoot no deputy, ooh, ooh, ooh. Yeah, all around in my hometown they're trying to track me down. They say they want to bring me in guilty for the killing of a deputy.").

the head.⁴ Not one member of the band Foster the People faced conspiracy charges for planning a school shooting.⁵ The lyrics from genres like reggae, rock, and pop are rarely criticized for communicating violence despite data that suggest pop music is one of the most lyrically violent genres.⁶ Instead, reggae, rock, and pop are viewed through the same lens as most art: one of creative license and artistic hyperbole. The opposite is true for rap music. The genre is frequently condemned for depicting violence, and its artists are accused of glorifying their own offensive and criminal actions through their music.⁷ No such benefit of creative liberty or artistic hyperbole is afforded to rap artists who write about unpopular and unpleasant themes like gangs, drugs, and murder.⁸ The disparity between the treatment of rap and that of other music is particularly important when, as is increasingly the norm, prosecutors use rap music at trial to help convict rap artists.⁹ As the duo Mobb Deep rapped, “For every rhyme I write, it’s twenty-five to life.”¹⁰

The use of rap music in criminal trials began in the 1990s.¹¹ At the same time that its influence grew, and its artists reached previously unheard-of levels of commercial success,¹² rap music came under intensifying scrutiny from police¹³ and politicians¹⁴ who criticized the genre and censored its artists. In 1991—with the

4. See QUEEN, *Bohemian Rhapsody*, on A NIGHT AT THE OPERA (EMI, Elektra 1975) (“Mama, just killed a man. Put a gun against his head. Pulled my trigger, now he’s dead.”).

5. See FOSTER THE PEOPLE, *Pumped Up Kicks*, on TORCHES (Startime, Columbia 2011) (“[F]ound a six-shooter gun . . . he’s coming for you, yeah he’s coming for you. All the other kids with the pumped up kicks, you better run, better run, out run my gun. All the other kids with the pumped up kicks, you better run, better run, faster than my bullet.”).

6. Cynthia M. Frisby & Elizabeth Behm-Morawitz, *Undressing the Words: Prevalence of Profanity, Misogyny, Violence, and Gender Role References in Popular Music from 2006-2016*, 10 MEDIA WATCH 5, 16 (2019) (“[L]yrics obtained from a random sample of pop music from the top charts revealed that this genre utilizes violence in lyrics at a level similar to hip-hop/rap and more so than any other music formats.”).

7. See *infra* Parts I & II.

8. See, e.g., ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 8–10 (2019); Briana Younger, *The Controversial Use of Rap Lyrics as Evidence*, NEW YORKER (Sept. 20, 2019), <http://www.newyorker.com/culture/culture-desk-the-controversial-use-of-rap-lyrics-as-evidence>.

9. See, e.g., United States v. Foster, 939 F.2d 445 (7th Cir. 1991).

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

11. See generally Foster, 939 F.2d 445 (the first example of using defendant-authored rap lyrics as evidence at trial).

12. See, e.g., TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 4 (1994); Dre’Kevius O. Huff, Note, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 341–42 (2018); Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185, 189 (2014).

13. ROSE, *supra* note 12, at 124–45; Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 PSYCHOL. PUB. POL’Y & L. 280, 280 (2016); Kubrin & Nielson, *supra* note 12, at 188–90.

14. ROSE, *supra* note 12, at 105; Kubrin & Nielson, *supra* note 12, at 190; Clarence Lusane, *Rhapsodic Aspirations: Rap, Race and Power Politics*, 23 BLACK SCHOLAR 37, 45–

tension between rap and “the establishment” as a backdrop—prosecutors introduced rap lyrics to help convict Derek Foster, a man on trial for several drug-related charges.¹⁵ *Foster* illustrated how effective rap music could be when used as evidence for the prosecution.¹⁶

Today, the use of rap in criminal trials is widespread and has been identified in over 500 cases across the United States.¹⁷ Judges admit rap music into evidence more often than not.¹⁸ The most common use of rap is during the guilt phase to show evidence of confession, knowledge, motive, or intent.¹⁹ Occasionally, the lyrics themselves are the crime.²⁰ However, even at sentencing, when demonstrations of remorse and rehabilitation are crucial, prosecutors have used rap music to “portray rappers as dangers to their communities.”²¹

Notably, the practice is almost exclusive to rap music.²² There has only been one documented case where prosecutors used defendant-authored lyrics from another genre in a similar manner.²³ With such a narrow application, it is not surprising that this strategy has faced rigorous criticism from many, including

46 (1993); Dana Hughes, *Hip-Hop in Politics: What a Difference a Generation Makes*, ABC NEWS (Feb. 14, 2013), <https://abcnews.go.com/Politics/OTUS/hip-hop-politics-difference-generation-makes/story?id=18495205>.

15. *Foster*, 939 F.2d at 456–57 (upholding a defendant’s conviction for possession with intent to distribute cocaine and PCP where prosecutors introduced lyrics written by the defendant depicting drug transactions to prove the defendant’s familiarity with code words and narcotics trafficking). The use of rap lyrics as evidence has expanded beyond the United States to various other regions including countries in the Middle East and North Africa as well as the United Kingdom, where prosecuting agencies use grime music—a genre heavily influenced by American hip-hop—as evidence in criminal trials. Kubrin & Nielson, *supra* note 12, at 196.

16. *See infra* Part II.

17. NIELSON & DENNIS, *supra* note 8, at 69.

18. Brief of ACLU of N.J. in Support of Defendant-Respondent at 17–18, *State v. Skinner*, No. A-57/58-12 (071764), 2012 WL 3762431 (N.J. Aug. 31, 2012) [hereinafter Brief of ACLU]. The ACLU of New Jersey found that, as of 2013, there were 18 cases in the United States that had examined whether rap lyrics were admissible as evidence against defendants in criminal trials. The research found that in 14 of the 18 cases, the lyrics were admitted. *Id.*

19. *See infra* Part II.

20. *See* *Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015); *Jones v. State*, 64 S.W.3d 728, 729–30 (Ark. 2002); *People v. Oduwole*, 985 N.E.2d 316, ¶¶ 3–15 (Ill. App. Ct. 2013); *infra* Part II.

21. Younger, *supra* note 8. The lyrics can also be used at the pre-trial and post-conviction stages of the criminal justice process by inducing defendants to enter into plea agreements or punishing inmates for violating disciplinary regulations. Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 n.5 (2007).

22. *See* *State v. Koskovich*, 776 A.2d 144, 157–58 (N.J. 2001) (the first documented case where a defendant’s rap lyrics were used as evidence); *see also* Dennis, *supra* note 21, at 2–3 n.6.

23. *Koskovich*, 776 A.2d at 157–58 (“About killing, people, you can kill by [illegible]. On by guns, one night you break in, somebody home. And you take their money and kill by drive [illegible] down the road and shout, and shouting. By the big heads. The Best.”); *see also* Dennis, *supra* note 21, at 2–3 n.6.

criminal justice reform advocates, critical race scholars, social science researchers, and rap artists themselves.²⁴ Opponents have recently argued that rap lyrics are protected speech under the First Amendment.²⁵ Others have focused on the prejudicial²⁶ impact of rap lyrics and how this type of evidence threatens constitutional guarantees of impartiality by exacerbating racial bias.²⁷ The latter is uniquely important because “authorities are often prosecuting a young man of color, ‘someone who already looms as a threatening stereotype in the minds of society.’”²⁸

Over the past three decades, researchers have sought to quantify this prejudicial impact by studying how the average person unconsciously judges rap music and rap artists.²⁹ The results of these studies should be worrisome for anyone concerned about the ills of juror bias. They demonstrate that people associate rap with criminality and violence more than any other genre.³⁰ Worse, people are significantly more likely to believe that rap artists are capable of committing murder.³¹ In fact, for some, simply writing rap music may be worse than potentially committing murder.³²

24. See generally Motion for Leave to File Brief as Amici Curiae and Brief for Michael Render (“Killer Mike”), Erik Nielson, & Other Artists & Scholars as Amici Curiae Supporting Petitioner, *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019) (No. 18-949), 2019 WL 1115837 [hereinafter Brief of Killer Mike]; Brief of ACLU, *supra* note 18; NIELSON & DENNIS, *supra* note 8; Younger, *supra* note 8.

25. See generally Brief of Killer Mike, *supra* note 24; Brief for Petitioner, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4101234 [hereinafter Brief for Petitioner, *Elonis*]; Brief of ACLU, *supra* note 18. The question of whether rap music should be excluded from criminal proceedings based on First Amendment protection is certainly an important one but one beyond the scope of this Note.

26. This specifically refers to “prejudicial” as it applies to Federal Rule of Evidence 403.

27. See, e.g., NIELSON & DENNIS, *supra* note 8, at 8–10; Dunbar et al., *supra* note 13, at 280.

28. Kubrin & Nielson, *supra* note 12, at 201 (quoting Erik Nielson, *When Rap Stands Trial*, ROOT (July 3, 2012), <https://www.theroot.com/when-rap-lyrics-stand-trial-1790892213>).

29. See generally Dunbar et al., *supra* note 13, at 280; Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIM. 507 (2018); Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCHOL. 795 (1999); Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCHOL. 2135 (1996) [hereinafter Fried, *Bad Rap for Rap*]; Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999) [hereinafter Fried, *Who’s Afraid of Rap*]; Adam Dunbar, *Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making* (2017) (unpublished Ph.D. dissertation, University of California, Irvine) (available at <https://escholarship.org/uc/item/2c6478vr>) [hereinafter Dunbar Dissertation];.

30. See generally Dunbar et al., *supra* note 13; Dunbar & Kubrin, *supra* note 29; Fischhoff, *supra* note 29; Fried, *Bad Rap for Rap*, *supra* note 29; Fried, *Who’s Afraid of Rap*, *supra* note 29; Dunbar Dissertation, *supra* note 29.

31. See Fischhoff, *supra* note 29, at 800, 803.

32. See *id.* at 800–03.

The true salience of these studies is easily missed without an explicit discussion of race and its inextricable connection to rap music.³³ The genre emerged as an expression of uniquely Black identity.³⁴ Although it has since evolved into a racially diverse art form, the unconscious understanding of rap music remains underpinned by notions of race and racial stereotypes about who criminals are, what they look like, and where they come from.³⁵

Thus, an alarming picture begins to emerge, one in which jurors unconsciously allow rap music, admitted as evidence, to stoke their implicit racial biases and prejudice their verdict. Although jury trials in the United States have never been free of racial bias, courts continue to strive toward this goal.³⁶ Surely, rap music has been a highly effective form of evidence for prosecutors, but effectiveness is not the only goal of the criminal justice system. A jury influenced by racial bias is so repugnant to our notions of justice³⁷ that any practice that risks such an outcome requires further examination.

This Note is a critical assessment of the use of rap music in criminal trials as evidence against defendants. Part I studies the history of rap music in the United States to highlight the historical connection between rap and race. It also reviews several empirical studies to explain how this connection affects the judgments people make about rap artists. Part II examines how rap music is used at trial. As a statement by a party opponent, defendant-authored rap lyrics are generally not governed by hearsay restrictions.³⁸ Instead, they are typically admitted through three evidentiary avenues: (1) inculpatory statements confessing to a crime; (2) the crime itself; or (3) other acts evidence demonstrating knowledge, motive, or intent.³⁹ Part III draws on history and empirical studies to argue that, under the balancing test prescribed by Federal Rule of Evidence 403, rap music is unfairly prejudicial in most cases because of the likelihood that the lyrics will exacerbate implicit racial biases in jurors, affecting the jury's ability to remain impartial as required by the U.S. Constitution.⁴⁰ Finally, Part IV assesses the strengths and weaknesses of other proposed solutions. This Note ultimately concludes that the best path forward is one where judges exclude rap music in all but the rarest of cases because judges should

33. These empirical studies did not make any final conclusions about the way that race impacts the negative perception of rap music and instead noted that further study was required. *See, e.g.,* Dunbar et al., *supra* note 13, at 280.

34. *See* ROSE, *supra* note 12, at 18, 21; *see also* Mukasa Mubirumusoke, *Rapping Honestly: NaS, Nietzsche, and the Moral Prejudices of Truth*, 30 J. SPECULATIVE PHIL. 175, 185 (2016).

35. *See infra* notes 174–78 and accompanying text.

36. *See* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) (“Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.”); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867–68, 871 (2017) (“The unmistakable principle underlying these precedents is that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’” (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979))).

37. *See, e.g., Flowers*, 139 S. Ct. at 2242.

38. FED. R. EVID. 801(d)(2)(A).

39. NIELSON & DENNIS, *supra* note 8, at 13–16 (similar categories have been identified by leading scholars on the topic).

40. U.S. CONST. amend. VI.

recognize the risk that rap music is likely to taint the jury's judgment of the defendant, especially when the defendant is a person of color.

I. RAP AND ITS INEXTRICABLE CONNECTION TO RACE IN AMERICA

There is no meaningful way to separate rap music from race.⁴¹ Rap is now a multiracial, multinational, and multicultural endeavor, but it first began in the United States as a uniquely Black form of art.⁴² It is a genre created by Black artists, riffing off of Black music, telling stories about Black lives for primarily Black audiences.⁴³ As one scholar put it, "Rap [is] a form of black aesthetic . . ."⁴⁴

A. Early Rap

In 1973, DJ Kool Herc, a Jamaican disc jockey in the Bronx, ignited the hip-hop scene with what is now considered the first version of rap.⁴⁵ While playing to his party audiences, DJ Kool Herc often singled out a 30-second segment from a song and used turntables to play it on repeat.⁴⁶ As the music played, he shouted simple phrases to excite the crowd and recited rhymes that he amplified using an echo chamber.⁴⁷ DJ Kool Herc's rhyming was reminiscent of Jamaican "toasting"—a practice that blends spoken poetry with music.⁴⁸ Other artists quickly adapted his style.

By 1979, the first recorded rap songs were released with the Fatback Band's "You're My Candy Sweet" and the Sugarhill Gang's "Rapper's Delight."⁴⁹ In 1984, Run-D.M.C. released their debut, self-titled album, sending rap into the mainstream and attracting white audiences with its taboo appeal.⁵⁰ *Run-D.M.C.* was

41. One empirical measure showed that people strongly associate rap music with Black people. Fried, *Bad Rap for Rap*, *supra* note 28, at 2136 n.3.

42. *Id.* at 2136; ROSE, *supra* note 12, at 18; Mubirumusoke, *supra* note 34, at 185.

43. One study from 1990 found that music preference and race were highly correlated with 96% of people who prefer heavy metal being white and 98% of people who prefer rap being Black. Interestingly, the study also assessed whether music preference was related to behavioral problems. It concluded that there was no measurable correlation between the two. See Rachel E. Sullivan, *Rap and Race: It's Got a Nice Beat, but What About the Message?*, 33 J. BLACK STUD. 605, 610 (2003) [hereinafter Sullivan, *What About the Message?*].

44. Mubirumusoke, *supra* note 34, at 185 ("Rap, as a form of black aesthetic, offers a unique response to racial oppression and its re-presentation in the media.").

45. Huff, *supra* note 12, at 339; Becky Blanchard, *The Social Significance of Rap & Hip-Hop Culture*, ETHICS DEV. GLOBAL ENV'T (EDGE) (July 26, 1999), http://hiphoparchive.org/sites/default/files/the_social_significance_of_rap_hip_hop_culture.pdf.

46. Henry A. Rhodes, *The Evolution of Rap Music in the United States*, in 4 THE MINORITY ARTIST IN AMERICA 6 (1993), <https://teachersinstitute.yale.edu/curriculum/units/files/93.04.04.pdf>.

47. *Id.*; ROSE, *supra* note 12, at 52.

48. Huff, *supra* note 12, at 339; Rhodes, *supra* note 46, at 5.

49. THE FATBACK BAND, *You're My Candy Sweet*, on FATBACK XII (Spring Records 1979); THE SUGARHILL GANG, *Rapper's Delight*, on SUGARHILL GANG (Sugar Hill 1979).

50. Ed Kiersh, *Run-D.M.C. is Beating the Rap*, ROLLING STONE (Dec. 4, 1986), <https://www.rollingstone.com/music/music-news/run-d-m-c-is-beating-the-rap-106981/>.

the first rap album to achieve gold status and the first to have a song featured on MTV.⁵¹

Generally, rap is characterized by fast-paced, often complex rhymes spoken over melodies that blend jazz, soul, blues, gospel, and reggae.⁵² The rhymes serve a storytelling purpose for typically young, Black, working-class Americans struggling under the weight of poverty, political disenfranchisement, mass incarceration, and police brutality.⁵³ In their hit song “The Message,” Grand Master Flash and the Furious Five rapped,

Rats in the front room, roaches in the back,
junkies in the alley with a baseball bat
The bill collectors, they ring my phone
and scare my wife when I’m not home.
Got a bum education. Double-digit inflation.
Can’t take the train to the job.
There’s a strike at the station
Don’t push me ‘cause I’m close to the edge.
I’m trying not to lose my head.⁵⁴

These artists used rap as a creative outlet to express discontent with the ways that their communities were simultaneously ignored and actively brutalized. Rap was “a form of political, economic, and ideological empowerment.”⁵⁵ It was also a way to humanize communities that were severely under- or misrepresented in other forms of media.⁵⁶ Chuck D, of the renowned group Public Enemy, once said that rap music was “black America’s TV station,”⁵⁷ a quote that morphed into the

51. *Id.*

52. Blanchard, *supra* note 45; Megan Sullivan, *African-American Music as Rebellion: From Slavesong to Hip-Hop*, 3 DISCOVERIES 21, 36 (2001), https://pdfs.semanticscholar.org/5f90/f91bda7b35c0c56816e40c62cde58bb10e18.pdf?_ga=2.195978732.1748009900.1571619982-1288669308.1571619982 [hereinafter Sullivan, *Music as Rebellion*].

53. ROSE, *supra* note 12, at 2–3, 18; Sullivan, *Music as Rebellion*, *supra* note 52, at 35–37.

54. GRAND MASTER FLASH AND THE FURIOUS FIVE, *The Message*, on THE MESSAGE (Sugar Hill Records 1982).

55. Lusane, *supra* note 14, at 39.

56. See TRAVIS L. DIXON, A DANGEROUS DISTORTION OF OUR FAMILIES: REPRESENTATIONS, BY RACE, IN NEWS AND OPINION MEDIA 22–24 (2017), https://colorofchange.org/wp-content/uploads/2019/05/COC-FS-Families-Representation-Report_Full_121217.pdf.

57. John Leland, *Public Enemy: Our 1988 Interview with Chuck D*, SPIN MAG. (Aug. 18, 2019), <https://www.spin.com/featured/public-enemy-chuck-d-it-takes-a-nation-of-millions-to-hold-us-back-september-1988-interview-armageddon-in-effect/>.

colloquial reference to rap as “CNN for black people.”⁵⁸ Indeed, rap artists have been likened to *griots*, West African oral historians, who serve as “the keepers and purveyors of knowledge” by spreading stories of culture and tradition through poetry and spoken word.⁵⁹ Rap music has long represented “black public dialogue.”⁶⁰

Moreover, rap is the latest manifestation of Black resistance through music.⁶¹ From spirituals crafted by enslaved people to rap songs penned by disenfranchised youth, Black communities in the United States have long used artfully subversive music to rebel against oppression.⁶² Some people have even described rap as the modern iteration of rhyming games used by enslaved people to pass messages to one another while evading the overseer’s watch.⁶³ Hip-hop journalist Davey D likened the two by saying enslaved people knew the risks of being heard, “[s]o they did what modern day rappers do. They flexed their lyrical skillz.”⁶⁴

B. Gangster Rap

In the late 1980s, West Coast rappers hit the scene with a subgenre of their own.⁶⁵ The media called it “gangster rap,”⁶⁶ a label disliked by its artists⁶⁷ but one that ultimately served to establish a unique title for a unique style.⁶⁸ The lyrics normally at issue in criminal proceedings are gangster rap despite being labeled more generally as rap.⁶⁹

The Los Angeles neighborhoods of Compton and Watts were the birthplace of gangster rap.⁷⁰ The experience of residents in these predominantly Black neighborhoods was the epitome of socioeconomic hardship.⁷¹ They were also the

58. See Blanchard, *supra* note 45; Stereo Williams, *Is Hip-Hop Still ‘CNN for Black People?’*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/is-hip-hop-still-cnn-for-black-people>.

59. Blanchard, *supra* note 45; Sullivan, *Music as Rebellion*, *supra* note 52, at 36.

60. ROSE, *supra* note 12, at 4.

61. Blanchard, *supra* note 45; Sullivan, *Music as Rebellion*, *supra* note 52, at 37.

62. Sullivan, *Music as Rebellion*, *supra* note 52, at 21, 37.

63. Blanchard, *supra* note 45.

64. Davey D, *Why Is Rap So Powerful*, DAVEY D’S HIP HOP CORNER (1998), <https://www.daveyd.com/whyrapispowerart.html>.

65. SOREN BAKER, *THE HISTORY OF GANGSTER RAP: FROM SCHOOLLY D TO KENDRICK LAMAR, THE RISE OF A GREAT AMERICAN ART FORM 4* (2018); ROSE, *supra* note 12, at 59.

66. BAKER, *supra* note 65, at 33.

67. Some artists of the genre felt that the term was an unnecessary division and that it all fell under hip-hop. Others have even said they hate the term. *Id.*

68. *Id.* at v (“They had created a new style of rap, one that contained graphic, X-rated stories of gangs, guns, violence, drugs, sex, and mayhem told in a brash, unapologetic manner.”).

69. See *infra* Part II. The lyrics that are generally considered more probative of guilt tend to be those that reference the themes that gangster rap songs are usually written about, including gang membership, violent crime, drugs, and firearms.

70. ROSE, *supra* note 12, at 59.

71. See *id.* In 1990, 18,707 people out of Watts’s total population of 32,089 were Black. *City of Los Angeles Neighborhoods Population & Race, 1990 Census*, L.A. ALMANAC, http://www.laalmanac.com/population/po241a_1990.php (last visited Apr. 20, 2020).

epicenter of rivalries between Black street gangs, namely the Bloods and Crips.⁷² These gangs stepped in to fill the void left by postindustrial economic redistribution.⁷³ They also served as political and social support for people who felt rejected by traditional institutions.⁷⁴ The gangs vied for power and prestige, but more fundamentally, their members fought to survive. This struggle—and the government’s efforts to police it—came to dominate the daily lives of people in these neighborhoods.⁷⁵ Thus, gangster rap started as “first-person street reporting from those living in, and surrounded by, America’s urban warzones.”⁷⁶

These songs were specific to the “experiences and fantasies [of a] poor, young, black, male subject in Los Angeles.”⁷⁷ They broke away from the party songs and comparatively mild-mannered rhymes that came before.⁷⁸ While offering the same political, social, and economic empowerment, gangster rap was filled with insightful but markedly profane descriptions of drugs, guns, gangs, violence, sex, and murder.⁷⁹ As Tech N9ne said, “[g]angster rap is an image of society.”⁸⁰ That society was the underground gangster lifestyle. The artists who created gangster rap were influenced by their personal experiences and, in fact, the most successful early gangster rap artists were former “hustlers,” meaning they had the knowledge to lend credibility to their music and to the lessons they frequently tried to teach through

72. BAKER, *supra* note 65, at 13; Julia Dunn, *Los Angeles Crips and Bloods: Past and Present*, ETHICS DEV. GLOBAL ENV’T (EDGE); Marcus Hoover, *Where All the Madness Began: A Look at Gang History*, ETHICS DEV. GLOBAL ENV’T (EDGE) (May 28, 1999). In 1986, Los Angeles gangs were 68% Black male and 2% Black female. The average age of gang members was 16 years old with 150,000 recorded Crips and 25,000 Bloods. BAKER, *supra* note 65, at 23.

73. See JAMES C. HOWELL, *GANGS IN AMERICA’S COMMUNITIES* 17 (1st ed. 2012); NIELSON & DENNIS, *supra* note 8, at 39–40.

74. The development of Black gangs in the United States and the progression of rivalry violence between them are themselves results of institutionalized racism and historical distribution of social and economic power along racial lines. The gangs developed to fill a void left by virtually all institutions. The lone institution that focused significant energy on these communities was the criminal justice system. See HOWELL, *supra* note 73, at 17; NIELSON & DENNIS, *supra* note 8, at 40.

75. In Los Angeles, deaths related to gangs hit 205 in 1987. By 1991, there were 330. Sharp increases in these incidents were reported in Los Angeles County throughout the decade. Stephen Braun & Paul Feldman, *Killings Related to Street Gangs Hit Record in ‘87*, L.A. TIMES (Jan. 8, 1988), <https://www.latimes.com/archives/la-xpm-1988-01-08-me-23134-story.html>; Jesse Katz, *Gang Killings in L.A. County Top a Record 700*, L.A. TIMES (Dec. 8, 1991), <https://www.latimes.com/archives/la-xpm-1991-12-08-mn-264-story.html>.

76. BAKER, *supra* note 65, at v.

77. ROSE, *supra* note 12, at 59. Although discussions of early rap focus mostly on men, there were many significant female artists who shaped the genre. See *Let’s Talk About the Female MCs Who Shaped Hip-Hop*, UDISCOVERMUSIC (Dec. 9, 2019), <https://www.udiscovermusic.com/stories/the-female-rappers-who-shaped-hip-hop/>.

78. See BAKER, *supra* note 65, at 1.

79. See generally *id.*; ROSE, *supra* note 12.

80. BAKER, *supra* note 65, at 241 (quoting Tech N9ne).

their lyrics.⁸¹ It is true that these artists used their experiences to “keep it real,” but the Gangster Rapper—the persona that drew the ire of a nation—was less a portrait of any real person and more a product of artistic hyperbole. It is a professional identity that artists continue to adopt today.⁸² Therein lies the first persistent myth about rap: the assumption that the events detailed in the music are wholly factual.⁸³

When Ice-T released his single “6 ‘N the Mornin,” he woke the music world up to gangster rap.⁸⁴ The song told the story of a man from Los Angeles who narrowly escapes a police raid, beats up a woman, starts pimping, gets arrested with an Uzi and a hand grenade, stabs another inmate in the eye, and eventually serves seven years in prison.⁸⁵ Regardless of what one thinks about the art, the song was only semiautobiographical.⁸⁶ Ice-T later called his music “faction”—a blend between fact and fiction.⁸⁷ The pure truth of the story was less important than the gravity of it. The shocking lyrics and perceived authenticity of it all brought attention⁸⁸ to the harsh realities of people living in “the hood.”

The second pervasive assumption about gangster rap is that it gratuitously uses profanity to promote violence.⁸⁹ The profanity, like other aspects of the genre, is an intentional expression of emotion.⁹⁰ Likewise, the violence depicted in these songs is a reflection of the frequent violence—both literal and structural—witnessed by its artists.⁹¹ The music does not create violence, nor do its artists set out to endorse

81. *Id.* at 15. Ice-T, one of the most prolific and successful gangster rap artists of the era, was commonly understood to be a former hustler, a term which can refer to someone who participates in various criminal activities. But Ice-T himself has spoken about how hip-hop and rap saved his life. He acknowledges the indiscretions of his youth and the harsh realities he faced and discusses how rap allowed him an outlet to document “the life” rather than go down the path that so many of his friends had. Ice-T explained that he always tried to show the two sides of the lifestyle in his music: “I tell you about the fun at the beginning but there’s pain in the end.” Tracy Marrow & Nelson George, *Thank God Hip-Hop Came Along*, *GUARDIAN* (May 16, 2008), <https://www.theguardian.com/music/2008/may/17/urbanmusic.features>.

82. This has sometimes come into tension with the purported goal of ‘keeping it real,’ but rap artists continue to hyperbolize or, in some cases, invent the events described in their lyrics. *See, e.g.*, ROSE, *supra* note 12, at 3.

83. *See* Dennis, *supra* note 21, at 15; *see also* ADAM BRADLEY, *BOOK OF RHYMES: THE POETICS OF HIP HOP* 89 (2009) (“Both rap’s greatest advocates and its loudest detractors each tend to interpret rap as direct speech.”).

84. BAKER, *supra* note 65, at 4, 14. Ice-T was inspired by the work of Schoolly D, who is widely credited as recording the first gangster rap song with “P.S.K.” *Id.* at 14.

85. ICE-T, *6 ‘N the Mornin* (Techno Hop Records 1986).

86. BAKER, *supra* note 65, at 15.

87. *Id.* at 14.

88. *Id.*

89. *See id.* at 16 (“‘6 ‘N the Mornin’ was full of profanity and was presented in an explicit, gritty way, but it wasn’t mindless rage.”); BRADLEY, *supra* note 83, at 86–88.

90. BRADLEY, *supra* note 83, at 86–88; *see also* BENJAMIN K. BERGEN, *WHAT THE F: WHAT SWEARING REVEALS ABOUT OUR LANGUAGE, OUR BRAINS, AND OURSELVES* 7 (2016) (“[T]he most potent words of all—the ones that have a direct line to the emotions—are profanity.”).

91. *See infra* notes 93–106 and accompanying text.

violence; rather, the art protests racial inequalities by shining a light on uncomfortable realities—“the crises transpiring in black urban America.”⁹²

Between 1980 and 2008, Black people were six times more likely to be a victim of homicide than white people.⁹³ In Los Angeles alone, the rivalries between street gangs led to hundreds of deaths in the 1980s.⁹⁴ In 1986, when Ice-T released “6 ‘N the Mornin’,” there were 398 gang-related deaths in the city.⁹⁵ Moreover, state violence remained centralized in Black neighborhoods, fueling the impulses behind gangster rap.⁹⁶ These communities lived—and continue to live—with the persistent threat of police intervention.⁹⁷ At its worst, the strained relationship between police and community results in overt instances of police brutality, the subject of many gangster rap songs.⁹⁸ The year that four LAPD officers used batons to beat Rodney King⁹⁹ was also the year that Body Count recorded “Cop Killer,” with lyrics written by Ice-T.¹⁰⁰

92. BAKER, *supra* note 65, at 27.

93. ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T OF JUST., HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008 11 (2011). This phenomenon continues today. In 2016, Black men were almost 10.4 times more likely to die by homicide than white men. Corinne A. Riddle et al., *Comparison of Rates of Firearm and Nonfirearm Homicide and Suicide in Black and White Non-Hispanic Men*, by U.S. State, 168 ANNALS INTERNAL MED. 712, 712 (2018).

94. BAKER, *supra* note 65, at 23.

95. *Id.* at 24, 33.

96. See, e.g., Hannah LF Cooper, *War on Drugs Policing and Police Brutality*, 50 SUBSTANCE USE & MISUSE 1188, 1189 (2015) (discussing both the historical and contemporary ways that policing has targeted Black communities). Additionally, police violence has a ripple effect beyond individual incidents. Matthew Desmond, et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 870 (2016) (using empirical analysis of 911 calls after publicized cases of police brutality against unarmed Black men to conclude that such cases have a community-wide impact in Black neighborhoods, exacerbating mistrust in police and significantly decreasing citizen crime reporting).

97. This disparate impact is the result of long-standing racial biases enmeshed in policing strategies that focus on Black communities. Some scholars have concluded that freedom from the “pernicious threat of police intervention . . . helped to define ‘Whiteness’” in America. Cooper, *supra* note 96, at 1189.

98. See, e.g., ICE-T, *Squeeze the Trigger*, on RHYME PAYS (Sire Records 1987) (“Cops hate kids, kids hate cops. Cops kill kids with warning shots. What is crime and what is not? What is justice? I think I forgot.”).

99. Rodney King, a 23-year-old Black man, was beaten with batons and kicked for 15 minutes by four officers with the Los Angeles Police Department. King led police on a high-speed chase that culminated in a brutal beating, leaving him with skull fractures, broken bones, and permanent brain damage. Although more than a dozen officers stood by and watched, ultimately four were charged with excessive use of force. In 1992, all four were acquitted. After the verdict, residents reacted in what became labeled as the “Los Angeles Riots,” the actions of a community whose simultaneous invisibility and dispensability had enraged it. Anjali Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

100. BODY COUNT, *Cop Killer*, on BODY COUNT (Sire, Warner Bros. 1992).

President Reagan's revamped War on Drugs also devastated Black communities.¹⁰¹ By the end of the 1980s, hysteria over an alleged epidemic of drug abuse in urban neighborhoods led Congress to pass severe sentencing laws aimed at crack cocaine users: users who were predominantly Black.¹⁰² Budgets allocated more funds towards police to accommodate the War on Drugs, which meant more patrols and more arrests.¹⁰³ These efforts led to increased incidents of police brutality and an erosion of Fourth Amendment protections,¹⁰⁴ while doing little to curb drug use.¹⁰⁵ Those arrested faced draconian penalties, creating a wave of long-term sentences that led to mass incarceration and the depletion of Black communities.¹⁰⁶ This all served as fodder for the flames of gangster rap. In 1990, Ice Cube rapped,

They say we promote gangs and drugs.
 You want to sweep a [n—a] like me up under the rug.
 Kicking shit called street knowledge.
 Why more [n—as] in the pen than in college?
 Because of that line I might be your cellmate.
 That's from the [n—a] ya love to hate.¹⁰⁷

C. Negative Perceptions of Rap Music and Implicit Racial Bias

The general public has always reacted negatively to rap.¹⁰⁸ In the early years, as rap artists sold hundreds of thousands of copies of their chart-topping albums,¹⁰⁹ a heated debate raged over their music. United by the fear that rap would

101. Cooper, *supra* note 96, at 1189; *A Brief History of the Drug War*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Dec. 1, 2019).

102. Cooper, *supra* note 96, at 1189; *A Brief History of the Drug War*, *supra* note 101; *Race and the War on Drugs*, ACLU, <https://www.aclu.org/other/race-war-drugs> (last visited Dec. 2, 2019).

103. Cooper, *supra* note 96, at 1189–90.

104. *Id.* at 1192.

105. *Id.*

106. *See id.* at 1189. The War on Drugs had several additional disastrous impacts on the country and on Black communities in particular. Among them was the demonization of drug users and the parallel focus on punishment over treatment. Another was the rise in HIV/AIDS deaths due to the lack of needle exchange programs. *Race and the War on Drugs*, *supra* note 102.

107. ICE CUBE, *The Nigga Ya Love to Hate*, on AMERIKKKA'S MOST WANTED (Lench Mob, Priority 1990). The decision by the author to censor the n-word in the text is out of a deep recognition of the fact that the use of this word, particularly by someone who is not Black, can be offensive and hurtful to many. It is *not* an effort to deny or stifle the power that can result from Black artists like Ice Cube using and reclaiming this term.

108. *See* Sullivan, *What About the Message?*, *supra* note 43, at 607 ("From the start, the public viewed hip-hop culture and rap music through a racist lens.")

109. *See, e.g.*, BAKER, *supra* note 65, at 63, 94.

poison children's minds and incite racial violence,¹¹⁰ critics in politics, media, and civil society launched concerted attacks to quell the genre.¹¹¹

In 1988, N.W.A. released its infamous protest song “[F—k] tha Police.”¹¹² The lyrics enraged law enforcement and politicians alike.¹¹³ The FBI sent a letter to N.W.A. condemning the song,¹¹⁴ and police effectively shut down N.W.A.’s tour by refusing to provide security at their concerts.¹¹⁵ In 1990, 2 Live Crew was brought to court after they released their hit single “Me So Horny.”¹¹⁶ They were later arrested on obscenity charges.¹¹⁷ Owners of record stores were even arrested for continuing to sell the album.¹¹⁸ Artists like LL Cool J, Too Short, and 2 Live Crew were arrested for performing their music.¹¹⁹

The genre was described as “sick” and “obscene.”¹²⁰ Sixty members of Congress signed a letter saying it was “vile” and “despicable.”¹²¹ Congressman Newt Gingrich told companies to pull advertisements from radio stations that played rap.¹²² President George H. W. Bush criticized Ice-T and Body Count for their song “Cop Killer.”¹²³ Vice President Dan Quayle denounced Tupac Shakur for promoting violence.¹²⁴ Second Lady Tipper Gore compared Ice-T to Hitler,¹²⁵ and President Bill Clinton said Sista Souljah advocated the killing of white people.¹²⁶ According to scholars, these comments were made in highly racialized contexts, suggesting that they were motivated by both implicit and explicit racial biases.¹²⁷ Ostensibly, there was outrage on the part of people in power who used thinly veiled critiques of rap

110. See Fried, *Bad Rap for Rap*, *supra* note 29, at 2135.

111. See *A Decade in Rap Censorship (1990-1999)*, SPIN, <https://www.spin.com/2013/08/the-worst-moments-of-the-90s-worst-band-names-worst-lyrics-worst-video/130809-worst-of-the-90s-c-delores/> (last visited Dec. 2, 2019).

112. N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Priority, Ruthless 1988).

113. BAKER, *supra* note 65, at 107; NIELSON & DENNIS, *supra* note 8, at 46.

114. Mathieu Delflem, *Popular Culture and Social Control: The Moral Panic on Music Labeling*, 45 AM. J. CRIM. JUST. 2, 16 (2019).

115. *A Decade in Rap Censorship (1990-1999)*, *supra* note 111.

116. See James Lemoyne, *Recording Ruled Obscene Brings Arrest*, N.Y. TIMES (June 9, 1990), <https://www.nytimes.com/1990/06/09/us/recording-ruled-obscene-brings-arrest.html>; *A Decade in Rap Censorship (1990-1999)*, *supra* note 111.

117. Lemoyne, *supra* note 116; *A Decade in Rap Censorship (1990-1999)*, *supra* note 111.

118. Lemoyne, *supra* note 116; *A Decade in Rap Censorship (1990-1999)*, *supra* note 111.

119. Dunbar et al., *supra* note 13, at 280. Authorities said the performances were lewd and profane. *Id.*

120. BAKER, *supra* note 65, at 107.

121. *Id.*

122. *A Decade in Rap Censorship (1990-1999)*, *supra* note 111.

123. ROSE, *supra* note 12, at 183 (calling Ice-T’s lyrics “sick”).

124. See Sullivan, *What About the Message?*, *supra* note 43, at 607.

125. *A Decade in Rap Censorship (1990-1999)*, *supra* note 111.

126. See Sullivan, *What About the Message?*, *supra* note 43, at 608.

127. See *id.*

music to reinforce racial stereotypes and stoke long-standing fears about angry and violent Black youth.¹²⁸

Amid the controversy, some psychologists began to ask what was really behind the public outcry over rap.¹²⁹ They hypothesized that rap music was being “judged through the tainted lens of a Black stereotype which includes such traits as violence, hostility, and aggression.”¹³⁰ As it turns out, this hypothesis was correct.

In 1996, psychologist Carrie Fried conducted the first study into this question.¹³¹ She gave 118 white participants identical lyrics from the folk song “Bad Man’s Blunder” by the Kingston Trio.¹³² With each set of participants, Fried manipulated the test by telling them that the lyrics came from a specific genre of music: folk, country, or rap.¹³³ They were asked to assess how offensive the lyrics were and whether they believed that the lyrics would lead to riots or other violence.¹³⁴ The results showed that people judged the song “significantly more negative on all measures” when they were told it was rap.¹³⁵

Fried then conducted a second test within the same study, this time without information about the genre.¹³⁶ Instead, 80 white participants received the same lyrics from “Bad Man’s Blunder” along with a photo of the person they were told wrote the song.¹³⁷ Fried used two identical photos except that in one photo, the young man was Black, and in the other, he was white.¹³⁸ She chose the photos from an innocuous insurance ad.¹³⁹ Once again, the participants were asked how offensive the lyrics were and whether they thought the music would incite violence.¹⁴⁰ The results were equally disheartening—when participants believed that the musician was Black, they found the lyrics more offensive and potentially violent.¹⁴¹ Overall, Fried concluded from this first study that genre and race significantly impact how people react to music lyrics, even when they are asked to judge them solely on the words.¹⁴² “Even a Kingston Trio song would be threatening if it were a rap song.”¹⁴³

128. See *id.* at 607–08; see also Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.”).

129. See generally Fischhoff, *supra* note 29; Fried, *Bad Rap for Rap*, *supra* note 29; Fried, *Who’s Afraid of Rap*, *supra* note 29.

130. Fried, *Bad Rap for Rap*, *supra* note 29, at 2136.

131. *Id.*

132. *Id.* at 2138.

133. *Id.*

134. *Id.*

135. *Id.* at 2139.

136. *Id.*

137. *Id.*

138. *Id.* at 2139–40 (noting that both images were pulled from the same advertising campaign and “were nearly identical except for the race”).

139. *Id.* at 2140.

140. *Id.*

141. *Id.*

142. *Id.* at 2141.

143. *Id.*

In 1999, Fried expanded her inquiry.¹⁴⁴ In her second study, she sought to measure how other factors influence opinions about music lyrics.¹⁴⁵ This time, she used a more diverse set of participants, selecting both white and Latino people.¹⁴⁶ Of the participants, some were told the lyrics were from a country song and others a rap song.¹⁴⁷ Once again, the results showed that the lyrics were considered significantly more offensive, dangerous, and violent when identified as rap.¹⁴⁸ Though the research found that age, parental status, musical preferences, and music buying habits all impacted the participants' opinions, the same trend emerged across all demographics¹⁴⁹—people expressed instinctive bias towards rap, believing that its offensive lyrics were likely to promote “violence, riots, and civil unrest.”¹⁵⁰ Ultimately noting that further study was required, Fried posited that “the lyrics of rap music are judged more harshly because rap is music associated with Black artists or Black culture. Rap lyrics may be rated as more hostile or aggressive or dangerous because of negative culturally held stereotypes.”¹⁵¹

Fried's seminal studies remain relevant despite their age. When researchers at UC Irvine replicated Fried's tests in 2016, they found that what was true then is true now.¹⁵² The total negative reaction to music lyrics increased significantly when participants believed they were given lyrics to a rap song.¹⁵³ The researchers also concluded that participants believed rap lyrics were “more literal” than lyrics from other genres.¹⁵⁴

“Gangsta Rap and a Murder in Bakersfield” by psychologist Stuart Fishcoff is perhaps the most useful study to explain how rap lyrics negatively impact the impartiality of criminal proceedings.¹⁵⁵ Fischhoff conducted the study after he was hired by defense counsel in the trial of Offord Rollins III, an 18-year-old Black high school student.¹⁵⁶ Rollins was accused of killing his former girlfriend.¹⁵⁷ The question at issue in the case was whether the jury should consider rap lyrics that Rollins wrote about the victim.¹⁵⁸

144. Fried, *Who's Afraid of Rap*, *supra* note 29, at 708.

145. *Id.* These factors included age, gender, parental status, musical preferences, and music-buying habits. *Id.*

146. *Id.* at 709.

147. *Id.* at 710. She omitted the folk option in her second study. *Id.*

148. *Id.* at 710–15.

149. *Id.* at 716. Interestingly, the reactions were the same across genders. *Id.* at 712.

150. *Id.* at 710.

151. *Id.* at 708.

152. Dunbar et al., *supra* note 13, at 283, 285. The authors noted that the fact that the same results were found in 2016 suggest that the bias against rap is profound because this more recent study employed several significant changes in methodology from the 1999 study. *Id.* at 288.

153. *Id.* at 285.

154. *Id.* at 288.

155. See Fischhoff, *supra* note 29, at 795.

156. *Id.*

157. *Id.*

158. *Id.* at 795–96.

To answer this question, Fischhoff used 134 participants from diverse ethnic and racial backgrounds.¹⁵⁹ They were each randomly assigned to assess one of four scenarios. All the scenarios contained the following biographical information: the subject is an 18-year-old Black male high school student from Southern California with good grades, an athletic scholarship, and a side job singing at parties.¹⁶⁰ These details mirrored those of the real-life Rollins.¹⁶¹

The participants with the first scenario were given only the above-mentioned biography.¹⁶² In the second scenario, participants were told that the subject was on trial accused of murdering his former girlfriend but maintains his innocence.¹⁶³ The third set of participants were not informed of any murder charges, but were given the subject's rap lyrics.¹⁶⁴ Finally, in the fourth scenario, participants received the subject's rap lyrics and were told that he had been accused of murder.¹⁶⁵ The lyrics used were the same ones that prosecutors sought to admit against Rollins.¹⁶⁶ An excerpt of the lyrics follows:

[B—h] let me go
She wouldn't let me go
So I slaped [sic] the ho
don't get mad
You fruit cocktail
See my rhymes
Now you happy
like a [f—g] in jail
sayin my name wrong
you trick silly rabbit
come in my face again
I'm gonta grab it.¹⁶⁷

The participants were asked to judge the young man on nine character traits: "caring-uncaring, selfish-unselfish, gentle-rough, likable-unlikable, conceited-modest, truthful-untruthful, sexually nonaggressive-sexually aggressive, capable of murder-not capable of murder, and not a gang member-a gang member."¹⁶⁸ The results were shocking. Fischhoff found that the rap lyrics drastically

159. *Id.* at 798.
160. *Id.* at 798–99.
161. *Id.* at 798.
162. *Id.* at 798–99.
163. *Id.* at 799.
164. *Id.*
165. *Id.*
166. *Id.* at 799–800.
167. *Id.* at 800.
168. *Id.* at 798–99.

prejudiced participants' judgments about the subject.¹⁶⁹ They were significantly more likely to attribute negative character traits to the young man after reading his lyrics.¹⁷⁰ Their judgments were more positive when the participants only knew he had been accused of murder than when they knew he was a rapper not facing murder charges,¹⁷¹ suggesting that people view being a rap artist as worse than potentially committing murder. Even more worrisome was the finding that participants were more inclined to believe that the young man was capable of murder after reading his lyrics.¹⁷² In the mind of the average person, "nice males don't write ugly lyrics and . . . males who do are definitely not nice."¹⁷³

The conclusion of these studies is unmistakable. Not only was rap music born as an expression of Black identity, but the association between rap and race is one that has been internalized by our collective subconscious and intertwined with pervasive stereotypes about Black criminality.¹⁷⁴ The "Violent Black Criminal" is a stereotype that social psychologists have observed since the mid-twentieth century.¹⁷⁵ Its predecessors emerged much earlier and have been part of our culture for centuries.¹⁷⁶ The effect of these stereotypes is tremendous. In fact, studies have shown that seeing Black people can trigger thoughts about crime, and thoughts about crime can in turn trigger images of Black people.¹⁷⁷ "The mere presence of a Black man, for instance, can trigger thoughts that he is violent and criminal . . . Merely thinking about Blacks can lead people to evaluate ambiguous behavior as aggressive . . ."¹⁷⁸

These stereotypes interact closely with our implicit biases because implicit biases can form as a result of continued exposure to stereotypes.¹⁷⁹ Our implicit biases build on these narratives by going "beyond stereotyping to include favorable or unfavorable evaluations toward groups of people."¹⁸⁰ Thus, when we as jurors are

169. *Id.* at 800.

170. *Id.*

171. *Id.* at 800–02.

172. *Id.* at 803; *see also* NIELSON & DENNIS, *supra* note 8, at 85.

173. Fischhoff, *supra* note 29, at 803. When Fischhoff presented these findings at a pretrial hearing, the judge decided to exclude the majority of Rollins's lyrics. The jury was deadlocked. The district attorney later chose not to retry Rollins for the murder. Three years later, Rollins was living as a successful college student. *Id.* at 804–05.

174. Eberhardt et al., *supra* note 128, at 876.

175. *See id.* ("The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.")

176. *See* Laura Green, *Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, JIM CROW MUSEUM OF RACIST MEMORABILIA, FERRIS ST. U., <https://www.ferris.edu/htmls/news/jimcrow/links/essays/vcu.htm> (last visited Apr. 23, 2020) (discussing various Black stereotypes in early American history including "the Savage"); *see also* Calvin John Smiley & David Fakunle, *From "Brute" to "Thug": The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350, 352–54 (2016).

177. *E.g.*, Eberhardt et al., *supra* note 128, at 878.

178. *Id.* at 876.

179. CHERYL STAATS ET AL., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015 4 (2015).

180. *Id.*

asked to judge the alleged actions of a rapper, the stereotypes about rap being Black and Black being criminal pervade, triggering implicit racial biases that cause us to make negative evaluations about that person.¹⁸¹

II. RAP AS EVIDENCE: HOW SONG LYRICS ARE USED IN CRIMINAL PROCEEDINGS

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. It is equally important to recognize that the lyrics demonstrate that the gangster lifestyle has become mainstream. It is now popular to be a "gangsta," the contemporary idiom for gangster The lifestyle of drug trafficking, violence, and greed has created individuals whose value system is counter to that of society at large.¹⁸²

A. *United States v. Foster*

When Derek Foster arrived in Chicago, he tried to keep pace with the other passengers exiting the train.¹⁸³ The two large suitcases and large blue duffle bag that he was carrying slowed him down.¹⁸⁴ As he struggled with the luggage, Foster turned around several times.¹⁸⁵ His behavior caught the attention of DEA agents at the train station.¹⁸⁶ When the agents approached him, Foster tried to put the suitcases down, but one fell over.¹⁸⁷ Reportedly, a puff of white powder wafted out of the corner of the suitcase as it hit the ground.¹⁸⁸ When it fell over again, emitting more smoke, one of the agents touched and smelled the substance, concluding that it was talcum powder.¹⁸⁹

Foster denied owning the suitcases and told agents that he agreed to help another man carry the luggage.¹⁹⁰ When asked about the blue duffle bag, he said it was in fact his, and he consented for the agents to search it.¹⁹¹ Inside, they found clothes, a beeper, train tickets, and a notebook.¹⁹² The notebook contained a page with the following handwritten lyrics: "Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town. Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average bussiness [sic] man."¹⁹³

181. *Id.* at 4.

182. Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, 54(3) U.S. ATT'YS BULL. 1, 1 (2006).

183. *United States v. Foster*, 939 F.2d 445, 448–49 (7th Cir. 1991).

184. *Id.*

185. *Id.* at 448.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 449.

191. *Id.*

192. *Id.*

193. *Id.*

After a lawful search of the suitcases, agents discovered a kilogram of cocaine and two 5-gallon containers of liquid phencyclidine (“PCP”) packed with diapers, foam rubber, and talcum powder.¹⁹⁴ Foster was charged with possession with intent to distribute cocaine and PCP.¹⁹⁵

At trial, prosecutors sought to admit the handwritten lyrics found in Foster’s notebook.¹⁹⁶ The court agreed to admit the evidence but limited the purpose of the lyrics to demonstrate knowledge and intent—knowledge of the drug trade and intent to participate in it.¹⁹⁷ Foster was convicted.¹⁹⁸

In 1991, the U.S. Court of Appeals for the Seventh Circuit held that, although the lyrics were certainly prejudicial, it was not in a position to question the finding by the trial court that the lyrics were not *unduly prejudicial*.¹⁹⁹ Foster argued that although rap music was “a popular musical style that described urban life,”²⁰⁰ his lyrics were fictional. The appellate court rejected this argument, concluding that there was a reasonable inference of knowledge and intent that the jury could have drawn from the lyrics.²⁰¹ It said that in portraying his fictional character, Foster “exhibited knowledge of an activity that is far from fictional,”²⁰² and his familiarity with drugs “made it more probable that he knew he was carrying illegal drugs.”²⁰³ With that, Foster lost his appeal.²⁰⁴

Foster was the earliest case in which a defendant was convicted based in part on rap lyrics presented at trial.²⁰⁵ The strategy was soon replicated in prosecutions across the country,²⁰⁶ with charges ranging from drug possession²⁰⁷ to murder.²⁰⁸ By 2005, it was standard practice.²⁰⁹ As rap grew as a genre—distorted by media coverage²¹⁰ and battered by criticism²¹¹—prosecutors began consciously and unconsciously exploiting the music’s notoriety.

194. *Id.*

195. *Id.*

196. *Id.* at 455.

197. *Id.*

198. *Id.* at 458.

199. *Id.* at 456–57 (emphasis added). Foster changed his story to agents several times and ultimately conceded that the only issue at trial was whether he knew he was transporting narcotics. *Id.* at 449.

200. *Id.* at 456.

201. *Id.* at 457.

202. *Id.* at 456.

203. *Id.* at 455.

204. *Id.* at 458.

205. NIELSON & DENNIS, *supra* note 8, at 62.

206. *Id.* at 69.

207. *See, e.g., Foster*, 939 F.2d at 449.

208. *See, e.g., Bryant v. State*, 802 N.E.2d 486, 491 (Ind. Ct. App. 2004).

209. NIELSON & DENNIS, *supra* note 8, at 67. By the 2000s, the practice was rampant. Most of the cases scholars have identified occurred after 2005. *Id.*

210. *See Sullivan, What About the Message?*, *supra* note 43, at 608.

211. *See supra* Part I.

B. Admissibility

In order to introduce rap into evidence, the prosecutor must first establish that the music is not inadmissible hearsay,²¹² and second, that it is relevant, as either evidence of a confession, evidence of a crime,²¹³ or permissible other acts evidence.²¹⁴

1. Hearsay

Federal Rule of Evidence 802 prohibits the admission of statements²¹⁵ that “the declarant does not make while testifying at the current trial or hearing”²¹⁶ and that “a party offers in evidence to prove the truth of the matter asserted in the statement.”²¹⁷ When a prosecutor seeks to introduce rap lyrics authored by the defendant to prove the truth of a fact at issue, the lyrics technically fall under this definition of hearsay. However, when the lyrics are both written by and offered against the defendant, they bypass the hearsay prohibition entirely and are considered admissible non-hearsay as an opposing party’s statement.²¹⁸

2. Relevance

As a threshold matter, only relevant evidence is admissible at trial.²¹⁹ The relevance requirement is a fairly low bar. The rule only requires that the evidence “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”²²⁰ If evidence is relevant, then it is generally admissible.²²¹

212. FED. R. EVID. 802.

213. FED. R. EVID. 401.

214. FED. R. EVID. 404(b).

215. FED. R. EVID. 802.

216. FED. R. EVID. 801(c)(1).

217. FED. R. EVID. 801(c)(2).

218. FED. R. EVID. 801(d)(2)(A) (explaining that a statement is not hearsay if “[t]he statement is offered against an opposing party and (A) was made by the party in an individual or representative capacity”).

219. FED. R. EVID. 401(a).

220. FED. R. EVID. 401(a)–(b).

221. FED. R. EVID. 402. This is subject to exceptions provided by the U.S. Constitution, federal law, rules established by the U.S. Supreme Court, and other Federal Rules of Evidence, including those prohibiting unexcepted hearsay. *Id.*

The courts that have addressed this issue have found rap lyrics relevant as (1) inculpatory statements confessing to the crime;²²² (2) the crime itself;²²³ or (3) statements demonstrating knowledge, motive, or intent.²²⁴

a. Inculpatory Statements Confessing to the Crime

First, courts have found rap music relevant when it has a tendency to show that the defendant confessed to the crime. While mere admission is not enough to support a criminal conviction,²²⁵ a confession can still be a powerful piece of evidence for the jury. Arguably, this effect is amplified when the evidence is rap music in which the defendant describes a similar crime to the one they are charged with. This is one instance where the belief that rap is “more literal”²²⁶ can have brutal consequences for the defendant.²²⁷ In certain cases, the descriptions are uniquely precise about the events of the crime at issue, but for many other cases, the descriptions are only vague references to the same theme.

222. See, e.g., *Greene v. Commonwealth*, 197 S.W.3d 76, 86–87 (Ky. 2006) (holding rap lyrics about defendant’s late wife were properly admitted to show defendant’s confession to her murder). *But see State v. Cheeseboro*, 552 S.E.2d 300, 312–13 (S.C. 2001) (holding rap lyrics about leaving no fingerprints and bloody bodies were not properly admitted as defendant’s confession to the crime because they were too vague).

223. These cases usually involve charges of terroristic threats. See, e.g., *Jones v. State*, 64 S.W.3d 728, 730, 736–37 (Ark. 2002) (holding rap lyrics about a classmate constituted a true threat and were not protected speech). *But see Elonis v. United States*, 135 S. Ct. 2001, 2005–07, 2012 (2015) (reversing on separate grounds defendant’s conviction for interstate communication of a threat based on rap lyrics about defendant’s ex-wife); *People v. Oduwole*, 985 N.E.2d 316, ¶¶ 48–54 (Ill. App. Ct. 2013) (reversing for insufficient evidence defendant’s conviction of attempt of a terroristic threat based on rap lyrics about a school shooting).

224. See, e.g., *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991) (holding rap lyrics about being the “biggest dope dealer” were properly admitted to show defendant’s knowledge of the drug trade and his intent to participate in it); see also *United States v. Herron*, 762 F. App’x 25, 30 (2d Cir. 2019) (holding rap lyrics about the Murderous Mad Dogs Bloods, violent crime, and drug trafficking were properly admitted to show defendant’s position in a gang, his knowledge of the alleged criminal activities, and his participation in them); *United States v. Moore*, 639 F.3d 443, 448 (8th Cir. 2011) (holding rap lyrics about drugs and guns were properly admitted to show defendant’s knowledge of drug code words and drug prices); *United States v. Price*, 418 F.3d 771, 783 (7th Cir. 2005) (holding rap lyrics to the song “COKE” were properly admitted to show defendant’s knowledge of the drug trade and to help the jury understand the “jargon that is pervasive in the drug trade”); *Bryant v. State*, 802 N.E.2d 486, 498–99 (Ind. Ct. App. 2004) (holding rap lyrics about finding a body in the trunk of a car were properly admitted to show defendant’s intent to commit murder and hide the body in his trunk). *But see Hannah v. State*, 23 A.3d 192, 196–97 (Md. 2011) (holding rap lyrics about guns were improperly admitted at trial to show defendant’s knowledge of and experience with guns); *State v. Skinner*, 95 A.3d 236, 238–39, 41 (N.J. 2014) (holding rap lyrics about graphic depictions of violence were improperly admitted at trial to demonstrate defendant’s alleged motive and intent).

225. See, e.g., *David A. Moran, In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 817 (2003).

226. See *Dunbar et al., supra* note 13, at 288.

227. See, e.g., *Greene*, 197 S.W.3d at 79 (upholding life sentence for defendant).

Consider *Greene v. Commonwealth*. Dennis Greene was tried for murdering his wife.²²⁸ Greene, angry over his wife's alleged infidelity, was accused of cutting her throat following a heated argument.²²⁹ Afterwards, Greene recorded a music video where he rapped the following lyrics:

[B—h] made me mad, and I had to take her life.
 My name is Dennis Greene and I ain't got no [f—ing] wife.
 I knew I was gonna be givin' it to her . . . when I got home . . .
 I cut her [motherf—in'] neck with a sword . . .
 I'm sittin' in the cell starin' at four walls . . .²³⁰

At trial, the prosecution sought to admit these lyrics as evidence saying that they were inculpatory statements confessing to the murder given the precise details of the song.²³¹ The court concluded the lyrics were admissible,²³² and Greene was convicted and sentenced to life in prison.²³³ *Greene* is perhaps the most definitive example of a case where defendant-authored rap music is highly probative of guilt because of the level of specificity of the lyrics.

However, contrast the *Greene* case with *State v. Cheeseboro*. Felix Cheeseboro was charged with armed robbery and the murder of three people.²³⁴ While he awaited trial, Cheeseboro wrote a rap song titled "The Ruckus."²³⁵ The song contained the following lyrics:

Ruckus, I believe you're a perpetrator, gold and platinum hater, cause me and J.D. is a force like Dark Vador. . . Like the 4th of July, I spray fire in the sky. If I hear your voice, better run like horses or like metamorphis, turn all y'all to corpses. No fingerprints or evidence at your residence. Fools leave clues, all I leave is a blood pool. Ten murder cases, why the sad faces? Cause when I skipped town, I left a trail [of] bodies on the ground.²³⁶

The trial court admitted the lyrics, but the Supreme Court of South Carolina disagreed with this decision.²³⁷ Unlike the court in *Greene*, it found that Cheeseboro's lyrics were "too vague in context" and their minimal probative value was "far outweighed by [their] unfair prejudicial impact as evidence of

228. *Id.*

229. *Id.* at 79–80.

230. *Id.* at 86.

231. *Id.*

232. *Id.*

233. *Id.* at 79.

234. *State v. Cheeseboro*, 552 S.E.2d 300, 304 (S.C. 2001).

235. *Id.* at 312.

236. *Id.* at 312–13.

237. *Id.*

[Cheeseboro's] bad character"²³⁸ Nonetheless, given the high standard of review, his conviction was affirmed.²³⁹

The degree to which rap music should serve as a confession to a crime is clearly a highly fact-specific inquiry, but the question remains where to draw that line between lyrics that provide a sufficiently unique description of the crime to constitute a confession and lyrics that only serve to paint the defendant as a violent criminal. Unfortunately, the courts do not seem to have offered much guidance. Considering the power that a confession can have on the jury's verdict, the stakes are high. The fact that rap music, unlike a diary, is an art form that is influenced by innumerable things²⁴⁰ makes it particularly difficult to identify the cutoff between reality and hyperbole. Likewise, the extent to which artists adopt the gangster rapper persona and the fact that the themes common to rap music—drugs, gangs, and violence—line up with criminal statutes further complicate the equation.

b. Rap Lyrics as Threats

Second, courts have found rap music relevant when the lyrics themselves are the substantive crime charged in the case; this usually involves songs that contain threats.²⁴¹ One factor in determining if the lyrics constitute a crime seems to be whether the defendant took steps to communicate the lyrics to the threatened party,²⁴² but once again the artistic nature of rap music makes this inquiry uncomfortably muddy.

In 2001, 15-year-old Blake Jones wrote several notes to a female student in his class.²⁴³ Upset that she refused to respond, Jones wrote a rap song about her.²⁴⁴ The lyrics read:

I hope you remember this day, cuz you'll forever be the cause of my
violence and rage,

You steadily rejected me, now I'm angry and full of [f—ing]
misery

I'm a [motherf—ing] murderer, I slit my mom's throat and killed my
sister. You gonna keep being a [b—h], and I'm gonna cliche,

238. *Id.* at 313.

239. *Id.* at 315. The court ultimately concluded that although the lyrics were improperly admitted, it was a harmless error and did not impact Cheeseboro's conviction. *Id.* at 313.

240. *See generally* ROSE, *supra* note 12.

241. *See, e.g.,* Jones v. State, 64 S.W.3d 728, 730, 736 (Ark. 2002) (holding rap lyrics about a classmate constituted a true threat and were not protected speech). *But see* Elonis v. United States, 135 S. Ct. 2001, 2005–07, 2012 (2015) (reversing on separate grounds defendant's conviction for interstate communication of a threat based on rap lyrics about defendant's ex-wife); People v. Oduwole, 985 N.E.2d 316, ¶¶ 48–54 (Ill. App. Ct. 2013) (reversing for insufficient evidence defendant's conviction of attempt of a terroristic threat based on rap lyrics about a school shooting).

242. *See infra* notes 260–64 and accompanying text.

243. Jones, 64 S.W.3d at 730.

244. *Id.*

My hatred and aggression will go towards you, you better run [b—h],
 cuz I can't control what I do. I'll murder you before you can think
 twice, cut you up and use you for decoration to look nice²⁴⁵

Jones later gave her the song.²⁴⁶ The next day, prosecutors filed a Petition for Adjudication of Delinquency alleging that Jones had committed an act of terroristic threatening, a felony in Arkansas.²⁴⁷ The juvenile court heard the petition and, after listening to Jones and others testify about his hobby of writing rap songs, it concluded that the lyrics constituted a terroristic threat toward the classmate.²⁴⁸ Jones was sentenced to seven days in juvenile detention and 24 months of probation.²⁴⁹

On appeal, the Supreme Court of Arkansas rejected Jones's claim that his lyrics were protected speech under the First Amendment.²⁵⁰ Rather, it held that the lyrics fell under the true threats exception.²⁵¹ A similar First Amendment argument was made by the petitioner in *Elonis v. United States*, a recent Supreme Court case involving rap lyrics posted on social media that contained violent imagery about Elonis's wife, co-workers, and several others.²⁵² The Court, however, focused its attention on a question of statutory interpretation and did not touch on whether rap lyrics that make threatening statements were protected speech.²⁵³

Without considering the First Amendment argument,²⁵⁴ there have been some cases where the lyrics were simply not enough to support criminal charges for threats. In *People v. Oduwole*, an appellate court reversed the conviction of Olutosin Oduwole for attempting to make a terrorist threat.²⁵⁵ In 2007, in the wake of the shootings at Virginia Tech, Oduwole, a student at Southern Illinois University—Edwardsville, was investigated by police after a federal firearms licensee alerted the ATF that Oduwole purchased four handguns.²⁵⁶ Eventually, officers searched Oduwole's car based on a university vehicle towing policy and recovered six rounds of ammunition.²⁵⁷ Underneath the center console, officers also found a small piece of paper, the back of which contained the following lyrics:

245. *Id.*

246. *Id.* at 730–31.

247. *Id.* at 731.

248. *Id.* at 731–32.

249. *Id.* at 732.

250. *Id.* at 733.

251. *Id.* at 733–37. For a fuller discussion of this exception, see *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”).

252. See generally Brief for Petitioner, *Elonis*, *supra* note 25.

253. *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015).

254. The question of whether rap music should be excluded from criminal proceedings based on First Amendment protection is certainly an important one but one beyond the scope of this Note.

255. *People v. Oduwole*, 985 N.E.2d 316, ¶ 54 (Ill. App. Ct. 2013).

256. *Id.* ¶¶ 5–9.

257. *Id.* ¶¶ 13–15.

I Lead She a follower, I'm Single and I'm not wit her, but she gott a throat deeper than a Sword Swallower/glock to the head of

SEND 2 to . . . paypal account if this account doesn't reach \$50,000 in the next 7 days then a murderous rampage similar to the VT shooting will occur at another prestigious highly populated university. THIS IS NOT A JOKE!²⁵⁸

Although a university detective who worked on the investigation testified that there was no evidence Oduwole was ever planning on communicating these words to anyone,²⁵⁹ the prosecution used the lyrics to support Oduwole's conviction for attempting to make a terrorist threat.²⁶⁰

On appeal, the court held that the lyrics were not sufficient evidence to constitute a substantial step towards making a threat.²⁶¹ It focused on the fact that Oduwole never made any moves to send the lyrics to anyone.²⁶² It also made note of the fact that Oduwole had not designated any particular audience for the message.²⁶³ Although the court did not explicitly rely on this in its holding, the defense presented expert testimony at trial that the words were the early composition of a rap song.²⁶⁴

c. Other Acts Evidence: Knowledge, Motive, or Intent

Finally, rap lyrics are often admitted as other acts evidence²⁶⁵ under Federal Rule of Evidence 404(b)(2).²⁶⁶ This provision permits the admission of evidence in a criminal case that goes to show, among other things, the defendant's motive, intent, or knowledge.²⁶⁷

The decision to admit other acts evidence is controversial²⁶⁸ because defendants often argue that circumstantial evidence of motive, intent, or knowledge is the functional equivalent of impermissible propensity evidence presented to show

258. *Id.* ¶ 15.

259. *Id.* ¶ 25.

260. *Id.* ¶¶ 3–4.

261. *Id.* ¶ 47.

262. *Id.* ¶ 48.

263. *Id.* ¶ 49.

264. *Id.* ¶ 38.

265. *See, e.g.*, *United States v. Foster*, 939 F.2d 445, 455–57 (7th Cir. 1991); *see also United States v. Herron*, 762 F. App'x 25, 30 (2d Cir. 2019); *United States v. Moore*, 639 F.3d 443, 448 (8th Cir. 2011); *United States v. Price*, 418 F.3d 771, 783 (7th Cir. 2005); *Bryant v. State*, 802 N.E.2d 486, 498–99 (Ind. Ct. App. 2004). *But see Hannah v. State*, 23 A.3d 192, 196–97 (Md. 2011); *State v. Skinner*, 95 A.3d 236, 238–39, 241 (N.J. 2014).

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

267. *Id.* (“This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”).

268. Ashley G. Chrysler, *Lyrical Lies: Examining the Use of Violent Rap Lyrics as Character Evidence Under FRE 404(b) and 403*, DIGITAL COMMONS MICH. ST. UNIV. C. L., at 1–2, 7 (2015), <http://digitalcommons.law.msu.edu/king/208> (citing Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1556–57).

the jury that the defendant is of bad character.²⁶⁹ “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”²⁷⁰ The Federal Rules Advisory Committee noted that the rule is such because character evidence is likely highly prejudicial and “tends to distract the trier of fact from the main question of what actually happened on the particular occasion.”²⁷¹ Improperly admitted character evidence encourages juries to punish people they think are bad by holding them to account for the ostensibly bad acts they are accused of.²⁷² Nevertheless, if the evidence demonstrates one of these permissible uses, it comes in.

There are generally two opposing proposals for how courts should interpret this rule.²⁷³ The first is that the rule is inclusionary, meaning that other acts evidence is admissible unless it only proves the defendant’s propensity to act.²⁷⁴ The second argues that the rule is exclusionary and disallows other acts evidence unless it only establishes motive, intent, knowledge, or falls under one of the remaining permitted uses.²⁷⁵

The majority of courts adopt the exclusionary interpretation,²⁷⁶ but the extent to which a majority recognition of this interpretation assuages criticism that this rule is just a runaround for prosecutors to play on a good guy–bad guy narrative remains to be determined. If Rule 404(b) is truly a rule of exclusion,²⁷⁷ then rap lyrics must be excluded because their public perception practically ensures that the lyrics cannot go only to show knowledge, motive, or intent. Nonetheless, they are commonly used for this purpose, especially in drug- or gang-related prosecutions.

Consider again *United States v. Foster*, a case in which the court admitted rap lyrics about being the “biggest dope dealer” as evidence of the defendant’s knowledge and intent when he was charged with possession with intent to distribute cocaine and PCP.²⁷⁸ This case represents a common way that rap music is admitted as other acts evidence in cases involving drug charges. In *Foster*, the simple act of writing the lyrics showed that the defendant knew specific drug terminology.²⁷⁹ And if rap music is “more literal,” then these lyrics also reveal Foster bragging about his status as a drug dealer. Similarly, in *United States v. Moore*, a case involving charges of conspiracy to distribute cocaine, the court admitted the defendant’s music to

269. FED. R. EVID. 404(a)(1); *Bryant*, 802 N.E.2d at 498; *State v. Cheeseboro*, 552 S.E.2d 300, 312 (S.C. 2001).

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

271. FED. R. EVID. 404(a) advisory committee’s note to 1972 proposed rule.

272. *See id.*

273. *Chrysler*, *supra* note 268, at 6.

274. *Id.* This argument was first articulated by Professor Julius Stone in 1938. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1004 (1938).

275. *Chrysler*, *supra* note 268, at 6. This argument was first advanced by John Henry Wigmore in 1942. JOHN HENRY WIGMORE, WIGMORE’S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 356 (3d ed. 1942).

276. *Chrysler*, *supra* note 268, at 7.

277. *See id.* at 6.

278. 939 F.2d 445, 449 (7th Cir. 1991).

279. *Id.* at 455.

demonstrate his knowledge of cocaine prices and code words.²⁸⁰ Likewise, in *United States v. Price*, the defendant was convicted based in part on his lyrics to the song “COKE,” which the court concluded showed his knowledge of drug trade “jargon.”²⁸¹

This strategy of exposing the defendant’s familiarity with elements of an offense through rap music is particularly effective in gang cases where prosecutors aim to prove the defendant’s participation in the gang and its criminal activities. *United States v. Herron* offers a good example. There, the defendant was accused of several RICO offenses relating to his alleged position in the Murderous Mad Dogs Bloods.²⁸² The court admitted rap videos that the defendant filmed to promote his music in order to identify him as a leader in the gang and to show his knowledge of firearms and drugs.²⁸³

Notably, there are a few cases where courts have held that rap music used to establish knowledge, motive, or intent was impermissible character evidence.²⁸⁴ For example, in *State v. Skinner* the trial court initially admitted the defendant’s music that depicted graphic violence as evidence of his motive and intent to commit the attempted murder alleged in the case.²⁸⁵ Ultimately, the Supreme Court of New Jersey reversed the conviction, holding that the lyrics were highly prejudicial and of little probative value for the particular incident at issue.²⁸⁶ *Hannah v. State* offers another example. There, the defendant’s conviction for attempted murder was reversed because the rap lyrics that were admitted to demonstrate the defendant’s knowledge of handling guns were prejudicial and too general.²⁸⁷ Still, cases like these are few and far between.²⁸⁸ Once again, the normal subject matter of rap music makes it complicated to meaningfully determine if the lyrics demonstrate actual knowledge, motive, or intent, or if they simply talk about guns, drugs, gangs, and violence because of the genre.

III. RAP MUSIC IS UNFAIRLY PREJUDICIAL

There is no satisfactory line to be drawn in any of the evidentiary avenues discussed above because rap music is like all other art forms in that it involves a great deal of creative license and artistic hyperbole—no clear test to assess pure evidentiary value emerges from such a jumble of truth and fiction. One piece of clarity does stand out, however: if the social and political history of rap music teaches anything, it is that rap is inescapably viewed through a racially biased

280. 639 F.3d 443, 448 (8th Cir. 2011).

281. 418 F.3d 771, 783 (7th Cir. 2005).

282. *United States v. Herron*, 762 F. App’x 25, 27–28 (2d Cir. 2019).

283. *Id.* at 30.

284. *E.g.*, *Hannah v. State*, 23 A.3d 192, 196–97 (Md. 2011) (holding rap lyrics about guns were improperly admitted at trial to show defendant’s knowledge of and experience with guns); *State v. Skinner*, 95 A.3d 236, 238–39, 241 (N.J. 2014) (holding rap lyrics about graphic depictions of violence were improperly admitted at trial to demonstrate defendant’s alleged motive and intent).

285. *Skinner*, 95 A.3d at 240–41.

286. *Id.* at 253.

287. *Hannah*, 23 A.3d at 196–97.

288. *See supra* note 284 and accompanying text.

lens.²⁸⁹ This understanding should fundamentally shift the court's inquiry when it decides whether to admit rap lyrics as evidence.

Under Federal Rule of Evidence 403, judges have the discretion to exclude otherwise admissible evidence if they determine that "its probative value is substantially outweighed by a danger of . . . unfair prejudice."²⁹⁰ This rule is often the only recourse for defendants seeking to prevent their music from being considered as potential evidence of their guilt.²⁹¹ The rules themselves do not define unfair prejudice, but the Federal Rules Advisory Committee offered some insight by saying that unfair prejudice is "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an *emotional* one."²⁹² This is an especially important consideration for other acts evidence because of the risk that juries will misuse it to impart bad character on the defendant.²⁹³

The likelihood of unfair prejudice posed by using rap music as evidence is undeniable.²⁹⁴ When rap lyrics are admitted as evidence, they trigger implicit biases, resulting in an undue tendency of individual jurors to make a decision based on their emotional reaction to the music and the subsequent negative judgments of its author, rather than based on an assessment of the merits. A particularly tangible example stands out—if people believe that rappers are more capable of committing murder,²⁹⁵ then evidence presented at trial that a defendant accused of murder wrote rap lyrics creates a serious risk that jurors will rely on this bias as an improper basis upon which to assess the defendant's guilt. The effect is worse for a defendant of color facing the insurmountable task of combatting the impact of dual, related stereotypes: as a rapper and as a person of color.

Moreover, this risk of unfair prejudice frequently and substantially outweighs the probative value of the lyrics. While there are rare cases in which the music describes the specific events of the crime in unique detail,²⁹⁶ more likely the lyrics are vague or general depictions of gangs, drugs, and violence that adhere to the overall themes of the gangster rap genre. The artistic complexity of rap music makes it unmanageable to task courts with knowing where the probative value of rap lyrics starts and where it stops. Thus, on the balancing scale, the weight of probative value remains doubtful, whereas the danger of unfair prejudice weighs heavy.

The prejudice against rap is particularly weighty because it is both visceral and unconscious. By definition, implicit bias permeates the subconscious mind,

289. See *supra* Part I.

290. FED. R. EVID. 403.

291. E.g., *United States v. Foster*, 939 F.2d 445, 455–56 (7th Cir. 1991); *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004); *Greene v. Commonwealth*, 197 S.W.3d 76, 86–87 (Ky. 2006); *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001).

292. FED. R. EVID. 403 advisory committee's note to 1972 proposed rule (emphasis added).

293. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 4.15 (3d ed. 2003).

294. See *supra* Part I.

295. Fischhoff, *supra* note 29, at 803.

296. See *Greene*, 197 S.W.3d at 86.

influencing the juror even when she believes she is making an entirely neutral decision.²⁹⁷ In fact, implicit bias often renders rational assessment impossible.²⁹⁸ There is a long line of research that shows jurors suffer from racial bias.²⁹⁹ However, researchers have not identified “the precise psychological processes through which the influence of race occurs in the legal context.”³⁰⁰ The most common explanation is “juror unexceptionalism”—if implicit bias generally impacts our decision-making, there is no reason to believe people are cured of this defect when they become jurors.³⁰¹

Nonetheless, when no conscious ill will is required of the juror, the effect can be particularly difficult for courts to isolate and detect.³⁰² Consequently, courts have been hesitant to recognize—and remedy—the effects of implicit racial bias. Unfortunately, the damage caused by implicit racial bias may be more detrimental than that caused by explicit racial bias in criminal trials. In both scenarios, the defendant is judged on an improper basis, but a defendant whose conviction was based on *explicit* racial biases by the jury has constitutional remedies recognized by the Supreme Court in *Peña-Rodriguez v. Colorado*³⁰³ that are not available to a defendant whose conviction may have been improperly influenced by the jury’s *implicit* racial biases. This stark inequity is something that trial courts should seek to remedy at the balancing test stage by excluding rap music before it is ever allowed to influence the jury.

In *Peña-Rodriguez*, the Court held that the no-impeachment rule—protecting jurors by preventing any statement made during deliberations from being disclosed³⁰⁴—must yield to the Sixth Amendment right to trial by an impartial jury³⁰⁵ when a juror makes “a clear statement that indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant.”³⁰⁶ However, the holding was essentially limited to the most egregious and overt demonstrations of racial bias. The juror’s bias in the case was so glaringly obvious that it simply could not be ignored in good conscience. Tasked with assessing the guilt of a Latino man accused of sexual assault, the juror repeatedly expressed his racism towards Latino people.³⁰⁷ He said things like, “I think he did it because he’s Mexican and Mexican men take whatever they want,”³⁰⁸ and, “nine times out of ten Mexican men were

297. See Fried, *Bad Rap for Rap*, *supra* note 29, at 2141. Participants were influenced by their implicit bias about rap even when they were asked to make a neutral assessment of only the words. *Id.*

298. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–29 (2012).

299. *Id.* at 1142.

300. *Id.* at 1144 (quoting Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007)).

301. *Id.* at 1144.

302. See *id.* at 1129; STAATS ET AL., *supra* note 179, at 14.

303. See, e.g., *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

304. FED. R. EVID. 606(b).

305. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. CONST. amend. VI.

306. *Peña-Rodriguez*, 137 S. Ct. at 869 (emphasis added).

307. *Id.* at 862.

308. *Id.*

guilty of being aggressive toward women and young girls.”³⁰⁹ The Court noted, however, that “[n]ot every offhand comment indicating racial bias or hostility” required such treatment.³¹⁰

The problem is that racial bias is rarely as explicit as it was in *Peña-Rodriguez*. It is far more likely that the underlying beliefs—forced beneath the surface by modern social convention—manifest in less detectable ways, emphasizing how imperative it is that courts meaningfully address the ills of implicit bias at the outset of a case. Although the Supreme Court has not yet recognized implicit racial bias as a foundation for constitutional remedies, it has been clear that courts have “a duty to confront racial animus in the justice system.”³¹¹ Even in *Peña-Rodriguez*, the Court stated that racial bias is “a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.”³¹²

The Supreme Court of Washington appears to be leading the way. In 2019, it held that instances of implicit racial bias require the same treatment as those of explicit racial bias.³¹³ The court acknowledged that “[a]n allegation that explicit or implicit racial bias was a factor in a jury’s verdict raises unique concerns that courts must address in order to safeguard the right to a fair trial by an impartial jury.”³¹⁴ It made this decision based in part on the understanding that implicit bias is increasingly dangerous, easily overlooked, and generally underestimated.³¹⁵

IV. A PATH FORWARD

Courts have not made it a frequent practice to robustly consider the relationship between rap music and implicit racial bias when deciding whether to admit rap as evidence. The racist judgment of rap music is far more engrained in our society than any court has likely appreciated. And worse, by routinely admitting rap lyrics in criminal trials, courts are likely reinforcing negative stereotypes by confirming the biased assumption that people who write rap music are probably criminals.

The majority of courts still admit rap music despite frequent objections by defense counsel who cite the risk of unfair prejudice under Rule 403.³¹⁶ If anything, the judge instructs jurors that the lyrics are to be used for a limited purpose,³¹⁷ but it is highly doubtful that these instructions are effective at preventing juries from

309. *Id.*

310. *Id.* at 869.

311. *Id.* at 867; *see also* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) (“Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.”); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.”).

312. *Peña-Rodriguez*, 137 S. Ct. at 865.

313. *State v. Berhe*, 444 P.3d 1172, ¶ 58 (Wash. 2019).

314. *Id.*

315. *Id.* ¶ 23.

316. *See, e.g.*, *United States v. Foster*, 939 F.2d 445, 455–57 (7th Cir. 1991).

317. *E.g., id.* at 455 (referring to the trial court’s instruction that “[t]he limited purpose for which the document is received is only as to evidence of knowledge and intent”).

improperly considering the evidence. As Professor Andrea Dennis, a leading scholar on the subject, wrote, “[c]ourts are either underestimating the prejudicial impact of the lyrics on jurors or overestimating the ability of jurors to ferret out their biases and prevent those biases from impacting their decision-making.”³¹⁸

The better solution is for trial courts to more thoroughly consider the serious risk that jurors will make decisions based on implicit racial bias when the defendant’s rap music is a factor, especially because the use of rap is more than a simple evidentiary determination. It can severely compromise a defendant’s constitutional right to a fair trial by an impartial jury, something the defendant may not be able to remedy on appeal. Though courts have been slow to recognize the dangers implicit racial bias poses to this constitutional right, the underlying duty has been expressed time and again: courts must root out racial animus in the criminal justice system. The discretion afforded to judges tasked with weighing the probative value and the risk of unfair prejudice is a powerful way to circumvent the resulting racial bias before it ever has the opportunity to infect the jury. This is far more preferable than leaving defendants subject to the uncertainty of slowly evolving constitutional remedies for implicit juror bias.

While I argue that the best path forward is for trial courts to exercise their discretion to exclude rap music except in the rare specific case, many are skeptical that after 30 years of precedent courts will begin to truly consider rap’s prejudicial impact. There have been several other solutions adopted or proposed, each with its weaknesses.³¹⁹

The most frequently adopted solution is to call expert rap witnesses in an effort to counter the damaging impact of rap music on the jury.³²⁰ These witnesses can speak to the inherent prejudice against rap music and the judgments it provokes.³²¹ They might also emphasize the artistic function of rap in order to combat the assumption that rap details true events.³²² When the court has admitted the music into evidence, this is probably the best damage control available. But there are two major problems with this solution. First, the jury is still exposed to the rap music, allowing all the unconscious biases to do their work. The expert witnesses are then left to try to counter the powerful psychological effect that is likely beyond repair. This leads to the second major problem: using expert rap witnesses is a remedial measure that has not deterred the admission of rap at trial.³²³ Instead, the practice of using rap lyrics as evidence is only growing.³²⁴ Two leading scholars on the matter have unequivocally stated that “[e]xpert testimony may help, but it’s not

318. Dennis, *supra* note 21, at 30.

319. There is no perfect solution to this problem. The biggest weakness of my own proposal is the potential that nothing will change in the courts’ consideration. I came to my conclusion after considering multiple paths forwards, but I do want to briefly discuss other solutions.

320. NIELSON & DENNIS, *supra* note 8, at 153.

321. *See id.*

322. *Id.* at 153–54.

323. *See id.* at 154.

324. *See id.*

going to solve this. The way to protect defendants is to keep the lyrics out of court altogether.”³²⁵

One possible way to accomplish this is through continued litigation under the First Amendment.³²⁶ As previously mentioned, a number of the briefs filed recently have argued that rap lyrics are protected expressive speech and should be insulated from use at trial.³²⁷ The Supreme Court has yet to provide any definitive answer on this question,³²⁸ but even strong dicta could go a long way to giving force to defendants’ objections that rap lyrics should be excluded from evidence as protected speech.³²⁹ Relatedly, some scholars have advocated for legislative measures to adopt a rule excluding evidence when it is recognized as protected First Amendment material.³³⁰ They cite existing evidentiary rules that exclude content protected as a matter of social policy, including privileged communications with attorneys, therapists, and spouses.³³¹

Perhaps the most controversial solution is a complete ban on the use of rap music in criminal proceedings.³³² Known as “rap shield rules,” these legislative measures would prohibit rap lyrics and rap videos from being used as evidence.³³³ The proponents of “rap shield rules” say they recognize the proposal is radical, but they “don’t believe that the criminal justice system has the tools or willingness to set reasonable boundaries.”³³⁴ They cite to the past 30 years during which courts have routinely deferred to law enforcement officials’ determinations about the probative value of rap lyrics, which often means the lyrics come in as highly probative pieces of evidence rather than being kept out as prejudicial forms of art.³³⁵

Finally, there is one potential solution that only requires a unilateral decision. The prosecuting agencies could adopt internal policies that prohibit the use of rap music as evidence in their cases, or individual prosecutors could independently decide not to use rap when trying a case. There is a growing cohort of “progressive prosecutors”³³⁶ who may use this information about rap and race as a reason to choose not to use this type of evidence.

325. *Id.* at 155.

326. A full analysis of the strengths and weaknesses of this type of litigation is beyond the purview of this Note.

327. *See, e.g.*, Brief of Killer Mike, *supra* note 24, at 5; Brief for Petitioner, *Elonis*, *supra* note 25, at 3; Brief of ACLU, *supra* note 18, at 18–19.

328. *See, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015).

329. *See, e.g.*, *Jones v. State*, 64 S.W.3d 728, 733 (Ark. 2002).

330. NIELSON & DENNIS, *supra* note 8, at 157–58.

331. *Id.*

332. *See id.* at 157.

333. *Id.*

334. *Id.*

335. *Id.*

336. *See, e.g.*, Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW 360 (Apr. 7, 2019), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor>; Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/>.

There are perhaps many combinations of these solutions that could serve to meaningfully address the damage caused by using rap music as evidence. But instead of legislative reforms, the structure of our justice system makes it likely that the battle will be fought on an individual level—individual prosecutors choosing what evidence to present; individual defense attorneys making creative arguments that combine law, history, and social psychology; and individual judges deciding where the scales weigh heaviest.

CONCLUSION

The criminal justice system is no stranger to racial injustice. There is nothing revolutionary about the realization that the system has functioned as a tool for the continued oppression of people of color in the United States.³³⁷ Indeed, scholars have argued that after the Civil War, the criminal justice system was exploited to adapt and disguise the institution of slavery,³³⁸ though perhaps its means have become increasingly obscured and easier to overlook. The growing practice of using defendant-authored rap music as evidence in criminal trials must be analyzed within this context.

There are grave implications for defendants—and for the integrity of our system—when prosecutors seek to admit rap lyrics and courts routinely permit such evidentiary admissions. These concerns cannot be pushed away by assuming that defendants are perpetually looking for ways to manipulate the system in order to stay out of prison for crimes they have committed. Though the chief concern for any individual defendant may be avoiding prison, the central question here is not actually whether someone is factually guilty of the crime they are charged with. True, a central purpose of our criminal justice system is to hold people accountable for crimes they have committed, and in such cases, evidence of this guilt likely abounds.

The question here, however, is whether courts are adequately considering the impact of implicit racial bias when allowing rap lyrics to be used in an effort to convict. There are cases in which the lyrics are so probative of guilt that one could concede the jury should consider them in their determination.³³⁹ But the more comfortable we are using this art form as evidence to convict its creators, the less discerning our inquiry becomes about whether it is just and in line with the stated goals of eliminating racial bias in the system to judge people by the type of music they write, especially when that music is highly racialized.

337. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

338. *Id.*

339. These are generally those cases where the lyrics describe with unique detail the narrow circumstances of a particularized crime. See *Greene v. Commonwealth*, 197 S.W.3d 76, 86–87 (Ky. 2006).