

## Verses Turned to Verdicts: YSL RICO Case Sets a High-Watermark for the Legal Pseudo-Censorship of Rap Music

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### ABSTRACT

Whichever way you spin the record, rap music and courtrooms don't mix. On one side, rap records are well known for their unapologetic lyrical composition, often expressing a blatant disregard for legal institutions and authorities. On the other, court records reflect a Van Gogh's ear for rap music, frequently allowing rap lyrics—but not similar lyrics from other genres—to be used as criminal evidence against the defendants who authored them. Over the last thirty years, this immiscibility has engendered a legal landscape where prosecutors wield rap lyrics as potent instruments for criminal prosecution. In such cases, color-blind courts neglect that rap is a genre originating from and predominantly performed by Black musicians, hence becoming complicit in catalyzing this targeted weaponization of rap music, chilling Black artistic expression, and effectively stripping the genre of its creative license.

Though hardly a novel challenge for rap artists, the pending criminal conspiracy case against Jeffrey Williams, professionally known as Young Thug, prompts a renewed sense of urgency in drawing a bright line between fictional rap lyrics and probative criminal evidence. Building from notable scholarship in this field, this Note situates the law's disproportionate maltreatment of rap music within the broader canvas of systemic racism to propose avenues for how the law may evolve to accommodate the persistent intersections between rap music and the judicial system. By delineating clear parameters for the admissibility of rap lyrics as evidence to address troubling bias in juror perceptions, this framework seeks to find a

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balance between protecting Black artistic expression and preserving the integrity of criminal proceedings.

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## INTRODUCTION

In May 2022, twenty-eight members of critically acclaimed rap music group YSL Records were arrested in Fulton County, Georgia, and charged with fifty-six counts of conspiring to violate the state's Racketeer Influenced and Corrupt Organizations (RICO) Act.<sup>1</sup> Among the several high-profile names listed in the eighty-eight-page indictment, prosecutors

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1. Bill Donahue, *Young Thug and YSL's Atlanta RICO Trial: Everything You Need to Know*, BILLBOARD (Nov. 25, 2023), <https://www.billboard.com/music/rb-hip-hop/young-thug-ysl-atlanta-rico-trial-charges-explained-123508777/> [https://perma.cc/Y3CK-B55A]. In 1970, Congress introduced the RICO Act as a means of prosecuting entire mafia crime syndicates and quickly securing felony convictions by relying on its “conspiracy” provisions to avoid the need to pin specific crimes on specific individuals. Devon Cole, *What Is RICO, the Law At the Heart of Trump's Georgia Criminal Case?*, CNN (Sept. 6, 2023), <https://www.cnn.com/2023/08/15/politics/rico-explainer-georgia-trump-indictment/index.html> [https://perma.cc/H9CX-GEKG]. Among the many states with legislation modeled after the 1970 RICO Act, Georgia, in particular, has a notoriously broad definition of “racketeering activity,” allowing prosecutors to introduce evidence that would not otherwise be admitted against individual defendants. *See id.*; *see also* Tamar Hallerman, *What to Know About Georgia's RICO Law*, AJC POL. (Sept. 6, 2023), <https://www.ajc.com/politics/what-to-know-about-georgias-rico-law/3Y2PBKLHWFDMLKYFEURTHLBVZY/> [https://perma.cc/7FXH-3N7U].

allege that Jeffrey Williams, professionally known as Young Thug, is the king pin of a criminal enterprise responsible for a decade's worth of crimes in Atlanta ranging from theft to murder.<sup>2</sup>

Not only do the serious allegations against Williams and YSL “rely heavily on the artists’ lyrics,” but many observers have befittingly questioned whether such asserted “evidence” is appropriate in the context of both the severe penalties facing the defendants and the criminal justice system more generally.<sup>3</sup> For example, during Williams’s bond hearing in June 2022, the prosecution began by reading the following lyrics to persuade the judge that Williams was a threat to the public: “Fuck the police. Fuck the judge. Mob life.”<sup>4</sup> Or, among the several lyrics that made it past the pretrial phases, prosecutors have introduced similar lines such as “I was capo in my hood way before a plaque.”<sup>5</sup> While those familiar with rap music would likely view these as no more than generic stock lyrics, displacing these lyrics from the creative forum in which the artist expressed them creates a grave risk that “negative attitudes toward crude and violent lyrics in hip-hop could bias a jury.”<sup>6</sup>

Considering that the YSL trial’s jury selection alone “lasted longer than any other trial in Georgia history,” the trial will likely reach its conclusion well after this Note is finalized.<sup>7</sup> In the meantime, however, musicians and lawmakers alike have begun pushing to halt such state-sanctioned attempts at pseudo-censoring rap artists merely for their vocal distaste toward legal actors and institutions.<sup>8</sup> In an open letter signed by over

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2. Indictment at 86, *State v. Williams*, No. 225C182273 (Fulton Cnty. Sup. Ct., May 7, 2022). With a Grammy award under his belt, Williams is widely acknowledged for his contributions to modern hip-hop culture and urban fashion. *See, e.g.*, Chris Richards, *A Loss for Words: Listening to the Post-Verbal Brilliance of Young Thug*, WASH. POST (Sept. 17, 2015), <https://www.washingtonpost.com/sf/style/2015/09/17/a-loss-for-words-listening-to-the-post-verbal-brilliance-of-young-thug/> [<https://perma.cc/TT5Z-PBHN>]; *Gender Bending Fashion*, MFA BOS. (Mar. 21–Aug. 25, 2019), <https://www.mfa.org/exhibitions/gender-bending-fashion> [<https://perma.cc/2YPW-97MQ>].

3. *See Art on Trial: Protect Black Art*, PROTECTBLACKART (Nov. 1, 2022), <https://www.protectblackart.co/> [<https://perma.cc/J9KS-DEVM>].

4. 11Alive, *State’s Case Against Bond for Young Thug Continues*, YOUTUBE, at 1:03–1:06 (June 2, 2022), <https://www.youtube.com/watch?v=xUYrGkuaJI> [<https://perma.cc/BD2Q-JARU>].

5. *See Joe Coscarelli, Young Thug Lyrics Will Be Allowed as Evidence in YSL RICO Trial*, N.Y. TIMES (Nov. 9, 2023), <https://www.nytimes.com/2023/11/09/arts/music/young-thug-lyrics-ysl-rico-trial.html> [<https://perma.cc/JR95-YZSH>].

6. *Id.*

7. *See* Tim Darnell, *Rap Lyrics Become Key Focus in Young Thug’s Trial*, ATLANTA NEWS FIRST (Oct. 31, 2023), <https://www.atlantaneewsfirst.com/2023/11/01/rap-lyrics-become-key-focus-young-thugs-trial/> [<https://perma.cc/PP4X-ZGEF>]. The trial officially began in November 2023, eighteen months after the initial indictment. Tim Darnell & Rachel Argon, *Judge Scolds Prosecutors Over Witness List in Young Thug Trial, Day 25*, ATLANTA NEWS FIRST (Feb. 4, 2024), <https://www.atlantaneewsfirst.com/2024/02/04/broadcasting-witnesses-looms-over-young-thugs-trial-testimony-resumes/> [<https://perma.cc/8AMN-JAMM>].

8. *See Art on Trial: Protect Black Art*, *supra* note 3.

one hundred artists, industry leaders, and legal experts, advocates urge that “[t]he use of lyrics against artists in this way is un-American and simply wrong. Beyond the obvious disregard for free speech and creative expression protected by the First Amendment, this racially targeted practice punishes already marginalized communities and their stories of family, struggle, survival, and triumph.”<sup>9</sup>

Notably, the treatment of rap music in the case against Williams and YSL Records is not a historical anomaly. Notwithstanding rap’s newfound commercial dominance, this practice of permitting lyrics into evidence has remained stubbornly unique to rap music for over thirty years despite its virtually identical lyrical content to other “rebellious” musical genres such as rock or country.<sup>10</sup> As one author puts it:

There is one musical genre that seems almost wholly devoted to violence. Dozens of the most popular works in this genre graphically depict murders. Male protagonists boast about their physical and sexual prowess . . . . Female characters are often cartoonish shells; they are usually portrayed as wanton and shallow and easily manipulated for sexual purposes. . . .

That genre, of course, is opera.<sup>11</sup>

But most would scoff if opera singers faced criminal sanctions for expressing unlawful conduct via song lyrics. Yet, the Federal Bureau of Investigations (FBI) and several police departments have organized “Hip-Hop Task Forces” to develop and construct cases “at the precise moments that they are otherwise unconstructable.”<sup>12</sup>

These cases, referred to as “rap on trial” cases, pose a peculiar risk of unduly prejudicing criminal defendants who author rap lyrics by encouraging jurors to engage in unacceptable propensity-to-commit inferences associated with rap’s shady themes.<sup>13</sup> Moreover, when considering

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9. *Id.*

10. See ANDREA L. DENNIS & ERIK NIELSON, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 14, 25 (2019) (“If you’re worried . . . that country music, with its own history of violent lyrics and violent artists, may be targeted the way rap is, your worries are probably unfounded.”); Jason E. Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 489 (2019) (“[U]nlike rock, which is regarded as an acceptable music genre, rap music is getting a raw deal when it comes to the legal process.”).

11. Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 RACE & JUST. 330, 331 (2017).

12. Donald F. Tibbs & Shelly Chauncey, *Justice Reform: From Slavery to Hip-Hop: Punishing Black Speech and What’s “Unconstitutional” About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL’Y 33, 37 (2016); see also, e.g., Shawn Setaro, *Why Are the NYPD Hip-Hop Police Spying on Rappers?*, COMPLEX MAG. (June 11, 2020), <https://www.complex.com/music/2020/06/nypd-hip-hop-police> [https://perma.cc/P445-LYDV] (discussing the New York City Police Department’s “Rap Intel Unit”).

13. See DENNIS & NIELSON, *supra* note 10, at 7 (coining the term “rap on trial”).

rap music in the context of its roots in African American culture, this disparate policing of rap suggests that regardless of the extent to which the genre's lyrical content is an issue, "without question, race is central here, just as it is in the routine administration of American criminal justice."<sup>14</sup>

Between 2006 and 2013, the American Civil Liberties Union (ACLU) determined that courts allowed rap lyrics into evidence in roughly 80% of cases that considered their admissibility.<sup>15</sup> In building off the ACLU's research, scholars conducted a nationwide study of over 500 criminal cases involving prosecution proffers of rap lyrics during trial.<sup>16</sup> In approximately 95% of these cases, the defendant was a Black or Latino male youth often charged with and convicted of a serious felony offense.<sup>17</sup> Meanwhile, in the handful of cases involving white defendants in analogous situations, the outcome was far more favorable for the defendant (i.e., reversal, acquittal, etc.).<sup>18</sup> A 2019 study has since reinforced these findings; most courts allow prosecutors to introduce rap lyrics into evidence, and this practice targets—or at least disproportionately impacts—Black and Latino male youth.<sup>19</sup>

This Note explores the negative attitudes and racial biases associated with rap music as applied to the heightened risk of prejudice posed by rap lyrics in the criminal context. Part I discusses the historical, cultural, and commercial dimensions of rap music, highlighting a history of institutional pseudo-censorship efforts aimed at Black music. Part II presents empirical data to advance the theory that negative attitudes associated with rap music, implicit racial biases toward people of color in urban communities, or a combination of both, ultimately cause jurors to confirm such biased perceptions by latching rap's negative themes onto criminal defendants who author generic rap lyrics. Part III analyzes notable rap on trial cases to

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14. *Id.* at 21. In the same breath, one cannot examine this issue without considering the disparate overcriminalization of urban African American communities. While African Americans represent only 13% of the U.S. population, they also represent roughly 38% of the state and federal prison populations. *Id.* Therefore, while a white man born in 2001 has a 1/17 chance of being incarcerated, a Black man has a 1/3 chance. *Id.* at 22.

15. Brief for ACLU of New Jersey as Amicus Curiae Supporting Defendant at 17–19, *State v. Skinner*, 218 N.J. 496, 95 A.3d 236 (N.J. Sup. Ct. 2014) (No. A-57/58-2 (071764)).

16. See DENNIS & NIELSON, *supra* note 10, at 12. When accounting for non-trial scenarios, such as when charging a suspect or securing an indictment, Professors Nielson and Dennis have identified nearly 700 cases where rap lyrics have been used as evidence. See *Mapping Rap on Trial*, RAP ON TRIAL, <https://www.rapontrial.org/> [<https://perma.cc/L7N6-VPKW>] (data sourced Jan. 8, 2024).

17. DENNIS & NIELSON, *supra* note 10, at 18–19.

18. See *id.*

19. Erin Lutes, James Purdon & Henry F. Fradella, *When Music Take the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 90–97, 131 (2019) (analyzing 160 federal criminal cases over a five-year period and concluding that the majority approach's allowance of rap lyrics into evidence exacerbates the overcriminalization of people of color in urban communities).

frame this practice as merely another iteration of the traditional institutional responses that have served to impede the social progress of marginalized communities. Part IV identifies California's Decriminalizing Artistic Expression Act, the leading statute restricting the prejudicial effects of rap on trial, as a nationwide solution. Finally, this Note makes a nuanced proposal to California's model statute that would further reduce the risk of rap music injecting unfair bias into criminal proceedings.

#### I. THE SUPPRESSION OF BLACK AMERICAN MUSIC: A HISTORY

In the early 1970s, DJs (disk jockeys) turned up New York Bronx block parties by extracting the percussion breaks of funk, soul, and disco songs and then rearranging them into original hip-hop beats with sound pockets that invited speaking rather than singing.<sup>20</sup> MCs (microphone controllers), tasked with introducing DJ performances, kept crowds energized between sets by talking over these beats in unique rhyming patterns.<sup>21</sup> When MCs ran out of words to rhyme, they welcomed members of the crowd to attempt spitting their own freestyles until the next DJ was ready to perform.<sup>22</sup> Fifty years later, these modest pastimes of verbal Scrabble—rap—now dominate the modern music industry as a genre of their own.<sup>23</sup>

However, “rap,” in its abstract, poetic sense, may be traced back far earlier than the 1970s.<sup>24</sup> In fact, many consider rap music to be a natural progression of African American literature and music, emerging from the longer lineage of Black musical storytelling.<sup>25</sup> For example, Amiri Baraka, founder of the Black Arts Movement, described rap as the inevitable

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20. David Dye, *The Birth of Rap: A Look Back*, NPR WORLD CAFÉ (Feb. 22, 2007), <https://www.npr.org/2007/02/22/7550286/the-birth-of-rap-a-look-back> [https://perma.cc/49MZ-AZSC]. While the exact origins of rap music are lightly disputed, most trace its epicenter to a party thrown in the first-floor community room of a Bronx apartment building located at 1520 Sedgwick Ave. See Tony M. Centeno, *August 11 in Hip-Hop History: Hip-Hop is Born at a Party in the Bronx*, iHEART (Aug. 10, 2023), <https://www.iheart.com/content/2022-08-09-august-11-in-hip-hop-history-hip-hop-is-born-at-a-party-in-the-bronx/> [https://perma.cc/WDU8-RZZK]. Here, on August 11, 1973, eighteen-year-old DJ Kool Here is often accredited for creating and performing the first rap song. *Id.*

21. Dye, *supra* note 20.

22. *See id.*

23. In 2021, rap and hip-hop accounted for a leading 29.9% of all streamed music consumption in the United States. Marie Charlotte Götting, *Streamed Music Consumption in the U.S. 2021, by Genre*, STATISTA (Aug. 29, 2023), <https://www.statista.com/statistics/475667/streamed-music-consumption-genre-usa/> [https://perma.cc/K3HQ-MDBM].

24. The etymology of “rap,” meaning to speak “sharply,” “suddenly,” or “vigorously,” denotes this word’s usage occurring in English as early as 1541. *Rap*, OXFORD ENG. DICTIONARY, <https://www.oed.com/thesaurus/?classId=149821> [https://perma.cc/F2ZM-PZAQ].

25. *See, e.g., History of Rap: A Powerful Voice of Expression*, MDLBEAST (Oct. 11, 2023), <https://mdlbeast.com/xp-feed/music-industry/history-of-rap-a-powerful-voice-of-expression> [https://perma.cc/9UD3-RGX5] (describing rap’s similarities to earlier forms of Black music).

continuation of the rhythmic speech patterns of blues, which in turn may be traced back to the music of African American slaves and again directly traced to pure African music.<sup>26</sup> Like Baraka, several other prominent African American figures have also comfortably framed rap music as a modern iteration of the poetic and rhythmic elements found in earlier forms of Black music.<sup>27</sup> For example, Professor Cornel West describes the rap artist as “a bridge figure who combines the two potent traditions in black culture: preaching and music.”<sup>28</sup> That is, “[t]he rap artist appeals to the rhetorical practices eloquently honed in African-American religious experiences and the cultural potency of black singing/musical traditions to produce an engaging hybrid. They are truly urban griots dispensing social and cultural critique, verbal shamans exorcising the demons of cultural amnesia.”<sup>29</sup>

While rap may at first glance seem attenuated from the music of African American slaves or precolonial African traditions, musicians and scholars alike commonly use this introspective framework to emphasize the uniquely inextricable nexus between all forms of music created, pioneered, or currently performed by Black musicians.<sup>30</sup> For example, Sarah Webster Fabio, a poet and early pioneer of Black studies in higher education curricula, describes the succession of Black creative expression as “a lifeline which extends from the early slave/work songs and religious spirituals and folktales,” at the base of which is “the long and highly developed oral tradition of ancient African Culture.”<sup>31</sup> Similarly, Maya Angelou, one of American history’s most influential (and most banned) authors, has implied that a holistic framing of Black creative expression is indeed the most

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26. See *id.*; LEROI JONES (AMIRI BARAKA), *BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA* 17–18 (1999) (originally published in 1963 under Baraka’s previous name, LeRoi Jones).

27. For a detailed discussion of the earlier musical traditions that influenced the development of rap music, see CHERYL LYNETTE KEYES, *RAP MUSIC AND STREET CONSCIOUSNESS* 17–32 (2004) (tracing rap’s origins to traditional forms of pre-colonial African verbal art and musical expression).

28. MICHAEL ERIC DYSON, *REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM* 12 (1993) (citing Cornel West as the person who originally articulated rap artists in this way).

29. *Id.* For a short discussion of the nexus between rap music and the *griot* tradition, see *infra* Section I.A.

30. See, e.g., DYSON, *supra* note 28, at 3 (citing “ancient African oral traditions as the antecedents to various contemporary African-American cultural practices”); Patricia Tang, *The Rapper as Modern Griot: Reclaiming Ancient Traditions*, in *HIP HOP AFRICA: NEW AFRICAN MUSIC IN A GLOBALIZING WORLD* 79–85 (Eric Charry ed., 2012) (quoting several musicians and scholars who have sought to establish a nexus between the shared elements of rap music and those in earlier forms of African and African American musical traditions).

31. See SARAH WEBSTER FABIO, *BIOGRAPHICAL NOTES*, in *BOSS SOUL: 12 POEMS BY SARAH WEBSTER FABIO SET TO DRUM TALK, RHYTHMS & IMAGES 1* (Folkway Records 1972), <https://folkways-media.si.edu/docs/folkways/artwork/FW09710.pdf> [<https://perma.cc/4LWC-U9BY>]; see also Sarah Webster Fabio, *POETRY FOUND.* (2024), <https://www.poetryfoundation.org/poets/sarah-webster-fabio> [<https://perma.cc/9MDV-RDRS>] (discussing Fabio’s notable contributions to academia and spoken-word poetry).

natural way to approach questions about its ever-developing oral-literary themes.<sup>32</sup> In a 2013 interview with Angelou, a reporter asked her whether she was “optimistic about the future of poetry.”<sup>33</sup> To this, Angelou promptly responded, “Oh, yes. All I have to do is listen to hip-hop or some of the rappers.”<sup>34</sup>

This Note likewise adopts a broad conception of “Black music” to properly consider the historical, economic, and industrial forces that have hindered the development of Black creative expression in contexts that bear striking similarities to rap on trial. By situating rap’s emergence as a natural extension of Black musical and rhetorical tradition, rap on trial is concomitantly framed as part of a larger, institutional effort to systemically stifle Black dissent and cultural development. While the Author acknowledges that this generalized approach to Black musical history lacks nuance and provides for an incomplete account of the vast domain of Black music, the subject matter of this Note would lack foundation without a simplified recantation of certain forms of expression that help inform the modern social context surrounding rap music.

#### *A. 1300s–1900s: A Tree Cannot Stand Without Its Roots*<sup>35</sup>

While most agree that rap music is an art form indigenous to the United States, traceable to earlier forms of African American music expressed in “chanted rhyme or poetic fashion,” some have sought to directly analogize rap music to precolonial African musical traditions that had also practiced “chanting styles” and “spoken word” poetry over percussion

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32. See Belinda Luscombe, *10 Questions with Maya Angelou*, TIME (Apr. 8, 2013), <https://time.com/123087/10-questions-with-maya-angelou/> [https://perma.cc/SZ2L-RU3B] (comparing non-musical poetry to rap music); see also New African, *Maya Angelou—The Most Banned Author in the US*, NEW AFR. MAG. (Aug. 5, 2014), <https://newafricanmagazine.com/6173/> [https://perma.cc/6EFM-6XNV] (discussing the banning of Maya Angelou’s best-selling 1969 autobiography, *I Know Why the Caged Bird Sings*, from public school curricula and libraries because conservative legislators and parents believed that Angelou’s first-hand retelling of the hardships she had faced would “likely to corrupt minors”).

33. Luscombe, *supra* note 32.

34. *Id.*; see also Nolan Feeney, *A Brief History of How Maya Angelou Influenced Hip Hop*, TIME (May 28, 2014), <https://time.com/125901/maya-angelou-rap-hip-hop> [https://perma.cc/3A7B-Z995] (referencing several rap songs that vocalized respect for the influential works of Maya Angelou, who had passed away in 2014).

35. Adapted from the pan-African proverb famously written by Marcus Garvey: “A people without the knowledge of their past history, origin and culture is like a tree without roots.” See Robin N. Hamilton, *The Story of Marcus Garvey*, AROUND ROBIN PROD. CO. (July 24, 2023), <https://www.aroundrobin.com/marcus-garvey/#marcus-garveys-speech> [https://perma.cc/9BB5-5GMG]. As with many prominent figures in the history of Black political activism, Marcus Garvey’s leadership has also played a role in influencing the works of several rap artists. See, e.g., KENDRICK LAMAR, *HiiiPoWeR*, on SECTION 80 (Top Dawg Ent. 2011) (“Last time I checked, we was racin’ with Marcus Garvey / On the freeway to Africa ‘til I wrecked my Audi.”).



breaks.<sup>36</sup> For example, hip-hop legends Afrika Bambaataa and Kanye West have described rap artists as postmodern *griots*, likening themselves to the West African verbal artists who traditionally served as keepers of oral history, music, and culture since at least the fourteenth century.<sup>37</sup>

The *griot* verbal tradition that blends music with social commentary, as some argue, may have served as the earliest antecedent for the vocal styles and narratives that later manifested in rap music.<sup>38</sup> For example, Nigerian record company executive Obi Asika argues that the “call-and-response” technique of traditional *griot* music is both fundamental to rap’s vocal styling and foundational to all Black music generally.<sup>39</sup> The call-and-response technique refers to a musical composition popularized in the early 1970s by James Brown—the “Godfather of Soul, the inventor of funk, the grandfather of hip-hop”—and used in early rap songs, such as Kurtis Blow’s 1980 record, “The Breaks.”<sup>40</sup> This technique, as Asika contends, mirrors the various music styles of West African ethnic sub-groups:

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36. KEYES, *supra* note 27, at 17–22; *see also* Tang, *supra* note 30, at 79–82.

37. *See* Tang, *supra* note 30, at 79–82 (quoting Afrika Bambaataa and Kanye West). While academia hotly contests the legitimacy of the rapper-as-post-modern-*griot* trope, this debate is beyond the scope of this Note. *See, e.g., id.* 79–89 (discerning whether rap directly descended from the *griot* tradition or whether the rapper-as-postmodern-*griot* trope is merely descriptive of the abstract similarities between rappers and *griots*); KEYES, *supra* note 27, at 17–25 (2004) (framing the *griot* tradition as the earliest traceable antecedent for rap music); Damon Sajani, *Troubling the Trope of “Rapper as Modern Griot”*, 6 J. PAN AFR. STUD. 156, 171 (2013) (challenging earlier works, both those supporting and those rejecting the rapper-as-postmodern-*griot* trope, for their oversimplification of the topic’s complexity and for their reliance “on a romanticized and selective depiction of the griot”). For purposes of this Note, the rapper-as-modern-*griot* trope may simply be understood as a metaphor for the similarities between rap music and *griot* verbal traditions, namely, the significant cultural respect for musical storytelling as a medium for social commentary. *See, e.g.,* Kimberly Monroe, *Trans-Atlantic Memories: Senegal’s Hip-Hop Griots and the Black Radical Tradition*, COUNCIL AM. OVERSEAS RSCH. CTRS. (May 19, 2020), <https://www.caorc.org/post/trans-atlantic-memories-senegal-s-hip-hop-griots-and-the-black-radical-tradition> [<https://perma.cc/88F6-98VV>] (“Rappers, like griots, are to their communities valuable human instruments who are entrusted to carry and preserve society’s history and culture.”).

38. *See, e.g.,* Lauren Lee, *Digging Up Rap’s Roots: How African Rhythms Birthed American Hip-Hop*, CNN (Dec. 15, 2023), <https://www.cnn.com/2023/12/15/africa/africa-hip-hop-50th-anniversary-history-spc/index.html> [<https://perma.cc/8WJK-JQ7J>]. Others, however, have argued that rappers and *griots* could not be more opposite of each other. *See, e.g.,* Sajani, *supra* note 37, at 156 (quoting Senegalese rapper Thiat of Keur Gui) (“The role of the griot and the role of the rapper are completely different, we are nothing alike. Ancient griots served kings and modern griot praise rich people and serve politicians. We are the opposite—we serve the people against the politicians, we are the voice of the voiceless.”).

39. Lee, *supra* note 38 (quoting Obi Asika).

40. *Id.*; James Brown, BIOGRAPHY (Apr. 22, 2021), <https://www.biography.com/musicians/james-brown> [<https://perma.cc/ZB2M-Z2GP>]. A straightforward example of the call-and-response composition is a song where one voice asks a question (i.e., “call”) and another voice answers (i.e., “response”). *See, e.g.,* BABY KEEM & KENDRICK LAMAR, *Range Brothers*, on THE MELODIC BLUE, at 03:50–05:17 (pgLang LLC 2022) (demonstrating the call-and-response composition in a rap song).

Ogene music [from the Igbo people] is at least a thousand years old; it's call-and-response. If you listen to the Orikis in Yoruba with a priest singing, it's call-and-response. If you listen to the foundations of Fuji [from the Yoruba people], it's hip-hop . . . .

Music is a ritual for us in Africa, it's not just entertainment . . . . Music is embedded in the form and function of African society from day one because it is also tied to the metronome of our hearts.<sup>41</sup>

Implicit in Obi Asika's statement is that, regardless of the classist elements that differentiate rap music and the *griot* tradition, their shared African origin are by themselves significant because, in Africa, music is revered as "the king of all professions."<sup>42</sup> And where "[m]usic and politics are inextricably linked and in places where histories are transmitted orally, the role of music is central to how a society defines itself and how it governs."<sup>43</sup> From this perspective, it follows that displacing a people's roots cannot magically erase their associated culture and practices.<sup>44</sup> So when colonials abducted over 12.5 million Africans during the Trans-Atlantic Slave Trade era—nearly half of which were West African (including *griots*)—and transplanted approximately 10.7 million in the Americas, African music came along too.<sup>45</sup>

When the first Africans arrived on this foreign land in the early 1600s, they, of course, could only communicate in their native dialects, resulting in 250 years of "an almost entirely oral culture" for the African (not yet American) diaspora.<sup>46</sup> In this alienated context, the first slaves managed to cling to two nonmaterial aspects of their former cultures: their religious beliefs and their artistic mediums.<sup>47</sup> Consequently, both secular

41. Lee, *supra* note 38 (quoting Obi Asika).

42. *See id.*; Break from Fela Kuti, in LUPE FIASCO FT. AYESHA JACO, *Prisoner 1 & 2*, on TETSUO & YOUTH, at 00:27–00:37 (Atl. Records 2015); *see also* Maya Elese, *Knowledge Session: The Griot Tradition*, I AM HIP-HOP MAG. (Mar. 18, 2018), <https://www.iamhiphopmagazine.com/thegriottradition/> [<https://perma.cc/Z85T-JZBY>] (drawing parallels between the *griot* tradition and rap music).

43. Gregory Barz & Keith Weghorst, *Introducing 'Rhythm of Change: African Music and African Politics'*, VAND. UNIV. BREAKTHRU BLOG (Jan. 22, 2018), <https://my.vanderbilt.edu/universityfundingprograms/2018/01/introducing-rhythm-of-change-african-music-and-african-politics/> [<https://perma.cc/RML4-ZB36>].

44. *See* BARAKA, *supra* note 26, at 16–18 (linking pure African music to post-slavery African American music).

45. *See id.*; Tang, *supra* note 30, at 82; KEYES, *supra* note 27, at 21; EQUAL JUST. INITIATIVE, THE TRANSATLANTIC SLAVE TRADE (2022), <https://ejl.org/report/transatlantic-slave-trade/origins/#the-barbarity-of-the-middle-passage> [<https://perma.cc/ML97-GN5E>]; *Trans-Atlantic Slave Trade—Estimates*, SLAVE VOYAGES, <https://www.slavevoyages.org/assessment/estimates> [<https://perma.cc/88ZX-KHGN>] (last visited Feb. 6, 2024).

46. BARAKA, *supra* note 26, at xi–xii; Harlem Late Night Jazz, *Work/Field Songs*, JAZZ HIST. TREE (2024), <https://www.jazzhistorytree.com/work-field-songs/> [<https://perma.cc/6HMQ-LS2B>] (last visited Feb. 6, 2024).

47. BARAKA, *supra* note 26, at 16.

slave music (i.e., “work” or “field” songs) and non-secular slave music (i.e., “spirituals” or “sorrow songs”) originated from the same type of West African music, experienced roughly parallel general trends in their development, and served as immediate predecessors for the subsequent development of blues.<sup>48</sup>

In the same vein as rap music, slave music willfully matured in the face of oppression. Despite efforts to stifle Black expression through the Slave Codes, states failed to eradicate the persistent remnants of African musical and oratory culture held onto by enslaved persons.<sup>49</sup> Conversely, slaves preserved their musical traditions by building African-style instruments, including drums and flutes, and singing field songs in call-and-response form to motivate each other with lyrics of freedom, tradition, and love.<sup>50</sup> Moreover, sorrow songs had proven to be a particularly influential means for expressing political dissent during this era.<sup>51</sup> Slaves sang these melancholic melodies to both convey feelings of loneliness and trumpet dreams of freedom, articulating stunningly direct lyrics to critique the conditions of slavery and condemn the perpetrators who supported its insurrection.<sup>52</sup> Although slave owners may have perceived such slave songs as no more than “loose talk by aggrieved and embittered men,”<sup>53</sup> Frederick Douglass wrote about the impact of these songs on the hearts and minds of enslaved persons:

Every tone was a testimony against slavery, and a prayer to God for deliverance from chains. The hearing of those wild notes always depressed my spirit, and filled me with ineffable sadness. I have frequently found myself in tears while hearing them. The mere recurrence to those songs, even now, afflicts me; and while I am writing these lines, an expression of feeling has already found its way down my cheek. To those songs I trace my first glimmering conception of the dehumanizing character of slavery. I can never get rid of that

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48. *Id.* at 18; Harlem Late Night Jazz, *supra* note 46; *Songs of the Underground Railroad*, HARRIET TUBMAN HIST. SOC’Y, <http://www.harriet-tubman.org/songs-of-the-underground-railroad/> [https://perma.cc/6DPH-GK3U] (last visited Mar. 13, 2024); see also Joseph Winters, *Contemporary Sorrow Songs: Traces of Mourning, Lament, and Vulnerability in Hip Hop*, 46 AFR. AM. REV. 9, 11 (2013) (exploring the dynamic between sorrow songs and hip-hop music).

49. BARAKA, *supra* note 26, at 16; Tibbs & Chauncey, *supra* note 12, at 44–45.

50. *How Black Music Changed History*, IOWA SCOPE (Feb. 17, 2023), <https://scope.uiowa.edu/blog/2023/02/how-black-music-changed-history> [https://perma.cc/45WC-LRG5]; see also DAVID P. SZATMARY & LYNSEY RIPLEY, *ROCKIN IN TIME: A SOCIAL HISTORY OF ROCK-AND-ROLL 2* (1987) (describing the call-and-response form in field songs).

51. See *Slavery*, DIGIT. HIST., <https://www.digitalhistory.uh.edu/era.cfm?eraID=6&smtID=6> [https://perma.cc/W9CT-4H29] (last visited Feb. 6, 2024).

52. Winters, *supra* note 48, at 11.

53. Tibbs & Chauncey, *supra* note 12, at 43–44.

conception. Those songs still follow me, to deepen my hatred of slavery, and quicken my sympathies for my brethren in bonds.<sup>54</sup>

As early as 1739, states began fearing that African slave music would “transmit subversive messages and fuel insurrection.”<sup>55</sup> Consequently, legislators began suppressing Black music by prohibiting slaves from owning “talking drums,” a traditional West African instrument used to lend an artistic frame to poetry and storytelling, because they had been deemed “dangerous communication tools.”<sup>56</sup> The following excerpt from Georgia’s Slave Codes illustrates the lengths to which these instruments had been perceived as threatening the existing social caste:

And it is absolutely necessary to the safety of this province, that all due care be taken to restrain the wandering and meeting of Negroes and other slaves, at all times . . . and their using and carrying mischievous and dangerous weapons, or using and keeping drums, horns, or other loud instruments, which may call together or give sign or notice to one another of their wicked designs and intentions; . . . and whatsoever master or owner or overseer shall permit or suffer his or their slave or slave at slaves at any time hereafter to beat drums, blow horns or, or other loud instruments, . . . shall forfeit thirty shilling sterling for every such offense.<sup>57</sup>

Eventually, slave owners realized that slave songs were the means of communication that incited a failed rebellion attempt and thus began regulating Black speech through the vague policing of “loose talk,” making no distinction between words of incitement and rhetorical creative expressions.<sup>58</sup> Hence, Black music, once treasured in Africa as an integral facet of social order, had explicitly been criminalized for threatening to impair the social hierarchy of slavery.<sup>59</sup>

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54. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE, WRITTEN BY HIMSELF 14 (1845).

55. PETER BLECHA, A HISTORY OF BANNED BANDS & CENSORED SONGS 16 (2004); Donna Dox, *The Superpower of Singing: Music and the Struggle Against Slavery*, NAT’L PARK SERV. (Dec. 8, 2021), <https://www.nps.gov/articles/000/the-superpower-of-singing-music-and-the-struggle-against-slavery.htm> [<https://perma.cc/J8KX-A5X7>].

56. BLECHA, *supra* note 55, at 16; Dox, *supra* note 55; see also Matthew Motta, ‘Talking Drums’: Long-Distance Communication in Early Africa, BREWMINATE (May 4, 2020), <https://brewminate.com/talking-drums-long-distance-communication-in-early-africa/> [<https://perma.cc/C5DA-W3CC>].

57. See Dena J. Epstein, *Slave Music in the United States Before 1860: A Survey of Sources* (Part 2), 20 MUSIC LIB. ASSOC. 377, 380 (reproducing paragraph 45 of Georgia’s legal code dealing with “Privileges and Disabilities of Slaves”).

58. Tibbs & Chauncey, *supra* note 12, at 43–44.

59. See *id.* at 42–46 (comparing rap on trial to the criminalization of Black speech during the Slave Era).

*B. 1900s–2000s: The Ghetto Symphony Goes on Tour*<sup>60</sup>

By the twentieth century, Black Americans had blended their African musical heritage with new American themes and instrumentals to create the blues, a genre that largely reflected “the despair of a people who [had been] denied access to justice” during the Jim Crow Era.<sup>61</sup> In echoing the *griot* tradition of musical storytelling, as well as the spirituals and work songs of their enslaved ancestors, blues singers spoke rhythmically and assertively about racial subjugation, “detailing the indignities suffered and specifically the failure of legal institutions to protect them.”<sup>62</sup>

Throughout the mid-twentieth century, the blues underwent several permutations that formed the basis of jazz, rhythm and blues (R&B), and rock-and-roll, all of which marked distinct eras where Black music had “found its way into white living rooms and dance halls.”<sup>63</sup> To counter this modicum of social acceptance achieved by Black musicians, the music industry employed parallel censorship efforts to reduce the influence that Black music had on American culture.<sup>64</sup> Sometimes, this censorship was explicit, such as when major radio stations and record companies black-listed Billie Holiday’s “Strange Fruit,” a blues song that “conjured appalling images of lynchings in the South.”<sup>65</sup> Or, for example, when the Houston Juvenile Delinquency and Crime Commission convinced local radio stations to “enforce morality and prevent the corruption of the youth” by banning thirty rock-and-roll songs from their airwaves, most of which had been authored by Black musicians.<sup>66</sup>

More often, however, Black musicians faced “systematic, controlled, and organi[z]ed” censorship efforts aimed at keeping Black music separate

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60. A nod to the A\$AP Rocky’s 2013 rap song, “Ghetto Symphony,” which touches on themes of “rebellion, pride, materialism, and the harshness of street life, ultimately delivering a message of resilience and the pursuit of dreams despite the obstacles.” A\$AP ROCKY, *Ghetto Symphony*, on LONG. LIVE. A\$AP. (A\$AP Worldwide 2013); *Meaning of Ghetto Symphony by A\$AP Rocky (Ft. A\$AP Ferg & Gunplay)*, SONGTELL (Aug. 1, 2023), <https://www.songtell.com/a-ap-rocky-ft-a-ap-ferg-gunplay/ghetto-symphony> [<https://perma.cc/273P-HBPK>].

61. David Pimentel, *The Blues and the Rule of Law: Musical Expressions of the Failure of Justice*, 67 LOY. L. REV. 191, 199 (2020); SZATMARY & RIPLEY, *supra* note 50, at 2; *see also* BARAKA, *supra* note 26, at 17–20 (describing the evolution of slave songs into blues).

62. *See* Pimentel, *supra* note 61, at 199–201; SZATMARY & RIPLEY, *supra* note 50, at 2–4.

63. *See* Pimentel, *supra* note 61, at 199; SZATMARY & RIPLEY, *supra* note 50, at 2; *see also* BARAKA, *supra* note 26, at 17–20 (describing the evolution of the blues into other musical genres).

64. *See* Elaine Maguire O’Connor, *Why They Tried to Censor the Blues*, LOUDER: CLASSIC ROCK (Dec. 6, 2020), <https://www.loudersound.com/features/why-they-tried-to-censor-the-blues> [<https://perma.cc/MF9S-CTH8>].

65. Pimentel, *supra* note 61, at 201–02.

66. O’Connor, *supra* note 64; *see also* Brief Timeline on Censored Music, ACLU (Sept. 26, 2005), <https://www.aclu.org/documents/brief-timeline-censored-music> [<https://perma.cc/T734-7U88>].

from mainstream music.<sup>67</sup> Following the first commercially successful blues song by an African American in the 1920s, record companies became freshly aware of a massive market segment, and thus coined the term “race records” as an all-encompassing genre for music “contemplated as being made by and for African Americans.”<sup>68</sup> By contrast, “popular music” denoted all music “made by and for whites generally.”<sup>69</sup> This strict segregation allowed record companies to recycle race records into popular music by having white artists release songs that copied lyrics and reappropriated rhythms from Black artists, thereby maximizing profitability in both market segments.<sup>70</sup>

When Billboard began publishing its best-selling record charts in the 1940s, it further engrained the classifications “popular” (white) and “race” (Black) music into the American social stratum.<sup>71</sup> Then in 1949, Billboard decided to rename “popular” into “pop” and “race” into “rhythm and blues” (R&B), the latter largely understood by Americans as “a code word for Black music.”<sup>72</sup> Indeed, this musical color line drawn by the music industry harmonized perfectly with the physical color line drawn by the Jim Crow South.<sup>73</sup>

Today, the commercial music industry’s racialized traditions continue to linger in covert, assorted fashions.<sup>74</sup> For example, when Beyoncé branched out into the country genre with her 2024 hit single, “Texas Hold ‘Em,” one radio station refused to play the song because, according to the manager, country stations simply “do not play Beyoncé.”<sup>75</sup> The internet immediately flared with debates regarding the music industry’s legacy of

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67. O’Connor, *supra* note 64.

68. *Id.*; ROBERT BRAUNEIS, COPYRIGHT, MUSIC AND RACE: THE CASE OF MIRROR COVER RECORDINGS 4 (2020), <https://kristelia.com/wp-content/uploads/2020/08/Copyright-Music-and-Race-Teaching-Module.pdf> [<https://perma.cc/2L5Y-6M6W>].

69. BRAUNEIS, *supra* note 68, at 4.

70. *See id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. *See, e.g.,* Mark Laver, *Lil Nas X and the Continued Segregation of Country Music*, WASH. POST (June 20, 2019), <https://www.washingtonpost.com/outlook/2019/06/20/lil-nas-x-continued-segregation-country-music/> [<https://perma.cc/SR2Y-6P2P>] (comparing Billboard’s reclassification of “Old Town Road” to a modern-day variation of race records).

75. Emily Schmall, *Radio Request Reignites Country Music Debates*, N.Y. TIMES (Feb. 21, 2024), <https://www.nytimes.com/2024/02/14/arts/music/beyonce-oklahoma-radio-station.html> [<https://perma.cc/42PX-F7CK>]. Beyoncé had previously expressed interest in mainstream country music in 2016 when she submitted her song, “Daddy’s Lesson,” for a Grammy under the country category. *Id.* However, the Recording Academy rejected her submission without public comment. *See id.*; *see also* Mesfin Fekadu, *AP Source: Grammy Country Committee Rejects Beyonce Song*, AP NEWS (Dec. 7, 2016), <https://apnews.com/arts-and-entertainment-music-9770ad054e9d48aeba56cc40e12b3c84> [<https://perma.cc/EF49-3KZH>].

gatekeeping certain genres from marginalized racial groups.<sup>76</sup> Fans bombarded the station with thousands of messages criticizing the station's "ridiculous and racist" refusal to play the song, with some observers outright calling for "the institutional oppressive regimes of country music to be removed."<sup>77</sup> The station ultimately caved into the public's demands and added the song into the station's rotation.<sup>78</sup> Despite this controversy, "Texas Hold 'Em" reached the top of Billboard's Hot Country Songs chart, making Beyoncé the first woman of color to accomplish this feat.<sup>79</sup>

While accomplished R&B artists like Beyoncé have successfully challenged the music industry's traditional Black / white taxonomy, rap artists have generally not seen success when attempting to do the same. For example, when Lil Nas X, a Black southern musician, released his 2019 hit single, "Old Town Road," most fans believed it to be a country song, as made apparent by its lyrics, themes, instruments, tempo, and melody.<sup>80</sup> Lil Nas X also stated that he intended for it to be a country song and hence why he released it under the "country" genre on streaming platforms.<sup>81</sup> But as soon as the song gained traction, Billboard removed it from the Hot Country Singles category because it "wasn't country enough," claiming instead that it was a variation of rap and hip-hop.<sup>82</sup> In response to Billboard's decision to reclassify "Old Town Road" as "rap," Lil Nas X sought out well-known country singer Billy Ray Cyrus (a white artist) and released a remix of the song that included a verse and other minor alterations from Cyrus.<sup>83</sup> Sure enough, streaming platforms classify the remix as "country," while the original version is classified as "country rap," "Southern hip-hop," "a country-adjacent hip-hop mish-mash," or just

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76. Schmall, *supra* note 75.

77. *Id.*; Karu F. Daniels, *Beyoncé's 'Texas Hold 'Em' Tops Billboard's Country Chart Amid Racially Charged Controversy*, DETROIT NEWS (Feb. 21, 2024), <https://www.detroitnews.com/story/entertainment/music/2024/02/21/beyonce-texas-hold-em-tops-billboards-country-chart-amid-racially-charged-controversy/72686077007/> [https://perma.cc/29XJ-6QVH].

78. Schmall, *supra* note 75.

79. *Id.*; Gary Trust, *Beyoncé's 'Texas Hold 'Em' Hits No. 1 on Billboard Hot 100*, BILLBOARD (Feb. 26, 2024), <https://www.billboard.com/lists/beyonce-texas-hold-em-number-one-hot-100-streams-airplay-sales-2/> [https://perma.cc/E8X9-4B3C].

80. *Id.*; LIL NAS X, OLD TOWN ROAD (Columbia Records 2019).

81. Laver, *supra* note 74.

82. Hubert Adjei-Kontoh, *Lil Nas' Song Was Removed from Billboard for Not Being 'Country' Enough. But Who Gets to Decide Categories?*, GUARDIAN (Apr. 2, 2019), <https://www.theguardian.com/music/2019/apr/02/lil-nas-song-removed-from-billboard-not-country-enough> [https://perma.cc/9TLK-D5C4].

83. Specifically, Cyrus recited the original lyrics on the first chorus, added a third verse, and harmonized with Lil Nas X on the final chorus. LIL NAS X FT. BILLY RAY CYRUS, OLD TOWN ROAD REMIX (Columbia Records 2019).

about any other variation of “it-could-be-country-but-the-artist-is-Black.”<sup>84</sup>

Under the view that the law seeks to maintain existing social class structures, particularly class relationships within that structure,<sup>85</sup> one may not be surprised to find that political and legal actors, like industry actors, have similarly sought to marginalize rap music at all phases of its existence. In this vein, scholars have likened the Slave Era regulations of “loose talk” to several milestone events in modern rap history.<sup>86</sup> For example, in 1985, former Second Lady Tipper Gore utilized her role as leader of the Parent’s Music Resource Center to raise national concerns about rap’s profane and sexually explicit content.<sup>87</sup> Shortly after, a Florida state court declared a rap album legally obscene for its profane lyrics, which caused many retailers to stop selling the record.<sup>88</sup> Later, congressional efforts at pseudo-censoring rap music succeeded when 2 Live Crew’s album, “Banned in the U.S.A.,” became the first album to bear the black-and-white parental advisory label.<sup>89</sup>

Also in 1989, the FBI and several police departments publicly condemned N.W.A.’s song, “Fuck tha Police,” leading to several performance cancellations in major cities due to police departments’ refusals to provide security.<sup>90</sup> At one N.W.A. performance in Detroit, police officers rushed the group off stage and back to their hotel as soon as they began

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84. See, e.g., Sama’an Ashrawi, *Before “Old Town Road”: The Evolution of Country Rap Tunes*, COMPLEX MAG. (Apr. 11, 2019), <https://www.complex.com/music/2019/04/evolution-of-country-rap-songs> [<https://perma.cc/5XE7-XKB4>]; Allegra Frank, *Lil Nas X’s “Old Town Road” Is a Banger. But Is It Country? Depends on Whom You Ask*, VOX MAG. (Apr. 5, 2019), <https://www.vox.com/culture/2019/4/5/18295966/old-town-road-lil-nas-x-billy-ray-cyrus-country-rap-debate> [<https://perma.cc/XA4U-Y889>].

85. See Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051 (1978) (discussing the Supreme Court’s “color-blind” approach to antidiscrimination laws following the Civil Rights Act of 1964).

86. See, e.g., Tibbs & Chauncey, *supra* note 12, at 41 (comparing the regulations of “loose talk of aggrieved and embittered slaves” to the regulations of “loose talk of aggrieved and embittered hip hop artists”).

87. See Vidhaath Sripathi, *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. GENDER RACE & JUST. 207, 215 (2021) (arguing that Tipper Gore’s efforts formalized the censorship of rap music).

88. Lutes, Purdon & Fradella, *supra* note 19, at 80. Although a federal district court agreed the album was obscene, the Eleventh Circuit subsequently ruled that the evidence provided was insufficient to justify the denial of First Amendment protections. *Luke Records v. Navarro*, 960 F.2d 134, 138–39 (11th Cir. 1992).

89. Zach Schonfeld, *Does the Parental Advisory Label Still Matter?*, NEWSWEEK (Apr. 20, 2016), <https://www.newsweek.com/does-parental-advisory-label-still-matter-tipper-gore-375607> [<https://perma.cc/DRE4-EHT4>]. 2 Live Crew’s prior album, “As Nasty as They Wanna Be,” was the same album declared legally obscene in Florida state court. Lutes, Purdon & Fradella, *supra* note 19, at 81.

90. Lutes, Purdon & Fradella, *supra* note 19, at 80.



performing the song.<sup>91</sup> The officers did not press charges and simply stated that they “just wanted to show the kids you can’t say ‘fuck the police’ in Detroit.”<sup>92</sup> Ironically, following the murder of George Floyd in 2020, “Fuck tha Police” resurged in popularity, and journalists credited it as “the perfect protest song.”<sup>93</sup> In discussing this resurgence, N.W.A. member MC Ren reminded listeners of the unfortunate reality that the song’s newfound popularity meant that its subject matter was still relevant over thirty years after its release.<sup>94</sup>

### C. 2000–Forward: Exploiting the Urban Black Narrative

Although rap has dominated the last decade of mainstream music, it likely would not have reached its current commercial success without the music industry’s exploitation of pre-existing racial narratives about Black Americans.<sup>95</sup> In the gangsta and drill rap subgenres in particular, rap artists are pressured to maintain a thug-like image to ensure their credibility as outlaws, albeit remarkably exaggerated to account for the artistic medium in which this persona is observed.<sup>96</sup> This image involves the narrative of exposure to inner-city gang life, including themes of violence, drugs, and misogyny.<sup>97</sup> Rappers may personify these elements because it forces “listeners and society as a whole to confront the social and economic

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91. *Id.*

92. *Id.*

93. Kory Grow, *How N.W.A.’s ‘Fuck tha Police’ Became the ‘Perfect Protest Song’*, ROLLING STONE (June 9, 2020), <https://www.rollingstone.com/music/music-features/nwa-fuck-tha-police-protest-song-1010355/> [<https://perma.cc/9ZYC-U3ZM>].

94. *Id.* On a separate but related note, consider that only months after George Floyd’s murder, it was Atlanta rapper Lil Baby—not the Minneapolis Police Department—that sponsored George Floyd’s daughter’s seventh birthday party. Heran Mamo, *Lil Baby Helps Throw Epic Birthday Party for George Floyd’s 7-Year-Old Daughter*, BILLBOARD (Dec. 17, 2020), <https://www.billboard.com/music/rb-hip-hop/lil-baby-birthday-party-george-floyd-daughter-gianna-9502061/> [<https://perma.cc/EU55-MFVE>].

95. See Lutes, Purdon & Fradella, *supra* note 19, at 84–85 (equating rap’s commercialization to the film industry’s Blaxploitation tactics from the 70s).

96. See Stoia, Adams & Drakulich, *supra* note 11, at 350, 357. Most readers are likely familiar with “gangsta rap,” popularized by 90s rappers such as Tupac, Biggie, and Snoop Dogg. See Greg Tate, *Gangsta Rap*, BRITANNICA (Jan. 25, 2024), <https://www.britannica.com/art/gangsta-rap> [<https://perma.cc/L7SL-9LF6>]. Although gangsta rap is mostly an outdated subgenre at this point, “drill rap,” which originated in Chicago in the early 2010s, now receives the same praises and criticisms as gangsta rap once did for its emphasis on violent lifestyles and realistic depictions of street life. Compare *id.* (describing gangsta rap), with S.Y., *Drill Rap Is One of Hip-Hop’s Most Misunderstood Genres*, BLEU MAG. (Aug. 1, 2023), <https://bleumag.com/music/what-is-a-drill-rap/> [<https://perma.cc/3Y9G-UBXY>] (describing drill rap in a similar way). For simplicity, this Note will use “gangsta” and “drill” interchangeably to refer to rap subgenres with violent lyrical content.

97. See Stoia, Adams & Drakulich, *supra* note 11, at 332–34; see also Shannon M. Cochran, *Hip-Hop Commercialization and the Destructive Exploitation of Young Black Males*, IND. U. PRESS 45, 45–46 (2015) (examining the music industry’s role in targeting Chicago’s poor Black male youth to make records and how this influenced Joseph Coleman’s actions on the last day of his life).

conditions that created them.”<sup>98</sup> Yet, from a commercial perspective, the gangsta rap persona is largely attributed to music executives who explicitly encourage it as a marketing pose in efforts to target young white consumers.<sup>99</sup> In effect, this persona “attracts listeners for whom the ghetto is a place of adventure, unbridled violence, and erotic fantasy, or an imaginary alternative to suburban boredom.”<sup>100</sup> “This appeal may be based in part on the degree to which this image taps into deep-seated racial stereotypes and anxieties, and they serve to reinforce neoliberal views of Black citizens and Black neighborhoods as undeserving.”<sup>101</sup>

In this regard, proponents of rap on trial fail to consider that much of rap, especially modern rap, contains stock “lyrical formulas” that musicians know their audiences expect to hear.<sup>102</sup> While some rap lyrics may contain autobiographical elements, they are most naturally understood as literary expressions containing sensationalized rhetoric and exaggeration. This is a careful distinction from courts that understand rap lyrics as literal, self-referential narratives that can be easily interpreted by the lay public.<sup>103</sup> Consider rap artist Lil Tecca who wrote the lyrics, “I got two twin Glocks, turn you to a dancer / I see two twin opps, leave ‘em on a banner.”<sup>104</sup> Lil Tecca took the liberty of discussing these lyrics in an interview: “I don’t have straps for nobody,” he said while laughing, “I don’t got no straps.”<sup>105</sup> Lil Tecca said simply what scholarship has sought to establish: modern rap artists are merely utilizing a well-established lyric formula to sell music.<sup>106</sup> Why? Because it’s provocative, and it gets the people going.<sup>107</sup>

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98. See Stoia, Adams & Drakulich, *supra* note 11, at 350.

99. *Id.* at 333–34.

100. *Id.* at 350 (internal quotation omitted).

101. *Id.* at 334 (internal citations omitted).

102. See *id.* at 331–32, 342.

103. *Id.*

104. LIL TECCA, *Ransom*, on WE LOVE YOU TECCA, at 00:23–00:30 (Republic Records 2019).

While the slang term “opps” literally translates to “cops,” the term is more commonly used to refer to one’s personal adversaries (e.g., a school bully). Therefore, most rap fans would understand these lyrics as no more than an empty threat rather than a call to murder police officers.

105. Genius, *Lil Tecca Breaks Down the Meaning of “Ransom”*, YOUTUBE, at 01:43–02:02 (June 7, 2019), [https://www.youtube.com/watch?v=c\\_fXqA5UAbY&t=112s](https://www.youtube.com/watch?v=c_fXqA5UAbY&t=112s) [<https://perma.cc/M2H4-TJPD>]. The slang term “straps” literally translates to “guns” and has no other plausible meaning in this context.

106. See, e.g., Stoia, Adams & Drakulich, *supra* note 11, at 331–32.

107. For context, this is a reference to Kanye West and Jay-Z’s diamond-plaque record, “N\*\*\*\*\* in Paris,” which contains an iconic interlude emphasizing the provocative function of rap lyrics. See KANYE WEST & JAY-Z, *N\*\*\*\*\* in Paris*, on WATCH THE THRONE, at 02:22–02:30 (Roc-A-Fella Records 2011). The interlude blends into the call-and-response structure of the song, with two unidentified speakers commenting on Kanye’s previous verse and Jay-Z responding to the speakers:

Without a stringent standard to distinguish truthful lyrics from hyperbolic ones, courts are often inclined to treat rap lyrics as “real” because that is the persona that rap artists strive to portray.<sup>108</sup> In a publication by the United States Department of Justice, a hip-hop task force investigator wrote the following: “In today’s society, many gang members compose and put their true-life experiences into lyrical form. . . . Law enforcement officials must remain mindful of such money laundering schemes and the opportunities to obtain inculpatory evidence in gang-related investigations and cases.”<sup>109</sup> However, even the most hardcore rap fans may not be able to confidently make such a distinction. For example, when Young Thug said “ready for war like I’m Russia. . . . getting all type of cash, I’m a general,” is he spitting bars (i.e., making a hyperbolic metaphor) or is he admitting to being the king pin of a criminal enterprise?<sup>110</sup> Never mind the literary devices—these exact lyrics were admitted in Williams’s ongoing trial as evidence of an overt act in furtherance of a conspiracy to violate state racketeering laws.<sup>111</sup>

Moreover, those who leave rap music’s racial implications to an afterthought and instead shift their primary focus to rap’s socially undesirable themes pose the risk of demonizing racial minorities merely for authoring fictional or hyperbolic rap lyrics. For example, in 2014, a Ferguson police officer shot and killed eighteen-year-old Michael Brown, and although the officer was not indicted, many Americans believed Brown’s killing to be racially motivated.<sup>112</sup> On the day of Brown’s funeral, the *New York Times* published an article shaming Brown for his interest in rap music, stating that he “had taken to rapping in recent months, producing lyrics that were by turns contemplative and vulgar,” therefore making him “no

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[Kanye West] Doctors say I’m the illest, ‘cause I’m suffering from realness / Got my n\*\*\*\*s in Paris, and they goin’ gorillas, huh? /

[Speaker 1] I don’t even know what that means /

[Speaker 2] No one knows what it means, but it’s provocative /

[Speaker 1] No it’s not, it’s gross— /

[Speaker 2] — It gets the people going[!] /

[Jay-Z] Ball so hard motherfuckers wanna fine me.

*Id.* at 02:15–02:36.

108. See Stoia, Adams & Drakulich, *supra* note 11, at 357.

109. Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, 54 U.S. ATTY’S BULL. (U.S. DEP’T OF JUST.) 1, 1 (2006), <https://www.justice.gov/archive/olp/pdf/gangs.pdf> [<https://perma.cc/GW4F-WBKU>].

110. YOUNG THUG FT. NICKI MINAJ, *Anybody*, on HEAR NO EVIL, at 0:52–1:36 (YSL Recs. 2016).

111. Indictment at 33, *State v. Williams* (YSL), No. 225C182273 (Fulton Cnty. Sup. Ct., May 7, 2022).

112. See *Tracking Events in the Wake of Michael Brown’s Shooting*, N.Y. TIMES (Nov. 24, 2014), <https://nyti.ms/3naL9VU> [<https://perma.cc/2JYX-HZPJ>].

angel.”<sup>113</sup> Judges, too, have made similar references to criminal defendants who author rap lyrics.<sup>114</sup> In a case concerning a defendant’s failed self-defense claims for voluntary manslaughter, a trial judge commented on the character of the decedent, Michael Randolph, during sentencing:

It’s tragic that a life was lost, but as [the prosecution said], Michael Randolph bears some responsibility here, and he does. He was described as an aspiring rapper. He has a prior criminal history . . . . So let’s not say that Michael Randolph was this wonderful citizen because he was not. His rap lyrics . . . glorified drug use, violence . . . . I was going to say something about the likelihood of Michael Randolph succeeding and being an aspiring rapper, but this is one of those times where I’m going to hold my tongue.<sup>115</sup>

To whatever extent these criticisms about rap music have merit, those familiar with rap’s culture are aware that its racial undertones remain unmoved. In a 2023 interview with Grammy-award-winning rapper Macklemore, a white artist, a reporter asked whether he felt like a “guest” in a predominantly Black genre.<sup>116</sup> To this, Macklemore replied,

If you look at the origin of where hip-hop came from and what was happening in New York City and what was happening in the Bronx—and the way the Black people and people of color been treated historically in America from the jump, this was a music that was birthed out of oppression. Hip-hop is inclusive so there’s always been an open door to a certain extent. In certain moments, it was a little bit harder to push it open back in the 90s. But I’m a guest. Em’s [Eminem] a guest. Doesn’t matter how good we get. Doesn’t matter how great Eminem is. We’re guests in the culture. A hundred percent. And that’s not to say that I don’t belong here. I absolutely belong here. But you still have to realize this is not your house, and that you’re a guest. And take your shoes off and help with some dishes.<sup>117</sup>

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113. John Eligon, *Michael Brown Spent Last Weeks Grappling with Problems and Promise*, N.Y. TIMES (Aug. 24, 2014), <https://www.nytimes.com/2014/08/25/us/michael-brown-spent-last-weeks-grappling-with-lifes-mysteries.html> [<https://perma.cc/HH2Q-5P85>].

114. See *Commonwealth v. Gesslein*, No. CR-3003-2012, 2013 Pa. Dist. & Cnty. Dec. LEXIS 560, at \*35–36 (Pa. Dist. & Cnty. Dec. 20, 2013).

115. *Id.*

116. CBS Mornings, TIKTOK (Mar. 30, 2023), <https://www.tiktok.com/t/ZTLkM5dw1/> [<https://perma.cc/36KA-GXW4>].

117. *Id.* Throughout his career, Seattle-based rapper Macklemore has consistently displayed this conscious understanding of hip-hop culture. Looking back to 2014, after Macklemore won the Grammy for Best Rap Album over Kendrick Lamar—shocking many rap fans to this day—he said, “I’m struggling with like, ‘Damn, I’m benefitting from the system I’ve been calling out since I was fucking 20 years old. . . . Here I am at the highest level of artistic merit, the Grammys, and here I am benefitting from the same shit I’ve been talking about.’” Will Lavin, *Macklemore Recalls Time He*

Collectively, these cases illustrate the disconnect between the rap community's and the legal community's perceptions of rap music that, at their core, are based on wildly different understandings of *why* the genre glorifies its negative themes. The following section discusses how this disconnect exacerbates racial disparities in the criminal justice context.

## II. PROPENSITY TO SPIT OR TO COMMIT?

The covert institutional attack on rap music—Black music—is perhaps most apparent in the judicial ambience of rap on trial. Consider that in 1965, just shortly before rap's inception, posters flooded the streets of New Orleans that read, "NOTICE! STOP. Help Save the Youth of America. DON'T BUY NEGRO RECORDS."<sup>118</sup> But rather than citing offensive language as the reason for the boycott, the flyers promoted the social censorship of Black music through outright bigotry: "The screaming, idiotic words and savage music of these records are undermining the morals of our white youth in America."<sup>119</sup> Paradoxically, New Orleans now prides itself as the birthplace of jazz and is also the home of a particularly jarring rap on trial decision.<sup>120</sup>

### A. Lil Mac Freestyles for Freedom

On the night of February 21, 2000, McKinley Phipps Jr. (p/k/a Mac), a prominent rapper in the early New Orleans rap scene, was set to perform at a nightclub near his hometown.<sup>121</sup> Before Phipps's performance, a fight had broken out in the crowd, resulting in the shooting and death of a young fan.<sup>122</sup> When Phipps initially heard the gunshots, he drew his own legally

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Won Grammy over Kendrick Lamar: "I Was Conflicted", NME (Feb. 3, 2021), <https://www.nme.com/news/music/macklemore-recalls-time-he-won-grammy-over-kendrick-lamar-i-was-conflicted-2871910> [<https://perma.cc/ZS8M-7C4C>].

118. CITIZENS' COUNCIL OF GREATER NEW ORLEANS, INC., HELP SAVE THE YOUTH OF AMERICA: DON'T BUY NEGRO RECORDS (1900), [https://egrove.olemiss.edu/citizens\\_pamph/36/](https://egrove.olemiss.edu/citizens_pamph/36/) [<https://perma.cc/27Q7-4VL5>].

119. *Id.*

120. See *Jazz Origins in New Orleans*, NAT'L PARK SERV. (Sept. 9, 2019), [https://www.nps.gov/jazz/learn/historyculture/history\\_early.htm](https://www.nps.gov/jazz/learn/historyculture/history_early.htm) [<https://perma.cc/9ZFT-SY7M>]; *State v. Phipps*, 00-1557, 2000 La. LEXIS 2055 (La. June 30, 2000) (discounting compelling evidence of a defendant's innocence and instead convicting him of manslaughter because of his rap lyrics and persona).

121. DENNIS & NIELSON, *supra* note 10, at 4. In 1990, thirteen-year-old McKinley Phipps released his debut album, "The Lyrical Midget," under the stage name "Lil Mac." *Id.* at 1. By 1998, Phipps had signed with Master P's legendary record label—No Limit Records—and quickly became the critically acclaimed artist known as Mac. *Id.* at 2. That same year, Phipps released his second and most successful album, "Shell Shocked," peaking at number 11 on the Billboard 200. See *id.*; Biography of Mac Phipps, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/bio/mac-hipps> [<https://perma.cc/Y4UA-PWX3>] (last visited Apr. 24, 2023).

122. See DENNIS & NIELSON, *supra* note 10, at 4.

registered firearm and ran to the back entrance to make sure his parents, who were there collecting money, were safe.<sup>123</sup> Witnesses reported Phipps wielding the firearm, and authorities subsequently identified and arrested him as the primary suspect in the shooting.<sup>124</sup>

At Phipps's trial, prosecutors repeatedly referred to Phipps by his rap moniker, "the Camouflage Assassin," presumably to take advantage of the anxiety that had spread throughout America after 9/11.<sup>125</sup> The prosecutors also quoted liberally from Phipps's 1998 rap album to sustain a conviction, invoking lyrics such as "[m]urder, murder, kill, kill, you fuck with me you get a bullet in your brain" to sustain a conviction.<sup>126</sup> However, jurors were unaware that the prosecutors "had selectively grabbed quotes from different songs, juxtaposing lyrics in a way Phipps never intended."<sup>127</sup> For example, Phipps never said, "you fuck with me you get a bullet in your brain."<sup>128</sup> The prosecutors had intentionally misquoted lyrics from Phipps's song where he rapped similar lyrics in direct reference to his Vietnam veteran father: "Big Mac, that's my daddy, rotten dirty straight up soldier . . . You fuck with me, he'll give you a bullet in your brain."<sup>129</sup> Meanwhile, prosecutors had taken the lyrics "[m]urder, murder, kill, kill" out of context from a different song altogether.<sup>130</sup> Nonetheless, the all-white jury convicted Phipps of manslaughter and sentenced him to thirty years in prison.<sup>131</sup>

The unduly prejudicial effect of Phipps's rap lyrics becomes even more apparent when considering the sheer lack of reliable evidence to connect Phipps to the shooting. At trial, several first-hand witnesses described a shooter who looked nothing like Phipps.<sup>132</sup> Additionally, Phipps's firearm had not been discharged, and investigating officers failed to recover the weapon that had been.<sup>133</sup> No other forensic evidence tied Phipps to the shooting.<sup>134</sup> *Another man even confessed to the shooting in a formal, recorded interrogation.*<sup>135</sup> However, prosecutors discounted the man's

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123. *Id.*

124. *Id.*

125. *Id.* at 5.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 6.

132. *Id.* at 4.

133. *Id.*

134. *Id.*

135. See *id.* For a recording of the confession, see David Lohr, *See for Yourself: Bodyguard Confesses to Club Shooting that Sent Rapper to Prison*, HUFFINGTON POST (Apr. 25, 2016), [https://www.huffpost.com/entry/confession-mac-hipps-murder\\_n\\_570bfae6e4b014223249b696](https://www.huffpost.com/entry/confession-mac-hipps-murder_n_570bfae6e4b014223249b696) [https://perma.cc/N29Y-JHA7].

confession by framing him as one of Phipps's "loyal worker[s]" who merely sought to take the blame for Phipps's crime.<sup>136</sup> The prosecution also produced several eyewitnesses, all of whom have since recanted their testimony completely, stating that "prosecutors threatened to put them in jail if they didn't finger Mac as the shooter."<sup>137</sup> For example, one witness who was pregnant at the time stated in a later interview that prosecutors told her she could either "identify Mac as the killer or have her baby in prison."<sup>138</sup>

Phipps could not believe what had happened: "I have lived my whole life trying to . . . stay out of jail so I can pursue my dreams . . . And here it is—my dream was being used against me in court."<sup>139</sup> Unfortunately, Phipps was neither the first nor the last rap artist to have his lyrics used against him in this manner.<sup>140</sup> But when considering rap's historical tension with commercial and legal institutions, one cannot be too surprised to find that rap on trial, at its core, is no more than a modern version of the law's prolonged attempt to control Black creative expression. Therefore, Phipps's case underscores the core dilemma presented in rap on trial cases: jurors viewing rap lyrics in criminal trials impute the stereotypical descriptors of rap music—"gangsta," "thug," and "outlaw"—onto the defendant, who is most likely a person of color,<sup>141</sup> thereby unjustly injecting into the proceeding implicit biases associated with the defendant's character and racial stereotype. The following subsection delves further into empirical data to support this contention.

### B. Rap = Black = Dangerous

The *Phipps* jury's implicit decision to criminalize rap music was not an outlier but a norm for rap on trial cases. For example, in 1992, Ronald Ray Howard made national headlines after shooting and killing a Texas

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136. Lohr, *supra* note 135. The prosecutors' references to Phipps's lyrics that glorified urban street life—even though gang affiliation was not an issue at trial or sentencing—presumably made this a convincing argument in the eyes of the jury. See Petition for Writ of Habeas Corpus at 6, *Phipps v. Wilkinson*, No. 06-0570 (E.D. La. Feb. 6, 2006).

137. DENNIS & NIELSON, *supra* note 10, at 5.

138. *Id.*

139. Sidney Madden & Rodney Carmichael, 'My Dream Was Being Used Against Me in Court', NPR (Oct. 23, 2020), <https://www.npr.org/2020/10/23/926291759/mac-no-limit-lyrics-on-trial-a-legacy-of-injustice> [https://perma.cc/V47W-U2LM]. Following Phipps's conviction, he continued to maintain innocence for the duration of his sentence. See Biography of Mac Phipps, *supra* note 121. After serving twenty-one years in Louisiana state prison, the governor granted Phipps clemency. *Id.* Phipps has since enjoyed spending time with his family, working with artists at No Limit Records, and traveling across the U.S. to tell his story. In 2022, Phipps also released a new rap album, titled "Son of the City." *Id.*

140. See, e.g., *State v. Williams*, No. 225C182273 (Fulton Cnty. Sup. Ct., May 7, 2022).

141. DENNIS & NIELSON, *supra* note 10, at 18–19 ("95% of cases").

state trooper during a routine traffic stop.<sup>142</sup> At the time of the incident, Howard, “a [nineteen]-year-old eighth-grade dropout,” was listening to Tupac’s latest album, *2Pacalypse Now*, while driving a stolen car.<sup>143</sup> At trial, Howard pled that Tupac made him pull the trigger.<sup>144</sup> While the jury did not accept this excuse as a mitigating factor, the jury did believe that Tupac’s music played some sort of mind control over Howard.<sup>145</sup> The case of Howard, coupled with other popular songs at the time, such as Ice T’s “Cop Killer,” sparked the narrative that rap required regulation because “the Constitution was not designed to allow people to call for the murder of others under the guise of entertainment.”<sup>146</sup> Conflictingly, when reporters asked Ice-T about his constitutional rights regarding an impending lawsuit from the Brotherhood of Police, he replied, “The First Amendment ain’t got shit to do with me . . . . When the First Amendment was written, I was property, [B]lack people were property. . . . The Constitution is a piece of shit.”<sup>147</sup>

Also in 1992, Professor Stuart P. Fischhoff conducted one of the first studies observing the prejudicial risks posed by rap lyrics when admitted into criminal evidence.<sup>148</sup> The trial of Offord Rollins III involved the alleged murder of Rollins’ former girlfriend.<sup>149</sup> At trial, the prosecution introduced several gangsta rap songs authored by Rollins despite Fischhoff’s expert testimony establishing “the poor as well as sullied evidentiary and psychological projective value of the rap lyrics.”<sup>150</sup> After the jury convicted Rollins, Fischhoff hypothesized that absent the negative personality traits conjured by associating Rollins’s alleged capacity for murder with his inflammatory rap lyrics, jurors could not have found him guilty beyond a reasonable doubt based on the proffered evidence.<sup>151</sup> Fischhoff later conducted a study involving 134 participants and described to them a

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142. Powell, *supra* note 10, at 487.

143. *Id.*

144. *Id.* at 488.

145. *Id.*

146. *Id.*

147. Carla Hall & Richard Harrington, *Ice-T Drops ‘Cop Killer’*, WASH. POST, July 29, 1992, at A1, <https://www.washingtonpost.com/archive/politics/1992/07/29/ice-t-drops-cop-killer/ef375f81-9f01-4324-925f-598fcf140e8a/> [<https://perma.cc/QZ54-ZNS2>]. To evade litigation, Ice-T ultimately agreed to cease distribution of “Cop Killer,” but not without making one final public comment: “I don’t understand why I’m supposed to like the police . . . . None of my leaders liked them. Martin Luther King, Malcolm X. [The police have] never been a friend of [B]lack people.” *Id.*

148. Stuart P. Fischhoff, *Gangsta Rap and a Murder in Bakersfield*, 29 J. APP. SOC. PSYCH. 795, 795 (1999).

149. *Id.* at 799 (“He is on trial accused of murdering a former girlfriend who was still in love with him, but has repeatedly declared that he is innocent of the charges.”).

150. *Id.* at 795.

151. *Id.*



hypothetical defendant with Rollins's biographical description.<sup>152</sup> Fischhoff randomly assigned one of four conditions to the participants: (1) No murder, no lyrics; (2) murder, no lyrics; (3) no murder, lyrics; and (4) murder, lyrics.<sup>153</sup> Participants then expressed their opinions about the defendant on a series of bipolar adjectives that formed an attitudinal scale (e.g., "untruthful—truthful," "capable of murder—not capable of murder," etc.).<sup>154</sup>

In sum, the results revealed that evidence of rap lyrics was at least, if not more, suggestive of a defendant's likelihood of murdering as compared to actual evidence of murder.<sup>155</sup> Not only did participants view the "no murder, lyrics" defendant more negatively than the "no murder, no lyrics" defendant, but participants also viewed the "no murder, lyrics" defendant *more negatively* than the "murder, no lyrics" defendant.<sup>156</sup> Rollins was granted a retrial on unrelated grounds, and Fischhoff's findings were introduced at the pretrial evidentiary hearing.<sup>157</sup> This resulted in the exclusion of most rap lyrics at the second trial.<sup>158</sup> The jury ultimately deadlocked, and the prosecution declined to pursue a third trial.<sup>159</sup>

In 2016, Dr. Adam Dunbar affirmed Fischhoff's findings and also conducted a separate experiment to determine whether participants would display the same negative attitudes toward rap lyrics if told instead that those lyrics were from country, punk, or heavy metal songs.<sup>160</sup> In short, Dunbar concluded that participants were more likely to view rap lyrics as "offensive," "literal," and "in need of regulation" when compared to identical lyrics framed in different genres.<sup>161</sup> In 2023, Dunbar also testified as an expert witness on behalf of Young Thug and YSL, clarifying that the

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152. *Id.* at 798–99 ("An 18-year-old African American male high-school senior resides in the Southern California region. He is a state champion in track, has a good academic record, and is planning on attending college on an athletic scholarship.").

153. *Id.* These conditions mirrored relevant details from the case, but participants were neither informed of this information's factuality nor aware of its relationship to an ongoing trial. *Id.* For example, participants in conditions 3 and 4 viewed a selected set of Rollins's authentic lyrics that the prosecution sought to introduce into evidence. *Id.* at 799.

154. *Id.* at 801.

155. *Id.* at 803. In other words, participants were more put off by the rap lyrics than by the murder charges." *Id.* at 802.

156. *See id.* at 803.

157. *Id.* at 804–05.

158. *Id.* The most inflammatory lyrics were excluded entirely. *Id.* at 805.

159. *Id.*

160. Adam Dunbar, *Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making* 50–61 (2017) (Ph.D. dissertation, University of California, Irvine), <https://escholarship.org/uc/item/2c6478vr> [<https://perma.cc/AN7S-PSKL>].

161. *Id.* at 39–44.

study participants additionally perceived rap artists as having the worst character overall and a greater predisposition for criminal propensity.<sup>162</sup>

Certainly, in the criminal trial context, evidence of a defendant's lyrics glorifying rap's negative themes can do no less than suggest to jurors that the defendant may have an inherent predisposition for danger and violence.<sup>163</sup> This notion is both intuitive and confirmed by social science research: most people presume that "nice males don't write ugly lyrics and that males who do are emphatically not nice."<sup>164</sup> Professors Laurie A. Rudman and Matthew R. Lee offer the following hypothetical scenario to illustrate the effect of this bias toward racial minorities:

Imagine a prospective employer headed for her office, stopped at a traffic light, exposed to rap music blaring from her neighbor's car radio. If she subsequently interviews a Black male applicant, her assessment of him may be skewed by this recent experience, despite her intention to make race-neutral decisions. This may be particularly true if the song portrays African Americans as violent or misogynistic, and if the applicant's behaviors are open to interpretation. . . . [T]he employer may reject the applicant due to a perceived fit between his personal characteristics and a negative group stereotype. If so, the employer will have fallen prey to a priming effect—the tendency to apply recently activated constructs to on-line judgments and decisions.<sup>165</sup>

Professors Rudman and Lee sought to test their hypothetical scenario by conducting two experiments that involved both primed subjects exposed to violent and misogynistic rap music and control subjects exposed to pop music.<sup>166</sup> The first experiment revealed that "violent and misogynistic rap music increased the automatic associations underlying evaluative racial stereotypes in high and low [primed] subjects alike."<sup>167</sup> The second experiment involved a priming manipulation followed by a "seemingly unrelated person perception task in which subjects rated Black or [w]hite targets described as behaving ambiguously."<sup>168</sup> The second experiment revealed that primed subjects judged the Black target less favorably than the

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162. Fox 5 Atlanta, *YSL Trial: Experts Discuss Rap Lyrics and Racial Bias*, YOUTUBE (Apr. 24, 2023), <https://www.youtube.com/watch?app=desktop&v=IUWDtsOeZUM> [<https://perma.cc/ZE8D-36PK>].

163. See Fischhoff, *supra* note 148, at 803; Dunbar, *supra* note 160, at 38–44.

164. See Fischhoff, *supra* note 148, at 803. See also Dunbar, *supra* note 160, at 38–44.

165. Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GRP. PROCESSES & INTERGRP. REL. 133, 133 (2002).

166. *Id.* at 135–39.

167. *Id.* at 133.

168. *Id.*

white target.<sup>169</sup> In contrast, control subjects rated Black and white targets similarly.<sup>170</sup>

In 2021, researchers conducted a similar study but from the lens of “stereotype threat theory,” which argues that reminders of negative stereotypes about one’s own stigmatized identity can undermine performance.<sup>171</sup> This study revealed that incidental exposure to violent and misogynistic rap lyrics impaired Black men’s, but not white men’s, cognitive performance, but only when the artist was “ostensibly Black.”<sup>172</sup> Furthermore, “listening to a Black (but not [w]hite) rapper activated negative stereotypes about Black people for both Black and [w]hite participants but only impaired performance among Black participants.”<sup>173</sup> These effects, referred to as “stereotype activation,” indicate that “some forms of artistic expression may activate culturally shared stereotypes and obstruct academic success among stigmatized groups.”<sup>174</sup>

When considering both studies together, they suggest that in the rap on trial context, jurors will perceive rap music differently, albeit still negatively, depending on the races and ethnicities of both the jurors and the defendants.<sup>175</sup> However, notwithstanding jurors’ races and ethnicities, their negative perceptions toward rap music are substantially bolstered when the defendant is Black.<sup>176</sup> This kind of implicit racial bias that unjustly influences jurors’ decision-making processes in criminal trials should have no place in our modern criminal justice system.

### III. BLAME THE BAR: THE STRUCTURAL FLAWS OF THE RULES OF EVIDENCE

Past works have acknowledged the difficulty of examining how individual state courts assess prosecution proffers of rap lyrics because most

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169. *See id.* at 141–42.

170. *Id.*

171. Simon Howard, Erin P. Hennes & Samuel R. Sommers, *Stereotype Threat Among Black Men Following Exposure to Rap Music*, 12 SOC. PSYCH. & PERSONALITY SCI. 719, 719 (2021).

172. *Id.*

173. *Id.*

174. *Id.*

175. *See Rudman & Lee, supra* note 165, at 141–42 (examining the correlation between rap’s negative stereotypes and the race of the subject being judged); Howard, Hennes & Sommers, *supra* note 171, at 719 (examining the correlation between rap’s negative stereotypes and the race of the person who is judging the subject).

176. *See Rudman & Lee, supra* note 165, at 141–42 (suggesting that Black subjects associated with rap music are perceived more negatively than white subjects associated with rap music); Howard, Hennes & Sommers, *supra* note 171, at 719 (suggesting that exposure to rap music impairs the judgment of Black individuals but not white individuals).

cases result in plea bargains, and thus, no online records likely exist.<sup>177</sup> Furthermore, in the few cases that do go to trial, only a handful of courts meaningfully evaluate the probative value of rap music against its prejudicial effect.<sup>178</sup> In contrast, the overwhelming majority of courts are largely dismissive of challenges against the admissibility of rap lyrics and instead allow their admission under Federal Rule of Evidence (FRE) 404(b) and state counterparts.<sup>179</sup> FRE 404(b)(2) allows the admission of otherwise impermissible evidence regarding a defendant's past crimes, wrongs, or other acts if offered for reasons other than to prove the defendant acted by that prior wrong or act.<sup>180</sup> Thus, rap lyrics are primarily introduced under the guise of establishing a defendant's motive, knowledge, intent, or identity.<sup>181</sup>

Rap music is also used in several other ways, and these scenarios are categorized in descending order of frequency as follows: as circumstantial evidence of the commission of *actus reus*; as proof of gang affiliation for sentencing enhancement purposes; as direct proof of a criminal threat; and as the incident that incited a crime.<sup>182</sup> Challenges to admissibility often fail because FRE 403 allows trial judges to exercise broad discretion in deciding whether to admit such evidence under FRE 404(b).<sup>183</sup> FRE 403 provides that trial judges *may* exclude the evidence if its probative value is *substantially* outweighed by its prejudicial effect.<sup>184</sup> While some appellate courts have expressed concerns over the heightened prejudicial risks posed by rap lyrics, these courts generally defer to trial courts' discretion on evidentiary rulings or otherwise find harmless error in light of other evidence.<sup>185</sup>

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177. See DENNIS & NIELSON, *supra* note 10, at 13. In the 2019 high-profile case of Daniel Hernandez (p/k/a Tekashi69 or 6ix9ine), prosecutors threatened to introduce Hernandez's rap songs into evidence to coerce him into a plea deal upon the condition that he be a government witness against New York City gang members. See Briana Younger, *The Controversial Use of Rap Lyrics as Evidence*, NEW YORKER (Sept. 20, 2019), <https://www.newyorker.com/culture/culture-desk/the-controversial-use-of-rap-lyrics-as-evidence> [https://perma.cc/ED8R-NCBZ]. Hernandez, who is known for his outlandish lyrics that most rap fans consider to be publicity stunts, maintained that even though his lyrics referenced gang activity, he had never been initiated into a gang. *Id.* Rather, Hernandez claimed that he merely had an arrangement with a particular gang "to keep making hits and giving financial support," and in return, he got his "career, credibility, protection, all the above." *Id.*

178. Lutes, James & Fradella, *supra* note 19, at 97.

179. *Id.* at 94–112.

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

181. Lutes, James & Fradella, *supra* note 19, at 112.

182. *Id.* at 91.

183. *Id.* at 97.

184. FED. R. EVID. 403.

185. See, e.g., *United States v. Foster*, 939 F.2d 445, 456–57 (7th Cir. 1991). Regarding the lyrics "Key for key, Pound for pound I'm the biggest dope deal dealer and I serve all over town," the appellate court stated it will not hesitate to uphold the district court's decision to admit the lyrics under

In cases where rap lyrics have taken the stand at trial, prosecutors are aware of the implicit racial bias associated with rap music and are ready to exploit jurors' perceptions of defendants who author rap lyrics.<sup>186</sup> Consider the following prosecution training manual from the United States Department of Justice.<sup>187</sup> Under a heading titled "Will the Real Defendant Please Stand Up?," the manual describes the generic defendant on his first day of trial: "his hair has grown out to a normal length, his clothes are nicely tailored, and he will have taken on the aura of an altar boy. But the *real* defendant is a criminal wearing a do-rag and throwing a gang sing."<sup>188</sup> Notice how the use of "*real* defendant" denies the defendant his presumption of innocence and the use of "do-rag" implies the defendant is Black.<sup>189</sup> The manual then states that through "music lyrics, prosecutors can invade and exploit the defendant's true personality. Gang investigators should focus on these items of evidence during search warrants and arrests."<sup>190</sup>

#### *A. The Dominant Approach: You Do the Rhyme, You Do the Time*

Given rap's inextricable connection to Black culture, coupled with the music industry's exploitation of racial narratives regarding urban street violence, prosecutors that frame rap lyrics as truthful admissions of criminal activity under FRE 404(b) may lead jurors to engage in unacceptable propensity-to-commit inferences based on pre-existing racial stereotypes. Unfortunately, the rules of evidence do not provide a means for filtering out the implicit stereotypes associated with rap music.

Consider the 2020 case of *Montague v. State*, where prosecutors successfully framed a defendant's rap lyrics as a direct admission of guilt for murder.<sup>191</sup> Three weeks before Montague's trial, he made a call on a recorded jail line to an unidentified recipient "and made several statements in the form of an amateur rap."<sup>192</sup> The relevant lyrics read as follows: "You know he's dead today / I'm on his ass like a Navy Seal / Man, my n——s

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FRE 404(b) because "there is always a possibility of unfair prejudice, i.e., that a jury could use the verse to draw forbidden inferences." *Id.* at 449, 457.

186. *See, e.g.*, *State v. Rucker*, No. M2014-00742-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 554, at \*18 (Tenn. Crim. App. July 9, 2015) (finding prosecutorial misconduct when the State recited the defendant's rap lyrics containing racial epithets that "had no purpose other than to place the defendant in a bad light [and] appeal to racial prejudice").

187. Alan Jackson, *Prosecuting Gang Cases: What Prosecutors Need to Know*, 2004 AM. PROSECUTORS RSCH. INST. (U.S. DEP'T OF JUST.) (SPECIAL TOPICS SERIES) 15–16, [https://ndaa.org/wp-content/uploads/gang\\_cases1.pdf](https://ndaa.org/wp-content/uploads/gang_cases1.pdf) [https://perma.cc/3TW9-L8YD].

188. *Id.* (emphasis added).

189. *See id.* (emphasis added).

190. *Id.*

191. *See Montague v. State*, 243 A.3d 546, 570 (2020) ("Mr. Montague's rap lyrics have heightened probative value as 'direct proof' of his involvement in Mr. Forrester's murder and are therefore admissible under [state counterpart to FRE 403].").

192. *Id.* at 553–54.

we ain't never squeal / . . . I'll give you a dream, a couple shots snitch / It's like hockey pucks the way I dish out this / It's a .40 when that bitch goin' hit up shit.”<sup>193</sup> Montague then asked the recipient to post the verse on Instagram.<sup>194</sup> When the recipient expressed concern over posting the lyrics, Montague replied, “I’m gucci. It’s a rap. [Fuck] they can do for [] about a rap?”<sup>195</sup>

At trial, the prosecution presented expert testimony establishing that the victim was shot by a .40-caliber handgun—the same kind of gun referenced in Montague’s verse.<sup>196</sup> Montague was consequently sentenced to thirty years in prison for second-degree murder.<sup>197</sup> On appeal, Montague’s main contention was that the lyrics were irrelevant.<sup>198</sup> As an alternative argument, Montague argued that even if the lyrics had some relevance, the trial court abused its discretion by failing to exclude evidence where the probative value was substantially outweighed by the danger of unfair prejudice.<sup>199</sup> The appellate court disagreed.<sup>200</sup>

In affirming the appellate court’s ruling, the state’s highest court harped on rap music’s reinforcement of a street code and its use of violence for “retaining respect and enforcing social norms.”<sup>201</sup> The court stated that Montague made the “stop snitching” references on social media to “potentially intimidate witnesses,” thus making the lyrics neither generic nor vague.<sup>202</sup> This made the defendant’s lyrics “increasingly probative of [his] guilt because the threats recited in the lyrics [made] it more probable that the defendant committed the crime.”<sup>203</sup>

The case of *Montague* highlights the erroneous assumption that rap lyrics carry probative value as they are “truthful and autobiographical” reflections of a defendant’s character.<sup>204</sup> This, in effect, disassociates rap from its creative context—but not its cultural context—and unjustly encourages jurors to latch rap’s negative themes onto the defendants who author them. But when courts display such a Van Gogh’s ear to rap music, they also fail to recognize rap’s artistic and commercial qualities as influential of its lyrical content.

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193. *Id.* at 554.

194. *Id.*

195. *Id.*

196. *Id.* at 567.

197. *Id.* at 555.

198. *Id.* at 556–57.

199. *Id.*

200. *Id.*

201. *Id.* at 551.

202. *Id.* at 552.

203. *Id.* at 565.

204. See Stoia, Adams & Drakulich, *supra* note 11, at 355.

*B. The Minority Approach: Bob Marley Didn't Shoot the Sherriff*

In contrast to *Montague* and the majority of rap on trial cases, only a handful of courts meaningfully consider the heightened risk of prejudice against criminal defendants when their rap lyrics are introduced into evidence.<sup>205</sup> The court in *State v. Skinner* vocalized the prejudicial concerns associated with rap on trial, establishing the leading precedent for limiting the admission of rap lyrics into criminal evidence.<sup>206</sup>

In connection with a 2005 shooting, prosecutors tried Vonte Skinner twice for attempted murder and related charges.<sup>207</sup> At the first trial, prosecutors introduced a redacted version of Skinner's lyrics authored before the alleged crime, but the jury ultimately deadlocked.<sup>208</sup> At the second trial, the prosecution called a law enforcement officer to "read to the jury, at great length, violent and profane rap lyrics" authored by the defendant.<sup>209</sup> The officer's testimony stretched uninterrupted across thirteen pages of the trial transcript, was replete with explicit language, contained graphic depictions of bloodshed and dismemberment, and, most notably, was unconnected to any of the specific facts of the defendant's case.<sup>210</sup> The prosecution maintained that these lyrics established the defendant's life in a "street culture of violence and retribution" and were, therefore, circumstantial evidence of his motive and intent for attempted murder.<sup>211</sup> The jury agreed and convicted Skinner.<sup>212</sup> However, the appellate court reversed his conviction because the prejudicial effect of the lyrics far outweighed their probative value.<sup>213</sup>

In affirming the appellate court's decision, the state's highest court relied on an amicus brief submitted by the ACLU that explained rap's roots in Black cultural tradition, as well as its common tropes depicting fictional urban street violence.<sup>214</sup> In framing rap as a vehicle for political and social commentary, the brief explained that "[f]rom the outset, rap

205. See Lutes, James & Fradella, *supra* note 19, at 97.

206. See *State v. Skinner*, 95 A.3d 236, 253 (N.J. 2014).

207. *Id.* at 238.

208. *Id.* at 240–41.

209. *Id.* at 238.

210. The relevant lyrics are too long to reproduce here but may be found in the court's opinion. *Id.* at 241–42.

211. Compare *id.* at 238, with *Montague v. State*, 243 A.3d 546, 553–54 (2020). In contrast to the defendant in *Montague*, the defendant in *Skinner* authored his lyrics prior to his arrest. Therefore, unlike the prosecutors in *Montague* who framed the defendant's lyrics as direct admissions of guilt, the prosecutors in *Skinner* framed the defendant's lyrics as evidence of his motive and intent, as permitted under the state's counterpart rule to FRE 404(b).

212. *Skinner*, 95 A.3d at 238–39.

213. *Id.* (referencing the state counterpart rule to FRE 403).

214. *Id.* at 245; see also Brief for ACLU of New Jersey as Amicus Curiae Supporting Defendant at 2–4, *State v. Skinner*, 95 A.3d 236 (N.J. 2014) (No. A-57/58-2 (071764)) [hereinafter ACLU Skinner Brief].

music has articulated the pleasures and problems of Black urban life in contemporary America.”<sup>215</sup> Thus, “it seems a cruelly ironic contribution to the vicious cycle of mass incarceration for rap music to be singled out as a medium of artistic expression capable of supporting convictions.”<sup>216</sup> Furthermore, “it would be a cruel irony, indeed, were the very type of social and political expression that may have been spawned by a deplorable assault on one group of people used to further the vicious circle of conviction, despair, conviction.”<sup>217</sup>

In ultimately finding Skinner’s lyrics inadmissible under state counterparts to FRE 404(b) and 403, the court held as follows:

In this case, defendant’s graphically violent rap lyrics could be fairly viewed as demonstrative of a propensity toward committing, or at the very least glorifying, violence and death. That prejudicial effect overwhelms any probative value that these lyrics may have. In fact, we detect little to no probative value to the lyrics whatsoever. The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song “I Shot the Sheriff,” actually shot a sheriff. . . . Defendant’s lyrics should receive no different treatment. In sum, we reject the proposition that probative evidence about a charged offense can be found in an individual’s artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced.<sup>218</sup>

Admittedly, no existing evidentiary avenue can provide a satisfactory bright-line rule for examining the probative value of rap lyrics because rap, like all other forms of creative expression, involves a great deal of creative license and artistic hyperbole.<sup>219</sup> Moreover, when considering the polar outcomes in *Montague* and *Skinner*, one thing is clear: “if the social and political history of rap music teaches anything, it is that rap is inescapably viewed through a racially biased lens. This understanding should fundamentally shift the court’s inquiry when it decides whether to admit

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215. ACLU Skinner Brief, *supra* note 214, at 2 (quoting TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 2 (1994)).

216. *Id.* at 4 (drawing support from MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 171–75 (2012)).

217. *Id.* at 15.

218. *Skinner*, 95 A.3d at 251–52.

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



rap lyrics as evidence.”<sup>220</sup> From this angle, some states have sought legislative solutions to limit trial court discretion in admitting creative expressions under state counterparts to FRE 403.<sup>221</sup>

#### IV. CALIFORNIA’S STATUTE AS THE FAVORED APPROACH

On August 22, 2022, the California legislature unanimously passed the Decriminalizing Artistic Expression Act to restrict the admissibility of criminal defendants’ creative expressions.<sup>222</sup> Signed into law on September 30, 2022, this “modest, common-sense act” sets an example for other states and mirrors federal efforts currently underway, such as the Restoring Artistic Protection (RAP) Act of 2022.<sup>223</sup> New York Senator Jamaal Bailey, a proponent of a similar bill in New York, summarizes the underlying purposes of these legislative efforts:

The admission of art as criminal evidence only serves to erode [the right to free speech], and the use of rap and hip-hop lyrics in particular is emblematic of the systemic racism that permeates our criminal justice system. In many cases, even the mere association with certain genres, like hip-hop and rap, leads to heightened scrutiny in the courtroom and is used to presume guilt, immorality, and propensity for criminal activity. This bill will finally put an end to this grossly discriminatory practice by ensuring that there is a valid nexus between the speech sought to be admitted into evidence and the crime alleged.<sup>224</sup>

This Note argues that California’s Decriminalizing Artistic Expression Act, with proposed revisions, should serve as the dominant approach to determining the admissibility of rap lyrics in criminal proceedings. This Act strikes a thoughtful balance between recognizing that rap music deserves heightened protection, both for its racial implications and its artistic

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220. *Id.* at 832–33.

221. *See, e.g.*, H.B. 3420, 103rd Gen. Assemb. (Ill. 2023–24) (amending Illinois’s Code of Criminal Procedure so that “evidence of a defendant’s creative or artistic expression, whether original or derivative, may not be received into evidence against the defendant in a criminal proceeding unless the evidence is determined by the court to be relevant and admissible.”).

222. A.B. 2799, 2022 Leg. Sess. (Ca. 2022), codified at CAL. EVID. CODE § 352.2.

223. Morgan Enos, *California Passes the Decriminalizing Artistic Expression Act: Why It’s a Win for the First Amendment & Creative Expression*, RECORDING ACAD. (Aug. 26, 2022), <https://www.recordingacademy.com/advocacy/news/california-passes-decriminalizing-artistic-expression-act-rap-what-to-know> [<https://perma.cc/XB7K-MKZ7>]. At the time of writing, the RAP Act has been introduced to the House of Representatives and has since been referred to a subcommittee for revision. Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

224. Press Release, Sen. Jamaal Bailey, N.Y. State Senate (Nov. 17, 2021), <https://www.nysenate.gov/newsroom/press-releases/2021/brad-hoylman-signal/senators-brad-hoylman-jamaal-bailey-introduce-rap> [<https://perma.cc/8VNF-D3NA>]; *see* S.B. 7527, 2021 Leg. Sess. (N.Y. 2021).

merits, while also allowing the judicial system to obtain the probative evidence necessary for administering a full and fair trial. Moreover, to put an end to the cyclic pseudo-censorship of Black music that has persisted in varied garments throughout history, this Note proposes an addition to the statute that would further its purpose of protecting Black music from future hyper-regulation.

### *A. Why the Statute Works*

Even when evidence is relevant, existing evidentiary standards allow courts to exclude evidence if its probative value is substantially outweighed by a danger of unfair prejudice.<sup>225</sup> However, courts in criminal cases commonly find heightened probative value in rap lyrics because they are laden with general themes of drugs, violence, and gang activity.<sup>226</sup> While some rappers now place disclaimers on their works, juries and judges with preconceived beliefs about rap music would likely give little weight to such assertions when considering the probative value of rap lyrics in the criminal context.<sup>227</sup> Therefore, the Decriminalizing Artistic Expression Act presumes that creative expressions carry minimal probative value when proffered for their literal truth or as truthful narratives.<sup>228</sup>

While the Act is facially neutral, this presumption displays an informed understanding of rap on trial with respect to two key aspects of rap music. First, it acknowledges that rap music is foundationally a form of artistic expression, with lyrics most naturally understood as hyperbole or fiction.<sup>229</sup> Second, it recognizes that the music industry has exploited rap's narratives of urban violence as a marketing scheme to attract suburban listeners, thus further diminishing the probative value of generic rap lyrics.<sup>230</sup>

To overcome this presumption, the proffering party must show that the expression is created near in time to the charged crime, bears a sufficient level of similarity to the charged crime, or includes factual details

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225. FED. R. EVID. 403.

226. See Stoia, Adams & Drakulich, *supra* note 11, at 332–34; see also, e.g., United States v. Moore, No. 4:09CR3092, 2012 U.S. Dist. LEXIS 103297, at \*9 (D. Neb. July 25, 2012) (finding that the defendant's rap lyrics "constituted evidence of participation in the drug-distribution conspiracy" because they "demonstrated knowledge of cocaine prices, used drug code-words, and even admitted possessing narcotics").

227. See, e.g., LIL DURK, *So What, on 7220* (DELUXE) (Alamo Records & Sony Music Ent. 2022) ("This deluxe is all cap, this shit is not real.").

228. See CAL. EVID. CODE § 352.2(a)(1). The statute defines "creative expression" as "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects in media." *Id.* § 352.2(c).

229. See Stoia, Adams & Drakulich, *supra* note 11, at 332–34.

230. *Id.* at 331–32.

not otherwise publicly available.<sup>231</sup> These conditions are analogous to *State v. Skinner*'s conditions for admissibility, which similarly require a proffering party to demonstrate a close temporal or factual nexus between the lyrics and the alleged crimes.<sup>232</sup> Whatever the language used, these conditions serve to balance the competing interests of the courts' need for reliable evidence and the defendants' fundamental right to pursue artistic endeavors.<sup>233</sup>

Moreover, in instructing courts to balance the probative value of creative expressions against their prejudicial effect, the Act places a special focus on the biases associated with rap music:

Undue prejudice includes, but is not limited to, the possibility that the trier of fact will . . . treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.<sup>234</sup>

In citing the research conducted by Professor Stuart P. Fischhoff in 1999, later affirmed by Dr. Adam Dunbar in 2016, the Act's legislative history reveals "a substantial body of research [showing] a significant risk of unfair prejudice when rap lyrics are introduced into evidence."<sup>235</sup> Accordingly, the legislature's primary purpose in enacting this statute was to "recognize that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice."<sup>236</sup>

Next, if the proffering party satisfies its burden, courts must weigh three more considerations, if raised by either party, before allowing a creative expression into evidence: (1) credible testimony regarding the social or cultural context, rules, conventions, and artistic techniques of the expression; (2) experimental or social science research demonstrating that a particular type of expression could explicitly or implicitly inject racial bias into the proceedings; and (3) evidence to rebut such research or testimony.<sup>237</sup> Collectively, these considerations would allow witness testimony explaining law enforcement's prolonged history of hyper-policing of

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231. See CAL. EVID. CODE § 352.2(a)(1).

232. See *Skinner*, 95 A.3d at 251–52; see also A.B. 2799, 2022 Leg., Third Reading 1, 4–5 (Cal. 2022) (endorsing New York Senator Jamaal Bailey's push to bar the admission of rap lyrics without "clear and convincing proof that there is a literal, factual nexus" to the case).

233. See *Skinner*, 95 A.3d at 251–52; CAL. EVID. CODE § 352.2(a)(1).

234. CAL. EVID. CODE § 352.2(a).

235. A.B. 2799, 2022 Leg., Reg. Sess. § 1(a) (Cal. 2022).

236. *Id.* § 1(b).

237. CAL. EVID. CODE § 352.2(b)(1)–(3).

Black music, to which rap music is certainly no outlier.<sup>238</sup> Moreover, these considerations would allow witnesses to testify about the outlandish metaphors inherent in rap's lyrical techniques, thereby reducing the likelihood that certain lyrics, such as Jeffrey Williams's "ready for war like I'm Russia," are taken to literally mean that Williams boasts the status of a Russian military general.<sup>239</sup>

Overall, the Decriminalizing Artistic Expression Act provides a sound framework to prevent jurors from engaging in unacceptable propensity-to-commit inferences based on deep-seated racial stereotypes, negative attitudes toward rap music, or a combination of both. However, savvy prosecutors will not easily surrender the chance to have jurors learn about a defendant's rap persona.<sup>240</sup> In such situations, this Note proposes one more constraint on proffered rap lyrics to ensure that defendants are not unduly prejudiced by genuine works of creative expression.

### *B. Where the Statute Could Improve*

California's Decriminalizing Artistic Expression Act allows courts to properly frame rap music in both its historical and commercial contexts, both of which are essential for counterbalancing the racial bias conjured by the negative stereotypes associated with rap music.<sup>241</sup> Furthermore, the statute encourages using expert testimony to assist triers of fact, who may be unfamiliar with the genre, in separating the actual defendant from the alter ego projected through the defendant's rap lyrics.<sup>242</sup> In practice, however, prosecutors often leverage expert testimony to "exploit this lack of familiarity [and] manipulate judges and juries into believing that lyrics . . . are windows into the 'true personality' of the defendant."<sup>243</sup>

Under FRE 702, a witness may generally qualify as an expert by "knowledge, skill, experience, training, or education," so long as their specialized knowledge is deemed helpful and reliable to the issues at hand.<sup>244</sup> Trial judges are responsible for excluding unreliable expert testimony if

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238. See, e.g., Tibbs & Chauncey, *supra* note 12, at 37–41 (discussing the history of Black musical censorship).

239. See Indictment at 33, *State v. Williams*, No. 225C182273 (Fulton Cnty. Super. Ct., May 7, 2022); cf. Stoia, Adams & Drakulich, *supra* note 11, at 331–32 (arguing that rap lyrics should not be understood literally).

240. See, e.g., *State v. Pope*, No. 74408-8-I, 2018 Wash. App. LEXIS 683, at \*14–19 (Ct. App. Mar. 26, 2018) (failing to exclude from evidence the prosecution's three references to the defendant's rap career, even though the trial court had explicitly asked the prosecution to limit such references).

241. See *supra* Section IV.A.

242. See CAL. EVID. CODE § 352.2(b)(1).

243. JACK LERNER & CHARIS KUBRIN, RAP ON TRIAL LEGAL GUIDE 3, 112 (2d ed. 2024).

244. See FED. R. EVID. 702; see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (articulating factors for courts to consider when approving the appointment of expert witnesses).

the proffering party fails to demonstrate that a witness is more likely than not to have a sufficient basis for that testimony.<sup>245</sup> Due to this flexible standard, prosecutors frequently rely on police officers—the common rapper’s worst enemy—to serve as expert witnesses for discussions related to discerning the evidentiary value of rap lyrics.<sup>246</sup> However, testifying officers “almost never have specialized knowledge about rap lyrics, are likely only qualified to be gang experts, and can misinterpret or misconstrue the meaning of the lyrics in question.”<sup>247</sup> And given that rap is a genre well known for vocalizing its unfiltered distaste toward law enforcement, testifying officers inherently have the incentive to interpret rap lyrics as literal confessions of predispositions to violence.<sup>248</sup>

Therefore, under FRE 702, an “officer who has been qualified as a ‘gang expert’ cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics.”<sup>249</sup> Testifying officers rely on the connection between rap artists and gang members to establish a basis for expert testimony, but that connection is necessarily contingent on racial stereotypes and animus against Black urban communities.<sup>250</sup> No legal or ethical basis exists that justifies such an assumption, and courts should not be persuaded to admit rap lyrics into evidence by way of testimony that relies on generalized preconceptions about Black people.

Nevertheless, most jurisdictions routinely allow gang experts to testify as rap experts and interpret lyrics with no qualifications beyond a career devoted to policing predominantly Black communities.<sup>251</sup> *People v. Bryant* demonstrates the severe consequences that can arise when courts unwittingly conflate gang expertise with rap expertise.<sup>252</sup> There, the court allowed a self-proclaimed “[B]lack gangs” expert with no knowledge of rap music to interpret rap lyrics based solely on his experiences of

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245. See *Daubert*, 509 U.S. at 579; FED. R. EVID. 104(a), 702. Under FRE 104(a), most preliminary questions concerning the admissibility of evidence, including expert testimony under FRE 702, must be proven by preponderance of the evidence. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (establishing the preponderance standard).

246. LERNER & KUBRIN, *supra* note 243, at 34, 112.

247. *Id.*; see, e.g., Chessie Thacher, *Prosecutors Used Rap Lyrics as Evidence in a Murder Trial; That’s Racial Bias*, ACLU N. CAL. (Sept. 28, 2021), <https://www.aclunc.org/blog/prosecutors-used-rap-lyrics-evidence-murder-trial-s-racial-bias> [<https://perma.cc/5E7W-TQH5>] (describing a gang expert’s highly controversial interpretation of generic rap lyrics).

248. *United States v. Williams*, 663 F. Supp. 3d 1085, 1142 (D. Ariz. 2022) (citing expert testimony by *Rap on Trial* Author Erik Nielson).

249. See *Commonwealth v. Gray*, 978 N.E.2d 543, 561 (Mass. 2012).

250. See Nazgol Ghandnoosh, *One in Five: Ending Racial Inequity in Incarceration*, SENTENCING PROJECT (Oct. 11, 2023), <https://www.sentencingproject.org/reports/one-in-five-ending-racial-inequity-in-incarceration/> [<https://perma.cc/AZ8R-BQC3>]; Lutes, Purdon & Fradella, *supra* note 19, at 87.

251. LERNER & KUBRIN, *supra* note 243, at 112–16.

252. See Thacher, *supra* note 247 (summarizing the relevant facts of *People v. Bryant*).

surveilling conversations of gang members in other investigations.<sup>253</sup> In reciting the defendant's lyrics to a non-Black jury, the officer repeated racial epithets (i.e., the n-word) and other racially coded language (e.g., "welfare queen," "super-predator") to trigger implicit biases in jurors of Black men as having a propensity for deviant behavior.<sup>254</sup>

After priming the jury's subconscious with racialized language, the officer erroneously interpreted the defendant's generic lyrics as direct evidence of gang activity.<sup>255</sup> For example, the officer testified that the phrase "to lay a demo," which is slang for recording a demonstration of one's own music, meant "shooting somebody."<sup>256</sup> He also testified that the phrase "geeked up," which is slang for being excited or intoxicated, meant "being armed with firearms."<sup>257</sup> Although both of these translations were in fact false, the court found that the officer "was well within his realm of expertise" and that these lyrics were relevant to proving gang affiliation.<sup>258</sup>

The jury sentenced the defendant to fifty-three-years-to-life in prison.<sup>259</sup> In 2020, California passed the Racial Justice Act, which retroactively applied to *People v. Bryant* and significantly lowered the standard of proving the existence of racial animus.<sup>260</sup> Under the new law, the judge dismissed all gang enhancements, vacated the guilty verdict, and granted a new trial free of bias.<sup>261</sup> Notably, after hearing expert testimony from actual rap on trial experts, the judge concluded that "the use of rap lyrics as criminal evidence evoked widely held implicit biases regarding African American men and was highly prejudicial, and the use of racially coded slang by the prosecutors primed the jury for outgroup implicit bias."<sup>262</sup>

As illustrated in *Bryant*, access to proper expert testimony when discerning the probative value of rap lyrics drastically shifts the case's outcome in favor of the defendant.<sup>263</sup> Moreover, law enforcement officers

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253. *People v. Bryant*, No. 05-152003-0, at \*9, \*50 (Cal. Super. Ct. Oct. 3, 2022).

254. *Id.* at \*5, \*16, \*19, \*49.

255. *Id.* at \*40–45.

256. *Id.* at \*58–59.

257. *Id.* at \*31, \*62.

258. *Id.* at \*40, \*62.

259. *Id.* at \*2. The codefendant, whose lyrics are not reproduced above, received fifty-years-to-life. *Id.*

260. *See id.* at \*2, \*65; CAL. PENAL CODE § 745. This Act is similar to Washington's GR 37 in that it allows courts to acknowledge implicit racial bias from the perspective of an "objective observer" in limited contexts, as opposed to requiring the usual showing of "purposeful discrimination." CAL. PENAL CODE § 745(h)(4); Wash. GR 37(e).

261. *Bryant*, No. 05-152003-0, at \*34.

262. *Id.*; *see also* Michael Levenson, *Judge Overturns Murder Convictions, Citing Use of Rap Lyrics at Trial*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/us/california-racial-bias-gary-bryant-diallo-jackson.html> [<https://perma.cc/BQ89-C497>] (discussing the judge's reliance on the newly introduced testimony).

263. *See Bryant*, No. 05-152003-0, at \*34.

should be deemed presumptively unfit to opine as expert witnesses on issues concerning the interpretation of rap lyrics because their biased and uninformed interpretations impair the integrity of the criminal justice system. Indeed, investigators and prosecutors are explicitly trained to divorce rap lyrics from their creative contexts and instead interpret them as truthful proclamations of criminal activity.<sup>264</sup> And when the specific facts of a case do not allow rap lyrics to be framed as literal confessions, these purported experts are further instructed to insinuate that a defendant's rap lyrics demonstrate a general disposition to disobey the law and engage in criminal activity.<sup>265</sup> Though barely managing to circumvent FRE 404's blanket prohibition against character and propensity evidence, this practice, in effect, injects racial stereotypes and divisive tropes into proceedings for the sole purpose of negatively distorting a defendant's character through mere association with the rap genre. Therefore, gang experts who inherently filter rap lyrics through the lens of criminality should be disqualified from testifying about rap lyrics because an informed selection of expert witnesses is necessary for reversing the chilling effects on Black creative expression.<sup>266</sup>

#### CONCLUSION

As the YSL trial unfolds, court records and rap records continue playing familiarly disharmonious tunes. Following a series of plea deals, only six of the twenty-eight defendants originally charged in the YSL indictment must defend themselves and their rap lyrics in front of jurors who are likely "unfamiliar with the larger context in which these raps were produced."<sup>267</sup> As warned by scholars and defense attorneys alike, "a jury that hears only these raps, without sufficient exposure to the musical genre as a whole or the cultural milieu that spawned the genre[,] may draw inaccurate, unwarranted, and highly prejudicial conclusions on the basis of what they hear or see."<sup>268</sup> Thus, by using lyrics such as "this that Mob life" or "I'm a boss, I call the shots" to tie YSL members to lawless behavior and gang affiliation, investigators and prosecutors have unwittingly stepped

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264. See, e.g., Jackson, *supra* note 187, at 16 (instructing investigators and prosecutors to use lyrics as literal gang evidence); Lyddane, *supra* note 109, at 6 (encouraging investigators and prosecutors to take advantage of "true life proclamations in the form of hip-hop lyrics").

265. See, e.g., Lorne Manly, *Rap Lyrics Can Be Used As 'Smoking Gun' in Criminal Cases*, SEATTLE TIMES (Mar. 27, 2014), <https://www.seattletimes.com/nation-world/rap-lyrics-can-be-used-as-smoking-gun-in-criminal-cases/> [<https://perma.cc/2VK5-68LH>] (discussing the misuse of rap lyrics during criminal prosecutions).

266. See *United States v. Williams*, 663 F. Supp. 3d 1085, 1110 (D. Ariz. 2022).

267. See LERNER & KUBRIN, *supra* note 243, at 70; Darnell & Argon, *supra* note 7.

268. LERNER & KUBRIN, *supra* note 243, at 70.

into a probative paradox.<sup>269</sup> While the prosecution hopes to accentuate to the jury the nihilistic aspects of these lyrics, those very aspects ironically bolster their fictitious nature and warrant a bright line to be drawn between mere creative expressions and probative evidence of criminal activity.

To preserve the integrity of the criminal justice system, courts and legislatures must acknowledge the fundamental characteristics of rap music that make it uniquely susceptible to racial stereotyping and erroneous assumptions regarding its sincerity.<sup>270</sup> Adopting procedural standards such as those outlined in California's Decriminalizing Artistic Expression Act would ensure that jurors evaluate criminal defendants based on their alleged criminal acts and intentions—not their race or character.<sup>271</sup> As an additional safeguard, reliable rap experts—not gang experts who interpret rap lyrics based on their general experiences of hyper-policing of predominantly Black communities<sup>272</sup>—should assist triers of fact in determining whether rap lyrics are relevant, hold probative value, or risk undue prejudice.<sup>273</sup> Ultimately, these precautions would both obstruct the injustices engendered by rap on trial and frustrate the cyclical, institutional pseudo-censorships efforts against Black creative expressions that have persisted throughout history.

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269. See Coscarelli, *supra* note 5 (discussing the specific lyrics admitted into the YSL trial).

270. See *supra* Section II.B.

271. See *supra* Section IV.A.

272. See *supra* Section IV.B.