

R.A.P.: RULE AGAINST PERPS (WHO WRITE RHYMES)

*Jason E. Powell**

(A group of young adults are standing in front of a school, beat-boxing and freestyle rapping.)

“I shot him. It was at a quarter to one. Nobody was there, so I didn’t run. It was 2007, October one. Under my bed is where I hid the gun.”

“Man, you killin’ it! Awwww! You’re under arrest for murder.” (Shows badge)

“What are you talkin’ about, man? I didn’t even do nothing.”

“Got your confession on tape.” (Plays tape recorder) *‘I shot him. It was at a quarter to one.’*

“Man, that wasn’t even me, man.” (Suspect is being handcuffed and taken away)

(On walkie talkie) *“He hid the gun under the bed.”*¹

INTRODUCTION

*“For every rhyme I write, it’s 25 to life.”*²

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1. DANCE FLICK (MTV Films 2009).

“Peep my words, yes, my heavenly words, words that get [rappers] locked up in seventy-third.”³

Although rap music has been addressed by the Supreme Court,⁴ it is not an area of expertise for the average judiciary. In spite of the fact that hip-hop is now a well-recognized and accepted genus of music, it is mostly a foreign language to courts, and is treated accordingly.⁵ When the topic arises, the result is generally an unfortunate attempt at humor that shows how little courts understand the culture, and how negatively they perceive the genre.⁶ Previous efforts to translate lyrics before a court⁷ suggest that judges may be

2. MOBB DEEP, *Shook Ones (Part II)*, on THE INFAMOUS (Loud Records 1995), lyrics available at <http://www.sing365.com/music/lyric.nsf/Shook-Ones-Pt-II-lyrics-Mobb-Deep/5581D7D0FBB638D5482568BD0033DCB9>.

3. SEAN PRICE, *Peep My Words*, on MONKEY BARZ (Duck Down Records 2005) (citing HELTAH SKELTAH, *Operation Lockdown*, on NOCTURNAL (Duck Down Records 1996)), lyrics available at <http://www.burpler.com/sean-price-peep-my-words-lyrics.html>.

“Seventy-third” refers to the 73rd Precinct, which is located at 1470 East New York Avenue in the Ocean Hill–Brownsville area of Brooklyn, New York. Precincts, NYPD, http://www.nyc.gov/html/nypd/html/precincts/precinct_073.shtml (last visited Dec. 1, 2010).

4. See *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 572 n.1 (1994) (“Rap has been defined as a ‘style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment.’”) (citing THE NORTON/GROVE CONCISE ENCYCLOPEDIA OF MUSIC 613 (1988)).

5. See *Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003) (referring to OutKast as a “rap” or “hip-hop” music duo in quotation marks as if rap is a novel music genre).

6. See *United States v. Murphy*, 406 F.3d 857, 859 n.1 (7th Cir. 2005).

The trial transcript quotes Ms. Hayden as saying Murphy called her a snitch bitch “hoe.” A “hoe,” of course, is a tool used for weeding and gardening. We think the court reporter, unfamiliar with rap music (*perhaps thankfully so*), misunderstood Hayden’s response. We have taken the liberty of changing “hoe” to “ho,” a staple of rap music vernacular as, for example, when Ludacris raps “You doin’ ho activities with ho tendencies.”

Id. (emphasis added). It is most likely not within the judicial scope of determination to decide pressing issues such as whether or not we should be thankful that the court reporter in this case was unfamiliar with rap music and its vernacular. Yet this type of cheap shot is a nice demonstration of the lack of respect and underlying bias courts have for hip-hop.

7. See *Parks*, 329 F.3d at 452.

The “translation” of the chorus reads as follows: “Be quiet and stop the commotion. OutKast is coming back out [with new music] so all other MC’s [mic checkers, rappers, Master of Ceremonies] step aside. Do you want to ride and hang out with us? OutKast is the type of group to make the clubs get hyped-up/excited.”

Id. The lyrics this translation is referring to read as follows: “Ah ha, hush that fuss. / Everybody move to the back of the bus. / Do you wanna bump and slump with us? / We the type of people make the club get crunk.” OUTKAST, *Rosa Parks*, on AQUEMINI (LaFace/Arista

behooved to simply leave rap outside of the courtroom because it is a subject unfit for typical proceedings.

Despite this certain *je ne sais quoi* that makes rap inappropriate in a courtroom setting, rap lyrics have become a notable form of evidence for prosecutors to use in criminal trials.⁸ Much to the chagrin of defendants, rap lyrics they wrote, or even co-wrote, may be used against them to prove intent, knowledge, or that they actually committed a specific crime. Using rap lyrics as evidence in this context raises a variety of issues under the Federal Rules of Evidence and the Constitution. The most prevalent objection under the Federal Rules, is that this form of evidence is irrelevant, improper character evidence, and unfairly prejudicial.⁹ The argument is that prosecutors submit violent or criminally-inspired rap lyrics written by a defendant as evidence of intent, knowledge, motive or identity,¹⁰ knowing full well that they are not allowed to offer such evidence as a means of proving defendant's bad character.¹¹ Under the guise of proving "intent" or

Records 1998), lyrics available at <http://www.sing365.com/music/lyric.nsf/Rosa-Parks-lyricsOutKast/F593AE7D7933DE01482568B70004E1BA>. To say there is something lost in translation is an understatement. According to OutKast, the chorus represented the fact that they were back on the rap scene, so all other MCs should get out of the way (i.e., move to the back of the bus.) *Parks*, 329 F.3d at 452. The translation hints toward this, but mostly seems like a desperate attempt to make sense of a completely foreign language. The Sixth Circuit commented that "[w]e are not called upon in this case to judge the quality of the Defendant's song, and whether we personally regard it as repulsive trash or a work of genius is immaterial to a determination of the legal issues presented to us." *Id.* at 462. However, upon reading the opinion, it is not difficult to figure out which one of the two options the court is leaning toward. *See also* Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008) ("Avery testified before the district court that 'i[l]'m down' meant that she approved of the idea of others contacting Schwartz to 'piss her off more.'" (emphasis added)); *United States v. Gibbs*, 190 F.3d 188, 200 n.4 (3d Cir. 1999) ("The word 'jawn' was used throughout the recorded conversations. Apparently, 'jawn' is slang for any noun, and throughout this case it was used variously to describe a car, cocaine, a nightclub, and a beeper." (emphasis added)).

8. *See, e.g., Gangsta Rappers' Lyrics Used Against Them in Court*, USA Today.com, Dec. 20, 2006, available at http://www.usatoday.com/life/people/2006-12-20-rap-lyrics_x.htm (last visited Dec. 1, 2010) [hereinafter "Gangster Rappers' Lyrics"] (discussing the impact one defendant's rap lyrics had at trial, and the growing use of rap lyrics in courts). *See also* *United States v. Stuckey*, 253 F. App'x 468 (6th Cir. 2007); *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991); *United States v. Wilson*, 493 F. Supp.2d 460 (E.D.N.Y. 2006).

9. *See* Andrea Dennis, *Poetic (In)Justice? Rap Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 8-12 (2007) (discussing the treatment of rap lyrics as evidence under the Rules and typical objections by defense).

10. *See id.* at 2.

11. FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .").

“knowledge,” prosecutors are able to enter otherwise inadmissible evidence, but in actuality jurors are forming an impermissible chain of inferences in their minds: this person writes violent rap, so they are of bad character, so they are guilty.¹²

There are also a number of constitutional concerns surrounding the admissibility of rap lyrics in criminal proceedings. The First, Fourth, Fifth, Sixth and Fourteenth Amendments are each applicable in allowing this type of evidentiary practice to continue.¹³ Some of the issues to be considered are freedom of speech, search and seizure, personal papers, and guilt by association. Further, courts should also be aware of the divide between how famous rappers are treated based on their lyrics, versus how the average criminal defendant who writes similar lyrics is treated.

This Note will analyze the implications of allowing criminal defendants’ rap lyrics to be used against them. There is no bright line rule for when and how this evidence can be used, but most courts seem to permit it despite penumbras of legality under both the Federal Rules of Evidence and the Constitution. Ultimately, a judge must weigh the relevance of potentially inflammatory lyrics against the possibility that jurors will make impermissible inferences from the particular prose.¹⁴ For the most part, there appears to be much leeway given to prosecution in allowing otherwise irrelevant and unfairly prejudicial evidence into trial under the pretense that jurors will be able to give the rap lyrics appropriate credence, in spite of studies to the contrary.¹⁵

Part I of this Note provides a background of the ongoing mutual animosity between the law and hip-hop culture. Part II analyzes the current “rule” guiding the admissibility of rap lyrics at trial, and tries to find harmony among circuits in the handling of this matter. Part III is an assessment of the problems associated with allowing rap lyrics to be used as evidence both under the Federal Rules and the Constitution. The dichotomy between commercial artists and aspiring rappers will be explored, and

12. See David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A.L. REV. 439, 535 (2001) (“Our society long ago deemed trial by character impermissible, and we must guard that principle with a system of evidence law that not only purports to exclude character evidence to prove conduct, but seeks to minimize the danger that the jury will misunderstand its instructions and circumvent the rules.”).

13. See discussion *infra* Part III.B.

14. FED. R.EVID. 403.

15. See Stuart P. Fischhoff, *Gangsta’ Rap and A Murder in Bakersfield*, 29 JOURNAL OF APPLIED PSCHOL. 795 (1999) (finding that rap lyrics are more damning to a defendant’s case than an actual murder charge).

finally, a solution offered which suggests that rap lyric should not be permitted in the courtroom except, perhaps, on rare occasions.

I. BACKDROP

“*Know n---as that go to jail just to get they teeth fixed.*”¹⁶

“*Jail ain’t sh-t but a place I see my homies at.*”¹⁷

A. *Brief History*

Normally, this would be the section of the Note that delves into an in-depth history and the evolution of hip-hop. This version will be more abbreviated. Rap music started around 1973 in the Bronx, New York.¹⁸ People learned to scratch vinyl records on turntables and sample albums to create beats, while emcees flexed their lyrical prowess in a new form of rhyming known as rapping.¹⁹ Soon thereafter, rap started seeing commercial success as groups such as the Sugar Hill Gang and Run DMC contributed to its ever-increasing popularity.²⁰ In the early 90s there was “gangsta” rap, then later Eminem—and much in between and after. It is safe to say, at this point, that most households have at least one rap album, or are familiar with rap in one way or another.²¹ But rather than discuss how rap got to where it is today, for the purposes of this Note, it would be more appropriate to focus on the innate hostility between rap and law which may be traced to the gangsta rap movement, but probably goes much deeper than that. Neither side seems to have much respect for the other, and so the vicious cycle continues.

16. JADAKISS, *Mighty D-Block (2 Guns Up)*, on WALK WITT ME (Universal Records 2003), lyrics available at <http://www.azlyrics.com/lyrics/sheeklouch/mightydblock2gunsup.html>.

17. KING MAGNETIC, *Crown Me*, on EVERYTHING’S A GAMBLE (King Mag Music 2007).

18. See Henry A. Rhodes, *The Evolution of Rap Music in United States*, YALE-NEW HAVEN TCHRS. INST., available at <http://www.yale.edu/ynhti/curriculum/units/1993/4/93.04.04.x.html> (last visited Dec. 1, 2010).

19. See *id.*

20. For further discussion, see Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 347–55 (2005).

21. See *infra* note 251. Artists such as 50 Cent and Eminem frequently sell millions upon millions of copies of their albums.

B. *Hip-Hop Theory of Punishment*²² (continued)

“[O]ur society avoids examining the root causes of behavior. Billions are spent each year on prisons and police, while only a fraction is spent on programs for poverty, which is one of the most fundamental variables responsible for crime to begin with.”²³

“One thing ‘bout music, when it hits, you feel no pain. White folks say it controls your brain. I know betta’ than that. That’s game, and we ready for that.”²⁴

With very few exceptions,²⁵ rap and law are about as immiscible as water and oil. One does not have to search far to find rap songs expressing

22. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 999–1001 (2004) (discussing the criminal justice system’s lack of deterrent effect within the hip-hop community).

23. ZEITGESIT ADDENDUM (GMP L.L.C. 2008).

24. DEAD PREZ, *Hip Hop, on LET’S GET FREE* (Loud Records 2000), lyrics available at <http://www.sing365.com/music/lyric.nsf/Hip-Hop-lyrics-Dead-Prez/BA3A8E3DC3B519EC48256A1E0028D6C5>.

25. See PAPOOSE, *Law Library (Part 1)* through *Law Library (Part 5)* (offering legal advice through rapping).

Hustlers who hustlin,’ gun busters who squeezin’
 Gangstas who eatin, theives who sneak theivin’
 If you still breathin’ I like to welcome you
 To section 190.05 “Grand Jury Proceedings.”
 You broke the law allegedly, and you caught a case,
 You sittin in the cell with your hands on your face.
 The District Attorney they gotta get an indictment,
 So they take the case to the grand jury, you not invited.
 Now you could let the D.A. go and choose you fate,
 Or you could go to the grand jury and plead your case.
 No less than 16 people, no more than 23,
 A panel by Superior Court, understand me.
 Gotta look ‘em in they eyes as simple as can be,
 Make ‘em believe you innocent, you could be free.

Id. Lyrics.Time, available at <http://www.lyricstime.com/papoose-law-library-lyrics.html>; see also *Eminem Judge Raps Out Dismissal*, BBC NEWS, October 18, 2003, available at <http://news.bbc.co.uk/2/hi/entertainment/3204318.stm> (last visited Dec. 1, 2010) (judge delivers holding in the form of a rap).

Mr. Bailey complains that his rap is trash,
 So he’s seeking compensation in the form of cash.
 Bailey thinks he’s entitled to some monetary gain
 because Eminem used his name in vain.

urban communities' distaste for law enforcement and the legal system as a whole. There is a deep-seated distrust within these communities for police and the legal process, which is often expressed via rap lyrics, either commercially or for personal use. In some instances, such as Ice-T "Cop Killer"²⁶ and Dr. Dre and Snoop Dogg "Deep Cover,"²⁷ the form of expression takes on vehement outrage and blatant desire to inflict violence upon police. Other times, the expression is a blunt statement, such as N.W.A. "F--k Tha Police,"²⁸ a more thoughtful commentary (also violent), such as Jedi Mind Tricks "Trail of Lies,"²⁹ or a humorous awareness of how the legal system functions, such as Sean Price "Fake Neptune."³⁰ Whatever tone is used, the message is straightforward. Rappers utilize their craft to articulate their own, and their community's, displeasure with the law. In return, the law has not looked favorably upon rap music; yet it was law enforcement and the

The lyrics are stories no one would take as fact.
They're an exaggeration of a childish act.
It is therefore this court's ultimate position,
that Eminem is entitled to summary disposition.

Id.

26. ICE-T, *Cop Killer*, on BODY COUNT (Warner Brothers Records 1992) ("Cop killer. / Better you than me. / Cop killer. / F--k police brutality!"), lyrics *available at* <http://artists.letsingit.com/ice-t-lyrics-cop-killer-273cz83>.

27. DR. DRE feat. SNOOP DOGG, *Deep Cover*, on DEEP COVER SOUNDTRACK (Epic Records 1992) ("Yeah, and you don't stop, cause it's 1-8-7 on an undercover cop."), lyrics *available at* <http://www.azlyrics.com/lyrics/drdr/deepcover.html>; *see* CAL. PENAL CODE § 187(a) (West 2008) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.").

28. N.W.A., *F--k Tha Police*, on STRAIGHT OUTTA COMPTON (Priority Records 1988) ("Without a gun and a badge, what do ya got?/ A sucka in a uniform waitin to get shot./ By me, or another n--ga./ And with a gat, it don't matter if he's smarter or bigger."), lyrics *available at* <http://www.lyricsdepot.com/n-w-a/fuck-tha-police.html>.

29. JEDI MIND TRICKS, *Trail of Lies*, on A HISTORY OF VIOLENCE (Babygrande Records 2008), lyrics *available at* <http://www.songlyrics.com/jedi-mind-tricks/trail-of-lies/293656/>.

And the news tell you, "cops is on the block for people."
I'ma put it simple and plain: cops is evil.
Take the television show COPS for example.
That's the sh-t they want America to watch and sample.
Never showin' you how dirty that they really is,
And that they hide behind their badge and that they're really b-tch.
I ain't never met a pig in my life,
That I ain't wanna catch a body on the jig of my knife.

30. SEAN PRICE, *Fake Neptune*, on MONKEY BARZ (Duck Down Records 2005), lyrics *available at* http://www.lyricsmania.com/lyrics/sean_price_lyrics_4513/monkey_barz_lyrics_14554/fake_neptune_lyrics_168896.html ("Ask me no question, I'll tell you no lie / Unless the judge is wack and the jury is jive.").

judicial system that gave rappers fodder to express what they felt was injustice in the first place. Regardless of which side is the chicken and which the egg,³¹ the tension is irrefutable.

Sexually-explicit rap lyrics (not abrasive toward law enforcement in any manner), have been treated as though the stores selling the albums were dealing child pornography. In *Skywalker Records, Inc. v. Navarro*,³² a local deputy, upon listening to 2 Live Crew's *As Nasty As They Wanna Be*, decided the album was inappropriate to be sold anywhere in his jurisdiction, and submitted an affidavit to the county court.³³ After reviewing the album, on March 9,³⁴ the judge found probable cause to believe the album was "obscene" under Florida law.³⁵ With the judge's blessing, local law enforcement took it upon itself to ensure no more copies of *As Nasty As They Wanna Be* would be sold in Broward County by threatening to arrest any music retail store manager who sold it.³⁶ After reviewing the facts of the case, the district court agreed with the county court's decision, and declared the album obscene, but also held the Sheriff's office violated the First and Fourteenth Amendments by prior restraint of free speech.³⁷ On appeal, the Eleventh Circuit emphatically reversed the district court's holding on the grounds that it did not comply with applicable law.³⁸ The court held that the district judge arbitrarily decided 2 Live Crew's album had no artistic value, despite expert testimony to the contrary,³⁹ thereby meeting the third and final

31. See NELSON GEORGE, *HIP HOP AMERICA* 42 (New York Penguin 1998).

[G]angsta rap (or reality rap or whatever descriptive phrase you like) is the direct by-product of the crack explosion. Unless you grasp that connection nothing else that happened in hip hop's journey to national scapegoat will make sense. This is not a chicken or the egg riddle—first came crack rocks, then gangsta rap.

Id.

32. 739 F. Supp. 578 (S.D. Fla. 1990).

33. *Id.* at 583.

34. Ironically, this is same date (not year) of rap icon, Notorious B.I.G.'s death. Overall, a historically bad day for rap music.

35. *Skywalker*, 739 F. Supp. at 583.

36. *Id.*

37. *Id.* at 603.

38. *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 139 (11th Cir.1992) ("We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.").

39. See *id.* at 137. Carlton Long, a Rhodes scholar with a Ph.D. in Political Science, felt the album reflected many aspects of the cultural heritage of poor, inner-city blacks and cultural experiences of the group itself. *Id.* Long also said that album contained statements of political significance or exemplified literary conventions such as alliteration, allusion, metaphor, rhyme, and personification. *Id.* It has been the trend among courts to largely ignore these redeeming aspects of the genre and focus solely on the bad, such as hip hop's propensity

prong of the Supreme Court's obscenity test.⁴⁰ Although the Eleventh Circuit corrected the lower court's biased holding, this case demonstrates a situation where police and judges alike teamed up in joint effort to put a damper on one rap group's right to free speech. In a way, it signified that rap was going to have an uphill struggle to achieve legitimacy in the eyes of the law.

If rap was in a struggle to attain goodwill from the law, Ronald Ray Howard and his fascination with Tupac Shakur did nothing to help. This case got people thinking that not only was rap music obscene, but its violent content actually had the ability to control what its listeners did in real life.⁴¹ On April 11, 1992, Mr. Howard, a 19-year-old eighth-grade dropout, shot and killed a Texas state trooper during a routine traffic stop.⁴² He had been driving a stolen car, and was listening to Tupac's latest album, *2pacalypse*

to use words like "ho" on a regular basis. See *United States v. Murphy*, 406 F.3d 857, 859 n.1 (7th Cir. 2005).

40. The Miller Test decided if a work was obscene based on whether: (1) the average person would feel the work appealed to the prurient interest; (2) based on contemporary standards, the work depicts or describes, in a patently offensive way, sexual conduct as defined by state law; and (3) the work, taken as a whole, lacks serious literary, artistic political, or scientific value. *Skywalker*, 739 F. Supp at 587 (citing *Miller v. California*, 413 U.S. 15 (1973)).

41. See IMANI PERRY, *PROPHETS OF THE HOOD* 96 (Duke Univ. Press 2004).

[R]egardless of the artistic merit of the work of a number of artists who believe to keep it real by celebrating destruction, there is a cost that result from the ideological force hip hop has with young people. . . . Yet . . . the idea that the music could cause a single act of violence or illegal activity is far from compelling. The issue is not that hip hop causes violence or whether hip hop causes violence. The United States has a violent culture compounded by devastating health and wealth disparities. The issue is that hip hop carries an ideological message about merit, human worth, and excellence, and if that message glorifies that which ails the community without any internal critique, doesn't it then become a politically objectionable ideology to be challenged by those seeking justice and equity for black Americans?

Id. But see JEDI MIND TRICKS, *Blood In Blood Out*, on VISIONS OF GHANDI (Babygrande Records 2003), lyrics available at <http://www.musicsonglyrics.com/J/jedimindtrickslyrics/jedimindtricksbloodinbloodoutlyrics.htm> ("You listenin' to me, you couldn't lose in a fight."); EMINEM, *Murder Murder*, on NEXT FRIDAY SOUNDTRACK (Priority Records 1999), lyrics available at <http://www.sing365.com/music/lyric.nsf/Murder-Murder-lyrics-Eminem/A6E6B8A6419BDE814825688800103F32> ("F--k it I give up, I'm surrounded in blue suits. / Came out with a white flag hollerin' 'TRUCE, TRUCE!' / Surrendered my weapon to cops. / Wasn't me! It was the gangsta rap and the peppermint Schnapps.").

42. Jason Talerman, *The Death of Tupac: Will Gangsta Rap Kill The First Amendment?* 14 B.C. THIRD WORLD L.J. 117, 117-18 (1994) (citing Jerrey Urban, *Grandmother Pleads for Teen in Killing*, HOUS. CHRON., Apr. 16, 1992, at A21; Chuck Phillips, *Texas Death Renews Debate over Violent Rap Lyrics*, L.A. TIMES, Sept. 17, 1992, at A1).

Now, at the time of the incident.⁴³ At trial Mr. Howard pled that Tupac made him pull the trigger.⁴⁴ In reaching its verdict, the jury did not buy that excuse as a mitigating factor, which would decrease Howard's blameworthiness, but they did believe the recording played a role in the crime.⁴⁵ This tragic occurrence, accompanied by other songs out at the time such as Ice-T's "Cop Killer," raised the tension between rap and law enforcement to new levels. The debate raged between individuals who viewed these songs as figurative expressions of frustration not to be taken literally,⁴⁶ and those who argued the Constitution was not designed to allow people to call for the murder of others under the guise of entertainment.⁴⁷ The president of the National District Attorney's Association at the time, Robert Macy, chimed in on the subject by stating, "If an officer is killed by someone influenced by 'Cop Killer,' the fires of hell will not be hot enough for distributors of the song."⁴⁸

The Ronald Ray Howard and 2 Live Crew cases exemplify the law's hostility toward rap music to the extent constitutional rights are trampled upon and music blamed for a crime committed by a fully competent individual.⁴⁹ However, it cannot be too surprising that rap has these legal troubles, when arguably, if it weren't for breaking laws, rap music may not be here today. Rap music's very foundation was built upon a certain disregard for laws. Trespass, copyright,⁵⁰ and other property laws were

43. *Id.*

44. *Id.* (noting that the Tupac lyrics said, "Cops on my tail. . . / They finally pull me over / and I laugh. / Remember Rodney King. / And I blast his punk ass.").

45. *Id.*

46. *Id.* at 133 (citing *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 194 (1988)).

47. *Id.* at 137 (citing Chuck Phillips, *The Uncivil War: The Battle Between the Establishment and Supporters of Rap Music Reopens Old Wounds of Race and Class*, L.A. TIMES CALENDAR, July 19, 1992, at 77).

48. *Id.* (citing Carla Hall & Richard Harrington, *Ice-T Drops "Cop Killer,"* WASH. POST, July 29, 1992, at A1). "The lyrics of Cop Killer are treated as if they possess the inherent ability to incite an entire race of African Americans to engage in a murderous crusade against the nation's police forces." *Id.* at 139.

49. *Id.* at 144 ("Society must decide whether Trooper Davidson was killed by a 'bullet or a song.'") (citing Chuck Phillips, *Testing the Limits*, L.A. TIMES, July 16, 1993, at F1).

50. See PERRY, *supra* note 41, at 114 (asserting that copyright violations have been too rigid toward hip hop). Perry discusses how rap music consists of many samples from many origins, but when combined, the work acquires its own distinct meaning. *Id.*

In other words, Tabasco should not be able to sue someone for using its well-known spice on a burrito consisting of a variety of ingredients which ends up being sold to consumers. The burrito has acquired its own distinct taste, of which Tabasco is but one component. But if these burritos were being sold in the hood, and were packaged in wrappers that said "ho" on them, all of a sudden Tabasco would have a better argument that their

circumvented all in the name of hip-hop music.⁵¹ In the same vein as rock music, rap symbolized rebellion in the face of authority. But, unlike rock, which is regarded as an acceptable music genre, rap music is getting a raw deal when it comes to the legal process.⁵² To reiterate the chicken and egg situation, in the perspective of most hip-hop-oriented communities, law enforcement is corrupt and unfair. Thus, rappers express these feelings in the form of a songs like “Cop Killer.”⁵³ In return, the law is outraged at this expression, and wants to treat it in ways that are not totally in agreement with the Constitution or relevant laws.⁵⁴ From the perspective of these communities, they are being mistreated twice over; once by police, then by the legal system for expressing how they feel about being mistreated in the first place. Meanwhile, courts and law enforcement may be ignoring the very real possibility that lyrics, which speak of injustice and frustration with the system, could be accurate portrayals of reality.⁵⁵

The distrust and ill-will towards law from an urban perspective may not necessarily be unfounded. Consider for starters the incongruity of treatment between people caught dealing or using cocaine versus those caught with crack. Crack, predominately a presence in black communities, is treated remarkably harsher than its very similar counterpart cocaine, whose users are

product was being infringed. For an interesting commentary on copyright, see EXIT THROUGH THE GIFT SHOP (Paranoid Pictures 2010).

51. See Butler, *supra* note 22, at 990. “The trespass law did not deter the graffiti artists, the copyright law did not stop the DJs from sampling any music they wanted, and the property law did not prevent DJs from ‘borrowing’ electricity from street lamps at public parks.” *Id.*

52. See PERRY, *supra* note 41, at 113 (proposing that rap is more vulnerable to scrutiny than rock music because it consists of “black artists performing black music”). “In addition . . . the United States resists certain kinds of black wealth.” *Id.* For blacks to make it, they must fit within white America’s comfort zone in the same way Bill Cosby and Colin Powell do. *Id.*

53. *Id.* at 27 (“When Time Warner went ballistic over ‘Cop Killer,’ a hardcore rock song by Ice-T’s heavy-metal band Body Count released on its Sire label, it was rap music (not rock) that was vilified for glorifying violence.” (citing Neil Strauss, *Rap and Rock*, THE VIBE HISTORY OF HIP HOP 240 (Alan Light ed., 1999))).

54. See discussion *infra* Part III.B.

55. See DEAD PREZ, *We Want Freedom*, on LET’S GET FREE (Loud Records 2000), lyrics available at <http://www.elyrics.net/read/d/dead-prez-lyrics/we-want-freedom-lyrics.html>.

That’s why police get stabbed and shot / Cuz a n---a can’t eat if the Ave. is hot. / Locked up, you get three hot meals and one cot. / Then you sit and rot, never even got a fair shot. / That’s where a whole lotta n----s end up. / My man moms even got sent up, tryin to keep the rent up. . . / One day the whole world will smoke herb / And n---s won’t get took to jail for hangin on the curb.

Id.

stereotyped as more affluent than those of crack.⁵⁶ As Paul Butler discusses, this demonstrates that punishment in the criminal justice system is driven largely by racial stereotypes.⁵⁷ Compare also, dogfighting, arguably a predominately black activity,⁵⁸ to hunting, mainly a white activity.⁵⁹ Michael Vick received twenty-three months for dogfighting conspiracy,⁶⁰ yet people are openly allowed to kill deer, and only receive a fine if not done in accordance with the law.⁶¹ Like the inequity of treatment between crack and cocaine, this discrepancy seems to be driven by stereotypes. There could be a number of feasible explanations, but the elephant in the room appears to be that the law punishes typically “black” activities more harshly than others.

56. In order for a cocaine distributor to receive the same sentence as a crack distributor, a cocaine distributor must possess one hundred times the quantity of cocaine. Butler, *supra* note 22, at 988 (citing David A. Slansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1290–98 (1995)). See SEAN PRICE, *Outlive the War, on SERVANTS IN HEAVEN, KINGS IN HELL* (Babygrande Records 2006), lyrics available at http://www.6lyrics.com/outlive_the_war-lyrics-jedi_mind_tricks.aspx (“F–k this rap s–t, I made the same money when I hustled this crack s–t. / Probably made more, cuz a n–ga don’t pay no taxes.”).

57. Butler, *supra* note 22, at 988 (citing ROBERT M. BOHM, CRIME, CRIMINALS AND CRIME CONTROL POLICY MYTHS, IN JUSTICE, CRIME AND ETHICS, 327, 343 (Michael C. Braswell, Belinda Rogers McCarthy & Bernard J. McCarthy eds., 1988) (explaining how common conceptions of crime are to a large degree informed by myths)).

58. The ASPCA says as with any underground illegal activity, it is impossible to know exactly who and how many people are involved in dogfighting. *Dogfighting FAQ*, ASPCA, <http://www.aspc.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.html> (last visited Dec. 1, 2010). Southern states attracted fighters because their laws had weaker penalties. *Id.* Now, dogfighting generally thrives wherever enforcement is weak. *Id.* An example is Michael Vick’s allegation that when he was a child, police officers realized that dogfighting was going on, yet made no arrests. *Video/Transcript: Michael Vick’s ‘60 Minutes’ Interview*, TODAY’S DRUM, Aug. 10, 2009, <http://www.todaysdrum.com/7547/transcript-michael-vicks-60-minutes-interview/> (last visited Dec. 1, 2010).

59. See Sammy McDavid, *MSU Scientists ‘Hunting’ Statistics About State Hunters*, MISS. ST. UNIV. NEWS, Sept. 20, 2006, available at <http://www.msstate.edu/web/media/detail.php?id=3581> (last visited Dec. 1, 2010) (“The survey also captured demographic information, including a Mississippi hunter population that is 94 percent white male . . .”).

60. *Michael Vick Sentenced to 23 Months in Jail for Role in Dogfighting Conspiracy*, FOX NEWS, Dec. 10, 2007, available at <http://www.foxnews.com/story/0,2933,316319,00.html> (last visited Dec. 1, 2010).

61. See, e.g., N.J. STAT. ANN. § 23:3–56.2 (West 2008).

Any person . . . who shall hunt for, pursue, shoot at, take, kill or wound, or attempt to take, kill or wound a deer as permitted by this section . . . without having a license as herein prescribed . . . or violates any other provision of this act . . . shall be liable to a penalty of not less than \$100.00 nor more than \$300.00 for the first offense, and not less than \$300.00 nor more than \$500.00 for the second and subsequent offense.

Id.

This raises the issue, which will be discussed below, of whether this concept applies to the admissibility of rap lyrics in criminal trials. Are criminal defendants who write raps, a stereotypically black activity,⁶² more prone to being convicted as a result of harsher treatment toward black lifestyle? Is the fact that rap lyrics are allowed into evidence in the first place indicative of this potential bias? These are the questions which will be explored in light of the context provided by this section.

With this likelihood of partiality in mind, and the feeling that those in the hip-hop community are basically predisposed to being put behind bars, is it any wonder that the criminal justice system is not achieving its deterrent effect? As Butler discusses, prison has become nothing more than a right of passage for most black males.⁶³ Therefore, punishment in the form of incarceration has lost both its deterrent effect and its ability to sufficiently stigmatize prisoners.⁶⁴ In fact, rap artists tend to believe incarceration actually stigmatizes the government.⁶⁵ Within the rap industry, doing time is something to brag about, not to be ashamed of, because it represents to their respective communities that they are “real.”⁶⁶ Hip-hop nonchalantly refers to “catching a case” in the same way one catches a cold.⁶⁷ Much of the problem is that our current punishment regime is designed from the top down, which is why many perceive it as ineffective and unfair.⁶⁸ From hip-hop’s perspective, incarceration is driven by profit rather than public safety, and has even been compared to slavery as demonstrated by Jedi Mind Tricks.⁶⁹

62. See PERRY, *supra* note 41, at 10 (“The accuracy of the assertion that hip hop has multiracial and multicultural origins does not suggest that it is not black. Only a worldview that subjugates blackness marks the phrase ‘it’s just black’ as an offensive designation.”).

63. Butler, *supra* note 22, at 999.

64. *Id.* at 997; see also PERRY, *supra* note 41, at 47 (“[T]here is a kind of revelry present in the lyrical treatment of the prisons as a fundamental element to the identity construction of black male youth.”).

65. Butler, *supra* note 22, at 999.

66. See Wilson, *supra* note 20, at 356–57 (discussing “The Trouble With ‘Keepin’ It Real”).

67. Butler, *supra* note 22, at 998; see also SEAN PRICE, *P-Body*, on JESUS PRICE SUPASTAR (Duck Down Records 2007), lyrics available at http://lyrics.astraweb.com/display/906/sean_price..jesus_price_supastar.pbody.html (“The judge is wack, the case is lame.”).

68. Butler, *supra* note 22, at 1000.

69. JEDI MIND TRICKS, *Shadow Business*, on SERVANTS IN HEAVEN, KINGS IN HELL (Babygrande Records 2006), lyrics available at <http://www.sing365.com/music/lyric.nsf/Shadow-Business-lyrics-Jedi-Mind-Tricks/1DCA0677B677F54D482571F500106376>.

Slavery is not illegal, that’s a f-kin’ lie! / It’s illegal unless it’s for conviction of a crime. / The main objective is to get you in your f-kin’ prime / And keep the prison

With this overall resentment toward the law because of its unfairness toward those associated with rap in mind, the law should be cognizant not to continue to add fuel to the fire, but as we shall see, rap lyrics admissibility in trials is yet another avenue for the bad feelings to continue to build.

*C. Scarlet Letters:*⁷⁰ *R-A-P*

At least one study⁷¹ suggests that if a defendant is associated with writing violent or misogynistic rap lyrics, a jury is going to look at them as if they had scarlet red letters across their garments (“R-A-P”), which they must wear in shame until the jury gets a chance to turn in a guilty verdict. Stuart Fischhoff’s survey, consisting of four sample groups and four different fact patterns,⁷² was designed to examine differences in jury perceptions of a defendant put on trial for murder who in two scenarios was associated with rap lyrics, and in two not. Fischhoff’s conclusion was that writing these lyrics⁷³ was more damning in terms of adjudged personality characteristics⁷⁴

full, and not give you a f--kin’ dime. / But they the real criminal keepin’ you confined / For a petty crime, but they give you two-to-nine. / And ain’t nobody there to protect ya’ / Except a bunch of incompetent human rights inspectors.

Id.

70. See NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Ticknor, Reed & Fields 1850).

71. Fischhoff, *supra* note 15.

72. The sample consisted of 134 participants between the ages of 18–56, equally representing whites, blacks, Hispanics and Asians. *Id.* The defendant in the study was based on a real defendant, an 18-year-old African American man, who was put on trial for murdering his girlfriend. *Id.* The first sample condition simply described the defendant as a state champion in track with a good academic record who sang at parties to make money, and then asked for impressions of the defendant. *Id.* The second sample was the same, but this time with a murder charge. *Id.* The third sample featured no murder charge, but violent, misogynistic lyrics, and the fourth sample had a murder charge and the same set of lyrics. *Id.*

73. The lyrics, word for word from the trial this survey was based on, read as follows:

I’d die before my dick starts to fizz / Pulled it out and my head smelled like fish / Rush to the shower to wash my dick / Let me go, let me go, bitch let me go / She wouldn’t let me go, so I slapped the ho / Don’t get mad you fruit cocktail / See my rhymes now you happy like a fag in jail / Sayin’ my name wrong, you trick silly rabbit / Come in my face again, I’m gonta grab it / So watch your chains and nugget / Cause wit the Steel in my hand, I’m ruggit / Put your guard up for your gold teeth / You little fink / Talk one more line, then I’m a sluggit.

Id. Fischhoff notes that these lyrics were highly imitative of rap songs popular at the time of the trial. *Id.*

74. *Id.* (discussing implicit personality theory).

Implicit personality theory looks at how we form judgments of people based on what we observe about them and what we infer they might do or might be because we

than the actual murder charge.⁷⁵ The study leads to the impression that creative devices can be perceived as authentic representation of one's personality.⁷⁶ Yet this notion seems to apply mostly to rappers. Screenwriters and authors generally do not receive the same sort of negative stigma for their creative outlets no matter how violent or twisted their movie or book.⁷⁷

Part of the problem lying at the heart of this matter is the unfamiliarity of judges and juries with the rap genre. They may have heard a rap song or two, but they don't *know* about hip-hop.⁷⁸ Sometimes rapping about murder can be an expression of frustration with the system, or a metaphor of some kind.⁷⁹ Nevertheless, judges will make assumptions that sound logical, but do not fit within the findings of the aforementioned survey, such as that "the jury will understand that we don't convict people for murder simply because they have written lyrics about murder,"⁸⁰ or that "this material is not unduly

think that certain traits tend to co-occur, e.g., fat people are happy or quiet people are thoughtful. In the present context, the implicit personality theory connection would be that people who write ugly, violent gangsta' rap lyrics may be disposed to murder.

Id. Aside from just being disposed to murder, the implication is that if you write "gangsta" rap lyrics, you necessarily live that lifestyle, i.e., you sell drugs, do drugs, disrespect women, drink forties, and drive a low rider on hydraulics. The implicit personality trait therefore is more of a predisposition to juries thinking that defendants actually do what they write.

75. *Id.*

76. Part of the problem lies in the autobiographical nature of the music, which derives from African American folk literary culture, which entails telling one's story in epic or comic terms. See PERRY, *supra* note 41, at 90–91.

77. See *infra* note 112. Poe, Puzo, and writers such as Stephen King are celebrated for their creative contributions, while rappers are consistently frowned upon for theirs. We probably won't ever know if a court would try using *The Godfather* or *Misery* against their respective authors as evidence that they committed a mob hit or torturous murder, but chances are, a court would not.

78. See, e.g., Parks v. LaFace Records, 329 F.3d 437, 441 (6th Cir. 2003).

79. PERRY, *supra* note 41, at 60 (referring to a Sean Price rap lyric, "the murder metaphor stands alongside proclamations of competitive orality and superiority."). "[I]f rappers killed as many people as they claimed to, they would all be in jail." *Id.* at 87. Thus, there is at least one rationalization for not jumping to the conclusion that because a rapper writes about murder, they do it or are predisposed to doing it. More often than not, it can likely be credited to "rap's tradition of overtly ridiculous braggadocio." See *Gangsta Rappers' Lyrics*, *supra* note 8; see also Boladian v. UMG Recordings, Inc., 123 F. App'x 165, 170 (6th Cir. 2005) (referring to rap music as "merely rhetorical hyperbole"). These are two examples where rap was given the benefit of the doubt. People understood that authors do not necessarily do what they write about it, it may just be braggadocio. This type of thought process has not translated into criminal matters however, where such understanding would be helpful to people with the most to lose.

80. United States v. Stuckey, 253 F. App'x 468, 483 (6th Cir. 2007) (discussing lower court's awareness of the potential for unfair prejudice, but that it was going to give a limiting

prejudicial because its contents are no more inflammatory than the crimes alleged.”⁸¹ Obviously, juries are a factor in this predicament as well. Bruce Rogow, 2 Live Crew’s attorney, stated that his ideal juror would be “a young black man who knew the music,” but the only juror he got that met that description was excused.⁸² Rogow understood the effect playing 2 Live Crew’s music in front of upper-middle class white jurors was going to have.⁸³ He also commented on the double standard that exists between rap and media such as movies, in that people are offended at racy rap lyrics but not at overtly violent films.⁸⁴ The bottom line is that in criminal trials, more times than not, the judge and a majority of the jury are going to be people who are not hip-hop aficionados, and therefore will be more likely to take offense to lyrics than people who are familiar with the genre.⁸⁵ Thus, they are quite prone to being impermissibly influenced in the way they will vote.⁸⁶

instruction during voir dire to make jurors understand that you cannot convict a person for murder because they write lyrics about murder).

This type of reasoning goes against the grain of why evidentiary rules are in place to begin with—distrust for juries. It is a hefty assumption indeed to think that a limiting instruction is going to prevent a jury from doing what they are told not to do. Often, it backfires by drawing attention to the very issue the court wants the jury to ignore. The Supreme Court made it quite clear that courts should be skeptical about using limiting instructions in the criminal context. *See* *Bruton v. United States* 391 U.S. 123, 124 (1968) (reversing conviction of defendant whose guilt hinged upon the spillover effect of a hearsay statement that was not supposed to be used against him, but did due to the ineffectiveness of the limiting instruction).

81. *United States v. Wilson*, 493 F. Supp. 2d 460, 463 (E.D.N.Y. 2006) (charging defendant with murdering undercover police officer).

82. Chino Wilson, *2 Live Crew Attorney: No Power of Censorship*, THE DAILY COLLEGIAN, Dec. 5, 1990, available at <http://www.collegian.psu.edu/archive/1990/12/12-05-90tdc/12-05-90dnews-08.asp> (last visited Jan. 3, 2009).

83. *Id.*

The jury composition in the Freeman case was very bad for us. . . (It was) upper middle class white, five women, one man and it was impossible to get a mix of jurors. Secondly, the record was the only evidence they put on in the case. The record is 80 minutes of incessant sexual talk.

Id.

84. *Id.*

85. *See* Paul Bolls et. al., *Sex and Violence Makes Me Yawn: Autonomic Desensitization to Music Videos*, ALL ACADEMIC, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/1/1/5/3/p111532_index.html (discussing how male adolescents who viewed violent rap music videos more easily condoned violence as a means of social problem solving).

86. *See* *Gangsta Rappers’ Lyrics*, *supra* note 8 (“In our case, they gave him the death penalty because he had such a terrible mouth.”).

D. *Overstanding*⁸⁷ Hip Hop

“Ya’ll pretending to overstand the matrix. Without attempting to overstand its basics.”⁸⁸

People do not like what they do not understand. This idea does not bode well for rap music, which, although at times seems to only be about anger and violence, is genuinely a complex and intricate medium.⁸⁹ Hip hop represents cherished qualities of black American culture passed down from generation to generation.⁹⁰ Yet, despite the underlying (at times undetectable) richness in the music, the general population often refers to hip hop as music in which “you just can’t understand what they are saying.”⁹¹ Regardless of whether or not people comprehend the subtleties of the genre, the artistic qualities are undeniable. Rap may personify outlaw values as a means of commenting on the injustices facing black communities today.⁹² Rap may also, aside from murder, use suicide as a metaphor for “widespread depression, despair, and hopelessness” facing typical “hustlers” trying to get by.⁹³ Or rap can express what a “good day” means to a black man in South Central Los Angeles, such as in Ice Cube’s “Today Was a Good Day.”⁹⁴ There, simply getting through the day without being stopped by the Los Angeles Police Department qualified that day as “good.” “Rap music provides not an evaluation of blame, but a sophisticated interpretive framework from which to consider racism on both socioeconomic and

87. See THE ONLINE SLANG DICTIONARY, available at <http://onlineslangdictionary.com/definition+of/overstand> (last visited Dec. 1, 2010) (“To understand something so completely that one ‘over’-stands.”).

88. JEDI MIND TRICKS, *Blood Runs Cold*, on VIOLENT BY DESIGN (Superegular Records 2000), lyrics available at <http://www.sing365.com/music/lyric.nsf/Blood-Runs-Cold-lyrics-Jedi-Mind-Tricks/C8EAC951E52C7FBB4825702E000F5DFB>.

89. See PERRY, *supra* note 41 at 1 (“To listen to hip hop is to enter a world of complexity and contradiction.”).

90. See *id.* at 26 (“Orality and verbal dexterity are highly appreciated skills in black American culture, and that appreciation has spilled over into the mainstream through black American voices since the civil rights era.”).

91. *Id.* at 50.

92. *Id.* at 103.

93. *Id.* at 104 (citing Dream Hampton, *Bad Boy*, in THE VIBE HISTORY OF HIP HOP 343 (Alan Light ed. 1999)).

94. ICE CUBE, *Today Was a Good Day*, on THE PREDATOR (Priority Records 1992), lyrics available at <http://www.sing365.com/music/lyric.nsf/It-Was-a-Good-Day-lyrics-Ice-Cube/3148F102D75ACE9A482568D9000EC64D> (“Plus nobody I know got killed in South Central L.A./ Today was a good day.”).

ideological levels.”⁹⁵ It allows the thugs themselves a medium to explain their actions which they “generally do not attribute . . . to a deficient culture or inherited racial flaws, but to hunger and lousy schools and tragic formative experiences.”⁹⁶ So, before jumping to conclusions that rap music is trash, people should take a moment not just to understand, but to “overstand” that rap music is much deeper than rhyming about drugs and violence. It is an art form which communicates thoughts and feelings that go beyond words on a page and which may not be obvious at first listen.⁹⁷

II. CURRENT STATE OF LAW

*“I never knew hustlers confessed in stereo. Or on video, get caught, you'll know who turned states. Evidence, murder weapon, confession and fingerprints. Mama always said watch what comes out your mouth. Tight case for the D.A. from here to down south.”*⁹⁸

If there is any “rule” concerning the admissibility of rap lyrics in criminal proceedings, it would seem to be that if a defendant is in any way connected to a violent rap prose, pin it on him, and it will usually be entered into evidence. No matter how irrelevant or inflammatory, the most cliché lyrics, which prove nothing more than a defendant’s ability to mimic commercial rap, will be offered as evidence of intent, knowledge, or motive of a crime.⁹⁹ Despite constitutional issues and Federal Rules of Evidence designed to prevent this sort of proof from being admitted, judges will

95. PERRY, *supra* note 41, at 111–12.

96. *Id.* at 109.

97. See, e.g., Butler, *supra* note 22, at 992 (“50 Cent, who made the best selling album of 2003, is described by some critics as a gangsta rapper, and by others as someone whose music comments critically, on the costs of violence and materialism.” (citing Kelefa Sanneh, *Music: The Albums and Songs of the Year*, N.Y. TIMES, Dec. 28, 2003, § 2, at 31 (noting how 50 Cent’s “casual jokes about death are his way of reminding us of the price he might have to pay for his success—and for our entertainment.”))). So while courts and average onlookers alike may see a genre that exploits all the negatives associated with coming from a poor background, others may see it more as a social commentary. Whatever side a person comes out on will likely depend on how much thought they care to devote to the subject.

98. JERU THE DAMAJA, *Ya Playin’ Yaself*, on WRATH OF THE MATH (PayDay Records 1996), lyrics available at <http://www.lyricstime.com/jeru-the-damaja-ya-playin-yaself-lyrics.html>.

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

usually allow it,¹⁰⁰ and the prosecution will then be equipped with a very powerful tool in convicting someone of a crime. If by chance an appellate court realizes it was a mistake to permit the lyrics to be used as evidence, it will simply disregard any potential injustice by labeling the mistake a harmless error,¹⁰¹ despite studies suggesting otherwise.¹⁰²

A prime example of how rap lyrics are treated during criminal trials is the line of cases leading up to, and eventually culminating in *United States v. Foster*.¹⁰³ Foster was stopped at a train station with a suitcase containing cocaine and a notebook of rap lyrics that read, “Key for Key, Pound for pound I’m the biggest Dope Dealer and I serve all over town.”¹⁰⁴ Despite defendant’s objection that the prejudice from admitting the verse clearly outweighed its minimal relevance to the issue of knowledge,¹⁰⁵ the lyrics were admitted into evidence under Federal Rule of Evidence 404(b)¹⁰⁶ because “the verse made it more probable that Foster had knowledge (and, therefore, more probable that he was guilty of the crime charged).”¹⁰⁷ The court further rationalized the lyrics admissibility on grounds that “the verse achieved heightened relevance by virtue of the fact that it also rebutted Foster’s protestations of naiveté.”¹⁰⁸ To the court, the rap prose “indicated, at a minimum, that Foster was familiar with drug code words and, to a certain extent, narcotics trafficking.”¹⁰⁹ This familiarity made it more likely Foster knew he had drugs in his possession.¹¹⁰ An interesting facet of this case was the court’s response to Foster’s argument that he was merely writing about a

100. See, e.g., *United States v. Wilson*, 493 F. Supp. 2d 460, 463 (E.D.N.Y. 2006) (“[T]his material is not unduly prejudicial because its contents are no more inflammatory than the crimes alleged against Wilson.”).

101. See, e.g., *United States v. Stuckey*, 253 F. App’x 468, 481 (6th Cir. 2007).

102. See Fischhoff, *supra* note 15.

103. 939 F.2d 445 (7th Cir. 1991).

104. *Id.* at 448–49.

105. See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .”).

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

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Id.

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

108. *Id.* at 455–56 (Foster contended that he had no knowledge of the suitcase’s contents).

109. *Id.* at 455.

110. *Id.*

“fictional” character, and that his lyrics had artistic value.¹¹¹ The court said that “in writing about this ‘fictional’ character, Foster exhibited knowledge of an activity that is far from fictional,” then distinguished his rap lyrics from celebrated fictional works of violence such as *The Godfather* and “The Pit and the Pendulum.”¹¹²

The *Foster* case, although decided in 1991, is still pertinent in demonstrating how courts handle rap lyrics as evidence. Whether it was decided correctly is debatable, but one thing is certain—courts should be wary of the repercussions of such decisions. One concern is that, to an extent, the Seventh Circuit made a rule of law that if a person writes lyrics comparable to that of Foster’s, they will be deemed to have had knowledge of whatever illegal activity they write about, or to further extremes, that they actually did it. In another drug case, self-employed rapper Karim Howard’s recorded lyrics (similar to Foster’s),¹¹³ were used as evidence of intent to distribute. The District Attorney commented that, “When he’s writing such lyrics, it would indicate to me that he’s a drug dealer.”¹¹⁴ This mentality, which is not uncommon, is indicative of the problem that the line between fiction and reality is blurred. Two Live Crew’s attorney, Bruce Rogow, says the fallacy is that courts confuse art with fact.¹¹⁵ By prosecutors introducing this type of evidence before white, middle-class juries, it has the potential of making defendants look very bad because to them, like the District Attorney, they believe that since the person writes about it, they must do it. The other possibility, is that controversial lyrics are used to make the defendant appear to be a bad person to boost the prosecution’s chances of conviction. “What you see are prosecutors reaching for anything they can to paint bad

111. *Id.* at 456.

112. *Id.* (discussing the difference between Foster’s lyrics’ relevance and that of Marion Puzo’s *The Godfather* and Edgar Allen Poe’s “The Pit and the Pendulum”).

[A]dmitting the rap verse was not the equivalent of admitting *The Godfather* as evidence that Mario Puzo was a mafia don or admitting “The Pit and the Pendulum” as evidence that Edgar Allen Poe had tortured someone. It was instead, the equivalent of admitting *The Godfather* to illustrate Puzo’s knowledge of inner workings of an organized crime family and admitting “The Pit and the Pendulum” to illustrate Poe’s knowledge of medieval torture devices.

Id.

113. “I’m going to sell coke until you call me pope, do dirt until the lord tries to stop me. It’s gonna take hundreds of bullets just to drop me . . .” The Associated Press, *Rapper’s Lyrics May Be Used Against Him in Drug Case*, FREEDOM FORUM, May 23, 2002, available at <http://www.freedomforum.org/templates/document.asp?documentID=16300>.

114. *Id.*

115. See *Gangsta Rappers’ Lyrics*, *supra* note 8.

into evidence, the Sixth Circuit brushed it off as a harmless error and affirmed the verdict.¹²⁵ This marked an occasion where a court actually recognized that rap lyrics were improperly entered into evidence. Most of the time, they are admissible based on bold assumptions like “it is unlikely that any reasonable juror would have been unduly influenced by the violent or profane nature of [defendant’s] rap lyrics,”¹²⁶ or on the classic theory that the lyrics were not more inflammatory than the crime charged.¹²⁷ The evidentiary and constitutional issues just mentioned merely scratch the surface of problems involved in using rap lyrics to convict criminal defendants. These issues, among others, will be addressed in more depth below. For now, realize that the current law for using rap lyrics in criminal proceedings is a free-for-all, where the prosecution will go to great lengths to get rap lyrics into evidence, and judges generally comply despite various concerns under the Rules of Evidence and the Constitution. Many assumptions are made along the path of admissibility, but perhaps the most troubling is that jurors will not make the inference that the defendant is a bad person because they write rap, therefore they are guilty. In comparison to other forms of evidence, rap lyrics are receiving a raw deal. But despite chilling effect, search and seizure, and due process concerns, rap lyrics continue to be used in criminal trials, where one’s ability to imitate artists such as Notorious B.I.G.¹²⁸ is equivalent to having been involved in a drug cartel.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

125. *Stuckey*, 253 F. App’x at 492.

126. *Id.* at 484.

127. *See, e.g.*, *United States v. Wilson*, 493 F. Supp. 2d 460, 463 (E.D.N.Y. 2006) (“[T]his material is not unduly prejudicial because its contents are no more inflammatory than the crimes alleged against Wilson.”).

128. *See* NOTORIOUS B.I.G., *Ten Crack Commandments, on LIFE AFTER DEATH* (Bad Boy Records 1997), lyrics available at http://www.6lyrics.com/music/notorious_big/lyrics/ten_crack_commandments.aspx

Number four: know you heard this before,

Never get high, on your own supply.

Number five: never sell no crack where you rest at.

I don’t care if they want a ounce, tell ‘em bounce.

Number six: that god damn credit, dead it.

You think a crackhead payin’ you back, sh-t, forget it.

III. DISCUSSION

“[S]oon as I write it, I get indicted.”¹²⁹

“[T]his lady take the stand. Had my records playin’ in the court like a reggae band.”¹³⁰

This section will analyze the evidentiary and constitutional issues arising from the use of rap lyrics as evidence in criminal proceedings. Rap lyrics will be compared to other forms of potentially damning evidence in order to evaluate whether they receive fair treatment. The dichotomy between famous rappers and aspiring rappers will also be explored, and finally a solution offered in hopes of providing courts guidance in this matter.

A. Evidentiary Issues

1. Relevance: Federal Rules of Evidence 401, 402, and 403

“Everything they say is irrelevant. I’m a element of rap that define pure elegance.”¹³¹

Federal Rule of Evidence 401 is very lenient when it comes to allowing in evidence as “relevant.” Its only requirement is that the evidence must have a tendency to make something more or less probable.¹³² Once it is determined the evidence is relevant, it is admissible under Rule 402, barring any exceptions under the Constitution, Acts of Congress, the Rules, or a Supreme Court determination.¹³³ However, as Rule 401 giveth, Rule 403

129. TRAGEDY KHADAFI, *Genghis Khan*, on VIOLENT BY DESIGN (Superegular 2000), lyrics, available at <http://www.sing365.com/music/lyric.nsf/Genghis-Khan-Feat-Tragedy-Khadafi-lyrics-Jedi-Mind-Tricks/28A1DE230454FE6048256DAB0012E086>.

130. JEDI MIND TRICKS, *Godflesh*, on A HISTORY OF VIOLENCE (Babygrande Records 2008), lyrics available at http://lyricwiki.org/Jedi_Mind_Tricks:Godflesh.

131. JEDI MIND TRICKS, *Séance of Shamans*, on A HISTORY OF VIOLENCE (Babygrande Records 2008), lyrics available at http://www.lyricsbay.com/seance_of_shamans_lyrics-jedi_mind_tricks_f_doap_nixon_outerspace.html.

132. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.

133. “All relevant evidence is admissible, except as otherwise provided by the Constitution . . . Congress, by these rules, or by other rules prescribed by the Supreme Court . . . Evidence which is not relevant is not admissible.” FED. R. EVID. 402.

taketh away.¹³⁴ Under Rule 403, even if the evidence is relevant, it may be inadmissible if its probative value is “substantially outweighed” by a listed danger; unfair prejudice, confusion of issues, or misleading the jury.¹³⁵

In the context of admitting rap lyrics into criminal trials, the tension between Rule 401 and Rule 403 comes to the forefront. On the one hand, you have a very broad standard that allows evidence if it has any tendency to make something more or less probable, but on the other, you have a rule that only disallows evidence if its probative value is substantially outweighed by prejudice. Rule 401 should trump Rule 403 in most situations because “substantially outweighing” is a more difficult standard to meet than “having a tendency to make more or less probable.” But, assuming for the moment that Dr. Fischhoff’s study¹³⁶ is accurate, judges should be cautious of the possibility that in some instances, permitting rap lyrics to be entered into evidence is in fact a violation of Rule 403 because the prejudicial effect *does* substantially outweigh any probative value. For the most part, courts proceed with no such caution.

In *United States v. Wilson*,¹³⁷ defendant, Ronell Wilson (a.k.a. “Rated R”) was charged with murdering an undercover police officer.¹³⁸ The government sought to enter, and Wilson sought to preclude, evidence consisting of (1) handwritten rap lyrics in his possession at the time of arrest, (2) rap lyrics on his friend’s computer, and (3) letters and rap lyrics seized from a member of his crew’s home.¹³⁹ Despite objections that the lyrics were irrelevant and unduly prejudicial, they were permitted on the basis that they were “relevant in determining whether the Stapleton Crew exists and whether it is ‘an enterprise engaged in racketeering activity,’”¹⁴⁰ and because the material was not more inflammatory than the crimes charged.¹⁴¹

134. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” FED. R. EVID. 403.

135. *Id.*

136. *See* Fischhoff, *supra* note 15.

137. 493 F. Supp.2d 460 (E.D.N.Y. 2006).

138. *See* DR. DRE feat. SNOOP DOGGY DOGG, *Deep Cover*, on DEEP COVER SOUNDTRACK (Epic Records 1992), lyrics available at <http://www.azlyrics.com/lyrics/drdre/deepcover.html>.

139. *Wilson*, 493 F. Supp. 2d at 462 (arguing the material in each category is irrelevant and unduly prejudicial, and that the last two categories were hearsay).

140. *Id.* at 463.

141. *Id.* at 462–63. Indeed, the “not more inflammatory than the crime charged” or the “not more inflammatory than their probative value” are popular rationales for allowing rap lyrics into criminal trials. *See United States v. Brown*, No. 407CR308, 2008 U.S. Dist. LEXIS 51805, at *6 (S.D. Ga. July 7, 2008) (discussing that rap lyrics written by defendant were not

“Not more inflammatory than the crime charged” is one excuse for getting rap lyrics in under Rule 401 despite Rule 403. The other is that they are relevant in demonstrating knowledge, motive, or intent such as in *People v. Estrada*,¹⁴² where a gang member’s lyrics were used against him at trial even though the court was aware of the potential for undue prejudice resulting from introduction of gang evidence.¹⁴³ Somehow, according to the

so inflammatory so as to outweigh their probativeness). *But see* Fischhoff, *supra* note 15 (urging the opposite).

Perhaps more studies like Fischhoff’s need to be conducted before scholars give credence to the thesis that rap lyrics are more inflammatory than most crimes charged. It is a troubling thought to think that it may be true, meanwhile courts continually assume the contrary as defendant’s lives hang in the balance. In some cases, rap lyrics may be the difference between a guilty verdict and one of not guilty. *See* Brief in Support of Request for Review, *supra* note 120, at *14–15.

In a close case such as this, with no eyewitnesses to the shooting and no physical evidence, allowing the jury to consider such inflammatory evidence makes it extremely likely that the evidence of the rap lyrics and the attendant predisposition to commit violent crimes, contributed to the verdict of first degree murder. As this was a closely balanced case, even a small degree of error may be enough to have influenced the jury to wrongfully convict the defendant.

Id. at *14. The brief then goes on to discuss factors which demonstrate “closeness” of a case: (1) whether the jury asks questions during deliberation and whether they request to have testimony re-read; (2) length of deliberations; and (3) refusal to convict on all counts. *Id.* at 14–15. The defendant in this case met all of these prongs, one in particular was the length of deliberation. *Id.* at *15. Citing four examples where six, nine, and eight hour deliberations, as well as five days, indicated the “issue of guilt was far from open and shut,” not “clearcut,” “close,” and “apparent that the case against defendant was not overwhelming,” counsel pointed to the fact that here, the jury took three days. *Id.* at *14–15 (citing *People v. Rucker*, 605 P.2d 843, 857 (Cal. 1980); *People v. Woodard*, 590 P.2d 391, 398 (Cal. 1979); *People v. Collins*, 438 P.2d 33, 41 (Cal. 1968); *People v. Medina*, 116 Cal. Repr. 133, 151 (Cal. Ct. App. 1974)).

The point defendant’s counsel in *Couch* made is valid. With even a scintilla of a possibility that rap lyrics might unduly prejudice a defendant’s case, is it fair to enter them into evidence when they may very well be the proverbial straw that breaks the camel’s back?

142. No. B151046, 2002 WL 1902924, at *7 (Cal. App. Aug. 20, 2002).

143. *Id.* “If gang evidence is relevant, trial courts should closely scrutinize it because it ‘may have a highly inflammatory impact on the jury.’” *Id.* (quoting *People v. Williams*, 940 P.2d 710, 738 (Cal. 1997)). In this case, the court mitigated the chances of such an impact by editing the defendant’s rap lyrics by omitting any unduly inflammatory matter. *Id.* The court felt compelled to admit the lyrics because they were “highly relevant to demonstrate motive and intent.” *Id.* An example of said “highly relevant” lyrics reads as follows:

He said Tiny Locos, and I said so what. You vatos threw rat, now you got it like that. You’re all f[]king b[]ches, and it’s known to be a fact. Then I pulled out my cuete and saw the puto f[] run. Run pinche sosa, because I kill just for fun.

court, Estrada's lyrics showed he had intent to kill.¹⁴⁴ Another example of a tenuous connection between rap lyrics and "intent" took place in *United States v. Brown*,¹⁴⁵ where lyrics that read "put a shotgun in my hand" were permitted to show defendant's intent to possess a gun.¹⁴⁶ Lastly, in *United States v. Foster*,¹⁴⁷ defendant's verse was admissible to show his knowledge of drug trafficking, thus making it more probable he was guilty of such activity.¹⁴⁸ Each of these examples show that courts are willing to accept the most tenuous of links between cliché rap lyrics and proof of intent/motive/knowledge.

These cases demonstrate the judicial system's willingness to ignore protections afforded under Rule 401 and Rule 403 by permitting otherwise irrelevant and inflammatory evidence to be admitted under the guise of motive, intent, knowledge, or "not more inflammatory than the crime charged." Apparently rap lyrics become relevant by prosecution simply saying they are, but the fact is, most of the lyrics being admitted are commonplace regurgitations of most rap songs on the radio. It is true that Rule 401 is very permissive in allowing evidence, but if Rule 403 is to be given any credence, this should be a situation where the evidence is barred due to a combination of lack of probative value and undue prejudice.

Id. at *3. If these were considered not inflammatory, the question comes to mind, what were the omitted lyrics like? The other question is, how exactly do these lyrics prove motive or intent?

144. *Id.* at *7.

145. 2008 U.S. Dist. LEXIS 51805, at *9.

146. *Id.* at *9–10. "[T]hese writings are admissible solely to prove defendant's intent to possess a gun, and not to show mere gang membership (*i.e.*, 'association by guilt')." *Id.* at *9. The court said the prosecution was precluded from referencing gang membership unless necessary, and only writings specifically probative of intent to possess a gun were admissible. *Id.* at *10. To the court, lyrics such as "Pkut \$hotgun\$ in my hand\$" satisfied this standard. *Id.*

147. 939 F.2d 445 (7th Cir. 1991).

148. *Id.* at 455. Foster argued the prejudice of admitting the verse outweighed its minimal relevance to the issue of knowledge. *Id.* But the court felt it made it more likely he knew about drug trafficking, therefore made it more likely he dealt drugs. *Id.* "In our view, the verse . . . indicated . . . that Foster was familiar with drug code words and to a certain extent, narcotics trafficking, a familiarity that made it more probable that he knew that he was carrying illegal drugs." *Id.* The verse the court is referring to reads as follows: "Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town. Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average bussiness [sic] man." *Id.* at 449.

2. Character: Federal Rule of Evidence 404

*“The evidence at the hearing shows that Anthony’s songs were written in the rap genre and that rap songs are ‘just rhymes’ and are metaphors. Thus, while some rap songs contain violent language, it is violent imagery and no actual violence is intended.”*¹⁴⁹

Rule 404(a)¹⁵⁰ forbids evidence of a person’s character to be admitted for the purpose of proving that since a person usually acts a certain way, they must have necessarily acted in conformity therewith on a particular occasion. On the flipside, Rule 404(b)¹⁵¹ may allow such evidence for purposes of proving motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake. A similar tension exists between Rule 404(a) and Rule 404(b) as between Rule 401 and Rule 403 when it comes to the admissibility of rap lyrics in criminal proceedings. Prosecution argues rap lyrics are relevant and prove motive or intent, therefore are admissible under Rule 401 and 404(b). Meanwhile, defense counters that they are irrelevant, unfairly prejudicial, and are being used to prove defendant’s bad character and propensity to commit crime in violation of Rule 404(a) and 403. In the end, the battle between Rule 404(a) and 404(b) usually turns out the same way as Rule 401 versus Rule 403—the lyrics get in.

In *United States v. Stuckey*,¹⁵² defendant was on trial for conspiracy to distribute cocaine, conspiracy to launder money, and for murdering an undercover agent.¹⁵³ The government wanted, and ultimately was able, to use Stuckey’s rap lyrics to help bolster their case.¹⁵⁴ Among several objections

149. *Latour v. Riverside Beaver Sch. Dist.*, No. Civ. A. 05–1076, 2005 WL 2106562, at *2 (W.D. Pa. Aug. 24, 2005) (emphasis added).

150. “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” FED. R. EVID. 404(a).

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

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

152. 253 F. App’x 468 (6th Cir. 2007).

153. *Id.* at 474.

154. *Id.* at 473-76. One example of these lyrics included, “I expose those who knows; Fill they bodys with ho[l]es; Rap em up in blankit; Dump they body on the rode.” *Id.* at 475. The lyrics repeatedly referred to killing and retaliating against “snitches.” *Id.*; see also ROCK (OF HELTAH SKELTAH), *Clans, Posses, Crews and Kliks*, on NOCTURNAL (Duck Down

by defense were: (1) that the lyrics were improper character evidence in violation of Rule 404(a); and (2) the lyrics assumed Stuckey did what he wrote, thus they were being used to show he acted in conformity therewith in violation of Rule 404(b).¹⁵⁵ The Sixth Circuit determined the rap lyrics may have been admitted in error, not because of Rule 404, but because of search and seizure issues.¹⁵⁶ However, even if there was error, it was harmless.¹⁵⁷

Records 1996) lyrics available at <http://www.lyricstime.com/heltah-skeltah-clans-posses-crews-and-kliks-lyrics.html> (“[O]ne time for your mind. / One time for the snitch droppin’ dimes. / Me don’t wanna hear you whine with my nine to your spine.”). Prosecution also introduced a rap lyric of Stuckey’s which read, “2 keys of raw we holdin; 100 bricks a week we movin.” *Stuckey*, 253 F. App’x at 482 n.12.

155. *Stuckey*, 253 F. App’x at 482.

156. *Id.* at 481 n.11. The court said that because Stuckey was on probation and staying at someone else’s apartment, coupled with the search warrant, he should have lacked a reasonable expectation of privacy. *Id.* at 481. Therefore, it did not matter that authorities seized his rap lyrics despite the search warrant only listing “marijuana.” *Id.* at 477; see also *infra* Part III.B.2.

157. *Stuckey*, 253 F. App’x at 481. The court declined to make a definitive ruling on constitutional grounds because it reasoned that even if there was a Fourth Amendment violation, any resulting error was harmless. *Id.* The court then explains why the district court did not abuse its discretion in allowing holding that the rap lyrics were relevant. *Id.* at 482. “The district court held that the rap lyrics were ‘not evidence of a prior act [but instead] evidence of statements about a certain characterization or certain genre of people.’” *Id.* The genre the court was referring to was “snitches” and in relation to this genre, the lyrics were “simply a prior statement.” *Id.* Therefore, the lyrics were not evidence of prior acts, so there was no Rule 404(b) violation. As for impermissible character evidence the Sixth Circuit said:

The Government introduced the rap lyrics not to show Stuckey was of a bad character or had a propensity for violence (or another bad character trait), but to show that he killed Darbins. Statements that Stuckey dislikes and kills “snitches,” fills their bodies with holes, wraps them in blankets, and dumps them in the road provides direct evidence that Stuckey shot Darbins, wrapped his body in blankets, and dumped it in the road. Had Stuckey rapped, “I shot Darbins, wrapped him in a blanket, and dumped him in the road,” the lyrics would clearly be admissible evidence just as if he had made the same statements to a third party. The difference in specificity between those hypothetical lyrics and the lyrics actually written by Stuckey is a matter of degree and goes to the strength of the evidence, which the jury was in the proper position to determine.

Id. at 482–83. This is the same jury the court said would “understand that we don’t convict people for murder simply because they have written lyrics about murder.” *Id.* at 483. But the court is flip-flop-ing. On the one hand, the lyrics are *not* evidence of prior acts, so they are allowed under Rule 404(b), but on the other hand, they *are* evidence of prior acts, in that Stuckey wrote about killing snitches, so he must do that sort of thing. The court should bear in mind that even when rappers mention the names of murder victims within their prose, it is not indicative of the fact that they murdered that person. See JEDI MIND TRICKS, *Blood in Blood out*, on VISIONS OF GHANDI (Babygrande Records 2003), lyrics available at

Similar issues arose in *United States v. Brown*, with similar results. Brown, Charon and Fields were facing conspiracy, attempted robbery, and gun charges.¹⁵⁸ Here too, lyrics were used as evidence against them.¹⁵⁹ Here too, defense objected that the lyrics should not be entered into evidence per Rule 404(b).¹⁶⁰ The district court felt the lyrics were admissible because they were not being shown to prove defendant's bad character, but to prove knowledge (and the like), similar to courts' rationale under Rule 401.¹⁶¹ Here we see, yet again, that by cloaking potentially inadmissible evidence as proof of "knowledge" or any other excuse under 404(b), prosecution is given a back door to admitting character evidence that would otherwise not get in.¹⁶²

3. Hearsay: Federal Rules of Evidence 801, 802 and 803

Hearsay is "a statement,¹⁶³ other than one made by the declarant¹⁶⁴ while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."¹⁶⁵ Within this definition is the term "assertion," which can be oral, written, or nonverbal conduct intended to be an assertion.¹⁶⁶ There are several exceptions to the rule,¹⁶⁷ but hearsay can essentially be boiled

<http://www.musicsonglyrics.com/J/jedimindtrickslyrics/jedimindtricksbloodinbloodoutlyrics.htm> ("I'm the one who hammered the first nail in Jesus.").

158. No. 407CR308, 2008 U.S. Dist. LEXIS 51805, at *3-4 (S.D. Ga. July 7, 2008).

159. *Id.* at *4. Brown's lyrics read (with character and style of original): "[W]hen I die, \$how no pity bury me deep in gangsta city, pkut a kitch fork\$ ac^ro\$\$ my c^hest and tell king hoover I tried my bes\$. Pkut \$hotgun\$ in my hand\$ and tell king hoover i tried my best." *Id.*

160. *Id.* at *3.

161. *Id.* at *6. The court felt the lyrics were not being offered to show defendant's bad character—i.e., that because he was a gang member, he was a bad person, and therefore guilty. *Id.* at 5-6. Instead, it was being offered to prove his "knowledge, opportunity and lack of mistake in possessing and using firearms in connection with criminal activity." *Id.* at *6. "Thus it dials directly into aspects (gun-possessing intent) of the central crime alleged by the Indictment and is admissible under [Rule 404(b)]." *Id.*

162. *See also* *United States v. Foster*, 939 F.2d 455 (7th Cir. 1991) (finding that defendant's verse was admissible under Rule 404(b)). The court explained that the rap lyrics were not admitted to prove that defendant really was "the biggest dope dealer," or to establish that he was of bad character, such as that of the fictional character portrayed in his lyrics. *Id.* at 456. Rather, they were used to show he possessed knowledge of drug trafficking. *Id.*

163. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a).

164. "A 'declarant' is a person who makes a statement." FED. R. EVID. 801(b).

165. FED. R. EVID. 801(c).

166. FED. R. EVID. 801(a).

167. *See* FED. R. EVID. 801(d) (prior statement by witness, admission by party-opponent); FED. R. EVID. 803 (e.g., excited utterance, recorded recollection, family records,

down to three components: (1) a statement/assertion; (2) made prior to the present proceeding; (3) offered for its truth, not some peripheral purpose that does not hinge on its truth.¹⁶⁸ At the heart of hearsay doctrine is the Confrontation Clause embedded within the Sixth Amendment, which says that defendants have a right to confront witnesses testifying against them.¹⁶⁹ It is considered unconstitutional for a person whose innocence or guilt is hanging in the balance to be unable able to cross-examine the person making an assertion against them.¹⁷⁰

The hearsay doctrine has implications in the realm of rap lyrics being used as evidence just as it would any manner an out-of-court statement is being used to prove the truth of the matter asserted. Imagine a scenario where lyrics, written by the defendant or someone else, can be used to prove the defendant committed a specific crime. Like Rule 403 and 404, there is a back door to getting past hearsay objections, which is to label the rap lyrics as “admissions” under Rule 801(d)(2).¹⁷¹ For example, in *United States v. Wilson*, lyrics found on a friend’s computer, as well as lyrics found at another friend’s home, were held to be not hearsay because they were “statements by a co-conspirator made during the course of and in furtherance of a conspiracy involving [the defendant].”¹⁷² Similarly, in *United States v.*

reputation as to character). Nonhearsay uses include: (1) Impeachment; (2) Verbal acts; (3) Effect on listener; (4) Verbal objects; (5) Circumstantial evidence of state of mind; (6) Circumstantial evidence of memory or belief.

168. FED. R. EVID. 801(a)–(c).

169. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

170. *See Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (reversing Washington Supreme Court for allowing a testimonial statement to be used against defendant without the opportunity to cross-examine the witness) (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

171. FED. R. EVID. 801(d)(2).

A statement is not hearsay if . . . [t]he statement is offered against a party and is

(A) the party’s own statement, in either an individual or a representative capacity or . . .

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Id.

172. 493 F. Supp. 2d 460, 463 (E.D.N.Y. 2006). The district court reasoned that because the lyrics found on the computer and in the friend’s home appeared to describe illegal activities of defendant’s “crew,” they were relevant in determining if the crew existed. *Id.* They did not violate hearsay because they were assertions made during and in furtherance of the conspiracy. *Id.* Unfortunately the district court’s opinion did not include these lyrics, but it would be interesting to see if these incriminating lyrics made specific references to things that only those engaged in the racketeering conspiracy would know about, or if they were just

Foster, the Seventh Circuit said had defendant's rap lyrics been inadmissible under Rule 404(b), the hearsay issue could be circumvented by categorizing the statements as an admission by a party opponent.¹⁷³ The main reason lyrics appear to get in based on Rule 801(d)(2) is that courts continue to assume that these defendants necessarily do what they write about, and therefore in writing these rhymes, are "admitting" to doing what they write.

Another assortment of hearsay issues arise when a nontestifying codefendant's rap lyrics are used against the defendant at trial. In *Bruton v. United States*,¹⁷⁴ the Supreme Court found reversible error in allowing a nontestifying codefendant's confession to be used against the defendant in that case.¹⁷⁵ The Court said it was a violation of the Confrontation Clause for the defendant to be unable able to cross-examine the person offering the testimony, and even limiting instructions would not be effective in erasing unfair prejudice.¹⁷⁶ Despite the Supreme Court's message that defendants have a right to confront their accusers, defendants who have rap lyrics offered against them do not always enjoy this right. In *People v. Olguin*,¹⁷⁷ the California Court of Appeals actually decided the lyrics¹⁷⁸ used against

average gangsta rap lyrics making reference to the same sort of things that commercial artists speak of.

It would be even more interesting to see how the court reasoned that the lyrics were "in furtherance" of the conspiracy. Does rapping about the crimes one commits throughout the course of a conspiracy actually further the conspiracy? Probably not—unless they were going to enter a rap contest, which featured a cash prize, so that if they won, they would then go buy the drugs to be distributed. This just seems to be another situation where the court assumes the authors do what they write about, hence allowing the lyrics into evidence as admissions.

173. 939 F.2d 445, 455 n.13 (7th Cir. 1991) (suggesting that the rap lyrics could fit within Rule 801(d)(2) as an admission by the defendant). Again, the court assumes the defendant did what he wrote about ("I'm the biggest Dope Dealer and I serve all over town."). The lyrics could be an admission, but they could also be fictional, as the defendant attempted to argue. *Id.* at 456.

174. 391 U.S. 123 (1968).

175. *Id.* at 127–28. "Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation." *Id.*

176. *Id.* at 132 ("Limiting instructions to the jury may not in fact erase the prejudice."). The Court was aware of the spillover effect the testimony would have on the jury. *See id.* at 132 n.8, 133–34. Even if the jury was told to ignore any references to Bruton, such instructions would either be ineffective or draw the jury's attention to the problem more, thus having a backfire effect.

177. 37 Cal. Rptr. 2d 596 (Cal. Ct. App. 1994).

178. *Id.* at 603. Examples of Mora's (codefendant) lyrics included, "See my home girl Smiley told me about you rats if you f[]ck with her Ill put my foot in your ass," "I keep riming do it by my self I don't need your friendship or your help just give me the mic and Ill rock

Olguin were *not* admissions, and that *Bruton* did not apply because there was nothing unreliable about the rap lyrics, they did not mention the crime he was on trial for, and the jury would be able to follow the limiting instruction.¹⁷⁹ In a similar situation, the Ninth Circuit found no *Bruton* violation when the rap lyrics being used to inculcate the defendant did not specifically mention the defendant's name as a participant in the crime.¹⁸⁰ Although courts have expressed Confrontation Clause concerns even in situations where a defendant's name is not explicitly mentioned, or has been redacted, the court ignored such concerns in allowing codefendant's rap lyrics to be used against the defendant.

4. Comparison to Other Forms of Evidence

In comparison to other potentially inflammatory forms of evidence used during criminal proceedings (or otherwise), rap lyrics appear to be receiving unfair treatment. Whether the comparison is drawn between rap lyrics and blatantly prejudicial items such as gruesome crime-scene photos¹⁸¹ and knife collections,¹⁸² or between analogous items such as diaries¹⁸³ and drawings,¹⁸⁴

your world with my visius voice Ill take control of you body and soul," and "Just crazy surenos smoking Marijuana and if you don't like it I sujest you break wide and if you don't stay, then you won't survive." *Id.* at 603 n.3.

179. *Id.* at 604–05. "Olguin argues Mora's lyrics constitute admissions and thus the *Bruton-Aranda* exception applies to this case. He is wrong." *Id.* at 604. "Even if we assume, arguendo, that these were admissions by Mora, they do not inculcate Olguin any more than they would inculcate any of a hundred Southside F Troopers." *Id.* at 605. "The lyrics do not mention the crime for which Mora and Olguin were on trial, and provide absolutely no information about the crime which could be imputed to Olguin." *Id.* (footnote omitted). The court then goes on to assume the very opposite of what the Supreme Court alluded to in *Bruton*:

Nothing makes these rap lyrics inherently unreliable—at least no more unreliable than rap lyrics in general—and there is little risk the jury would find them so authoritative as to overwhelm their ability to follow the instruction to consider them only against Mora. Thus neither of the underlying premises upon which the *Bruton-Aranda* rule is based are operable here, and neither is the rule.

Id. So while the Supreme Court distrusts limiting instructions' ability to prevent prejudice, this court felt completely comfortable in the jury's ability to follow the limiting instruction given.

180. *Davis v. Taylor*, 116 F. App'x 807, 809–10 (9th Cir. 2004); *see also infra* note 191 and accompanying text.

181. *See State v. Chapple*, 660 P.2d 1208 (Ariz. 1983) (reversing lower court's determination that gruesome photos of shotgun wound to victim's head were admissible because they were irrelevant and unduly prejudicial).

182. *See McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993) (holding that evidence of knife collection was properly excluded because it was irrelevant and emotionally charged).

the outcome is congruous—rap lyrics are more relevant, less inflammatory, and “less hearsay” than all of the above. Thus, courts allow rap lyrics into evidence, while excluding the other examples, despite concerns that rap lyrics are irrelevant, prejudicial, and hearsay.

Under the aforementioned Rule 404 analysis, courts have been willing to exclude many different forms of evidence because of low probative value and impermissible, inflammatory character inferences. For example, in *McKinney v. Rees*,¹⁸⁵ the Ninth Circuit decided a defendant’s knife collection was impermissibly allowed into evidence because it was irrelevant, emotionally charged, and painted a bad image of the defendant.¹⁸⁶ It found that the evidence was used to cause jurors to skip careful analysis, and instead convict McKinney based on his suspicious character.¹⁸⁷ This sort of precautionary approach to admitting potentially damning evidence was not present in similar circumstances involving rap lyrics. In *People v. Couch*, rap lyrics used by prosecution in virtually the same fashion as the knife collection were admitted into evidence despite counsel raising the same concerns as in *McKinney*.¹⁸⁸ The California Superior Court did not see the similarity between the two cases despite counsel making the analogy,¹⁸⁹ and the rap lyrics were allowed into evidence. The defendant was subsequently convicted.

In *State v. Chapple*, the Supreme Court held that it was erroneous to admit gruesome photos of the aftermath of a shooting.¹⁹⁰ Its reasoning was

183. See *Collins v. Kibort*, 143 F.3d 331, 338 (7th Cir. 1998) (affirming that diary was inadmissible as hearsay); *United States v. Palumbo*, No. 95–1474, 1996 WL 19071, at *3 (2d Cir. Jan. 17, 1996) (holding that diary was inadmissible as hearsay).

184. See *People v. Lewis*, 181 P.3d 947, 1006–07 (Cal. 2008) (holding that cartoon caricature of a cat was inadmissible as hearsay).

185. 993 F.2d 1378 (9th Cir. 1993).

186. *Id.* at 1385 (“The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body.”).

187. *Id.*

188. Brief in Support of Request for Review, *supra* note 120, at *13 (“The introduction of the rap lyrics presented petitioner as a man who was armed with a nine millimeter firearm and ready to use it in a driveby shooting, and therefore was responsible for the driveby death of Bradley Hebert.”). Counsel went on to argue that once the jury heard lyrics such as “I’m a killa with a nine milla,” it was impossible for them to judge the case on its merits without being influenced unfairly by the rap tape. *Id.*

189. *Id.* at *12.

190. *State v. Chapple*, 660 P.2d 1208, 1216 (Ariz. 1983) (“We find, therefore, that the photographs in question had little probative value on the issues being tried and that their admission in evidence could have almost no value or result except to inflame the minds of the jury.”).

that the photos were irrelevant to the issue at hand, and the sole purpose of them was to impair jury objectivity. This Note has already mentioned a few examples where in response to similar arguments by defense, courts have permitted rap lyrics into evidence anyway.¹⁹¹ These holdings indicate a bias toward rap music. While it may not necessarily be as shocking to hear rap lyrics as it is to see the aftermath of a shotgun wound to the head—it could be to some. One can imagine a vulgar combinations of words that could be just as inflammatory as gruesome photos, with little relevance and high prejudicial effect. These cases hint toward the probability that such lyrics would be admissible.

Even forms of evidence that closely resemble rap lyrics have been excluded, while raps continue to be mostly admissible. In substance, these lyrics are personal writings, no different than poetry, song lyrics, diaries, journals, or even drawings. In some cases maybe they are autobiographical, in others they might be creative outlet.¹⁹² The same can be said of diaries and drawings, so one would think they and rap lyrics would be treated equally. However, in both *Collins v. Kibort* and *United States v. Palumbo*, diaries were held to be inadmissible as hearsay.¹⁹³ In *People v. Lewis*, a cartoon drawing was also found to be hearsay.¹⁹⁴ Yet, in *Davis v. Taylor*,¹⁹⁵ the hearsay rule was circumvented in an effort to allow incriminating rap lyrics into the proceeding despite Supreme Court precedent to the contrary.¹⁹⁶ Thus

191. See *United States v. Stuckey*, 253 F. App'x 468, 483 (6th Cir. 2007) (“[T]he district court did not abuse its discretion by ruling that the prejudice of the lyrics did not substantially outweigh their probative value.”); *United States v. Wilson*, 493 F. Supp. 2d 460, 462 (E.D.N.Y. 2006) (finding that the rap lyrics were relevant because they described activity that resembled aspects of the central crime alleged by the Government and not unduly prejudicial because the lyrics were not more inflammatory than the crime charged); *United States v. Foster*, 939 F.2d 445, 455–57 (7th Cir. 1991) (finding no error in allowing rap lyrics into evidence because the lyrics were relevant in proving defendant had knowledge of drug trafficking, and not unduly prejudicial because “[a]s with any evidence admitted . . . there is always a possibility of unfair prejudice.”).

192. See discussion *supra* Part I.

193. *Collins v. Kibort*, 143 F.3d 331, 338 (7th Cir. 1998); *United States v. Palumbo*, No. 95–1474, 1996 WL 19071, at *3 (2d Cir. Jan. 17, 1996).

194. See *People v. Lewis*, 181 P.3d 947, 1006–07 (Cal. 2008).

195. 116 F. App'x 807 (9th Cir. 2004).

196. *Id.* at 809–10. Defendant urged that co-defendant’s rap lyrics were erroneously admitted into evidence in violation of *Bruton v. United States*, 391 U.S. 123 (1968), where the Supreme Court held that admission in a joint trial of a codefendant’s out-of-court statement naming the defendant as a participant in the crime violated the Confrontation Clause. 391 U.S. at 125–26. But the Ninth Circuit, in affirming Davis’s conviction, reasoned that since the rap lyrics did not reference Davis by name, *Bruton* was not violated. *Davis*, 116 F. App'x at 810 (citing *Richardson v. Marsh*, 481 U.S. 200, 221 (1987) (holding that where such a statement is

diaries (and cartoon caricatures of cats) are afforded greater protections under the rules of evidence than rap lyrics, despite the obvious fact that rap lyrics and diaries, in essence, are extremely similar.

More has been done to protect alleged child molesters from inflammatory evidence than defendants who write raps. In *United States v. Curtain*,¹⁹⁷ the Ninth Circuit held it was reversible error to allow defendant's pornographic reading material to be entered into evidence without properly weighing its probative value against potential prejudice.¹⁹⁸ The Ninth Circuit came to a similar conclusion in *Guam v. Shymanovitz*,¹⁹⁹ where it also found reversible error in allowing sexually explicit homosexual literature into evidence.²⁰⁰ Particularly interesting language used by the court in *Curtain* was that "[t]he link between fantasy and intent is too tenuous for fantasy to be probative."²⁰¹ Therefore, according to certain circuits, it is more of a stretch to assume an alleged child molester who possesses child pornography actually molests children, than it is to assume that a person who makes vague references to drugs in their raps actually traffics drugs. How can the link between fantasy and intent be tenuous in one instance and not in the other?

In *United States v. Monzon*,²⁰² the Seventh Circuit found it to have been erroneous for the district court to admit testimony concerning defendant's long pinky fingernail and marijuana butts into evidence.²⁰³ The court found that this evidence was not probative of the issue (conspiracy to distribute cocaine), and was impermissible character evidence under Rule 404(b).²⁰⁴ As

redacted to eliminate not just the defendant's name, but any mention of his existence, there is no deprivation of confrontation rights)). *But see* Gray v. Maryland, 523 U.S. 185, 186 (1998) (finding that a jury will often react to an unredacted confession and a confession redacted with the word "delete" similarly by realizing that the confession refers to the defendant).

197. 489 F.3d 935 (9th Cir. 2007) (en banc).

198. *Id.* at 958–59. In this case, upon arresting the defendant, police seized his digital assistant containing "over 140 stories about adults having sex with children." *Id.* at 938.

199. 157 F.3d 1154 (9th Cir. 1998).

200. *Id.* During the trial of a middle school guidance counselor charged with sexual and physical abuse of boys, prosecution was permitted to introduce evidence of defendant's sexually explicit homosexual literature. *Id.* at 1155.

201. *Curtain*, 489 F.3d at 961.

202. 869 F.2d 338 (7th Cir. 1989).

203. *Id.* at 344–45. Monzon was tried and convicted of drug trafficking. He raised a number of evidentiary errors on appeal, one of which was an officer's testimony that he observed defendant sporting a long pinky fingernail, which was a fad among cocaine users and traffickers, and noticed marijuana butts in his car. *Id.* at 343.

204. *Id.* at 344. "The government has not shown, and we cannot think of, any way in which marijuana or long pinky fingernail evidence was probative of that intent." *Id.* "The only probative value of this evidence goes toward showing that a person of the Defendant's character is likely to have committed the crime, but that is exactly what *Rule 404(b)*

previously mentioned, rap lyrics are generally not afforded such protections under Rule 404.²⁰⁵ Instead, jurors are permitted to make inferences that because this person writes raps about a subject, they do it or had intent to do it. But it seems that if a pinky nail and marijuana cannot be admitted to prove intent, rap lyrics should not either. Each is equally probative, and both likely do little else but show a defendant is likely to behave a certain way.

Finally, in a proceeding that parallels many of the cases involving rap lyrics mentioned within this Note, the Washington Court of Appeals erred on the side of caution in deciding whether or not admitting defendant's fictional writings into evidence was erroneous. In *State v. Hanson*,²⁰⁶ the court, believing that within the context, defendant's violent fictional writings were highly prejudicial and had no probative value, found the trial court's evidentiary ruling to be reversible error.²⁰⁷ Realizing that stories do not demonstrate a writer's propensity for anything other than a desire to write, the court was not willing to let Hanson's stories be used against him as evidence of his propensity for violence.²⁰⁸ This seems to be the most well-reasoned, logical decision mentioned thus far, and one that is highly applicable to the admissibility of rap lyrics.

prohibits." *Id.* Essentially, the evidence would have been relevant in attempting to prove the defendant used drugs, but was impermissible character evidence in trying to prove he had intent to distribute. Although the court held the evidence to have been erroneously admitted, it felt the error was harmless. *Id.* at 345.

205. See *supra* Part III.A.2.

206. 731 P.2d 1140 (Wash. Ct. App. 1987).

207. *Id.* at 1145. In a reversing and remanding Hanson's conviction due to evidentiary error, the court, in a moment of clarity, offers reasoning that is hauntingly applicable to current treatment of rap lyrics in criminal trial.

Thus, his writings are probative only if we accept the proposition that an author's character can be determined by the type of book that he writes. Because we reject this proposition, and because the circumstances of this case made the introduction of Hanson's writings highly prejudicial, we reverse and remand for a new trial.

Id.

208. *Id.* "A writer of crime fiction, for example, can hardly be said to have displayed criminal propensities through works he or she has authored." *Id.* at 1144. The court went on:

Even if we were to assume that Hanson's writings were probative of his character, any probative value would be overwhelmed by the danger of unfair prejudice. The crime charged was a random, brutal act of violence for which there was no apparent motive. By suggesting that the defendant's character conformed to the violent acts in his writings, the State supplied the jury with an improper explanation for why the defendant would have committed the crime charged.

Id. at 1144-45.

B. Constitutional Issues

1. First Amendment: Free Speech and Chilling Effect

*“I’m just playin’ you know that. F--k around, these days, these dirty D.A.’s ‘ll use your raps.”*²⁰⁹

Aside from Sixth Amendment Confrontation Clause concerns,²¹⁰ use of rap lyrics against criminal defendants has a number of other constitutional implications—none more significant than freedom of speech. The First Amendment of the United States Constitution is an assurance of this right. It says simply yet profoundly that “Congress shall make no law . . . abridging the freedom of speech.”²¹¹ There are a few exceptions to this rule,²¹² but for the most part, people have come to understand the First Amendment to mean that they are free to say anything they want without fear of punishment. Nowhere is this concept more prevalent than in the world of art, where freedom to express one’s ideas is paramount. When courts use creative devices as evidence of their creator’s knowledge or intent to commit a crime, the result is a chilling effect²¹³ on that art form. People, cognizant of the possibility that their work may be used against them, will refrain from

209. ROCK (OF HELTAH SKELTAH), *W.M.D., on D.I.R.T (Da Incredible Rap Team)* (Duck Down Records 2008), lyrics available at http://lyrics.astraweb.com/display/402/heltah_skeltah.dirt.wmd.html.

210. See *supra* Part III.A.3.

211. U.S. CONST. amend. I.

212. See *Debs v. United States*, 249 U.S. 211, 217 (1919) (affirming lower court’s finding that defendant’s speech violated the Espionage Act). Deb’s speech was said “to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces.” *Id.* at 212. First Amendment objections were overruled. *Id.* In affirming, Justice Holmes said the jury had been properly instructed that Debs could not be found guilty unless his words had the “natural tendency and reasonably probable effect to obstruct the recruiting service” and that he had had specific intent to do so. *Id.* at 216. Thus, the Supreme Court set forth a “clear and present danger” test which allowed for restrictions on freedom of speech if there was a likelihood of imminent and significant harm, depending on who the speaker was and where they gave the speech.

213. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (finding that if the newspaper had the burden of proving every single statement of fact in a story, it would result in a chilling effect on the press because it is nearly impossible to verify every fact). The chilling effect in this context would prevent the press from effectively doing its job. The chilling effect in the art context would prevent artists from feeling as though they could express their ideas, no matter how controversial, freely and without concern for repercussion. See David Lindorff, *Soldier Marc Hall’s Freedom Rap Song Lands Him In Liberty Jail*, LEWROCKWELL.COM, Jan. 11, 2010, <http://www.lewrockwell.com/orig10/lindorff8.1.1.html>.

engaging in total freedom of expression—which the First Amendment is designed to protect.

Using rap lyrics as evidence against the accused can lead to a chilling effect on the rap music genre. Rappers, commercial or aspiring, will become overly concerned with their lyrics being used to incriminate them, and will therefore hold back from discussing controversial topics, whether they are real life experiences or complete fabrications. Some have spoken out about the negative impact courts have on rap music for this reason.²¹⁴ Part of the problem lies within the blurry line between reality and the persona that rappers feel the need to portray—i.e., “keepin’ it real.”²¹⁵ Many rappers present themselves as gangsters, drug dealers, or pimps because it helps sell. The more they can convince their audience they are authentic, the greater the likelihood people will purchase their albums; otherwise, they will lose credibility and subsequently sales.²¹⁶ Meanwhile, less-famous rappers may feel pressured to mimic these successful artists in order to make it as rappers themselves. But rather than consider this chain of events, courts seem to immediately assume, illogically, that people must do what they write.²¹⁷

One law professor has commented on the mistaken belief many defendants have that artistic license renders their confessions worthless to prosecutors.²¹⁸ But if the First Amendment is to be given full effect, this belief should not be mistaken. To place even a hint of doubt in the mind of a

214. See Wilson, *supra* note 82 (Bruce Rogow discussing how the Constitution must be observed particularly in the area of art, otherwise the result will be mundane, uncreative, unprovocative art because people will be too afraid to offend the government); see also Talerman, *supra* note 42. “There appears to be a double standard in the treatment of rap music under the Constitution. African-American artists have been singled out in this unparalleled censorship drive. The inescapable conclusion is that inherent racism spurs enhanced censorship efforts.” *Id.* at 121.

215. See Wilson, *supra* note 20.

216. *Id.* at 356–57.

Indeed, one sign that a rapper is “keepin’ it real” is to explicitly call out other rappers as “fakers” or “narrators” in a song’s lyrics, while claiming that their own experiences are genuine. Rappers’ self-endorsement of their “real” image often carries over to their interviews with hip-hop magazines and rap radio stations. In order to sell more records, rappers must maintain their “street” image at all costs. *Id.* “America demands ‘authenticity,’ and rappers invite this assumption with their constant refrains of ‘keepin’ it real.’” *Id.* at 358.

217. See Brief in Support of Request for Review, *supra* note 120, at *8. “To conclude that because someone sings or writes about a given topic, that they must necessarily be involved in it would generate absurd and chilling results violative of the First Amendment.” *Id.*

218. See Brick, *supra* note 118.

person writing rap lyrics as to whether or not they may come back to haunt that person is un-American and unconstitutional. Current evidentiary procedures produce such a chilling effect. The law's distaste for rap music should not give it the ability to strip authors of their constitutional rights. Part of rap's charm is its ability to produce discomfort. Although courts may not like it, or respect it as art, that does not mean they should turn a blind eye to the Constitution in order to punish its participants.²¹⁹

2. Fourth Amendment: Search and Seizure

The First Amendment is not alone in being overlooked when it comes to the evidentiary use of rap lyrics in criminal proceedings. The government, well-aware of its effect on a jury, will go to great lengths to get a hold of any and all rap lyrics associated with a defendant, even if it means trampling upon constitutional protections. The Fourth Amendment provides that people have a right to be secure in their "persons, houses, papers, and effects against unreasonable searches and seizures."²²⁰ Law enforcement officials are not permitted to search one's home, car, bag, etc. without probable cause, and even then they may be limited in what they are allowed to search and seize.²²¹ However, this rule has also been bent to help prosecution bolster their cases.

In *Stuckey*, following the defendant's arrest for several charges, including murder, the DEA applied for a search warrant listing "marijuana" as the only item to be searched for and seized.²²² Despite this limitation, upon searching Stuckey's vehicle, agents seized a knapsack containing handwritten raps.²²³ Although defense filed a motion to suppress all evidence seized during the search, the district court denied it and allowed the lyrics to

219. S.G. Tallentyre, *THE FRIENDS OF VOLTAIRE* 199 (Smith, Elder, & Co. 1906) ("I disapprove of what you say, but I will defend to the death your right to say it.").

220. U.S. CONST. amend. IV.

221. *See, e.g.*, *Chimel v. California*, 395 U.S. 752, 768 (1969) (holding that the search of defendant's home was unreasonable under the Fourth and Fourteenth Amendments; searches incident to arrest are limited to the immediate surroundings of the accused, so police were not justified in searching Chimel's entire home without a search warrant).

222. *United States v. Stuckey*, 253 F. App'x 468, 477 (6th Cir. 2007). The DEA felt there was probable cause the Stuckey was guilty of the crime of possession of marijuana upon finding a marijuana cigarette. *Id.* Additional drug-related items were allowed to be searched and seized such as plastic bags, scales, razor blades, documents related to the sale of marijuana, and cell phones, but they were all crossed out by the searching agent and only "marijuana" was left. *Id.* at n.8.

223. *Id.* at 477.

be used as evidence.²²⁴ Worse yet, on appeal, the Sixth Circuit found the district court's error to be harmless and affirmed his life sentence.²²⁵ Whether or not the error was harmless is debatable. What is not debatable is the law's willingness to yet again deprive a defendant of a constitutional right because of rap.

3. Fifth Amendment: Personal Papers and Self-Incrimination

Following *Boyd v. United States*,²²⁶ the Fourth and Fifth Amendments have been inextricably linked—one guarding against unreasonable search and seizure, the other against self-incrimination.²²⁷ It was at once settled law that the Fifth Amendment's²²⁸ protections were applicable in preventing personal writings from being used against their authors at trial.²²⁹ However, rights to privacy have gradually been stripped away through subsequent decisions,²³⁰ as well as legislation.²³¹ Despite recognition of the importance

224. *Id.* at 477–78. The court reasoned that Stuckey lacked a sufficient Fourth Amendment privacy interest in the apartment to challenge that search and alternatively that any privacy interest he had was extinguished because he was on supervised release. *Id.* at 478.

225. *Id.* at 481. “[T]he district court’s failure to suppress the rap lyrics was harmless with respect to Stuckey’s convictions for murder and witness tampering.” *Id.* The court pointed out that the government did not rely only on the improperly seized lyrics, but also lyrics from an album Stuckey released in 1997 which “similarly discussed silencing informants and having informants end up in the trunk of Stuckey’s car.” *Id.* So, essentially, it did not matter that the district court allowed in one set of lyrics unconstitutionally, because there was another set that was relevant in proving Stuckey committed the crime, since rappers necessarily do what they rap about on commercial releases.

226. 116 U.S. 616 (1886).

227. The Supreme Court felt there was no difference between seizing “a man’s private books and papers to be used in evidence against him” and “compelling him to be a witness against himself.” *Id.* at 633.

228. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).

229. *See Bellis v. United States*, 417 U.S. 85, 87-88 (1974) (citing *Boyd v. United States*, 116 U.S. 616 (1886)):

It has long been established . . . that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. . . . The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.

230. *See United States v. Doe*, 465 U.S. 605, 612 n.10 (1984) (“If the party asserting the Fifth Amendment privileges has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.”).

of privacy in writing one's thoughts,²³² the Supreme Court has molded the Fifth Amendment into providing less and less protection for personal papers of any sort.²³³

Defendants can hardly begrudge the treatment of rap lyrics under the Fifth Amendment, as the Court has made it quite clear that privacy is a luxury once had. The interesting aspect of using lyrics in the same fashion as diaries, however, is that belief that defendants are writing about things that occur in their daily lives, much in the same way a person writes in a diary. This is a bold assumption, and is especially troubling when the lyrics used in this fashion have been impermissibly seized from the defendant such as in *Stuckey*.

4. Fourteenth Amendment: Guilt by Association and Due Process

The Fourteenth Amendment²³⁴ has come to symbolize fairness in the administration of the law. Due process, substantive and procedural, is a big part, if not the entirety, of this goal. Every issue mentioned in this Note has an impact on due process, but the focus in this section is on guilt by association as it pertains to rap music. In *Dawson v. Delaware*,²³⁵ the Supreme Court declared it unconstitutional to introduce evidence of defendant's affiliation with the Aryan Brotherhood²³⁶ during capital

231. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S.C.).

232. See *Fisher v. United States*, 425 U.S. 391, 420 (1976) (Brennan, J., concurring) (finding committing one's thoughts to paper facilitates the preservation of intimate memories); *In re Johanson*, 632 F.2d 1033, 1043 (3d Cir. 1980) (finding the right to commit one's thoughts to paper stimulates the development of ideas); see also Christina Johnson, *Privacy Lost: The Supreme Court's Failure to Secure Privacy in that Which is Most Private—Personal Diaries*, 33 MCGEORGE L. REV. 129, 131 n.12 (2001).

233. See *Doe*, 465 U.S. at 618 (O'Connor, J., concurring) (“[J]ust to make explicit, what is implicit in the analysis . . . [is] that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.”).

234. U.S. CONST. amend. XIV, § 1:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

235. 503 U.S. 159 (1992).

236. The prosecution sought to introduce (1) expert testimony regarding the origin and nature of the Aryan Brotherhood, as well as the fact Dawson had the words “Aryan Brotherhood” tattooed on his hand, (2) testimony that Dawson referred to himself as “Abaddon” and had this word tattooed across his stomach, and (3) photos of multiple swastika

sentencing.²³⁷ The Court ultimately agreed with defense's arguments that the evidence was irrelevant, inflammatory, and impermissible character evidence used to punish Dawson for his controversial beliefs.²³⁸ Put simply, evidence of a defendant's affiliation (usually to a gang), generally cannot be used against that person in a criminal proceeding.²³⁹ To hold otherwise would be to allow the jury to make impermissible inferences such as "this person is in a gang, therefore they are a bad person, therefore they are guilty."²⁴⁰

The same concerns expressed by the Supreme Court in *Dawson* exist today in the form of guilt by association—to rap. Just like how the *Dawson* prosecution wanted to paint the defendant as a bad person because of his gang affiliation, so do prosecutors who submit evidence of a defendant's rap lyrics. The very inferences the Court was worried the jury would make in *Dawson* occur when defendants' rap lyrics are used as evidence, except instead of inferring that because the person is in a gang he is guilty, they infer that because he writes raps he is guilty. Rap music has taken the place of a gang (or religion), so that now defendants are found guilty based on their association to rap. Perhaps because the association in this context is not to a tangible item such as a gang (or mosque),²⁴¹ courts do not realize the

tattoos on his back and one he painted on his cell wall. *Id.* at 161–62. The “Abaddon” and “Aryan Brotherhood” evidence were permitted at trial, but not the swastika evidence. *Id.* at 162. The trial court imposed the death penalty, and the Supreme Court of Delaware affirmed. *Id.* at 163.

237. *Id.* at 160 (holding that it violated the First and Fourteenth Amendments to introduce evidence of the fact defendant was a member of the Aryan Brotherhood where the evidence had no relevance to the issues being decided in the proceeding).

238. Dawson was tried and convicted for first-degree murder, possession of a deadly weapon during commission of a felony, and other crimes. *Id.* at 161. The Court did not believe Dawson's affiliation with the gang was relevant to any of the issues presented by these charges. *Id.* at 166. “[T]he Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim.” *Id.* Further, it found the evidence “proved nothing more than Dawson's abstract beliefs.” *Id.* at 167. “The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

239. The Court suggested that in some cases associations with a gang may prove to be pertinent. *Id.* at 166 (“A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future.”).

240. “[T]he inference which the jury was invited to draw in this case tended to prove nothing more than the abstract beliefs of the Delaware chapter.” *Id.* The Court was clearly concerned that this inference would lead to a biased verdict based largely upon the jury's animosity toward Aryan beliefs, and not on an individual assessment of the defendant.

241. Guilt by association can also be extended to encompass religion and race. *See United States v. Brown*, No. 407CR308, 2008 U.S. Dist. LEXIS 51805, at *8 (S.D. Ga. July 7,

unconstitutionality of what is going on, but the similarity is striking. Middle-aged, white jurors view gangs the same way they view rap—the two practically go hand in hand.²⁴² Thus, the effect of presenting rap lyrics to a jury as evidence is as good as saying “this person is in a gang.”²⁴³ Allowing one in and not the other, or as it is in this case, allowing one in most of the time and the other in some of the time, is incongruous and unconstitutional in precisely the same manner as *Dawson*.

C. *Famous Rappers and “Wannabes”*: A Dichotomy

“*Lotta rappers out here acting with no movie roles.*”²⁴⁴

“*You ain’t a ghetto thug. You an actress.*”²⁴⁵

One final consideration courts should be aware of in dealing with the admissibility of rap lyrics during trials is the divide between famous rappers and aspiring rappers. Treating the two as separate ilk based on virtually the same product (lyrics) is a threat to due process and inequity in the administration of justice. The analogy is often made that assuming a rapper does what he raps about is tantamount to assuming Al Pacino is affiliated with the mafia.²⁴⁶ In each situation, the actor and rapper are both playing

2008). “[I]t is unfair to engage in guilt by mere association . . . or inflame juror passions in an effort to convict merely because defendant is, for example, an Arab Muslim.” *Id.* “[P]rosecution cannot convict on the basis of the defendant’s ethnic background or national origin.” *Id.*

It should be noted that all of the guilt-by-association considerations mentioned (gangs, Islam, and rap) are, for the most part thought of as “black” activities. See PERRY, *supra* note 41. Country club memberships, Catholicism, and classical music do not seem to be making quite the same number of appearances in criminal proceedings as the other trio.

242. Indeed, in almost every case mentioned where rap lyrics were used as evidence, the defendant was in a gang.

243. This provides prosecution a loophole in that if evidence of gang membership cannot be admitted, they can try to use the defendant’s rap lyrics if there are any. It basically allows a backup method of getting one form of inflammatory evidence in or the other.

244. D.I.T.C., *Day One*, on WAY OF LIFE (Tommy Boy Records 2000), lyrics available at http://www.asklyrics.com/display/DITC/Day_One_Lyrics/129042.htm.

245. JEDI MIND TRICKS, *Deer Hunter*, on VIOLENT BY DESIGN (Superegular Records 2000), lyrics available at <http://www.sing365.com/music/lyric.nsf/The-Deer-Hunter-Feat-Chief-Kamachi-lyrics-Jedi-Mind-Tricks/28DAB0F4E6983D5748256DAB0012EC02>.

246. See *Gangsta Rappers’ Lyrics Used Against Them in Court*, *supra* note 8. “[Rap]’s about boasting. It’s about exaggerating. . . . It’s about acting If Robert De Niro, or Al Pacino . . . are charged with shooting somebody, are they going to be playing clips from *The Godfather* in court?” *Id.*

characters. Sometimes judges are willing to accept this notion in cases involving rap stars.²⁴⁷ But at least one lawyer has commented on the disparity of treatment between famous rappers and less-famous clients.²⁴⁸ The implication is that judges are more inclined to believe famous rappers are playing a character than they are the average person who writes raps.²⁴⁹ But if these aspiring rappers are virtually mimicking the lyrics of well-known commercial artists, why is it their lyrics are considered more authentic? Why is it that judges are more willing to accept that famous rappers are playing a character than they are average people who rap about the same things? Is it not possible they too are playing characters?

The line between fiction and reality is often unclear.²⁵⁰ Artists frequently draw upon their own real life experiences in composing whatever it is they write—book, poem, script or song. But jumping to conclusions like “because this person is familiar with drug trafficking jargon, they must be a drug dealer” is dangerous—particularly in light of the fact that music is so accessible and any number of people can become familiar with such jargon simply by listening to 50 Cent.²⁵¹ There is simply no valid explanation for

247. When a famous Philadelphia rapper, Beanie Sigel, was sentenced on gun charges, the prosecutor quoted lyrics of his about pouring acid on children and raping pregnant women. *Id.* However, the judge was dismissive, saying Sigel was playing a character for his fans. *Id.*

248. Beanie Sigel’s lawyer, Fortunado Perri, Jr., said he “has had a tougher time downplaying the significance of rap lyrics written by other, less-famous clients.” *Id.* “If we have to deal with it at trial, the argument . . . is that it is just kids goofing off, imitating things that they hear from world renowned artists.” *Id.* But Perri says it can be challenging to exclude lyrics from non-professional rappers when the lyrics mimic the act for which they are charged, particularly if the lyrics explain the criminal conduct. E-mail from Fortunado Perri, Jr., Esq., to Jason E. Powell (Dec. 18, 2008, 12:44:01 EST) (on file with author).

249. Perri says professionals are afforded more deference by courts because it is easier to argue artistic license, First Amendment issues, as well as a proven track record of turning a profit from their lyrics. E-mail from Fortunado Perri, Jr., Esq., to author (Dec. 18, 2008, 12:44:01 EST) (on file with author).

250. See *United States v. Curtain*, 489 F.3d 935, 961 (9th Cir. 2007) (en banc) (“The link between fantasy and intent is too tenuous for fantasy to be probative.”).

251. See Wilson, *supra* note 20, at 356 (discussing 50 Cent’s commercial success as an artist). 50 Cent’s debut gangsta rap album, *GET RICH OR DIE TRYIN’*, sold 1.5 million copies in its first week and a half of release, and within nine months sold over 6 million copies. *Id.* at 356 n.51. Therefore, according to most courts, if some or all of these 6 million people imitated this artist’s lyrics in some way or another, they would all then have knowledge of drug trafficking or intent to do so. This goes for people living in poverty to upper-class teenagers. Simply by mimicking a lyric directly from that album such as, “My soldiers slangin’ ‘caine, sunny, snow, in sleet or rain,” 6 million more people have now acquired the knowledge and intent to traffic cocaine. 50 CENT, *Blood Hound*, on *GET RICH OR DIE TRYIN’* (G-Unit Shady Aftermath Interscope Records 2002), lyrics available at <http://www.azlyrics.com/lyrics/50cent/bloodhound.html>.

how making vague references to criminal activities in one context is fictional and not in the other. The more sound approach is to treat all rap lyrics, famous or otherwise, as fictional, unless there is good reason not to.

D. Solution

The government naturally wants to convict guilty criminal defendants. Using rap lyrics to strengthen the prosecution's case can be a helpful way to achieve this. But imagine, for a moment, that rap lyrics were not allowed. If a defendant were to walk in a case where prosecution had, but was unable to use, that defendant's violent rap lyrics, did they really have a strong case to begin with? Is it necessary to use rap lyrics at all? If guilty or not guilty truly hinged on rap lyrics being entered into evidence, then the evidentiary and constitutional issues discussed above are increased exponentially. In that case, courts should think long and hard about whether the lyrics are relevant, and if so why.²⁵²

A proposed solution would be to disallow defendants' rap lyrics from being used as evidence at all, unless they make some *specific* reference to a crime that *only* a guilty party would know about.²⁵³ In other words, if

252. It is not enough to take a verse with vague references to drug dealing, possessing firearms, killing snitches, etc., and then say that the defendant had knowledge, motive or intent concerning those references. It needs to be much more specific. Yet courts are very permissive in admitting rap lyrics into evidence based on this less-than-compelling reasoning. See Brief in Support of Request for Review, *supra* note 120, at *6:

During the prosecutor's closing argument he used the rap tape as evidence of premeditation and deliberation: . . . What's the importance of the rap album? I'll tell you the importance of the rap album. . . . The importance of the rap album is most of us don't think about how to premeditate and deliberate a murder Marvin sings about it, Marvin reenacts the title track of shootings called Pay Back. He has thought about what it takes to commit a murder, so he doesn't get to argue this is not a premeditated and deliberated murder, 'cause it clearly is.

Id. The court allowed the album into evidence despite objections by defense that the very nature of the tape, which featured shots being fired in the background and vehicles, was much more prejudicial than its probative worth. *Id.* at *4. "I don't know how a tape of this sort can show the defendant's intent of premeditation, his intent to go and kill somebody. Those things are pure speculation." *Id.*

253. See Cyrus Langhorne, *Lyrics Land Rapper in Prison Over Shooting Case*, SOHH.COM, available at http://www.sohh.com/2008/11/lyrics_land_rapper_in_pri.html (last visited Dec. 5, 2010). Aspiring emcee, Rico Todriguez Wright was sentenced to 20 years after indirectly confessing to a shooting via rap song. *Id.* Wright shot victim, Chad Blue, two years before the conviction. *Id.* Blue testified about the chain of events leading up to the shots, but it was Wright's lyric, "Chad Blue knows how I shoot," that secured rapper's prison term. *Id.*

someone raps, “Yo, I deal coke. I ain’t no joke,” it should *not* be used to show knowledge or intent to distribute cocaine. But if someone wrote a rap that said, “I killed the snitch and left him in the ditch; behind my house, wit a red and blue sock in his mouth,” then, if in fact, a slain undercover police officer was found in a ditch with a red and blue sock in his mouth, and no one knew about that fact except for the police (i.e., there were no news stories reporting this specific fact), then the lyrics *should* be allowed into evidence. As it is now, both statements get in, despite the obvious fact that the first statement proves absolutely nothing.

A recommended method of analysis would ask: (1) whether the lyrics being offered into evidence are fact-specific or merely vague references to activities commonplace in most rap music; and (2) if fact-specific, whether there was any way for the defendant to have discovered this information without having participated in the activity, or having been associated with others who did. The problem, however, is that the first prong will necessitate an ability to recognize and distinguish “typical” rap lyrics versus fact-specific scenarios unique to given crimes. This is a tall task for courts (as discussed throughout), who still refer to the genre in quotation marks when referencing it in opinions.²⁵⁴ The more sound approach calls for a complete abandonment of rap lyrics being used as evidence.

Requiring courts to abide by this proposed rule is problematic in that it requires a basic understanding of hip-hop.²⁵⁵ Some familiarity is necessary to differentiate lyrics that pass muster from those that do not. Because such working knowledge is a long-shot, it would behoove the judiciary system as a whole to enact a per se ban on rap lyrics in criminal proceedings.²⁵⁶

This is a good example of rap lyrics specific enough to satisfy the proposed rule. The rapper specifically mentions a person who was shot. However, there is no reason for him to do so unless he had been the one who actually did it—assuming Wright was not a compulsive liar. Courts generally require no such specificity, and are usually satisfied with cliché mimicry of gangsta rap.

254. See *Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003) (referring to OutKast as a “rap” or “hip-hop” music duo in quotation marks as if rap is a novel music genre).

255. See discussion *supra* Part I.D.

256. Furthermore, this is probably an appropriate juncture to request and advise all rap artists, commercial and aspiring, to put a little more thought into the rhyme-writing process. There is really only so much to be said about dealing drugs, and committing various crimes correlative to a gangsta lifestyle. Unless you can discuss these redundant topics creatively, or tie them into a deeper metaphor for something else, please, do yourself and hip-hop a favor, and try something different. Record companies are largely to blame for what has gone wrong with rap in recent years, but that does not make imitating phony, commercial, gangsta rap artists excusable. Some of the rhymes featured throughout this note were so bad and cliché,

IV. CONCLUSION

*“Ever since William Cooper been deceased, police watch every A.O.T.P. release. And they tap when we speak, when we rap over beats.”*²⁵⁷

*“Tell the feds ‘Calm down. It’s just music.’”*²⁵⁸

Rap lyrics are unduly prejudicial by nature. To continue using them as evidence is to ignore protections provided by the Constitution and Federal Rules of Evidence. No matter how courts rationalize their admissibility, the potential chilling effect on the genre, accompanied by the fact that lyrics will not make or break the prosecution’s case, should be more than enough reason to leave rhymes outside of the courtroom. The law has demonstrated its resentment toward rap music for many years in a variety of ways. This is one more method to continue that trend. Presenting violent, misogynistic rap lyrics written by a defendant to a judge and jury who do not understand where they are coming from, and in all likelihood simply have a distaste for rap, is not fair. It allows jurors to reach a decision based on improper inferences. It also ignores the fact that most times the lyrics are not relevant and are overly inflammatory. As it is, free speech, search and seizure, due process, and the Federal Rules, combined, are not enough to prevent vague references to criminal activity in one’s lyrics from being used against their author.²⁵⁹

that the defendant deserved some sort of punishment simply for authoring them. The fact they were read out loud in front of a jury may have been punishment enough.

While courts should, in fairness, refrain from using rap lyrics as evidence, artists should absorb some of the blame for failing to do anything original. The least rappers could do is come up with new slang to keep judges and jurors alike in the dark about what is actually being discussed in the lyrics. But instead we continue to see the same old, same old. Darwinism suggests that rappers who are unable to heed this advice and adapt to a judiciary who uses their raps against them, will pay the ultimate price by catching a stint in the bing—all because of an inability to be original. See URBAN DICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=the%20bing> (last visited Dec. 5, 2010) (defining “bing” as a “prison or jail” —well before Microsoft came along and tried to compete with Google (bing.com)).

257. APATHY, *When You Need Me*, on THE SOUND AND THE FURY (Babygrande Records 2006), lyrics available at <http://www.lyricsreg.com/lyrics/vinnie+paz/When+You+Need+Me/>.

258. CAM’RON, *Where I Know You From*, on CRIME PAYS (Diplomat Records 2009), lyrics available at http://www.lyricsbay.com/where_i_know_you_from_lyrics-camron.html.

259. The law’s treatment of rap over the years would suggest that if one raps, he or she should consider giving it up, or at least not rap about anything remotely controversial. Some

rappers have contemplated branching out into other facets of the music industry, such as singing, to avoid this problem. "I guess this all a part of God's plan. / Beware of the beast undercover in the marked van. / If you a smart man, use your voice to sing./ Cause that's the only f--king way to avoid the bing!" JEDI MIND TRICKS, *The Worst*, on LEGACY OF BLOOD (Babygrande Records 2004), lyrics available at <http://www.sing365.com/music/lyric.nsf/The-Worst-lyrics-Jedi-Mind-Tricks/8BFD0B754D1C68414825720300147090>.