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ART AND EVIDENCE: JUDICIAL TOOLS FOR DETERMINING THE ADMISSIBILITY OF RAP LYRICS IN CRIMINAL TRIALS

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ABSTRACT

When rap lyrics or videos are offered as evidence in a criminal proceeding, trial judges must determine whether the material is admissible. This decision-making process may be complex and/or nuanced, since it involves principles of substantive law, evidentiary rules, trial procedure, societal norms, and biases all at once. With this Article, the authors seek to help readers better understand the process by discussing these components in the context of this work. The authors propose that assessing rap content for admissibility in criminal trials calls for a sincere application of the tools and methods already available to trial judges, and a heightened awareness of the potential that societal biases may unduly influence the outcome.

The authors argue that this decision-making process is a distinctly judicial practice, as it turns on the individualized evaluation of the evidence and circumstances in a particular case. This Article discusses the attempt of some states to regulate the admissibility of rap content with legislation (proposed in some, enacted in others). The authors classify this legislation as employing either an instructive approach, which

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guides trial judges through careful assessment of the evidence, or a preclusive approach, which seeks to exclude material based on categorical designations. The authors argue that any legislative intervention in this internal judicial process should be instructive.

Overall, this Article intends to support trial judges as they endeavor to promote fairness in the trial process. To this end, Section III of this Article provides a series of questions distilled from the voluminous case law on the topic, evidentiary principles, and observations about the common themes of the rap genre. These questions serve as a guide for trial judges as they assess the probative value and prejudicial effect of the proffered evidence, and helps navigate constitutional objections.

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INTRODUCTION

In a murder trial, the prosecutor alleges that the victim’s fatal shooting was gang related and done in retaliation for an earlier shooting.¹ As evidence, the prosecutor offers a YouTube video of the defendant performing a song in the gangster rap style. The video is professionally produced and conforms to many themes common in gangster rap,² including posing with firearms and cash and bragging about drug dealing and graphic violent acts.³ The prosecutor alleges that the defendant’s rap lyrics name specific locations where local gangs sell drugs, refer to gang members by name, and contain threats to murder the victim.⁴ The prosecution argues that the video shows that both the

1. This hypothetical scenario is an amalgamation of facts from cases Judge Campbell has heard as a trial judge or read in judicial opinions, and should not be considered commentary on any particular case.

2. The use of rap lyrics as evidence is often criticized because “the style of rap music . . . is (in)famous for its exaggerated, sometimes violent rhetoric,” which has evolved from the “black musical and storytelling traditions dating back centuries.” Motion for Leave to File Brief as Amici Curiae and Brief of Amici Curiae Michael Render (“Killer Mike”), Erik Nielson, and Other Artists and Scholars in Support of Petitioner at 13, 19, *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019) (No. 18-949), 2019 WL 1115837 [hereinafter *Brief of Artists and Scholars*]; see also Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 18 (2007) (noting that the commercialization of rap music has led to a genre that “espouses a youthful male dominance and superiority, romanticizes and glorifies crime, violence, drugs, and cars, and objectifies and marginalizes women”).

3. See *United States v. Williams*, 663 F. Supp. 3d 1085, 1100–05 (D. Ariz. 2023) (providing Professor Erik Nielson’s testimony about common themes and images in modern rap videos).

4. See *id.*

victim and the defendant were involved in gang activity and that certain lines in the video show the defendant's motive for the murder.⁵

The defense argues that the video should not be admitted as evidence because the violent acts depicted will unfairly prejudice the jury.⁶ The defense contends that the video should be excluded as nonprobative because it is a work of fiction,⁷ and that the admission of gangster rap inserts racial bias into the trial.⁸ They further argue that the prosecution violates the defendant's constitutional right to free speech by criminalizing his artistic expression.⁹

The trial judge must now decide whether the video should be shown to the jury. On what basis should this decision be made? Should the state legislature make this determination instead of the trial judge?

The thorny questions raised by this scenario are far from hypothetical. Over the last three decades, courts have increasingly admitted rap lyrics or videos as evidence in criminal trials.¹⁰ In response, a movement has emerged opposing the admission of rap content as evidence, often categorically, arguing that its use is based on racial prejudice, misinterprets rap music, and violates free speech principles.¹¹ Recent trials of high-profile rap artists have thrust this issue into the public consciousness.¹² State and federal legislatures have now taken up the issue, passing and considering legislation to regulate the use of "creative expression" in criminal trials.¹³

The authors of this Article draw on Judge Campbell's experiences as a trial judge who has addressed these issues multiple times in his courtroom. There are legitimate

5. The use of rap lyrics as evidence of gang membership is a common feature in these cases. *See, e.g.*, *People v. Olguin*, 37 Cal. Rptr. 2d 596, 603–04 (Ct. App. 1994).

6. *See, e.g.*, *State v. Skinner*, 95 A.3d 236, 243 (N.J. 2014) ("Defendant emphasizes that . . . the lyrics read to the jury were disturbing, violent, and primarily written in the first person. He contends that their admission was highly prejudicial and served no purpose other than to inflame the passions of the jury.")

7. *See, e.g.*, *Commonwealth v. Knox*, 190 A.3d 1146, 1160 (Pa. 2018) ("Appellant and his *amici* argue [that] rap music often contains violent imagery that is not necessarily meant to represent an intention on the singer's part to carry through with the actions described. This follows from the fact that music is a form of art and [a]rtists frequently adopt mythical or real-life characters as alter egos or fictional personas." (second alteration in original) (quoting Dennis, *supra* note 2, at 23)).

8. *See, e.g.*, *United States v. Mills*, 367 F. Supp. 3d 664, 668 (E.D. Mich. 2019) (arguing that the government's "intended use of the rap lyrics/videos at issue is nothing short of unadulterated racism").

9. *See, e.g., id.* at 667 ("[T]he First Amendment protects freedom of speech and expression, including music, and the rap lyrics and videos at issue in this case are forms of artistic expression entitled to a heightened level of protection.")

10. A study conducted between 2012 and 2019 found 160 instances of prosecutors using rap lyrics as evidence. Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 90 (2019). Scholars generally trace the first such case to *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991). *See* Dennis, *supra* note 2, at 5–6.

11. *See generally* ERIK NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* (2019) (discussing the history of using rap content as evidence in trials and advocating for limits on its use).

12. *See, e.g.*, Joe Coscarelli, *Young Thug Lyrics Will Be Allowed as Evidence in YSL RICO Trial*, N.Y. TIMES (Nov. 9, 2023), <https://www.nytimes.com/2023/11/09/arts/music/young-thug-lyrics-ysl-rico-trial.html> (on file with the Temple Law Review).

13. *See infra* Part I.D.3.

concerns about using rap as evidence in criminal trials. In some instances the content has been excluded from trials.¹⁴ However, in other cases, the content has been admitted in evidence. This is because art and evidence are not mutually exclusive. For instance, threats and intimidation can be crimes, whether or not they are set to meter.¹⁵ Moreover, art can fairly be used as evidence of an actor's intentions, knowledge, associations, or other factors that could point toward their guilt, making the expressions admissible under the rules of evidence.¹⁶

Trial courts rely on the rules of evidence¹⁷ to administer proceedings fairly, ascertain the truth, and secure a just determination.¹⁸ These principles support two basic conclusions: (1) that the admission of evidence at trial must be consistent with the trial's truth-determining process; and (2) that the determination of admissibility should be a fact-specific, case-by-case exercise. To achieve these principles, the rules of evidence require that evidence is only admissible if it has probative value that is not outweighed by the risk of unfair prejudice to the defendant.¹⁹

These core evidentiary principles are intended to apply to all modes of human expression. The potentially unjust use of rap lyrics against defendants in criminal cases is not due to the absence of a valid method of assessment for their admissibility. Rather, the challenge rests in the unique difficulties of assessing the probative value and prejudicial potential of rap content, and the presiding trial judge's ability to fairly apply evidentiary principles to a form of human expression that may be loaded with social judgments. Review of the relevant case law on the subject shows that courts apply evidentiary principles inconsistently to rap content: Some judges are laudably thorough,²⁰ while others have allowed juries to consider unfairly prejudicial rap content with little analysis.²¹

This Article offers two features. First, it aims to create a judicial tool to help judges assess the admissibility of rap content at trial. This tool consists of a series of questions that trial judges should consider when analyzing the probative value and prejudicial effect of rap content.²² These questions are derived from case law and rooted in the core principles underlying the rules of evidence.

Second, this Article offers a framework for understanding the efforts of state legislators to limit or regulate the use of rap content as evidence. There are essentially two approaches that legislators can take: preclusive or instructive. A preclusive approach involves legislation that sets out to limit the use of rap content as trial evidence in all or

14. See, e.g., *Commonwealth v. Gibson*, No. CP-51-CR-0006605-2013, 2014 Phila. Ct. Com. Pl. LEXIS 537, at *15 (Pa. Ct. C.P. Phila. Cnty. Jan. 5, 2015).

15. See *infra* Part I.B.1.

16. See *infra* Part I.C.1.

17. Generally, state rules of evidence are modeled on the Federal Rules of Evidence and contain similar or identical language. For simplicity, this Article will refer to the state and federal rules interchangeably, as their principles are generally the same.

18. FED. R. EVID. 102.

19. See *infra* Part I.C.2; FED. R. EVID. 401, 403, 404(b).

20. See, e.g., *United States v. Williams*, 663 F. Supp. 3d 1085, 1132–57 (D. Ariz. 2023).

21. See, e.g., *Baker v. State*, 899 S.E.2d 139, 141 (Ga. 2024) (finding that the trial court's admission of a rap video was an abuse of discretion that merited a new trial).

22. *Infra* Part III.A.

most cases, either by outright prohibition or by setting demanding procedural hurdles that are likely to result in *de facto* prohibition. This approach is categorical, deeming all rap or artistic content equally significant in all cases, regardless of the factual and legal contexts in which it is offered. This one-dimensional approach may undermine the truth-determining function of criminal trials by depriving juries of evidence that is relevant and admissible under well-established legal principles and methodology.

By contrast, an instructive approach seeks to guide trial judges as they assess the admissibility of rap content by refining the inquiries related to probative value and prejudicial effect, and by establishing a consistent process for determining admissibility. This approach recognizes that trial judges are uniquely positioned to evaluate the facts of each case, and that the danger of unfair prejudice warrants heightened scrutiny of this emerging type of evidence.

This Article proceeds in several parts. Section I discusses the historical background of the use of rap content as trial evidence, reviews case law interpreting the admissibility of rap content, and considers the attempts by legislators to restrict the admission of rap content as evidence. Section II presents a suggested framework for legislators who are considering regulating the admissibility of rap content—distinguishing between instructive or preclusive approaches and comparing the approaches taken by appellate courts to those being considered by legislators. Finally, Section III lays out a roadmap that trial judges can use to assess the admissibility of rap content in a particular case by presenting questions that the judge should answer about the evidence at issue.

We conclude by proposing that any legislative intervention should, first and foremost, avoid undermining the truth-determining purpose of trials. Well-meaning attempts to address the potential of abusive or improper admission of rap content should not result in preemptive statutory exclusions that replace critical, case-by-case analysis. Indiscriminate preclusions can lead to a “tail wagging the dog” effect that is contrary to the fundamental fairness expected from the trial process. Thus, any legislation on the matter should be instructive, with the goal of supporting trial judges’ ability to make case-specific determinations that rely on tried-and-true methods to determine admissibility.

I. BRIEF HISTORY OF THE USE OF RAP AS EVIDENCE

Hip-hop is a cultural and artistic movement that emerged in the 1970s from impoverished urban Black communities and encompasses a wide range of artistic mediums, including music, dance, and graffiti.²³ Rap, a subgenre of hip-hop rooted in Black musical and storytelling traditions,²⁴ has become one of the most popular musical genres in the United States.²⁵ As rap evolved, it focused on common artistic themes, such

23. Brief of Artists and Scholars, *supra* note 2, at 5–7.

24. *Id.* at 13. This is not to diminish the important contributions of Latino and Latina artists, and artists from many other cultures on the genre. See Geoff Harkness, *Hip Hop Culture and America’s Most Taboo Word*, CONTEXTS, Aug. 2008, at 38, 41 (“Though hip hop is sometimes portrayed as having grown strictly out of African American culture, in reality it was the product of [B]lack interaction with a variety of ethnic groups, including large numbers of Latinos, particularly Puerto Ricans.”); e.g., Lucas Villa, *Hip-Hop’s 50th: The Latinos Who Shaped the Genre*, LATINA (Aug. 11, 2023), <https://latina.com/hip-hops-50th-the-latinos-who-shaped-the-genre/> [https://perma.cc/P3KN-MDN7].

25. Brief of Artists and Scholars, *supra* note 2, at 5–7.

as fictionalized first-person accounts of crime and poverty, opposition to police brutality, and political commentary and protest.²⁶ Increased commercialization elevated “gangster rap,” which “espouses a youthful male dominance and superiority, romanticizes and glorifies crime, violence, drugs, and cars, and objectifies and marginalizes women,” to become the most successful subgenre.²⁷ As a collection of artists, scholars, and advocates recently described in an amicus brief to the Supreme Court of Pennsylvania, the rap genre “draws strength by ‘shattering taboos, sending up stereotype, and relishing risqué language and subject matter.’”²⁸

The rise of social media, coupled with the massive popularity of the rap genre, has facilitated an ever-increasing number of aspiring artists to publish rap videos online.²⁹ These videos are often professionally produced, sometimes including multiple rappers or artists performing work written by others.³⁰ Rap videos often feature locations frequented by the rapper and film the rapper’s friends and associates.³¹ Rap commonly depicts gang violence, crime, drug use and sales, the objectification of women, and includes racial slurs.³² Gun violence is one of the most prominent themes, with rappers often filming themselves with weapons and including “highly specific” descriptions of firearms.³³ Also common are “beefs,” where rappers insult or threaten rivals.³⁴

A central thematic undercurrent in rap is animosity toward police and tension between Black communities and law enforcement. One of the most famous examples is the 1988 song by N.W.A. called “Fuck Tha Police,” which comments on police brutality by depicting an inverted trial of a police officer prosecuted by the rappers.³⁵ The song infuriated law enforcement and set off political and police efforts to censor both the song

26. *See id.* at 7–17.

27. Dennis, *supra* note 2, at 18. Notably, this description was not written by a stodgy politician or bigoted media figure but by a noted scholar and advocate for restricting the use of rap as evidence. *See, e.g.*, Bryant v. State, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004) (noting that the lyrics at issue “contain profanity, racial slurs, degrading references to women and references to murder and drug use”), *aff’d sub nom.*, Bryant v. Brown, 873 F.3d 988 (7th Cir. 2017); United States v. Williams, 663 F. Supp. 3d 1085, 1100–04 (D. Ariz. 2023) (discussing testimony of Professor Nielson regarding the common themes of glorifying crime, drugs, and violence, and objectifying women in rap).

28. Brief of Artists and Scholars, *supra* note 2, at 14 (quoting Henry Louis Gates Jr., *Foreword* to ADAM BRADLEY & ANDREW DUBOIS, *THE ANTHOLOGY OF RAP* xxv–vi (Adam Bradley & Andrew DuBois eds., 2010)).

29. *Williams*, 663 F. Supp. 3d at 1102 (discussing testimony of Professor Nielson).

30. *Id.* at 1103, 1105.

31. *See, e.g.*, United States v. Graham, 293 F. Supp. 3d 732, 737 (E.D. Mich. 2017).

32. *See, e.g., id.*; United States v. Herron, No. 10-CR-0615, 2014 WL 1871909, at *1–2 (E.D.N.Y. May 8, 2014) (describing the videos at issue); United States v. Gamory, 635 F.3d 480, 488 (11th Cir. 2011) (“The video shows the rap artist Tone Flowa singing a rap song that contained explicit lyrics dealing with drugs, sex, profanity, degradation of women, firearms, and threats of violence against the police and public.”); United States v. Wiley, 610 F. Supp. 3d 440, 443 (D. Conn. 2022) (“The videos, each published to YouTube . . . [show the defendant] holding unknown sums of cash, sitting in or near various luxury vehicles, and performing rap songs that include lyrics laced with profanities, describing drug distribution, [the defendant’s] claimed wealth and gambling losses, and other content about [his] life.”), *aff’d*, 726 F. App’x 25 (2d Cir. 2019).

33. *Williams*, 663 F. Supp. 3d at 1101.

34. *Id.*

35. N.W.A., *Fuck Tha Police*, on Straight Outta Compton (CD, Ruthless Recs. Aug. 8, 1988); *see also* Brief of Artists and Scholars, *supra* note 2, at 9–11 (discussing the history and impact of this song).

and its sentiment.³⁶ These efforts were ultimately unsuccessful and “the phrase ‘fuck the police’ is now common in rap music, both as a way to acknowledge N.W.A.’s song and to extend the group’s criticism of police.”³⁷

Rap also created and popularized the “[s]top [s]nitching” movement in the early 2000s, which casts cooperation with the police—by anyone—as an act of disloyalty punishable by violence.³⁸ Stop snitching content in rap is often coupled with explicit threats of violent retribution against anyone who cooperates with criminal investigations.³⁹ One study of over one thousand rap songs concluded that in cases of snitching, “violent retaliation is portrayed as punishment and is characterized as . . . not only appropriate but also obligatory.”⁴⁰

Given the simmering tensions between the police and the Black communities where rap originated, and the genre’s often violent and transgressive themes, it is perhaps unsurprising that these artistic works began appearing as police-obtained evidence in criminal trials. *United States v. Foster* is often cited as the first example.⁴¹ *Foster* featured many issues that remain relevant in modern cases and has been cited over one hundred times in courts around the country.⁴²

The defendant Foster was arrested at Chicago’s Union Station when a large, heavy suitcase he was carrying burst open, spilling white powder in front of two Drug Enforcement Administration agents.⁴³ When the officers searched his luggage, they found a kilogram of cocaine, a five-gallon can of phencyclidine (PCP), and a handwritten notebook containing a rap verse: “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.”⁴⁴

Foster’s defense was that the suitcase did not belong to him and that he did not know what it contained.⁴⁵ The prosecutors sought admission of the rap lyrics to prove

36. Brief of Artists and Scholars, *supra* note 2, at 8–11.

37. *Id.* at 17.

38. Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1264–68 (2011).

39. See *Jordan v. State*, 212 So. 3d 836, 858 (Miss. Ct. App. 2015) (Fair, J., dissenting) (“Violence and retribution are spectacularly common themes in rap music. . . . For snitching in particular, ‘rappers are not at all reluctant to administer capital punishment.’ ‘Entire songs may be devoted to warning others about the repercussions of snitching and testifying.’ Other scholars have observed that ‘[a]rguably, the anti-snitching message has emerged as a central theme within hip-hop.’” (second alteration in original) (citations omitted)), *aff’d by an equally divided court*, 212 So. 3d 817 (Miss. 2016). Notably, Judge Fair used this evidence to argue against the relevance of admitting rap lyrics at trial. *Id.*

40. Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 367–68, 374 (2005).

41. 939 F.2d 445 (7th Cir. 1991); see Dennis, *supra* note 2, at 5 (discussing *Foster* and identifying it as the first case where rap lyrics were used as evidence).

42. *Shepard’s® Citing Decisions Analysis*, *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991), LEXIS, <https://plus.lexis.com/shepards/shepardspreviewpod?pdshrepid=urn:contentItem:7XWP-6PH1-2NSD-N4HT-0000-00&crd=7163b91e-dfb2-4884-bad0-8b924764b364&lashepardsid=0f74bc60-4f49-4ce1-8619-a23a8fb4081a-1&pdshpepat=citingref#/citingref/0f74bc60-4f49-4ce1-8619-a23a8fb4081a-1> (on file with the Temple Law Review) (last visited Jan. 30, 2025).

43. *Foster*, 939 F.2d at 448.

44. *Id.* at 449 (alteration in original).

45. *Id.*

that Foster was a drug dealer.⁴⁶ The trial court admitted the lyrics but limited the scope of their use, noting that the lyrics did not “establish that the defendant is, in fact, the biggest dope dealer” but that the lyrics could be used to show his intent in carrying the suitcase and knowledge of its contents.⁴⁷

On appeal, the Seventh Circuit upheld this approach, concluding that the verse “indicated, at a minimum, 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.”⁴⁸ Further, the court noted that the relevance of the lyrics increased because Foster’s knowledge of the suitcase’s contents was the primary issue disputed at trial.⁴⁹

Foster argued that the lyrics could not be relevant to his guilt because they were fictitious.⁵⁰ The Seventh Circuit disagreed, finding that fictional writings were not per se inadmissible.⁵¹ To support this conclusion, the court distinguished between direct evidence of Foster’s guilt and evidence of Foster’s knowledge:

[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 [sic] Poe had tortured someone. It was, instead, the equivalent of admitting *The Godfather* to illustrate Puzo’s knowledge of the inner workings of an organized crime family and admitting “The Pit and the Pendulum” to illustrate Poe’s knowledge of medieval torture devices.⁵²

The court also rejected Foster’s argument that admitting the verse would unfairly prejudice the jury against him.⁵³ While it was possible that the jury could draw either proper or improper inferences from the lyrics,⁵⁴ the appellate court upheld the trial judge’s decision because “assessing the relative impact of these inferences, and any accompanying potential for unfair prejudice, . . . requires a contemporaneous assessment of the presentation, credibility, and impact of the challenged evidence. The district court [judge] is thus uniquely suited to that task.”⁵⁵

In the decades following *Foster*, prosecutors have sought to introduce rap lyrics in a wide array of contexts.⁵⁶ Prosecutors have offered lyrics as confessions;⁵⁷ as evidence of a defendant’s motive;⁵⁸ as evidence of gang affiliation or association between

46. *Id.* at 455.

47. *Id.* (quoting the trial court’s jury instruction that deemed the defendant’s rap lyrics admissible to prove knowledge or intent of the crime).

48. *Id.*

49. *Id.*

50. *Id.* at 456.

51. *See id.* (citing *State v. Hanson*, 731 P.2d 1140 (Wash. Ct. App. 1987)).

52. *Id.*

53. *Id.* at 456–57.

54. *Id.* at 457.

55. *Id.* (internal quotation marks omitted) (quoting *United States v. York*, 933 F.2d 1343, 1352 (7th Cir. 1991)).

56. *See generally* Lutes et al., *supra* note 10 (collecting and analyzing cases).

57. *See, e.g.*, *United States v. Stuckey*, 253 F. App’x 468, 475 (6th Cir. 2007); *Daniels v. Lewis*, No. C 10-04032, 2013 WL 183968, at *10 (N.D. Cal. Jan. 17, 2013).

58. *See, e.g.*, *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015).

defendants and/or victims;⁵⁹ as evidence of a criminal enterprise in Racketeer Influenced and Corrupt Organizations Act (RICO) cases;⁶⁰ to rebut a defendant's testimony of their peaceable character;⁶¹ to prove possession of firearms, drugs, or stolen property;⁶² and to prove witness intimidation and terroristic threats.⁶³ Defendants have also introduced rap lyrics as evidence of innocence.⁶⁴ While the contexts of these cases are tremendously varied, determining the admissibility of the rap contents breaks down into two distinct paths: the protections of the First Amendment and the rules of evidence.

A. *Distinguishing First Amendment Cases from Evidentiary Cases*

When rap content is itself alleged to be an illegal act, the court must consider whether the rapper can be prosecuted for the content or speech without violating the First Amendment.⁶⁵ However, when rap content is offered as evidence to prove *other* illegal conduct by the rapper, First Amendment concerns subside, and the admissibility of the rap content depends instead on the rules of evidence.⁶⁶ Any assessment of the admissibility of rap content in a particular case must start with distinguishing these two contexts. Accordingly, any attempt by legislators to regulate the admission of rap content by trial courts must begin with an understanding of the different issues raised by these two types of cases.

Critics of the use of rap content in criminal trials often focus on concerns related to free speech and the First Amendment.⁶⁷ However, First Amendment protections are only at issue in a minority of cases where the rap content itself is the alleged illegal conduct, such as in the context of witness intimidation or terroristic threats.⁶⁸

59. See, e.g., *People v. Olguin*, 37 Cal. Rptr. 2d 596, 603 (Ct. App. 1994); *United States v. Williams*, 663 F. Supp. 3d 1085, 1099 (D. Ariz. 2023); *United States v. Wiley*, 610 F. Supp. 3d 440, 444 (D. Conn. 2022).

60. See, e.g., *United States v. Mills*, 367 F. Supp. 3d 664, 668 n.7 (E.D. Mich. 2019).

61. See, e.g., *Commonwealth v. Hawkins*, No. 1184 MDA 2012, 2014 WL 10986149, at *12 (Pa. Super. Ct. Feb. 7, 2014); *Hannah v. State*, 23 A.3d 192, 194–96 (Md. 2011).

62. See, e.g., *United States v. Dore*, No. 12 Cr. 45, 2013 WL 3965281, at *8 (S.D.N.Y. July 31, 2013); *United States v. Houston*, 205 F. Supp. 2d 856, 865 n.6 (W.D. Tenn. 2002), *aff'd*, 110 F. App'x 536 (6th Cir. 2004).

63. See, e.g., *Elonis v. United States*, 575 U.S. 723, 727, 731 (2015); *Jones v. State*, 64 S.W.3d 728, 730–31 (Ark. 2002).

64. See, e.g., *People v. Melendez*, 384 P.3d 1202, 1217–18 (Cal. 2016); *United States v. Muschette*, 392 F. Supp. 3d 282, 288–89 (E.D.N.Y. 2019), *aff'd sub nom.*, *United States v. Ramsey*, No. 20-860, 2021 WL 5022640 (2d Cir. Oct. 29, 2021); *People v. Bush*, 234 N.E.3d 754, 774 (Ill. 2023); *Commonwealth v. Lehman*, 275 A.3d 513, 522 (Pa. Super. Ct. 2022); *State v. Leslie*, No. 12–1335, 2014 WL 70259, at *6 (Iowa Ct. App. Jan. 9, 2014).

65. See, e.g., *Commonwealth v. Knox*, 190 A.3d 1148, 1151, 1153–58 (Pa. 2018).

66. See, e.g., *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (rejecting the defendant's First Amendment challenge because the rap video and tattoos were used as evidence of participation in a RICO enterprise, not as the proscribed conduct itself).

67. See, e.g., Ryan J. Bennett, *Rappers' Rhymes Are Not Admissions to Crimes: Eliminating the Unlawful Use of Rap Lyrics Against Rappers in Criminal Proceedings*, 48 OHIO N.U. L. REV. 1, 2 (2021).

68. See, e.g., *Elonis v. United States*, 575 U.S. 723, 727 (2015); *Jones v. State*, 64 S.W.3d 728, 730–31 (Ark. 2002).

Far more common are cases like *Foster*, where rap is purported to be evidence of other acts rather than the speech being an illegal act in and of itself.⁶⁹ The central issues in these cases are based on the rules of evidence and whether the specific facts of the case make the rap content relevant and admissible. Defendants commonly argue that using their art as evidence of other crimes violates the First Amendment by criminalizing their speech.⁷⁰ These arguments misinterpret First Amendment law.⁷¹ Music is speech protected by the First Amendment.⁷² But the Supreme Court has noted: “The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.”⁷³

However, the First Amendment does prohibit admitting “evidence of a defendant’s abstract beliefs . . . when those beliefs have no bearing on the issue being tried.”⁷⁴ When prosecutors introduce rap as evidence of independent illegal conduct, the constitutional question is whether they offered it for a permissible purpose under the rules of evidence or to impermissibly show defendant’s unrelated beliefs to portray the defendant in a negative light.⁷⁵ In effect, the evidentiary question subsumes the constitutional question. If rap content is relevant and admissible under the rules of evidence, then its use does not violate the First Amendment.⁷⁶ While admitting inadmissible rap would violate the First Amendment, the rules of evidence already exclude its use.⁷⁷

B. *Rap That Is a Crime*

Defendants often raise both constitutional and evidentiary challenges to the admission of rap content. Courts can usually determine which arguments have merit based simply on the charges—unless the defendant is charged with making illegal

69. *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) (admitting a rap verse as evidence of the defendant’s knowledge of narcotics trafficking, not to prove that he was “the biggest dope dealer”).

70. *See, e.g., United States v. Herron*, No. 10-CR-0615, 2014 WL 1871909, at *2 (E.D.N.Y. May 8, 2014), *aff’d*, 762 F. App’x 25 (2d Cir. 2019); *United States v. Williams*, 663 F. Supp. 3d 1085, 1132 (D. Ariz. 2023); *United States v. Wiley*, 610 F. Supp. 3d 440, 443 (D. Conn. 2022).

71. *See, e.g., United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (rejecting a First Amendment challenge because “the speech is not ‘itself the proscribed conduct’” (quoting *United States v. Caronia*, 703 F.3d 149, 161 (2d Cir. 2012))); *State v. Garlington*, No. P1-2017-0542 A&B, 2020 R.I. Super. LEXIS 42, at *12 (Super. Ct. May 21, 2020) (“[T]he First Amendment does not prohibit the evidentiary use of protected speech, subject to the applicable rules of evidence. Rap lyrics, like other protected speech, may be used by the prosecution to establish the elements of a crime or to prove motive or intent.”); *United States v. Graham*, 293 F. Supp. 3d 732, 736 (E.D. Mich. 2017) (explaining that the use of rap lyrics would implicate the First Amendment only if the lyrics were not relevant to the case).

72. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

73. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

74. *Dawson v. Delaware*, 503 U.S. 159, 168 (1992).

75. *Graham*, 293 F. Supp. 3d at 736 (quoting *United States v. Fell*, 531 F.3d 197, 229 (2d Cir. 2008)); *Williams*, 663 F. Supp. 3d at 1132.

76. *Williams*, 663 F. Supp. 3d at 1132.

77. *United States v. Garnes*, No. 14-20119, 2015 WL 3574845, at *2 n.1 (E.D. Mich. June 5, 2015) (citing *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015)).

threats, First Amendment claims can usually be rejected.⁷⁸ But when the defendant's speech itself is alleged to be a criminal act, courts must ensure that the charges do not violate the defendant's right to free speech.⁷⁹

Under the First Amendment, which applies to states through the Fourteenth Amendment, "the government generally lacks the authority to restrict expression based on its message, topic, ideas, or content."⁸⁰ First Amendment protections cover a broad range of expressions "including art, poetry, film, and music" and "apply equally to cultured, intellectual expressions and to crude, offensive, or tawdry ones."⁸¹ However, First Amendment protections are not absolute.⁸² Governments may restrict speech and expression with "such slight social value" that the benefits of protecting the speech are "clearly outweighed by the social interest in order and morality."⁸³ Categories of speech and expressive acts that the government can restrict based on their content include incitement to imminent lawlessness, fighting words, defamation, fraud, obscenity, and speech integral to criminal conduct.⁸⁴ The most relevant First Amendment exception when rap content is alleged to be illegal conduct is the true threats doctrine.⁸⁵

1. The True Threats Doctrine

"True threats" are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."⁸⁶ The Supreme Court established the true threats doctrine in the 1969 case *Watts v. United States*, which distinguished "political hyperbole" (protected) from "true threat[s]" (unprotected), based on the context of a particular statement.⁸⁷ The Court highlighted several factors for identifying true threats, including whether a threat is conditional, the reaction of the listeners, and the fact that political language is "often vituperative, abusive, and inexact."⁸⁸

78. See, e.g., *United States v. Donald*, No. 21-cr-8, 2023 WL 6958797, at *22 (D. Conn. Oct. 20, 2023) (noting that the defendant's First Amendment argument "should not detain the Court for very long").

79. See, e.g., *Commonwealth v. Knox*, 190 A.3d 1146, 1153–54 (Pa. 2018); *Commonwealth v. Bollinger*, No. 611 EDA 2018, 2020 WL 7312196, at *10 (Pa. Super. Ct. Dec. 11, 2020); *People v. Murillo*, 190 Cal. Rptr. 3d 119, 120 (Ct. App. 2015); *People v. Oduwole*, 985 N.E.2d 316, 317–21 (Ill. App. Ct. 2013); *State v. Baumgartner*, Nos. 89190, 91207, 91208, 2009 WL 344988, at *1, *6 (Ohio Ct. App. Feb. 12, 2009).

80. *Knox*, 190 A.3d at 1154 (citing *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

81. *Id.*

82. *Ashcroft*, 535 U.S. at 573.

83. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

84. *Knox*, 190 A.3d at 1154–55 (collecting cases).

85. See, e.g., *Jones v. State*, 64 S.W.3d 728, 733–34 (Ark. 2002); *Knox*, 190 A.3d at 1155; *People v. Murillo*, 190 Cal. Rptr. 3d 119, 124 (Ct. App. 2015). Rap music also appears in a separate First Amendment context when public schools discipline or expel students based on the content of rap lyrics. These cases are analyzed under the student-speech doctrine from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969); see, e.g., *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015). While these cases are worthy of further study, they are beyond the scope of this Article.

86. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

87. 394 U.S. 705, 708 (1969) (internal quotation marks omitted).

88. *Id.*

After *Watts*, state courts and federal circuit courts developed widely differing tests for identifying true threats.⁸⁹ Some courts used subjective tests focused on whether the person making the threat foresaw that the speech would be perceived as a threat.⁹⁰ Other courts established objective tests based on whether a reasonable person would view the statement as a true threat.⁹¹

The 2003 Supreme Court case *Virginia v. Black* addressed a law banning cross burning with the intent to intimidate.⁹² In a fractured opinion, the Court found that true threats do not require that the speaker “actually intend[s] to carry out the threat.”⁹³ Instead, “a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders,” and “protect[s] people from the possibility that the threatened violence will occur.”⁹⁴ Further, “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”⁹⁵

The Court next addressed true threats in *Elonis v. United States* in 2015, this time in the context of threats made in a rap song.⁹⁶ Defendant Elonis was a rapper and comedian who regularly posted on Facebook, interspersing edgy political commentary⁹⁷ with rap lyrics and other posts about murdering his wife, school children, and police officers.⁹⁸ After a series of events put him under police surveillance, which included threatening his former employer and a judge who granted his wife a restraining order, Elonis was eventually convicted for making illegal threats after he posted rap lyrics threatening an FBI agent who had visited his house.⁹⁹

The Supreme Court overturned his conviction but ultimately ducked considering the First Amendment,¹⁰⁰ focusing on common law principles, which generally require criminal statutes to include a subjective mental state element to “separate wrongful

89. *Jones*, 64 S.W.3d at 734–35 (collecting cases).

90. *See id.* at 734 (citing *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997)).

91. *See id.* at 735 (citing *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)).

92. 538 U.S. 343, 347 (2003).

93. *Id.* at 360.

94. *Id.* (first alteration in original) (internal quotation marks omitted) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

95. *Id.*

96. 575 U.S. 723, 731–32 (2015).

97. *Id.* at 726, 728 (discussing Defendant Elonis’s version of the skit, “It’s Illegal to Say,” in which he explained how it was illegal to say that he wanted to kill his wife, but not illegal to say it was illegal to say so).

98. *Id.* at 729. Elonis’s posts regarding his wife were particularly graphic, such as writing that he wanted to murder his wife, put her head on a stick, and “bust this nut all over [her] corpse.” *United States v. Elonis*, 841 F.3d 589, 598 (3d Cir. 2016) (alteration in original) (upholding Elonis’s convictions on remand from the Supreme Court).

99. *Elonis*, 575 U.S. at 726–31. The jury convicted Elonis under 18 U.S.C. § 875(c). *Id.* at 726.

100. The majority opinion by Chief Justice Roberts states that it was “not necessary to consider any First Amendment issues,” *id.* at 740, despite significant discussion of First Amendment issues in a dissent by Justice Alito, *id.* at 746–48 (Alito, J., concurring in part and dissenting in part).

conduct from ‘otherwise innocent conduct.’”¹⁰¹ The Court found that threats can be identified objectively.¹⁰²

[A]n anonymous letter that says “I’m going to kill you” is “an expression of an intention to inflict loss or harm” regardless of the author’s intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.¹⁰³

However, the Court found that the principle that “wrongdoing must be conscious to be criminal” required a level of subjective intent greater than negligence for a threat to become illegal,¹⁰⁴ indicating that a conviction for true threats requires both a subjective and objective component.

Finally, in 2023, *Counterman v. Colorado* established recklessness as the required mental state for true threats.¹⁰⁵ Convictions for true threats must include proof that “the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.”¹⁰⁶ In this context, recklessness means “a speaker is aware ‘that others could regard his statements as’ threatening violence and ‘delivers them anyway.’”¹⁰⁷ The Court likened this standard to the *New York Times Co. v. Sullivan* standard in defamation cases, finding that a recklessness standard balanced the competing interests in preventing self-censorship and protecting victims from threats of violence.¹⁰⁸

2. Applying the True Threats Doctrine to Cases Involving Rap Content

Because the true threats doctrine shifted multiple times during the decades when rap songs started appearing in true threats cases, the precedential value of cases upholding convictions under the true threats doctrine prior to *Counterman* must be carefully assessed. However, considering these cases in light of the recklessness standard announced in *Counterman* suggests an approach for analyzing future cases. This proposal is discussed in Part III.A.1.

An early example of a rap prosecuted as a true threat is *Jones v. State*, which reached the Arkansas Supreme Court in 2002.¹⁰⁹ Jones and Arnold were high school friends who began to drift apart due to Jones’s repeated trips to juvenile detention.¹¹⁰ Jones regularly wrote poetry and raps that he read to Arnold, some of which contained violent language, but none of which were directed at anyone in particular.¹¹¹ One day, Jones passed a note

101. *Id.* at 734, 736 (majority opinion) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

102. *See id.* at 733.

103. *Id.*

104. *Id.* at 740–41 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)); *see also* *Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring) (urging the Court to address the unfinished business in *Elonis*, and noting that *Black* and *Elonis* “suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat”).

105. 143 S. Ct. 2106, 2111 (2023).

106. *Id.* at 2112.

107. *Id.* at 2117 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

108. *Id.* at 2115, 2118–19 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

109. 64 S.W.3d 728, 733 (Ark. 2002).

110. *Id.* at 730.

111. *Id.*

to Arnold in class, but she refused to write back.¹¹² Jones then wrote a rap including the following lines and gave it directly to Arnold later that day:

I'm a motherfuckin murderer, I slit my mom's throat and killed my sister. You gonna keep being a bitch, and I'm gonna cliché [click],
 My hatred and aggression will go towards you, you better run bitch, cuz I can't control what I do. I'll murder you before you can think twice, cut you up and use you for decoration to look nice,
 I've had it up to here bitch, there's gonna be a 187 on your whole family trik [trick],
 Then you'll be just like me, with no home, no friends, no money,
 You'll be deprived of life itself, you won't be able to live with yourself,
 Then you'll be six feet under, beside your sister, father, and mother,
 You'll be in hell, and I'll be in Jail, but I won't give a fuck cuz we all know I've been there before.¹¹³

Arnold immediately reported the rap to the school principal and later told a police officer that she felt scared because she believed that Jones was capable of carrying out the threats detailed in the rap.¹¹⁴ Jones told the principal and police officer that the rap was not a “big deal” because he was just modeling his writing after the rapper Eminem.¹¹⁵ Based solely on the rap, Jones was eventually adjudicated for “terroristic threatening.”¹¹⁶

On appeal, the Arkansas Supreme Court adopted a five-factor objective test to determine whether Jones's rap was an unprotected true threat, considering:

the reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.¹¹⁷

After applying these factors, the court upheld Jones's adjudication.¹¹⁸ However, the court never considered Jones's subjective intent behind the rap. Therefore, under the standards later announced in *Elonis* and *Counterman*, the conviction would have been unconstitutional.¹¹⁹ If the court had considered Jones's subjective intent, it would likely have been insufficient to uphold a conviction. Jones told the police that he “didn't understand why everyone was upset,” and the school principal testified at trial that “Jones

112. *Id.*

113. *Id.* (alterations in original).

114. *Id.* at 731.

115. *Id.*

116. *Id.* at 732. Arkansas law defines terroristic threatening as “[w]ith the purpose of terrorizing another person, the person threatens to cause death or serious physical injury . . . to another person.” ARK. CODE ANN. § 5-13-301(a)(1)(A) (West 2025).

117. *Jones*, 64 S.W.3d at 735 (quoting *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)).

118. *Id.* at 736–37.

119. *See Counterman v. Colorado*, 143 S. Ct. 2106, 2111–12 (2023) (“[T]he First Amendment . . . requires proof that the defendant had some subjective understanding of the threatening nature of his statements.”); *Elonis v. United States*, 575 U.S. 723, 734 (2015) (“The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that ‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’” (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952))).

seemed to have no understanding that his writing could frighten or harm another person.”¹²⁰ This testimony would have made it difficult for the prosecution to prove that Jones was “aware that others could regard his statements as threatening violence and deliver[ed] them anyway,” as required by *Counterman*.¹²¹

By contrast, in 2018, the Supreme Court of Pennsylvania in *Commonwealth v. Knox* employed an approach that would likely be upheld under *Counterman*.¹²² Codefendants Knox and Beasley were arrested by Officer Kosko and Detective Zeltner for attempting to flee from a traffic stop.¹²³ Heroin, cash, and a loaded stolen gun were recovered from Knox and Beasley and their vehicle.¹²⁴ While the multiple charges related to this event were pending, Knox and Beasley wrote and recorded a rap song titled “Fuck the Police,” which was posted on YouTube.¹²⁵ The video showed Knox and Beasley miming firing guns at the camera and included the following verses:

This first verse is for Officer Zeltner and all you fed force bitches
 And Mr. Kosko, you can suck my dick you keep on knocking my riches
 You want beef, well cracker I’m wit it, that whole department can get it
 All these soldiers in my committee gonna fuck over you bitches

 So now they gonna chase me through these streets
 And I’m a jam this rusty knife all in his guts and chop his feet
 You taking money away from Beaz and all my shit away from me
 Well your shift over at three and I’m gonna fuck up where you sleep.

 I ain’t carry no 38 dog, I spit with a tec
 That like fifty shots nigga, that’s enough to hit one cop on 50 blocks nigga

 And them informants that you got, gonna be layin’ in the box
 And I know exactly who workin’, and I’m gonna kill him wit a Glock
 Quote that.¹²⁶

Officer Kosko and Detective Zeltner, who were both scheduled to testify against Knox and Beasley in less than a month, reported feeling threatened by the video and took safety precautions.¹²⁷ Knox and Beasley were then arrested and charged with terroristic threats and witness intimidation.¹²⁸

120. *Jones*, 64 S.W.3d at 731.

121. *Counterman*, 143 S. Ct. at 2117 (internal quotation marks omitted) (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

122. *Commonwealth v. Knox*, 190 A.3d 1146, 1158–59 (Pa. 2018).

123. *Id.* at 1148.

124. *Id.*

125. “Fuck the Police” was uploaded to YouTube by a third party and linked to a Facebook page, where Knox and Beasley regularly shared their music, which was being monitored by the police. *Id.* at 1149–50.

126. *Id.* The lyrics were reproduced in full by the court. In the interest of brevity, this Article only reproduces the lines that were discussed in the court’s analysis.

127. *Id.* at 1149, 1151.

128. *Id.* at 1150; see 18 PA. STAT. AND CONS. STAT. §§ 4952(a), 2706(a)(1) (West 2025).

Knox appealed his conviction on the threats and intimidation charges, arguing that the rap was protected speech under the First Amendment.¹²⁹ The Supreme Court of Pennsylvania adopted a two-pronged approach to the true threats doctrine: first, considering Knox's subjective intent under *Black* and *Elonis*, and second, considering the objective contextual factors from *Watts*.¹³⁰ Based on this standard, the court upheld Knox's conviction.¹³¹

First, the court considered the rap lyrics to assess Knox's subjective intent, focusing primarily on the fact that Knox "mention[ed] Detective Zeltner and Officer Kosko by name, stating that the lyrics are 'for' them. [Knox] proceed[ed] to describe in graphic terms how he intend[ed] to kill those officers. In this way, the lyrics are both threatening and highly personalized to the victims."¹³² Further, the lyrics were specifically rooted in a recent interaction between Knox and the officers. "[T]he officers' interference with his drug-selling activities, together with the upcoming criminal proceedings at which the [officers] were scheduled to testify . . . , are stated in the lyrics to provide the primary motivation for [Knox's] desire to exact violent retribution."¹³³

Second, the court considered objective contextual factors derived from *Watts*—similar to those used in *Jones*—to assess "whether the speech conveys a serious expression of an intent to inflict harm."¹³⁴ The court noted that the threats were "mostly unconditional" and that the named officer reacted with fear and took safety measures, including obtaining security details while the other officer retired early.¹³⁵ Although the song was not directly communicated to the officers, the trial court found that Knox intended it to eventually reach them.¹³⁶ Further, the court found that the officers had reason to believe that Knox might engage in violence since the officers were aware that a loaded, stolen firearm was found in the car with Knox during the original incident.¹³⁷

129. *Knox*, 190 A.3d at 1152.

130. *Id.* at 1158. Since *Counterman* had not yet been decided, the court did not review Knox's subjective intent under a recklessness standard, instead reviewing the trial court's finding that Knox "acted with a subjective intent to terrorize or intimidate the officers in question." *Id.*

131. *Id.* at 1161.

132. *Id.* at 1159. Some of the court's other interpretations are rather dubious, though, such as their claim that the lyrics "do not include political, social, or academic commentary." *Id.* at 1158; see also Brief of Artists and Scholars, *supra* note 2, at 16–17 (discussing the political context of Knox's rap).

133. *Knox*, 190 A.3d at 1159.

134. *Compare id.* ("These factors include such items as whether the threat was conditional, whether it was communicated directly to the victim, whether the victim had reason to believe the speaker had a propensity to engage in violence, and how the listeners reacted to the speech."), with *Jones v. State*, 64 S.W.3d 728, 735 (Ark. 2002) ("When determining whether statements have constituted threats of force, we have considered a number of factors: the reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive." (quoting *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996))).

135. *Knox*, 190 A.3d at 1159.

136. *Id.* at 1160.

137. *Id.*

The court acknowledged:

[R]ap music often contains violent imagery that is not necessarily meant to represent an intention on the singer's part to carry through with the actions described. This follows from the fact that music is a form of art and "[a]rtists frequently adopt mythical or real-life characters as alter egos or fictional personas."¹³⁸

However, the court concluded that the naming of the officers "involved in [Knox's] criminal cases who were scheduled to testify against him, and the clear expression . . . that these officers are being selectively targeted in response to prior interactions with [Knox], stand in conflict with the contention that the song was meant to be understood as fiction."¹³⁹

C. Rap as Evidence of a Separate Crime

Despite the common argument often made by criminal defendants that the First Amendment precludes the admission of rap lyrics as evidence in criminal cases, constitutional considerations are not determinative in the majority of rap-as-evidence inquiries. Far more common are cases like *Foster*, where the rap content is not purported to be illegal in and of itself but is instead offered as evidence of separate illegal acts.¹⁴⁰ The central issues in these cases are two distinct inquiries: (1) whether the rap is relevant to the conduct the defendant is charged with¹⁴¹ and (2) whether the prejudicial nature of the rap evidence outweighs that relevance.¹⁴²

1. The Relevance of Rap Content as Evidence

Under Federal Rule of Evidence 401 or a state equivalent ("Rule 401"), "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."¹⁴³ Relevance is binary: Irrelevant evidence is inadmissible, and relevant evidence is admissible unless some other evidentiary rule or law excludes it.¹⁴⁴

138. *Id.* (second alteration in original) (quoting Dennis, *supra* note 2, at 23).

139. *Id.* at 1160–61.

140. *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) (admitting a rap verse as evidence to establish the defendant's knowledge of narcotics trafficking, not to prove that he was "the biggest dope dealer").

141. *See, e.g., Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004) (finding that the lyric "[e]juz the 5–0 won't even know who you are when they pull yo ugly ass out the trunk of my car" was relevant because Bryant was accused of murdering his stepmother and driving around with her dead body in the trunk), *aff'd sub nom.*, *Bryant v. Brown*, 873 F.3d 988 (7th Cir. 2017); *Brooks v. State*, 903 So. 2d 691, 700 (Miss. 2005) (finding that rap lyrics were not relevant because they described murder with a gun, while Brooks was accused of murder with a meat fork).

142. *See State v. Skinner*, 95 A.3d 236, 251–52, 253 (N.J. 2014) (establishing a framework for balancing the probative value of rap lyrics against their potential for unfair prejudice).

143. FED. R. EVID. 401. Generally, state rules of evidence are modeled on the federal rules and contain similar or identical language. For simplicity, this Article refers to the state and federal rules interchangeably, as their principles are generally the same.

144. FED. R. EVID. 402; David H. Kaye, *Digging into the Foundations of Evidence Law*, 115 MICH. L. REV. 915, 927 (2017); *Baker v. State*, 899 S.E.2d 139, 147 (Ga. 2024) (quoting *Harris v. State*, 875 S.E.2d 659, 681 (Ga. 2022)).

Generally, relevance is a low bar.¹⁴⁵ But the party offering the evidence must still identify a fact at issue that the evidence makes more or less likely. For example, in *United States v. Bey*, the defendant was charged with unlawful possession of a firearm, leading to the prosecution seeking to introduce into evidence a rap video of Bey's that referenced firearms.¹⁴⁶ The prosecution argued that the video proved Bey's "knowledge and absence of mistake," but the court found that the fact of Bey's knowledge was not at issue, because Bey was charged with simple possession.¹⁴⁷ If the government proved that Bey possessed a gun, then he was guilty, regardless of if he made a mistake or not.¹⁴⁸ Since there was no fact at issue that the video made more or less likely, it was irrelevant and inadmissible.¹⁴⁹

Relevant evidence breaks down further into two basic categories: intrinsic and extrinsic. Intrinsic evidence is relevant because it relates to the events of the alleged criminal conduct, either directly or as circumstantial evidence.¹⁵⁰ For example, in *United States v. Graham*, a rap video was admitted as intrinsic, direct evidence in a RICO case because the lyrics discussed multiple factual events related to the case, including outcomes of defendants' previous criminal trials, and because the video contained clips of local news coverage of a related murder.¹⁵¹ Courts have also considered rap as direct evidence when it closely resembled the facts of the defendant's alleged criminal conduct.¹⁵²

Rap content can also be circumstantial intrinsic evidence of a charged crime (as well as a potential separate crime) if the rapper uses their music to intimidate witnesses,¹⁵³ which is a distinct analysis from the true threats cases discussed in Part II.B.

145. *Montague v. State*, 243 A.3d 546, 564 (Md. 2020) (quoting *Williams v. State*, 179 A.3d 1006, 1013 (Md. 2018)); *see also* *United States v. Sneed*, No. 14 CR 00159, 2016 WL 4191683, at *5 (M.D. Tenn. Aug. 9, 2016) ("The standard for relevancy is 'extremely liberal.'" (quoting *United States v. Whittington*, 455 F.3d 736, 738 (6th Cir. 2006))).

146. No. 16-290, 2017 WL 1547006, at *3 (E.D. Pa. Apr. 28, 2017).

147. *Id.*

148. *Id.*

149. *Id.* at *4.

150. *See, e.g., Daniels v. Lewis*, No. C 10-04032, 2013 WL 183968, at *11 (N.D. Cal. Jan. 17, 2013) ("[T]he lyrics on their face directly evidence Petitioner's involvement in the crimes he was charged with."); *United States v. Norwood*, No. 12-CR-20287, 2015 WL 2343970, at *11 (E.D. Mich. May 14, 2015) ("[R]ap lyric evidence that provides direct proof against a defendant—such as an admission or details that are not generally known and dovetail with the facts of the case—should be analyzed for relevance under [Rule] 401 and evaluated under [Rule 403]'s standard for prejudice, and not the standard for prejudice under a [Rule 404(b)] analysis." (second, third, and fourth alterations in original) (quoting *State v. Skinner*, 95 A.3d 236, 249 n.5 (N.J. 2014))), *aff'd in part sub nom.*, *United States v. Gills*, 702 F. App'x 367 (6th Cir. 2017); *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013) (collecting cases that deemed rap lyrics admissible where "the lyrics describe[d] details that mirror[ed] the crime charged").

151. 293 F. Supp. 3d 732, 735–38 (E.D. Mich. 2017); *see also* Government's Supplemental Briefing at 2, *Graham*, 293 F. Supp. 3d 732 (No. 15-20652-05) (discussing the contents and relevance of the videos).

152. *See, e.g., United States v. Stuckey*, 253 F. App'x 468, 482 (6th Cir. 2007) ("Stuckey's lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street—precisely what the Government accused Stuckey of doing to [the victim] in this case. Therefore, the district court did not abuse its discretion by holding that the lyrics were relevant.").

153. *See, e.g., Montague v. State*, 243 A.3d 546, 565 (Md. 2020) (finding that rap lyrics with "stop snitching" content, released while the defendant is awaiting trial, can "make it more probable that the defendant

Such evidence is often considered to show “consciousness of guilt.”¹⁵⁴ For example, in *Jordan v. State*, the defendant Jordan appeared in a rap video centered on chasing down and murdering a former friend for providing the state with evidence.¹⁵⁵ The video was posted on YouTube while Jordan was awaiting trial.¹⁵⁶ Two witnesses who were scheduled to testify against Jordan saw and interpreted the rap video as a direct threat aimed at them.¹⁵⁷ The court held the video was relevant to the case because “evidence of a defendant’s attempt to keep a witness from testifying has probative value as an incriminating circumstance inconsistent with [the defendant’s] innocence.”¹⁵⁸

By contrast, extrinsic evidence—other acts not directly related to the alleged crime¹⁵⁹—can be relevant under Federal Rule of Evidence 404(b) or a state equivalent (“Rule 404(b)”) to show the defendant’s knowledge, intent, identity, or other factors that *indirectly* point toward their guilt.¹⁶⁰ This rule was used to find the defendant’s rap lyrics in *Foster* relevant, not to prove that he was “the biggest dope dealer” but to prove that he knew what was in his suitcase.¹⁶¹ Another example is *United States v. Dore*, in which a Mercedes-Benz was used during a robbery and subsequently the court admitted a rap video showing the defendant driving the same Mercedes, so as to prove that he had access to the vehicle.¹⁶² Courts have also admitted videos and lyrics featuring threats of violence against “snitches” under Rule 404(b) as evidence of motive or modus operandi in RICO cases.¹⁶³

However, these other acts are inadmissible under Rule 404(b) to “prove a person’s character in order to show that on a particular occasion the person acted in accordance with [their] character.”¹⁶⁴ The Supreme Court has described this inadmissible “propensity evidence” as improperly “generalizing a defendant’s earlier bad act into bad character and taking that as raising the odds that [the defendant] did the later bad act now charged.”¹⁶⁵

committed the crime”); *United States v. Castleman*, 795 F.3d 904, 915 (8th Cir. 2015) (recognizing that “evidence of death threats against witnesses” is considered “direct evidence of the crime charged” (quoting *United States v. Zierke*, 618 F.3d 755, 759 (8th Cir. 2010))).

154. *Montague*, 243 A.3d at 565 n.11.

155. 212 So. 3d 836, 841–42 (Miss. Ct. App. 2015), *aff’d by an equally divided court*, 212 So. 3d 817 (Miss. 2016).

156. *Id.* at 839.

157. *Id.* at 842, 846.

158. *Id.* at 842 (alteration in original) (internal quotation marks omitted) (quoting *Mattox v. State*, 137 So. 2d 920, 923 (Miss. 1962)).

159. See *United States v. West*, No. 18-249, 2019 U.S. Dist. LEXIS 183007, at *13–14 (E.D. Pa. Oct. 22, 2019) (discussing the difference between intrinsic and extrinsic evidence).

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

161. *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991).

162. No. 12 Cr. 45, 2013 WL 3965281, at *7–8 (S.D.N.Y. July 31, 2013).

163. *United States v. Norwood*, No. 12-CR-20287, 2015 WL 2343970, at *11 (E.D. Mich. May 14, 2015), *aff’d in part sub nom.*, *United States v. Gills*, 702 F. App’x 367 (6th Cir. 2017).

164. FED. R. EVID. 404(b)(1).

165. *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

A prime example of the principles guiding inadmissible propensity evidence is the case *Baker v. State*.¹⁶⁶ In a rap video (filmed months before the murder the defendant was charged with occurred) Baker did not sing but danced and waved a gun at the camera.¹⁶⁷ At trial, the prosecution used the video to argue that Baker promoted gun violence and was, therefore, more likely to be the shooter.¹⁶⁸ The Supreme Court of Georgia reversed Baker’s conviction, finding that the only link between him waving a gun in a rap video and his alleged motivation to commit the murder was “the video’s portrayal of Baker as a violent gunman—a link that essentially amounts to impermissible propensity evidence.”¹⁶⁹ The court concluded the video was evidence of “scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.”¹⁷⁰

The distinctions between using a defendant’s rap as intrinsic evidence (direct or circumstantial evidence of the crime) or as extrinsic evidence (evidence of the defendant’s motive, intent, or other permissible purpose under Rule 404(b)) can be difficult to parse in many cases.¹⁷¹ The prominence of these distinctions has grown as courts and legislatures increasingly restrict the use of rap lyrics as indirect evidence through Rule 404(b) analysis, but not when rap is used as direct evidence.¹⁷²

2. Weighing Probative Value Against the Risk of Unfair Prejudice

Once evidence is determined to be relevant and otherwise admissible, there is an additional step of the evidentiary analysis under Federal Rule of Evidence 403 or a state equivalent (“Rule 403”), which allows the court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice” to the defendant.¹⁷³ This Rule 403 analysis is the area where rap evidence is most unique and challenging to balance its probative or prejudicial value. The probative value of rap

166. 899 S.E.2d 139, 147–49 (Ga. 2024). Although the rap evidence constituted inadmissible propensity evidence, the court in *Baker* found that it should have been excluded under the state equivalent of Federal Rule of Evidence 403 rather than Rule 404(b). *Id.* at 151. However, courts also exclude rap evidence under Rule 404(b) if it fails to have a “non-propensity purpose[.]” *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *12 (E.D. Pa. Apr. 28, 2017). Ultimately, whether under Federal Rule of Evidence 403 or a state equivalent (“Rule 403”) or under Rule 404(b), the principle is the same: Propensity evidence should be excluded when its probative value is outweighed by the risk of unfair prejudice to the defendant. FED. R. EVID. 403.

167. *Baker*, 899 S.E.2d at 143, 149.

168. *Id.* at 150.

169. *Id.* at 149. The court also rejected several other grounds for probative value proposed by the State. *Id.* at 148–150.

170. *Id.* at 151 (quoting *Harris v. State*, 875 S.E.2d 659, 681 (Ga. 2022)).

171. For example, some courts consider witness intimidation to be direct evidence, while others analyze it under Rule 404(b). *Montague v. State*, 243 A.3d 546, 565 n.11 (Md. 2020).

172. *See, e.g.*, *State v. Skinner*, 95 A.3d 236, 249 n.5 (N.J. 2014); LA. R. EVID. 404(B)(1)(b)(ii).

173. FED. R. EVID. 403. Evidence can also be excluded under Rule 403 for “confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *Id.* But, based on the authors’ review of the case law, the most common issue in rap-as-evidence cases is unfair prejudice. Some cases analyze unfair prejudice under Rule 404(b), rather than Rule 403, but the analysis is generally similar. *See, e.g.*, *Commonwealth v. Correia*, 210 N.E.3d 407, 418–19 (Mass. 2023). The degree to which unfair prejudice must outweigh probative value varies by jurisdiction. *Compare* FED. R. EVID. 403 (requiring that unfair prejudice must “substantially outweigh” probative value), *with* PA. R. EVID. 403 (only requiring the danger of unfair prejudice to “outweigh” probative value).

content is unclear in many cases due to the difficulty of determining the extent to which a rap song is factual or fictitious.¹⁷⁴ Rule 403 analysis is often where defendants have had the most success in excluding rap evidence.¹⁷⁵

Rule 403 analysis requires two inquiries: First, identify the probative value of rap content for each proposition it is offered to prove and, second, weigh that probative value against the rap's potential for prejudice.¹⁷⁶ Both of these steps are highly dependent on the facts of the case and, to some degree, defy definitive answers¹⁷⁷ because they rely on subjective interpretations of "the presentation, credibility, and impact of the challenged evidence."¹⁷⁸

a. The Probative Value of Rap Evidence

Probative value is a gradient, in contrast to the binary of relevance.¹⁷⁹ The greater the tendency evidence has to make a disputed fact more or less probable, the greater its probative value.¹⁸⁰ The Supreme Court of Georgia noted in *Baker*:

[T]he extent to which evidence tends to make the existence of a fact more or less probable depends significantly on the quality of the evidence and the strength of its logical connection to the fact for which it is offered. Probative value also depends on the marginal worth of the evidence—how much it adds . . . to the other proof available to establish the fact for which it is offered. The stronger the other proof, the less the marginal value of the evidence in question. And probative value depends as well upon the need for the evidence. When the fact for which the evidence is offered is undisputed or not reasonably susceptible of dispute, the less the probative value of the evidence.¹⁸¹

In and of itself, a defendant's musical tastes or creations have no inherent probative value.¹⁸² As the Texas Court of Criminal Appeals noted when overturning the defendant's conviction in *Hart v. State*, "[w]e don't convict people for murder simply because they have written lyrics about murder."¹⁸³ Instead, establishing the probative

174. See *Skinner*, 95 A.3d at 251.

175. See, e.g., *United States v. Williams*, 663 F. Supp. 3d 1085, 1095 (D. Ariz. 2023); *People v. Coneal*, 254 Cal. Rptr. 3d 653, 655 (Ct. App. 2019); *Commonwealth v. Gray*, 978 N.E.2d 543, 562 (Mass. 2012); *Hannah v. State*, 23 A.3d 192, 202 (Md. 2011); *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011); *Brooks v. State*, 903 So. 2d 691, 700 (Miss. 2005); *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001).

176. See, e.g., *Baker v. State*, 899 S.E.2d 139, 148–51 (Ga. 2024) (identifying the probative value of the rap video with respect to each of the four purposes that the State offered it to prove).

177. Appellate decisions addressing the probative value and prejudicial effect of rap evidence often include dissents reaching different conclusions on these issues. See, e.g., *id.* at 156 (LaGrua, J., dissenting); *Montague v. State*, 243 A.3d 546, 570 (Md. 2020) (Watts, J., dissenting); *Jordan v. State*, 212 So. 3d 836, 851, 854 (Miss. Ct. App. 2015) (Fair, J., dissenting), *aff'd by an equally divided court*, 212 So. 3d 817 (Miss. 2016).

178. *United States v. Foster*, 939 F.2d 445, 457 (7th Cir. 1991) (quoting *United States v. York*, 933 F.2d 1343, 1352 (7th Cir. 1991)).

179. Kaye, *supra* note 144, at 927.

180. *Baker*, 899 S.E.2d at 147 (citing *Olds v. State*, 786 S.E.2d 633, 640 (Ga. 2016)).

181. *Id.* (quoting *Olds*, 786 S.E.2d at 640–41).

182. See *Hart v. State*, 688 S.W.3d 883, 896 (Tex. Crim. App. 2024) ("[M]usic lyrics do not prove anything about the character of the person who listens to the music or lip syncs to it on video.").

183. *Id.* (quoting *United States v. Stuckey*, 253 F. App'x 468, 483 (6th Cir. 2007)).

value of a defendant's musical endeavors requires demonstrating a connection between the music and the alleged criminal conduct.¹⁸⁴

In some cases, the probative value of rap evidence is quite clear. Courts around the country have cited *Greene v. Commonwealth* as exemplary of highly probative rap content.¹⁸⁵ It was undisputed that Greene came home from work, got in a fight with his wife, grabbed a turkey knife, and cut his wife's throat "from ear to ear, so deeply that it scraped the spine."¹⁸⁶ Then, just days after the murder, Greene made a rap video with several friends and filmed himself singing the following verses¹⁸⁷:

"B—— made me mad, and I had to take her life. My name is Dennis Greene
and I ain't got no f——ing wife."

"I knew I was gonna be givin' it to her . . . when I got home . . ."

"I cut her motherf——in' neck with a sword . . ."¹⁸⁸

Greene did not deny killing his wife but asserted an affirmative defense of extreme emotional disturbance (EED).¹⁸⁹ He also argued that the trial court should have excluded the rap video under Rule 403 as unfairly prejudicial.¹⁹⁰ But the Kentucky Supreme Court held that the video's highly probative value outweighed the danger of unfair prejudice, noting that the rap "refer[ed] to [Greene's] actions and emotions regarding this crime, . . . shed[] light on [Greene's] EED defense by illuminating his mental state shortly after the killing, and . . . establishe[d] premeditation and motive in [Greene's] own words."¹⁹¹

By contrast, other cases have featured rap evidence with clearly minimal probative value.¹⁹² The defendant in *United States v. Gamory*, who allegedly went by the initials JB and owned a company called Hush Money Entertainment, was charged with drug sales and money laundering.¹⁹³ The prosecution introduced a YouTube video depicting a singer—who was not the defendant—wearing a necklace with "JB" on it and singing "drug money is Hush Money."¹⁹⁴ The trial court admitted the video, but on appeal the Eleventh Circuit reversed, noting that the defendant did not appear in the video, and there

184. *See id.* ("[T]he State did not offer anything demonstrating that the lyrics and video were somehow representative of [Hart's] character in that they applied outside of the artistic rendering, nor did they demonstrate that, even if they had some real-world application, it was relevant to the charged offense.").

185. 197 S.W.3d 76, 86–87 (Ky. 2006); *see also* State v. Skinner, 95 A.3d 236, 252 (N.J. 2014) (noting that the lyrics admitted in *Greene* exhibited an unmistakable factual connection to the charged crimes); People v. Coneal, 254 Cal. Rptr. 3d 653, 667 (Ct. App. 2019) (discussing *Greene*); United States v. Norwood, No. 12-CR-20287, 2015 WL 2343970, at *11 (E.D. Mich. May 14, 2015) (same), *aff'd in part sub nom.*, United States v. Gills, 702 F. App'x 367 (6th Cir. 2017).

186. *Greene*, 197 S.W.3d at 79, 84.

187. *Id.* at 80.

188. *Id.* at 85 (omissions in original) (alterations in original).

189. *Id.* at 80, 84.

190. *Id.* at 86–87.

191. *Id.* at 87.

192. *See, e.g.*, State v. Bond, No. 2019CA0033, 2023 WL 4444691, at *7–9 (Ohio Ct. App. July 10, 2023) (overturning the trial court's decision to show the jury a music video that the Bond neither wrote nor performed, based solely on his posting one line from the song on Twitter).

193. 635 F.3d 480, 485, 493 (11th Cir. 2011).

194. *Id.* at 493.

was no evidence that he authored the lyrics or shared the views they expressed.¹⁹⁵ The Eleventh Circuit also noted that the probative value of the video was decreased because the defendant's nickname and business ownership were not seriously in dispute and were demonstrated by alternative, less prejudicial evidence.¹⁹⁶ Similarly, in *United States v. Williams*, the prosecution sought to introduce several rap videos in a sprawling gang case against seventeen defendants.¹⁹⁷ After an exhaustive evidentiary hearing, the court concluded that the rap videos were minimally probative because they were cumulative of other evidence, some of the lyrics were indecipherable, and they did not “exhibit an unmistakable connection to the facts of the charged offenses.”¹⁹⁸ Additionally, the court noted that the videos’ probative value was reduced because “there was no evidence presented to establish who wrote the lyrics . . . , when the lyrics were written, or when the videos and songs were produced.”¹⁹⁹

Many courts have also held that the probative value of rap evidence is inherently reduced—though not necessarily eliminated—by rap’s artistic nature.²⁰⁰ For example, the court in *Bey* found that “[a]lthough Bey’s songs are expressed through a first-person narrative and include references to his life . . . his lyrics also clearly feature fictional imagery, metaphors, and exaggerated storylines.”²⁰¹ To this point, the court highlighted the outlandishness of the specific lyrics the prosecution sought to introduce as evidence, wryly noting that “[t]he government has not demonstrated, for example, that Bey actually carries pistols while in Porsches, has been shot in his chest and experienced burning ‘like vodka,’ has shot Jewish people, or kills ‘at will.’”²⁰²

Similarly, the court in *People v. Coneal* held that rap often contains “obviously fictional” lyrics and that “[a]bsent some meaningful method to determine which lyrics represent real versus made up events, or some persuasive basis to construe specific lyrics literally, the probative value of lyrics as evidence of their literal truth is minimal.”²⁰³

On the other hand, some common features of the rap genre tend to make rap evidence more probative. Rap lyrics and videos often feature real locations,²⁰⁴ name real

195. *Id.*

196. *Id.*

197. 663 F. Supp. 3d 1085, 1096 (D. Ariz. 2023).

198. *Id.*

199. *Id.* at 1141.

200. *See, e.g.,* *United States v. Sneed*, No. 14 CR 00159, 2016 WL 4191683, at *6 (M.D. Tenn. Aug. 9, 2016) (“The Government’s argument has a fatal flaw; rapping about selling drugs does not make it more likely that Defendant Sneed did, in fact, sell drugs.”). *But see* *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013) (“We recognize . . . that defendant-authored rap lyrics ‘may employ metaphor, exaggeration, and other artistic devices,’ . . . and can involve ‘abstract representations of events or ubiquitous storylines.’ . . . But these features do not exempt such writings from jury consideration where, as here, the lyrics describe details that mirror the crime charged.” (quoting *Dennis*, *supra* note 2, at 14, 26)).

201. *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *6 (E.D. Pa. Apr. 28, 2017).

202. *Id.*

203. 254 Cal. Rptr. 3d 653, 666 (Ct. App. 2019).

204. *See* *United States v. Graham*, 293 F. Supp. 3d 732, 737 (E.D. Mich. 2017); *see also* *United States v. Williams*, 663 F. Supp. 3d 1085, 1102 (D. Ariz. 2023) (discussing testimony of rap expert Professor Nielson).

individuals or gangs,²⁰⁵ reenact criminal conduct,²⁰⁶ or unmistakably draw on the rapper’s lived experiences.²⁰⁷ Rap artists also often profess that their lyrics are true and authentic.²⁰⁸ But these statements are difficult to assess in a court of law, since rappers commonly profess authenticity to bolster their reputation—regardless of whether their lyrics are actually true.²⁰⁹

b. The Prejudicial Effect of Rap Evidence

Once courts have determined the probative value of rap evidence, they must assess its prejudicial effect. Evidence is not excludable as unfairly prejudicial simply because it damages the defendant’s case.²¹⁰ Instead, “unfair prejudice” generally means that the evidence has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”²¹¹ The Supreme Court has defined “unfair prejudice” as “the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the offense charged.”²¹² Inadmissible propensity character evidence, such as the rap evidence presented in *Baker*, is one improper prejudicial basis.²¹³ Evidence can also be prejudicial if its inflammatory content might evoke a strong emotional reaction in the jury.²¹⁴ Courts

205. See, e.g., *State v. Garlington*, No. P1-2017-0542 A&B, 2020 R.I. Super. LEXIS 42, at *3 (Super. Ct. May 21, 2020) (“The above quoted lyrics mention ‘Kasean,’ ‘Devon’ and ‘Dougie.’ It appears that ‘Kasean’ refers to Kasean Benton, ‘Devon’ to Devon Young[,] and ‘Dougie’ to Douglas Cooper. Consistent with the song lyrics, all three met violent deaths.”); *Coneal*, 254 Cal. Rptr. 3d at 664; *People v. Zepeda*, 83 Cal. Rptr. 3d 793, 799 (Ct. App. 2008); *Tann v. United States*, 127 A.3d 400, 465 (D.C. 2015).

206. See, e.g., *United States v. Dore*, No. 12 Cr. 45, 2013 WL 3965281, at *7 (S.D.N.Y. July 31, 2013) (acting out robbery); *Jordan v. State*, 212 So. 3d 836, 842 (Miss. Ct. App. 2015) (acting out the murder of a witness), *aff’d by an equally divided court*, 212 So. 3d 817 (Miss. 2016).

207. See, e.g., *United States v. Carpenter*, No. 21-837-cr, 2022 WL 16960577, at *1–3 (2d Cir. Nov. 16, 2022) (discussing indications that the defendant’s rap video contained nonfictional content, including the lyric “Drugby, he stacking and flipping,” which related to the evidence that the defendant texted a picture of white powder on a scale to a contact in his phone named “Drugby”); *Daniels v. Lewis*, No. C 10-04032, 2013 WL 183968, at *11 (N.D. Cal. Jan. 17, 2013) (discussing how the defendant admitted that at least half of the rap lyrics at issue did, in fact, relate to the crimes he was charged with).

208. See, e.g., *Daniels*, 2013 WL 183968, at *10 (considering rap lyrics which included the phrase “nothing fake in my raps”); *In re Quintero*, 541 P.3d 1007, 1033 (Wash. Ct. App.), *appeal denied*, 554 P.3d 1234 (Wash. 2024) (table decision); *People v. Bush*, 234 N.E.3d 754, 773 (Ill. 2023).

209. See *Williams*, 663 F. Supp. 3d at 1102 (discussing testimony of rap expert Professor Nielson); *United States v. Donald*, No. 21-cr-8, 2023 WL 6958797, at *22 (D. Conn. Oct. 20, 2023) (“[R]ap artists arguably face pressure to convince listeners that ‘their lyrics are truthful and accurate representations of their lives, beliefs, and conduct,’ even where their music in fact represents ‘fiction, imaginative constructions, or hip hop’s traditional journey into myth.’” (first quoting *Dennis*, *supra* note 2, at 19; and then quoting IMANI PERRY, *PROPHETS OF THE HOOD* 87 (2004))).

210. *United States v. Mills*, 367 F. Supp. 3d 664, 671 (E.D. Mich. 2019).

211. FED. R. EVID. 403 advisory committee’s note to 1972 proposed rules.

212. *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

213. See *supra* Part II.C.1 for a discussion of *Baker v. State*, 899 S.E.2d 139 (Ga. 2024). See, e.g., *Hannah v. State*, 23 A.3d 192, 201 (Md. 2011) (“[The defendant’s rap lyrics] were probative of no issue other than the issue of whether he has a propensity for violence.”).

214. See, e.g., *Williams*, 663 F. Supp. 3d at 1135 (“[C]ertain scenes [in the rap video] may arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish.” (second alteration in original) (quoting *United States v. Williams*, No. 13-cr-00764, 2017 WL 4310712, at *7 (N.D. Cal. Sep. 28, 2017), *aff’d*

have found rap content unfairly prejudicial in cases in which the evidence portrayed the defendant as a gang member;²¹⁵ featured racial slurs and denigrated “African-Americans, women, and cooperating witnesses;”²¹⁶ included “language and imagery related to drugs, gun crime, [and] violence based on religion;”²¹⁷ contained “profanity, sex, promiscuity, and misogyny;”²¹⁸ or painted defendants as “eagerly and ruthlessly seeking out and engaging in violence, with no empathy for their victims.”²¹⁹ Importantly, this inflammatory content alone did not make the evidence at issue inadmissible. But, in these cases, the combination of low probative value and prejudicial, inflammatory content made the rap content inadmissible.²²⁰

Rap also has an inherently prejudicial effect based on negative perceptions of the genre. As the U.S. District Court for the District of Connecticut found in *United States v. Donald*, “[e]ven beyond the content of rap music, lyrics, and videos, stereotypes about the genre and those who create rap music—typically young men of color—may influence how police, judges, and jurors interpret rap lyrics.”²²¹ The court’s observations in *Donald* are supported by a growing body of research showing that rap content is inherently prejudicial when offered as evidence,²²² which must be considered to accurately weigh its prejudicial effect against its probative value.

c. *Weighing the Factors*

Finally, once a court has evaluated the probative value and prejudicial effect of rap evidence, the two factors must be weighed against each other to decide whether each piece of evidence is admissible. Under Rule 403, relevant evidence is only inadmissible if its probative value is “substantially outweighed” by the danger of unfair prejudice.²²³ In a minority of states, including Pennsylvania, the danger of unfair prejudice only needs to “outweigh” the probative value.²²⁴ Many states also require a more stringent balancing

sub nom., *United States v. Heard*, Nos. 18-10218, 18-10228, 18-10239, 18-10248, 18-10258, 2022 WL 2662882 (9th Cir. July 11, 2022)); *United States v. Wiley*, 610 F. Supp. 3d 440, 446 (D. Conn. 2022) (“[R]ap music as a genre often glorifies violence, misogyny, crime, and other offensive messaging which makes its introduction into evidence potentially highly prejudicial.”); *Hart v. State*, 688 S.W.3d 883, 895 (Tex. Crim. App. 2024).

215. *Commonwealth v. Gray*, 978 N.E.2d 543, 562 (Mass. 2012).

216. *Williams*, 663 F. Supp. 3d at 1135 (quoting *Williams*, 2017 WL 4310712, at *7).

217. *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *7 (E.D. Pa. Apr. 28, 2017).

218. *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

219. *People v. Coneal*, 254 Cal. Rptr. 3d 653, 668 (Ct. App. 2019).

220. *Gray*, 978 N.E.2d at 562; *Williams*, 663 F. Supp. 3d at 1157; *Bey*, 2017 WL 1547006, at *7–8; *Gamory*, 635 F.3d at 493; *Coneal*, 254 Cal. Rptr. 3d at 669.

221. No. 21-cr-8, 2023 WL 6958797, at *21 (D. Conn. Oct. 20, 2023).

222. *See id.* (first citing Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 PSYCH. PUB. POL’Y & L. 280, 281 (2016); then quoting Carrie Fried, *Who’s Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. APP. SOC. PSYCH. 705, 705 (1999); and then quoting Stuart Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APP. SOC. PSYCH. 795, 795, 803 (1999)).

223. FED. R. EVID. 403. State equivalents to the federal rule have similar or identical language. *See, e.g.*, IND. R. EVID. 403; MISS. R. EVID. 403; GA. CODE ANN. § 24-4-403 (West 2025).

224. PA. R. EVID. 403.

test when evidence is offered under Rule 404(b) than when it is analyzed solely under a Rule 403 framework.²²⁵

Since both probative value and prejudicial effect are highly fact-specific, appellate courts defer to trial court determinations on these factors.²²⁶ Appellate courts generally review evidentiary issues, including the admissibility of rap evidence, under the highly deferential abuse of discretion standard.²²⁷ Even if an appellate court finds that the district court erred in admitting rap evidence, the court will not reverse a conviction if it finds that the error was “harmless” meaning it did not sufficiently contribute to the conviction to merit a new trial.²²⁸ This deferential standard of appellate review places the primary responsibility for determining the admissibility of rap content on the trial court judge. However, the unusual nature of rap evidence, and the complexities of its evidentiary evaluation, have caused appellate courts to overrule trial court evidentiary rulings in many cases.²²⁹

D. Responses to the Use of Rap Content as Evidence

The number of criminal cases involving rap music as evidence rapidly increased in the early 2000s, in part because of a push by federal prosecutors to promote rap evidence as an effective means to prosecute gang-related crimes.²³⁰ In response, scholars and activists began criticizing the practice and calling for limits on using rap as criminal evidence. One of the first manifestations of this campaign was a 2007 article by Professor Andrea Dennis titled “Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence,” which argued that courts’ analysis of rap lyrics was skewed by incorrect assumptions that “(1) interpreting and understanding rap music lyrics is not a subject requiring specialized knowledge[;] (2) rap music lyrics should be literally understood;

225. See, e.g., *State v. Skinner*, 95 A.3d 236, 247 (N.J. 2014) (“Because [Rule] 404(b) guards against the wholly unacceptable prospect that a jury might become prejudiced against a defendant based on earlier reprehensible conduct, the rule is often described as [one] of exclusion.” (second alteration in original) (internal quotation marks omitted) (quoting *State v. Rose*, 19 A.3d 985, 1009 (N.J. 2011))); *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *2 (E.D. Pa. Apr. 28, 2017) (“Rule 404(b) is a rule of general exclusion, and carries with it no presumption of admissibility.” (quoting *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014))).

226. See *United States v. Foster*, 939 F.2d 445, 457 (7th Cir. 1991).

227. The abuse of discretion standard varies by jurisdiction, but all are highly deferential. See, e.g., *United States v. Gamory*, 635 F.3d 480, 492 (11th Cir. 2011); *Montague v. State*, 243 A.3d 546, 555–56 (Md. 2020).

228. See, e.g., *DeHart v. State*, No. 43A03-1611-CR-2594, 2017 WL 2927437, at *4 (Ind. Ct. App. July 10, 2017) (“The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood the questioned evidence contributed to the conviction.” (quoting *Martin v. State*, 779 N.E.2d 1235, 1242 (Ind. Ct. App. 2002))).

229. See, e.g., *State v. Canady*, No. 22-0397, 2023 WL 4531668, at *8 (Iowa Ct. App. July 13, 2023), vacated, 4 N.W.3d 661 (Iowa 2024); *People v. Coneal*, 254 Cal. Rptr. 3d 653, 655 (Ct. App. 2019); *Commonwealth v. Gray*, 978 N.E.2d 543, 562 (Mass. 2012); *Baker v. State*, 899 S.E.2d 139, 141 (Ga. 2024).

230. See Dennis, *supra* note 2, at 1; Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. ATT’YS’ BULL., May 2006, at 1, 8, <https://www.justice.gov/archive/olp/pdf/gangs.pdf> [<https://perma.cc/AR6S-FUDU>]; ALAN JACKSON, AM. PROSECUTORS RSCH. INST., PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 15–16 (2004), https://assets.noviams.com/novi-file-uploads/ndaa3/migrated%20assets/project_148/images/gang_cases1.pdf [<https://perma.cc/37BD-VYZJ>].

and (3) rap music lyricists depict accurate, truthful, and self-referential narratives.”²³¹ To address these issues, Professor Dennis argued that courts should view rap lyrics in the context of the genre, recognize that rap evidence has an inherently prejudicial effect, and allow defendants to offer expert witnesses to contextualize their music.²³² The article has since become highly influential, and has been cited by state courts in at least ten different states,²³³ federal courts in four different circuits,²³⁴ and numerous law journals and articles.²³⁵

Since Professor Dennis’s seminal article, a growing body of scholarship has critiqued the uses of rap as evidence. Scholars have argued that rap evidence is used by prosecutors as a proxy for race²³⁶ and chills free speech by causing artists to self-censor.²³⁷ Researchers have found that “violent lyrics are perceived as more threatening, dangerous, and literal when they are described as rap, compared with another music genre.”²³⁸ Some advocates have argued that rap lyrics should be completely banned from use in criminal trials.²³⁹ Others have argued that it should be banned for certain kinds of uses²⁴⁰ or have proposed various changes to the rules of evidence to restrict its use.²⁴¹

Beginning in the early 2010s, courts began to respond. Courts started allowing the presentation of expert testimony to contextualize the social and artistic background of the rap genre.²⁴² A growing number of courts also began to adopt the “strong nexus” test developed by the New Jersey Supreme Court in *State v. Skinner*.²⁴³ Then, in the early

231. Dennis, *supra* note 2, at 12–13.

232. *Id.* at 30–31, 35–39.

233. *E.g.*, *Coneal*, 254 Cal. Rptr. 3d at 667 n.16; *Commonwealth v. Knox*, 190 A.3d 1146, 1160 (Pa. 2018).

234. *E.g.*, *United States v. Donald*, No. 21-cr-8, 2023 WL 6958797, at *22 n.12 (D. Conn. Oct. 20, 2023); *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *6 n.2 (E.D. Pa. Apr. 28, 2017).

235. *E.g.*, Lutes et al., *supra* note 10, at 130 n.301; Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 708 (2019).

236. Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What’s “Unconstitutional” About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL’Y 33, 36 (2016).

237. Lutes et al., *supra* note 10, at 129.

238. Dunbar et al., *supra* note 222, at 281.

239. NIELSON & DENNIS, *supra* note 11, at 157 (“[W]e propose legislators nationwide enact rap shield rules that completely ban the use of rap lyrics, videos, or promotional materials as evidence in criminal proceedings.”).

240. Lutes et al., *supra* note 10, at 128 (arguing for a per se ban on using rap as character evidence).

241. Kelly McGlynn, Jacob Schriener-Briggs & Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutions*, A.B.A. 16–18 (Jan. 11, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/?login [<https://perma.cc/VYQ6-M2H7>].

242. *See, e.g.*, *United States v. Herron*, No. 10-CR-0615, 2014 WL 1871909, at *8 (E.D.N.Y. May 8, 2014) (noting that expert testimony regarding rap music “may seem novel” but allowing expert testimony “as to the history, culture, artistic conventions, and commercial practices of hip-hop or rap music, focusing on gangsta rap”), *aff’d*, 762 F. App’x 25 (2d Cir. 2019).

243. 95 A.3d 236, 238–39 (N.J. 2014).

2020s, legislators began responding, with several states adopting or considering legislation to restrict or ban the use of “creative expression” as evidence.²⁴⁴

1. Expert Witnesses

Since the earliest instances of rap being admitted as evidence in criminal trials, prosecutors have used police officers and detectives as expert witnesses to interpret the meaning of rap lyrics.²⁴⁵ In a minority of cases, courts have excluded police officers from testifying about the meaning of rap lyrics because they are not sufficiently qualified as experts.²⁴⁶ More commonly, officers are allowed to testify as experts with minimal discussion of their qualifications related to the rap genre.²⁴⁷ Following Professor Dennis’s watershed scholarship, it became more common for defendants to also offer their expert witnesses to testify to the meaning and evidentiary importance of rap evidence.²⁴⁸

The 2014 case *United States v. Herron* serves as an early example of a court allowing defense expert testimony on rap history and culture.²⁴⁹ Herron was charged as part of a RICO case, and the government sought to introduce a large number of videos featuring Herron’s rap music.²⁵⁰ Herron requested the court to allow Dr. James Peterson, director of Africana studies at Lehigh University, to testify that “based on the traditions, patterns, roots, and antecedents of hip hop music, including gangst[er] rap, th[e] song lyrics and expressions by artists . . . may not be taken as expressions of truth by virtue of being stated or sung by the artist.”²⁵¹

In response, the government argued that Dr. Peterson’s opinion was inadmissible as expert testimony under the Federal Rules of Evidence because “(1) [it could not] be the product of reliable principles or methods, (2) would not be helpful to jurors, and

244. See, e.g., CAL. EVID. CODE § 352.2 (West 2023); Decriminalizing Artistic Expression Act, ch. 973, § 2, 2022 Cal. Stat. 94, 94.

245. See, e.g., *People v. Goldsberry*, 630 N.E.2d 1113, 1116, 1118 (Ill. App. Ct. 1994) (reversing the trial court’s decision to admit expert testimony that rap lyrics and notebook drawings were evidence of gang affiliation).

246. *Commonwealth v. Gray*, 978 N.E.2d 543, 561 (Mass. 2012) (“A police officer who has been qualified as a ‘gang expert’ cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics.”).

247. See, e.g., *Brown v. State*, No. 1302, 2016 WL 5720590, at *4–5 (Md. Ct. Spec. App. Sep. 30, 2016) (permitting a detective’s testimony about the meaning of the rap lyrics).

248. See Dennis, *supra* note 2, at 35–40; see, e.g., *United States v. Harris*, No. 12-cr-205-T-17MAP, 2016 WL 4204633, at *1 (M.D. Fla. July 28, 2016); *D’Ambrosio v. City of Methuen*, No. 16-cv-10534, 2018 U.S. Dist. LEXIS 242901, at *1–3 (D. Mass. Apr. 5, 2018). For example, Professor Nielson, one of the leading advocates for banning rap evidence, has testified in over a dozen such cases. Erik Nielson, *Expert or Advocate? The Role(s) of the Expert Witness When Rap Is on Trial*, 41 POPULAR MUSIC 446, 447 (2022). Courts have also allowed expert testimony on the history, culture, and meaning of rap evidence in pretrial hearings to aid in courts’ Rule 403 balancing analysis of the probative value versus the potential prejudicial effect of rap presented for admission as evidence. See, e.g., *United States v. Williams*, 663 F. Supp. 3d 1085, 1100–04 (D. Ariz. 2023) (discussing the testimony of Professor Nielson).

249. No. 10-CR-0615, 2014 WL 1871909, at *6–8 (E.D.N.Y. May 8, 2014), *aff’d*, 762 F. App’x 25 (2d Cir. 2019).

250. *Id.* at *1.

251. *Id.* at *7.

(3) [went] beyond the bounds of proper expert testimony.”²⁵² While the court had precluded expert witness testimony on hip-hop culture in a prior case, this time the court found that because of the large volume of rap evidence from Herron’s successful music career expert testimony would be helpful for the jury to understand its context and meaning.²⁵³ The court noted that this type of expert testimony was “novel” but ultimately concluded that “Dr. Peterson [was permitted to] testify as to the history, culture, artistic conventions, and commercial practices of hip-hop or rap music, focusing on gangst[er] rap,” provided that he did not invade the provenance of the jury by assessing the credibility of the evidence.²⁵⁴

2. The Strong Nexus Test

In recent years, appellate courts around the country have started restricting the admissibility of rap content by adopting the strong nexus test, as pioneered by the New Jersey Supreme Court in the 2014 case *State v. Skinner*.²⁵⁵ At Skinner’s trial for attempted murder, the prosecution was permitted to read “at great length” rap lyrics that Skinner had written years earlier.²⁵⁶ The prosecution did not allege that the lyrics had any factual connection to the alleged attempted murder but argued that the lyrics were admissible under Rule 404(b) as extrinsic evidence because they showed Skinner’s “motive and intent” by discussing “a street culture of violence and retribution.”²⁵⁷

First, the court determined that Rule 404(b) was the correct framework for analyzing the admissibility of the rap evidence in this particular case.²⁵⁸ The court noted that if rap evidence “provides direct proof against a defendant—such as an admission or details that are not generally known and dovetail with the facts of the case,” it should be analyzed for relevance under Rule 401 and then evaluated for unfair prejudice under Rule 403.²⁵⁹ But when rap evidence is not offered as direct proof, it should be screened under the more stringent protections against propensity evidence in Rule 404(b) because “expressive actions, which are not overtly criminal but can be perceived as wrong or bad, can persuade a jury of a defendant’s guilt, regardless of the evidence proffered by the State.”²⁶⁰

The court then turned to the rap content, finding that its probative value depended on whether “one believes that those lyrics, many of which were written long before the . . . shooting, specifically relate to defendant’s motive on th[at] evening.”²⁶¹ Further, [t]he difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted

252. *Id.*

253. *Id.* at *8 (citing *United States v. Wilson*, 493 F. Supp. 2d 484, 489 (E.D.N.Y. 2006)).

254. *Id.*

255. 95 A.3d 236, 238–39 (N.J. 2014); *see, e.g.*, *Commonwealth v. Correia*, 210 N.E.3d 407, 420 (Mass. 2023); *Montague v. State*, 243 A.3d 546, 563–64 (Md. 2020).

256. *Skinner*, 95 A.3d at 238.

257. *Id.*

258. *Id.* at 248–50.

259. *Id.* at 249 n.5.

260. *Id.* at 249.

261. *Id.* at 251.

in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song “I Shot the Sheriff,” actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story “The Tell-Tale Heart,” simply because of their respective artistic endeavors on those subjects.²⁶²

The court further found that, beyond the difficulty of assessing the evidentiary value of rap content, admitting the defendant’s “inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risk[s] poisoning the jury against [the] defendant.”²⁶³ The court then announced what is now known as the strong nexus test, holding that:

Fictional forms of inflammatory self-expression . . . are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact.²⁶⁴

Applying this test, the court found that the presented rap lyrics had little to no probative value and should not have been admitted.²⁶⁵ The court concluded its opinion by cautioning judges to act cautiously when admitting “the inflammatory contents of a person’s form of artistic self-expression as proof of the writer’s character, motive, or intent.”²⁶⁶ To this end, *Skinner* urged trial courts to consider the availability of alternative forms of evidence to make the same point and, when admitted, carefully redact rap evidence to reduce unnecessary prejudice.²⁶⁷

Appellate courts in several other states have explicitly adopted and built upon *Skinner*’s strong nexus test.²⁶⁸ In *Montague v. State*, the Supreme Court of Maryland determined that rap evidence has an inherently prejudicial effect, but “the probative value of a defendant’s rap lyrics shares an inverse relationship with unfair prejudice. The closer the nexus between a defendant’s rap lyrics and the details of an alleged crime, the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence of the defendant’s bad character.”²⁶⁹ *Montague* also highlighted the importance of the sequence of events, finding that lyrics are more probative when written close in time to the alleged crime and when they are released publicly shortly before a trial and contain threats of retaliation against witnesses.²⁷⁰

262. *Id.*

263. *Id.* at 238.

264. *Id.* at 238–39; *see also id.* at 251–52 (“[W]e reject the proposition that probative evidence about a charged offense can be found in an individual’s artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced.”).

265. *Id.* at 251.

266. *Id.* at 253.

267. *Id.*

268. *See Montague v. State*, 243 A.3d 546, 564 (Md. 2020); *Commonwealth v. Correia*, 210 N.E.3d 407, 420 (Mass. 2023); *In re Quintero*, 541 P.3d 1007, 1032 (Wash. Ct. App.), *cert. denied*, 554 P.3d 1234 (Wash. 2024) (table decision).

269. *Montague*, 243 A.3d at 566.

270. *Id.* at 564–65.

In *Commonwealth v. Correia*, the Massachusetts Supreme Judicial Court cited both *Skinner* and *Montague* in adopting the strong nexus test.²⁷¹ The court noted that, under this scheme, both a “‘nexus to the details’ of the alleged crime and ‘temporal nexus’ are necessary.”²⁷² “This ‘nexus’ can be direct—where rap music or lyrics recount key details of the events in a case—[or indirect—]where a defendant expresses . . . knowledge, a motive, or another relevant fact in dispute, even though the music is not a literal account of events that took place.”²⁷³

Finally, even in cases in which the lyrics have a close nexus to the crime, courts must provide a limiting instruction to the jury to confine the lyrics to their accepted use.²⁷⁴ Establishing this, the Massachusetts Supreme Judicial Court concluded that the trial court had erred by admitting the rap lyrics without providing an instruction to the jury on their permissible uses.²⁷⁵

At least one federal court has now adopted the nexus test, with the Eastern District of New York noting in *United States v. Jordan* that “a rule-of-thumb [sic] has emerged” among state courts that “the relevance of rap lyrics as trial evidence depends on the existence of a specific factual nexus between the content of rap music and the crimes alleged.”²⁷⁶ Notably, *Jordan* expressly rejected the reasoning in *Foster*, concluding that lyrics demonstrating a defendant’s knowledge of the drug trade generally were insufficient to establish a nexus between the music and charged conduct.²⁷⁷

While the strong nexus test refines the question of rap content admissibility, it still leaves many case-specific determinations to the trial court judge. Most importantly, the trial court must still interpret the lyrics to determine how closely they relate to the crime. Often, reasonable minds can disagree about these assessments, such as in *Montague*, where a strong dissent argued that the lyrics were too generic to have significant probative value.²⁷⁸ Still, it is worth remembering that the trial judge’s role is not to decide what facts are true—instead, the judge only needs to determine what evidence the jury can fairly consider.

3. Legislative Responses

In the early 2020s, legislators began introducing bills to restrict the use of rap content as evidence. The clear motivating factor behind these bills is the increased use of rap in criminal trials. However, legislators have generally avoided attempting to define “rap,” instead choosing to limit the use of a defendant’s broadly defined “creative expression.”²⁷⁹

California became the first state to enact a “creative expression” evidence bill by passing the Decriminalizing Artistic Expression Act of 2022 (“California Creative

271. 210 N.E.3d at 420.

272. *Id.* (quoting *Montague*, 243 A.3d at 558–59, 564).

273. *Id.*

274. *Id.*

275. *Id.* at 421.

276. 714 F. Supp. 3d 158, 164 (E.D.N.Y. 2024).

277. *Id.* at 164 n.17.

278. *See Montague v. State*, 243 A.3d 546, 576 (Md. 2020) (Watts, J., dissenting).

279. *See* Assemb. B. 2799, 2021–2022 Leg., Reg. Sess. §§ 1(b), 2(c) (Cal. 2022).

Expression Law”).²⁸⁰ The legislature aimed to ensure that “creative expression [would] not be used to introduce stereotypes or activate bias against . . . defendant[s]” and established that “the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.”²⁸¹

This California law established an individualized balancing test as part of California’s version of Rule 403 that is triggered when “a party seeks to admit as evidence a form of creative expression.”²⁸² Since this provision is placed under Rule 403, it applies to all uses of creative expression, as opposed to the strong nexus test from *Skinner*, which applies only when rap content is offered as extrinsic evidence under Rule 404(b).²⁸³ California’s balancing test now requires courts to consider that:

- (1) [T]he probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and
- (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of [s]ection 1101, treat the expression as evidence of the defendant’s propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.²⁸⁴

The first part of this test lists factors similar to those identified by *Skinner*, *Montague*, and *Correia* for finding a strong nexus,²⁸⁵ while the second part directly addresses the concerns raised by scholars that the use of rap evidence is based on racial prejudice.²⁸⁶ In addition, the statute requires courts to consider “[c]redible testimony” regarding the context of the genre of creative expression at issue, and social science research on whether the use of the creative expression evidence could implicate racial bias.²⁸⁷

Finally, California law defines “creative expression” as “the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.”²⁸⁸

280. Greg Gonzalez, *Music to Our Ears: California Law Restricts Use of Artistic Expression as Evidence in Criminal Trials*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Oct. 6, 2022), <https://www.thefire.org/news/music-our-ears-california-law-restricts-use-artistic-expression-evidence-criminal-trials> [<https://perma.cc/R69V-Z99D>].

281. Cal. Assemb. B. 2799, § 1(b).

282. CAL. EVID. CODE § 352.2(a) (West 2023). California Code of Evidence section 352.2 is California’s version of Federal Rule of Evidence 403.

283. See *State v. Skinner*, 95 A.3d 236, 249 n.5 (N.J. 2014).

284. CAL. EVID. CODE § 352.2(a) (West 2023). California Code of Evidence section 1101(b) is California’s version of Federal Rule of Evidence 404(b).

285. See *supra* Part I.D.2 for a discussion of the strong nexus test.

286. See, e.g., Tibbs & Chauncey, *supra* note 236, at 36.

287. CAL. EVID. CODE § 352.2(b) (West 2023).

288. *Id.* § 352.2(c).

Beyond this broad definition, the law does not guide courts on how to identify creative expression, or which party is responsible for notifying the court that the particular evidence is creative expression.

One of the first cases to test the scope of California's new law, *People v. Hands*, upheld the admission of a video of the defendant singing along to rap songs, which was live streamed minutes before he shot four people at a park.²⁸⁹ The defendant did not deny the shooting but claimed that he did it in self-defense, because he was shooting at a rival gang member who had shot him in the arm earlier that day.²⁹⁰ The video at issue showed the defendant singing along with two rap songs on the topics of "entering rival gang territory, finding a rival gang member, and shooting and killing the rival" while pointing a gun at the camera.²⁹¹ The trial court found that the video was "highly probative of [the] defendant's state of mind a mere [thirty] minutes before the shooting," and that this probative value outweighed the risk of unfair prejudice.²⁹² The appellate court upheld this decision, similarly concluding that, despite the new law, the video's probative value was not substantially outweighed by the risk of unfair prejudice.²⁹³ The appellate court also noted that the new law's requirement that "the probative value of [creative] expression for its literal truth or as a truthful narrative [be] minimal" was inapplicable because the video was admitted as evidence of the defendant's intent to kill, not for the literal truth of the lyrics.²⁹⁴

Louisiana is the only other state to successfully pass a creative expression law, and it only effects a minor technical change in comparison to the California law.²⁹⁵ Congress²⁹⁶ and multiple states, including New York and Maryland,²⁹⁷ have considered proposed bills with much more stringent requirements for admitting creative expression evidence. To date, none have passed—but New York's came close.²⁹⁸

The proposed New York bill would have gone further than California's by creating a "presumption of inadmissibility of evidence of [a] defendant's creative expression" in

289. No. C098551, 2025 WL 79662, at *1 (Cal. Ct. App. Jan. 10, 2025). Most other cases considering the statute have addressed whether it applies retroactively. *See, e.g., People v. Venable*, 304 Cal. Rptr. 3d 731, 733 (Ct. App.), *cert. granted*, 528 P.3d 871 (Cal. 2023).

290. *Hands*, 2025 WL 79662, at *3.

291. *Id.* at *2.

292. *Id.* at *5.

293. *Id.*

294. *Id.* (emphasis omitted) (quoting CAL. EVID. CODE § 352.2(b) (West 2023)).

295. The statute states that "creative or artistic expression is not admissible in a criminal case to prove the character of a person in order to show that he acted in conformity therewith," but also allows it to be admitted to prove the defendant's knowledge, intent, or other factors normally permitted under Rule 404(b) if the party offering the evidence gives advance notice. LA. CODE EVID. ANN. art. 404B(b)(ii) (2025). Louisiana state courts already considered rap lyrics under Rule 404(b). *E.g., State v. Davis*, No. 2016-KA-0078, 2016 WL 7451365, at *5–7 (La. Ct. App. Dec. 28, 2016). The only real change created by the statute appears to be the requirement that the prosecution give advance notice of its intent to offer rap content as evidence.

296. *See* Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

297. *See* S.B. 1738, 2023–2024 Reg. Sess. § 1 (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/S1738> [<https://perma.cc/SB8U-8HXT>]; H.B. 1429, 2024 Gen. Assemb., 2024 Sess. § 1 (Md. 2024), <https://mgaleg.maryland.gov/2024RS/bills/hb/hb1429f.pdf> [<https://perma.cc/2VP7-RS4R>].

298. *See* N.Y.S.B. 1738. The bill passed the state senate and was considered but not passed by the state assembly.

criminal trials, whether the evidence is “original or derivative.”²⁹⁹ To be admissible, the party offering rap evidence would need to “affirmatively prove” its relevancy and admissibility “by clear and convincing evidence.”³⁰⁰ To do so, the offering party would be required to prove:

- (a) [a] literal, rather than figurative or fictional, meaning and, where the work is derivative, that the defendant intended to adopt the literal meaning of the work as the defendant’s own thought or statement;
- (b) a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged;
- (c) relevance to an issue of fact that is disputed; and
- (d) distinct probative value not provided by other admissible evidence.³⁰¹

The court must then make “an on-the-record statement . . . of the findings of fact essential to its determination.”³⁰² Finally, if any creative expression evidence is admitted, “the court has a duty to apply careful redactions, provide limiting instructions, and consider the least prejudicial means of presenting the creative expression to the fact-finder.”³⁰³

Some legislators have sought even further restriction. A proposed New Jersey statute would implement a per se rule that “a defendant’s creative or artistic expression, whether original or derivative, in audio or video format, . . . shall not be received into evidence against the defendant in a criminal proceeding.”³⁰⁴ This blanket prohibition of material falling under the amorphous definition of “creative artistic expression” would be patently problematic.

It remains to be seen whether the current nationwide momentum to legislatively regulate creative expression evidence will result in more enacted legislation, or how courts will interpret these new laws. However, the recent high-profile trials of famous rappers such as Jeffery Lamar Williams (“Young Thug”) will likely add fuel to the already controversial practice of using rap as evidence.³⁰⁵ Since legislative and judicial reforms will likely continue along the path they have taken in the last decade, it is essential that advocates, judges, and legislators think carefully about how best to regulate the admissibility of rap content as evidence.

II. EMBRACING AN INSTRUCTIVE APPROACH TO THE ADMISSIBILITY OF RAP

The rules of evidence provide the tools for trial judges to make thoughtful and fair decisions regarding the admission of rap lyrics in trials. However, a review of the case law shows that these rules have historically been unevenly applied. Rap content has unique attributes that increase the chances of erroneous admission. These errors are likely driven, at least in part, by preconceptions and/or biases that judges or juries may have

299. *Id.* § 1.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. Assemb. J. Res. 178, 220th Gen. Assemb., Reg. Sess. § 1 (N.J. 2022).

305. See Coscarelli, *supra* note 12.

about rap music and the people who make it. Thus, additional guidance for trial courts regarding the uses of rap content as criminal evidence may be warranted.

This need for additional guidance has been recognized by appellate courts around the country, leading to the growing adoption of the strong nexus test and the use of rap cultural expert witnesses.³⁰⁶ This movement was well underway by the time the growing political pressure of the last several years led legislators to take up the issue.³⁰⁷ But any attempt to legislatively regulate the use of rap or creative expression evidence must avoid interfering with the truth-seeking purpose of the trial process. This Article proposes that instructive, rather than preclusive, regulation would assist trial judges in the thoughtful assessment required to fairly determine whether or not rap content is admissible in each case.

An instructive approach is one that helps the trial court more accurately assess the probative value and prejudicial effect of rap content by structuring the trial court's analysis, identifying important factors for the trial court to assess, and establishing procedural guidelines. Critical to an instructive approach is centering the trial judge in the process by requiring case-by-case decisions, rather than noncontextual, categorical judgments about rap content. An instructive approach accounts for the inherently prejudicial nature of rap evidence by engaging trial courts in a thoughtful assessment of rap content for relevance and fairness before admission.

In contrast, a preclusive approach rests on the notion that particular types of evidence should be uncritically excluded from trial. The most obvious example of this preclusive approach is the proposed legislation in New Jersey, discussed above, which would per se ban the use of any creative expression as trial evidence.³⁰⁸ Notably, regulations that are not preclusive on their face can also have a preclusive effect if they impose such a high burden for admissibility that they frustrate established tenets of admissibility or create impracticable pretrial litigation that may dwarf the trial itself.

A. *Developing the Instructive Approach*

California's Creative Expression Law, while not perfect, provides an example of an instructive approach.³⁰⁹ The law provides guiderails for California trial courts' analysis by creating an evidentiary framework, identifying factors for trial judges to consider, and providing procedural guidelines. First, California's Creative Expression Law employs the Rule 403 framework, applying its principles to all uses of creative expression—rather than relying on the often-murky distinctions between intrinsic and extrinsic evidence.³¹⁰ Second, the California law highlights factors for trial courts to consider. To assess probative value, courts must consider the amount of time between the creation of the

306. See *supra* Parts I.D.1, I.D.2 for a discussion of these topics.

307. See *supra* Part I.D.3 for a discussion of the proposed and adopted state court laws regulating the use of rap content as evidence.

308. See N.J. Assemb. J. Res. 178.

309. See CAL. EVID. CODE § 352.2(a) (West 2023).

310. Compare *id.* (applying to “any criminal proceeding”), with *State v. Skinner*, 95 A.3d 236, 249 n.5, 251–52 (N.J. 2014) (noting that rap content offered as direct evidence should be analyzed under Rules 401 and 403, but that extrinsic evidence offered under Rule 404(b) should be subject to heightened scrutiny under the strong nexus test).

creative expression and the alleged criminal conduct, the level of similarity between the lyrics and the alleged crime, and whether it includes factual details that are not publicly available.³¹¹ To assess prejudicial impact, the California law requires the court to consider whether the offered rap content could be improperly viewed as “evidence of the defendant’s propensity for violence or general criminal disposition” and “the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.”³¹² Additionally, California imposes procedural protections by requiring the admission of rap content to be addressed in limine out of the presence of the jury, and requiring that the court considers any offered expert testimony on the cultural context of the creative expression and social science research regarding the risk of racial bias.³¹³

Unfortunately, the California law undercuts its instructive benefits by applying an overly broad definition of creative expression, which includes “the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film and other such objects or media.”³¹⁴ This definition could be interpreted to cover all sorts of evidence that would not normally be considered artistic content, such as text messages, social media posts, phone calls, or even conversations. There is nothing particularly controversial about using a defendant’s words or creations as evidence, as long as they are relevant. In fact, the rules of evidence specifically allow a party’s words to be used against them in court.³¹⁵ The overbroad drafting of creative expression laws could lead to protracted and unnecessary disputes about whether particular words or actions are sufficiently “creative” for the heightened evidentiary standard to apply. These problems could have been avoided by limiting the law’s application to the unique complexities of rap lyrics and content. As activists against the use of rap content as evidence have argued, “[n]o other art form, fictional or otherwise, is targeted as pervasively in court as rap is, even though other genres have long traditions of violence.”³¹⁶

The *Hands* case is an early indication that the California statute may have successfully struck an appropriate balance. The statute supported the admission of a video of the defendant rapping about relevant subject matter, taken just minutes before the shooting, as highly probative evidence of the defendant’s intent leading up to the incident.³¹⁷ In its framework for analyzing rap content for admissibility, the California law required that the established probative value depend on what the rap content was offered to prove, and applied restrictions on evidence offered for the literal truth of its content.³¹⁸ The law validated the video as particularly relevant since the defendant’s intent was central to his claims of self-defense.³¹⁹ Interestingly, despite the new law, the result in *Hands* is very similar to the result in *Greene*, discussed in Part I.C.2.a, which

311. EVID. § 352.2(a)(1).

312. *Id.* § 352.2(a)(2).

313. *Id.* § 352.2(b), (d).

314. *Id.* § 352.2(c).

315. See FED. R. EVID. 801(d)(2) (exempting opposing party’s statements from the rule against hearsay).

316. Brief of Artists and Scholars, *supra* note 2, at 20.

317. *People v. Hands*, No. C098551, 2025 WL 79662, at *5–6 (Cal. Ct. App. Jan. 10, 2025).

318. *Id.* at *4–5.

319. See *id.* at *5, *7.

also found that a rap video of the defendant Greene, recorded shortly after the admitted murder of his wife, was highly probative because it shed light on Greene's intent and mental state.³²⁰ That the law still allowed for a trial judge to admit highly probative rap content after a thorough consideration is a hopeful sign that California's Creative Expression Law is not overly preclusive.

B. Problems with a Preclusive Approach

Fully preclusive approaches, such as the proposed per se ban in New Jersey, are unlikely to gain traction in courts or state legislatures. However, proposed legislation derived from Congress's stalled Restoring Artistic Protection Act of 2022—like that proposed in New York and Maryland—may be so restrictive that it prevents the admission of creative expression evidence in the vast majority of cases.

Though it purports to leave the determination up to the trial court, New York's proposed statute sets an almost impossible bar for the admission of creative expression. First, the proposed New York law would establish a requirement that the offering party "affirmatively prove" that the offered content has a "literal, rather than figurative or fictional, meaning."³²¹ All art, including rap music, has figurative meanings. Further, courts have widely recognized that the rap genre commonly uses "exaggeration, metaphor, and braggadocio for the purpose of artistic expression"³²² and involves "abstract representations of events or ubiquitous storylines."³²³ Requiring a party to affirmatively prove that a particular rap does not employ these predominant attributes of the genre would exclude most rap expressions from admission, irrespective of any relevance to the case. That the offering party must do so by "clear and convincing evidence" and overcome a "presumption of inadmissibility" makes the imposition even more onerous.³²⁴

In the unlikely event that the proponent passes this gauntlet, they would then be required to prove that the literal meaning of the rap content has "a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged," and that it has "distinct probative value not provided by other admissible evidence."³²⁵ By themselves, these two requirements interpose a higher threshold than the strong nexus test adopted by appellate courts.

Well-meaning activists, academics, and legislators are correct to worry about the potential for prejudice when rap content is admitted as evidence in the criminal process.

320. *Compare id.* at *5 (finding that a rap video was not unfairly prejudicial because it was "highly probative of [the] defendant's state of mind a mere [thirty] minutes before the shooting"), *with* *Greene v. Commonwealth*, 197 S.W.3d 76, 87 (Ky. 2006) (finding that a rap video was not unfairly prejudicial because it "sheds light on Appellant's [extreme emotional disturbance] defense by illuminating his mental state shortly after the killing.").

321. S.B. 1738, 2023–2024 Reg. Sess. § 1 (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/S1738> [<https://perma.cc/SB8U-8HXT>].

322. *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *6 (E.D. Pa. Apr. 28, 2017); *see also* *Montague v. State*, 243 A.3d 546, 562, 569 (Md. 2020) (discussing the use of exaggeration and metaphor in rap lyrics).

323. *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013) (quoting *Dennis*, *supra* note 2, at 26).

324. N.Y.S.B. 1738 § 1.

325. *Id.* § 1(2)(b), (d).

However, a goal to categorically exclude any creative expression as evidence is both myopic and contrary to the interests of justice. Categorical exclusion presents at least two distinct problems: It disrupts the administration of justice, and it conflates rap as evidence cases with rap as threats cases.

1. Categorical Determinations Disrupt the Administration of Justice

The public has an interest in the availability of evidence for the fair and equitable administration of justice. To this end, the rules of evidence are designed to be rules of admission, permitting consideration of information that is relevant, probative, and not unfairly prejudicial. Categorical exclusions based solely on content upend this design for balance by uncritically precluding evidence that may be necessary for a fair adjudicative process.

This principle is strongly demonstrated in *Greene*.³²⁶ *Greene* has been cited by courts around the country as an example of highly probative rap lyrics that were properly admitted as evidence.³²⁷ It was undisputed that Greene had killed his wife by cutting her throat with a kitchen knife.³²⁸ Greene's defense was that he did not intentionally murder his wife because he was acting under extreme emotional disturbance.³²⁹ Just days after killing his wife, Greene filmed himself singing, "I cut her motherf---in' neck with a sword . . ." ³³⁰

The relevance and probative value of Greene's rap seem obvious. However, under the preclusive structure considered in New York and other states, Greene's rap may have been inadmissible. The New York law would have required the prosecutor in *Greene* to affirmatively prove that the line "I cut her motherf---in' neck with a sword"³³¹ had a "literal, rather than figurative or fictional, meaning."³³² But the reference to a sword is clearly figurative, as Greene cut his wife's neck with a kitchen knife.³³³ Should Greene's own description of the killing be inadmissible simply because he chose to use a metaphor to describe it? Reasonably the answer should be no, but a highly preclusive law would prevent the trial judge from making the logical choice in this situation. Alternatively, a judge could find that the reference to the sword had a literal meaning, despite the use of figurative language. While this result would make more sense on the facts of the case, it would undercut the statute's intent of prohibiting courts from reading literal meanings into figurative language.

326. 197 S.W.3d 76, 86–87 (Ky. 2006). See *supra* Part I.C.2.a for a discussion of *Greene*.

327. See, e.g., *State v. Skinner*, 95 A.3d 236, 252 (N.J. 2014) (noting that the lyrics admitted in *Greene* exhibited an unmistakable factual connection to the charged crimes); see also *People v. Coneal*, 254 Cal. Rptr. 3d 653, 667 (Ct. App. 2019) (noting the admissibility of rap lyrics in *Greene*); *United States v. Norwood*, No. 12-CR-20287, 2015 WL 2343970, at *10–11 (E.D. Mich. May 14, 2015) (citing *Greene*), *aff'd in part sub nom.*, *United States v. Gills*, 702 F. App'x 367 (6th Cir. 2017).

328. *Greene*, 197 S.W.3d at 79, 84.

329. *Id.* at 80, 84.

330. *Id.* at 85 (omission in original) (alteration in original).

331. *Id.* (omission in original) (alteration in original).

332. S.B. 1738, 2023–2024 Reg. Sess. § 1(2)(a) (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/S1738> [<https://perma.cc/SB8U-8HXT>].

333. *Greene*, 197 S.W.3d at 84.

Overly preclusive rules can also require courts to assess questions that simply don't make sense in the particular context of the evidence presented. For example, in *Dore*, the prosecution introduced a rap video showing the defendant driving the same Mercedes-Benz that was later used to commit a robbery to prove that the defendant had access to the vehicle.³³⁴ In this context, what does it mean for the court to determine that the video has a “literal, rather than figurative or fictional, meaning?”³³⁵ Is the meaning automatically literal since the video literally showed the same car? Or did the choice to use that car instead of some other car in the video have no particular meaning at all?

Unreasonable outcomes and endless quandaries like these would impair the truth-determining purpose of trials. But this can be easily avoided by shifting from a preclusive approach to an instructive approach. Instead of requiring the court to make a specific finding that creative expression has a literal rather than figurative meaning, a very similar law could require the court to consider whether the probative value of creative expression evidence is reduced because it has a figurative, rather than literal meaning. By requiring the court to consider a critical question, this framing preserves the trial judge's ability to meaningfully address the unique facts of each case.

2. Conflating Rap as Evidence with Rap as Threats Cases

Categorical rules regulating the admissibility of rap content ignore the fact that there are two very different contexts where this type of evidence is presented—when rap content is alleged to be evidence that the rapper committed a separate crime, and when the rap is itself alleged to be illegal conduct.³³⁶ The public interests and the evidentiary and legal framework at issue are very different for these two types of cases.

When rap content is used as evidence of other illegal conduct, there is often other evidence available to prosecutors. This point is demonstrated by the many cases where appellate courts have found that even if rap content was improperly admitted, the error was harmless in light of other strong evidence against the defendant.³³⁷ Since the need for rap content as evidence in these cases may be lower, categorical restrictions may be less damaging to the truth-determining process.

However, in cases where the rap content is used to illegally threaten witnesses³³⁸ or make other illegal true threats, the public interest in admitting the evidence is far higher. The rap content is essential to prove such a case. A per se ban, such as the one proposed in New Jersey, would essentially legalize witness intimidation, as long as it was done in a way that is “creative.”³³⁹ How can the government prosecute a witness intimidation case if the illegal threat itself is inadmissible?

334. No. 12 Cr. 45, 2013 WL 3965281, at *7 (S.D.N.Y. July 31, 2013).

335. N.Y.S.B. 1738 § 1(2)(a).

336. See *supra* Parts I.B, I.C for a discussion of the distinctions between these two types of cases.

337. See *United States v. Recio*, 884 F.3d 230, 238 (4th Cir. 2018) (finding that there was significant other evidence that the defendant was a felon in possession of a firearm, including testimony from two eyewitnesses who saw him throw a gun, and the recovery of the gun from where they saw it thrown); *United States v. Gamory*, 635 F.3d 480, 494 (11th Cir. 2011) (discussing the overwhelming other evidence of the defendant's illegal drug dealing operation).

338. See, e.g., *Commonwealth v. Knox*, 190 A.3d 1146, 1159–61 (Pa. 2018).

339. See *Assemb. J. Res. 178*, 220th Leg., Reg. Sess. (N.J. 2022).

Laws against witness intimidation serve the public interest by encouraging witnesses to crimes to tell their stories and by protecting them from retribution. Stringent regulations on creative expression evidence with no flexibility could dissuade prosecutions for this type of witness intimidation. These cases already have the higher burden of surviving constitutional scrutiny under the true threats doctrine.³⁴⁰ Adding strenuous evidentiary burdens to the existing constitutional burden is simply unnecessary and counterproductive.

Laws that disincentivize prosecution due to witness intimidation could not come at a worse time, as courts around the country are currently facing an epidemic of witness intimidation.³⁴¹ The “stop snitching” movement, which was created and popularized through the rap genre,³⁴² is a major impediment to solving crimes.³⁴³ Case law shows that defendants can, and do, use rap lyrics to threaten and intimidate witnesses.³⁴⁴ But thus far, legislators have ignored this important context when drafting broad regulations against creative expression evidence. It is not far-fetched to imagine that witness intimidation via rap will increase if laws are passed that make it difficult or impossible to introduce creative expression as evidence.

Witnesses to crimes are not the only ones who may suffer under a preclusive approach to regulating rap content as evidence. True threats are not protected by the First Amendment because they “subject individuals to fear of violence and to the many kinds of disruption that fear engenders.”³⁴⁵ We live in an age where receiving violent threats is becoming an all-too-common experience. A 2021 Pew Research Center poll found that the percentage of Americans who had received threats of physical violence online doubled, from seven percent to fourteen percent, between 2014 and 2020.³⁴⁶ Overall, forty-one percent of Americans reported receiving some kind of online harassment.³⁴⁷ Public officials have been particularly targeted, receiving “[a] deluge of violent messages” in recent years.³⁴⁸

340. See *supra* Part I.B.1.

341. See John Browning, #Snitches Get Stitches: Witness Intimidation in the Age of Facebook and Twitter, 35 PACE L. REV. 192, 194 (2014).

342. *Montague v. State*, 243 A.3d 546, 565 n.10 (Md. 2020).

343. Margaret O’Malley, *Witness Intimidation in the Digital Age*, THE PROSECUTOR, July/Aug./Sep. 2014, at 14, 18, <https://pceinc.org/wp-content/uploads/2015/06/Witness-Cooperation-and-Intimidation-Witness-Intimidation-In-the-Digital-Age.pdf> [<https://perma.cc/H643-CFEF>].

344. See, e.g., *Commonwealth v. Knox*, 190 A.3d 1146, 1159 (Pa. 2018); *Montague*, 243 A.3d at 565; *Jordan v. State*, 212 So. 3d 836, 842, 846 (Miss. Ct. App. 2015), *aff’d by an equally divided court*, 212 So. 3d 817 (Miss. 2016).

345. *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (internal quotation marks omitted) (quoting *Virginia v. Black*, 538 U.S. 343, 360 (2003)).

346. EMILY A. VOGELS, PEW RSCH. CTR., *THE STATE OF ONLINE HARASSMENT 4* (2021), https://www.pewresearch.org/wp-content/uploads/sites/20/2021/01/PI_2021.01.13_Online-Harassment_FINAL-1.pdf [<https://perma.cc/4Y8V-X7B5>].

347. *Id.*

348. Rob Kuznia, Majlie de Puy Kamp, Alex Leeds Matthews, Kyung Lah, Anna-Maja Rappard & Yahya Abou-Ghazala, *A Deluge of Violent Messages: How a Surge in Threats to Public Officials Could Disrupt American Democracy*, CNN (Dec. 7, 2023, at 22:33 ET), <https://www.cnn.com/2023/12/07/politics/threats-us-public-officials-democracy-invs/index.html> (on file with the Temple Law Review).

As *Elonis* shows, the damaging impact of receiving violent harassment online is not softened simply because the person making the threats prefers to do so in rhymes.³⁴⁹ Among the many online posts *Elonis* made threatening and degrading his soon-to-be ex-wife, he wrote:

There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, b****, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, b****, so I can forgive you.³⁵⁰

Based in part on this post, *Elonis*'s ex-wife obtained a Protection From Abuse order from the state court.³⁵¹ Should she have been denied this protection simply because *Elonis* chose to rhyme his threats? *Elonis* violated this protective order just a week later by posting another violent rap song.³⁵² At trial, *Elonis*'s ex-wife testified that his posts "made [her] extremely afraid for [her] life[,] . . . like [she] was being stalked, and . . . extremely afraid for [her] and [her] children's and [her] families' lives."³⁵³ Should the jury have been prevented from hearing the basis for her fears, simply because *Elonis* styled himself as a rapper?

A minority of criminal cases that include rap content as evidence involve rap as threats.³⁵⁴ However, they present unique circumstances requiring different treatment from the more common cases where rap content is used as evidence of independent illegal conduct. Trial courts need flexibility to reach fair results in unique circumstances. The broad preclusive measures considered by some state legislatures ignore the wide variability among cases by forcing a one-size-fits-all approach to all evidence, once it is labeled creative.³⁵⁵

III. A JUDICIAL ROADMAP FOR ASSESSING THE ADMISSIBILITY OF RAP CONTENT

No legislative intervention is necessary, though, to develop a comprehensive legal framework to assist trial judges in determining the admissibility of rap content. This Section suggests a roadmap that is rooted in constitutional principles, foundational evidentiary concepts, legal precedent, the nature of rap content, and the trial judge's duty to manage the trial and reduce unfair prejudice. Further, the roadmap is designed to evolve as necessary through interpretation by appellate courts, which are specifically charged to review trial judges' decisions for procedural and substantive errors, with legality and fairness as objectives.

349. See 841 F.3d 589, 593 (3d Cir. 2016) (upholding *Elonis*'s conviction on remand).

350. *Id.* at 593.

351. *Id.*

352. *Id.* at 594.

353. *Id.* at 593 (first, second, fourth, fifth, sixth, and seventh alterations in original) (internal quotation marks omitted).

354. A content analysis of 211 cases involving the use of rap as evidence in criminal cases from 2012 to 2017 found that only sixteen included criminal threats. See *Lutes et al.*, *supra* note 10, at 88–89, 105.

355. See S.B. 1738, 2023–2024 Reg. Sess. § 1 (N.Y. 2023), <https://legislation.nysenate.gov/pdf/bills/2023/S1738> [<https://perma.cc/SB8U-8HXT>].

This roadmap consists of a series of questions intended to assist trial judges in fairly determining the admissibility of rap content in a criminal trial. While all evidence requires careful consideration, rap content has unique aspects that make its probative value and prejudicial potential particularly murky. Common features of the rap genre both raise³⁵⁶ and lower³⁵⁷ its probative value. Rap content also has inherently prejudicial tendencies,³⁵⁸ but these tendencies are not present in all cases.³⁵⁹ These conflicting factors defy categorical assessments. Thus, they must be carefully weighed based on the facts of each individual case. The greatest responsibility for this task must ultimately rest with trial judges, who are charged with safeguarding the trial process for fairness—including ensuring that juries consider only the appropriate evidence—and who are intimately familiar with the issues and facts of a particular case.

In answering the questions proposed in this roadmap, one should be mindful that the judge is not the ultimate factfinder and need not determine whether the lyrics are true or related to the charged crime. Final assessments of the weight and credibility of rap evidence must be left to the jury.³⁶⁰ However, admitting rap content without considering the types of questions suggested below is a failure to fully account for the unique

356. Weighing against the probative value of rap content is its artistic and literary nature, its stylings of braggadocio and exaggeration, the heavy use of slang and coded reference, and the known tendency of rappers to overstate the authenticity of their work. Brief of Artists and Scholars, *supra* note 2, at 16.

357. Rap videos often feature real locations, discuss real events, demonstrate specific knowledge relating to firearms, the drug trade, and local gangs, and sometimes even show specific objects that later appear at crime scenes, with lyrics that often name real people. See *supra* Part I.C.2.a for examples of demonstrative cases. One of the most common themes in rap is retaliation against anyone who cooperates with law enforcement. See Rachael A. Woldoff & Karen G. Weiss, *Stop Snitchin': Exploring Definitions of The Snitch and Implications for Urban Black Communities*, 17 J. CRIM. JUST. & POPULAR CULTURE 184, 190–92 (2010); Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1264 (2011) (tracing the early origins of the “stop snitching” movement to the Baltimore rap scene); *Jordan v. State*, 212 So. 3d 836, 858 (Miss. Ct. App. 2015) (Fair, J., dissenting), *aff'd by an equally divided court*, 212 So. 3d 817 (Miss. 2016). This “stop snitching” content coincides with a current epidemic of witness intimidation in courts around the country. See Browning, *supra* note 341, at 195–201. See generally O'Malley, *supra* note 343 (discussing the problem the digital era presents for witness intimidation).

358. Rappers often depict themselves as dangerous criminals and use racially charged, bigoted, and violent language, which could inflame the passions of a jury. See *supra* Part I.C.2.b for examples of demonstrative cases. The rap genre is also rooted in Black racial identity and cultural traditions, so its use in criminal trials inherently implicates America's racial dynamics and prejudices. See *Commonwealth v. Correia*, 210 N.E.3d 407, 420 (Mass. 2023) (“This risk [of unfair prejudice] is exacerbated by realities . . . that rap historically has been used, by Black Americans especially, to give voice to observations of violence, poverty, and crime—frequently irrespective of the rapper's own involvement—as ‘a form of political expression.’” (quoting *Commonwealth v. Gray*, 978 N.E.2d 543, 561 n.24 (Mass. 2012))); see also Brief of Artists and Scholars, *supra* note 2, at 5–13 (discussing the origins, rise, and influence of hip-hop and rap music).

359. Rap, especially the gangster rap style, is a wildly popular commercial genre that millions of people enjoy and aspire to emulate. See *United States v. Mills*, 367 F. Supp. 3d 664, 672 (E.D. Mich. 2019) (“[B]ecause rap . . . is a mainstream and widely recognized music genre, the Court finds it highly unlikely that any reasonable juror nowadays could conclude that [the defendant] is guilty of racketeering conspiracy merely because the rap songs contain potentially offensive themes.”); *United States v. Stuckey*, 253 F. App'x 468, 484 (6th Cir. 2007). Rap lyrics are also nonoffensive in many cases and may have no particular emotional impact on the jury. See, e.g., *United States v. Recio*, 884 F.3d 230, 233–38 (4th Cir. 2018).

360. See *Recio*, 884 F.3d at 236 (“Although reasonable minds could also interpret the lyric otherwise, that only affects the weight of the evidence, not its admissibility.”).

probative and prejudicial attributes of rap content.³⁶¹ The answers to these questions are often interrelated, and must be considered together in the totality of the circumstances of the case. Given the complexity of these questions, determining the admissibility of any rap content in limine facilitates a more thorough and fair assessment, and a well-developed record for appellate review.

To assess the probative value of rap content, courts should consider:

1. What is the correct legal framework for analyzing rap content?
2. What is the rap content offered to prove?
3. Who created the rap content?
4. When was the rap content created?
5. What was the context in which the rap content was created?
6. What do the lyrics mean to the writer and/or their intended recipient?
7. How closely does the rap content resemble the charged crime?
8. Is the rap content cumulative of other evidence?

In assessing the rap content's potential for unfair prejudice, courts should consider:

1. How does the prosecution intend to use the rap content?
2. How does the rap content depict the defendant?
3. Does the rap content use bigoted or offensive language?
4. What empirical evidence and scholarly research is available regarding the prejudicial effect of rap content?
5. Can the prejudicial effect be reduced by limiting the amount or type of rap content admitted?
6. Can the prejudicial effect of rap content be reduced by instructing the jury on its permitted uses?

Since these questions will have more or less prominence depending on the facts of a particular case, they should not be treated like a checklist. Instead, the trial judge must identify and focus their analysis on the most important issues in each case. The nature and purpose of each question are explained below.

A. *Questions Assessing the Probative Value of Rap Content*

1. What Is the Correct Legal Framework for Analyzing Rap Content?

All analysis of disputed evidence starts with choosing the correct legal framework. When analyzing rap content, a question preceding all others must first be answered: What is the crime charged? The answer determines whether the analysis of rap content should focus on evidentiary or constitutional questions. If the defendant is being directly criminally punished for their rap, such as being charged under a terroristic threats statute, the evidence must be considered under the true threats doctrine. But if the rap evidence is offered as proof of independent criminal conduct, First Amendment arguments can generally be rejected.³⁶²

361. See Dennis, *supra* note 2, at 12–14 (arguing that “courts fail to treat rap music lyrics as an art form”).

362. See *supra* note 70 for a collection of cases.

For cases implicating the true threats doctrine, the recklessness standard announced in *Counterman*³⁶³ and precedential cases, such as *Jones*³⁶⁴ and *Knox*,³⁶⁵ suggests a test for assessing the constitutionality of convictions for the content of rap songs. First, courts should make an objective assessment based on contextual factors derived from *Watts* to determine whether the rap is “‘a serious expression of intent to inflict harm,’ and not merely jest, hyperbole, or a steam valve.”³⁶⁶ Objective factors should include: (1) the recipient’s reaction, (2) whether the rap contained conditional or unconditional threats, (3) whether the rap was communicated directly to the recipient, (4) whether the rapper had made similar statements to the recipient in the past, and (5) whether the recipient had reason to believe that the rapper might engage in violence.³⁶⁷

These factors should be considered in light of the unique social context of rap music, which can make interpreting rap lyrics difficult for people unfamiliar with the genre’s conventions.³⁶⁸ Rappers commonly use figurative language, invent new meanings of words, rely on slang and coded references, exaggerate, and express vulgar, violent, and taboo themes.³⁶⁹ Therefore, *Watts*’s finding that political threats should be interpreted with the understanding that political language is “often vituperative, abusive, and inexact” applies equally to rap music.³⁷⁰

Second, if the objective factors weigh in favor of the rap being a true threat, then the court must consider whether the rapper acted recklessly by “consciously disregard[ing] a substantial risk that his communications would be viewed as threatening violence.”³⁷¹ To do so, the prosecution must provide evidence that the rapper was “aware that others could regard his statements as threatening violence and deliver[ed] them anyway.”³⁷²

If rap is offered as evidence of independent illegal conduct, the court must then choose, again, the correct evidentiary framework. Rap content offered as intrinsic (direct or circumstantial) evidence of the crime—such as demonstrating knowledge of key details that would have been known only to the perpetrator—should be considered for relevance under Rule 401 and then screened for unfair prejudice under Rule 403.³⁷³ Rap evidence offered as extrinsic evidence to prove the defendant’s motive, intent, or other

363. *Counterman v. Colorado*, 143 S. Ct. 2106, 2111–12, 2117 (2023).

364. *Jones v. State*, 64 S.W.3d 728, 735 (Ark. 2002).

365. *Commonwealth v. Knox*, 190 A.3d 1146, 1159 (Pa. 2018).

366. *Id.* at 1165 (Wecht, J., concurring in part and dissenting in part) (quoting J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 858 (Pa. 2002)). The test proposed here is based on Justice Wecht’s concurrence in *Knox* and incorporates *Counterman*, which had not yet been decided at the time.

367. *See id.* at 1159; *Jones*, 64 S.W.3d at 735.

368. *See* Brief of Artists and Scholars, *supra* note 2, at 16.

369. *Id.* at 13–16.

370. *Watts v. United States*, 394 U.S. 705, 708 (1969).

371. *Counterman v. Colorado*, 143 S. Ct. 2106, 2112 (2023).

372. *Id.* at 2117 (internal quotation marks omitted) (quoting *Elonis v. United States*, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part)).

373. *See State v. Skinner*, 95 A.3d 236, 249 n.5 (N.J. 2014) (discussing the difference between direct evidence and indirect evidence); *Holmes v. State*, 306 P.3d 415, 418 n.2 (Nev. 2013) (finding that the trial court had incorrectly analyzed rap content under Rule 404(b) when it was offered as direct evidence). *See supra* Part I.C.1 for a discussion of how to differentiate between intrinsic and extrinsic evidence.

indirect factors should be considered under Rule 404(b)'s more stringent balancing test to ensure that it is not inadmissible propensity evidence.³⁷⁴

2. What Is the Rap Content Offered To Prove?

The most basic question regarding the probative value of rap content is determining what the material is being offered to prove. If the offering party cannot identify a disputed fact that the rap content makes more or less likely, then it is irrelevant, and no further analysis is warranted.³⁷⁵ Further, the offering party must clearly and affirmatively identify the facts that it intends the rap content to prove before it is possible to determine how effectively the rap content proves that fact.³⁷⁶ The stated purpose for admitting potentially prejudicial evidence, such as rap content, should also form the basis of limiting instructions to the jury and the permissible uses of evidence during trial.³⁷⁷ For all these reasons, trial courts should require a party offering rap content to clearly state the facts that they intend it to prove, and the basis for why it proves those facts, before finding that the rap content has probative value.³⁷⁸

3. Who Created the Rap Content?

Rap content is far more probative as evidence if it is created by the defendant than if it is created by someone else.³⁷⁹ Cases such as *Williams*, discussed in Part I.C.2.a involving professionally produced rap songs or videos that may have been written by multiple people and directed and edited by others³⁸⁰ show that determining the exact authorship of any particular line is difficult.³⁸¹ If it is not known who created the rap content, it is nearly impossible to determine the extent to which it represents the actions or beliefs of the defendant, therefore reducing its probative value.³⁸² Further, if the

374. See, e.g., *Baker v. State*, 899 S.E.2d 139, 147–51 (Ga. 2024).

375. See, e.g., *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *5 (E.D. Pa. Apr. 28, 2017).

376. See *Baker*, 899 S.E.2d at 147 (“[T]he extent to which evidence tends to make the existence of a fact more or less probable depends significantly on the . . . strength of its logical connection to the fact for which it is offered.” (quoting *Olds v. State*, 786 S.E.2d 633, 640 (Ga. 2016))).

377. See *id.* at 150; *Commonwealth v. Correia*, 210 N.E.3d 407, 420 (Mass. 2023).

378. See, e.g., *United States v. Herron*, No. 10-CR-0615, 2014 WL 1871909, at *5 (E.D.N.Y. May 8, 2014) (showing an example of a trial court procedure requiring the offering party to make this showing), *aff'd*, 762 F. App'x 25 (2d Cir. 2019); see also *Commonwealth v. Gray*, 978 N.E.2d 543, 545, 556–57 (Mass. 2012) (reversing a murder conviction because the trial court allowed unqualified “experts” to testify to the meaning of a rap video, and allowed the prosecutor to stray beyond the purpose for which the prosecution offered the video); *Baker*, 899 S.E.2d at 150 (“[T]he trial court allowed the prosecutor to capitalize on the video’s prejudicial impact by emphasizing the video not to prove the purposes for which the State now asserts the video was probative (i.e., to complete the story of the crime, to establish Baker’s identity, to show Baker’s motive, or to prove that Baker had access to the guns used in the shooting), but for the purpose of showing Baker’s alleged propensity for violence . . .”). In both *Gray* and *Baker*, the existence of a trial court record for the alleged purpose for admitting the rap content was crucial to overturning unjust convictions. *Gray*, 978 N.E.2d at 561; *Baker*, 899 S.E.2d at 151–54.

379. See, e.g., *Gray*, 978 N.E.2d at 560.

380. *United States v. Williams*, 663 F. Supp. 3d 1085, 1140 (D. Ariz. 2023).

381. See, e.g., *United States v. Donald*, No. 21-cr-8, 2023 WL 6958797, at *24–25 (D. Conn. Oct. 20, 2023).

382. See *Williams*, 663 F. Supp. 3d at 1133.

defendant did not write the lyrics, they may be inadmissible hearsay.³⁸³ Therefore, if the defendant does not admit authorship, the party requesting admission of the rap content must sufficiently establish authorship for the content to prove it has probative value.³⁸⁴

4. When Was the Rap Content Created?

Rap evidence is most probative when it is created close in time to the charged crime and is less probative the more distant in time its creation is from the charged or alleged crime.³⁸⁵ Courts have found that rap content created months removed from the charged crimes was sufficiently remote to reduce its probative value,³⁸⁶ and lyrics written years removed from the crime likely have little to no probative value.³⁸⁷

Cases such as *Montague*, discussed in Part.I.D.2, show that the relevant time period depends on what the rap evidence is offered to prove.³⁸⁸ Rap lyrics written after a crime are generally more probative of the defendant's involvement in the crime.³⁸⁹ But a video created before a crime is more probative to show the defendant's access to firearms or possession of instruments of a crime.³⁹⁰ If rap content is offered to show "consciousness of guilt," because it contains threats against witnesses, such as in the *Jordan* case discussed in Part I.C.1, the relevant time period is the proximity between the publication of the rap and the witness's expected testimony.³⁹¹

5. What Was the Context in Which the Rap Content Was Created?

Assessing the meaning and probative value of rap content requires considering the context in which it was created. In cases where the defendant is charged with making an illegal threat via a rap song, the context of the relationship between the writer and their intended recipient is particularly important.³⁹²

Some contextual clues can indicate that rap content has low probative value. For example, rap created by professional or semiprofessional musicians may be less

383. See, e.g., *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011); *United States v. Williams*, No. 13-cr-00764, 2017 WL 4310712, at *6 (N.D. Cal. Sep. 28, 2017), *aff'd sub nom.*, *United States v. Heard*, Nos. 18-10218, 18-10228, 18-10239, 18-10248, 18-10258, 2022 WL 2662882 (9th Cir. July 11, 2022).

384. *Donald*, 2023 WL 6958797, at *25 ("[B]efore these rap videos [can] be considered for admission into evidence, these threshold issues as to their production and the corresponding chain of custody issues related to their production must be satisfied.").

385. *Montague v. State*, 243 A.3d 546, 564 (Md. 2020); *Donald*, 2023 WL 6958797, at *28; *United States v. Stephenson*, 550 F. Supp. 3d 1246, 1252–53 (M.D. Fla. 2021).

386. *Donald*, 2023 WL 6958797, at *27–28 (citing *Stephenson*, 550 F. Supp. 3d at 1252).

387. *Montague*, 243 A.3d at 558–59 (finding that lyrics composed two years before a crime had an "extraordinarily weak temporal nexus to the crime" (citing *Hannah v. State*, 23 A.3d 192, 193 (Md. 2011))); *DeHart v. State*, No. 43A03-1611-CR-2594, 2017 WL 2927437, at *6 (Ind. Ct. App. July 10, 2017) (finding that lyrics written three years earlier "has only the slightest tendency to prove that [the defendant] committed robbery and murder").

388. *Montague*, 243 A.3d at 564–65.

389. *Id.* at 564.

390. See, e.g., *United States v. Dore*, No. 12 Cr. 45, 2013 WL 3965281, at *7–8 (S.D.N.Y. July 31, 2013).

391. *Jordan v. State*, 212 So. 3d 836, 842, 845–46 (Miss. Ct. App. 2015), *aff'd by an equally divided court*, 212 So. 3d 817 (Miss. 2016); *Montague*, 243 A.3d at 565.

392. See, e.g., *Jones v. State*, 64 S.W.3d 728, 736 (Ark. 2002); *Commonwealth v. Knox*, 190 A.3d 1146, 1159 (Pa. 2018).

probative. As the production value of a rap song or video increases, the chances that multiple people contributed to the writing of lyrics or the directing of videos also increase.³⁹³ Further, rappers aspiring to achieve commercial success may be more affected by the pressures of the music industry. As the Eastern District of New York noted in *United States v. Jordan*, “rap artists have become increasingly incentivized to create music about drugs and violence to gain commercial success, and will exaggerate or fabricate the contents of their music in pursuit of that success.”³⁹⁴ However, when there is no evidence that the rap lyrics were intended for public consumption, or there is evidence of only a limited target audience, this may indicate more probative value since the content of the rap evidence is less likely to have been influenced by the pressures of the music industry.

The context in which rap content is created can also increase its probative value. Multiple courts have found that rap lyrics or videos were more probative because they were created or published while the defendant was awaiting trial and contained direct or indirect threats against witnesses.³⁹⁵ In cases involving racketeering or gang-related violence, the creation and dissemination of rap content containing threats can also be evidence of furthering a criminal conspiracy.³⁹⁶

6. What Do the Lyrics Mean to the Writer or Recipient?

The meaning of rap lyrics is one of the most difficult questions for the court to consider, as the meaning of art is famously subjective. Many courts have recognized that the artistic nature of rap inherently reduces its probative value.³⁹⁷ Courts have also recognized that the slang, coded references, and general linguistic stylings used in rap can make it particularly difficult to interpret.³⁹⁸

Courts should consider the testimony of expert witnesses to assist with interpreting rap content, the meaning of which will often not be common knowledge for judges or juries.³⁹⁹ Expert witnesses can also shed light on how pressures from the music industry

393. See *United States v. Williams*, 663 F. Supp. 3d 1085, 1105, 1133, 1140 (D. Ariz. 2023).

394. 714 F. Supp. 3d 158, 163 (E.D.N.Y. 2024).

395. *Montague*, 243 A.3d at 565; *Commonwealth v. Flamer*, 53 A.3d 82, 84, 89 (Pa. Super. Ct. 2012); *Jordan*, 212 So. 3d at 842, 846.

396. See Ellie Rushing, *Defying the Code of Silence*, PHILA. INQUIRER (June 3, 2024, at 05:00 ET), <https://www.inquirer.com/crime/a/philadelphia-gangs-witness-testimony-ybc-yfa-gun-violence-20240603.html> (on file with the Temple Law Review).

397. E.g., *State v. Skinner*, 95 A.3d 236, 251 (N.J. 2014) (“The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views.”); *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *6 (E.D. Pa. Apr. 28, 2017) (“Viewed in their broader artistic context, the rap music evidence does not have a high probative value.”).

398. See *Jordan*, 714 F. Supp. 3d at 163 (“In the context of rap music, however, the Court must remain cognizant that ‘hip hop is fundamentally an *art form* that traffics in hyperbole, parody, kitsch, dramatic license, double entendres, signification, and other literary and artistic conventions to get it [sic] point across.” (quoting Michael Eric Dyson, *Foreword to THAT’S THE JOINT!: THE HIP-HOP STUDIES READER* xii (Murray Forman & Mark A. Neal eds., 2004))); *United States v. Donald*, No. 21-cr-8, 2023 WL 6958797, at *21–22 (D. Conn. Oct. 20, 2023).

399. See *supra* Part I.D.1 for a discussion of the use of expert witnesses to testify regarding the rap and hip-hop culture and practices.

and cultural conventions can influence rappers' lyrics.⁴⁰⁰ When no party has offered an expert witness, courts may consider expert testimony from similar cases in other jurisdictions. For example, Judge Markovich's remarkably thorough opinion in *Williams* provides a lengthy discussion of rap history and conventions through the testimony and cross-examination of the provided rap expert.⁴⁰¹ Courts should also scrutinize the qualifications of police officers who testify about the meaning of rap lyrics, as they may have no specialized knowledge qualifying them to testify as expert witnesses in this area.⁴⁰²

In interpreting the meaning of any lyric, courts should consider the entire context of the song. Prosecutors often focus on only a line or two from a song, sometimes ignoring that the song, as a whole, covers many more themes and issues, which may indicate that an isolated line should not be viewed literally.⁴⁰³

In cases where rap content is alleged to be evidence of witness intimidation, courts should also consider the witness's interpretation and understanding of the rap content. This is particularly important when the defendant has been charged with witness intimidation because the subjective effect on the listener is one of the objective factors that courts generally assess under the true threats doctrine.⁴⁰⁴ In cases where the rap content is offered as evidence of consciousness of guilt, the effect on the listener can help distinguish between intentional intimidation and the generic stop snitching themes common in many rap songs.⁴⁰⁵

If the music is accompanied by a video, courts should consider whether the imagery adds to, clarifies, or changes the meaning of the lyrics. Videos that show locations, people, or items associated with the charged crime may increase the probative value of the lyrics contained within them.⁴⁰⁶ Courts should not assume, though, that simply because a rap video depicts a defendant as a drug dealer or gang member, the video is an admission that they partake in those activities.⁴⁰⁷

7. How Closely Does the Rap Evidence Resemble the Charged Crime?

Having considered the possible meanings of the rap content, courts must then assess the extent to which it resembles or relates to the charged crime. The strong nexus test,

400. See, e.g., *United States v. Herron*, No. 10-CR-0615, 2014 WL 1871909, at *7–8 (E.D.N.Y. May 8, 2014), *aff'd*, 762 F. App'x 25 (2d Cir. 2019).

401. *United States v. Williams*, 663 F. Supp. 3d 1085, 1100–10 (D. Ariz. 2023).

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

403. See, e.g., *Commonwealth v. Gibson*, No. CP-51-CR-0006605-2013, 2014 Phila. Ct. Com. Pl. LEXIS 537, at *13–14 (Pa. Ct. C.P. Phila. Cnty. Dec. 31, 2014).

404. *Jones v. State*, 64 S.W.3d 728, 735 (Ark. 2002); *Commonwealth v. Knox*, 190 A.3d 1146, 1159 (Pa. 2018).

405. See *Jordan v. State*, 212 So. 3d 836, 842, 846 (Miss. Ct. App. 2015), *aff'd by an equally divided court*, 212 So. 3d 817 (Miss. 2016).

406. See, e.g., *United States v. Graham*, 293 F. Supp. 3d 732, 735, 737 (E.D. Mich. 2017) (considering a rap video that incorporated news clips of a murder committed by one of the defendant's associates); *United States v. Dore*, No. 12 Cr. 45, 2013 WL 3965281, at *7 (S.D.N.Y. July 31, 2013) (admitting a rap video showing the defendants in possession of a vehicle later used in a robbery).

407. See, for example, *Commonwealth v. Gibson*, in which Judge Campbell addressed a similar issue and the assistant district attorney insisted that three rap videos amounted to the defendant's admission of criminal activity. 2014 Phila. Ct. Com. Pl. LEXIS 537, at *6.

which courts are increasingly adopting, makes the similarity between the lyrics and the charged crime an essential factor for determining the admissibility of rap content.⁴⁰⁸ Even courts that have not endorsed the strong nexus test recognize that the probative value of rap content depends to some extent on “the specificity with which the lyrics describe the facts surrounding the offense(s) charged.”⁴⁰⁹ Courts have long recognized that rap content has little to no probative value where it is “too vague to be construed as being about the case.”⁴¹⁰

Despite the emphasis that courts place on determining how closely rap lyrics resemble the charged crime, the results are often highly arguable.⁴¹¹ The difficult nature of this inquiry increases the importance of carefully considering the contextual factors described above. A superficial determination under the strong nexus framework that a rap song resembles the charged crime, without more, fails to fully analyze other factors that could increase or decrease the probative value of the rap content.

8. Is the Rap Content Cumulative?

Finally, courts should consider whether it is necessary to introduce the many complexities related to admitting rap content by determining whether the rap content is cumulative of other, more clearly admissible evidence. It is a well-recognized evidentiary principle that the probative value of a particular piece of evidence decreases when other available evidence proves the same fact.⁴¹² When rap content is offered to prove a fact that is not seriously contested or for which there are significant, alternative forms of evidence to rely on,⁴¹³ admitting the rap content could unnecessarily delay the trial or confuse the issues before the jury.⁴¹⁴ Given the difficulties in assessing rap evidence—and the inherent danger of unfair prejudice presented by it—courts should be reluctant to admit rap content that can reasonably be regarded as cumulative.

408. See *supra* Part I.D.2 for a discussion of the strong nexus test.

409. *Tann v. United States*, 127 A.3d 400, 468 (D.C. 2015) (collecting cases); *accord* *United States v. Recio*, 884 F.3d 230, 234–35 (4th Cir. 2018); *Holmes v. State*, 306 P.3d 415, 418–20 (Nev. 2013).

410. *Commonwealth v. Flamer*, 53 A.3d 82, 90 n.10 (Pa. Super. Ct. 2012); *accord* *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001); *see also* *Hannah v. State*, 23 A.3d 192, 197–202 (Md. 2011) (comparing cases that had found or not found that specific lyrics clearly referenced the crimes the defendants were charged with).

411. *See, e.g.,* *Montague v. State*, 243 A.3d 546, 575 (Md. 2020) (Watts, J., dissenting) (arguing the majority erred in concluding the rap lyrics closely resembled the charged crime); *Jordan v. State*, 212 So. 3d 817, 826 (Miss. 2016) (King, J., dissenting).

412. *See* *Baker v. State*, 899 S.E.2d 139, 147 (Ga. 2024) (“[P]robative value depends . . . upon the need for the evidence. When the fact for which the evidence is offered is undisputed or not reasonably susceptible of dispute, the less the probative value of the evidence.” (quoting *Olds v. State*, 786 S.E.2d 633, 641 (Ga. 2016))); *DeHart v. State*, No. 43A03-1611-CR-2594, 2017 WL 2927437, at *6 (Ind. Ct. App. July 10, 2017) (“A judge balancing probative value against unfair prejudice should focus on the incremental effect of the challenged evidence, and weigh the additional probative value provided by the challenged evidence in light of other evidence already in the case against the additional potential for unfair prejudice in light of other evidence already in the case.” (quoting ROBERT LOWELL MILLER, JR., INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 403.102 (4th ed. 2016))).

413. *See, e.g.,* *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

414. *United States v. Williams*, 663 F. Supp. 3d 1085, 1133 (D. Ariz. 2023).

B. Questions for Assessing the Prejudicial Effect of Rap Content

Once courts have fully considered the probative value of the rap content at issue, another set of questions can help assess the offered evidence's potential for unfair prejudice.

1. How Does the Prosecution Intend To Use the Rap Content?

The way in which a party uses, or misuses, admitted rap content inherently impacts its prejudicial effect.⁴¹⁵ Courts should clearly identify the intended uses of rap content before admitting it and strictly limit the parties to those intended uses. For example, in *Baker*, discussed in Part I.C.2.a, the prosecution argued that a rap video Baker appeared in was relevant to identify him, to complete the story of the investigation, to show that he had access to firearms, and to show that he considered himself a “big shot” because he was part of the entourage of a successful rapper.⁴¹⁶ However, once the video was admitted, the prosecution repeatedly used the video to argue that Baker promoted gun violence through rap music and was, therefore, the shooter—a textbook case of inadmissible propensity evidence.⁴¹⁷ As the prosecutor noted in closing arguments: “Go back to that Ghetto Angels video. Right? That’s all they know, the gun violence. They want to promote it.”⁴¹⁸ This statement is a far cry from the limited purposes for which the prosecution was permitted to admit and use Baker’s rap content as evidence.⁴¹⁹ As the Supreme Court of Georgia noted in their decision granting Baker a new trial, “the prosecutor severely exacerbated the video’s prejudicial impact by emphasizing that it showed Baker’s predisposition to gun violence.”⁴²⁰

In cases such as *Baker*, where rap content is admitted for a narrow purpose, courts should ensure the parties limit their use of that evidence to that narrow purpose. Given the potentially highly prejudicial nature of rap content, allowing parties to go beyond the limited grounds for its admission can severely prejudice the defendant. Additionally, as *Baker* demonstrated by reversing a murder conviction based solely on the improper use of admitted rap evidence,⁴²¹ lax control over the uses of rap content by prosecutors can have a high cost on judicial resources and lead to unnecessary delay and obstruction of justice.

2. How Does the Rap Content Depict the Defendant?

Many courts have noted that rap content depicting the defendant as a gang member or violent criminal introduces a danger of unfair prejudice.⁴²² Admitting violent and/or

415. See, e.g., *Baker*, 899 S.E.2d at 150.

416. *Id.* at 148.

417. *Id.* at 150–51.

418. *Id.*

419. *Id.* at 148.

420. *Id.* at 152.

421. *Id.* at 153–54.

422. *Hart v. State*, 688 S.W.3d 883, 895 (Tex. Crim. App. 2024) (“[A]ny song that glorifies criminality, regardless of genre, is inherently prejudicial. The danger associated with playing these videos to the jury is that the jury might regard creative expression as proof that Appellant engaged in criminal behavior based upon his rap videos instead of regarding them as nothing more than creative expression.”); see also *People v. Concal*, 254

graphic rap content may cause the jury to convict the defendant based on a belief that the defendant has a propensity for violence, or on an emotional response to the lyrics.⁴²³ A combination of violent lyrics with graphic or violent images can increase this prejudicial effect.

However, not all rap lyrics depict the defendant in a particularly negative light. For example, in *United States v. Recio*, the government sought to introduce a single line from Recio's social media post: "It's Always Tucked, Kuz I'll B Damn If My Life Get Took!!"⁴²⁴ While the probative value of this lyric may be debatable, its prejudicial effect is clearly far lower than the rap videos at issue in *Coneal*, which the court described as "paint[ing] a picture of [the defendant] and his fellow gang members as eagerly and ruthlessly seeking out and engaging in violence, with no empathy for their victims."⁴²⁵ Given the tremendous variability of rap songs and videos, fully assessing the prejudicial nature of any particular rap content requires considering the extent to which it paints the defendant in a negative or violent light.

3. Does the Rap Content Use Bigoted or Offensive Language?

Many courts have recognized that the racist, misogynist, bigoted, profane, or otherwise offensive language that is common in many rap songs and videos has the potential to enflame the passion of the jury and risks a conviction on an improper basis.⁴²⁶ But not all rap songs contain offensive content.⁴²⁷ The prejudicial effect of rap content should be assessed based on its particular potential to offend rather than on categorical statements about the genre.

4. What Empirical Evidence and Scholarly Research is Available Regarding the Prejudicial Effect of Rap Content?

A growing body of scholarly and sociological research suggests that rap content has an inherently prejudicial effect when used as trial evidence due to negative public perceptions of rappers and the connections between those negative perceptions and racial bias.⁴²⁸ Courts have increasingly begun to review these studies, either directly or through

Cal. Rptr. 3d 653, 668 (Ct. App. 2019) (collecting cases); *Commonwealth v. Gray*, 978 N.E.2d 543, 562 (Mass. 2012) ("Although the defendant is neither of the two featured rappers, lyrics such as 'forty-four by my side,' accompanied by images of stereotypical 'gangsta thugs,' some of whose faces are covered by bandanas, could not but have had a prejudicial impact on the jury."):

423. See *Coneal*, 254 Cal. Rptr. 3d at 668; *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001); *Hannah v. State*, 23 A.3d 192, 195, 201 (Md. 2011).

424. 884 F.3d 230, 233 (4th Cir. 2018).

425. *Coneal*, 254 Cal. Rptr. 3d at 668.

426. See *United States v. Wiley*, 610 F. Supp. 3d 440, 446 (D. Conn. 2022) ("[R]ap music as a genre often glorifies violence, misogyny, crime, and other offensive messaging which makes its introduction into evidence potentially highly prejudicial."); e.g., *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011); *United States v. Williams*, 663 F. Supp. 3d 1085, 1134–35 (D. Ariz. 2023).

427. See *Montague v. State*, 243 A.3d 546, 570 n.1 (Md. 2020) (Watts, J., dissenting).

428. See, e.g., Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 507 (2018); Dunbar et al., *supra* note 222, at 280; Carrie Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705, 705 (1999); Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 795 (1999).

the testimony of expert witnesses, when considering the prejudicial nature of rap content.⁴²⁹ Many other courts have reviewed legal scholarship on the issue, which considers largely the same sociological source material but places it in the context of case law.⁴³⁰

Sociological research on public perceptions of rap can provide important context about the prejudicial nature of rap content when admitted as criminal evidence.⁴³¹ However, these studies should be carefully reviewed, as with any other type of evidence, and their results should not be overstated.⁴³² Further, some of the studies may be out of date or may not represent the jurors in a particular jury pool.⁴³³ As with many other factors, legal and sociological scholarship is simply one nondispositive factor worthy of the court's consideration.

5. Can the Prejudicial Effect Be Reduced by Limiting the Amount or Type of Rap Content Admitted?

As courts have become more sophisticated in their analysis of rap content in recent years, it has become common to admit only the specific portions of the rap content that are most relevant and clearly admissible.⁴³⁴ For example, when the Eastern District of New York was presented with a large quantity of rap content in *United States v. Herron*, the court concluded that “the wholesale admission of the proffered evidence [would] subject [Herron] to unfair prejudice based on the minimal relevance of some portions of the videos.”⁴³⁵ The court then laid out specific procedures for the piece by piece assessment of the rap content, which could reduce the danger of unfair prejudice.⁴³⁶ First, the court required the party requesting admission of rap content to clearly articulate its intended purpose for each piece of evidence.⁴³⁷ Such a requirement helps courts keep the

429. *E.g.*, *United States v. Donald*, No. 21-cr-8, 2023 WL 6958797, at *21 (D. Conn. Oct. 20, 2023) (collecting studies); *Wiley*, 610 F. Supp. 3d at 445; *Williams*, 663 F. Supp. 3d at 1135–36; *Jordan v. State*, 212 So. 3d 836, 858 (Miss. Ct. App. 2015) (Fair, J., dissenting), *aff'd by an equally divided court*, 212 So. 3d 817 (Miss. 2016).

430. *See supra* notes 233–34 for a collection of relevant cases.

431. *See Dunbar et al.*, *supra* note 222, at 289 (noting that their study found that “the mere label of rap is sufficient to induce negative evaluations,” and arguing that “judges might underappreciate the extent to which the label of lyrics—and not the substantive lyrics themselves—impact jurors’ decisions”).

432. *See id.* at 284 tbl. 2. The Dunbar study asked participants to assess a set of lyrics on a nine-point scale, with half told that the lyrics were from a country song and the other half told that they were from a rap song. *Id.* When asked whether “[t]he song is dangerous or harmful to society,” the country group’s average score was 3.34, while the rap group’s was 3.79. *Id.* at 284. Similarly, when asked whether “[t]he lyrics are threatening,” the country group averaged 3.18, while the rap group averaged 4.21. *Id.* Although the study shows that participants consistently rated lyrics as more dangerous and threatening when believed to be rap, the effect was not particularly strong. *See id.*

433. *See id.* at 288 (“It must be acknowledged that the samples used in these studies are not probability samples representative of the United States population. The findings should be qualified by this limitation.”).

434. *See, e.g.*, *Wiley*, 610 F. Supp. 3d at 447 (including an appendix listing the specific lyrics admitted or excluded).

435. No. 10-CR-0615, 2014 WL 1871909, at *5 (E.D.N.Y. May 8, 2014), *aff'd*, 762 F. App’x 25 (2d Cir. 2019).

436. *Id.* (quoting *Old Chief v. United States*, 519 U.S. 172, 185 (1997)).

437. *Id.*

parties from straying beyond the admissible purposes of the rap content.⁴³⁸ Secondly, the court stated that it would review each piece of rap content before deciding whether it will go before the jury,⁴³⁹ providing Herron ample opportunity to object. Third, the court noted that it “may exclude as cumulative or redundant rap-related video evidence that goes to a fact that has been firmly established” by other evidence.⁴⁴⁰ Doing so simplifies issues for the jury and may obviate the need for difficult evidentiary determinations. Fourth, the court required the government to state whether each piece of evidence was being admitted for the truth of the matter asserted and, if so, to provide a relevant hearsay exception under which it can be admitted.⁴⁴¹ Since trial courts have broad latitude in managing the admission and use of evidence, Judge Garaufis’s laudably thorough procedures in *Herron* can serve as a framework for other courts looking to manage and assess rap evidence.

6. Can the Prejudicial Effect Be Reduced by Instructing the Jury on the Evidence’s Permitted Uses?

Judge Garaufis’s procedure in *Herron* also ensured that the jury was properly instructed on the permissible uses of any admitted rap content.⁴⁴² This is an important step because jury instructions are essential to reduce the danger of unfair prejudice for any admitted rap content.⁴⁴³ Such instruction should remind the jury that only they, as the trier of fact, can decide the meaning of lyrics and whether they relate to the charged crime.

Some courts, however, have called into question the effectiveness of limiting instructions when prejudicial rap videos become a feature of the trial.⁴⁴⁴ Further, overly generalized limiting instructions may be insufficient to cure the prejudice caused by the improper admission and use of rap content in some cases.⁴⁴⁵ Instead, limiting instructions should specifically address the proper use and purpose of potentially prejudicial evidence.⁴⁴⁶ Like the other judicial measures discussed in this Article, the effect of limiting instructions depends on the particular facts of the case.

438. See *supra* Part III.B.1 for a discussion of *Baker*, which is a helpful comparison.

439. *Herron*, 2014 WL 1871909, at *5.

440. *Id.*

441. *Id.*

442. *Id.* at *5–6.

443. See, e.g., *Commonwealth v. Correia*, 210 N.E.3d 407, 421 (Mass. 2023) (holding that some rap content may have been admissible, but “[i]n the absence of an instruction as to how the jury could consider the lyrics, their probative value was outweighed by their prejudicial effect”); *People v. Olguin*, 37 Cal. Rptr. 2d 596, 604 (Ct. App. 1994) (“The trial court specifically admonished the jury not to consider the lyrics against Olguin, and, except in limited circumstances . . . jurors are presumed to adhere to the court’s instructions absent evidence to the contrary.”).

444. *United States v. Stephenson*, 550 F. Supp. 3d 1246, 1253 (M.D. Fla. 2021); *United States v. Williams*, 663 F. Supp. 3d 1085, 1136 (D. Ariz. 2023).

445. E.g., *Baker v. State*, 899 S.E.2d 139, 152 n.19 (Ga. 2024) (“We note that the trial court instructed the jury during the final charge that the lawyers’ closing arguments were not evidence, but under these circumstances, that generalized instruction was not sufficient to cure the prejudicial impact of the prosecutor’s improper propensity argument.”).

446. See *id.*

CONCLUSION

There is nothing particularly controversial about using a defendant's words or creations as evidence, so long as they are relevant. Indeed, the rules of evidence specifically allow a party's words to be used against that party in court. However, the artistic expression commonly referred to as rap is so drenched in controversy that judicial assessments of its admissibility are almost certain to attract both scrutiny and controversy.

This Article explores the many difficult questions involved in deciding whether to admit rap content in criminal trials. It discusses the admission process, along with the rules of evidence and jurisprudence that govern admission; addresses how courts have handled the admissibility of rap content over time; analyzes legislative efforts to address concerns about the unjust use of rap content; and establishes a roadmap for assessing such content for admissibility. This Article also proposes a theoretical framework for legislators considering statutory regulation of the admission of rap content in criminal trials. While the authors agree that the admission of rap content raises legitimate concerns about unjust use in some cases, this Article calls attention to the risk that categorical or overly restrictive statutory prohibitions would impair the procedural safeguards for fairness already built into the trial process and could lead to widespread miscarriages of justice. It suggests instead that any attempt to regulate the admission of rap content should focus on enhancing trial judges' ability to make accurate, thorough, and fair assessments of this type of evidence.