

Rappers' Rhymes Are Not Admissions to Crimes: Eliminating the Unlawful Use of Rap Lyrics against Rappers in Criminal Proceedings

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Rappers' Rhymes Are Not Admissions to Crimes: Eliminating the Unlawful Use of Rap Lyrics against Rappers in Criminal Proceedings

RYAN J. BENNETT*

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ABSTRACT

Society believes rap is “more literal, offensive, and in greater need of regulation” than country, punk rock, or heavy metal, and that most rap lyrics contain unfair prejudice, which substantially outweighs the probative value of the lyrics in the eyes of a jury. Therefore, courts often misapply Federal Rule of Evidence (FRE) 403 to rap lyrics when they admit rap lyrics into evidence.

Judges also participate in discrimination against young, black, male rappers because rap is so inextricably linked to black men, and judges usually admit unfairly prejudicial rap lyrics into evidence against the rapper defendant, even though rap lyrics are usually unreliable sources of literal admissions of guilt. This discrimination is so prevalent today that it violates the Fifth Amendment Due Process Clause under *Bolling v. Sharpe* because it results in grossly unfair outcomes in the American justice system against young, black men.

Additionally, prosecutors commonly use rappers’ lyrics against rappers as evidence of literal admissions of guilt even though the First Amendment is intended to protect artistic expressions; moreover, rappers’ lyrics are usually not specific enough to be literal admissions. Therefore, judges also violate rappers’ First Amendment right to free speech when they admit into evidence lyrics that are not literal admissions of guilt. Unfortunately, the Supreme Court of the United States’ majority opinion did not discuss in depth the issue of the First Amendment on the most recent criminal rap case, *Elonis v. United States*. By avoiding the First Amendment issue, the Supreme Court left addressing rappers’ plight for another day.

Accordingly, this Article is the first to propose that the Supreme Court adopt a unique factor test into the Federal Rules of Evidence. This Article also proposes additional safeguards. For instance, the jury must be given jury instructions limiting the scope of the rap lyrics and providing a background on the realities of rap and its negative treatment in society. In addition, defendants should be highly encouraged to hire an expert in rap to explain their prejudicial value if the prosecution wants to admit those lyrics into evidence. These new safeguards will serve to lower the chance of a court wrongfully admitting a rapper’s unfairly prejudicial lyrics into evidence against the rapper in a criminal trial, give young, black men a better chance at a fair trial, and allow for a broader right to freedom of expression. If this is not immediately remedied, other entertainers including comedians, horror story novelists, painters, and more could be convicted of crimes they did not commit simply for their artistic expressions.

I. INTRODUCTION

Lil Mac Phipps, a passionate and excited uprising rapper, was a young man who loved to write rap lyrics, which were well-received by the rap community, and no evidence showed that he ever acted in accordance with his violent lyrics.¹ Instead, Phipps was mild-mannered and enjoyed reading poetry.² He even still called his father “Daddy.”³ One day at an open mic night in Louisiana, Phipps was about to perform when an altercation ensued between members of the audience.⁴ One person was shot, and Phipps left in a flight to avoid danger.⁵ He remembered, however, that his parents were still inside, so he quickly returned to get them out.⁶

Not long afterward, Phipps was arrested and convicted of manslaughter.⁷ Phipps possessed a gun, but it had never been fired, making the crime impossible.⁸ In fact, the bullets made for Phipps’s handgun did not match the fatal bullet at all.⁹ Furthermore, the prosecution heavily relied on using Phipps’s rap lyrics to establish his involvement in the crime.¹⁰ The prosecution manipulated his lyrics in any way they could to make the charge stick to Phipps.¹¹ This manipulation included juxtaposing lyrics that were not created together and putting parts from different songs together to send the message the prosecution wanted to send—not the message Phipps meant when he wrote them.¹²

The court convicted Phipps of manslaughter and sentenced him to thirty years to life in prison.¹³ Now, Phipps is in the twentieth year of this sentence and “has always maintained his innocence.”¹⁴ Even though Thomas Williams

1. See ERIK NIELSON ET AL., *Introduction to RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* 1 (2019).

2. *Id.*

3. *Id.* at 3.

4. *Id.* at 4.

5. *Id.*

6. See NIELSON ET AL., *supra* note 1, at 4.

7. *Id.*

8. *Id.*

9. David Lohr, *See for Yourself: Bodyguard Confesses to Club Shooting that Sent Rapper to Prison*, HUFFPOST (Apr. 25, 2016, 7:44 AM), https://www.huffpost.com/entry/confession-mac-hipps-murder_n_570bfae6e4b014223249b696.

10. NIELSON ET AL., *supra* note 1, at 5.

11. *Louder than a Riot: Lyrics on Trial: Mac Phipps (Pt 2)*, NPR (Oct. 15, 2020) (transcript available at <https://www.npr.org/transcripts/923405080>) (“... in this case, they actually took lines from different songs, changed them somewhat and then put them together as if they had come from the same song and in doing so dramatically changed the meaning of the lyrics. And that was problematic because what we know is that the character that Mac presented in his lyrics had nothing to do with the person who authored them.”).

12. *Id.*

13. NIELSON ET AL., *supra* note 1, at 6.

14. Ramon Antonio Vargas, *Former No Limit Rapper Mac Released from Prison, Back Home After Being Granted Parole: ‘Blessed’*, THE NEW ORLEANS ADVOCATE (JUNE 23, 2021 AT 10:51 AM),

confessed to the murder only days after Phipps's arrest, Phipps was convicted nonetheless.¹⁵ Unfortunately, the confession was useless because the court thought Thomas was just being a loyal worker willing to lay down his entire life in confessing to a crime he did not do to gain a better reputation with Phipps.¹⁶ At trial, prosecutors discounted Thomas's testimony, portraying him as a loyal worker in Phipps's entourage and eager to cover for his boss.¹⁷ After all, Williams was engaged to Phipps's aunt and had two children with her.¹⁸ But Buddy Spell, Phipps's attorney, gave a reasonable response to the injustice:

The government's argument that Mac Phipps inspired such loyalty amongst his entourage that this man would confess to a crime he did not commit, one that could buy him a life hitch at Angola, simply to curry favor with Mac is patently ridiculous, . . . The mere suggestion of such fantasy underscores the general unreliability of a conviction based upon a disingenuous prosecution. The government targeted Mac and nothing — neither truth nor justice — was going to interfere with the task at hand.¹⁹

Additionally, the prosecution unreasonably dismissed Mr. Williams's confession.²⁰ The coroner's report, which indicated the victim, Baron Victor, Jr., was shot at close range, apparently "contradicted" Mr. Williams's statement because Williams said he shot Victor at a range of six to ten feet when Victor was charging Williams with a beer bottle.²¹ There are multiple issues with the prosecution's dismissal of Williams's confession: (1) Williams claimed self-defense, but if he actually shot him up close, it would look less like self-defense, (2) Williams may not remember exactly what the distance was, (3) "close" is a flexible term and is defined differently by each situation and person, and (4) after the interview, Williams was permitted to exit the sheriff's office and was told that the police "would get back to him."²²

https://www.nola.com/news/courts/article_612244fa-d43a-11eb-83d1-1fc4e097c3f4.html; Lohr, *supra* note 9.

15. 'My Dream Was Being Used Against Me in Court,' *Mac Phipps, Lyrics on Trial and a Legacy of Injustice in Louisiana*, NPR (Oct. 23, 2020) (transcript available at <https://www.npr.org/2020/10/23/926291759/mac-no-limit-lyrics-on-trial-a-legacy-of-injustice>) ("Then, a ray of hope: Days after Mac's arrest, a man named Thomas Williams walked into the St. Tammany Sheriff's office with his pastor beside him. He had something to tell the police about the shooting. Something that had been keeping him up at night.")

16. Lohr, *supra* note 9.

17. *Id.*

18. *Id.*

19. *Id.*

20. Lohr, *supra* note 9.

21. *Id.*

22. *Id.*

Although a quick Google search defines “close” as “a short distance away or apart in space or time,” it does little to clear up the arbitrary distinction between close and far in the context of the Phipps case.²³ In other words, one person may believe “close” means one foot or less while another person may think that it means six or ten feet; the context matters. Regardless, a reasonable investigator should not rule out a detailed confession just on an arbitrary definition of the word “close.” At the very least, serious concerns arose because of the prosecution’s dismissal of Williams’s confession.²⁴

Furthermore, despite Williams’s history, the prosecution dismissed his confession with little to no research into the man or his confession.²⁵ For example, Williams was arrested on a federal firearms violation in August of 2000, six months after the shooting.²⁶ Even after this arrest, no one obtained a search warrant to look for a murder weapon.²⁷ Williams said he shot the decedent with a revolver.²⁸ Phipps’s handgun did not match the fatal bullet.²⁹ No one contacted Williams to determine what gun he had, no ballistics tests were completed, and Phipps’s pistol was conclusively not the murder weapon.³⁰ Additionally, the key witness whose testimony helped put Phipps away recanted her statements against him because she was threatened by investigators who said they would charge her if she did not help them convict Phipps.³¹ If all of the previous issues were not enough, other prosecution witnesses have told HuffPost that police and prosecutors either bullied them into giving false testimony or ignored their statements.³² There is no doubt that many questionable things occurred in Mac Phipps’s case.

Twenty years later, Mac Phipps still sits in prison after repeatedly professing his innocence and asking authorities (like the Louisiana State Governor) to grant him a pardon, to no avail.³³ Maybe the worst issue about the Phipps case was that when Phipps was on trial in Louisiana, the law there did not require a unanimous verdict to convict a defendant.³⁴ So up-and-coming rapper Mac Phipps was convicted 10-2 for manslaughter.³⁵ Today, Phipps still sits in prison, even though on April 20, 2020, the Supreme Court

23. Definition of Close, GOOGLE, <http://google.com> (follow hyperlink; then search “close”).

24. Lohr, *supra* note 9.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Lohr, *supra* note 9.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. NIELSON ET AL., *supra* note 1, at 5; Lohr, *supra* note 9.

35. NIELSON ET AL., *supra* note 1, at 6; Lohr, *supra* note 9.

of the United States held that the Constitution requires unanimous jury verdicts in state criminal cases.³⁶

This Article defines the serious problem in today's legal system regarding rap lyrics being used against their author as evidence of the rapper's crime. Through the history, facts, and current laws regarding rap, this Article highlights how young minority men are disparately impacted by courts who convict them by their own rap lyrics because they are the predominant rap users.³⁷ This Article then argues that this disparate impact results in bad cultural and social policy, a violation of Federal Rule of Evidence 403, and, consequently, the Fifth Amendment Due Process Clause and the First Amendment Freedom of Speech Clause.³⁸ The fact that the majority opinion by the Supreme Court of the United States did not address the First Amendment issue in depth in the most recent rap lyric case, *Elonis v. United States*, is problematic, and a solution needs to be reached as soon as possible.³⁹

Accordingly, this Article proposes a unique and new solution. If a court wants to admit rap lyrics in a criminal case against the author of those lyrics, the court must first thoroughly analyze the proposed new stringent factor test with the circumstances and evidence of the defendant in mind to determine whether the evidence has a more negative impact than a positive one on the defendant in the eyes of the jury. In addition, the jury must be given jury instructions limiting the scope of the rap lyrics and providing a background on the realities of rap and its negative treatment in society. Lastly, defendants should be highly encouraged to hire an expert in rap lyrics to explain those lyrics and their meaning if the prosecution wants to admit those lyrics into evidence. These new safeguards will lower the chance of a rapper's lyrics being wrongfully admitted into evidence against him and bring the American justice system one step closer to a long-term solution to this prevalent and serious miscarriage of both justice and the purposes of FRE 403 and the First and Fifth Amendments.

36. See *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *U.S. Supreme Court Mandates Juror Unanimity in State Criminal Trials*, AMERICAN BAR ASSOCIATION (July 24, 2020, 7:15 PM), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/supreme-court-mandates-unanimity-in-state-criminal-trials/#:~:text=Louisiana%2C%20all%20verdicts%20in%20state,will%20now%20require%20unanimous%20juries.&text=On%20April%202020%2C%202020%2C%20in,verdicts%20in%20state%20criminal%20trials.

37. See *infra* Part II. A. 1.

38. See *infra* Part II. B.

39. See *Elonis v. United States*, 135 S. Ct. 2001 (2015).

II. THE UNDENIABLE TRUTHS OF RAP IN SOCIETY AND LAW

To understand the issues relevant to this Article, one will need to know the general overview of rap. For example, how did it come to be? How does society view it? What benefits derive from the genre? Despite the genre's mainstream relevance, many followers and critics know too little about rap to make an informed decision as to whether there really exists a problem or if rappers are just trying to escape punishment for crimes they admitted to committing.⁴⁰

A. Facts

1. Birth of Rap

Many believe that rap stands for "Rhythm and Poetry," however, people disagree as to whether this is the real meaning.⁴¹ These arguments have merit because rap would be capitalized (RAP) if it were an acronym, or it would appear as "R.A.P.," but that is not the case.⁴² The more likely meaning of rap is "to strike, especially with a quick, smart, or light blow,"⁴³ as well as "to utter sharply or vigorously: to rap out a command."⁴⁴ Another key definition is "to converse, especially in an open and frank manner."⁴⁵ These principles come together if you consider freestyle rapping. But to really understand rap, one must travel past the definitions and far back in time to its African roots.⁴⁶

Over a hundred years before today's rap music existed, griots, or West African historians, rhythmically narrated stories to drums and sparse instrumentation.⁴⁷ Griots' purpose was to "preserve the genealogies, historical narratives, and oral traditions of their people."⁴⁸ Similarly, blues is a West African musical tradition that was first played by black Americans around the time of the Emancipation Proclamation, over 157 years ago.⁴⁹ Elijah Wald, a Grammy-Award-winning blues musician and historian, and

40. Lewis Pearce, *Tackling Generic Rap Attitudes: Common Misconceptions About Rap from Those Who Do Not Listen*, THE INNOVATION (Aug. 22, 2020), <https://medium.com/the-innovation/tackling-generic-rap-attitudes-d035bb9549c3>.

41. Rob Level, *Does Rap Stand for Rhythm and Poetry? (Video)*, SMART POETRY (Jun. 12, 2017), <https://www.smartrapper.com/rap-stand-rhythm-poetry/>.

42. *Id.*

43. Definition of Rap, DICTIONARY.COM, <http://www.dictionary.com> (follow hyperlink; then search definitions field for "rap").

44. *Id.*

45. HAROLD WENTWORTH & STUART BERG FLEXNER, DICTIONARY OF AMERICAN SLANG 735 (2d supp. ed. 1975).

46. Lawrence Pollard, *Rap Returns Home to Africa*, BBC NEWS (Sept. 2, 2004), <http://news.bbc.co.uk/2/hi/africa/3622406.stm>.

47. *Id.*

48. *Griot*, ENCYC. BRITANNICA, <https://www.britannica.com/art/griot> (last visited Jan. 28, 2021).

49. Lamont Pearley, Sr., *The Historical Roots of Blues Music*, BLACK PERSPECTIVES (May 9, 2018), <https://www.aaihs.org/the-historical-roots-of-blues-music/>.

others, claim people rapped the blues back in the 1920s.⁵⁰ One notable example of rapping in blues was from 1950: “Gotta Let You Go” by Joe Hill Louis.⁵¹ Later on, jazz developed from the blues and has been cited as a precursor to hip hop.⁵² In fact, one jazz musician and poet, John Sobol, stated that rap “bears a striking resemblance to the evolution of jazz both stylistically and formally.”⁵³ Rap began in different forms over a century ago.⁵⁴

However, rap changed after N.W.A. This group was formed during 1987 and 1988, and released “Straight Outta Compton,” their debut album in 1988.⁵⁵ Two notable songs emerged from the album: first was the song “Fuck tha Police,” which protested police brutality and racial profiling, and second was the song “Gangsta Gangsta,” which painted the worldview of the inner-city youth.⁵⁶ The former song started a rivalry between the group and various law enforcement agencies.⁵⁷ Policemen no longer would provide security for N.W.A. at their concerts, diminishing the group’s plans to tour.⁵⁸ With this one album, N.W.A. created what is called “reality rap.”⁵⁹ Ice Cube, one of the most famous rappers from the group, called it “hardcore gangster rap.”⁶⁰ Its purpose was to not only gain fame, but to bring light to the issues in impoverished, usually black or minority communities, like Compton, California.⁶¹ Some say N.W.A. is the birth of the issues between rappers and law officials, whether that be police officers, prosecutors, or judges.⁶² At the very least, rap has significantly changed since its West African beginnings.

50. Elijah Wald, *Hip Hop and Blues*, ELIJAH WALD (2004), <https://elijahwald.com/hipblues.html>.

51. JOE HILL LOUIS, *GOTTA LET YOU GO* (1950).

52. See John Sobol, *DIGITOPIA BLUES: RACE, TECHNOLOGY, AND THE AMERICAN VOICE* 17 (2002).

53. *Id.*

54. Pollard, *supra* note 46.

55. Shaheem Reid, *Unreleased Eazy-E Tracks Coming in March*, MTV NEWS (Dec. 19, 2001), www.mtv.com/news/1451563/unreleased-eazy-e-tracks-coming-in-march/.

56. N.W.A., *FUCK THA POLICE* (1988); N.W.A., *GANGSTA GANGSTA* (1988).

57. Gerrick Kennedy, *Exclusive: The Moment N.W.A Changed the Music World*, L.A. TIMES, (Dec. 9, 2017), <https://www.latimes.com/entertainment/music/la-et-ms-nwa-parental-discretion-20171205-html-story.html>.

58. Kory Grow, *N.W.A’s ‘Straight Outta Compton’: 12 Things You Didn’t Know*, ROLLING STONE, (Aug. 8, 2018), <https://www.rollingstone.com/feature/n-w-as-straight-outta-compton-12-things-you-didnt-know-707207/>.

59. *Id.*

60. *Id.*

61. *Id.*

62. Kennedy, *supra* note 57.

2. Society's Negative Biases Towards Rap

A majority of society views rap in a negative light.⁶³ As a result, some courts have tried to protect rappers.⁶⁴ For example, in 2014, the Supreme Court of New Jersey condemned the use of rap lyrics as evidence, highlighting the enduring racial stereotypes and double standards that inform people's perceptions of rap music.⁶⁵ The court pointed out that just because Bob Marley wrote a song called "I Shot the Sheriff" did not mean he actually did, and just because Edgar Allen Poe wrote "The Tell-Tale Heart" did not mean that he actually buried an old man beneath the floor.⁶⁶ The New Jersey Supreme Court explained that the risk of admitting bad-act evidence in court can result in the jury convicting a defendant merely because they view him as a bad person in general.⁶⁷ The court did not hold that no rap lyrics could be admitted, but the lyrics must be relevant to the facts and circumstances and must not be unfairly prejudicial to the defendant.⁶⁸ In that case, they were in fact unfairly prejudicial and therefore could not be admitted into evidence.⁶⁹ Some courts have found good reason to exclude rap lyrics from criminal cases against rappers because they unfairly prejudice the jury against the defendant.⁷⁰

Indeed, jurors disproportionately construe rap lyrics in a more negative light than any other genre of music.⁷¹ In 2017, Adam Dunbar, then a candidate for a doctorate of philosophy in Criminology, Law and Society, conducted experiments that he discussed in his dissertation: "Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making."⁷² In Dunbar's dissertation, he explained the experiments and published his findings that included analyses about potential consequences of admitting rap lyrics into trial.⁷³ He worked with two separate groups of people and conducted three different experiments.⁷⁴

63. *Blacks See Growing Values Gap Between Poor and Middle Class*, PEW RESEARCH CENTER (Nov. 13, 2007), <https://www.pewresearch.org/social-trends/2007/11/13/blacks-see-growing-values-gap-between-poor-and-middle-class/>.

64. *See generally* State v. Skinner, 218 N.J. 496 (N.J. 2014).

65. *Id.* at 521-22.

66. *Id.*

67. 514.

68. *Id.* at 522.

69. *Skinner*, 218 N.J. at 521-22.

70. *Id.* at 522-23.

71. Adam Dunbar, *Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making*, at 39 (2017) (unpublished Ph.D. dissertation, University of California, Irvine) (on file at <https://escholarship.org/uc/item/2c6478vr>).

72. *Id.* at 33.

73. *Id.*

74. *Id.*

The first experiment showed that the participants deemed identical lyrics “more literal, offensive, and in greater need of regulation” when they thought the lyrics were rap than when they thought the lyrics were country.⁷⁵ For the first experiment, Dunbar issued lyrics to two separate groups.⁷⁶ To the first group, he gave rap lyrics and told them they were from a country song.⁷⁷ To the second group, Dunbar provided the same set of rap lyrics and told them they were from a rap song.⁷⁸ Afterward, the experimenters asked both groups how negatively they viewed the lyrics, and the results were somewhat shocking.⁷⁹ Across multiple aspects, the results of the experiment conveyed that rap lyrics were rated more problematic than lyrics from genres of country, punk, or heavy metal music.⁸⁰ This is no small issue because “[t]he American Civil Liberties Union (“ACLU”) determined that courts admitted (and jurors witnessed) defendants’ rap lyrics into evidence at trial in almost 80% of cases examined from 2006 to 2013.”⁸¹ In the second experiment, the participants reacted in the same way as they did in the first experiment, but with a different set of rap lyrics, showing that the discrimination was not unique to one set of lyrics.⁸²

The third experiment underscored that jurors could pre-judge a defendant’s guilt based on the prejudicial nature of that defendant’s lyrics.⁸³ For the third experiment, Dunbar provided participants with rap lyrics in two different contexts, at trial or not at trial.⁸⁴ If participants believed a defendant was guilty in the trial context, they were more likely to treat the rap lyrics as an admission of guilt.⁸⁵ By contrast, if participants believed a defendant was not guilty outside of trial context, those participants were less likely to see the rap lyrics as an admission of guilt.⁸⁶ This implies that jurors who thought the defendant was guilty were more likely to see his lyrics in an incriminating light.⁸⁷ These assumptions pose a problem as jurors are supposed to look at the case objectively based on the evidence, but the study shows that jurors can rush to conclude that the defendant is guilty and *then* look at the evidence

75. *Id.* at ix.

76. Dunbar, *supra* note 71, at 36.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Deborah C. England, *Rap Lyrics in Evidence: Is It a Crime to Rhyme?: Can Rap Lyrics Be Admitted as Evidence in a Criminal Trial? Is So, What Do They Prove?* CRIMINALDEFENSELAWYER, <https://www.criminaldefenselawyer.com/resources/rap-lyrics-evidence-is-it-a-crime-rhyme.htm>.

82. Dunbar, *supra* note 71, at 41.

83. *Id.* at 81.

84. *Id.* at 84.

85. *Id.* at 87-88.

86. *Id.* at 88.

87. Dunbar, *supra* note 71, at 93.

with that prejudice in mind.⁸⁸ The implication of this evidence means that jurors will be more likely to convict a rapper defendant than a non-rapper defendant because the jurors will see the rapper in a more incriminating light than a different type of artist because of the violent and misogynistic nature of rap lyrics.⁸⁹

Courts usually admit rap lyrics against young, black men because of rap's culture.⁹⁰ One notable work highlights this issue with using rap lyrics in criminal trials. *Rap on Trial: Race, Lyrics, and Guilt in America*, is a "groundbreaking expose" about the alarming use of rap lyrics as criminal evidence to convict and incarcerate young men of color.⁹¹ In this book, the author references the work of Andrea L. Dennis, who has found over 500 cases where a court admitted rap lyrics into evidence against the rapper defendant in a criminal trial.⁹² In about 95 percent of these rap lyric cases, "the defendant is a young, black or Latino man with a local fan base, if any fan base at all."⁹³ These truths highlight the fact that rappers are usually young, black men, and their lyrics are usually admitted against them in trial.⁹⁴ Coupled with the negative view society has about rap lyrics,⁹⁵ the fact that the rap lyrics are usually admitted against young, black men, who are then incarcerated,⁹⁶ shows that black communities, especially young, black men, need a savior from the negative biases society has against them for their interest in rap music.

3. Rap's Societal Benefits

Rap has many social and economic benefits to society that are not always considered by judges and juries, and the time is now for rap to be viewed as what it is: a "free flow and exchange of ideas."⁹⁷ In 1987, during a controversial time for rap, the Fifth Circuit Court of Appeals in *Herceg v. Hustler Magazine* explained their views on courts admitting rap lyrics into

88. *Id.* at 99.

89. *United States v. Gamory*, 635 F.3d 480, 488, 493 (11th Cir. 2011); *see also Hannah v. State*, 23 A.3d 192, 202 (2011) (holding that rap lyrics were more prejudicial than probative because they "had no tendency to prove any issue other than . . . [that the defendant] was a violent thug").

90. *See generally*, NIELSON ET AL., *supra* note 1.

91. *Id.* at 20.

92. Marmstr3, *Arachnophonia: Rap On Trial*, BLOG (Feb 18, 2020) <https://blog.richmond.edu/pars ons/2020/02/arachnophonia-rap-on-trial/>.

93. *Id.*

94. *Id.*

95. *Blacks See Growing Values Gap Between Poor and Middle Class*, PEW RESEARCH CENTER (Nov. 13, 2007), <https://www.pewresearch.org/social-trends/2007/11/13/blacks-see-growing-values-gap-between-poor-and-middle-class/>.

96. Marmstr3, *supra* note 92.

97. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987). *See generally, Themes, Impacts of Rap Music on Youths: Themes*, IMPACTS OF RAP MUSIC ON YOUTHS, <https://impactofrapmusiconyouths.weebly.com/positive-impacts.html> (last visited Dec. 11, 2020) [hereinafter "*Themes*"].

evidence.⁹⁸ The Fifth Circuit’s opinion highlights the fact that rap lyrics are indeed a free expression under the First Amendment, even though they often may be grueling or inappropriate:

The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the cost society endures by receiving reprehensible or dangerous ideas.⁹⁹

Freestyle rap is a common form of grueling or inappropriate rap.¹⁰⁰ Freestyling is defined as a “style of improvisation with or without instrumental beats, in which lyrics are recited with no particular subject or structure.”¹⁰¹ Freestyle rap’s nature coincides with one of the definitions of rap: “to converse, especially in an open and frank manner.”¹⁰² Freestyle rapping, like other forms of improvisation, is difficult and often requires many hours of practice before performers can successfully entertain stages in front of full audiences.¹⁰³ When practicing freestyle rap, “rappers’ brain activity increase[s] in areas responsible for motivation, action, language, emotion, and motor skills.”¹⁰⁴ However, activity decreases in brain regions known to regulate supervision and monitoring.¹⁰⁵ This is an incredible discovery because many songs that rappers publish are freestyle raps, including Notorious B.I.G., Jay-Z, Snoop Dogg, Lil Wayne, Eminem, Juice WRLD, and more.¹⁰⁶

Many rappers know that the best way to continue their flow in a freestyle is that virtually nothing is off limits.¹⁰⁷ For example, Juice WRLD freestyled for over fifty-two minutes straight on Tim Westwood TV over many different beats.¹⁰⁸ Many times, he described murdering people with his “chopper,”

98. 814 F.2d at 1019.

99. *Id.*

100. See EMINEM, *KICK OFF (FREESTYLE)* (2018) (“I’ve always looked at battle rap as competition or war, and the main objective is to destroy, completely f—’ obliterate your opponent by saying anything and everything, whatever the f— you can, to get a reaction from the crowd. So nothing’s off limits.”).

101. *FREESTYLE: THE ART OF RHYME* (Palm Pictures 2000).

102. WENTWORTH & FLEXNER, *supra* note 45.

103. Cole Mize, *How Long Does It Take to Get Good At Rapping?*, COLE MIZE STUDIOS (Aug. 8, 2018), <https://colemizestudios.com/how-long-to-get-good-at-rapping/>.

104. *This is your brain on freestyle rap: NIDCD study reveals characteristic brain patterns of lyrical improvisation*, NIH (Nov. 15, 2012), <https://www.nidcd.nih.gov/news/your-brain-freestyle-rap-nidcd-study-reveals-characteristic-brain-patterns-lyrical-2014>.

105. *Id.*

106. *Rappers Who Freestyle Their Songs*, HIP HOP PUSH (2016), <https://hiphoppush.com/music-discussions/rappers-who-freestyle-their-songs>; *supra* notes 92–96.

107. *Supra* note 100.

108. See TimWestwoodTV, *Juice WRLD freestyle (R.I.P.) Hour of fire over Eminem beats!* Westwood, YOUTUBE (OCT. 5, 2018), <https://www.youtube.com/watch?v=fSoT13msPe4&t=2071s>.

which is another word for gun, and taking Percocets and other drugs.¹⁰⁹ Here is a freestyle verse from the video:

Experienced like a vet but I am still a rookie, I feel like I'm sesame,
robbing them for they cookies, run up I hit 'em that chopper leave his
ass shook, beefin' on Facebook get your face took, shoot you in yo'
face give a fuck 'bout how your face look, stealing faces lil' n****
I'm such a face crook try to rob me I shoot you, you know I face
crooks.¹¹⁰

Later in the freestyle, Juice WRLD says, "All my n****s Mormon huh, they must have nine wives, pull up with that chopper uh, that bitch take your life, pull up to your hotel room then I take your wife, take her to my hotel room its gon' be a long night."¹¹¹ Should people really believe he robbed people for their cookies and was stealing people's faces?¹¹² Did he really take other people's wives from their hotel rooms?¹¹³ Or did he just freestyle things that he thought rhymed and sounded cool in the rap community? At the end of the video, Juice WRLD said, "I done made like six songs in here!"¹¹⁴ This is plain evidence that rappers do indeed make songs based off freestyles they came up with on the spot.¹¹⁵

Despite society's negative view toward it, rap has benefits to social awareness.¹¹⁶ For instance, it promotes fundamental notions of identity and purpose; creativity; practice in voicing opinions, emotions, and feelings; the opportunity to gain money and a fan-base; the opportunity to escape from bad times into rap music; venting; and more.¹¹⁷ Rap is viewed as the "great unifier of diverse populations."¹¹⁸ It can give youth a sense of style and identity.¹¹⁹ It educates people on many social issues and does so in a way to give the listener many various perspectives.¹²⁰ Rap conveys hope to those who are impoverished¹²¹ by providing an escape from poverty.¹²² For example, famous rappers like ASAP Rocky, 2Pac, Machine Gun Kelly, Travis Scott,

109. *Id.*

110. *Id.* at 41:20.

111. *Id.* at 49:15.

112. *Id.* at 41:20.

113. Tim WestwoodTV, *supra* note 108, at 49:15.

114. *Id.* at 50:18.

115. *Id.*

116. *See generally* *Themes*, *supra* note 97.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Themes*, *supra* note 97.

122. Edwin Ortiz, *20 Rappers Who Used to Be Homeless*, COMPLEX, (Jun. 1, 2014), <https://www.complex.com/music/2014/06/rappers-who-used-to-be-homeless/dj-quik>.

and more, all escaped the clutches of poverty through their rap.¹²³ Rappers' escape from poverty and hardship conveys a message to rap fans that they too can overcome anything if they put their mind to it.¹²⁴ Furthermore, it garners support for awareness of social issues because rap music brings light to otherwise unheard issues.¹²⁵ Additionally, it serves as entertainment that people can listen, dance, and sing along to with a confidence and a feeling of escape, for at least a few minutes.¹²⁶ Rap has even been used as a form of therapy.¹²⁷ Therapy programs include "ELEMENTary Hip Hop Skool," and "Project Spitfire," which engage youth and address their issues in therapy, allowing them to reflect on their own past experiences.¹²⁸ This results in the growth and development of the young participants to understand the importance of the freedom of expression and the reality that issues arise where people just have to learn from those issues and try to be better in the future.¹²⁹ Rap is used to equip and teach real-world life principles into the youth.¹³⁰ Despite all these wonderful positives that come from rap, many people in society still look at it in a mostly negative light.¹³¹

B. Law

1. Federal Rule of Evidence 403 and Hearsay

The Federal Rules of Evidence, which apply only to the Federal courts, are usually applicable to state courts because most states model their rules after the Federal Rules of Evidence, and state courts try most criminal cases.¹³² In this Article, Federal Rule of Evidence (FRE) 403 is the main evidence rule discussed. FRE 403 states that, for a piece of evidence to be admitted at trial, the probative value must substantially outweigh the effects of the prejudicial value or the possibility of misleading the jury.¹³³ Unfair

123. *Id.*; *On The Come Up: Travis Scott*, THROUGH//ADVERSITY (Oct. 14, 2017), <https://medium.com/@throughadversity5/on-the-come-up-travis-scott-d9a5db7e173a> ("Eventually his parents would find out and cut off all financial support they were giving Travis, this would eventually lead to Scott being homeless, penniless, and on his own.").

124. *Themes*, *supra* note 97.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Themes*, *supra* note 97.

130. *See generally id.*

131. Dunbar, *supra* note 71, at 31.

132. Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 293 (1990); *Federal vs. State Courts – Key Differences*, FINDLAW (Jun. 20, 2016), <https://www.findlaw.com/litigation/legal-system/federal-vs-state-courts-key-differences.html> ("Most criminal cases involve violations of state law and are tried in state court, but criminal cases involving federal laws can be tried only in federal court.").

133. FED. R. EVID. 403.

prejudice means to cause “improper or unfair treatment amounting to something less than irreparable harm.”¹³⁴ Judges have a wide range of discretion to sustain or overrule a FRE 403 objection, and this depends somewhat on how well opposing parties’ attorneys argue.¹³⁵ Some courts have been very clear that rap lyrics can be very prejudicial against the defendant, allowing for exclusion of those lyrics from evidence. For example, the Fourth Circuit Court of Appeals discussed in *United States v. Recio* that lyrics can describe a “panoply of violent, criminal, or distasteful conduct,” which can paint the defendant in a bad light.¹³⁶ In addition, the Eleventh Circuit has held that a rap video that “contained violence, profanity, sex, promiscuity, and misogyny” was heavily prejudicial and had little probative value to the alleged drug and money laundering crimes in that case.¹³⁷ These examples show that rap lyrics tend to be unfairly prejudicial and in those cases should be excluded based on FRE 403 guidelines, but most courts will not rule the same way because the FRE 403 guidelines are minimal, and allow for reasonable minds in today’s society to differ.¹³⁸

Unfortunately, courts do not always exclude unfairly prejudicial rap lyrics from evidence in a criminal trial.¹³⁹ This depends on a judge’s discretion, which is somewhat affected by opposing parties’ attorneys.¹⁴⁰ Envision a defense attorney in a criminal case where the prosecution is trying to admit the defendant’s rap lyrics into evidence to show his intent or motive to commit the alleged crime. Whether or not the judge admits the evidence depends largely on the preparation and knowledge of the parties’ attorneys and the judge’s personal perceptions. For instance, a defense attorney raises a 403 objection to unfair prejudice because of the likelihood the jurors will mischaracterize the rapper’s lyrics. The prosecution must convince the judge that the rap lyrics would be more helpful to establish the crime than it would, for example, be harmful in prejudicing the jury against the defendant.¹⁴¹

A claim for ineffective assistance of counsel could remedy a case where the defense attorney does not adequately argue a FRE 403 objection for the prejudicial effect of the rap lyrics.¹⁴² However, in the first 255 cases involving exoneration by DNA evidence, an overwhelming majority of those

134. *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003).

135. FED. R. EVID. 403.

136. *United States v. Recio*, 884 F.3d 230, 236 (4th Cir. 2018).

137. *United States v. Gamory*, 635 F.3d 480, 488, 493 (11th Cir. 2011); *see also Hannah*, 23 A.3d at 202 (holding that rap lyrics were more prejudicial than probative because they “had no tendency to prove any issue other than . . . [that the defendant] was a violent thug”).

138. FED. R. EVID. 403.

139. *See NIELSON ET AL.*, *supra* note 1, at 6.

140. *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004)

141. FED. R. EVID. 403.

142. Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT 1 (Sept. 2010).

claims were denied, showing that there are better ways to fix this problem.¹⁴³ The implications of this provide a backdrop for why this Article proposes a reminder of the reality of rap with jury instructions to judges and lawyers, to prevent, ahead of time, claims for ineffective assistance of counsel.

This Article cannot discuss admission of rap lyrics into criminal trials without addressing the hearsay rules in the FRE.¹⁴⁴ FRE 801 discusses hearsay, which is a statement that the declarant makes outside of a trial or hearing that a party offers in evidence to prove the truth of the matter asserted in the statement.¹⁴⁵ However, because this Article is about prosecutions against rapper defendants in criminal trials, the rapper is always a party-opponent to the prosecutors in the situations discussed.¹⁴⁶ Because it has been “universally accepted” that statements of a party-opponent are not considered hearsay, rap lyrics for the purposes of this Article are generally not considered hearsay and “are thus admissible as substantive evidence to prove the truth of the matter asserted.”¹⁴⁷ Even though defense lawyers who argue against ill-prepared prosecutors and ill-prepared judges may sometimes win a hearsay objection because the prosecutor and judge may not know of the opposing party hearsay rule, it is very rare, and thus would not be practical to address more than in this paragraph. Therefore, this Article does not argue that hearsay applies here.

2. Fifth Amendment

This Article focuses on the Fifth Amendment only because the Fourteenth Amendment does not apply to the Federal Government.¹⁴⁸ The United States Constitution’s Fourteenth Amendment states, in relevant part, that “no State shall deny to any citizen the equal protection of the laws.”¹⁴⁹ In fact, this amendment was primarily made to benefit black American citizens.¹⁵⁰ In order to understand how this Amendment has been applied in American courts, one must look at case law regarding the Fourteenth Amendment.

143. *Id.*

144. *See generally* FED. R. EVID. 801.

145. *Id.*

146. Michael H. Graham, *Admission by Party-Opponent, Fed. R. Evid. 801(d)(2); Government Agent or Employee, Experts, Confrontation Clause*, 51 CRIM. L. BULL. 1139 (2018).

147. *Id.*

148. U.S. CONST. amend. XIV.

149. *Id.*

150. André Douglas Pond Cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: “The Sun Don’t Shine Here in This Part of Town”*, 21 HARV. BLACKLETTER L.J. 1, 46 (2005) (“ . . . [T]he ‘Framers’ of the Fourteenth Amendment clearly and unquestionably intended that the Fourteenth Amendment would empower, assist or directly benefit black Americans.”).

For example, in *Zeno v. Pine Plains Central School District*, a young biracial (half-white, half-Latino) teenager (Zeno) moved to a new school, which held very few minority students.¹⁵¹ Over the next few years, Zeno received increasingly disturbing and extreme racist threats (including death threats), slurs, and the like, based on his dark skin.¹⁵² The facts of the case imply that many of the students who bullied him thought that he was black or partially black, even though he was not.¹⁵³ Zeno inundated the school with his complaints when these incidents happened.¹⁵⁴ The school knew about and had the resources to fix the issue yet failed to take appropriate action against Zeno's bullies.¹⁵⁵

The Civil Rights Act of 1964, Title VI, was a law that Congress asserted its power to pass through the Fourteenth Amendment Equal Protection Clause, among other pieces of legislation.¹⁵⁶ It declared that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁵⁷ Because the school did not protect Zeno's interests in his school activities, which were funded by the Federal government like they should have, Zeno was ultimately awarded one million dollars in damages for years of distress.¹⁵⁸

One would think this amendment would help black Americans with this Article's primary issue; however, the Fourteenth Amendment has been held not to apply to the Federal government.¹⁵⁹ However, through reverse incorporation of the Fifth Amendment in *Bolling v. Sharpe*, the Supreme Court of the United States held that “discrimination may be so unjustifiable as to be violative of due process,” essentially ruling that discrimination by the federal government is impliedly prohibited by the Due Process Clause of the Fifth Amendment, which does apply to the Federal Government.¹⁶⁰

151. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 659 (2d Cir. 2012).

152. *Id.* at 658-59.

153. *Id.* at 659.

154. *Id.*

155. *Id.*

156. U.S. Dep't of Labor, Legal Highlight: The Civil Rights Act of 1964 (“In the 1960s, Americans who knew only the potential of ‘equal protection of the laws’ expected the president, the Congress, and the courts to fulfill the promise of the 14th Amendment In 1964, Congress passed Public Law 88-352 (78 Stat. 241). The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex or national origin.”).

157. Civil Rights Act of 1964, 42 U.S.C. §2000d (2012).

158. *Zeno*, 702 F.3d at 659, 673.

159. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.”).

160. *Id.*

The Fifth Amendment states, in relevant part, that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . .”¹⁶¹ Due process of law is the basic idea that the federal courts will apply civilized standards of procedure and evidence to trials by reason, which must be “consistent with fundamental principles of liberty and justice.”¹⁶² This also applies to criminal trials.¹⁶³ In regard to this Article’s topic, adequate due process of law requires that a district court’s decision to exclude relevant evidence is subject to “special deference” by appellate courts.¹⁶⁴ This is because it is very rare for appellate judges to be competent enough to overrule the trial court’s ruling on the evidence because the appellate judge was not present during the trial.¹⁶⁵

3. First Amendment

The First Amendment of the United States Constitution states, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech.”¹⁶⁶ The purpose of the freedom of speech clause in the First Amendment is to allow American citizens, not the Government, to decide what is discussed in the public forum.¹⁶⁷ Any other approach goes directly against “the premise of individual dignity and choice upon which our political system rests.”¹⁶⁸ Under the Constitution, the individual makes the aesthetic and moral judgments about art and literature—not the government—“even with the mandate or approval of the majority.”¹⁶⁹ In other words, despite what the majority of people may think about a music genre, it is still art.¹⁷⁰

“The expressive conduct protected by the First Amendment is not limited to conduct that communicates a political, social, philosophical, or religious message; First Amendment protection also extends to artistic expression such as painting, music, poetry, and literature.”¹⁷¹ For example, the Tenth Circuit Court in *Cardtoons, L.C. v. Major League Baseball Players Association* held that entertainment, no less than political and ideological speech, is also protected by the First Amendment and motion pictures, programs broadcast by radio and television, and live entertainment such as dramatic works all fall

161. U.S. CONST. amend. V.

162. *McNabb v. United States*, 318 U.S. 332, 340 (1943); *Ex parte Estrada*, 93 F. Supp. 713, 715 (N.D. Tex. 1950).

163. *Id.* At 715.

164. *United States v. Proano*, 912 F.3d 431, 440 (7th Cir. 2019).

165. *Id.*

166. U.S. CONST. amend. I.

167. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

168. *Id.*

169. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011).

170. *Id.*

171. *State v. Chepilko*, 965 A.2d 190, 197 (N.J. Super. Ct. App. Div. 2009).

within the First Amendment guarantee.¹⁷² The First Amendment has laid the groundwork for the protection of rap lyrics, which are the artistic expressions of a rap artist.¹⁷³

For the government to impose liability on someone for their speech, there must be “[e]xacting proof requirements” because “it is necessary to tolerate ‘instance[s] of individual distasteful abuse of a privilege’ to avoid chilling free speech.”¹⁷⁴ In other words, even though some speech is distasteful, it is not violative of the First Amendment unless there are exact proof requirements on how the speaker may be liable, and the speaker’s actions meet those requirements.¹⁷⁵ However, the Supreme Court of the United States has held that the Constitution does not protect true threats.¹⁷⁶ A true threat is a statement “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.”¹⁷⁷ Luckily, hyperbole is not considered a true threat.¹⁷⁸ Justice Alito’s concurrence in part in *Elonis* suggests that it would be unwise to allow real threats to be disguised as rap lyrics or parody.¹⁷⁹ However, a concurrence is not binding law, so there are still protections for rappers’ works of art, if there is not a *serious* expression of an intent to commit an act of violence to a particular individual or group of individuals.¹⁸⁰

Nonetheless, rappers still wrestle with the fine lines of First Amendment protections of their artwork, but they are not the only ones.¹⁸¹ For example, one can look at Lenny Bruce. In the 1950s, one of the most influential stand-up comedians in history, Lenny Bruce, began garnering more popularity, performing at shows across the country by the mid-1950s.¹⁸² Bruce, early on, was dissatisfied with traditional, non-offensive comedy and transitioned to

172. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996).

173. *United States v. Mills*, 367 F. Supp. 3d 664, 667-71 (E.D. Mich. 2019).

174. Reply Brief for Petitioner at 16, *Elonis v. United States*, 135 S. Ct. 2001 (2014) (No. 13-983), 2014 WL 5488911, at *16.

175. *Id.*

176. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (citing *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620, (2003)).

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

178. *Elonis*, 135 S. Ct. at 2014 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*)).

179. *Id.* at 2013 (Alito, J., concurring in part and dissenting in part).

180. *Id.* at 2016.

181. *Supra* note 11; Ben Dandridge-Lemco, *YNW Melly May Be Put on Trial But His Lyrics Shouldn’t Be*, THE FADER (Feb. 14, 2019), <https://www.thefader.com/2019/02/14/ynw-melly-arrest-murder-charges-murder-on-my-mind-lyrics> (“Over the past 25 years, rap lyrics have been used in hundreds of criminal cases; they’ve been played for juries [sic] and introduced as evidence in the trials of high profile stars and aspiring rappers alike.”).

182. Barbara Maranzani, *Lenny Bruce’s Obscenity Trial Challenged First Amendment Rights and Paved the Way for Other Socially Conscious Comedians*, BIOGRAPHY (June 1, 2020), <https://www.biography.com/news/lenny-bruce-obsenity-trial>.

his own “dark, satirical view of once-taboo topics like politics, religion, race, sex, and drugs” where no one was safe from his comedic criticisms, including first lady Eleanor Roosevelt.¹⁸³ By the time the 1960s arrived, Bruce gathered a large following but also many opponents.¹⁸⁴ These opponents included the Manhattan District Attorney and the Archbishop of a local church, who began investigating Bruce.¹⁸⁵

In the spring of 1964, Bruce was performing at a popular Greenwich Village nightclub when undercover detectives recorded two of his shows, which they later presented to a Grand Jury for indictment of Bruce.¹⁸⁶ Bruce was arrested in April of 1964 and charged with violating New York Penal Code 1140, which prohibits obscene material that could result in the “corruption of morals of youth and others.”¹⁸⁷ Bruce was convicted in November of 1964.¹⁸⁸ On August 3, 1966, likely as a result of his now virtually unemployable career, mounting legal bills, and drug habit, Bruce was found dead of a morphine overdose at the age of 40.¹⁸⁹ In 1973, the Supreme Court of the United States reversed previous precedent on First Amendment protections, extending protection to material that has literary, artistic, and social value.¹⁹⁰ In 2003, fellow comics Robin Williams, Penn and Teller, and others, petitioned the New York Governor George Pataki, and Bruce received a posthumous pardon for his 1964 conviction.¹⁹¹ Bruce is a prime example of how rappers are not the only entertainers who can suffer criminal punishment despite First Amendment protections.¹⁹²

Although many have tried to equate rappers with country, punk, or heavy metal musicians, a better comparison may be comedians.¹⁹³ Comedians, similar to rappers, maintain their on-stage image throughout their real life.¹⁹⁴ Comedians often exaggerate or embellish stories and “mix truth with fiction to maximize the effect their art has on the audience.”¹⁹⁵ There is no apparent and relevant case law on point regarding comedians, but the similarities between comedians and rappers allows one to compare the two to see if a

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Maranzani, *supra* note 182.

188. *Id.*

189. *Id.*

190. *Miller v. California*, 413 U.S. 15 (1973).

191. Maranzani, *supra* note 182.

192. *Id.*

193. Michael Conklin, *The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence*, 95 IND. L. J. 50, 56 (2020).

194. *Id.*

195. *Id.*

reasonable person would see the comedian's stand-up routine to be a literal admission of guilt like the rap lyrics of a rapper.

4. *The Supreme Court's Most Recent Rap Case*

On June 1, 2015, the Supreme Court of the United States decided the most recent rap case between Anthony Elonis and the government.¹⁹⁶ Elonis, after his wife left him, created the pseudonym "Tone Dougie" and posted self-styled "rap" lyrics bearing violent language and imagery about his wife, co-workers, a kindergarten class, and state and federal law enforcement.¹⁹⁷ Elonis often claimed the posts were fictitious and that he was simply exercising his First Amendment right.¹⁹⁸ However, others thought differently.¹⁹⁹ His boss fired him for threatening co-workers, and his wife sought and was granted a state court protection-from-abuse order against Elonis.²⁰⁰

Elonis's former employer informed the Federal Bureau of Investigation of Elonis's posts, which eventually led to his arrest.²⁰¹ He was charged with five counts of violating a statute that made it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another."²⁰² At trial, Elonis requested a jury instruction requiring the Government to prove Elonis intended to communicate a "true threat."²⁰³

The jury convicted Elonis on four of the five counts, and Elonis renewed his jury instruction challenge on appeal.²⁰⁴ The Third Circuit affirmed, holding that "Section 875(c) [of the relevant state statute] requires only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat."²⁰⁵ The Supreme Court overturned the Third Circuit's instruction requiring only negligence on the part of Elonis, holding it insufficient to support a conviction.²⁰⁶ The Court explained that not mentioning a criminal intent requirement does not dispense with the requirement.²⁰⁷ In other words, the Supreme Court declared a defendant must be "blameworthy in mind" before his conviction.²⁰⁸ Because negligence was

196. *Elonis*, 135 S. Ct. at 2006-07 (majority opinion).

197. *Id.* at 2004-07.

198. *Id.* at 2005.

199. *Id.* at 2007.

200. *Id.* at 2005-06.

201. *Elonis*, 135 S. Ct. at 2006-07.

202. *Id.* at 2002.

203. *Id.* at 2007.

204. *Id.* at 2002-3.

205. *Id.* at 2007.

206. *Elonis*, 135 S. Ct. at 2011.

207. *Id.* at 2019 (citing *Morissette v. United States*, 342 U.S. 246, 250).

208. *Id.* at 2009 (citing *Morissette*, 342 U.S. at 250).

an insufficient mental state to convict him, *Elonis* did not communicate a “true threat.”²⁰⁹

The Court’s majority opinion declined to discuss implications of rap lyrics to the First Amendment.²¹⁰ Chief Justice Roberts’s opinion for the majority quickly dispensed with the First Amendment: “[a] fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech.”²¹¹ Chief Justice Roberts then reasoned, “[g]iven our disposition, it is not necessary to consider any First Amendment issues” because the Court found *Elonis*’s posts not to be true threats.²¹² The case’s concurrence and dissent did address First Amendment protections of art; however, their opinions were not part of the majority and are not binding law and are merely persuasive opinions.²¹³

This fact begs a question: why did the majority of the Supreme Court of the United States not address the First Amendment issue in *Elonis* even though the parties raised it? The Supreme Court did not address it because the only issue before the Supreme Court was “whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.”²¹⁴ Since the Court held that the defendant did have to be aware of the threatening nature of the communication, it did not need to address the First Amendment.²¹⁵ Even though the Supreme Court in *Elonis* did not address the First Amendment issues of rap lyrics being admitted against rappers, this Article will.

III. FRE 403 MISAPPLICATION AND CONSTITUTIONAL VIOLATIONS

A. Misapplication of Federal Rule of Evidence 403

Courts too often admit and juries too often rely on rap lyrics as an admission of guilt, which unfairly prejudice (or cause “improper or unfair treatment amounting to something less than irreparable harm”) the jury against the defendant.²¹⁶ The Federal Rule of Evidence 403 states that, for a piece of evidence to be admitted at trial, the probative value of it must substantially outweigh the effects of prejudicial value or misleading the jury.²¹⁷ As a reminder, judges have a wide range of discretion to sustain or

209. *Id.* at 2012-13.

210. *Id.* at 2004.

211. *Elonis*, 135 S. Ct. at 2017.

212. *Id.* at 2012.

213. *Id.* at 2013.

214. *Id.* at 2005.

215. *Id.* at 2004.

216. *In re Vivendi Sec. Litig.*, 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003).

217. FED. R. EVID. 403.

overrule (grant or deny, respectively) a rule 403 objection based somewhat on what the opposing parties' attorneys argue.²¹⁸ Despite this discretion, it seems clear to some courts that rap lyrics are unfairly prejudicial to the defendant.²¹⁹ For example, the Fourth Circuit Court of Appeals emphasized how rap lyrics are admitted:

To be sure, lyrics, like other forms of artistic expression, can describe a panoply of violent, criminal, or distasteful conduct, and so in some cases courts have excluded lyrics, finding they primarily served to paint the defendant in an unflattering light. For example, the Eleventh Circuit has held that a rap video that “contained violence, profanity, sex, promiscuity, and misogyny” was “heavily prejudicial” and had “minimal” probative value to the alleged drug and money laundering crimes.²²⁰

Society and most jurors tend to look at rap lyrics in a more negative light than they would if the lyrics were from a country, punk rock, or even heavy metal song.²²¹ This is because most jurors would believe that the rap lyrics were literal admissions of guilt, misleading them to believe that the case before them is less complicated than it is.²²²

Jurors who believe rap lyrics are literal admissions of guilt are misled because rap lyrics are usually unreliable as evidence of literal admissions of guilt in criminal cases. First, rappers often use their own experiences, acquaintances' experiences, or experiences of those they observe to create rap music material.²²³ Second, rappers are known for embellishing or inventing criminal acts that they committed or did not commit to bolster their rapper persona.²²⁴ Third, rappers often adopt completely fake characters or real characters as “alter egos or fictional personas” of themselves in their rap music material.²²⁵ Rap lyrics are bad sources of their own author's literal admissions of guilt because the authors of them use inspiration from multiple

218. *Id.*

219. *United States v. Recio*, 884 F.3d 230, 236 (4th Cir. 2018); *see also Hannah*, 420 Md. 339, 23 A.3d at 202 (holding that rap lyrics were more prejudicial than probative because they “had no tendency to prove any issue other than . . . [that the defendant] was a violent thug”).

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

221. Dunbar, *supra* note 71, at 12-13.

222. Dunbar, *supra* note 71, at 16 (“participants in the rap condition evaluating the lyrics as more likely to be literal and more likely to need regulation than those in the country condition.” . . . “Although not significantly different, participants in the rap condition rated the lyrics as more offensive than participants in the country condition . . .”).

223. *People v. Coneal*, 41 Cal. App. 5th 951, 969 (2019), review denied (Feb. 11, 2020), (citing Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007), 20–23 https://digitalcommons.law.uga.edu/fac_artchop/962).

224. *Id.*

225. *Id.*

areas, including many other people, and often exaggerate these experiences or stories from which they derive their material.²²⁶

Furthermore, rappers' purposes for the material in their songs is not usually to get a scrupulous, accurate, and factual account of a real occurrence; their purpose is to send a message, bring attention to a social issue, or maybe just to sound cool in their community.²²⁷ What is clear is that rap lyrics should not, barring certain rare circumstances, be taken as literal admissions of guilt or facts of a story. Instead, they should be taken as art. One might look for a logical similarity to rappers in comedians, for they maintain an on-stage persona, exaggerate or embellish stories, and "mix truth with fiction to maximize the effect their art has on the audience."²²⁸ A startling fact to underscore the severity of rap lyrics being used in courts is that courts admitted and jurors witnessed defendants' rap lyrics into evidence at trial in almost 80% of cases examined from 2006 to 2013.²²⁹ For these reasons, the probative value of rap lyrics should be substantially lower than how society views them.²³⁰

Unfortunately, the problems that today's rappers face extends past the trial and the rapper-defendant's life. When disproportionate amounts of black rappers, usually men, are convicted because of their skin color and their rap identity, it drastically affects the communities they leave behind.²³¹ For example, family members are deeply affected when their loved one has been sent to prison.²³² Partners of the imprisoned may feel they are "stuck in a bad dream," or simply overwhelmed and shocked at what happened, even if they saw it coming.²³³ Children can be terrified for years if they witness their loved one being taken away.²³⁴ In fact, many children have recurring nightmares or fears that "their other parent, or other family members, will also be taken away from them."²³⁵ Obviously, this happens to any family when anyone is imprisoned and not only in rap cases. However, there is one main distinction here between rap and all the other types of cases: Rap lyrics are inherently prejudicial against the defendant, especially if he is a black male rapper, because rap and its negative aspects (like misogyny, drugs, and

226. *Id.*

227. *Themes*, *supra* note 97.

228. *Id.*

229. England, *supra* note 81.

230. *Id.*

231. *A Guide for Families Coping with Life after Arrest*, JIGSAW CHARITY, <https://www.jigsawcharity.org/a-guide-for-families-coping-with-life-after-arrest/#:~:text=How%20families%20are%20affected,family%20members%20see%20it%20happening.&text=Many%20have%20recurring%20nightmares%2C%20and,be%20taken%20away%20from%20them>.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

violence) are inextricably linked to black culture.²³⁶ This link results in black communities being damaged and unfairly treated in the American justice system.

The fact is that rapper defendants receive negative treatment from jurors because of their rap lyrics.²³⁷ Yet, judges continue to believe this is a nonissue.²³⁸ For example, in *Mills v. United States*, the Michigan Eastern District Court wrote an opinion on a rapper's criminal case of racketeering, "recognizing that rap music 'is no longer an underground phenomenon and is a mainstream music genre,' and, therefore, it is unlikely that reasonable jurors would reason that 'a rapper is violent simply because he raps about violence.'"²³⁹

The court in *Mills* thought that juries would know the difference between art and admissions of guilt; yet blatant discrimination toward rappers lives on in society, and more rappers are wrongfully imprisoned every day. Just because rap is now mainstream does not mean that juries and society no longer have implicit biases against rap. In fact, it could mean just the opposite; it could now mean that most people know what is commonly associated with rap. It could also now mean that most people have listened to the words of famous rappers, or that most know that violence is common in rapper's lives. It does not, however, necessarily lower the chances of society being biased against it; it could raise the chances of inherent bias against it too as the number of rap artists, and therefore exposure, has increased.²⁴⁰ Rap lyrics are usually unfairly prejudicial and black communities are suffering disproportionately more from rapper convictions than any other community.²⁴¹

B. Violation of Fifth Amendment's Due Process Clause

When courts admit rap lyrics into evidence in a criminal case, it disproportionately affects minorities and infringes on their rights to social freedom and equality. This is because minorities overwhelmingly participate in rap.²⁴² Based on a poll of African Americans by YouGov, R&B and hip-

236. *Hannah*, 23 A.3d at 202 (holding that rap lyrics were more prejudicial than probative because they "had no tendency to prove any issue other than . . . [that the defendant] was a violent thug"); FED. R. EVID. 403.

237. *United States v. Mills*, 367 F. Supp. 3d 664, 672 (E.D. Mich. 2019).

238. *Id.*

239. *Id.*

240. *Hip-Hop and the Changing Music Industry*, THE ECONOMICS REVIEW (Dec. 4, 2019), <https://theconreview.com/2019/12/04/hip-hop-and-the-changing-music-industry/> ("Bigger artists started to endorse and support smaller ones, leading to an increase in the amount of up-and-coming rappers in the music industry.").

241. *The Politics of Race in Rap*, HARVARD POLITICAL REVIEW (Jun. 8, 2014), <https://harvardpolitical.com/politics-race-rap/>.

242. *Id.*

hop are the genres most influenced by African American culture today, with 62% and 39%, respectively, of black adults in the United States selecting these as among their top three favorite music genres.²⁴³ Additionally, 84% and 83%, respectively, of black Americans say that African-American culture influenced the hip-hop and rap genres either a lot or somewhat, making these two genres the “most influenced by black culture.”²⁴⁴ Additionally, Harvard Politics published an article on the politics of race in rap, establishing that rap is an “overwhelmingly black genre.”²⁴⁵ Based on these facts, the black American population is largely entwined with the rap genre. Because of this implication, courts that admit rap lyrics against the authors are disproportionately affecting the black community, especially when those courts convict and imprison the rappers whose rap lyrics they admitted into evidence at trial.

95% of rap lyric cases involve young, black or Latino men.²⁴⁶ According to a Pew Research report, about 70% of society says that rap’s societal impact is bad.²⁴⁷ Unsurprisingly, black men are the most likely to view rap as having a positive societal impact, but the numbers are still low, at 18% of black men for hip-hop and 11% for rap.²⁴⁸ Because most of these rapper criminal cases involve these minority men and because most of society views what these men do as negative, society views these men participating in rap in a more negative light than their non-minority counterparts. As a result, jurors, who are inherently part of our society, will likely view these men in a more negative light than other men not involved in the rap genre.

The law would call this unequal treatment of young, black men in courts under the Fourteenth Amendment Equal Protection Clause.²⁴⁹ The Fourteenth Amendment declares that no State shall deny to any citizen the equal protection of the laws.²⁵⁰ However, the Fourteenth Amendment only applies to the states and not to the federal government.²⁵¹ But there may be another way, although unlikely, to prevent this discrimination by federal

243. Jamie Ballard, *Most Black Americans Say Music Helps Them Feel Connected to Others*, YOU GOV AMERICA (Dec. 13, 2018, 10:00 AM), <https://today.yougov.com/topics/arts/articles-reports/2018/11/13/black-americans-music-rap-gospel-rb-genres>.

244. *Id.*

245. *Supra* note 241.

246. NIELSON ET AL., *supra* note 1.

247. *Rate Rap Low*, PEW RESEARCH CENTER (Feb. 5, 2008), <https://www.pewresearch.org/fact-tank/2008/02/05/rate-rap-low/>.

248. *Id.*

249. U.S. CONST. amend. XIV.

250. *Id.*

251. *Life Savers Concepts Ass’n of Cal. v. Wynar*, 387 F. Supp. 3d 989, 996–97 (N.D. Cal. 2019) (“... [T]he Fourteenth Amendment applies to the states, and actions of the Federal Government and its officers are beyond the purview of the [Fourteenth] Amendment.”).

courts.²⁵² In 1954, the Supreme Court of the United States ordered desegregation between black and white people by applying the Due Process Clause of the Fifth Amendment, stating that “discrimination may be so unjustifiable as to be violative of due process[,]” thereby introducing a novel idea into law: reverse incorporation.²⁵³

Reverse incorporation is the idea that equal protection can apply to the federal government through the Due Process Clause of the Fifth Amendment, even though the Fourteenth Amendment Equal Protection Clause applies only to the states.²⁵⁴ There are very few cases that have successfully used reverse incorporation to prove federal racial discrimination.²⁵⁵ Richard Primus’s Columbia Law Review Comment, *Bolling Alone*, dives deeper into why this may be, essentially reducing it to shared norms of the federal judiciary and other branches of the federal government.²⁵⁶ In sum, when federal officers engage in racially discriminatory behavior, sub-constitutional rules are enough to take care of the misconduct; the Constitution need not be implicated.²⁵⁷

Even though *Bolling* is virtually never used today for racial discrimination cases, that fact does not bar the possibility of it being used to deal with the issues this Article discusses.²⁵⁸ *Bolling* was undoubtedly a rare type of case to take care of an extreme and very controversial problem: segregation.²⁵⁹ Therefore, using it again requires a racially discriminatory problem of similar gravity to segregation. This Article does not argue for the overturning of one case or another; it highlights the broad issue of admitting rap lyrics as evidence. Therefore, the breadth of this *Bolling* argument may have more strength here than in arguing a specific case in court.

In this Article, “genre segregation” means the disparate treatment that rap receives that no other genre (excluding hip-hop, as they are often seen as synonymous; rap grew out of hip-hop culture²⁶⁰) receives. The term is used to parallel “segregation” with racial discrimination: “the unconstitutional policy of separating people on the basis of color, nationality, religion, or the

252. See Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975 (2004) (explaining that *Bolling v. Sharpe* has virtually no successors).

253. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); Primus, *supra* note 252, at 975.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Primus, *supra* note 252, at 975.

259. *Bolling*, 347 U.S. at 499.

260. *Rap vs. Hip Hop*, NEXT LEVEL (Aug. 2, 2018), <https://www.nextlevel-usa.org/blog/rap-vs-hip-hop#:~:text=The%20standard%20answer%20is%20that,out%20of%20Hip%2DHop%20culture.&text=Rap%2C%E2%80%9D%20KRS%2DONE%20famously,Hop%20is%20something%20you%20live.%E2%80%9D> (“‘What’s the difference between rap and hip-hop?’ This is a common question for people becoming interested in hip-hop culture.”).

like.”²⁶¹ This Article only focuses on the race of the rapper defendants and not the federal judges or attorneys, be they prosecutors or defense lawyers.

There are relevant similarities to segregation in 1954 and genre segregation today. There is genre segregation of rap because punk rock, heavy metal, and country are all viewed in a different and more positive light than rap, and more people see rap as literal than any other genre of music.²⁶² Comparing rap to these three genres is intended to provide the closest genres to rap based on their lyrics alone. Because rap commonly discusses themes that society deems negative, rappers receive similar negative treatment.²⁶³ Rap is inextricably linked to young, black males and has a more prejudicial effect to juries than any other musical genre. In other words, rap and rappers receive disparate and unequal treatment in the eyes of the law just like black people did in the 1950s and 1960s during the era of segregation. However, since the Fourteenth Amendment does not apply to the Federal government, the Fifth Amendment Due Process Clause is essential to fixing discrimination against today’s rappers.

Due process of law is the basic idea that the federal courts will apply “civilized standards of procedure and evidence” to trials by reason, which must be “consistent with fundamental principles of liberty and justice.”²⁶⁴ Adequate due process of law requires that a district court’s decision to exclude relevant evidence is subject to “special deference” by appellate courts.²⁶⁵ This is because it is very rare for appellate judges to be competent enough to overrule the trial court’s ruling on the evidence.²⁶⁶ Because there is such special deference, if a trial court judge wrongly decides a FRE 403 objection to exclude based on prejudice, the appellate court has virtually no options to help the aggrieved rapper.²⁶⁷ This is an issue because if a trial judge does not look close enough at all circumstances and facts of the case before deciding this objection, prejudicial evidence may be admitted.²⁶⁸ In almost every instance, even if the trial judge were wrong in his judgment, except for cases where he was so wrong that “no reasonable person would agree” with him, there is practically nothing that the appellate court can do.²⁶⁹ Rap lyrics are inherently prejudicial against the defendant, who is usually a young, black man, and a judge’s rulings on admissions of rap lyrics receive

261. *Segregation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

262. *See generally* Dunbar, *supra* note 71.

263. *Id.*

264. *McNabb*, 318 U.S. at 340; *Ex parte Estrada*, 93 F. Supp. at 715.

265. *Proano*, 912 F.3d at 440.

266. *Id.*

267. *Id.*

268. *See id.*

269. *Proano*, 912 F.3d at 438 (“We will reverse a ruling only if no reasonable person would agree with the district court’s view.”).

special deference by higher courts, allowing the judge substantial discretion even though most people would see his or her decision as wrong.²⁷⁰ Therefore, this abuse of discretion issue amounts to a violation of due process.²⁷¹ This creates another strong reason for why trial judges should be required to use this Article's stringent factor test to increase the accuracies of their rulings in response to FRE 403 objections in rapper criminal cases where their lyrics are used against them as evidence of the alleged crimes.²⁷²

Courts that try to admit evidence against anyone must do it in a way that equally applies the Federal Rules of Evidence, a law that has been amended by Congress and the Supreme Court of the United States.²⁷³ Courts that admit unfairly prejudicial rap lyrics against young, black rappers are usually inherently discriminating, whether intentionally or not, against the mainly minority men who practice rap.²⁷⁴ As laid out above in this Article, minority male rappers receive the short end of the stick; they cannot fairly be tried in court when their lyrics are commonly unfairly prejudicial yet are still used against them.²⁷⁵ Therefore, courts that admit unfairly prejudicial rap lyrics against rapper defendants violate the Fifth Amendment Due Process Clause.²⁷⁶

C. Violation of First Amendment's Freedom of Speech Clause

The First Amendment of the United States Constitution states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."²⁷⁷ The purpose of the freedom of speech clause in the First Amendment is to allow Americans, not the Government, to decide what is discussed in the public forum.²⁷⁸ Any other approach would go directly against "the premise of individual dignity and choice upon which our political system rests."²⁷⁹ Under the Constitution, the individual makes the aesthetic and moral judgments about art and literature, not the Government, "even with

270. See generally Marmstr3, *supra* note 92.

271. *Ex parte Estrada*, 93 F. Supp. at 715.

272. See generally Proano, 912 F.3d at 440.

273. *Federal Rules of Evidence*, <https://www.rulesofevidence.org> ("The current rules were initially passed by Congress in 1975, after several years of drafting by the Supreme Court.") (last visited Sept. 11, 2021).

274. See *Gamory*, 635 F.3d at 488, 493.

275. *Id.*

276. U.S. CONST. amend. V.

277. U.S. CONST. amend. I.

278. *Simon & Schuster, Inc.*, 502 U.S. at 116 (citing *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971))); 16A AM. JUR. 2D *Const. Law* § 461 (2021).

279. *Simon & Schuster, Inc.*, 502 U.S. at 116 (citing *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971))).

the mandate or approval of the majority.”²⁸⁰ In other words, despite what the majority of people may think about a music genre like rap, the music is still art.²⁸¹

“The expressive conduct protected by the First Amendment is not limited to conduct that communicates a political, social, philosophical, or religious message; the First Amendment protection also extends to artistic expressions such as painting, music, poetry, and literature.”²⁸² For example, the Tenth Circuit Court in *Cardtoons, L.C. v. Major League Baseball Players Association* held that “[e]ntertainment, no less than political and ideological speech, is also protected by the First Amendment and motion pictures, programs broadcast by radio and television, and live entertainment such as dramatic works all fall within the First Amendment guarantee.”²⁸³

The Supreme Court of the United States has held that “the Constitution does not protect true threats.”²⁸⁴ Luckily for rappers, hyperbolic speech is not considered a true threat.²⁸⁵ Additionally, rap often uses hyperbolic expressions.²⁸⁶ Rap is not covered by the true threat exception to First Amendment protections, even though over 500 rap lyric cases have been brought in criminal court, and there are at least 50,000 rap songs.²⁸⁷ When courts admit unfairly prejudicial rap lyrics into evidence (which jurors examine for a literal admission of guilt), the courts also criminalize obviously false or exaggerated statements against rappers who never intended to communicate a *serious* threat because rap is often violent, explicit, and hyperbolic.²⁸⁸

The First Amendment has not fulfilled its purpose for rappers because it has been largely ignored by judges and juries who see rap as a true threat or literal interpretation instead of a creative expression.²⁸⁹ The purpose of the First Amendment’s Freedom of Speech Clause is to allow the American

280. *Brown*, 564 U.S. at 790 (quoting *United States v. Playboy Entm’t Group*, 529 U.S. 803, 818 (2000)).

281. *Id.*

282. *Chepilko*, 965 A.2d at 197.

283. 16A AM. JUR. 2D *Const. Law* § 531 (citing *Cardtoons, L.C.*, 95 F.3d 959).

284. *Elonis*, 575 U.S. at 46-47 (Alito, J., dissenting in part) (citing *Virginia v. Black*, 538 U.S. 343, 359-60 (2003); *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992); *Watts v. United States*, 394 U.S. 705, 707-08 (1969)).

285. *Watts*, 394 U.S. at 708.

286. See Timmhotep Aku, *30 Ridiculously Exaggerated Rapper Claims*, COMPLEX (Jun. 14, 2013), <https://www.complex.com/music/2013/06/30-ridiculously-exaggerated-rapper-claims/> (“Hip hop and hyperbole go hand in hand.”).

287. Tahir Hemphill, *Hip Hop Word Count*, MIT DOCUBASE (2011), <https://docubase.mit.edu/project/hip-hop-word-count/> (“A database of the lyrics to more than 50,000 rap songs dating back to 1979.”).

288. *Recio*, 884 F.3d at 236; *Gamory*, 635 F.3d at 493; see also *Hannah*, 23 A.3d at 202 (holding that rap lyrics were more prejudicial than probative because they “had no tendency to prove any issue other than . . . [that the defendant] was a violent thug”).

289. See *Simon & Schuster, Inc.* at 116.

people, not the Government, to decide what topics and issues were discussed in the public forum.²⁹⁰ The Western District Court of Louisiana agreed: “All—political and non-political—musical expression, like other forms of entertainment, is a matter of [F]irst [A]mendment concern,” and the “First Amendment protection extends to rap music.”²⁹¹ This is true even though the music may be unpopular or may include dangerous ideas or perspectives.²⁹² Considering these notions, why do judges continue to admit art as evidence against a rapper to charge him with a crime?

The Supreme Court of the United States held in 1992 that evidence protected by the First Amendment may still be admissible.²⁹³ The Supreme Court of Nevada allowed the defendant’s rap lyrics to be admitted because they matched the details of the crime so specifically that it could not have been coincidence.²⁹⁴ The Eastern District Court of Michigan found that rap lyrics were not abstract beliefs of defendants, which would otherwise prevent their admission under the First Amendment.²⁹⁵ The Sixth Circuit Court of Appeals ruled similarly though for a different reason, doubting that any reasonable juror would find that the defendant was violent because he raps about violence.²⁹⁶

However, the Sixth Circuit is mistaken; jurors *do* conclude that rappers commit crimes as a result of their song lyrics appearing offensive.²⁹⁷ For instance, Adam Dunbar’s study concluded that “participants in the rap condition evaluat[e] the lyrics as more likely to be literal[,] more likely to need regulation,” and more offensive than lyrics in the country, punk rock, or heavy metal condition.²⁹⁸ The fact that rap’s common themes include misogyny, drugs, or violence makes society an enemy of the rap genre.²⁹⁹ This is because people believe that rappers spread amoral ideas far and wide, which is an issue for many in society.³⁰⁰

290. *See id.*

291. *Torries v. Hebert*, 111 F. Supp. 2d 806, 809 (W.D. La. 2000) (quoting *Cinevision Corp. v. Burbank*, 745 F.2d 560, 569 (9th Cir. 1984) (quoting *Davidson v. Time Warner*, 1997 U.S. Dist. LEXIS 21559, *41 (S.D. Tex. 1997))).

292. *See Madison v. Frazier*, 539 F.3d 646, 654 (7th Cir. 2008).

293. *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993) (“the Constitution does not erect a per se barrier to the admission of evidence . . .”).

294. *Holmes v. State*, 129 Nev. 567, 573 (2013) (“But these features do not exempt such writings from jury consideration where, as here, the lyrics describe details that mirror the crime charged.”).

295. *Mills*, 367 F. Supp. 3d. at 672.

296. *See United States v. Stuckey*, 253 F. App’x 468, 484 (6th Cir. 2007).

297. Dunbar, *supra* note 71, at 39 (“participants in the rap condition evaluating the lyrics as more likely to be literal and more likely to need regulation than those in the country condition.” . . . “Although not significantly different, participants in the rap condition rated the lyrics as more offensive than participants in the country condition . . .”).

298. *Id.*

299. *See Recio*, 884 F.3d at 236; *see Dunbar, supra* note 71, at 1.

300. *See Recio*, 884 F.3d at 236; *see Dunbar, supra* note 71, at 1.

Nonetheless, “speech that entertains, like speech that informs, is [supposed to be] protected by the First Amendment.”³⁰¹ This is because “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.”³⁰² The point of rap is usually to entertain or inform the listener.³⁰³ Because rap usually accomplishes both, and “the line between” informing and entertaining is “elusive,” rap should be protected by the First Amendment and not admitted for literal admissions of guilt in most cases.³⁰⁴ For instance, rap is often used as a tool to express social and political opinions to the youth of the day to educate them about current issues so that they can be proactive members of society.³⁰⁵ These expressions are supposed to be protected by the First Amendment.³⁰⁶

However, in the most recent Supreme Court case involving rap lyrics, the Court invoked the True Threat Doctrine to allow the rapper’s lyrics to be used to incriminate the defendant without having to address the First Amendment in depth.³⁰⁷ This occurred because courts are only required to answer the issues pertaining to the arguments raised by the parties in the case at hand.³⁰⁸ *Elonis*’s attorneys only raised the issue of mental intent for liability under the First Amendment, not the unfairly prejudicial issue: artistically expressive rap lyrics being used against mainly young, black men.³⁰⁹ Even though the Supreme Court of the United States “slapped the hand” of the Ninth Circuit Court of Appeals for addressing issues *not* raised by the parties in that case, the hypocritical Supreme Court often itself addresses issues not raised by the parties.³¹⁰ Nevertheless, the Supreme Court majority opinion did not address in depth the First Amendment issues apparent today with most rappers and their lyrics.³¹¹

The Supreme Court should have addressed First Amendment issues with rap lyric usage in criminal trials because it is an extremely hot topic today

301. *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (“[s]peech that entertains, like speech that informs, is protected by the First Amendment because ‘[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.’”).

302. *Cartoons*, 95 F.3d at 969 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

303. *Mize*, *supra* note 103.

304. U.S. CONST. amend. I.

305. *Themes*, *supra* note 97.

306. U.S. CONST. amend. I.

307. *Elonis*, 575 U.S. at 746-47 (Alito, J., dissenting in part).

308. *Dictum*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/dictum> (“A remark, statement, or observation of a judge that is not a necessary part of the legal reasoning needed to reach the decision in a case. Although dictum may be cited in a legal argument, it is not binding as legal precedent, meaning that other courts are not required to accept it.”) (last visited, Dec. 11, 2020).

309. *Elonis*, 575 U.S. at 2001.

310. Timothy Macht & Derek Borchardt, *Can Courts Introduce Legal Issues Not Raised by the Parties?*, N.Y. L.J. (July 2, 2020, 3:37 PM), <https://www.law.com/newyorklawjournal/2020/07/02/can-courts-introduce-legal-issues-not-raised-by-the-parties/>.

311. *See Elonis*, 575 U.S. at 740.

and because many rappers have been imprisoned for their artistic expressions.³¹² Instead, the majority quickly dismissed the First Amendment issues because the case before the Court depended on the mental intent of the author, *Elonis*, and the Court decided that *Elonis*'s posts were not true threats.³¹³ The Supreme Court's failure to address this issue allows artistic expressions like rap to continue to be used against their artists.³¹⁴ This opens the door to other types of artists to be charged with crimes they likely did not commit just because of their artistic expressions. Something needs to be done or this problem will persist.

The Supreme Court in *Elonis* should have held that rap lyrics need more protection than they already receive. Rap lyrics should be admitted in criminal trials but only under special circumstances. When the rap lyrics parallel the details of the crime the rapper is charged with so closely that there is a reasonable likelihood that the author was involved in the crime, they should be admitted. Lyrics should also be admitted if they contain previously unreleased details. Unfortunately, this is not how rap lyrics are usually admitted.³¹⁵

In over 500 cases, courts admitted rap lyrics into evidence against the rapper defendant in a criminal trial.³¹⁶ However, this number is certainly not representative of the actual number of rapper defendants whose rap lyrics have been used against them in criminal trials; it is likely much higher.³¹⁷ Shockingly, in about ninety-five percent of rap lyric criminal cases, "the defendant is a young black or Latino man with a local fan base, if any fan base at all."³¹⁸ An overwhelming percentage of rap lyric criminal cases are against young, black men, and, even if many in society think those lyrics are distasteful, those lyrics usually are unfairly prejudicial against them when used as evidence; thus, it is clear that the justice system is not treating them fairly for their participation in a form of art.³¹⁹ Thus, any young, black male rapper either fears or should fear his lyrics being used against him in a

312. See generally *So to Speak: 'Rap on Trial'*, NICO PERRINO (Mar. 9, 2020) (podcast transcript available at <https://www.thefire.org/so-to-speak-podcast-transcript-rap-on-trial/>).

313. See *Elonis*, 575 U.S. at 740.

314. See generally *supra* note 312.

315. FED. R. EVID. 404 ("(2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

316. *Supra* note 312.

317. Erik Nielson, *Prosecutors Are Increasingly – and Misleadingly – Using Rap Lyrics as Evidence in Court*, THE CONVERSATION (Mar. 17, 2020), <https://theconversation.com/prosecutors-are-increasingly-and-misleadingly-using-rap-lyrics-as-evidence-in-court-131440>.

318. Marmstr3, *supra* note 92.

319. *Id.*

criminal trial because his lyrics are not being admitted against him fairly and with the right factors in mind.³²⁰

The Founding Fathers of the United States intended for protection of free speech when the First Amendment was passed, but even today, young, black, American men are not receiving that protection.³²¹ Because of this hard truth, rappers have only a handful of options before them to prevent their lyrics from being taken as literal admissions of guilt in criminal trials. They can stop expressing themselves through their desired art form. Rappers could hide their true lyrics by not publishing them. They could change their lyrics before publishing them to prevent courts from using their lyrics against them. Or they could continue to express themselves “freely” and risk receiving a criminal charge for something in which the rapper most likely had not even been involved.³²² These are the readily available options rappers have because the courts directly minimize rap and the entire rap genre by penalizing rappers for what they write, speak, or sing about, regardless of the rapper’s physical actions.³²³

Courts and prosecutors have cornered rappers.³²⁴ To allow this to continue, the Government simply need not do anything differently.³²⁵ However, allowing this to continue will also result in bad public policy because of the continued stifling of the creativity, ability to vent, the financial gain of rappers, and the dissemination and social benefits of valuable rap content.³²⁶ These benefits include increased social awareness; fundamental notions of identity and purpose; creativity; practice in voicing opinions, emotions, and feelings; the opportunity to gain money and a fan-base; the opportunity to escape from bad times into rap music; venting outwardly about the struggles with which they or another person have dealt, and more.³²⁷ These are the things the Founding Fathers sought to protect when they drafted the First Amendment, but the Founding Fathers have been let down because rappers continue to pay the price.³²⁸

Courts have either forgotten or ignored that rap is a form of artistic expression along with a beneficial avenue for many people in the world.³²⁹ For example, rap is seen as the “great unifier” of diverse populations by

320. *See generally* *Stuckey*, 253 F. App’x at 482-84, 492.

321. *See* *Simon & Schuster, Inc.*, 502 U.S. at 116; *supra* note 312.

322. Hemphill, *supra* note 287.

323. Marmstr3, *supra* note 92.

324. *See supra* Part III. A.

325. *See id.*

326. *Themes*, *supra* note 97.

327. *Id.*

328. *See generally* *Simon & Schuster, Inc.*, 502 U.S. at 105; *supra* note 312.

329. *See supra* Parts II. A. 3, II. B. 3.

giving youth a sense of style and identity.³³⁰ It educates people on many social issues and does so in a way that shows the listener various perspectives.³³¹ Rap conveys hope to those who are impoverished that they can overcome anything if they put their mind to it because the rappers people listen to have done so before.³³² Rap has been used as a form of therapy to engage youth and address their uses in therapy, allowing them to reflect on their own past experiences.³³³ These programs include “ELEMENTary Hip Hop Skool,” and “Project Spitfire.”³³⁴ Rap garners support for awareness of social issues because rap music brings light to otherwise unheard issues.³³⁵ Of course, it also serves as entertainment that people can listen, dance, and sing along to, and just escape from reality for a few minutes.³³⁶ Rap is indeed a form of artistic expression, yet judges and prosecutors continue to demonize rap when they admit it into evidence, unfairly prejudicing the jury against the rapper.³³⁷

Freestyle rap is a more extreme example of rap that should also receive First Amendment protection.³³⁸ Freestyle rap’s disregard for social barriers is helpful and is probably essential to what unlocks the creativity required to successfully produce unique and popular rap songs.³³⁹ However, with the current criminal judicial system in place, rappers’ First Amendment right and fundamental freedom of expression is violated.³⁴⁰ Imagine a beat going on to the rhythm of “Stayin’ Alive” and after four measures, you must start rhythmically speaking words that make sense, rhyme, and convey some message, all simultaneously. Objectively, it is difficult to do, at the least.

A problem arises when rappers record a beautiful freestyle only if it is left untouched. Assuming the rapper talks about the common rap-genre (potentially controversial) things like illegal crime, drug use, objectifying women, or violence, that beautiful freestyle masterpiece, one never meant to be tinkered with, becomes or should become a worrisome ordeal to the rapper.³⁴¹ If that freestyle rapper knows that other rappers’ lyrics have been

330. *Themes*, *supra* note 97; *see generally* *Simon & Schuster, Inc.*, 502 U.S. at 105; *supra* note 312.

331. *Rap as a Positive Influence*, HIP HOP FOR CHANGE: JOIN THE RESISTANCE (Apr. 22, 2012), <https://hiphopforchange.wordpress.com/>.

332. *Id.*

333. *Id.*

334. *Id.*

335. Adam Selon, *Socially Conscious Hip-Hop and Rap*, PUBLIC SPHERE PROJECT (Jun. 5, 2013), <https://www.publicsphereproject.org/content/socially-conscious-hip-hop-and-rap>.

336. Jae Allen, *What Are the Benefits of Rap Music to Teenagers?*, OUR PASTIMES (Sept. 15, 2017), <https://ourpastimes.com/what-are-the-benefits-of-rap-music-to-teenagers-12344170.html>.

337. *Mills*, 367 F. Supp. at 672.

338. *See supra* Part II. A. 2.

339. *Mills*, 367 F. Supp. at 672; TimWestwoodTV, *supra* note 108.

340. *See supra* Parts II. A. 3., III. A., B.

341. *Recio*, 884 F.3d at 236

used against them to prove they committed crimes, he has only three readily available options to prevent his own legal issues.³⁴² First, he could publish it as the masterpiece it is and hope a prosecutor does not pursue him. Second, he could not publish it at all. Third, he could edit out the offensive parts and most likely skew or completely undermine the intended message of the freestyle rap. Without any other alternatives to potentially being criminally charged for his expressions, there is clearly a restriction on rappers' rights to freedom of expression.³⁴³

There are cases when admitting rap lyrics into evidence does not violate the artist's rights because the songs are strangely consistent with the crime committed.³⁴⁴ However, it is more common that rap lyrics do not *specifically* describe the crime.³⁴⁵ In addition, prosecutors often believe that writing, singing, speaking, or creating violent rap lyrics makes a rapper more prone to commit a crime.³⁴⁶ This idea may be exactly why many rappers have been thrown in prison.³⁴⁷ With this reasoning, prosecutors may continue to try to admit rap lyrics against defendant rappers essentially because they are rappers.³⁴⁸ For these reasons, judges and prosecutors who use unfairly prejudicial lyrics against rappers violate the rapper's First Amendment protection of freedom of expression when they use them against rappers as evidence of literal admissions of guilt.³⁴⁹

IV. PROPOSED FACTOR TEST

To combat this pervasive and serious problem, this Article proposes a three-pronged solution.³⁵⁰ First, this Article proposes a unique and new factor test with attached reminders about the reality of rap music.³⁵¹ Second, in rap cases like the ones discussed here, the jury should be instructed on the background and reality of rap if rap lyrics are admitted, that way the rap is not as prejudicial as it might otherwise be.³⁵² Third, in the jury instructions,

342. *Id.*

343. *See supra* Part III. A. B.

344. *Recio*, 884 F.3d at 235 (“Lyrics posted or authored by a defendant can be relevant if they match details of the alleged crime.”).

345. *Aku*, *supra* note 286 (“Rap and hyperbole go hand in hand.”).

346. A. Palmer, *Violent Song Lyrics May Lead to Violent Behavior*, AMERICAN PSYCHOLOGY ASSOCIATION (2003), <https://www.apa.org/monitor/julaug03/violent>; David Reese, *Experts Decry Increasing Use of Rap Lyrics in Criminal Trials*, COURTHOUSE NEWS SERVICE (Sept. 7, 2017), <https://www.courthousenews.com/experts-decry-increasing-use-rap-lyrics-criminal-trials/>.

347. *Palmer*, *supra* note 346; *Reese*, *supra* note 346.

348. *Palmer*, *supra* note 346; *Reese*, *supra* note 346.

349. *See supra* Parts II. B. 1, 3, III. A.

350. *See supra* Part I.

351. *See id.*

352. *See id.*

there should also be a strong encouragement for rappers to use experts to explain the prejudicial value of rap lyrics.³⁵³

With a new factor test to guide courts when they think artwork, particularly rap, is more probative than unfairly prejudicial, courts should not admit rap lyrics into evidence until they have carefully analyzed the threat of prejudicial value, if any, of the rap artwork.

It is up to the court's discretion whether to admit lyrics into evidence based on a balancing test between the probative value and any unfair prejudice.³⁵⁴ A big contributing factor to the problem is that judges often wrongfully allow these lyrics to be admitted to prove intent or motive of a crime when the rapper's lyrics are outdated, the rapper was pandering to audiences, the rapper's image clashes with his or her true self, and the jury looks at rap more negatively than any other musical genre.³⁵⁵ There are no specific safeguards in place to ensure that every rapper's lyrics are looked at in context of all the surrounding circumstances when a plethora of people, including judges and jurors, misinterpret and misconstrue rap lyrics, which are not intended to be taken literally.³⁵⁶

Barring cases where the lyrics so specifically describes a crime that the writer must have committed it, been involved in it, or had specific substantive knowledge of it (outside of public knowledge), this Article proposes that courts must weigh additional factors to further analyze whether the art's prejudicial value substantially outweighs its probative value.³⁵⁷

The proposed factor test includes seven different factors: the writer's intentions and local and global environment; the view of the art if it were another genre; the similarity between the lyric and the crime; the writer's goal to fit their lyrics into the genre's common stereotypes; popularity of the song and rapper; character of the rapper outside of their persona; and relevance in scope of the art to the crime.³⁵⁸ The following paragraphs go into more detail about each factor.

Factor 1: What was the intention with the lyric? What was the writer's local environment – physically, mentally, socially, and otherwise? What meaningful events just happened globally, nationally, locally, or individually? By looking at intention and surrounding circumstances of the artist when the lyrics were written, one can understand and get a better glimpse into why or how the artist came up with those lyrics. If the circumstances and events match, relate to, or are similar to the events of that

353. *See id.*

354. FED. R. EVID. 403.

355. *Mills*, 367 F. Supp. 3d at 672.

356. *See generally Mills*, 367 F. Supp. at 664.

357. *See generally Recio*, 884 F.3d at 230.

358. *See supra* Part I.

time, the lyrics are more likely to be commentary, and less likely to be literal, thereby making the lyrics weigh more on the side of exclusion.

Factor 2: If the lyrics were thought to be of another genre (Country), would reasonable people think the lyric was still as probative or prejudicial as the art in question? This is a hypothetical question to think about, not a concrete factor to prove with evidence. By thinking about whether changing the genre of the lyrics would change the jury's decision, jurors may not change their mind much because they know that it is not a country song, it is a rap song. So, some jurors may not entertain that hypothetical very long. However, this problem can be remedied with the background of rap and its harsh realities revealed to the jurors before they come to a final verdict.

Factor 3: Did the facts of the crime, at the time of the creation of the art in question, coincide with the crime timeline? If they do, that factor weighs more on the side of admission. If not, then it weighs on the side of exclusion.

Factor 4: To what extent does the evidence show the writer portraying a fiction or a typical blend of trendy topics in his or her artwork to pander to fans in an effort to increase financial or other gains? For example, rappers commonly rap about misogyny, drugs, and guns. While pop stars commonly sing about sex, horror novelists commonly discuss depressing times and murder, and actors portray a character, no reasonable person understands the depiction to be reality. If there is a substantial reason to believe that the rapper was trying to pander to the genre to gain financial success, that makes the lyrics less indicative of the true defendant, weighing more on the side of exclusion.

Factor 5: How popular was the song? Famous rappers have been found to be taken less literally than amateur ones.³⁵⁹ However, that presents a paradox for upcoming rappers because if they are ever to get famous, how are they going to do it if they are imprisoned for their lyrics before then?³⁶⁰ Therefore, amateur rappers should receive more protection than what currently exists if their lyrics are admitted into evidence.

Factor 6: What evidence is there of the character of the rapper in life, external to their artwork? What actions has the rapper taken and what do the people who know the rapper closest say? If the artist's peers know that the character and actions of the rapper do not coincide with, or even contradict, the rapper's lyrics, then the evidence should more likely be excluded. What do the acquaintances say? Information from acquaintances can provide further insight into who the person is. If close friends paint one picture, but

359. NIELSON ET AL., *supra* note 1, at 16.

360. See generally Michael Conklin, *The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence*, 95 IND. L. J. SUPP. 50, 53 (2019-2020).

acquaintances paint another, the court should look closer into the specifics before deciding the true character.

Factor 7: Was the admission relevant in scope to only the relevant portions of the lyrics? For example, lyrics must be admitted in a narrow form, and cannot be juxtaposed together, misconstruing context. The prosecution cannot present irrelevant or old lyrics to try to establish a present or recent mental intent.

V. CONCLUSION

Federal and state courts do not treat young, black male rappers fairly.³⁶¹ All federal courts and most state courts are supposed to follow the Federal Rules of Evidence or a similar set of rules, respectively.³⁶² The Federal Rules of Evidence were passed by Congress and have been amended yearly by the Supreme Court of the United States.³⁶³ Federal courts misapply FRE 403 when they admit unfairly prejudicial lyrics against the rappers who wrote those lyrics, resulting in many rappers' convictions.³⁶⁴ This is because rap is and will be inextricably linked with African Americans for the foreseeable future, and rap is also linked with negative impacts on society by most of the American population.³⁶⁵ Unfortunately, this occurs despite all of rap's social and economic benefits.³⁶⁶ This includes increased social awareness, potential for financial gain through an increasingly easy and massive audience through social media and the internet, a useful venting device, the challenging of rap users and listeners to open their minds to new perspectives, and several other benefits.³⁶⁷ In short, there is an inherently unfair and significant problem with federal and state courts' application of their Federal Rules of Evidence to discriminate against young, black, predominantly male rappers in criminal cases.³⁶⁸ This unfair treatment has resulted in misapplications of the Federal Rule of Evidence 403 and the violation of the Fifth Amendment's Due Process Clause.³⁶⁹

Furthermore, rap has been established for many years as a legitimate art form which is supposed to be protected as free speech under the First Amendment.³⁷⁰ Yet, many courts continue to admit First Amendment expressions, often erroneously, believing that rap lyrics have a higher

361. *See supra* Parts II. A. 2, III. A-C.

362. *See supra* Part III. A.

363. *See id.*

364. *See supra* Part III. A.

365. *See supra* Part II. A. 2.

366. *See supra* Part II. A. 3.

367. *See supra* Part III. A.

368. *See id.*

369. *See id.*

370. *See supra* Part III. C.

probative value in court against the rap lyrics' author than the lyrics' unfairly prejudicial effects on the jury.³⁷¹ Rap lyrics are often less probative than prejudicial because they tend to follow the common themes of the genre: violence, drug-use, and misogyny, among other commonly frowned-upon ideas.³⁷² Additionally, rap lyrics usually do not describe a serious intent to threaten or harm anyone specifically, meaning they should usually not be taken as literal admissions of guilt.³⁷³ The lack of serious and specific threats should mean that rappers' art is protected by the First Amendment.³⁷⁴ However, their unfairly prejudicial lyrics have still been admitted in courts despite being art, and this has resulted in a violation of the First Amendment.³⁷⁵

To remedy this problem, this Article suggests a new factor test that the Supreme Court should incorporate into the Federal Rules of Evidence. This test will help courts address prejudicial art like rap when they are tasked with the difficult decision of whether or not to admit rap lyrics against a rapper defendant under FRE 403.³⁷⁶ In addition, jury instructions should remind the jurors of rap's inherent and often negatively viewed identity in society, so the lyric is not as prejudicial as it might otherwise be.³⁷⁷ In addition to the jury instructions, there should also be a strong encouragement for rappers on trial to use experts to help explain the prejudicial value of rap lyrics.³⁷⁸ These suggestions will increase fairness in courts and decrease the unfortunate, yet, real discrimination against young, black, male rappers.³⁷⁹

If today's rap problem is not soon remedied, a similar injustice could spread to other entertainers like comedians, poets, horror-story novelists, or television and movie producers. Although these people perform different work than rappers, they are similar in many ways; society benefits from their use of artistic expressions through the form of entertainment or new perspectives.³⁸⁰ Those similarities coupled with today's rap issue potentially open the door to more restrictions on a broader group of American citizens' rights, especially those protected as provided in the Federal Rules of Evidence and similar state rules, the First Amendment, and the Fifth Amendment.³⁸¹

371. *See supra* Part III. A.

372. *See id.* *See also* Dunbar, *supra* note 71, at 1.

373. *See supra* Part III. A.

374. *See supra* Part III. C.

375. *See supra* Part IV.

376. *See id.*; FED. R. EVID. 403.

377. *See supra* Part IV.

378. *See id.*

379. *See supra* Part II. B. 3.

380. *See id.*

381. *See supra* Part III.

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Courts must close that door before it fully opens, otherwise countless innocent lives, like Lil Mac Phipps, may be damaged forever.³⁸²

382. *See generally* NIELSON ET AL., *supra* note 1.