LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 10 SPRING 2023 ISSUE 2

FROM PAPER TO PRISON: HOW A RAPPER'S BARS CAN LAND THEM BEHIND BARS

Sean Freeland

I. INTRODUCTION

If Johnny Cash were on trial for murder, it would hardly be fair for the prosecution to use his song, *Folsom Prison Blues,* to show that he has a tendency to shoot people. Though Cash says, "I shot a man in Reno, just to watch him die,"[1] most listeners would agree that Cash was engaging in artistic expression. The same could be said for Al Pacino if he was on trial for drug trafficking. Would it be fair to use his role in *Scarface* to show that he was more likely to commit those crimes?

That scenario seems laughable, but it is precisely the situation that criminal defendants across the United States face. Many rappers who face criminal prosecution find their music used against them at trial. Artistic expression is one of the most protected forms of free speech,[2] but prosecutors and courts frequently disregard the first amendment as if it does not apply to musical artists. As a result, many of those defendants do not receive fair trials. Their juries are prejudiced by the premise that

---

[1] JOHNNY CASH, FOLSOM PRISON BLUES (Sony Music Entertainment 1968).

[2] *FREEDOM OF EXPRESSION IN THE ARTS AND ENTERTAINMENT,* AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/freedom-expression-arts-and-entertainment (last visited Feb. 14, 2023).

because the defendant writes violent lyrics, they must act violently, too. Rap music has historically been a form of counter-cultural expression that often contains violent lyrics.[3] No matter the content, it is still music or –distilled to its lyrics – poetry. Both are forms of artistic expression that the First Amendment should safeguard.

However, in criminal trials, if a defendant has written a rap resembling the crimes alleged, the prosecution will likely use it against the defendant. The Federal Rules of Evidence have safeguards to protect against similar forms of evidence coming into trial (such as propensity or character evidence).[4] Still, nothing yet exists that protects artistic expression from being used as a form of propensity evidence. Until courts implement adequate safeguards, prosecutors will continue to use defendants' art against them as an unfair method to secure a conviction.

II. UNPROTECTED FORMS OF SPEECH

A pillar of democracy is the freedom to say what one wishes without fearing persecution. In America, freedom of speech is so fundamental that the Framers protected it in the First Amendment of the Constitution.[5] Yet, speech need not be spoken. The Supreme Court has long recognized that speech is simply a communication of ideas. Communication occurs through direct speech out of one's mouth, written language and symbols, or by taking some action to communicate a message.[6] The government cannot ban or otherwise limit speech. No matter the medium that one conveys the speech, the First Amendment protects the message. "Congress shall make no

---

[3] Drew Findling, *When Your Art Can and Will Be Used Against You: Hip-Hop, Expression, and the Criminal Justice System,* MEDIUM (Jan. 10, 2019), https://nacdl.medium.com/when-your-art-can-and-will-be-used-against-you-hip-hop-expression-and-the-criminal-justice-d7b4c500efef.

[4] FED R. EVID. 404(a); FED R. EVID. 608.

[5] U.S. CONST. amend. I.

[6] *See* Virginia v. Black, 538 U.S. 343 (2003) (spoken word was meant to express some intent); *see* Schenck v. United States, 249 U.S. 47 (1919) (where mailed pamphlets were considered speech); *see* Texas v. Johnson 491 U.S. 397 (1989) (where the court said burning the flag was a type of symbolic speech in order to convey a message).

law . . . abridging the freedom of speech . . . ."[7] However, citizens' freedom of speech is not absolute.

There are certain narrow limitations to free speech. Categories of speech exist that do not allow the speaker complete immunity from the law.[8] These include obscenities, true threats, fighting words, and advocacy of imminent lawless action, among others.[9] Such unprotected categories highlight the real harm that speech has the potential to create. As a result, the Supreme Court established limitations over time to guard against such harm.[10]

A. FIGHTING WORDS

The fighting words doctrine allows the government to limit speech when it is likely to incite immediate violence or retaliation by the recipients of the words.[11] The Court established this limitation to buttress breach of peace and disorderly conduct ordinances.[12] In disallowing fighting words, the Court acknowledges that some types of speech are useless to society.[13] The Court first ruled on fighting words in *Chaplinsky v. New Hampshire* (1942).[14] There, Walter Chaplinsky, a Jehovah's Witness, was distributing religious pamphlets when a crowd gathered around him.[15] A city marshal approached Chaplinsky and then walked away.[16] Apparently, several people made complaints about the content of Chaplinsky's speech.[17] After the crowd turned to a riot, the marshal returned to see Chaplinsky escorted away by a different police officer.[18] When Chaplinsky saw the marshal, he uttered, "you are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or

---

[7] U.S. CONST. amend. I.
[8] *Black*, 538 U.S. at 358-60.
[9] *Id*.
[10] *Id.*
[11] *Id.* at 359.
[12] *See id.*
[13] *See* J. Michael Bitzer, *Chaplisnky v. New Hampshire (1942)*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://mtsu.edu/first-amendment/article/293/chaplinsky-v-new-hampshire.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

agents of Fascists."[19] As a result, Chaplinsky was charged with a New Hampshire statute prohibiting the use of offensive, derisive, or annoying words toward others.[20] Chaplinsky sued, alleging that his First Amendment free speech rights were violated, and the case made its way to the Supreme Court.[21] Justice Murphy wrote for The Court that fighting words "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[22] Murphy further posited that these types of utterances serve no essential role and have such a minuscule social value that they can be limited without violating the First Amendment.[23]

The Court further narrowed the fighting words doctrine in *Terminiello v. Chicago*[24], *Texas v. Johnson*[25], and *R.A.V. v. St. Paul*.[26] Through the *Chaplinsky* decision and its progeny, the Court attempted to provide a limitation to free speech that would guard against the incitement of violence. *Chaplinsky*, however, was not the first case to contemplate the issue. *Schenck v. U.S.* (1919) is an earlier case that addresses the danger of absolute freedom of speech as it relates to violence.[27]

B. ADVOCACY OF IMMINENT LAWLESS ACTION

Through *Schenck*, the Court developed a class of limitation aptly referred to as advocacy of imminent lawless action.[28] This classification of speech that is likely to incite or

---

[19] *Id.*
[20] *Id.*
[21] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[22] *Id.*
[23] *Id.*
[24] Terminiello v. City of Chicago, 69 S. Ct. 894, at 896 (1949) (citing Bridges v. California, 314 U.S. 252 (1941)) (holding speech will be protected unless it is likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest).
[25] Texas v. Johnson, 491 U.S. 397 (1989) (holding the government cannot ban the expression of certain disagreeable ideas on the presumption that their disagreeableness will provoke violence).
[26] R.A.V. v. St. Paul, 505 U.S. 377 (1992) (where a government enacted content restriction must be broad and cannot single out specific content-based viewpoints).
[27] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
[28] *Id.*

lead to violence or illegal actions.[29] The oft-cited example is yelling "fire" in a crowded theatre. The Court in *Schenck* said, "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic."[30] The Court went on to say, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[31] In other words, the Court is pointing out that context matters. Words themselves will not be prosecuted unless they are of the sort that elicits a danger merely by their utterance – which can only happen in particular situations.

The Court then narrowed *Schenck* through a line of free speech cases. First, *Brandenburg v. Ohio* limited the clear and present danger test to words that are *actually* likely to produce such imminent lawless action.[32] Essentially, *Brandenburg* reaffirmed that context is of the utmost importance in free speech cases. More importantly, the Court in *Brandenburg* developed a two-prong test to analyze inciteful speech: (1) speech can be prohibited if it incites or produces imminent lawless action, and (2) it is likely to incite or produce such action.[33] This test presents a high bar to pass for the government.

The difficulty of clearing the *Brandenburg* test was apparent in *Hess v. Indiana*.[34] The defendant was convicted for speech that the state said advocated for imminent lawless action.[35] At first glance, it seems like Gregory Hess said words that would lead to imminent lawless action. In a crowded war protest, as police were clearing the street of a mob, Hess shouted some variation of "[w]e'll take the fucking street

---

[29] Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Expression: from the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 863 (2008).
[30] *Schenck*, 249 U.S. at 52.
[31] *Id.*
[32] Brandenburg v. Ohio 395 U.S. 444, 447-49 (1969) (where the Court overturned the conviction of a KKK member on the basis that his words, though offensive to some, were not said to particular people or in a particular place that would lead to imminent lawless action).
[33] *Id.* at 447.
[34] *See* Hess v. Indiana, 414 U.S. 105 (1973).
[35] *See id.*

again!"[36] Applying the *Schenck* standard, where context matters, and the *Brandenburg* two-prong test, Hess seems to be on the losing end. For context's sake, Hess was standing in a rowdy crowd that was being cleared by the police.[37] Shouting something about taking to the streets seems to be language advocating for imminent lawless action in such a context. However, the Supreme Court ruled the opposite.[38]

The Court overturned Hess's conviction on the basis that his speech was not directed toward any specific person and was not speaking any louder than any other demonstrator.[39] The *Hess* case seems to point out that he was in the clear because there was no resulting disorder from Hess's words. Hess is an example of how subjective the Court can be regarding free speech. *Brandenburg* gave us a clear two-prong test to analyze imminent lawless action, which can lead to different conclusions when applied. Though the test is clear and concise, the explanations of the test's analysis are about as clear as mud.

C. OBSCENITY

Contrary to popular belief, obscenity is a class of speech that is strictly sexual.[40] Obscene material has been notably difficult to identify over the years – partly because the definition of obscenity constantly changes. The Supreme Court identified it in 1957 as any type of communication that was "utterly without redeeming social importance."[41] The Court changed this definition in 1973.[42] In *Miller v. California*, the Court developed a three-prong test that precisely defines the metes and bounds of obscenity as it relates to unprotected speech.[43] The *Miller* Test ties obscene material to that which must be sexual in nature and built on the earlier social

---

[36] *Id.* at 107.
[37] *Id.* at 106.
[38] *Id.* at 108-09.
[39] *Id.* at 110-11.
[40] David L. Hudson, *Obscenity and Pornography*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1004/obscenity-and-pornography (last visited Feb. 14, 2023).
[41] Roth v. United States, 354 U.S. 476, 484 (1957).
[42] *See* Miller v. California, 413 U.S. 15 (1973).
[43] *Id.* at 24.

importance test.[44] According to *Miller*, a trier of fact must identify the following:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[45]

Part (c) of the test adopts the 1957 ruling that labeled obscenities as "utterly without redeeming social importance."[46] However, parts (a) and (b) were added, directing the attention of obscenities to sexual material. This addition is particularly interesting because the Court acknowledges that some material may be offensive but does not rise to the level of unprotected speech.[47] Even offensive material is speech that should be protected, so long as it is not overtly sexual as to harm minors and un-consenting adults.[48] *Cohen v. California* was the precursor to *Miller* in that the Court addressed the issue of obscenity regarding sexual material.

In *Cohen*, police arrested the defendant for wearing a jacket that said, "fuck the draft."[49] The defendant did not engage in loud or boisterous behavior, nor did he commit an act of violence or utter a sound before his arrest.[50] On appeal, Justice Harlan stated, "this is not . . . an obscenity case. . . . [S]uch expression must be, in some significant way, erotic."[51]

Even before the *Miller* Obscenity Test's introduction, people understood that obscene material is not just offensive but also sexual in nature. This assertion begs the question of

---

[44] *See id.*

[45] *Id.*

[46] *Id*. at 36; *see also Roth,* 354 U.S. at 476.

[47] *See* Cohen v. California, 403 U.S. 15 (1971) (where the defendant wore a jacket that said "fuck the draft" in a courthouse and on appeal the Supreme Court of the United States said it was not obscene).

[48] *Id*. at 25.

[49] *Id*. at 16.

[50] *Id.* at 16-17.

[51] *Id*. at 20 (citing *Roth*, 354 U.S. at 477).

why the government, knowing the elements of the *Miller* Test, would threaten the arrest of people who sold a rap album on the basis of obscenity. The Broward County Sheriff's Office in Florida investigated the sale of a 2 Live Crew album in 1990.[52] The rap group's album, *As Nasty As They Wanna Be,* was deemed obscene by a Federal Judge in the State of Florida.[53] The album is noticeably explicit and can undoubtedly be taken as offensive by some listeners. Most of the songs even graphically reference sex.[54] However, a federal circuit court ruled that the album was not obscene by the *Miller* standard.[55] In essence, the case centered on the fact that 2 Live Crew's album has artistic value, so it is highly protected.[56] The court got it right, but it took an appellate review to reach that conclusion. The district court ruling the album to be obscene is only one example of how the courts mistreat rap as artistic expression.[57]

D. TRUE THREATS

A true threat is an unprotected category of speech that is often cited when someone makes a threat against another person, provoking fear. The Supreme Court first established the doctrine in 1969[58] but did not attach a black letter definition until *Virginia v. Black*, when Justice O'Connor opined:

> True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting

---

[52] Paul Fischer, *2 Live Crew*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1447/2-live-crew.
[53] *Id*.
[54] 2 LIVE CREW, AS NASTY AS THEY WANT TO BE (Luke Records 1989).
[55] Fischer, *supra* note 52.
[56] *Id.*
[57] *See id.*
[58] *See* Watts v. United States, 394 U.S. 705 (1969).

> people from the possibility that the threatened violence will occur.[59]

It is reasonable that threats against a particular individual or group will not be tolerated. However, it is not necessarily fair that speech may be treated as a true threat, even if the speaker never intends to carry out the threat. Unfortunately, this quandary represents the situation that many rappers find themselves in. Rap lyrics often paint images of violence, so if a set of lyrics happen to mention a particular individual, the artist may find themselves being prosecuted – even if the lyrics are merely an artistic expression.

This is the exact scenario Olutosin Oduwole found himself in.[60] The trial court sentenced Oduwole to half a decade in prison for mere lyrics to a song.[61] He was prosecuted for allegedly making terroristic threats.[62] Fortunately for Oduwole, his case was overturned on appeal when the Illinois Appellate Court took note of Oduwole's expert witness.[63] The witness testified that Oduwole's song in question merely "constituted the formative stages of a rap song."[64] It took an expert witness to explain to the court that Oduwole was not communicating a serious expression of intent tends to be the issue with rappers on trial.

Rap is a foreign language to most courts.[65] The music genre as a whole is unfamiliar to many judges, and for those that are not avid listeners, gangsta' rap can sound brutish and angry. Rap music has always contained elements of anti-authoritarian, countercultural, and political criticisms in the lyrics.[66] When taking the lyrics out of context and examining them on paper, they can seem threatening – especially when a particular individual or group of individuals is named. Many lyrics are especially damning when prosecutors either refuse or

---

[59] Virginia v. Black, 538 U.S. 343, 359-60 (2003).
[60] People v. Oduwole, 985 N.E.2d 316 (Ill. App. Ct. 2013).
[61] Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUM. J. L. & ARTS 1, 2-3 (2014).
[62] *Id.* at 3.
[63] *Id.*
[64] *Id.*
[65] *See id.* at 5.
[66] Findling, *supra* note 3.

cannot separate the illustrative lyrics from the actual life of the creator.[67]

Though the free speech saga of *As Nasty As They Wanna Be* is a redemption story that dealt with silencing speech, there is an innumerable amount of other artists whose physical freedom is taken away from them based on their artistry, as seen in cases like Oduwole's. Criminal defendants who make gangsta' rap are continuously at risk of having their rhymes used against them as if the raps were a journal entry or an autobiography. Artistic expression is one of the most protected forms of speech. Still, prosecutors and courts consistently make the mistake of labeling raps as true threats, advocacy of imminent lawless action, or obscenity.

The nuances between each category are difficult to parse out, but it does not matter for prosecutors. They often pick a category and convince the courts that a rapper's lyrics are not artistic expression at all – instead, they are an account of what a defendant has done or plans to do. In taking this approach, the federal and state governments effectively jailed rappers using their art as a vehicle to put them behind bars.

III. CASES AND CONSEQUENCES OF INTRODUCING A DEFENDANT'S LYRICS AT TRIAL

When courts allow a defendant's lyrics into evidence, they grant the prosecution a significant advantage in the case.[68] Judges are forced to grapple with issues, including the lyrics' interpretation, understanding, and meaning.[69] Prosecutors will often use lyrics in an autobiographic way rather than as artistic expression.[70] Many of the lyrics brought into evidence are taken out of context. The artists often reference expensive cars and luxurious items in the same songs that speak about violence and drugs, though a public defender represents them.[71] Most of the time, the lyrics do not relate to the case.

---

[67] *Id.*

[68] Andrea L. Dennis, *Poetic (In)Justice? Rap Music as Art, Life, and Criminal Evidence*, 31 COLUM. J. L. & ARTS 1, 3 (2007).

[69] *Id.*

[70] *Id.* at 2.

[71] Interview with Erik Nielson, Professor, Univ. Richmond (Nov. 24, 2019). Prof. Nielson wrote the book, "Rap on Trial," wherein he explains the use of rap lyrics as criminal evidence in court cases.

For instance, in *United States v. Wilson*, the defendant was charged with murder when he allegedly shot two law enforcement officers in the back of the head.[72] At trial, the prosecution was able to admit the defendant's rap lyrics into evidence which stated, "come teast Rated U Better have that case and dat Golock/Leavea 45 slogs in da back of ya head cause getting dat bread I ain't goin stop to I'm dead [sic]."[73] The court agreed to introduce these lyrics as substantive evidence to be weighed in the defendant's guilt.[74] Although there is no clear link between those lyrics and law enforcement, the court still allowed them into evidence. The prosecutor presumably wanted those lyrics in as propensity evidence. Propensity evidence is that which tends to show someone acted in conformity with their character, and it is not admissible.[75] Seemingly, prosecutors get a defendant's lyrics into trial by arguing that the lyrics are not evidence of the defendant's character.

Sometimes, though, the prosecution does not even try to disguise the fact that they are introducing the lyrics as evidence of the defendant's character.[76] Such conduct was evident in *Commonwealth v. Neblett*, where the defendant allegedly shot and killed a store clerk during a robbery.[77] The Prosecutor sought to admit lyrics purportedly written by the defendant, stating, "So any N[****] in the path to the flow of my cash Will find that breathing is a privilege when taking your last."[78] The prosecution introduced the lyrics during the guilt phase of the trial, where the prosecutor argued that they were a "reflection" of the Defendant's "soul."[79] During the sentencing phase, the prosecutor argued further: "Just because you write lyrics doesn't mean they have true meaning. Johnny Cash was never really in Folsom Prison and didn't shoot his old lady down. *But Defendant is living his lyrics*."[80]

---

[72] United States v. Wilson, 493 F. Supp.2d 484, 485 (E.D.N.Y. 2006).
[73] *Id.* at 488-89.
[74] *Id.*
[75] FED. R. EVID. 404.
[76] *See* Dennis, *supra* note 68.
[77] *Id.* at 7.
[78] *Id.*
[79] *Id.*
[80] *Id.* (emphasis added).

The lyrics in *Neblett* were ruled inadmissible during the sentencing phase, but the effort of prosecutors to get inculpatory lyrics into trial has not diminished.[81] Trial courts overwhelmingly allow defendants' music lyrics into evidence.[82] The United States Attorney's Office understands this so much that they published a bulletin in 2006 titled "Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy."[83] The beginning premise of the bulletin states, "[i]n today's society, many gang members compose and put their true-life experiences into lyrical form."[84] Unfortunately, the bulletin does not mention lyrical expression as a form of art or the hyperbole and exaggeration frequently found in rap music.[85] This a troubling endorsement by the U.S. government which likely informs its attorneys that any defendant that writes rhymes, and is involved in gang-related crime, is writing about his personal, real-life experiences with the alleged crime.

For example, this is evident in *Cook v. State*, where a defendant was charged and convicted of felony murder, aggravated robbery, and theft.[86] In *Cook*, the prosecution used the defendant's lyrics to show his intent to commit the crimes he was charged with.[87] In *United States v. Price*, the government charged the defendants with conspiracy to distribute crack cocaine, and the court allowed their supposedly written lyrics into evidence to show that a conspiracy existed.[88] In another case, prosecutors used the defendant's lyrics, "Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town," to convict the defendant of drug distribution charges.[89]

There is no limit for prosecutors who get their hands on a defendant's lyrics. If they tend to portray the defendant in a bad light or could be used to show motive, intent, or some other aspect of a case, the caselaw suggests prosecutors will seek to introduce the lyrics into evidence – directly violating a defendant's freedom of artistic expression. This infringement

---

[81] *Id.*, n. 32.
[82] *Id.* at 30.
[83] Findling, *supra* note 3.
[84] *Id.*
[85] *Id.*
[86] Cook v. State, 345 Ark. 264 (Ark. 2001).
[87] Dennis, *supra* note 68, at 10.
[88] United States v. Price, 418 F.3d 771, 775 (7th Cir. 1995).
[89] United States v. Foster, 939 F.2d 445, 449 (7th Cir. 1991).

has enormous ramifications, often ending with the defendant's conviction.

Aside from an infringement on freedom of speech, prosecuting a defendant with an emphasis on their lyrics has another serious problem. As it turns out, defendants who make gangsta' rap are more likely to be perceived as guilty.[90] For example, a study was conducted around a murder trial where the defendant had written "violent and misogynistic" lyrics that some thought pertained to the murder of his high school classmate and girlfriend.[91]

The defendant, Offord Rollins IV, was an 18-year-old standout track star and high school student when his girlfriend was killed.[92] Rollins and a relative had written some rap lyrics that were confiscated by the police during their investigation.[93] Though the lyrics were for entertainment and commercial purposes and reflected the lyrics found in the rap genre at the time, the prosecution used them to taint the jury's perception of Rollins.[94]

Several psychological studies have been completed on implicit personality theory.[95] The theory examines how people judge others when presented with information on what they do or what they are like.[96] For example, people tend to think that fat people are also happy and that shy people are also quiet.[97] These are superficial judgments made about someone based on some trait. However, the prosecution in Rollins's case understood that people make connections about people on this basis, so they attempted to form a connection in the jury's mind.[98] The state tried to show that because Rollins writes violent lyrics, he must also behave violently.[99] They were ultimately successful as Rollins was convicted of murder – but not before evidence of jury misconduct affected the

---

[90] *See* Stuart P. Fischoff, *Gangsta' Rap and A Murder In Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795 (1999).
[91] *Id.*
[92] *Id.* at 798.
[93] *Id.*
[94] *Id.* at 797.
[95] *Id.* at 796.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 797.
[99] *Id.*

disposition.[100] Rollins's case ended in a mistrial, giving him another opportunity to prove his case in court.[101] This time, his defense team would use a psychological expert to present evidence of implicit personality theory and fight to keep his lyrics out of evidence.[102]

Stuart Fischoff, the defense's expert, was aware of the potential prejudice that Rollins's lyrics could pose.[103] However, up until this point, there had not been any substantial studies completed to show this to a scientific degree.[104] Therefore, before Fischoff testified at the evidentiary hearing, he conducted his own study.[105] Fischoff took a sample of 134 people at California State University and presented Rollins's case with a twist to them.[106]

He presented the facts in four different ways and asked the respondents to answer questions regarding their perspective of Rollins.[107] He presented the biographical characteristics (Rollins's race, student-athlete status, age, etc.) to four groups in four different ways: (1) with the lyrics – with the murder allegation, (2) without the lyrics – without the murder allegation, (3) with the lyrics – without the murder allegation, and (4) without the lyrics – with the murder allegation.[108] The study found that the impression of Rollins was substantially worse when Rollins's characteristics were presented with his lyrics.[109] Coupled with the murder allegation, respondents judged the defendant particularly poorly.[110] A striking finding in Fischoff's study was that the rap lyrics alone evoked more negative feelings than the murder accusation.[111]

Presenting these findings to the court in Rollins's retrial, the judge decided to exclude most of the lyrics, particularly the violent lyrics.[112] The retrial ended in a deadlocked jury, and the

---

100 *Id.* at 795.
101 *Id.*
102 *Id.*
103 *See id.*
104 *See id*.
105 *Id.*
106 *Id.* at 798.
107 *Id.* at 798.
108 *Id.* at 798-99.
109 *Id.* at 803.
110 *Id.*
111 *Id.*
112 *Id.* at 804.

state decided not to retry the case for a third time.[113] Rollins became a free man, and the exclusion of his lyrics was a major, dispositive factor.[114]

IV. TURNING AN EVIDENTIARY CORNER, A CHANGE IS COMING

New Jersey's appellate court overturned a defendant's conviction based on his rap lyrics.[115] That case is more of the same. A young black man, Vonte Skinner, was placed on trial for attempted murder.[116] The prosecution sought to introduce evidence of his rap lyrics and succeeded.[117] As a result, Skinner was convicted.[118] However, on appeal, the conviction was overturned.[119] Hitting the mark, the New Jersey Supreme Court opined:

> writing rap lyrics – even disturbingly graphic lyrics, like defendant's – is not a crime. Nor is it a bad act or a wrong to engage in the act of writing about unpalatable subjects, including inflammatory subjects such as depicting events or lifestyles that may be condemned as anti-social, mean spirited, or amoral.[120]

The crux of Vonte Skinner's case was that his lyrics bore no relation to the charges against him.[121] Moreover, Skinner wrote the lyrics at issue months and years before the commission of the crime.[122] The Court was aware of this and ruled with an emphasis placed on Evidentiary Rule 404.[123] The Court explains that Rule 404 is meant to keep propensity evidence out (i.e.,

---

[113] *Id.*
[114] *Id.* at 805.
[115] *See* State v. Skinner, 218 N.J 496 (N.J. S. Ct. 2014).
[116] *Id.* at 499.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 500.
[120] *Id.* at 517.
[121] *Id.* 524-25.
[122] Saskia de Melker & William Brangham, *New Jersey Court Strikes Down Murder Conviction Based on Violent Rap Lyrics,* PBS (Aug. 9, 2014, 12:21 PM), https://www.pbs.org/newshour/nation/nj-supreme-court-strikes-conviction-based-rap-lyrics.
[123] *Skinner*, 218 N.J at 517-18.

evidence of prior bad acts or wrongs that may be used to show that the defendant is predisposed to do bad things).[124] Though the New Jersey Appellate Court got it right in *Skinner*, courts frequently fail as gatekeepers because lyrics are a unique form of evidence that the rules do not expressly cover.

Prosecutors tend to use the arresting officer to get lyrics into evidence.[125] Admitting lyrics this way is a form of hearsay, but courts will often allow them to use the opposing party statement exception.[126] Therefore, once admitted as an exception to hearsay, a relevance analysis is the only evidentiary barrier left to clear.[127] Relevant evidence is that which tends to make a fact more or less probable.[128] Based on that definition, it seems relevant that defendants would be more likely to commit violent acts if they write down violent things. An issue with that premise is the overly prejudicial effect that it may have on the defendant. Therefore, relevant evidence will be admissible only if its probative value is substantially outweighed by the danger of unfair prejudice, among other things.[129] The unfair prejudice analysis is a subjective decision made by a judge. It is usually at this juncture that courts admit lyrics.[130]

The other evidentiary avenue that should keep lyrics out but often fails as a safeguard is through prior bad acts or wrongs.[131] The problem is that rap lyrics do not classify as a prior bad act or wrong. It is simply a form of artistic expression, so many courts do not see an evidentiary barrier to allowing them into evidence. However, as seen time and time again, they tend to be unduly prejudicial. The prosecution usually understands that if they can get violent, offensive lyrics into evidence, they will poison the minds of the jury with the thought that the defendant must be a bad person because he writes bad things. This is a difficult obstacle to face for defendants who write rap lyrics. In order to address the issue, lawmakers must create a new evidentiary rule.

---

[124] *Id.*
[125] Dennis, *supra* note 68, at 9.
[126] *Id.*
[127] *Id.*
[128] FED. R. EVID. 401.
[129] FED. R. EVID. 403.
[130] *Id.* at 12.
[131] FED. R. EVID. 404(b).

Congress had an opportunity to tackle the issue but fell short. The Restoring Artistic Protection Act (RAP) was introduced to the House of Representatives on July 27th, 2022, by Rep. Henry C. Johnson, Jr.[132] The purpose of the bill was to limit the admissibility of a defendant's creative or artistic expression against the defendant in a federal criminal case.[133] The bill would have amended the Federal Rules of Evidence. The initiative aimed to add a rule stating, "evidence of a defendant's creative or artistic expression, whether original or derivative, is not admissible against such defendant in a criminal case."[134] Some exceptions exist.[135] First, there must be a hearing outside the presence of the jury and a finding of the following by clear and convincing evidence.[136] Creative and artistic expressions will be admissible:

> (1)(A) if the expression is original, that defendant intended a literal meaning, rather than a figurative or fictional meaning; or
> (B) if the expression is derivative, that the defendant intended to adopt the literal meaning of the expression as the defendant's own thought or statement;
> (2) that the creative expression refers to the specific facts of the crime alleged;
> (3) that the expression is relevant to an issue of fact that is disputed; and
> (4) that the expression has distinct probative value not provided by other admissible evidence.[137]

This additional rule would have curtailed the infringement on freedom of speech and protected defendants that make music or other forms of art depicting a violent or deviant type of lifestyle.[138]

---

132 H.R. 8531, 117th Cong. (2022).
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*

V. CONCLUSION

Though disappointing, Congress's inability to enact the RAP Act is not a total failure. The mere presence of the bill on the House floor is a step in the right direction to protect defendants' rights. Amending the Federal Rules of Evidence to include the RAP Act's provisions is pertinent to create a hurdle for prosecutors to clear before the admittance of song lyrics into a trial. Rap is an art form, not a memoir. When Johnny Cash sang about shooting a man down in Reno, it would not be used as evidence of his violent tendencies if the government accused him of murder. If Hunter S. Thompson were found guilty of drug crimes, it would be an abomination if *Fear and Loathing in Las Vegas* were used against him at trial. The same should be true for rappers and their music. If the government accuses a rapper of committing a crime, their art should not be used against them to prove their guilt. Therefore, lawmakers should enact a bill like the Restoring Artistic Protection Act. It would have the effect of equating rap to other art forms and protecting rappers' artistic freedom. It is important to note, however, that any congressional intervention would only take effect in federal court. Most criminal cases are not in federal jurisdiction, so each state would have to enact its own version of this rule for it to take broad effect in every U.S. courtroom. However, some states have already begun enacting these rules,[139] so the outlook is hopeful.

[139] *See*, e.g., California, New Jersey, New York, among others who have implemented a version of the RAP Act in their state legislature.