Crazy Story: Admission of Guilt or Braggadocio? Defendant-Authored Drill Lyrics as Evidence in Trials

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I. INTRODUCTION

Drakeo the Ruler, a prominent rap artist, released his latest album *Thank You for Using GTL* June 5, 2020, while he was still in Men's Central Jail in Los Angeles County.[2] His final song on the album, "Fictional," closes with the following lyrics:

> If I say something in a rap, it's not real
> My mind is . . . I have a lot of imagination
> It's fictional
> So I don't want my words misinterpreted or any of that misconstrued
> If you're gonna use my music against me, I expect you use it the same way you would . . .
> This call is being recorded
> Country music, punk rock, metal
> Jazz, whatever
> Blues, whatever
> Treat rap the same way that you're gonna treat any other genre
> You're not gonna hold Denzel Washington accountable for his role in Training Day
> So don't do the same thing with my music
> That's all I'm saying
> And this tape is gonna hurt n—as' feelings
> (Damn, like that, Joog?)
> It's fictional
> (Thank you for using GTL).[3]

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[2] Matthew Ismael Ruiz, *Drakeo the Ruler: Thank You For Using GTL, Albums, Reviews*, PITCHFORK (June 10, 2020), https://pitchfork.com/reviews/albums/drakeo-the-ruler-thank-you-for-using-gtl/.

[3] DRAKEO THE RULER & JOOGSZN, *Fictional*, *on* THANK YOU FOR USING GTL, at 03:11-04:04 (Stinc Team 2020), https://genius.com/Drakeo-the-ruler-and-joogszn-fictional-lyrics.

Drakeo the Ruler was released from L.A. County Men's Jail[4] on November 4, 2020, where he had been incarcerated for over a year after pleading guilty to firing from a vehicle.[5] He was arrested and charged with first degree murder, attempted murder, and several counts of conspiracy to commit murder related to a 2016 death.[6] He was acquitted on the murder and attempted murder charges, but was found guilty of unlawful gun possession by a felon, and had a hung jury[7] on the second count of criminal gang conspiracy.[8] The State sought a retrial on the conspiracy charges.[9] Despite the admission of his lyrics into evidence, Drakeo was not convicted—nor was he acquitted; he sat nine months in solitary awaiting his retrial.[10]

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4 Charu Sinha, *Drakeo the Ruler to Finally Be Released from Prison Following Contentious Legal Battle*, VULTURE (Nov. 4, 2020), https://www.vulture.com/2020/11/drakeo-the-ruler-released-jackie-lacey-loss-election-2020.html.

5 Andrew Limbong, *Drakeo The Ruler Released From Jail After Accepting Plea Deal*, NPR (Nov. 5, 2020), https://www.npr.org/2020/11/05/931836700/drakeo-the-ruler-released-from-jail-after-accepting-plea-deal. Drakeo The Ruler was indicted on eleven total felony counts for his trial which was set to begin November 4, 2020. Sinha, *supra* note 4. The charges included: conspiracy to commit a crime, participation in a criminal street gang, murder, unlawful discharging of a firearm in a motor vehicle, five counts of attempted murder, and possession of a firearm by a felon. *Id.* Drakeo the Ruler agreed to a plea deal and was released on time served the same day. *Id.*

6 Sam Levin, *The Jailed LA Rapper Whose Songs Were Used to Prosecute Him*, THE GUARDIAN (Oct. 2, 2019), https://www.theguardian.com/us-news/2019/oct/01/drakeo-the-ruler-los-angeles-rapper-songs.

7 Under the Sixth Amendment, for serious offenses, a "jury must reach a unanimous verdit in order to convict." Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020). The "Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." *Id.* at 1397. When "[a] jury . . . cannot reach a verdict by the required voting margin" the result is a "hung jury." *Hung Jury*, BLACK'S LAW DICTIONARY (7th ed. 1999). A hung jury is considered a mistrial, not an aquital, and the Supreme Court of the United States has long held that the double jeopardy clause is not violated when a mistrial is granted because of a hung jury. *See* United States v. Perez, 22 U.S. 579, 580-81 (1824). In his Commentaries on the Constitution, Justice Story wrote that the meaning of the double jeopardy clause was:

> [T]hat a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged . . . . But it does not mean, that he shall not be tried for the offence a second time, if the jury have been discharged without giving any verdict . . . for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy.

Janey E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV., 701, 705 (1981) (quoting 3 JOSPEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1781 (1833)). The result is a state of limbo for criminal defendants as they await for the prosecution to determine if they will retrie the case. *See id.*

8 Limbong, *supra* note 5; admin, *Drakeo the Rule Is Reportedly Going Back on Trial for Criminal Gang Conspiracy*, SOUNDINDEPTH.COM (Dec. 18, 2021), https://soundindepth.com/drakeo-the-ruler-is-reportedly-going-back-on-trial-for-criminal-gang-conspiracy/2021/12/18/top-hip-hop-music-news/admin/.

9 Limbong, *supra* note 5; admin, *supra* note 8.

10 Eddie Fu, *Here's How Drakeo The Ruler's "Flex Freestyle" Lyrics Are Being Used Against Him in Court*, GENIUS (May 14, 2019), https://genius.com/a/here-s-how-drakeo-the-ruler-s-flex-freestyle-lyrics-are-being-used-against-him-in-court (quoting DRAKEO THE RULER, *Flex Freestyle*, *on* SO COLD I DO EM (Stinc Team 2016)) ("Sheesh, everything I state is fact . . . I'm not these other street n—s, bitch I can really rap . . . I'm ridin' round town with a tommy gun and a Jag . . . And you can disregard the yelling, RJ tied up in the back."); Sinha, *supra* note 4. Drakeo was acquitted

Rap covers controversial and emotional topics, such as crime, violence, and drugs.[11] Improper admission of defendant-authored lyrics jeopardizes the defendant's right to a fair and impartial jury. Defendant-authored lyrics, especially when the lyrics reference crimes for which the defendant is being charged, may violate character evidence rules prohibiting propensity evidence, and prejudice jurors' ability to remain impartial and rational. Improper admission puts a defendant in a compromising position of explaining the subjective meaning of rap lyrics, coupled with a concern the jury will misinterpret the lyrics beyond it's intended scope.[12] While rap is popular today, it is important to distinguish between facts and fiction—to not (unduly) prejudice a defendant's right to a fair and impartial jury.[13] It is important to take any lyrics within context, including the themes, metaphors, or other conventions common to the genre of rap or drill rap.[14]

The remainder of the article is organized as follows. Part II provides background information on rap, including the history of it and the emergence of drill rap, and the use of it as evidence in the criminal justice system. Part III points out pitfalls from the use of rap lyrics in the courtroom and implicit bias, which potentially undermine a defendant artist's right to a fair and impartial trial—even with safeguards. Part IV identifies cases where rap lyrics are admitted under 404(b) and analyzes the use, lyrics, and how they differ. Part V suggests a three-prong strategy to efficiently address the use of rap in court within the Rules of Evidence. Part VI concludes the article.

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for the murder and attempted murder charge. Sinha, *supra* note 4. However, he had a hung jury (10-2 "Not Guilty") on the PC 26100(c) charge of shooting from a moving vehicle. *Id.* Furthermore, he had a hung jury (7-5 "Not Guilty") based on the PC 182.5 charge of "willfully promot[ing], further[ing], assist[ing] or benefit[ing] from any felonious criminal conduct, by members of that gang . . . ." *Id.* In this case (10-2 jury verdict), the underlying felonious conduct was the unlawful discharge of a firearm from a moving vehicle charge. *Id.* "According to Juror 6, Count 2 [Criminal Gang Conspiracy/Murder] was hung 10-2 for acquittal through the first *three rounds* of voting. The vote only changed in to 7-5 on the *final* round of voting." Paul Thompson, *Drakeo the Ruler's Life Was Stolen Too Many Times*, VULTURE (Dec. 23, 2021), https://www.vulture.com/article/drakeo-the-ruler-obituary.htm (emphasis added). It is also noteworthy that Drakeo spent nine months in solitary confinement while awaiting the second trial. Limbong, *supra* note 5.

11 Erin Lutes et al., *When Music Takes the Stand: A Content Analysis of how Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 81 (2019); *see also* Sam Davies, *The Controversial Music that Is the Sound of Global Youth*, BBC (June 7, 2021), https://www.bbc.com/culture/article/20210607-the-controversial-music-that-is-the-sound-of-global-youth; MONTANA OF 300, *Chiraq* (Fly Guy Ent., E1 Music 2020).

12 TEDx Talks, *The Threatening Nature of … Rap Music? Charis Kubrin TedxOrangeCoast*, YOUTUBE (Oct. 23, 2014), https://www.youtube.com/watch?v=cjTIhRtFJbU&feature=youtu.be.

13 The author fills a void in legal literature by proposing a three-step approach. *See* Reyna Araibi, *"Every Rhyme I Write": Rap Music as Evidence in Criminal Trials*, 62 ARIZ. L. REV. 805, 815 (2020).

14 Jonathan Ilan, *Digital Street Culture Decoded: Why Criminalizing Drill Music is Street Illiterate and Counterproductive*, 60 BRIT. J. CRIMINOLOGY, 994, 1001-06 (2020).

II. BACKGROUND OF RAP AS EVIDENCE

Erik Nielson and Andrea L. Dennis, who are leading scholars on the practice of admitting rap music as evidence, have found more than five hundred cases in which rap lyrics have been used in a criminal trial.[15] Outside of the genre of rap, there has only been one case where defendant-authored lyrics were introduced as evidence in a criminal proceeding.[16] This practice is becoming increasingly common, yet critics point to the double standard between literal interpretations derived from rap lyrics and nonliteral interpretations to other genres of music.[17] Rap music, while widely popular today, continues to carry negative connotations stemming from cultural stereotypes.[18] Subsequently, rap artists' lyrics are scrutinized and interpreted literally, while artists of other genres enjoy the benefit of "artistic hyperbole."[19] Unlike artists such as Johnny Cash and Bob Marley, who never had their art used in a criminal trial, rap artists repeatedly have their songs and lyrics admitted into evidence during criminal trial proceedings.[20]

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15 State v. Koskovich, 776 A.2d 144 (N.J. 2001); ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 69 (2019).

16 *Koskovich*, 776 A.2d 144; Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2-3 (2007).

17 *See, e.g.*, Erik Nielson, *Prosecutors Are Increasingly–and Misleadingly–Using Rap Lyrics as Evidence in Court*, THE CONVERSATION (Mar. 17, 2020, 8:10 AM), https://theconversation.com/prosecutors-are-increasingly-and-misleadingly-using-rap-lyrics-as-evidence-in-court-131440; *see also* NIELSON & DENNIS, *supra* note 15, at 8-10.

18 Hunter Schwarz, *25 Years Ago, 2 Live Crew Were Arrested for Obscenity. Here's the Fascinating Back Story*, WASH. POST (June 11, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/06/11/25-years-ago-2-live-crew-were-arrested-for-obscenity-heres-the-fascinating-back-story/.

19 Motion for Leave to File Brief as Amici Curiae and Brief of Amici Curiae Michael Render ("Killer Mike"), Erik Nielson, and Other Artists and Scholars in Support of Petitioner at 24, Knox v. Pennsylvania, 139 S. Ct. 1547 (2019) (No. 18-949). Amici stated that:

> Like all poets, rappers use figurative language, relying on a full range of literary devices such as simile and metaphor. Rappers also, in the tradition of African American vernacular, invent new words, invert the meaning of others, and lace their lyrics with dense slang and coded references that defy easy interpretation, especially among listeners unfamiliar with the genre. Furthermore, rappers famously rely on exaggeration and hyperbole as they craft the larger-than-life characters that have entertained fans (and offended critics) for decades.

Id. at 16.

20 JOHNNY CASH, *Folsom Prison Blues*, *on* WITH HIS HOT AND BLUE GUITAR (Sun Record 1957) ("I shot a man in Reno, just to watch him die."); BOB MARLEY AND THE WAILERS, *I Shot the Sheriff*, *on* BURNIN' (Island, Tuff Gong 1973) ("I shot the Sheriff, but I didn't shoot no deputy, Oh no! I shot the Sheriff but I didn't shoot no deputy, ooh, ooh, oo-ooh!"). At this time, one could argue that this is because neither Bob Marley nor Johnny Cash were ever charged with murder. However, it is added to point out the comparisons between two other genres' lyrics also covering violent topics such as murder. See NIELSON & DENNIS, *supra* note 15.

A. Emergence of Drill Rap

Drill rap, a musical style originating in Chicago, Illinois, is a specific subgenre of rap music.[21] This subgenre of rap derives its name from the slang word "drill," referring to automatic weapons or killing.[22] Like gangster rap, drill rap maintains the underlying themes of Black masculinity (i.e., having power, status, and subsequent respect or fear of their counterparts) through depictions of violence and defeating adversaries.[23] From the south side of Chicago, original drill artists, such as Chief Keef,[24] deliver curt, unpolished lyrics that do not glaze over the authentic "grit" of the streets of Chicago.[25] This style grew beyond the city of Chicago, with New York and London both having established drill rap cultures in their own rights.[26] The rap industry has evolved to become more mainstream, and as such, there are capitalistic gains in selling the illusion of this culture.[27] Like other genres, rap music, including the drill subgenre, tells a story. Although this genre differs in tone and delivery, these differences do not lessen the artistic value of rap music.[28]

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21 Lucy Stehlik, *Chief Keef Takes Chicago's Drill Sound Overground*, THE GUARDIAN (Nov. 16, 2012, 12:00 EST), https://www.theguardian.com/music/2012/nov/16/chief-keef-chicago-drill-rap.

22 Alphonse Pierre, *11 Songs That Define Chicago Drill, the Decade's Most Important Rap Subgenre*, PITCHFORK (Oct. 15, 2019), https://pitchfork.com/features/article/2010s-drill-rap-songs/; Jess Wakefield, *THIS IS NOT A DRILL What is Drill Music and Where Did it Come From?*, THE SUN (Feb. 16, 2022, 15:28), https://www.thesun.co.uk/tvandshowbiz/6922406/drill-music-rappers-where-from/.

23 Demetrius Green, Documenting Drill Music: Understanding Black Masculine Performances in Hip-Hop (July 25, 2018) (M.A. thesis, The University of Kansas) (on file at https://kuscholarworks.ku.edu/bitstream/handle/1808/28068/Green_ku_0099M_16185_DATA_1.pdf?sequence=1&isAllowed=y).

24 Kyann-Sian Williams, *Move over, Chicago: How the UK Made Drill its Own–and Then Sold it Back to the World*, NME (Feb. 25, 2020), https://www.nme.com/blogs/nme-blogs/uk-drill-chicago-chief-keef-am-skengdo-67-pitbulls-terms-and-conditions-2611268. Keith Cozart, or "Chief Keef," is widely acknowledged as one of the pioneers of the "drill rap" subgenre back in the early 2010s. *See* Stehlik, *supra* note 21. Then, as a teenager, Chief Keef became one of the first drill rap artists to sign a major recording contract with Kanye West. *Id.*

25 Jon Caramanica, *Chicago Hip-Hop's Raw Burst of Change*, N.Y. TIMES (Oct. 4, 2012), https://www.nytimes.com/2012/10/07/arts/music/chicago-hip-hops-raw-burst-of-change.html.

26 Ilan, *supra* note 14, at 1013. The reach and influence of drill rap is global. *See* Davies, *supra* note 11.

27 Seandrasims, *It's a Drill!: The Sound That Has Music Labels Flocking to the Windy City*, ALLHIPHOP (Aug. 23, 2012), https://allhiphop.com/features/its-a-drill-the-sound-that-has-music-labels-flocking-to-the-windy-city/. Here, there is an incentive for the music industry to sell this image or illusion of street violence, as the blueprint has been so successful in the past. *Id.* Furthermore, aspiring artists will present these personae, lyrics, and story topics in order to make themselves more commercially desirable, regardless of whether they are accurate to their personal story. *Id.* Since there is an incentive to sell the image regardless of its truth, one cannot take a literal interpretation of one's art. Dennis, *supra* note 16, at 4.

28 Jill Serjeant, *Kendrick Lamer Becomes First Rapper to Win Pulitzer*, REUTERS (Apr. 16, 2018, 2:41 PM), https://www.reuters.com/article/us-usa-pulitzer-kendrick-lamar/kendrick-lamar-becomes-first-rapper-to-win-pulitzer-idUSKBN1HN2RQ. Rapper Kendrick Lamar won the Pulitzer Prize in 2018 for his 2017 album *Damn*. *Id.*

Admission of rap lyrics against an author in a criminal trial puts the artist in a vulnerable position.[29] This misrepresentation may result from a lack of knowledge, cognitive prejudice, or implicit bias.[30] The danger stemming from such bias is in the implicit nature of prejudice; it cannot be easily seen or measured.[31] Perhaps the most alarming (or dangerous) thing about rap's admission into evidence, is that a person may not be aware of the risk posed

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[29] City News Service, *Tiny Doo, Aaron Harvey React To Their $1.5M Settlement After Wrongful Arrest*, KBPS (Feb. 11, 2020, 10:55 AM PST), https://www.kpbs.org/news/politics/2020/02/11/tiny-doo-another-man-wrongfully-jailed-will-split. Brandon "Tiny Doo" Duncan, a San Diego rapper, was arrested in 2014 for an alleged conspiracy charge. *Id.* He was incarcerated for seven months with his link to the criminal enterprise being his rap songs. *Id.* It was later determined that his rights were violated; the charges were dismissed, and he successfully negotiated a settlement with the San Diego city council. *The Threatening Nature of . . . Rap Music? Charis Kubrin TedxOrangeCoast*, *supra* note 12. Based upon the lyrics alone, Dr. Charis Kubrin thought she knew what Olotusin Oduwale meant with his lyrics. *Id.* However, she realized that his "shocking and offensive lyrics, out of the fear of terrorism, were being completely misinterpreted." *Id.* at 04:39-:57. She realized that the lyrics were nothing more than an introduction song, and spent hours "educating the jury on the finer points of gangsta' rap." Considering the business, it was not surprising to her that Odulwale portrayed a violent persona and the glorification of guns—both of which are staples of gangsta' rap. *Id*. She also explained to the jury that not all lyrics rhymed or flowed and that it was her professional opinion that the six lines of text were either notes or ideas for a new rap song or an intro or outro for a new rap song—not a terrorist threat. *Id.* at 05:20-6:43. She was stunned that the jury was unable to see the truth until she realized that:

> While she had presented the cold, hard facts. [sic] The prosecuting attorney, he dialed up the courtroom emotion and played to the jury's fear. At one point, he even slammed down Oduwole's gun on the witness stand, leaned in close, stared me dead in the eyes, and asked "now, does that change your opinion about what was written in the text?" . . . Emotions trump logic every time!

Id. at 07:23-08:03. *See generally* People v. Oduwole, 2013 IL App (5th) 120039. Olotusin Oduwole was "charged by information with attempt (making a terrorist threat), a Class 1 felony" based upon the following lyrics found in a notebook within his car: "send $2 to . . . paypal account if this account doesn't reach $50,000 in the next 7 days then a murderous rampage similar to the VT shooting will occur at another highly populated university. THIS IS NOT A JOKE!" *Id.* ¶¶ 3-4. Dr. Charis Kubrin was brought in to testify on Olutosin Oduwole's behalf when he was tried and convicted based upon six lines of lyrics and nearly 2,000 pages of documents seized by the State *Id*. ¶21. Dr. Kubrin reviewed Mr. Oduwale's content from the papers seized from his vehicle and "numerous pages in defendant's notebook" only to opine that "the writings on the paper constituted the formative stages of a rap song." *Id.* ¶ 38. Olutosin Oduwale had an aspiring rap career and would write about his career. *Id.* ¶ 21. Police interviewed Olotusin Oduwale, as well as his fraternity brothers, and searched his apartments only to find some handguns. Nothing else found indicated he was a terrorist threat. *Id.* ¶¶ 19-20, 24. However, the lyrics served a large part in convicting Mr. Oduwale. Luckily for Defendant, his conviction was reversed on appeal *Id.* ¶ 51.

[30] Dennis, *supra* note 16, at 2 ("Such narrative frameworks are used to satisfied your expectations – both conscious and unconscious."). *See generally* Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135 (1996).

[31] *See* State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019); *see also Implicit Bias*, PERCEPTION INST., https://perception.org/research/implicit-bias/ (last visited on Feb. 1, 2021). By its definition, "implicit" is something which is not plainly expressed when compared to explicit biases. *Implicit Bias*, *supra* note 31. "[I]mplicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias." *Berhe*, 444 P.3d at 1180.

by their implicit bias and believe that they are making all judgments based solely on reason.[32]

B. History of Mistreatment

The purpose of the Federal Rules of Evidence ("FRE"), as outlined in Rule 102, states that "[t]hese Rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, [and] promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[33] After applying the Rule 403 balancing test,[34] admission of rap, such as drill rap, into evidence during criminal proceedings rarely aligns with the purpose outlined in Rule 102.[35] It has been

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32 Fried, *supra* note 30.

33 FED. R. EVID. 102.

34 FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

35 FED. R. EVID. 102 ("These Rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, & promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

shown to be unfair to defendant-artists,[36] a waste of court time and resources,[37] and secure unjust determinations.[38]

In determining the admissibility of a defendant's lyrics on the FRE 403 and 404(b) balancing test, courts should first examine whether there is both a strong temporal *and* factual *nexus* between the lyrics offered and charge(s) alleged.[39] However, courts *should* also look outside for assistance in determining the lyrics' weight of probative value.[40]

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[36] State v. Skinner, 95 A.3d 236, 253 (N.J. 2014). The New Jersey Supreme Court held:

> The admission of defendant's inflammatory rap verses, a genre that certain members of society view as art and others as distasteful and descriptive of mean-spirited culture, risked poisoning the jury against defendant. . . . In the weighing process, trial courts should consider the existence of other evidence [aside from fictional forms of inflammatory speech, self-expression, art] that can be used to make the same point.

Id. at 238-39. Defendant's rap lyrics depicted generally violent topics. *Id.* at 239. However, the court held that the trial court judge abused its discretion by denying Defendant's motion in limine and allowing the admission of lyrics where the similarities between murder and rap were neither strong nor specific. *Id.* at 243. Vonte Skinner was convicted by jury after his rap was read to the jury. *Id.* at 254. The New Jersey appellate division reversed Skinner's conviction. *Id.* at 253.

[37] People v. Coneal, 254 Cal. Rptr. 3d 653, 655 (Cal. Ct. App. 2019). The appellate court held that the trial court's admission of defendant-authored rap songs was prejudicial and cumulative but not harmful. *Id.* at 670. The People argued it was relevant evidence of the gang activity. *Id.* at 664. The People introduced screenshots of the videos, as well as the lyrics and videos themselves. *Id.* The defendant did not contest that this evidence was relevant. *Id.* at 662. However, the court ruled that the probative value of the videos themselves was minimal. *Id.* at 655. "In fact, the only new 'information' provided by the videos is the lyrics, and the lyrics are the problem." *Id.* at 664. "As we will explain, the lyrics add no probative value but are extremely prejudicial." *Id.* at 668. The court quoted the following rap lyrics by the defendant in its discussion of the case:

> Creep up when you sleepin/ Leave you dead in your sheet'; 'A thirty on that Mac 10 and it make you do a back flip . . . So we left 'em bloody like a raw steak'; 'Last man slid through put him on a shirt. . . . Leave a whole family six feet in the dirt'; 'I kill you and your kin folks'; and 'I got a gun named 'Chap Stick.'/Boy she really clap shit./ Slip up on that man and left his thoughts where his lap is.' His Taliban associates similarly rap: 'I'm a let that snitch bleed from his head to his knees'; 'Bullets in his head./ Eyes still open but his body is still tweakin.' 'you can get it in the face, you can get it in broad day, night or the morning. It's on sight when I see e'm. This is my only warnin, when bullets start stormin and bodies all laid out . . . . Spray e'm out a hundred shots . . . . Rearrange your face, hands like a surgeon. It's hurtin. Bury e'm closed caskets. Turn wife's into widows and sons to little bastards'; 'I'll leave you in the traffic/Leave you stankin in the alley/In a dumpster where the cats is' 'Call me major pain cuz I'm a shoot until my wrist hurt'; and 'Fill em up with hollow tips.

[38] *Id.* at 668.

[39] State v. Skinner, 95 A.3d 236, 252 (N.J. 2014). The strong nexus should be an "unmistakable factual connection to the charged crimes." *Id.* Furthermore, judges should not view the evidence in a vacuum; rather, they should view it with an understanding that weighs the risk of substantial prejudice with the probative value of its admission. The more serious the charged crime, the more probative value should be required. *See id.* at 238-39. "[A] trial court may properly exercise discretion . . . in not rigidly applying in isolation a particular Rule [of Evidence] which would obstruct and defeat the central purpose of the Rules as a whole . . . . [T]he court may apply a balancing test of the . . . relevant factors of the individual case." 29 AM. JUR. 2D *Evidence* § 21 (2022); United States v. Opager, 589 F.2d 799 (5th Cir. 1979).

[40] FED. R. EVID. 702. It is the position of this Note to suggest it is not efficient to admit defendant-authored lyrics *most* times. Rather, when courts are weighing probative value and prejudicial

Judges hold discretionary power in determining whether relevant evidence may be excluded for other reasons.[41] Judges determine whether the probative value gained in proffered evidence's admission is substantially outweighed by the danger of unfair, inefficient, and confusing proceeding.[42] However, the standard barring relevant evidence is often a high one[43]—a defendant's lyrics are admitted more often than not.[44] Admitting defendant-authored rap lyrics into a criminal proceeding undermines their rights to a fair and impartial jury trial in ways that may not be understood or visible to a judge.[45]

The addition of judicial continuing legal education ("CLE") programs, focusing on the risks associated with implicit biases, *may* be an efficient way to address potential problems without any substantive changes to the Federal Rules of Evidence.[46] If given specific training in implicit bias, judges may be better equipped to minimize the risk of undue prejudice in their application of the Federal Rules of Evidence regarding admission of rap lyrics. Furthermore, with this knowledge, judges may prevent risk of undue prejudice before it occurs by limiting its admission when possible.[47] Education would include the dangers a defendant-artist faces when their music is admitted regardless of specific jury instruction; the costs and time associated with doing it "right;" and that any probative value is *rarely*[48] enough to be admissible under Rule 403.[49] Also, it may be said to go against

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effects, they consider use of outside assistance in the form of a preliminary hearing or by means of expert testimony under Federal Rule of Evidence 702. At the end of this Note, the author intends to take the reader through what that *may* look like and how to properly tender a "rap expert." *See infra* Part VI.

41 In regards to Federal Rule of Evidence 403, the Advisory Committee wrote:

> In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

FED. R. EVID. 403, advisory committee's note to proposed rule.

42 FED. R. EVID. 403. Judges determine and the weigh probative value and prejudicial effect of the admittance of relevant evidence through a 403 "balancing test." *Id.*

43 Under Federal Rule of Evidence 403, relevant evidence may be inadmissible if its "probative value is *substantially outweighed* by" the danger of unfair prejudice. *Id.* (emphasis added).

44 Araibi, *supra* note 13, at 808. "The ACLU of New Jersey found that, as of 2013, there were [eighteen] cases in the United States that had examined whether rap lyrics were admissible as evidence against defendants in criminal trials." *Id.* at 809 n.24. The research found that in fourteen of the eighteen cases, the lyrics were admitted. *Id.* at 808.

45 *See* State v. Berhe, 444 P.3d 1172, 1178 (Wash. 2019) (recognizing that determining whether a person is influenced by implicit racial bias is a challenging task).

46 Through the channels currently in place, such as CLE programs, one will not have to upend the Federal Rules of Evidence in order to address defendant-authored rap lyrics in the courtroom.

47 It is the position of this Note to suggest that the best time to exclude nonmaterial defendant-authored lyrics is before a jury has a chance to hear them or misinterpret them.

48 It is not the position of this Note to suggest that admission of rap on trial will *never* be admissible on a Rule 403 balancing test.

49 FED. R. EVID. 403.

the purpose of the Federal Rules of Evidence.[50] This judicial CLE would require few, if any, changes to the FRE and would be the most efficient way to administer every proceeding fairly, eliminate unjustifiable expenses and delay, and secure a just determination.[51]

There are over five hundred identified cases where rap lyrics have been used within criminal proceedings.[52] Every time it is used, the possibility of its misuse grows—in ways that may not be visibly apparent at the time. In addition to CLE programs, courts should *strongly* consider the assistance of expert consultation in the pretrial hearings to perform an accurate 403 balancing test or testimony should defendant's lyrics be admissible. Such experts could provide necessary context to examine the lyrics, including themes, metaphors, and other conventions common to the genre of rap, such as drill rap, to *accurately* assess and distinguish an alleged admission of guilt from mere braggadocio[53] common in the genre.[54]

III. THE "REAL THREAT" OF IMPLICIT BIAS

The court already offers protections, through its rules, to avoid prejudice to the defendant if defendant-authored lyrics are sought to be admitted.[55] The court offers these protections to avoid undue prejudice[56] to the defendant which invokes biases that can be seen and heard in more pronounced ways explicitly rather than implicitly.[57] However, explicit biases are not the only forms of biases which may prejudice defendants and undermine the court system.[58] Implicit biases are in all of us and differ from

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50 FED. R. EVID. 102.

51 *Id.*; *see also* Ernest A. Finney, Jr., *The Art of Advocacy*, 50 S.C.L. REV. 565 (1999). "Generally, the justice system offers built-in safeguards to determine correct systemic injustices suffered by parties, but is up to counsel to invoke that shield of protection." *Id.* at 565.

52 NIELSON & DENNIS, *supra* note 15.

53 The term "braggadocio" is defined as "empty boasting" or "arrogant pretension." *Braggadocio*, MERRIAM-WEBSTER (2022), https://www.merriam-webster.com/dictionary/braggadocio.

54 Ilan, *supra* note 14, at 1003-04 ("[R]appers are rated by authenticity in their relative merits are discussed in terms of who is the most violent . . . . [Rappers with a] violent reputation (as opposed to necessarily committing many violent acts) raises rappers in an economy of street-cultural standing, affirming them as more authentic.").

55 *See generally* FED. R. EVID. 401-03.

56 "Prejudice" is defined as "[t]he harm resulting from a fact trier being exposed to evidence that is persuasive but inadmissible (such as evidence of prior criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned . . . a preconceived judgment or opinion formed with little or no factual basis." *Prejudice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

57 State v. Berhe, 444 P.3d 1172 (Wash. 2019).

58 *See, e.g.*, Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 858 (2017) ("Where a juror makes a *clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant*, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.)" (emphasis added); *see also Berhe*, 444 P.3d at 1180 ("[I]mplicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias."); BAILEY

person to person.[59] These biases shape the way people think, evaluate, and reason.[60] Individuals may not even be aware of its invisible influence, which is perhaps the scariest part.[61]

Rap has long been associated with negative connotations, scrutinized, and regulated at a level which other music is not.[62] These associations and perceptions affect how people process and analyze the same information.[63] Fair and impartial juries are fundamental to a proper justice system—it is undermined when not evaluated properly.[64] Such implicit bias has been shown in various scientific studies including the Fried Experiment addressed below.[65]

A. Fried Experiment

In 1996, a psychological study conducted by Professor Carrie B. Fried, Ph.D,[66] examined bias in subjects' reactions to the same lyrics perceived as different genres of music.[67] There were one hundred and eighteen participants, ranging from twenty to eighty-four years of age.[68] Participants read the lyrics to "Bad Man's Blunder," a country song about a person killing a police officer.[69] However, participants were assigned to three groups, indicating which genre they were told the lyrics belonged to: folk, country, or rap.[70] Fried hypothesized that there would be noticeable differences in perception across genres, specifically that there would be the greatest negative reaction toward rap.[71]

MARYFIELD, IMPLICIT RACIAL BIAS 1 (2018), https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-implicit-racial-bias.pdf ("Implicit biases are associations made by individuals in the unconscious state of mind. This means that the individual is likely *not aware* of the biased association.") (emphasis added).

59 MARYFIELD, *supra* note 58, at 1 ("Implicit racial bias fundamentally differs from explicit racial bias. While the latter typically manifests as overt racism or discrimination, implicit bias occurs unconciously [sic], typically without discriminatory intent. 'Well-meaning people who consciously reject racism or other bias may unwittingly act in ways that result in discrimination because of implicit bias.'").

60 *Implicit Bias*, *supra* note 31; *see also* discussion of Dr. Fried's experiment, *infra* Part. II. A.

61 "[I]mplicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias." State v. Berhe, 444 P.3d 1172, 1171 (Wash. 2019); *Infra* Part II. B.

62 Schwarz, *supra* note 18.

63 *Infra* Part II. A. *See also* Fried, *supra* note 30.

64 U.S. CONST. amend. VI.

65 Fried, *supra* note 30.

66 *Dr. Carrie Fried, Faculty & Staff*, WINONA STATE UNIV., https://www.winona.edu/psychology/fried.asp (last visited Dec. 17, 2021).

67 Fried, *supra* note 30, at 2136.

68 *Id.* at 2138.

69 *Id.*

70 *Id.*

71 *Id*.

Participants in the "folk" group reported the lowest perceived risk that the song would lead to civil unrest, took the least offense to the lyrics, and reported the least concern about their children listening to the song when compared to the other two groups (i.e. rap and country).[72] Reactions to the lyrics as a "country" song were comparative to the perceptions within the "folk" group.[73] Participants in the "rap" group reacted more negatively—taking greater offense to the lyrics and calling for more regulation.[74] Additionally, those in the "rap" group reported concern about their children listening to the song at *nearly* twice the rate.[75] Results of this study supported Fried's hypothesis that people perceive rap in a fundamentally different way.[76]

Fried then conducted a second study to further demonstrate this perceived bias.[77] In this study, she presented lyrics from two different songs, "Bad Man's Blunder" and "Cop Killer."[78] Participants were told one artist was Black and the other artist was white to measure implicit bias based on race.[79] Results of this study were consistent with the first, highlighting that people are not necessarily aware of their negative perception.[80] It demonstrated that people associate rap more negatively when knowing it is rap, as opposed to other genres.[81] Furthermore, it showed that there is a direct relation between understanding and reactions to an artist's lyrics depending on the artists' race.[82] This is not to say that the tests proved causation or showed that people had an active or conscious bias, but rather highlighted that people may be unaware of their negative perception of Black people.[83]

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72 *Id.* at 2140.

73 Fried, *supra* note 30, at 2140. "Folk" and "Country" labelled songs were comparable throughout. *Id.* "Country" was on average deemed *slightly* more offensive than "Folk," a greater "[t]hreat to society", and in more "[n]eed to regulate" and of "[w]arning labels." *Id.* Additionally, participants viewed "Folk" with a greater need for a "[c]omplete ban" when comparing it with "Country." *Id.* Participants also expressed greater concern with their "[c]hild listening" to songs when labelled "Folk" rather than "Country." *Id.*

74 *Id.* Participants expressed a greater need for music lyrics' regulation when labelled as a "Rap" song rather than either "Folk" or "Country."

75 *Id.* (showing that the concern for a child listening to the lyrics of a song was 1.48 times higher when the song was labbelled "Rap" as compared to the same song being labelled as "Country").

76 *Id.* at 2139.

77 *Id.* Fried conducted her second study "to examine whether the effects obtained in Study 1 could be replicated by simply identifying the artist as Black versus White. It was predicted that if the artist was Black, the song would provoke more negative reactions than if the artist was White." *Id.* at 2139.

78 *Id.* at 2139-40.

79 Fried, *supra* note 30, at 2139-40.

80 *Id.* at 2141-42.

81 *See generally id.* Participants perceived the same song lyrics more negatively when told it was a "Rap" song, rather than a "Folk" or "Country" song in *every category measured*. *Id.* at 2140.

82 *Id.* at 2140-41.

83 *Id.* at 2141. Dr. Fried's study supports this Note's position that a bias may not necessarily be a conscious one that we perceive. Rather, it may be a subconscious, or *implicit* bias, which one *may not* be aware of.

Differences based on genre and race include greater perception of the lyrics as offensive, dangerous, and worrisome if children listened to it.[84] Overall, Fried's study demonstrated that people associate rap more negatively when knowing it is rap, as opposed to other genres, and found that there was an implicit racial bias from participants.[85]

Rap music and its subgenres, such as drill, are most associated with young people of color, particularly Black people.[86] Defendant-authored lyrics put the defendant at risk of prejudice similar to that seen in Fried's studies, meaning the risk is not explicit but rather internalized.[87]

The standard of review for evaluating whether an error (in trial court's evidentiary rulings) may be overturned is whether it was an abuse of discretion.[88] A trial court judge abuses their discretion when a "ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."[89] If an appellate court determines that a trial court judge abused their discretion, it then evaluates whether the error was harmless.[90] For a defendant to successfully warrant a reversal from the appellate court, they must show the decision caused them substantial or undue prejudice.[91] However, it is difficult to reverse admission of rap lyrics, as prejudice to the defendant is difficult to prove when it is implicit and not easily perceived.[92]

The Supreme Court of Washington recognized that implicit bias carries the same risk of prejudice as explicit bias.[93] As Fried's experiment indicate, these people were not aware of this bias or perception.[94] If people are not aware of prejudice regarding menial issues such as genre, it would be reasonable to wonder if they can remain impartial in more weighing matters (i.e., a legal proceeding).[95] However, this is a recent trend, and it is difficult to show that the implicit bias during deliberation was unreasonable.[96] A state

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84 *Id*. at 2141. When comparing the "same lyrical passage" in the same one to nine point bipolar scale, participants responded to the song more negatively when told it was a Black artist than a White artist in every category. *Id.* at 2140.

85 *See generally* Fried, *supra* note 30.

86 *Id.* The date and time are often disputed, but there is consensus that the birth of Rap began in the Bronx, New York City, New York in the early 1970s. David Dye, *The Birth of Rap: A Look Back*, NPR (Feb. 22, 2001, 1:06 PM ET), https://www.npr.org/templates/story/story.php?storyId =7550286. "Drill rappers would seem to overwhelmingly belong to a particular demographic: young, male, [B]lack and underprivileged, a demographic group with a long history of tense relationships with the agencies of criminal justice." Ilan, *supra* note 14, at 995.

87 *See generally* Ilan, *supra* note 14, at 995.

88 United States v. Gluk, 831 F.3d 608, 613 (5th Cir. 2016).

89 Williams v. Manitowoc Cranes, L.L.C., 898 F.3d 607, 615 (5th Cir. 2018).

90 *Gluk*, 831 F.3d at 613.

91 State v. Skinner, No. A-2201-08T2, 2012 WL 3762431 (N.J. Super. Ct. App. Div. Aug. 31, 2012).

92 *Id.*

93 *See* State v. Berhe, 444 P.3d 1172 (Wash. 2019).

94 *See* Fried, *supra* note 30, at 2135.

95 *Id*.

96 "The 'threshold for determining whether evidence is relevant is comparatively low,' and '[courts] rarely reverse such decisions because they "are fundamentally a matter trial management."'" United

often requires overt, explicit examples of unreasonable jury behavior.[97] Most times, a judge (on objection from the defense)[98] may offer a "limiting jury instruction" of how the jury may perceive or receive the information.[99]

B. Fischoff Experiment

In *People of the State of California v. Rollins*, Defendant, Offord Rollins III, was charged with the 1991 murder of his ex-girlfriend in

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States v. Recio, 884 F.3d 230, 235-38 (4th Cir. 2018) (quoting United States v. Kiza, 855 F.3d 596, 604 (4th Cir. 2017)). The Fourth Circuit Court of Appeals held that "even if the district court erred in admitting the [Defendant's] Facebook post, the error was harmless." *Id.* at 239.

97 *See generally Berhe*, 444 P.3d 1172. The Washington Supreme Court addressed the standard and procedures to determine whether evidentiary hearings are necessary on a motion for a new trial and when jury deliberations can be tainted by racial bias. *Id.* at 1178. Allegations of juror misconduct can only arise after a verdict has been entered, and courts hold discretion whether there needs to be an evidentiary hearing. *Id.* The state supreme court determined that the trial court abused its discretion by denying Berhe's motion without holding an evidentiary hearing. *Id.* at 1177. The court goes on to explain that society pressures many "who consciously hold racially biased views" from admitting that they do so. *Id.* at 1178. Juror H.C., in deliberations, said that "he believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017). The jurors reported that H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "'I think he did it because he's Mexican and Mexican men take whatever they want.'" *Id.* According to the jurors, H.C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.* Finally, the jurors recounted that Juror H.C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was "an illegal." *Id.*

98 *See* FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."); United States v. Herron, No. 10-CR-0615, 2014 WL 1871909, at *9 (E.D.N.Y. May 8, 2014). In *United States v. Herron*, the court denied Defendant's motion to preclude rap videos and related video and audio. *Herron*, 2014 WL 1871909, at *9. However, it also denied the Government's motion to preclude testimony of Defendant's proposed expert. *Id.* The trial court judge held, in response to Defendant's Motion in Limine, to exclude some of the rap videos and required the government to follow a specific procedure for the video clips it sought to admit. *Id.* at *5. Under Federal Rules of Evidence 401 and 403, the videos were highly probative for the conspiracy charges (weapons-related, narcotics trafficking, and money laundering) and outweighed any risk of prejudice. *Id.* at *3-5. The trial court determined it was too premature to exclude evidence as cumulative in motions in limine. *Id.* at *5. The court held that the government must indicate how it intends to use the evidence, including a description of the evidence and its relevance, to defense counsel before the day of trial. *Id.* However, Defendant may request the court to provide a limiting instruction to the jury, including but not limited to, that the evidence is not considered for any improper purpose. *Id.*

99 An Indiana court of appeals affirmed the following jury instruction on defendants rap as permissible:

> This item is being introduced for a limited purpose. It is not being admitted to you and you may not consider it in any way to determine that [Defendant Ward] is a bad person or [Ward], in terms of the lyrical content, there are going, there are going to be slang terms, and other things that you may find that you may disagree with or unacceptable.

Ward v. State, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019).

Bakersfield, California[100] The jury found him guilty after his violent rap lyrics were read.[101] Dr. Stuart Fischoff, a psychologist, testified in Rollins' first trial about the projected psychological value of rap lyrics and the little evidentiary weight the jury should give them.[102] Rollins was granted a new trial due to juror misconduct.[103] At his second trial, Rollins' new counsel sought to exclude his lyrics as unduly prejudicial (i.e., they had little probative value to his mind, motive, or intent), but the District Court judge wanted evidence to support that rap lyrics would improperly bias a jury.[104] Fischoff was retained by the Defense to determine whether Defendant's rap lyrics biased his character in a way that was prejudicing his right to a fair and impartial jury.[105]

Dr. Fischoff conducted a study and examined participants' impressions of the defendant's character as well as whether there was any prejudicial effect, and if so—which party it worked against.[106] After confirming no participants were familiar with the case, all participants were read descriptions[107] of Rollins based on factual, biographical information with four variable conditions across groups based on what information was disclosed: (1) no murder, no lyrics; (2) murder, no lyrics; (3) no murder, lyrics; and (4) murder, lyrics.[108] Respondents were given nine adjective factors to evaluate within their individual conditions on a "bipolar" scale.[109] There were 134 participants with a mean age of 27.6, (56 were male, 78 were females) selected as a representative population.[110] Participants were assigned to groups to ensure that there was equal representation across all of the conditions tested.[111]

Fischoff hypothesized that participants would view descriptions with lyrics more negatively then without lyrics, and the results of the study

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100 *Id*. at 795; *see* Eric Shepard, *Prep Star Rollins Guilty of Murder*, L.A. TIMES (Apr. 4, 1992, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-1992-04-04-sp-296-story.html.

101 Stuart P. Fischoff, *Gangsta' Rap and a Murder in* Bakersfield, 29 J.APPLIED SOC.PSYCH 795-96 (1999).

102 Due to jury misconduct, Defendant Offord Rollins III was given a new trial. *Id.*

103 *Id.* at 796.

104 *Id.*

105 *Id.* at 795-796. There was a 12-0 jury verdict of guilty in the first trial (mistrial declared for juror misconduct).

106 Fischoff, *supra* note 103, at 797.

107 *Id*. at 798-99. The true descriptor of Offord Rollins, as seen in all four conditions, was: "[a]n 18-year-old African American male high school senior resides in the Southern California region. He is a state champion in track, has a good academic record and is planning on attending college on an athletic scholarship. He makes extra money by singing at local parties." *Id.* at 799.

108 *Id.* at 799.

109 *Id.* at 801 (including caring v. uncaring, selfish v. unselfish, gentle v. rough, likable v. unlikable, conceited v. modest, truthful v. untruthful, sexually non-aggressive v. sexually aggressive, capable of murder v. not capable of murder, and gang member v. not a gang member).

110 *Id.*

111 *Id.* at 798. The groups were based in part on race (e.g., Asian, white, Black, and Hispanic) across the four conditions groups. *Id.*

reflected his presumption.[112] However, he did not anticipate the close differentiation between the description of a teen accused of murder without rap lyrics and a description with rap lyrics without the mention of a murder accusation.[113] Based on Fischoff's findings, Rollins' lyrics were largely excluded, and his second trial resulted in a hung jury.[114]

C. Jury Instructions Are Not a Magical Cure for All Propensity Evidence

Upon a timely objection from counsel, a judge may offer limiting instructions with the admission of certain *sensitive* evidence and how it is to be used by the factfinder.[115] While limiting instructions are helpful in certain scenarios, it cannot be expected that lay persons will easily do what appellate courts wrestle with.[116] It should not be expected that jurors perform the impossible task of correctly weighing veiled, improper propensity character evidence.[117] Distinguishing whether character evidence is impermissible propensity or a permissible non-propensity is not always easy.[118] While this type of evidence may be relevant, it may be deemed to carry too much weight to use responsibly or overcome potential prejudice.[119]

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112 Fischoff, *supra* note 101, at 797.

113 *Id.* at 801. The condition "no rap, murder" was characterized more favorably in six of the nine factors evaluated than "rap, no murder." *Id.* at 803.

114 *Id.* at 805. The court decided not to retry Defendant Rollins a third time after a 6-6 hung jury. *Id.* at 806.

115 FED. R. EVID. 105; *see also* United States v. Gomez, 763 F.3d 845, 860-61 (7th Cir. 2014) (*citing United States v. Jones, 455 F.3d 800*, 811-12 (7th Cir. 2006) (Easterbrook, J., concurring)) ("When given, the limiting instruction should be customized to the case rather than boilerplate."). "A good limiting instruction needs to be concrete so that the jury understands what it legitimately may do with the evidence." *Gomez*, 763 F.3d at 860 (quoting *Jones*, 455 F.3d at 812). In order to "effectively distinguish appropriate from inappropriate inferences," jurors should be told in plain language the specific purpose for which the evidence is offered and that they should not draw any conclusions about the defendant's character or infer that on a particular occasion the defendant acted in accordance with a character trait. *Id.*

116 *Gomez*, 763 F.3d at 856.

117 Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.").

118 *Gomez*, 763 F.3d at 856 ("This is not to say that other-act evidence must be excluded whenever a propensity inference can be drawn; rather, Rule 404(b) excludes the evidence if its relevance to 'another purpose' is established *only* through the forbidden propensity inference. Spotting a hidden propensity inference is not always easy.").

119 Exclusion of character evidence is supported by psychological research. *See* Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL'Y 241, 254 (2017) ("The overvaluation hypothesis is consistent with psychological research on the fundamental attribution error, which occurs when people overestimate the influence of personality and underestimate the influence of the environment on behavior."). The "fundamental attribution error" ("FAE") explains that people *tend* to give excessive attributional weight to internal, dispositional factors and insufficient attributional weight to external, situational factors. David A. Sonenshein, *The Misuse of Rule 404(B) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 258-62 (2011) ("FAE explains that

As Justice Jackson explained in *Michelson v. U.S.*,

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.[120]

Some commentators suggest that judges are either overestimating the jury's ability to disregard biases that would prevent such biases from impacting their decisions or underestimating the prejudicial impact that defendant-authored rap lyrics have on juries.[121]

Given the risk of substantial prejudice to a defendant artist, the purpose of the Federal Rules of Evidence is better served by avoiding the admission of rap lyrics into evidence before a trial begins whenever possible.[122] Andrea Dennis, an Evidence professor at the University of Georgia School of Law and a scholar on the issue, points out that the decision to admit rap into evidence is a discretionary decision trial judges make.[123] In an interview, she says:

> There is a workaround . . . . For example, if you have dealt drugs in the past that might indicate you have some knowledge about drugs or how to deal drugs. Right? There is a workaround for this prohibition on character evidence. And so, that is often what prosecutors will do and because the ability of the court to exclude it is within their discretion, they don't have to exclude the evidence, even if they think it unfairly prejudicial. On balance [403 balance test], most courts will admit that evidence, even if there is some concern over unfair prejudice . . . well, maybe [judges] try to tell the jury "don't use it for that character based reasoning that we prohibit . . . use it for this other purpose . . . " but once the elephant is in the room or you can choose your metaphor . . . the point is: jurors have heard this evidence.[124]

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people systematically underestimate the levels of influence that external factors have on behavior and instead attribute a person's actions primarily to his disposition.").

120 Michelson v. United States, 335 U.S. 469, 475-76 (1948).

121 Elizabeth Shumejda, *The Use of Rap Music Lyrics as Criminal Evidence*, 25 N.Y. STATE BAR ASSOC. ENT., ARTS & SPORTS L.J. 29, 32-33 (2014); *see also* Dennis, *supra* note 16, at 30.

122 Dennis, *supra* note 16, at 31; *see also* FED. R. EVID. 102.

123 Dennis, *supra* note 16, at 24; *see also* United States v. Recio, 884 F.3d. 230 (4th Cir. 2018) (explaining the deference appellate courts must show to trial court's decisions whether evidence is relevant).

124 So to Speak podcast, *'Rap on Trial'*, YOUTUBE, at 10:59-12:22 (Mar. 4, 2020), https://www.youtube.com/watch?v=5kMxKqzYwjc.

Eventually, the District Court judge in *Rollins* excluded much of the defendant-authored raps at trial after reviewing the study.[125] Offord Rollins III, having been previously convicted of his ex-girlfriend's murder, was not convicted in his second trial where the lyrics were largely not admitted.[126] This study demonstrates how rap and juror bias could prejudice a Defendant's right to a fair trial when authored-lyrics are admitted when *not* necessary.[127] For Offord Rollins III, this was the difference between freedom and incarceration. Furthermore, this shows that these experiments have real world effects; Rollins is not a hypothetical—he is a real person and this was a real case.[128] Both experiments concerning rap have been largely replicated,[129] both demonstrate that there is a negative perception when evaluating rap, *perhaps* race, and raise the question of whether a person can look past these points and remain impartial, if serving on a jury.[130]

Given the indeterminable risks of prejudice, which is hard to raise successfully on appeal,[131] courts should consider risks of both implicit and explicit biases a defendant may face when evaluating whether a piece of evidence is substantially more prejudicial than it is probative. If anything, admission of this seemingly "relevant evidence" poses a higher substantial risk of prejudice to the defendant's fair and impartial trial because it is harder to show what jurors perceived.[132] Courts are aware that admission of rap as evidence may be damaging to a defendant; thus, when evaluating evidentiary impact, it should not be evaluated in a vacuum.[133]

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125 Fischoff, *supra* note 101, at 804.

126 *Id.*

127 *See generally id*.

128 For another example of a rapper's lyrics being considered as evidence in a murder trial, see State v. Skinner, 95 A.3d 236 (N.J. 2014). Vonte Skinner was convicted by jury after his rap was read to the jury. *Id.* at 238. The New Jersey Appellate Division reversed Skinner's conviction. *Id.* The New Jersey Supreme Court held:

> [T]he admission of defendant's inflammatory rap verses, a genre that certain members of society view as art and others as distasteful and descriptive of mean-spirited culture, risked poisoning the jury against defendant. . . . In the weighing process, trial courts should consider the existence of other evidence [aside from fictional forms of inflammatory speech, self-expression, art] that can be used to make the same point.

Id. at 238-39. *See* discussion *supra* note 36.

129 *See generally* Adam Dunbar et al., *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280 (2016). Dunbar added in punk and metal, in lieu of folk. *Id.* at 281-82. However, his results did not yield any considerable difference when the sole variable was race—such as was seen by Fried's second experiment. *Id.* at 287-88; Fried, *supra* note 30.

130 *See generally id.*; Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); Fried, *supra* note 30.

131 United States v. Recio, 884 F.3d 230, 235 (4th Cir. 2018). Circuit Judge Motz held that the district court's error, if any, in admitting lyrics posted to Facebook was harmless. *Id.* at 238.

132 *See generally* State v. Berhe, 444 P.3d 1172 (Wash. 2019); Fried, *supra* note 30.

133 State v. Pelletier, 2020 MT 249, ¶ 21, 401 Mont. 454, 473 P.3d 991 ("[A]ll relevant evidence is inherently 'prejudicial to one side or the other,' otherwise relevant evidence is subject to exclusion under Rule 403 only if the risk of prejudice, confusion, or distraction is 'unfair,' *i.e.* where it is likely to: (1) provoke jury hostility or sympathy for one side regardless of probative value; (2)

IV. ADMISSION OF DEFENDANT-AUTHORED RAP LYRICS AS EVIDENCE

Drill rap is a nuanced subgenre of rap that covers topics like violence, crimes, gangs, and drugs in a dark, nihilistic, and gritty way.[134] It is easy for a lay listener to misinterpret and associate this art with reality.[135] Dangers of misinterpretation leave the defendant at the mercy of jurors in a way that they never expected. The admission of drill rap, whether intentional or not, leaves a defendant in the position of explaining its meaning rendering them vulnerable to potential prejudices associated with the lack of understanding of the genre.[136] The danger of substantial prejudice a defendant faces if a jury

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unduly confuse, mislead, or distract the jury from the central matters at issue in the case; or (3) cause the jury to give undue importance or emphasis to an extraneous prejudicial matter."). Additionally:

> A trial court may properly exercise discretion by reason of the Rules [of Evidence] in not rigidly applying in isolation a particular Rule which would obstruct and defeat the central purpose of the Rules as a whole, and the court may apply a balancing test of the peculiarities and relevant factors of the individual case.

29 AM. JUR. 2D *Evidence*, *supra* note 39; *see also* United States v. Opager, 589 F.2d 799 (5th Cir. 1979).

134 Stehlik, *supra* note 21.

135 *See, e.g.*, People v. Oduwole, 2013 IL App (5th) 120039, ¶ 26; *see also* Ilan, *supra* note 14, at 1003-04. Jonathon Ilan writes:

> Analysing drill music and audience discussions around it suggests that there is significantly more evidence of violent discourse than there is of violence itself. It would seem, moreover, that a significant proportion of violent commentary is not specific provocation but 'phatic': part of social exchange as opposed to evidence of real intention. Whilst it is a convention of drill music for rappers to speak in the first person, this should not necessarily be interpreted as confession. Violent and crimino-entreprenerial lyricism is a means of identifying with the code of the street, establishing an artist as an authentic voice of the ghetto, with all the cultural acumen and 'cool' that attaches to this. Lyrics frequently boast that[,] whilst other rappers lie about their criminal acumen, this rapper is 'real'—authentic. . . . To accept that these discussions are necessarily referring to actual instances of violence demands accepting the smear about the opposing rapper's grandmother as literally true, something anyone familiar with teenage banter would be very reluctant to do. A street[-]literate reading of drill videos and lyrics understands that rhetoric is being deployed. Violence is being discussed in more abstract and/or conversational ways, not necessarily threatening, procuring or referring to specific acts of actual violence. This is not to deny that crime and violence take place involving drillers as either victims or perpetrators—rather, it emphasizes not to view the violence as directly related to, caused by or evidenced by the music.

Ilan, *supra* note 14, at 1002-03. Here, when taken literally and combined with implicit bias, confirmation bias, or even a lack of understanding could lead jurors to infer braggadocio and themes present and common to be reality. *Id.* at 998-99.

136 For another example of arrests of rappers based in part on rap lyrics, see City News Service, *supra* note 29; Kristina Davis, *Rapper 'Tiny Doo' and College Student Arrested Under Controversial Gang Law Get Day in Court Against Police*, THE BALT. SUN (May 22, 2018, 8:55 PM), https://www.baltimoresun.com/sd-me-tiny-doo-20180522-story.html. Brandon Duncan, a rapper known as "Tiny Doo," and Aaron Harvey spent seven months in jail on charges similar to that of Darrell Caldwell, known as "Drakeo the Rapper." Davis, *supra* note 29. However, Tiny Doo and

misinterprets or takes the lyrics literally can be hard to recover from—even if a jury is instructed what scope and weight to perceive it with.[137]

Rap is most often admitted into evidence at trials under Rule 404(b), the Prior Bad Acts Rule.[138] Generally, character evidence is impermissible at trial for the purposes of showing "propensity," or that a defendant likely acted a certain way in a particular situation because they had in a prior instance.[139] This exception to the general rule against the admission of character evidence allows for use of character evidence showing "non-propensity purposes."[140] These other purposes may be admissible to show a defendant's motive, intent, opportunity, preparation, plan, knowledge, identity, absence of a mistake, or a lack of accident.[141] The court intended these exceptions to be narrow because character evidence can be extremely powerful depending on how it is used.[142]

Aaron Harvey were released and awarded nearly $1.5 million in a settlement after a court determined that San Diego Police Department violated their civil liberties. City News Service, *supra* note 29.

137 *See* Ward v. State, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019) (affirming the trial court's judgment, including the following jury instruction on the evidence of the defendant's rap: "[t]his item is being introduced for a limited purpose. It is not being admitted to you and you may not consider it in any way to determine that [defendant] [Ward] is a bad person or [Ward], in terms of the lyrical content, there are going, there are going to be slang terms, and other things that you may find that you may disagree with or unacceptable").

138 *See* FED. R. EVID. 404(b). Michigan alone treats defendant-authored rap as admissible hearsay by a party, witness, or opponent under Federal Rule of Evidence 801(d) rather than the Prior Bad Acts Rule. United States v. Mills, No. 16-cr-20460, 2019 WL 3423318 (E.D. Mich. July 30, 2019); United States v. Graham, 293 F. Supp. 3d 732, 738-39 (E.D. Mich. 2017) (denying Defendant's motion to preclude the government's admission of eleven Defendant-authored rap tracks to support the Seven Mile Bloods' racketeering charges); People v. Foster, No. 320136, 2015 WL 2412383, at *5-6 (Mich. Ct. App. May 19, 2015) (holding that, although Defendant had shown his rap videos were inadmissible, he was not entitled to relief).

139 FED. R. EVID. 404(a)(1); United States v. Hazelwood, 979 F.3d 398, 409-11 (6th Cir. 2020). On appeal, Judge Suhrheinrech held that the trial court's admission of undercover audio recordings where Defendant Mark Hazelwood is heard using deeply offensive racist and misogynistic language "could risk public outrage against the company" that he was a bad businessman and reckless enough to commit said allegations (fraud) and that the lyrics were not relevant. *Hazelwood*, 979 F.3d at 402, 412. The court would go onto hold that "[t]his is vintage bad character evidence—and precisely the type of reasoning the Federal Rules of Evidence forbid." *Id.* at 402.

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

141 *Id.*

142 *Id.* "Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused." FED R. EVID. 404(b) advisory committee's note to 1991 amendment.

A. Rap Lyrics Prejudicing Defendant's Right to Impartial Trial: *State v. Skinner*

In 2005, Lamont Peterson, was paralyzed after being shot multiple times with a nine-millimeter gun which was never recovered.[143] Vonte Skinner's cellphone was recovered at the scene of the crime.[144] Skinner was arrested, tried, but not convicted in connection with the shooting.[145] Later, he was retried and the State sought admission of the defendant's authored rap lyrics as evidence of his motive despite his objections.[146] The State read the jury the Defendant's authored rap lyrics,[147] and Vonte Skinner was convicted of attempted murder, aggravated assault, and aggravated assault with a deadly weapon.[148] The New Jersey Appellate Court reviewed the admission of the defendant's authored lyrics and determined them to be a harmful error;[149] the New Jersey Supreme Court later affirmed.[150]

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143 State v. Skinner, No. 06-11-1756, 2012 WL 3762431, at *1 (N.J. Super. Ct. App. Div. Aug. 31, 2012).

144 *Id.*

145 *Id.* The first trial resulted in a mistrial due to a hung jury. *Id.*

146 The court's opinion states:

> Defendant wrote the lyrics over a period of several years. The State pointed to one lyric written after September 2005, but conceded that others were written as many as three or four years prior to this crime. The jury was *not* given any information about when the lyrics were written.

Id. at *3 (emphasis added).

147 State v. Skinner, 95 A.3d 236, 241-42 (N.J. 2014). The following lyrics were in Skinner's car at the time of his arrest:

> I'm the n* * *a to drive-by and tear your block up, leave you, your homey and neighbors shot up, chest, shots will have you spittin' blood clots up. Go ahead and play hard. I'll have you in front of heaven prayin' to God, body parts displaying the scars, puncture wounds and bones blown apart, showin' your heart full of black marks, thinkin' you already been through hell, well, here's the best part. You tried to lay me down with you and your dogs until the guns barked. Your last sight you saw was the gun spark, nothin' but pure dark, like Bacardi. Dead drunk in the bar, face lent over the wheel of your car, brains in your lap, tryin' to comprehend what the f* *k just tore you apart, made your brains pop out your skull. . . . On the block, I can box you down or straight razor ox you down, run in your crib with the four pound and pop your crown. Checkmate, put your face in the ground. I'll drop your queen and pawn, f* *k—f* *k wastin' around. They don't call me Threat for nothin.' . . . You pricks goin' to listen to Threat tonight. 'Cause feel when I pump this P–89 into your head like lice. Slugs will pass ya' D, like Montana and Rice, that's five hammers, 16 shots to damage your life, leave you f* * * * *s all bloody. . . . In block wars I am a vet. In the hood, I'm a threat. It's written on my arm and signed in blood on my Tech. I'm in love with you, death.

Id. at 241.

148 *Id.* Before trial, Vonte Skinner filed a motion in limine to exclude rap lyrics from admission. *Id.* However, the trial court judge denied his motion, and the state read over thirteen pages of his lyrics into the record. *Id.*

149 *Skinner*, 2012 WL 3762431, at *2. Defendant must show there was an abuse of discretion on the trial judge's decision to raise a successful appeal for admission of evidence. *Id.*

150 *Skinner*, 95 A.3d at 242.

The State argued its admission was only to show defendant's motive or intent; however, the court held otherwise.[151] The New Jersey Supreme Court held that the admission of these violent lyrics, although not a crime themselves, offered little probative value to the crime the defendant was charged with and risked "poisoning the jury against a defendant."[152] The State had already raised evidence, through witness testimony, which it argued showed the defendant's motive.[153] The New Jersey Supreme Court determined that the lyrics were sensational, covering violent topics or subjects meant to inflame jurors or support the State's argument.[154]

Most importantly, the Court determined that even if the lyrics were not sensational, it had no clear and convincing evidence to indicate that Skinner's raps were anything more than fictional bravado.[155] In doing so, the Court prevented the risk that Skinner would be needlessly prejudiced by the lyrics' admission, "absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced."[156] The New Jersey Supreme Court distinguished this case from other cases admitting defendant authored rap lyrics since such cases displayed "unmistakable factual connection to the charged crimes."[157] Here, the lyrics were references to general violence and crime, consistent with the framework of the genre.[158] The Court properly concluded the lyrics did not offer such sufficient probative value that the risk of prejudice was outweighed in this case.[159]

There is a safeguard outlined in Rule 403 though, stating that even relevant evidence may be inadmissible if its "probative value is substantially outweighed by its prejudicial impact."[160] There are few examples of cases where its probative value may have outweighed its prejudicial effect—therefore, we need not overhaul the FRE to handle this evidence efficiently.

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151 *Id.*

152 *Id.* at 249 ("Rule 404(b) serves as a safeguard against propensity evidence that may poison a jury against the defendant.").

153 *Id.* at 250.

154 *Id.*

155 *Id.* at 251. This would potentially leave jurors to question, without merit, whether a defendant acted similarly in the crime charged.

156 *Skinner*, 95 A.3d at 251-52.

157 *Id.* at 252 (distinguishing this case from Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004), and Greene v. Commonwealth, 197 S.W.3d. 76 (Ky. 2006)).

158 *Id.* ("Absent a such a strong nexus to defendant's *charged* crime, his fictional expressive writings are not properly evidential.") (emphasis added).

159 *Id.*

160 FED. R. EVID. 403; *see also* United States v. Gamory, 635 F.3d 480, 493 (11th Cir. 2011) (recognizing that admittance of a rap video was very prejudicial because it contained "violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle").

B. Defendant-Authored Lyrics May Be Sufficiently Probative

Dennis Greene was tried and convicted in 2003 for the murder of his wife; he was sentenced to life in prison.[161] During his trial, the state admitted portions of Greene's defendant-authored rap lyrics and video as evidence.[162] Dennis Greene then appealed his conviction to the Kentucky Court of Appeals, asserting his lyrics were wrongfully admitted and caused him undue prejudice.[163] Tara Greene, Dennis' wife, died after having her throat slit from ear to ear.[164] Testimony was given that Dennis Greene left work early to go home,[165] then the couple argued, and Tara told Dennis that she had cheated on him with four different men.[166] After Tara was killed, Dennis left for Chicago where he informed some friends of his arrival and what happened.[167] While in Chicago, Dennis began recording rap videos reflecting on his actions and emotions.[168]

Dennis Greene asserted the affirmative defense to the murder charge that he was under extreme emotional distress.[169] However, the defendant-authored lyrics and rap video indicated otherwise and the trial court judge admitted them.[170] These rap videos depicted the defendant, shortly after the murder, saying:

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161 *Greene*, 197 S.W.3d at 79.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* Testimony was given that Defendant said, "I'm going to do it. I'm going to kill her." *Id.*

166 *Id.*

167 *Greene*, 197 S.W.3d at 80.

168 *Id.*

169 *Id.* Given the difference in the *mens reas* requirements for murder and manslaughter, the defendant's state of mind was in dispute, and any probative value pertaining to his motive or thoughts was essential to the fact finder. *Id.*; *see also* KY. REV. STAT. ANN. §§ 507.020, .030 (West 1984). In Kentucky, a person is guilty of murder when:

> With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution *a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance* for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime.

§ 507.020(1)(a) (emphasis added).

170 *Greene*, 197 S.W.3d at 79.

> B—— made me mad, and I had to take her life. My name is Dennis Greene and I ain't got no f——ing wife. I knew I was gonna be givin' it to her . . . when I got home . . . I cut her motherf——in' neck with a sword . . . I'm sittin' in the cell starin' at four walls . . . .[171]

While the victim had died from a kitchen knife, not a sword, and this rap was recorded while Dennis fled to Chicago, not from a prison cell, the factual connection between the defendant's authored lyrics and the crime alleged was "unmistakable."[172] In the admitted defendant-authored lyrics, Dennis Greene depicted knowledge[173] and intent[174] concerning the exceptions for admission of character evidence under FRE 404(b).[175] Certainly, there is an unmistakable factual connection between the defendant-authored lyrics and the crime alleged.[176] Furthermore, there is a dispute over the state of Dennis' mind, and it is necessary to gather information upon that to ascertain the truth.[177] Therefore, the presentation of Greene's authored lyrics, despite its prejudicial effect, is an example of why the purpose of Federal Rules of Evidence would not be well served through a complete ban of rap as evidence.[178]

C. *State v. Montague*: A Step Too Far?

While many *could* agree with the appellate decision in *State v. Skinner* that those lyrics were insufficiently probative with its prejudicial impact and that the lyrics in *Commonwealth v. Greene* may be sufficiently probative as an exception under FRE 404(b), distinguishing that line is where there is strife or debate. In 2019, the Maryland Appellate Court determined that the trial court had not "abuse[d] its discretion in admitting [Petitioner's] rap

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171 *Id.* at 86.

172 State v. Skinner, 95 A.3d 236, 252 (N.J. 2014) (citing *Greene*, 197 S.W.3d at 80).

173 *Greene*, 197 S.W.3d at 85. Defendant rapped the lyrics "*I knew I was gonna' be givin' it to her . . . when I got home*." *Id.*

174 *Id.* Defendant rapped the lyrics "*B---- made me mad, and I had to take her life*." *Id.*

175 FED. R. EVID. 404(b). These "other purposes" may be admissible to show a defendant's motive, intent, opportunity, preparation, plan, knowledge, identity, absence of a mistake, or a lack of accident. *Id.*

176 *Greene*, 197 S.W.3d at 85. Defendant rapped the lyrics *"[m]y name is Dennis Greene and I ain't got no f---ing wife*." *Id.*; *see also Skinner*, 95 A.3d at 252.

177 FED. R. EVID. 102.

178 The Montana Supreme Court has stated that:

> [A]ll relevant evidence is inherently 'prejudicial to one side or the other,' otherwise relevant evidence is subject to exclusion under Rule 403 only if the risk of prejudice, confusion, or distraction is 'unfair,' *i.e.* where it is likely to: (1) provoke jury hostility or sympathy for one side regardless of probative value; (2) unduly confuse, mislead, or distract the jury from the central matters at issue in the case; or (3) cause the jury to give undue importance or emphasis to an extraneous prejudicial matter.

State v. Pelletier, 2020 MT 249, ¶ 21, 401 Mont. 454, 473 P.3d 991.

lyrics under Maryland Rule 5-403."[179] While the majority holding is based in-part by *State v. Skinner*,[180] it *arguably* extends its holding.[181] Petitioner, Lawrence Earvin Montague was convicted of "second-degree murder, first-degree assault, use of a firearm in a crime of violence, use of a firearm in the commission of a felony, and wearing, carrying, or transporting a handgun on or about the person" in 2019.[182]

The State offered lyrics from a telephone call[183] Mr. Montague made prior to trial as evidence he sought to "potentially intimidate witnesses."[184] As seen in *Greene*[185] and *Skinner*,[186] the majority held it was not an error to admit Mr. Montague's authored lyrics for the jury to hear.[187] In doing so, the majority based its decision on *Skinner*[188] and *Holmes*,[189] finding a "close nexus" between the lyrics and the charged crime despite Montague not being charged nor on-trial for witness intimidation as the State theorized. [190]

The majority rejects Montague's assertion that rap, as a whole, is "typified by exclusively violent" themes.[191] The majority is correct.

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179 Montague v. State, 243 A.3d 546, 570 (Md. 2020).

180 *See id.* at 559-60; *Skinner*, 95 A.3d at 236.

181 This position is the basis of Justice Watts' dissent. *See Montague*, 243 A.3d at 570 (Watts, J., dissenting).

182 *Id.* at 554-55.

183 The Court of Appeals for the Third Circuit has held that "prisoners 'have no right to unlimited telephone use,' and reasonable restrictions on telephone privileges do not violate their First Amendment rights." Almahdi v. Ashcroft, 310 F. App'x 519, 522 (3d Cir. 2009) (citing Washington v. Reno, 35 F.3d 1093, 1099-1100 (6th Cir. 1994)). "[T]he Supreme Court has held, 'Prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells.'" Whitehurst v. May, No. CV 18-107-RGA, 2021 WL 951214, at *7 (D. Del. Mar. 12, 2021) (citing Hudson v. Palmer, 468 U.S. 517, 530 (1984)); *see also* Doe v. Delie, 257 F.3d 309, 316 (3d. Cir. 2001) ("The Supreme Court has concluded that the Fourth Amendment right to privacy, to be free from unreasonable searches, is fundamentally inconsistent with incarceration.").

184 *Montague*, 243 A.3d at 552. The following lyrics were introduced at trial:

> Listen, I said YSK/ I ain't never scared/ I always let it spray / And, if a n——a ever play / Treat his head like a target / You know he's dead today / I'm on his ass like a Navy Seal / Man, my n——s we ain't never squeal / I'll pop your top like an orange peel / You know I'm from the streets / F.T.G. / You know the gutter in me / And I be always reppin' my YSK shit /Because I'm a king / I be playin' the block bitch / And if you ever play with me /I'll give you a dream, a couple shots snitch / It's like hockey pucks the way I dish out this /It's a .40 when that bitch goin' hit up shit / 4 or 5,rip up your body quick / Like a pickup truck / But you ain't getting picked up / You getting picked up by the ambulance / You going to be dead on the spot/ I'll be on your ass.

Id. at 554.

185 Greene v. Commonwealth, 197 S.W.3d 76 (Ky. 2006).

186 State v. Skinner, 95 A.3d 236, 241-42 (N.J. 2014).

187 *Montague*, 243 A.3d. at 554-55.

188 *Skinner*, 95 A.3d 236.

189 Holmes v. State, 306 P.3d 415, 422 (Nev. 2013).

190 *See Montague*, 243 A.3d 546. To her point in the dissent, Justice Watts denied that there was a "close factual nexus to the crimes charged, let alone an unmistakable factual connection" between Defendant's authored lyrics and the charged crime. *Id.* at 572 (Watts, J., dissenting).

191 *Id.* at 556 n.6.

However, this is an over generalization as the genre is large and complex.[192] One of drill rap's characterizing features include violence, however.[193]

The State Prosecutor offered two theories as an attempt to bolster the "strong nexus" between Montague's generic rap lyrics and his charged crime.[194] The first cited reason, by the State, was that Montague made the phone call using another inmate's phone PIN number and his request another man record it.[195] The State proffered this "PIN evidence" and Mr. Montague's request his rap be recorded, alleging this was an attempt to conceal his malicious intent of threatening a witness.[196] Alternatively, another reason why inmates, such as Montague, would use other inmate's PINs is simple, straightforward, and reflective of the system we have in-place: the inmate lacked sufficient funds in his account and used another's PIN, with sufficient monies, to make a phone call.[197] Then came Montague's rap, which the majority did not even attempt to assert bore an "unmistakable factual connection" to the alleged crime.[198] The majority also rested its decision on the unfounded allegation that the rap lyrics against "snitches" was a threat against a witness regardless of the lyrics or themes being generic or common to the genre.[199]

Ultimately, the majority relied on and cited to these facts in showing that it was not an abuse of discretion the lyrics were admitted and bore a strong nexus.[200]

D. The Arguments for a "Rap Shield" *May* Be Unnecessary and Counterintuitive

The purpose of Federal Rules of Evidence include efficiency of time and resources toward the ascertainment of truth.[201] Therefore, it is not necessarily benefited with an outright "ban" of the admission of rap lyrics as evidence.[202] A bar of admission for defendant-authored lyrics may be a quick fix, but an outright ban *may* circumvent the FRE's goal of truth.[203] A ban, as some recommend through "rap shield" laws, would require an overhaul of

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192 *Id.* at 570 n.1 (Watts, J., dissenting). In footnote one of the dissent, Justice Watts eloquently explains, with various references, why "it would be an overgeneralization to leave the impression that rap music/lyrics focus exclusively on violence." *Id.*

193 Stehlik, *supra* note 21.

194 *Montague*, 243 A.3d at 551-52.

195 *Id.*

196 *Id.* at 567-68.

197 *Id.* at 551 n.5.

198 *Id.* at 572 (Watts, J., dissenting).

199 *Id.* at 573-74.

200 *Montague*, 243 A.3d at 570.

201 FED. R. EVID. 102.

202 Dennis, *supra* note 16, at 31.

203 FED. R. EVID. 102.

the rules by treating drill and other genres of rap as "different."[204] It may not be necessary.[205] Another critique of this proposed solution is that it presumes judges are not able to apply the FRE to potentially controversial pieces of evidence. Judges must, currently, balance how to keep the purpose of evidence and avoid substantial prejudice.[206]

E. State-Based Solutions: "Rap Music on Trial"

In 2021, New York proposed "Rap Music on Trial," a bill to "protect freedom of speech and artistic expression in the State of New York."[207] In doing so, New York seeks to enhance free speech protections by "ensuring criminal defendants are tried by evidence of criminal conduct rather than the provocative nature of their artistic works and taste."[208] While this bill is currently only in the Senate Codes Committee, it is a trailblazer for the movement to address rap on trial and protect artists from the risk of their lyrics being misinterpreted by a jury.[209] It was drafted based on "recent scholarship" on the practice of introducing rap as evidence.[210] The "Rap on Trial" bill balances the truth and protection of artist's free speech by prohibiting prosecution from admitting artist's rap lyrics unless by a "clear and convincing" showing to *both* the literal and factual *nexus* between both the lyrics and the purported facts of the case.[211] Similarly to most 404(b)[212] evidence, there will be a hearing outside the presence of a jury to determine

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204 First Amendment issues are outside the scope of this paper. Additionally, a policy consideration for efficiency—creation of a new rigid rule—would discount the judge's ability to handle sensitive issues. Here, the solution gives them additional resources to use a system that they are already familiar with.

205 It is the position of this Note that the justice system need not upend the rules of evidence in place to handle this type of evidence. Rather, it is the position of this Note that, given more knowledge and consideration of the true ramifications of implicit bias and any impermissible character inferences, a judge will better utilize the tools already provided to them when evaluating defendant-authored rap lyrics.

206 Michael Conklin, *The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence*, 95 IND. L.J. SUPPLEMENT 50, 65 (2019) ("Regardless of the criticisms provided in this Article, rap on trial is an issue that judges should be educated on . . . . Rap lyrics taken out of context can provide a distorted story about the defendant.").

207 S. 7527, 2021-22 Leg., Reg. Sess. (N.Y. 2021).

208 *Id.* This bill seeks to balance the need of finding the truth, as outlined in the purpose of evidence, but not demonize a genre, culture, or artist. *Id.*

209 *Id.*

210 Nancy Dillon, *New York Lawmakers Introducing Bil to Limit Rap Lyrics as Evidence in Criminal Trials*, ROLLINGSTONE (Nov. 16, 2021, 8:31 PM ET), https://www.rollingstone.com/music/music-news//ny-state-senators-bill-legislation-rap-lyrics-evidence-criminal-trials-1258767. It is presumed to be based at least in part by the work of Andrea Dennis, Dr. Charis Kubrin, or Erik Nielson. *Id.*

211 S. 7527.

212 FED. R. EVID. 404.

the relevance of the lyrics.[213] While not a "Rap Shield,"[214] the "Rap on Trial" bill seeks a higher standard of admissibility than mere relevance.[215]

V. THREE-PRONG STRATEGY TO EFFICIENTLY ADDRESS RAP IN COURT

A three-prong strategy—judicial implicit bias training, use of rap experts, and following the precedent set forth by *State v. Skinner*[216]—would efficiently address undue prejudice that a defendant may face with the admission of their authored rap lyrics as evidence in trial.[217] Due to the complex and pervasive nature of the issue, no single solution may alleviate the undue prejudices efficiently and effectively. Taken as a whole, the three prongs comprise a flexible, comprehensive approach to ensure a defendant-author's right to a fair and impartial jury.[218]

When applying the lyrics sought to be admitted, there is data suggesting how listeners may perceive lyrics, symbols, and themes (common to the genre or industry) differently than they are meant to be heard.[219] There is sufficient data to proffer these experts within the genre under FRE 702(c) and 702(d) to back up the implicit bias towards the genre.[220] Defendant should be allowed to offer experts testimony to explain this threat so that the judge may understand the full extent and pervasiveness within implicit bias. Furthermore, the experts may aid in distinguishing sensational and braggadocio lyrics, common to the genre, compared to what the prosecutors say they mean.[221] In doing so, the judge may use the safeguards already in place, provided by the FRE, while avoiding impermissible character evidence the jury may hear.[222] Ideally, consultation with and tendering an expert within the field would be done within a pre-trial hearing or at a Motions in Limine hearing. Then, if a trial judge determines that the

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213 S. 7527; *see also* People v. Coneal, 254 Cal. Rptr. 3d 653 (Cal. Ct. App. 2019); discussion *supra* note 37.

214 Rap shield is also known as the "ban" of the admission of rap in criminal trials. *See* Dennis, *supra* note 16, at 31.

215 S. 7527. Based on language of the bill, it seeks to raise the standard of admissibility to "clear and convincing." *Id.*

216 State v. Skinner, 95 A.3d 236, 241-42 (N.J. 2014).

217 FED. R. EVID. 102.

218 U.S. CONST. amend. VI.

219 *See supra* Part III. A.

220 *See generally* Fried, *supra* note 30; Fischoff, *supra* note 101; Dunbar et al., *supra* note 129; *see also* Broeder, *supra* note 130 (describing the limitations of jurrors' ability to follow "limiting instructions"); FED. R. EVID. 702.

221 Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185, 194-95 (2014); *see also* United States v. Harris, No. 12-cr-205-T-17MAP, 2016 WL 4204633 (M.D. Fla. July 28, 2016).

222 It is a position of this Note that, given more knowledge and consideration of the true ramifications of implicit bias and any impermissible character inferences, a judge will better utilize the tools already provided to them when evaluating defendant-authored rap lyrics.

probative value of the lyrics is outweighed by the prejudicial effect, they may exclude them before the jury can hear it. Furthermore, if the lyrics are admitted, the expert opinion testimony would help educate the jury who are the judge on properly distinguishing between fantasy lyrics common in the genre and true 404(b) situations.

Courts have determined in *Skinner* and *Coneal* that lyrics may have some probative value if there is a strong temporal *and* factual nexus between the crime alleged and defendants lyrics.[223] However, in *Coneal*, an appellate review determined that this probative value of the defendant's video could have been demonstrated in a less prejudicial way than playing lyrics and videos to show the necessary element of organization when prosecution also presented screenshots of those videos and did not use the lyrics to make that connection to the crime.[224]

A. Implicit Bias Training for Judges

Admission of rap into evidence during a criminal trial properly, often opposes the purpose of the FRE outlined in rule 102.[225] "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[226]

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223 *See* State v. Skinner, 95 A.3d 236, 253 (N.J. 2014). ("Our sister jurisdictions rarely have admitted a defendant's rap lyric compositions into evidence without a demonstration of a *strong* nexus between the subject matter of the lyrics and the *underlying* crime.") (emphasis added); *see also* People v. Coneal, 254 Cal. Rptr. 3d 653 (Cal. Ct. App. 2019).

224 *Coneal*, 254 Cal. Rptr. 3d 653. The defendant did not contest that the evidence of videos and rap lyrics was relevant. *Id.* at 664. However, the court ruled that the screenshots and other evidence had already indicated that and "the probative value of the videos themselves was *minimal*." *Id.* at 665 (emphasis added). "In fact, the only new "information" provided by the videos is the lyrics, and the lyrics are the problem. As we will explain, the lyrics add no probative value but are extremely prejudicial." *Id.* at 666. Some of appellant's lyrics included:

> Creep up when you sleepin/Leave you dead in your sheet; A thirty on that Mac 10 and it make you do a back flip./ . . . So we left 'em bloody like a raw steak; Last man slid through put him on a shirt./ . . . Leave a whole family six feet in the dirt; I kill you and your kin folks; and I got a gun named 'Chap Stick.'/Boy she really clap shit./ Slip up on that man and left his thoughts where his lap is.

Id. at 668. Similarly, his Taliban associates rapped:

> I'm a let that snitch bleed from his head to his knees; Bullets in his head./ Eyes still open but his body is still tweakin.; you can get it in the face, you can get it in broad day, night or the morning. It's on sight when I see e'm. This is my only warnin, when bullets start stormin and bodies all laid out . . . Spray e'm out a hundred shots . . . Rearrange your face, hands like a surgeon. It's hurtin. Bury e'm closed caskets. Turn wife's into widows and sons to little bastards; I'll leave you in the traffic/Leave you stankin in the alley/In a dumpster where the cats is; Call me major pain cuz I'm a shoot until my wrist hurt; and Fill em up with hollow tips.

Id.

225 FED. R. EVID. 102.

226 *Id.*

Rarely are the defendant's lyrics or rap the crime itself for a jury to consider; however, when defendant-authored lyrics are admitted and entered into evidence, most times the State offers them.[227] It appears that often, admission of defendant-authored rap lyrics is counterintuitive to the purposes of the FRE as it can mislead the jury, confuse the issues, and can undermine a defendant's right to a fair and impartial process.

A judge educated on implicit bias, admissions of rap or rap lyrics, and the risks of implicit bias a defendant-artist faces if admitted into evidence will understand that it rarely aligns with the purpose of the Federal Rules of Evidence—and should be avoided whenever possible.[228] Educating trial court judges on implicit bias is the most efficient way to address any prejudice a defendant may face from the admission of lyrics.[229]

Some states have already begun implementing education or training programs on implicit biases.[230] In 2012, the National Center for State Courts ("NCSC") compiled a report examining three states' training on implicit bias within the court system and the results were promising.[231] While different in structure, the programs demonstrated some takeaways for a successful program.[232] The programs were optional for the participants, received well,

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227 *See supra* note 44.

228 *See* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); State v. Skinner, 95 A.3d 236, 238-39 (N.J. 2014). The New Jersey Supreme Court determined that the lyrics added little, if any probative value, and risked danger of prejudice or emotional bias against Vonte Skinner. *Skinner*, 95 A.3d at 238-39. Additionally, Federal Rule of Evidence 404(a) prohibits use of character evidence to show defendant's propensity to act generally. FED. R. EVID. 404(a)(1).

229 Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225-26 (2009). Ninety-seven percent of judges believe they are in the top half at handling race objectivity—a mathematical impossibility. *Id.* at 1225. Furthermore, fifty percent believe they are in the top quartile. *Id.* This is consistent with many implicit bias studies where individuals are more confident in their abilities to handle perceived racially sensitive topics. *See, e.g.*, Sonenshein, *supra* note 119, at 262; Joelle Emerson, *Don't Give Up on Unconscious Bias Training - Make it Better*, HARV. BUS. REV. (Apr. 28, 2017), https://hbr.org/2017/04/dont-give-up-on-unconscious-bias-training-make-it-better. An important part of implicit bias training is attainable, reasonable, and intentional goals. *See* FED. R. EVID. 102. Additionally, some defendant-authored rap lyrics may contain probative value that is not substantially outweighed by risk of undue prejudice. For an example of when a trial court admitted defendant-authored lyrics because of their sufficient, direct, and probative value for the direct charge alleged, see Greene v. Commonwealth, 197 S.W.3d 76 (Ky. 2006) (holding that Defendant's rap lyrics were probative in value such that the jury could weigh them in reaching its decision). In that case, the defendant sought to show that he was in extreme emotional distress and thus did not have the *mens rea* required to commit the crime. *Id.*

230 *See generally* PAMELA M. CASEY ET AL., HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.259.1089&rep=rep1&type=pdf. California, Minnesota, and North Dakota offered seminars for different members of the legal field. *Id.* at 6. The seminars were similar in nature yet tailored to each state. *Id.* at 21.

231 *See generally id.*

232 *Id.* The NCSC report came away with a few takeaways:

and mostly successful.[233] The report indicated each training had specific steps or goals including: (1) becoming *aware* of one's own bias, (2) being *concerned* about the consequences of bias, and (3) learning to *replace* the biased response with non-prejudiced responses—which more closely match the values people consciously believe they hold.[234] When judges better understanding the extent of their own biases and potential consequences of implicit bias, they *could* make better decisions.[235] Control of one's implicit bias requires active, conscious control.[236]

Many states currently require judges, as well as lawyers, to participate in continuing legal education CLE programs.[237] Here, there is already an opportunity and program in place to educate and inform judges.[238] By offering implicit bias training through existing CLE programs, little, if any, overhaul to the Federal Rules of Evidence, court proceedings, or the system in place would be required—it would be the most efficient way to address problems. For example, because CLE programs are already required, by many, but not all, such a course on Implicit Bias has the potential to touch a very large, specialized audience of judges.[239] Benefits of this CLE program *may* extend beyond just the admission of rap lyrics.

> 1. Court audiences are receptive to implicit bias information[,] . . . 2. Complexity of the implicit bias subject matter demands time and expertise[,] . . . 3. *Tailor implicit bias program to specific audiences*[,] . . . 4. Content delivery methods affect participant understanding and satisfaction[,] . . . 5. Dedicate time to discuss and practice strategies to address the influence of implicit bias[, and] . . . 6. develop evaluation assessment with faculty [of the program.]
>
> *Id.* at 21-31 (emphasis added).

233 CASEY ET AL., *supra* note 230, at 21; *see also* Lee Jussim, *Mandatory Implicit Bias Training is a Bad Idea*, PSYCH. TODAY: RABBLE ROUSER (Dec. 2, 2017), https://www.psychologytoday.com/us/blog/rabble-rouser/201712/mandatory-implicit-bias-training-is-bad-idea. In all the states, at least eighty percent of the participants expressed satisfaction with the program in their respective state. CASEY ET AL., *supra* note 230, at 21.

234 CASEY ET AL., *supra* note 230, at 23.

235 It is the position of this Note to suggest that judges, *rather than jurors, may* be a more efficient path to address potentially prejudicial or inflammatory evidence due to court resources, time, knowledge, etc.

236 Rachlinski et al., *supra* note 229, at 1225.

237 *See, e.g.*, *Judicial Education in Illinois, Judges*, ILL. CTS., https://www.illinoiscourts.gov/judges/judicial-education-in-illinois/ (last visited Mar. 22, 2022) ("The Supreme Court of Illinois requires each active Illinois judge to attain 30 hours of continuing judicial education every two years through attendance at the biennial *Education Conference*."). *But see* TENN. SUP. CT. R. 2.03(g) (providing that Tennessee judges are not required to undergo this training if they are a part of the federal system).

238 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012). It is suggested that trial judges improve the conditions in which they make decisions, such as adjusting their mindsets and reducing time restraints, in order to avoid making an emotional decision. *Id.* at 1177-78.

239 Jussim, *supra* note 233. It has been suggested that there is a potential for backlash from the beneficial aspects of implicit bias training if mandatory. *Id.* However, on a volunteer basis, it could have a long lasting, sustainable impact in curbing one's personal biases. Emerson, *supra* note 229. An important part of implicit bias training is attainable, reasonable, and intentional goals. *Id.*

With further education on implicit bias, specifically regarding rap such as drill, trial court judges will be better equipped to use their discretion.[240] Judges may comprehensibly understand the risk of prejudice often substantially outweighs any probative value derived from admission of defendant-authored rap lyrics into evidence. The admission of drill rap and the risk of it being misinterpreted should be avoided whenever possible; judges aware of this understand it is best to avoid it before the jury has a chance to misinterpret it and cause undue prejudice to the defendant.[241] However, it is unrealistic to presume that all judges would have this training before a relevant case is on their docket and that the training could address this issue.[242]

B. Use Rap Experts to Alleviate Bias

Another possible solution to limit undue prejudice to a defendant with the admission of their lyrics as evidence would be the use of an expert to testify or clarify the conventions and context of rap.[243] While some courts

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240 Jason A. Cantone, *Federal and State Court Cooperation: Effectiveness of Implicit Bias Training*, FED. JUD. CTR., https://www.fjc.gov/content/337738/effectiveness-implicit-bias-trainings (last visited Feb. 27, 2021). The conductors of this study liken implicit bias training to kicking a bad habit (e.g. avoiding prejudice). *Id.* They presented five strategies to use to reduce bias in their own lives:

> 1. Replace stereotypical responses with non-stereotypical responses and reflect on why the stereotypical response occurred[,] 2. Imagine counter stereotypic individuals[,] 3. Obtain specific individual information about members of groups to prevent stereotypic inferences[,] 4. *Take the perspective of members of stereotyped groups*[,] 5. Seek out opportunities to interact with members of stereotyped groups.

Id. (emphasis added). One example would include judges putting themselves in the defendant's shoes as if the lyrics were their own.

241 Holmes v. State, 306 P.3d 415, 423 (Nev. 2013) (Saitta, J., dissenting). The dissenting judge felt that the probative lyrics states ought to admit pertain to crimes which are common "fodder" to the rap music genre. *Id.* at 424. Furthermore, given the slight probative value as compared to prejudicial effect in determining Defendant's guilt or innocence and lifetime sentence associated with the charge, she did not feel it was probative enough to warrant the risk. *Id.* at 423.

242 It is important to note that training alone may not be enough to avoid implicit bias. Research has found that older adults are more likely to create and maintain stereotypical inferences than younger adults, causing them to be more prejudicial. *See* Gabriel A. Radvansky et al., *Stereotype Activation, Inhibition, and Aging*, 46 J. EXPERIMENTAL SOC. PSYCH. 51 (2010). Implicit prejudice can be measured by the Implicit Association Test ("IAT"). *Id.* Results from this test have "indicated that older adults are less successful than younger adults in regulating automatic bias toward African Americans, but show no differences in degree of bias itself." *Id.* at 52. This *may* be an additional hurdle in judicial bias as, for example, the majority of municipal court judges are over the age of forty. *See Municipal Court Judge: Demographics and Statictics In The US*, ZIPPIA, https://www.zippia.com/municipal-court-judge-jobs/demographics/ (last visited Feb. 3, 2022).

243 *See* United States v. Harris, No. 12-cr-205-T-17MAP, 2016 WL 4204633 (M.D. Fla. July 28, 2016). The judge allowed the use of proffered expert testimony to aid jurors distinguishing from common, metaphorical meanings and literal interpretations from Defendant's authored rap lyrics. *Id.* at *5.

have not opposed this as a solution,[244] other courts have not found it necessary.[245] The benefits of this as a solution include someone to point out common tools which artists use in rap and may allow jurors to properly give the evidence an adequate weight in its admission.[246] Since judges have discretion in admission of evidence, the use of an expert may help jurors distinguish from braggadocio, even inflammatory, lyrics prevalent in the genre and something else.[247] When distinguishing between puffing and probative, use of a rap expert could be a great asset to have—especially in a Motions in Limine hearing.[248] The shortcomings of use of rap experts include the time, money, and resources tendering an expert on something which may not be the most efficient use of time.

Under the Federal Rules of Evidence Rule 702,[249] the factfinder could benefit from an expert's knowledge within the artistic conventions, nuances, and culture.[250] Given the inclusive notes of advisory committee on FRE 702, one would perceive an average jury, around fifty years of age,[251] would likely

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244 *Id.*; *see also* United States v. Herron, No. 10-CR-0615, 2014 WL 1871909, at *9 (E.D.N.Y. May 8, 2014).

245 United States v. Wilson, 493 F. Supp. 2d. 484 (E.D.N.Y 2006).

246 *See Harris*, 2016 WL 4204633.

247 *Id.* Judge McCoun III held, in response to Defendant's notice and disclosure of Rap Expert Witness Dr. Kubrin:

> In my view, given the Government's broad and damning interpretation of Defendant Green's rap lyrics, expert testimony which educates a predominantly white jury on the nature of rap and gangster rap videos/lyrics and which suggests a sound basis for a different interpretation of the lyrics is reasonable and may assist the jury in weighing the import of this graphic evidence. While this may be novel, I conclude it is appropriate.

Id. at *4.

248 The aid of an expert *may* help to distinguish generic or common rap expressions, symbols, styles, and preconceived notions from something else. It is the position of this Note that defendant-authored lyrics may be sufficiently probative and need not be excluded entirely. Use of experts may minimize undue prejudices while also allowing juries to make an informed ruling on relevant evidence.

249 FED. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.").

250 *Harris*, 2016 WL 4204633, at *13. Judge McCoun III held that the use of rap expert witness Dr. Charis Kubrin, PhD as an aid or educator to a predominantly white jury on the nature of rap and gangster rap videos and lyrics was reasonable and may assist the jury in weighing the graphic evidence. *Id.* at *5.

251 SHAMENA ANWAR ET AL., THE ROLE OF AGE IN JURY SELECTION AND TRIAL OUTCOMES (2012), https://www.nber.org/system/files/working_papers/w17887/w17887.pdf. This study looked at the average age of jurors in this study's pool (Florida) and found *on average* the age of jurors was above forty-nine years old (49.6 and 49.9 between counties). *Id.* at 9-10. Furthermore, the study found that there is a sharp difference in conviction rates between jury pools over the age of fifty and those pools with an average age under fifty. *Id.* at 10. "The results indicate that increasing the average age of the jury pool by one year increases conviction rates by one percentage point." *Id.* at 14; Shumejda, *supra* note 221, at 32-33; *see also* Dennis, *supra* note 16, at 30.

benefit from the use of a tendered expert.[252] The layman may understand that rap is widely popular and commercially successful, but not understand the conventions and metaphorical or literal translations.

In a commercial industry obsessed with "keeping it real" or "realness," it is necessary to understand much of its techniques.[253] For example, a professor having spent years studying the industry, themes,[254] style, flow, and conventions could properly explain that rap lyrics do not necessarily rhyme.[255] Furthermore, in the "rap game," lyrics that are more misogynistic will sell more and be perceived better.[256] Additionally, the more violent lyrics may be tending to get the artist more respect in the community.[257] Together, the more violent and misogynistic the lyrics, the more songs they are going to sell.[258] Rap, such as drill, is sensational and commercially successful—a means to a better life.[259] While courts and prosecutors may think they understand the art—these experts would aid with context to the rhymes.

Rap experts would have some scholarship in the field, possibly the history and evolution of the genre, themes, commercial industry, the artistic conventions, and the social constraints of people perceiving them. This knowledge, be it through sociology, linguistics, African American studies, or criminology, or anthropology, would lend a hand to factfinders in approaches defendant-artists may take in their craft.[260] This knowledge would likely pass

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252 Regarding Federal Rule of Evidence 702, the advisory committee wrote:

> There is no more certain test for determining when experts may be used then the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. . . . When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.

FED. R. EVID. 702, advisory committee's note to proposed rules.

253 Dennis, *supra* note 16, at 36; *see also* Ilan, *supra* note 14, at 1003-04 (2020).

254 Kubrin & Nielson, *supra* note 221, at 195. ("From her content analysis of Oduwole's lyrics and in comparison to her own research, *she explained that the themes found in Tosin's lyrics were consistent with those found in gangsta rap more generally*, namely, establishing credibility as a skilled rapper, money and material wealth, misogyny and the objectification of women, and most prominently, violence.").

255 *Id.* Intros and outros are often spoken, unrhymed words that set the tone for an album to come. *Id.*

256 Kubrin & Nielson, *supra* note 221, at 195; *see also The Threatening Nature of . . . Rap Music? Charis Kubrin TedxOrangeCoast*, *supra* note 12.

257 Ilan, *supra* note 14, at 1003-04 ("[R]appers are rated by authenticity and their relative merits are discussed in terms of who is the most violent . . . . [Rappers with a] violent reputation (as opposed to necessarily committing many violent acts) raises rappers in an economy of street-cultural standing, affirming them as more authentic.")

258 Kubrin & Nielson, *supra* note 221, at 195; *see also The Threatening Nature of . . . Rap Music? Charis Kubrin TedxOrangeCoast*, *supra* note 12.

259 Stehlik, *supra* note 21.

260 United States v. Herron, No. 10-CR-0615, 2014 WL 1871909, at *6 (E.D.N.Y. May 8, 2014). In response to Defendant's motion to tender an expert in rap, Judge Garaufis wrote, "[t]he district court's inquiry into the reliability of expert testimony is 'flexible,' and *Daubert* factors are neither exclusive nor dispositive, they 'neither necessarily nor exclusively appl[y] to all experts or in every

the 704(a) requirement of "other specialized knowledge" in understanding the lyrics and explaining those to the jury.[261] Scholars, Dr. Charis Kubrin and Erik Nielson have spent over a decade studying rap and its usages both in and out of the courtroom.[262] They have been consulted by multiple courts and lawyers to lend their knowledge as a tool. Their data is based on scholarship in the field of rap, criminology, and sociology.

As discussed above, the genre of rap as a whole, and particularly the sub-genre of drill, contains many references to crime, violence, drugs, or other crime, and it is important to clarify what is pervasive to the whole when evaluating the probative value of a defendant's song. These "experts" could testify and use their knowledge to help the jury understand the proper weight.[263] In *Harris*, Kubrin testified to show the common phrases between defendant Green's lyrics and other rap lyrics.[264] It was intended to show that rap music videos often share common elements such as flashing money, acting out fictitious drug deals, and other crimes. It was intended that she describe the conventions of defendant's lyrics *within the context of other gangster rap music*, explaining how rap is not meant to be autobiographical or taken literally, but merely metaphorically.[265]

Courts acknowledge that admissible defendant-authored lyrics should be specific to the alleged crime rather than reflect common themes of the rap genre.[266] When evaluating whether defendant-authored lyrics meet this specificity criteria, the court should consider the use of a rap expert. The use of rap experts, when evaluating a piece's probative weight, would also aid a judge's ability to conduct a 403-balancing test—before any risk of jurors misinterpreting the information.[267] The benefits of this proposed solution would be mitigating risks of undue prejudice to a defendant, while an expert may distinguish braggadocio puffing from a confession. However, this solution has its own drawbacks. How would you go about the qualifications for tendering a witness as a "rap expert?" How much time and resources would be spent bringing in an expert, and after doing so, and would this be

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case.'" *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 139 (1999)). "The district court has 'the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.'" *Id.* (quoting *Kumho Tire Co.*, 526 U.S. at 142).

261 FED R. EVID. 702.

262 *Expert Witnesses*, RAP ON TRIAL, http://endrapontrial.org/expert-witnesses/ (last visited Feb. 27, 2021).

263 *See generally* United States v. Harris, No. 12-cr-205-T-17MAP, 2016 WL 4204633 (M.D. Fla. July 28, 2016); *See also Herron*, 2014 WL 1871909, at *8-9.

264 *Harris*, 2016 WL 4204633.

265 *See id.*

266 *See* State v. Skinner, 95 A.3d 236, 252 (N.J. 2014). ("Our sister jurisdictions rarely have admitted a defendant's rap lyric compositions into evidence without a demonstration of a strong Nexus between subject matter of the lyrics and the underlying crime.").

267 It is the position of this Note that the ideal time for this determination would be handled in Motions in Limine or other pre-trial hearings.

the most efficient use of court resources? Drill rap, like any art, is complex in nature—there cannot be a mechanical test to evaluate a work's hyperbole from literal meaning.[268]

Even explicit jury instructions may not be enough to avoid a potential substantially prejudicial effect.[269] Even with "proper" instructions,[270] it may not be enough.[271] Not even awareness of existing implicit bias will remedy the problem with jury members. Individuals must be aware of their own *personal* implicit bias and avoid succumbing to it. Not only is it an *unrealistic* waste of the court's time, money, and resources to educate and explain implicit biases to the jury,[272] it is arguable that it is not the justice system's place or purpose to do so.[273]

Rap experts, with knowledge of drill rap, may not be enough to mitigate all damages of potential prejudice to artists—but would reasonably be able

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268 Dennis, *supra* note 16, at 31. Advocates for a ban on rap as evidence, or a "Rap Shield," point to the difficulty in applying mechanical tests to complex art such as rap. *Id.*

269 *See generally* Broeder, *supra* note 130, at 744 (discussing data collected about a jury's ability to ignore inadmissible evidence). On admission of defendants' rap lyrics by prosecutors, Andrea L. Dennis writes: "[s]uch narrative frameworks are used to satisfy your expectations—both conscious and unconscious." Dennis, *supra* note 16, at 2. *See generally* Fried, *supra* note 30, at 2135. In *State v. Berhe*, the Washington Supreme Court recognized that "when explicit or implicit racial bias is a factor in a jury's verdict, the defendant is deprived of the constitutional right to a fair trial by an impartial jury. . . . Meanwhile, implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness." State v. Berhe, 444 P.3d 1172, 1178 (Wash. 2019).

270 FED. R. EVID. 105; *see also* United States v. Gomez, 763 F.3d 845, 860-61 (7th Cir. 2014) ("When given, the limiting instruction should be customized to the case rather than boilerplate."). "A good limiting instruction needs to be concrete so that the jury understands what it legitimately may do with the evidence." *United States v. Jones*, 455 F.3d 800, 811-12 (7th Cir. 2006) (Easterbrook, J., concurring). "[T]o 'effectively distinguish appropriate from inappropriate inferences,' jurors should be told . . . the specific purpose for which the evidence is offered and that they should not draw any conclusions about the defendant's character or infer that on a particular occasion the defendant acted in accordance with a character trait." *Gomez*, 763 F.3d at 860-61 *(quoting Jones*, 455 F.3d at 812 (Easterbrook, J., concurring)).

271 *See* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (noting that asking jurors to disregard a defendant's prior bad acts requires "mental gymnastics which is beyond, not only their powers, but anybody's else"); *see also* R.T. v. State, 848 N.E.2d 326, 332 (Ind. Ct. App. 2006) ("Jurors are presumed to follow a trial court's instruction." Trial judge limiting scope of how Jury may view defendant's authored lyrics.").

272 In *Pena-Rodriguez v. Colorado*, the Court stated:

> *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, jurorreports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it."

Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 868-69 (2017) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (1982) (Rehnquist, J., concurring in result)).

273 Some may portray these steps as either unnecessary or judicial activism by a court.

to help jurors give it appropriate weight.[274] Time spent arguing, holding hearings over its admission, and the expense of hiring experts may be a waste of time, resources, or inefficient to the Court. However, they can be avoided if the admission of improper rap lyrics does not happen. Even with the appellate system, it is hard to show examples of prejudices from implicit bias' invisible influence. You cannot see it; you cannot instruct it away.[275] Simply because explicit biases or prejudices are more visible, does not negate the effect of implicit bias.[276] It is still there. It is still felt. It is just harder to show.

Potential limitations include the time and resources necessary for an expert to review the offered material (i.e., lyrics, details of the case, etc.), produce a statement, and present their findings to the factfinder. Additionally, this solution may not prevent all potential undue prejudices as an expert can merely present their findings; it then falls on the factfinder to analyze the information at hand.

C. When Admission is Necessary, Follow *State v. Skinner*

As the court outlined in *State v. Skinner*, there should be an "unmistakable factual connection" between the lyrics and the charged crime.[277] Scholars have found only once that another genre of defendant-authored lyrics were brought into court, punk music.[278] Citizens, who may not fully understand the Federal Rules of Evidence, perceive this disparity as a "culture war" with rap and its subgenres, such as drill rap.[279] This use and misuse of admission of defendant-authored lyrics by prosecutors exacerbates the mistrust between artists, communities, and the perception of a racist justice system.[280] Federal Rule of Evidence 102 states that "[t]hese rules

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274 *'Rap on Trial', supra* note 124; United States v. Herron, No. 10-CR-0615, 2014 WL 1871909, at *6 (E.D.N.Y. May 8, 2014) (denying Defendant's motion to preclude rap videos and related video and audio). However, the court also denied the Government's motion to preclude testimony of Defendant's proposed expert. *Id.*; *see also* Dennis, *supra* note 16, at 32. (pointing out that rap experts may be able to discern between commonplace and general braggadocio and factual conventions—with the goal to understand rap lyrics weight, if any).

275 *See generally* Araibi, *supra* note 13, at 805.

276 State v. Berhe, 444 P.3d 1172, 1178 (Wash. 2019).

277 State v. Skinner, 95 A.3d 236, 252 (N.J. 2014); 29 AM. JUR. 2D *Evidence*, *supra* note 39; *see also* discussion *supra* note 39.

278 State v. Koskovich, 776 A.2d 144 (N.J. 2001); Dennis, *supra* note 16, at 2-3.

279 Dina LaPolt, *Rap Lyrics Now Admissable as Court Evidence: A Dangerous Precedent (Guest Column)*, VARIETY (Jan. 5, 2021, 9:30 AM PT), https://variety.com/2021/music/opinion/rap-lyrics-admissible-evidence-dangerous-precedent-1234878315/ (discussing the aftermath of the *State v. Montague* case).

280 Drakeo The Ruler (@IamMRMOSELY), TWITTER (Jan. 9, 2019, 10:23 PM), https://twitter.com/IamMRMOSELY/status/1083217629869830144 ("I NO LONGER WANNA BE A RAPPER ANYMORE. THANK DETECTIVE HARDIMAN FOR TRYNA USE MY LYRICS AGAINST ME. I WILL BE PULLING ALL MY MUSIC DOWN TOMORROW. U CRUSHED MY DREAMS #THANKDETECTIVEHARDIMAN ☹."); NIELSON & DENNIS, *supra* note 15, at 69. Leading scholars on the practice of admitting music as evidence, have found more

should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[281] Judges, based on the disparity and the rate of admission for defendant-authored rap lyrics, do not *avoid* the appearance of impropriety—even with a limiting instruction.[282]

VI. CONCLUSION

The best way to avoid potential undue prejudices in the admission of defendant-authored rap lyrics—which the court may not efficiently circumvent—is to avoid the juror hearing it whenever possible.[283] The damages, even with accompanying instructions, may not be efficiently avoided. It *may* be a waste of time and resources to try to do this "right," so the purpose of the Federal Rules of Evidence is better served avoiding the jury hearing this evidence.[284]

Judicial discretion in excluding relevant evidence on the grounds of prejudice, confusion, or a waste of time, when read in light of the rule pertaining to the purpose and construction of the Federal Rules of Evidence, contemplates a flexible scheme of discretionary judgments by trial courts designed to minimize the evidentiary cost of protecting parties from unfair prejudice.[285] Judges properly hold the discretion in the admission of evidence, but they should consider the cost, time, and resources when evaluating what the jury should be able to hear.[286]

A judge educated in the implicit bias a defendant-artist faces if authored lyrics are entered as evidence will understand that admission rarely aligns with the purpose of the Federal Rules of Evidence and should be avoided as

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than 500 cases in which rap has been used in a criminal trial. NIELSON & DENNIS, *supra* note 15, at 69.

281 FED. R. EVID. 102. The official commentary on the Code of Conduct for U.S. judges states, "[a] judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen." Judicial Conference, *Chapter 2: Code of Conduct for United States Judges*, *in* 2 ETHICS AND JUDICIAL CONDUCT, GUIDE TO JUDICIARY POLICY 4 (2019).

282 NIELSON & DENNIS, *supra* note 15; *see supra* note 44; *supra* note 281; FED. R. EVID. 105.

283 *See* Hunt, *supra* note 119, at 254; Sonenshein, *supra* note 119, at 262. *See generally* Broeder, *supra* note 130, at 744 (discussing data collected about a jury's ability to ignore inadmissible evidence).

284 FED R. EVID. 102. Furthermore, there *are* times when it is necessary to admit sufficiently probative lyrics to ascertain the truth.

285 United States v. Jackson, 405 F. Supp. 938, 945 (E.D.N.Y. 1975) ("Rule 403, read in the light of Rule 102, contemplates a flexible scheme of discretionary judgments by trial courts designed to minimize the evidentiary costs of protecting parties from unfair prejudice.").

286 29 AM. JUR. 2D *Evidence*, *supra* note 39; Shumejda, *supra* note 121, at 32-33; *see also* Dennis, *supra* note 16, at 30.

often as possible.[287] The resources are already in place for CLE programs, and judges with a better knowledge of implicit bias will better apply the Federal Rules of Evidence already in place.[288] With this knowledge, judges will understand the implications associated in admitting rap, such as drill rap, as evidence in a trial under 404(b)—then they are better able to apply the 403-balancing test.[289] Here, there would be no substantive changes to the FRE, it would be an efficient use of resources (i.e., expert, time, etc.), and it would limit the prejudicial effect as often as possible.

Alternatively, judges should consider the use of expert testimony or consultation in weighing lyrics' probative and prejudicial values in determining admissibility.[290] Just because the rap or lyrics are relevant[291] and the jury *may* see non-propensity purposes, it does not mean they need to hear them,[292] especially when they are not the issue at hand.[293] When considering the expenses it would take to educate a jury on their own implicit bias, a more reasonable solution would be avoiding this problem whenever possible by not admitting lyrics as evidence. In cases which the lyrics are deemed admissible, the use of experts *may* also give the factfinder the proper weight of probative value in lending knowledge to give necessary context to the defendant-authored lyrics.[294]

When the rap lyrics themselves do not reference or are not the crime charged, admission of defendant-authored rap lyrics into evidence may be considered unjustifiable expenses or delays that contradict the purpose and construction of the Federal Rules of Evidence.[295] As outlined in Rule 102, "[t]hese Rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, [and] promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[296] The effort, time, and expenses potentially

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287 To not unduly prejudice a defendant, evidence should be sufficiently probative. FED. R. EVID. 403; FED. R. EVID. 102.

288 *See generally* Fried, *supra* note 30.

289 The solution involves several "checks and balances" to give judges a better ability to use the tools and rules that are currently in-place.

290 FED. R. EVID. 403; FED R. EVID. 404(b).

291 Circuit Judge Motz held that the district court's error, if any, in admitting lyrics posted to Facebook was harmless. United States v. Recio, 884 F.3d 230, 235-38 (4th Cir. 2018). Judge Motz also stated that "[courts] rarely reverse such decisions because they 'are fundamentally a matter trial management.'" *Id.* at 235 (quoting United States v. Kiza, 855 F.3d 596, 604 (4th Cir. 2017)).

292 *'Rap on Trial'*, *supra* note 124.

293 Writing for the United States Court of Appeals for the Fifth Circuit, Chief Judge Brown wrote about a confrontation between Federal Rules of Evidence 608(b) and 102, discussing that a balancing of the purposes behind both rules is appropriate. United States v. Opager, 589 F.2d 799, (5th Cir. 1979).

294 While all it has been said that all evidence is prejudicial, it is important for the factfinder to reach their conclusions based on reason and fact rather than emotion. Fed. R. Evid. 403.

295 29 Am. Jur. 2d *Evidence*, *supra* note 39.

296 Fed. R. Evid. 102.

needed to do this "right," could and would be better served by not hearing rap lyrics as evidence in trials as often as possible.