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## Rap on Trial: Race, Lyrics, and Guilt in America

Erik Nielson

University of Richmond, enielson@richmond.edu

Andrea L. Dennis

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# INTRODUCTION

McKinley Phipps was something of a prodigy. Born into a family of artists and raised in New Orleans's Third Ward, Phipps always had a gift for words. As a boy, he began writing poetry, which he sometimes recited at local coffee shops, but by the late 1980s, as rap music was becoming a national sensation, he saw the chance to turn his love for words into a career.

At age eleven, he released his first video, rapping as "Lil Mac." Then in 1990, at the age of thirteen, he released his first album, *The Lyrical Midget*. Featuring production from fellow New Orleans artist Mannie Fresh, who would go on to become one of hip hop's most celebrated producers, it was one of the earliest commercial hip hop efforts to emerge from New Orleans.

One of the songs from the album, "I Need Wheels," captures the frustration that many children experience when they long for independence they can't have. Straddling the line between his aspirations and his reality, Lil Mac raps about needing a car of his own, even though he's several years too young to drive. And he claims to have women all across the city, even as he's begging his father to buy him a car so he can visit them: "So Daddy buy me a car / I got too many girlfriends that live too far / And then every weekend I'm stuck at home / With this fine girl teasing me on the telephone."

On the surface, it's a song about a kid who wants a car so he can meet girls. It's a song that teens from all walks of life can relate to. But it also speaks to the sense of being trapped that Phipps, and many kids in the poorer neighborhoods of New Orleans, felt on a daily basis.<sup>1</sup> By

1990, the city was experiencing record levels of violent crime and had one of the highest black poverty rates among large cities in America. As such, it offered limited opportunities for upward mobility to young black men, so Lil Mac's fear that without a car he might be "stuck at home" would have resonated in a community where being "stuck" often meant being poor, in prison, or worse.

Ironically, Phipps had already found the vehicle he needed to escape: rap music. His debut record not only rode the rising tide of rap music across the country but also foreshadowed the rise of New Orleans as a hip hop mecca, thanks in large part to the success of No Limit Records, founded by rapper Master P. At its peak in the 1990s, No Limit was producing albums at a dizzying pace and was expanding its roster to include the likes of Mystikal and Snoop Dogg. In 1998 alone, No Limit released twenty-three albums and sold nearly 15 million copies.<sup>2</sup>

One of those albums, *Shell Shocked*, belonged to Phipps, now rapping as Mac. He had declined offers from bigger labels, such as New York's Def Jam Recordings, to join No Limit, and he was quickly recognized as one of the most talented lyricists on the label. While he never led a life of crime himself, Mac was skilled at producing the gritty, often violent lyrics that helped No Limit sell records. As Mac himself noted in a 2016 interview, "We're in this to make this money, and we're feeding a market that demands this type of content. At the end of the day, I wasn't walking around shooting people in real life, and I wasn't walking around selling drugs to people in real life. . . . I made the kind of music I made because to me at that time it appeared to be the most lucrative route."<sup>3</sup>

After hearing the lyrics in *Shell Shocked*, delivered by a rapper who sometimes called himself "The Camouflage Assassin," listeners probably would've been surprised to learn that Mac had no criminal record whatsoever and that he was, in fact, a mild-mannered young man who

liked to read poetry and still called his father “Daddy.” Likewise, most people would’ve been surprised to learn that No Limit Records, with its stable of flashy artists who were rapping about guns and drugs, was actually a highly disciplined, tightly run business. Master P had an incredible knack for anticipating the demands of his audience, and he was able to meet those demands quickly, sometimes recording and releasing an album in just a few weeks.<sup>4</sup> To make the No Limit system work, he demanded discipline from his artists as well, forcing them to stay as focused on the end game as he was.

That end game, of course, was money, and No Limit was making a lot of it. By 1999, Master P made *Fortune* magazine’s “40 Richest Under 40” list, with an estimated net worth of \$361 million.<sup>5</sup> He was just twenty-nine years old. While much of the country didn’t know who he was or that his No Limit enterprise had grown to include a wide range of other businesses, he and the No Limit family were certainly well known in New Orleans. They flaunted their money and celebrated their success openly. When Master P bought a mansion in Baton Rouge’s exclusive Country Club of Louisiana, next to former Louisiana governor Edwin Edwards, many saw the improbable and inspiring rise of a black kid from the projects of New Orleans who had made it to the highest levels of power.

But many others saw something different. They saw black men getting rich off a form of entertainment they considered an affront to “traditional” American values. And they saw a group of black men who weren’t afraid to call attention to police harassment, abuse, and corruption. One of Master P’s earliest songs, “Crooked Ass Law,” set the tone for subsequent songs from the No Limit label, which were sometimes openly critical of and defiant toward the police. In “Runnin’ from the Police,” a song by C-Murder (Master P’s brother) and No Limit labelmate Mystikal, C-Murder raps, “Every time I see the boys in blue / I wanna run and get the gun and start bustin’ for fun.”

Perhaps unsurprisingly, No Limit artists often found themselves the targets of police surveillance and harassment. Just driving a short distance could be provocation for a police stop. In a recent interview, Baton Rouge rapper Lil Boosie (who now raps as Boosie Badazz), also known for being critical of the police in his songs, spoke to the way he and others were routinely singled out by police. One time, for example, police pulled Boosie over, and before letting him go, they threw thousands of dollars of his cash across a freeway. Another time they took a knife to the upholstery in his car, just to make a point.<sup>6</sup>

In that kind of environment, it makes sense that Master P and his artists would adopt military imagery in their aesthetic, most obvious in their penchant for camouflage clothing. Perhaps they saw themselves as soldiers in a culture war, with camouflage signaling their recognition that visibility can create vulnerability.

No artist came to realize that more than Mac.

On the night of February 20, 2000, he was performing during an open mic night at Club Mercedes in Slidell, Louisiana, a small venue about thirty miles outside of New Orleans. A fight broke out in the tightly packed crowd, and a young fan, Barron Victor Jr., was shot and killed in the melee. When he heard the gunshots, Mac initially made his way to the back door before returning inside the club to make sure his parents, who were there collecting money for the performance, were safe. He drew his own (legally registered) gun for protection, meaning witnesses saw him with a gun in his hand, a fact that authorities seized on. They immediately identified Mac as the primary suspect and arrested him later that evening.

The ensuing process was a nightmare.<sup>7</sup> Numerous witnesses at the scene had described a shooter who looked nothing like Mac. The gun Mac was carrying hadn't been fired, and police never recovered the weapon that had been. No other forensic evidence tied Mac to the crime. *Another man even went to police and confessed to the shoot-*

*ing*. Nevertheless, authorities charged Mac—who had no criminal record—with first-degree murder. At trial they produced a number of their own eyewitnesses who, nearly fifteen years later, recanted their testimony completely, revealing that prosecutors threatened to put them in jail if they didn't finger Mac as the shooter. One of them, a pregnant woman named Yulon James, was told she could identify Mac as the killer or have her baby in prison.<sup>8</sup>

The trial itself, taking place just weeks after the September 11, 2001, attacks, revealed just how damaging Mac's rap career was to his case. The prosecutor took great pains to depict him as the brutal character in his songs. Taking full advantage of people's fear and anxiety after 9/11, he intentionally repeated Mac's moniker—the Camouflage Assassin, a name inspired by Mac's love of kung fu movies—throughout the trial. And he quoted liberally from Mac's 1998 album. "This defendant who did this is the same defendant whose message is, 'Murder murder, kill, kill, you fuck with me you get a bullet in your brain,'" the prosecutor said during his closing argument. "You don't have to be a genius to figure out that one plus one equals two."<sup>9</sup>

Jurors didn't know the prosecutor had selectively grabbed quotes from different songs, juxtaposing lyrics in a way Phipps never intended. Phipps was rapping about his Vietnam veteran father in the song "Shell Shocked" with the line "Big Mac, that's my daddy, rotten dirty straight up soldier . . . You fuck with me, he'll give you a bullet in your brain." The lyrics do not even contain the line "you fuck with me you get a bullet in your brain," as the prosecutor claimed. And the line "Murder, murder, kill, kill" is from a different song altogether.

Louisiana is a special place. Aside from consistently vying for the title of America's (and therefore the world's) incarceration capital, until very recently it was one of two states where jury verdicts didn't have to be unanimous to convict (the other is Oregon).<sup>10</sup> In a throwback to Jim Crow, Louisiana permitted guilty verdicts even if up to

two (out of twelve) jurors found a defendant not guilty.<sup>11</sup> In November 2018, Louisiana voters finally passed a constitutional amendment requiring unanimous verdicts in all felony trials.

That change would have led to a very different outcome for Mac. That's because even after the all-white jury was exposed to coerced witnesses and a barrage of mangled rap lyrics, two jurors held out. Today that would've been enough to avoid a guilty verdict, but in 2001 it wasn't. Mac was convicted of manslaughter, a lesser charge, and was sentenced to thirty years in prison, a term he is still serving despite mountains of evidence that he was wrongly convicted. He refuses to accept parole because that would require him to admit his guilt first.

Years after the verdict, the jury foreman revealed in an interview that the lyrics presented to the jury certainly helped inform their decision. "The music—the lyrics—they played all that shit [in court]," he said. "I don't listen to that shit, but the music might have been the problem. The rap got his mind all messed up. He was living a life that he thought he was a gangsta. He was making it big time with the gold chains and all that shit that went with it. To shoot somebody in a public place on the dance floor, you gotta think you're a bad son of a bitch."<sup>12</sup>

One might forgive Mac if he eventually succumbed to bitterness after serving nearly twenty years in prison for a crime he almost certainly didn't commit. But that's not Mac. Still gentle and mild-mannered, he has been a model inmate and a man with seemingly endless patience in a system that has been content to throw men like him away.

In a telling postscript, in the years following Mac's incarceration, both C-Murder (Master P's brother) and Lil Boosie were also charged with murder. In both cases, authorities used, or attempted to use, their lyrics and rap images against them.

Boosie was lucky; he was acquitted. C-Murder was not. He is serv-

ing a life sentence, even as the eyewitnesses against him, as in Mac's case, have recanted their testimony, claiming that police, who were openly hostile to rap music, coerced them all along.<sup>13</sup> Former No Limit label-mates, C-Murder and Mac are now being housed in the same Louisiana prison, a reminder that in America's police culture, rapping can be a very dangerous business.

Stories like these are playing out all across the country: with alarming regularity, young men are finding themselves in handcuffs, in courtrooms, and often in prison because of their rap lyrics. Rather than acknowledging that these lyrics are the result of creative license, the criminal justice system has effectively denied rap music the status of art, allowing police and prosecutors to present it to juries as autobiography rhymed over a beat—often with devastating consequences.

No other fictionalized form, musical or otherwise, is treated this way in court. That's why we call this book *Rap on Trial*. It's not art on trial. It's not music on trial. It's only rap.

From its origins in the streets of the Bronx, New York, in the late 1970s, rap music has emerged into today's mainstream. Once an outsider musical art form predicted to have a short lifespan, rap music is now the most listened-to genre in the United States. It has become part of a multibillion-dollar industry, one used to market products as common and diverse as sneakers, soda, deodorant, internet service, clothing, food and alcohol, headphones, sports drinks, automobiles, water, and cellphones.<sup>14</sup>

With commercial success has come critical acclaim as well. Rap lyrics are included in numerous literary anthologies, taught at major universities, and acknowledged by even the most traditional institutions for their imagination and sophistication. In 2018, for example, Kendrick Lamar, one of rap's most commercially successful artists, was awarded the Pulitzer Prize in Music for his album *DAMN.*,



which the Pulitzer committee described as “a virtuosic song collection unified by its vernacular authenticity and rhythmic dynamism that offers affecting vignettes capturing the complexity of modern African-American life.”<sup>15</sup>

Modern rap music is a rich, complex art form. Research tells us that listening to and creating rap music can be a healthy aspect of adolescence and young adulthood. At the most basic level, it can simply serve as a creative and entertaining outlet. But it also can facilitate identity development, support emotional intelligence, and provide a safe space for experimentation. For these reasons and others, hip hop–based education has become increasingly influential in secondary and post-secondary contexts.<sup>16</sup> In many other contexts—social, educational, and clinical—hip hop is a powerful therapeutic tool.<sup>17</sup> And listening to hip hop has been shown to increase youth involvement in social and political activism.<sup>18</sup>

For many youth, beyond just personal development, writing rap music is a way to make a living and advance their social and economic standing. Becoming a rapper is a legitimate professional goal, particularly for individuals who are otherwise shut out of the economic mobility game. Even those who don’t become the next Jay-Z or Kendrick Lamar—two of rap’s most successful artists—have a wide range of career opportunities open to them. Hip hop is, after all, big business.

Despite all these prosocial aspects, kids who produce or listen to rap are often viewed as dangerous or antisocial. Particularly in public spaces, such misperceptions can leave kids vulnerable.

Consider Jordan Davis. In November 2012, seventeen-year-old Davis, who was black, was shot and killed by Michael Dunn, a white man. Dunn was infuriated by Davis and his three friends, who were playing rap music loudly through the speakers of their car stereo at a Florida gas station. Dunn had pulled his vehicle into the station, adja-

cent to the boys' vehicle. Dunn allegedly said to his girlfriend, who was in the car, "I hate that thug music," or referred to the music as "rap crap."<sup>19</sup> Dunn asked that the music be turned down, and an argument began when the boys refused. Dunn subsequently opened fire on the vehicle from the outside, killing Davis, who was seated in the rear of the vehicle. No gun or weapon was found in the car. Dunn claimed he acted in self-defense because Davis was threatening him with a gun or stick and he feared for his life. After two trials, Dunn was convicted of murder.

Or consider Michael Brown, whose interest in rap caused him to be demonized in the news media. In the early morning hours of August 9, 2014, eighteen-year-old Brown was shot and killed by white police officer Darren Wilson. Shortly after, on the day of Brown's funeral, a *New York Times* article about Brown painted a picture of him as a troubled youth and referred to him as "no angel."<sup>20</sup> The article chronicled Brown's alleged criminal history, drug and alcohol use, and even his residence in "a community that had rough patches." To complete the picture of Brown's problems, the article described his interest in rap music. Brown reportedly "had taken to rapping in recent months, producing lyrics that were by turns contemplative and vulgar." The article then quoted one of Brown's lyrics: "My favorite part is when the bodies hit the ground." Of course, there were softer lyrics in which Brown complained of deadbeat dads and doted on his stepmother. But those didn't reinforce the narrative of Brown as a monster. After the article was published, criticism came swiftly, and the author subsequently expressed regret over his choice of words. While this particular article may have struck a nerve, this was nothing new in the media or, it turns out, the courtroom.

Many people know the stories of Jordan Davis and Michael Brown.<sup>21</sup> But there are far more stories that people don't know, particularly those happening with little fanfare inside criminal courtrooms across

America. In these spaces, judges and prosecutors routinely reject rap music as a worthwhile enterprise. They read lyrics without context, ignoring the artistic conventions and the prospect of personal gain that should inform their interpretations. Moreover, they regularly overlook rap as a normal, healthy, positive aspect of life: defendants can simply enjoy or create the music without malicious motives, for fun, as a way to work through difficult emotions or experiences, or to improve their personal or financial status. Instead, these judges and prosecutors seem driven by a desire to convict and incarcerate.

Rap on trial is a dangerous trend we should pay attention to for several reasons. Most importantly, it contributes to society's ongoing willingness to target, incarcerate, and dehumanize already vulnerable black and Latino men. It has disrupted the lives of countless young men, inserting them into the criminal justice system in a way that forever alters their future. What's more, the tactic is spawning a modern resurgence of the use of racial epithets and racial images in the trial process—a practice which has long been shunned—in the process undermining the legitimacy and fairness of the criminal justice system. Finally, rap on trial mutes a current generation of rappers who find themselves behind bars, out of public view, and may intimidate current and future generations of rappers who fear criminal justice consequences as a result of their lyrics.

In the end, we aren't trying to convince you to like rap music. We aren't claiming that everyone in the pages to follow is innocent of every crime they're accused of. Our goal is more basic than that. It's to demonstrate that in courtrooms across the nation, people are being denied a fair trial in a particularly insidious way.

Andrea first encountered this issue in the early 2000s when she worked as an assistant federal public defender, representing indigent clients charged with federal crimes. Another attorney in the office had

a client who was an aspiring rapper. The client had been charged with homicide, and songs he had recorded were among the pieces of evidence against him. That case was resolved with the songs playing little role in the outcome, but it signaled something alarming to Andrea. Fast-forward to 2006, when she was a new law professor at the University of Kentucky in Lexington. A colleague mentioned that the Taquan Neblett capital trial was ongoing in a local courthouse. Neblett was charged with murdering a music store clerk during a 2004 robbery, and he was facing the death penalty.

The prosecutor sought to rely on lyrics purportedly written by Neblett on the day of his arrest, weeks after the killing:

*So any nigga in the path to the flow of my cash  
Will find that breathing is a privilege when taking your last*

At trial, the prosecutor argued that the graphic and violent nature of the lyrics was a “reflection” of Neblett’s “soul” and should be admitted to prove Neblett’s guilt. The court rejected the argument and refused to admit the lyrics. After the jury convicted Neblett, however, the court admitted the lyrics during the capital sentencing phase. There the prosecutor argued to the jury, “Just because you write lyrics doesn’t mean they have true meaning. Johnny Cash was never really in Folsom Prison and didn’t shoot his old lady down. But defendant is living his lyrics.” The jury recommended a death sentence. Because of juror misconduct during the trial, however, the court sentenced Neblett to life without the possibility of parole for twenty-five years.<sup>22</sup>

After recalling the earlier case from her career and following the Neblett case, Andrea determined that there was something worth examining more deeply. Her research resulted in a 2007 academic law review article that defined the scope of the practice to date, analyzed the lawfulness of the practice in light of evidence rules and the small body of existing social science, and proposed solutions, including the

use of defense expert testimony. Since that time, she has continued to follow the issue and collaborate with Erik.

For more than a decade, Erik's research has focused on the complex relationship between black art and the law in the United States. In 2011, as part of that research, he began coming across more and more cases in which rap music was being used as evidence in criminal cases. A handful involved artists who were fairly well known (at least to hip hop fans)—Louisiana rapper Lil Boosie (now Boosie Badazz), Philadelphia rapper Beanie Sigel, and California rapper X-Raided, to name a few. But then scores of cases involving amateur artists across the country began to turn up.

To get a better sense of what was happening, Erik began reaching out to the defense attorneys who represented these rappers. When they learned about his Ph.D. in English and that much of his teaching and scholarship centered on hip hop, they began to ask if he'd be willing to help, either by consulting or by serving as an expert witness. Eager to see the criminal process up close and to understand exactly how rap lyrics were being permitted as evidence, he agreed. Since then, he's worked on roughly fifty cases across the country, serving as an expert in more than a dozen of them.

Once it became clear that rap on trial was pervasive, he wanted to consider it systemically. That's how he found Andrea, who was one of the first scholars to write about it. For the last several years, they've been working together to raise awareness about a problem they both agree has frightening implications for our criminal justice system.

Over the last ten years, we have been seeking out and documenting cases of rap on trial. To date we have identified approximately five hundred from across the nation and in both state and federal courts. Finding these cases hasn't been easy. We found many of them through

searches of legal case databases and media reporting. We learned of many others from attorneys who had pending cases and were seeking expert assistance. And, sad to say, some we learned of from attorneys who discovered our work only *after* they had a rap on trial case. We continue to look for cases, confident that there are far more closed cases than we have identified out there and, unfortunately, more cases coming in the future. We regularly hear about cases in which prosecutors use a single rap video to indict various people who happened to appear in it, even if they were just standing or dancing in the background. If those cases ended in plea bargains, as many do, there are likely no online records to search because the case didn't go to trial. And if we're hearing stories like this routinely, we know that even with the hundreds of cases we have identified, there are far more we haven't. In the meantime, our current collection of rap on trial cases forms the basis for this book.

Those cases reveal that there are a few basic scenarios in which prosecutors use rap lyrics as criminal evidence. These aren't rigid categories, and there's sometimes overlap between them, but they help conceptualize the practice.

**The diary.** One of the most common scenarios occurs when prosecutors treat a defendant's lyrics as rhymed confessions. Take, for example, the 2012 trial of Alex Medina, a fourteen-year-old boy charged as an adult with first-degree murder in Ventura, California. Medina was an aspiring rapper, and in the course of his arrest, police seized his notebooks full of lyrics, as well as recordings he had made. At trial, the prosecutor claimed that the most violent lyrics in the songs were "autobiographical journals" containing numerous admissions of guilt.<sup>23</sup> It didn't matter that the lyrics were written in verse and were clearly inspired by well-known rappers or weren't even written by Medina (he had copied down lyrics to some of his favorite songs, which were then characterized erroneously as his own). They were

presented to the jury as confessions of previous acts. In the end, he was convicted and sentenced to twenty-five years to life, the maximum possible. During sentencing, the judge called Medina a “psychopath.”

**Motive and intent.** If the lyrics were written or performed by the defendant *before* the alleged crime, prosecutors have to change their argument somewhat. The lyrics obviously cannot be an after-the-fact confession, so prosecutors instead argue that the lyrics are evidence of the defendant’s identity, motive, intent, or knowledge with respect to the crime.

Take, for instance, a seminal case dating back to 1991, one of the earliest cases we’ve found involving rap lyrics as evidence, *United States v. Foster*. The defendant, Derek Foster, was caught by police at Chicago’s Union Station transporting large quantities of drugs in suitcases. Foster denied that he knew the drugs were in the suitcases, but he did admit that a notebook he was carrying belonged to him. The notebook had rap lyrics he had written, which included the line “Key for Key, Pound for pound I’m the biggest Dope Dealer and I serve all over town.” These were later introduced as evidence of Foster’s knowledge of drug terminology and the drug business; he was ultimately convicted of possession with intent to distribute.

On appeal, Foster’s attorneys argued that the lyrics were pure fiction, consistent with popular rap at the time, and therefore never should have been admitted as evidence. But the Seventh Circuit U.S. Court of Appeals said they were admissible as evidence, noting that “in writing about this ‘fictional’ character, Foster exhibited knowledge of an activity that is far from fictional. He exhibited some knowledge of narcotics trafficking, and in particular drug code words.” The court didn’t consider the possibility that Foster learned these terms from popular culture, the way many of us do.

*Foster* is just one example of how rap lyrics are used as evidence of a defendant’s mind-set with respect to a crime. Other examples include

cases in which songs authored by a defendant, or even another person, are used to show a defendant's gang associations, knowledge of firearms, knowledge of criminal activity, or involvement in other illegal activities.

**Threats.** There's one final scenario in which rap lyrics are introduced as evidence: when they are considered threats. Unlike the previous scenarios, in which the lyrics are used to establish the defendant's role in some underlying crime, in threats cases, the lyrics themselves are the crime. Here, police and prosecutors argue that rap lyrics should be understood as literal threats directed at another person or group of people. "True threats" are not protected under the First Amendment, and so they can be legitimately criminalized. Threats cases are a relatively small subset of what we've found, but they have been growing over the last decade, thanks in large part to antiterrorism laws passed after 9/11, but also to the growth of social media.

In fact, the highest-profile case involving rap as evidence, *Elonis v. U.S.*, was a threats case that played out over social media and was ultimately heard by the U.S. Supreme Court. *Elonis* dates to 2010, when twenty-seven-year-old Anthony Elonis began posting violent messages to Facebook, often in rap lyric form, that were directed at his estranged wife and, once the FBI got involved, a female agent who was investigating his actions.<sup>24</sup> Elonis insisted that he was merely writing lyrics that were consistent with the conventions of rap music; at one point he singled out rapper and fifteen-time Grammy winner Eminem—who is well known for hurling lyrical threats at his ex-wife—as one of his influences.<sup>25</sup> He also included caveats in the posts themselves that he was using the lyrics in an artistic sense.

But prosecutors argued that the lyrics were literal threats, not art, and ultimately the jury agreed. Elonis was found guilty and sentenced to forty-four months in prison.<sup>26</sup> The U.S. Supreme Court later overturned the verdict based on the law governing the definition of a true



threat. The justices didn't make any decisions on the broader First Amendment questions about rap, art, and freedom of speech.

Whether charged as a threat or used as evidence of a crime, the common denominator is the claim by police and prosecutors that rap lyrics are accurate reflections of a defendant's thoughts, intentions, or actions. Rarely do they acknowledge—as they do with films, novels, and other musical genres—that there's a distinction between the author and the narrator telling the story. Consider how that would play out if this happened with other forms of entertainment. Crime novelists, radical poets, and screenwriters of horror films would all be in serious trouble if we could be convinced that their art was a reflection of their real lives.

The rules of evidence that govern criminal cases generally protect these other artists. But those rules are not applied in the same way to rap music unless the defendant is famous. The vast majority of defendants confronted with their rap lyrics are amateurs, who at best have achieved local or regional success. They are not nationally or internationally known and do not perform in major concert venues, if they even perform onstage. But the fame level of the defendant and whether the defendant performs in highly public settings influence how police, prosecutors, and courts evaluate lyrics and assess their admissibility in court. If the defendant is famous or performs the lyrics in concert settings, then the lyrics are readily deemed fictional, fantastical, and for pure entertainment. If the defendant is not famous, then the lyrics are deemed true depictions of life. In other words, defendants who are famous rappers are extended artistic respect and creative license, while amateurs are presumed to be rapping about their real lives, as if they have little artistic ability or aim. But there is no rational reason to distinguish between defendants based merely on whether they are aspiring or famous. And certainly fame shouldn't determine whether someone is treated fairly by the criminal justice system. But it does.

For amateur rappers, this lack of protection leaves them exposed, and prosecutors take full advantage, using it as an opportunity to convince judge and jury alike that the defendant is actually living the lifestyle depicted in the lyrics. If the song in question has vivid depictions of violence and other illicit activity, the jury will see a criminal underneath.

That's not just our take. A revealing excerpt from a training manual written by a California prosecutor includes this description of a generic defendant: "Invariably, by the time the jury sees the defendant at trial, his hair has grown out to a normal length, his clothes are nicely tailored, and he will have taken on the aura of an altar boy. But the *real* defendant is a criminal wearing a do-rag and throwing a gang sign."<sup>27</sup> Notice the assumption that the "real defendant," one who's supposedly presumed innocent at this stage, is already proclaimed a criminal. And the "do-rag" reference gives us a pretty good idea of what he might look like, too.

To uncover the real criminal, the manual advises that "through photographs, letters, notes, and *even music lyrics*, prosecutors can invade and exploit the defendant's true personality."<sup>28</sup>

We don't believe prosecutors should be able to use rap music this way. Some evidence is useful in determining guilt or innocence—that is, it has *probative value*. Other evidence has the potential to cause a jury to act in an emotional or irrational way regardless of the evidence—it could have an unfairly *prejudicial impact*. To ensure a fair trial for the defendant, prosecutors shouldn't be allowed to introduce evidence if its prejudicial impact substantially and unfairly outweighs its probative value. Rap music is an art form, told in rhymed verse, that privileges figurative language and resides in a long tradition of hyperbolic rhetoric. It has little, if any, probative value. At the same time, research has shown over and over that rap lyrics are likely to be highly prejudicial and inflammatory, particularly the violent, hyper-aggressive lyrics that are generally at issue in cases like these. Some

people simply don't like rap music, and for many, the genre invokes racist stereotypes about the inherent criminality of young black and Latino men.

Social science confirms the bias against rap in comparison to country music, which has many of the same themes. In a 1999 study, for example, participants were divided into two groups and then given song lyrics that contained depictions of violence (they were from a folk song). Both groups were given the exact same lyrics, but one group was told that they came from a country song, while the other group was told they came from a rap song. The group that believed the lyrics were from a rap song rated them as more dangerous and in need of regulation than the group that was told the lyrics were from a country song. The researcher posited that the differences were rooted in racial stereotypes; rap music primes negative stereotypes about urban blacks, while country music, in which white artists predominate, does not. In 2016, this study was replicated by researchers from the University of California–Irvine, who found the same bias against rap.

Age may also play a significant role in the practice of rap on trial. In particular, data confirms that most criminal defendants are young adult males, but jurors, in contrast, tend to be quite a bit older. This age disparity potentially translates into a difference in appreciation for and understanding of rap music, both generally and in the trial context. After all, rap has become the most popular musical genre overall but falls out of the top spot among older age groups, and data suggests that older people are more likely to have negative views of rap music than of other musical genres.<sup>29</sup>

Not surprisingly, our research has found that the defendant in these cases is almost always a young man of color. Based on the data we have collected, we estimate that in 95 percent of these cases the defendant is either black or Latino. While we do, on occasion, encounter cases with white defendants, these are the exception, not the rule. What's

more, it's worth noting that in the handful of cases involving white defendants, the outcome is often more favorable for the defense. In *Elonis*, the threats case, the Supreme Court ultimately ruled in *Elonis's* favor. *Elonis* is white.

In another case, an eighteen-year-old from Boston named Cameron D'Ambrosio was charged with making threats with his lyrics after the Boston Marathon bombing. If convicted, he faced up to twenty years in prison, but prosecutors couldn't even convince a grand jury to indict him. He walked free. He is also white.<sup>30</sup>

For black and Latino defendants, however, the outcomes are often devastating. In the majority of cases we've identified, rap lyrics are being used to prosecute serious crimes including murder, armed robbery, and narcotics trafficking. In some of the cases, the evidence—putting aside the lyrics—is incredibly weak. And when defendants are found guilty, as they usually are, the consequences are severe. Many face terms that are decades long. Others are sentenced to life in prison without the possibility of parole. And we've found nearly thirty cases where rap lyrics were introduced to help prosecutors secure death sentences.

When prosecutors are allowed to introduce rap music as evidence, they often gain a stranglehold on the case. That's because rap lyrics allow them to create a narrative about the defendant that is incredibly difficult to undo. Even with a weak case, they can usually win a conviction.

Take the case of Vonte Skinner, a New Jersey drug dealer and aspiring rapper. In 2008, he was tried for the attempted murder of fellow drug dealer Lamont Peterson.<sup>31</sup> When Skinner was arrested, police found pages of his violent rap lyrics in the backseat of his girlfriend's car. With lines like "In the hood, I am a threat / It's written on my arm and signed in blood on my Tech / I'm in love with you, death," prosecutors were eager to introduce the lyrics at trial to establish Skinner's

“violent state of mind.” That’s because their case was weak; the only other real evidence they had was testimony from witnesses who changed their stories repeatedly.

During the trial, over repeated objections from the defense, the prosecutor was allowed to read to the jury thirteen pages of Skinner’s lyrics, even though all were composed before the shooting—in many cases *years* before—and none of them mentioned the victim or contained details about the crime. The tactic worked. The jury found Skinner guilty of attempted murder, and he was later sentenced to thirty years in prison.

But in 2012, Skinner’s conviction was overturned by an appellate court, which ruled that the lyrics never should have been admitted as evidence in the first place. The majority wrote, “We have a significant doubt about whether the jurors would have found defendant guilty if they had not been required to listen to the extended reading of these disturbing and highly prejudicial lyrics.” In August 2014, the Supreme Court of New Jersey unanimously upheld the appellate court’s decision.

That’s a rare victory. In the vast majority of cases, rap lyrics are admitted, and appeals are unsuccessful. The New Jersey ACLU, for instance, found that in cases where various courts considered the admissibility of rap lyrics as evidence, they were allowed nearly 80 percent of the time.<sup>32</sup> Their data analysis came from a very small sampling of cases, however. Our research, which has the benefit of a much larger sample of cases, leads us to the conclusion that the number is significantly higher. Appeals of criminal convictions are unsuccessful generally, and appealing the use of rap music as evidence virtually never works.

Because it’s such an effective tactic for prosecutors—and because courts aren’t stopping them—it makes sense that more and more are using it, as our research confirms. Over the last decade in particular,

we've seen a dramatic increase. There are a number of reasons for this expansion, including the role of digital and social media, the formal ways that police and prosecutors have enshrined the practice, and changes in the legal and political landscape post-9/11. But one of the most worrying is that the basic checks and balances that exist in the criminal trial process to ensure that everyone is playing fairly appear to be missing here.

To be clear, while we are focused on the use of rap as evidence in criminal trials, it should also be recognized that rap lyrics are routinely used throughout the criminal justice process. Police are using rap lyrics to identify and arrest suspects. Prosecutors are using them to charge those suspects. Because the stakes are so high for the young men caught up in this—and because rap lyrics make for convincing evidence for jurors—many agree to a plea bargain rather than face a jury that might equate them with the characters in their songs.

Why is rap singled out? There's no single explanation. But without question, race is central here, just as it is in the routine administration of American criminal justice. The statistical outcomes speak loudly on this larger point. Research tells us, for example, that black Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences.<sup>33</sup> A number of studies have demonstrated that these disparities exist even when the crimes themselves are the same.

The result? African Americans represent only 13 percent of the U.S. population, yet they represent roughly 38 percent of the state and federal prison populations.<sup>34</sup> When we consider the entire incarcerated population in the United States—to include prisons, local jails, and detention centers—we have roughly 2.3 million people behind bars,

the most in the world. Approximately 920,000 of those people are African American, and the vast majority of them are men.<sup>35</sup> To put these numbers into perspective: A black man born in 2001 has a one-in-three chance of being incarcerated. A white man? One in seventeen.<sup>36</sup>

In addition to the numbers, though, the experience of black men in the criminal process has always been qualitatively different than for others. Their cases have never been simply about whether the objective evidence proves beyond a reasonable doubt that they committed a crime. Instead, their race and gender have long been tools for prosecution and punishment. Although criminal court rules today try to minimize this discriminatory treatment, they are often ineffective. And such is the case with rap on trial.

Many of the factors contributing to rap on trial are not new. Society has long viewed black art and expression as a threat and turned to the criminal justice system to control black speech and creative endeavors. From slave drumming and songs to Jim Crow-era ballads, in cabarets and jook joints, and during the civil rights and black nationalist eras, black art and artists have always been criminally regulated. Modern rappers are caught up in this legacy, too, with the use of rap as evidence representing the most current and, in some respects, extreme manifestation of this form of social control.

They are also caught up in the state's long history of invoking racial epithets, narratives, and themes in the courtroom. Prosecutors know that they probably can't get away with using overtly racist language anymore, but it doesn't mean they've given up on playing to the fears and stereotypes that such language evokes. In a criminal justice context—and in mainstream discourse, for that matter—rap has long been a proxy for black (and sometimes Latino) youth culture. Like the word “thug,” which is race-neutral on the surface but is almost always used to refer to black men in pejorative ways, rap

offers police and prosecutors a convenient way to talk about young men of color while invoking racial stereotypes that would otherwise be unacceptable.

And judges are letting them do it, despite being charged with ensuring that evidence doesn't create unfair prejudice. They simply aren't scrutinizing the evidence for unfairness or ensuring that police experts are appropriately qualified to testify about rap lyrics (which they almost never are). Judges also avoid serious consideration of whether First Amendment constitutional protections should keep lyrical evidence out of court.

Underlying all of these explanations for rap on trial is a basic reality: consistent across historical eras, the criminal justice system, criminal rules, and those who work in the system have demonstrated a willingness to treat black and Latino young men as disposable.

In short, this practice happens because it works, few are aware it's happening, and even fewer are critically challenging it. And it's growing—not only because it is effective and relatively hidden from public view, but also because of the ease with which police and prosecutors can now find the evidence. Dramatic transitions in music format, artist and fan accessibility, and artist profitability have influenced how police and prosecutors find and use rap lyrics. Over time, options for music consumption have evolved from live performances to physical copies to digital formats. Rap evidence has similarly transitioned. When this issue originally burst onto the scene, prosecutors primarily worked with physical evidence, such as defendant-artists' handwritten lyrics in notebooks or recordings on cassette tape, CD, or DVD. Today, the majority of music is consumed via downloading or streaming from the internet.<sup>37</sup> Facebook, YouTube, Spotify, Snapchat, SoundCloud—all of these digital platforms serve as sources for police and prosecutors to find rap evidence.



Another change that has occurred over the years is the music industry's expansion from traditional record labels to include independent internet production and distribution platforms. There is no need to wait for a record deal or music station to gain exposure. Artists big and small can directly and efficiently connect with the public by going directly to market through YouTube, Facebook, and SoundCloud. And the artist who develops a large fan base, even if still unknown on a national level, can then leverage that popularity into other moneymaking endeavors such as licensing, sponsorships, brand partnerships, live shows, touring, and festivals. Not only is the industry paying attention, but so are police and prosecutors.

And this becomes the trap of rap on trial. Young adults are making rap music for a number of reasons. It's entertaining. It's creative. It's expressive. But many of the young men we've seen in these cases come from poor neighborhoods with limited opportunities for upward mobility. For them, rap isn't just creative or expressive. It's a potential vocation, and a way out.<sup>38</sup> If they can be punished for trying to rap their way to a better life, then we are witnessing a process that's not just unfair—it's cruel.

Those who have found themselves punished for their art deserve a voice, and we hope this book helps to effect change to that end. However, we want to do it honestly. We are tempted, for example, to offer the typical First Amendment argument, which is dusted off and sent into service whenever speech is under attack. It's the specter of a slippery slope, which with rap on trial would go something like this: You might not care about rap music. You might not even like it. But you should still be worried because once we start limiting certain types of speech, we open the door to limiting the kinds of speech you do value. This argument is often used to galvanize support among a diverse group of people by revealing their shared interests and vulnerabilities.

The problem is that we don't believe it, not in this context. Over the last thirty years, even as rap on trial has exploded, we simply have not seen it expand to other art forms. If you're worried, therefore, that country music, with its own history of violent lyrics and violent artists, may be targeted the way rap is, your worries are probably unfounded. The same goes for horror movies or crime novels.

The reason should be obvious. Those are primarily white forms of entertainment, which means they are more or less immune to the kind of judicial attacks that rap music, and the people who create it, endure routinely. So it's important to emphasize that rap on trial is not a First Amendment issue with racial implications. It's a racial issue with First Amendment implications.

That's not just a semantic distinction. We see rap on trial as both a window into the broader racial inequalities that play out in our criminal legal system and a casualty of those inequalities. We don't want to minimize the importance of free expression or the need to protect it; we just want to be clear that we believe rap is being used to punish the people of color who produce it. In our view, meaningful change will come only if we first acknowledge this basic reality.

One final word before moving on.

As is already apparent from this introduction, quotes of actual rap lyrics involved in cases are sprinkled throughout the book. We have quoted the language exactly as it appears in our source material. There may be misspellings, grammatical errors, or slang. The lyrics may be confusing without additional context, definition, or explanation. Yet we have not attempted to offer correction or clarification of these quotes. We have not redacted or edited this language, unless that was the form of the evidence used in court. Virtually all of the lyrics quoted involve language that may be considered offensive by

some, including epithets and profanity. We have remained faithful to the original written form as we found it so that readers experience the same lyrics that police, prosecutors, judges, defendants, and jurors worked with in the case. That experience is essential to understanding why this practice is cause for so much concern.