

Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement

Taifha Natalee Alexander*

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* Taifha Natalee Alexander, JD. LLM Candidate Specializing in Critical Race Studies, University of California – Los Angeles School of Law (2021); JD, Georgetown University Law Center (2017); BS, St. John's University (2012). The author thanks Professor Alvaro Santos for teaching the Drug Law and Policy seminar, which provided the framework for this article. She also thanks the *Harvard Journal of Sports and Entertainment Law* staff for their constructive comments and feedback on this Article. The author also thanks her husband, James Marcus Alexander, for his thoughtfulness and unwavering support. And finally, the author is eternally grateful to Hip-Hop as a transformational genre of music and catalyst for positive social change. All errors are mine.

ABSTRACT

Take the word “overseer” like a sample. Repeat it very quickly in a crew, for example. Overseer, overseer, overseer, overseer. Officer, officer, officer, officer. Yeah, officer from overseer. You need a little clarity? Check the similarity! The overseer rode around the plantation. The officer is off, patrollin’ all the nation. The overseer could stop you, “what you’re doing?” The officer will pull you over just when he’s pursuing. The overseer had the right to get ill. And if you fought back, the overseer had the right to kill. The officer has the right to arrest. And if you fight back they put a hole in your chest (woop)¹ – KRS-One, American Rapper and Producer.

¹ KRS-ONE, *Sound of Da Police*, on RETURN OF THE BOOM BAP (Jive Records 1993). For lyrics see KRS-ONE, *Sound of Da Police*, GENIUS, <https://genius.com/Krs-one-sound-of-da-police-lyrics> [<https://perma.cc/28YW-2JAP>] (last visited Apr. 30, 2020).

INTRODUCTION

In the mid-1970s, hip-hop was created in a predominately Black,² economically disenfranchised neighborhood in the South Bronx.³ Since its inception, hip-hop artists have used their music to highlight, critique, and discuss the social, political, and cultural realities of contemporary Black issues while also crafting narratives and rhythm that resonate with an oftentimes voiceless audience.⁴ Similar to scholars of Critical Race Theory and other outsider scholarship, hip-hop artists use stories to add context to the marginalized group history of the Black experience⁵. Specifically, for the

² The term “Black” is a broad one, encompassing a diverse collection of cultural and national differences. Its unitary use in this article is not intended to diminish or ignore the significant differences that exist within the Black community. Rather, this article uses the term Black in recognition that while some people may identify with their African roots and prefer “African American,” many Black Americans cannot trace their lineage back to a specific African country due to the horrors of the transatlantic slave trade and resulting dominate legal and political culture of the United States, which includes mass incarceration of the same population. In using the term “Black,” this article refers to Black Americans to highlight the undeniable, historical uniqueness of the lingering effects of chattel slavery and Jim Crow segregation on Black Americans.

³ For a detailed discussion on the origins of Hip Hop, see, e.g., Dick Hebdige, *Rap and Hip-Hop: The New York Connection*; in *THAT’S THE JOINT! THE HIP HOP STUDIES READER* 223, 224 (Murray Forman & Mark Anthony Neal eds., 2004); Tricia Rose, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* (1994); Christopher Doval et. al, *Hip Hop and Other Professor’s Pedagogy*, 2 ARIZ. ST. SPORTS & ENT. L.J. 73, 73 (2012); Halifu Osumare, *Rap and Hip Hop*, in 1 OXFORD ENCYCLOPEDIA OF AFRICAN THOUGHT 272 (F. Abiola Irele & Biodun Jeyifo eds., 2010).

⁴ See Tricia Rose, *THE HIP HOP WARS: WHAT WE TALK ABOUT WHEN WE TALK ABOUT HIP HOP – AND WHY IT MATTERS* 7 (2008); see also Osumare, *supra* note 3.

⁵ See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); see also Lisa R. Pruitt, *Who’s Afraid of White Class Migrants? On Denial, Discrediting and Disdain (and Toward a Richer Conception of Diversity)*, 31 COLUM. J. GENDER & L. 196, 202 (2015) [hereinafter *Who’s Afraid*]; *We Won’t Go Back*, 2 NEW LAB. F. 51 (1998) (quoting CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997); Aderson Bellegarde Francois, *Acts of Meaning: Telling and Retelling the Narrative of Race-Conscious Affirmative Action*, 57 HOWARD L.J. 467, 474-75 (2014) (emphasizing the importance of storytelling in adding context to a marginalized group’s history). Outsider scholarship is being defined as the academic study of scholars that critiques the experiences of outgroups within the United States, like feminist legal theory, Asian American scholarship and LGBTQ legal theory. See Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 66 (2003).

past forty years, hip-hop artists have described and challenged the American criminal justice system as racially biased and inequitable.⁶

Yet, with the commercialization of hip-hop into the mainstream as “gangsta rap”⁷ over the past thirty years,⁸ some rappers have been using their lyrics to glorify criminal activity within the Black community.⁹ The evolution of hip-hop from a vehicle to depict the contemporary Black experience to a form of mainstream entertainment consumed by a global audience may be contributing to the mass incarceration of Black men.¹⁰

Many scholars have focused on the relationship between racial bias and criminality at each stage of the adjudication process.¹¹ This Article examines the relationship between hip-hop and legal actors’ attribution of criminality to Black men generally and Black men who are rappers, more specifically, as consumers and producers within the genre. I will argue that law enforcement officers, prosecutors, and judges have erroneously utilized and misinterpreted hip-hop to bolster society’s stereotypes of Black men as drug dealers and criminals. Prosecutors introduce and judges allow hip-hop lyrics as evidence against Black men in criminal proceedings via a legal balancing test that consistently tips the scale against Black men. As a result, prosecutors, judges, and juries contribute to the disproportionate mass incarceration of Black men in the American criminal justice system through the admission of rap lyrics – a form of artistic expression – as evidence of culpability in criminal proceedings.

⁶ See, e.g., N.W.A, *F—k Tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless Records/Priority Records 1988) (describing to a Black audience that the criminal justice system would prefer young Black men in jail, regardless of their innocence); KANYE WEST, *Power*, on MY BEAUTIFUL DARK TWISTED FANTASY (Roc-A-Fella Records 2010) (recognizing that “the system broken, the school is closed, the prison open”); 2PAC, *Changes*, on 2PAC GREATEST HITS (Interscope Records 1998) (explaining that “instead of war on poverty, they got a war on drugs so police can bother me”).

⁷ Gangsta rap is defined as lyrics that focus on selling drugs, shooting, killing and demeaning women. See Rose, *supra* note 4, at 35; Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER, RACE & JUST. 47, 57 (2012).

⁸ See Rose, *supra* note 4, at 2.

⁹ See *id.*

¹⁰ But see Akilah Folami, *From Habermas to “Get Rich or Die Tryin’”: Hip Hop, The Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & LAW 235, 253 (2007) (arguing that despite gangsta rap’s commercial successes, it must continue to be contextualized within its Hip-Hop beginnings because it gives voice to an otherwise invisible and marginalized group of Black and Latino male youth).

¹¹ See generally Paul Butler, *Locking up My Own: Reflections of a Black (Recovering) Prosecutor*, 107 CALIF. L. REV. 1983 (2019).

Part I of this Article will examine the mass incarceration of Black men in the United States. Part II will suggest that criminal justice officials use hip-hop to contribute to the mass incarceration of Black men in at least three ways. First, criminal prosecutors have been contributing to the mass incarceration of Black men by introducing rap lyrics into criminal proceedings against Black rappers. Second, judges and police officers may hold biases against Black men because rap music sensationalizes Black men as drug dealers and abusers. Third, legal actors' use of hip-hop as evidence contributes to mass incarceration, which has in turn created an obvious disconnect between how legal actors and Black men perceive prison. On the one hand, prosecutors, judges, and lawmakers view prison as a deterrent to crime. Contrastingly, Black men view imprisonment as a natural occurrence under the unfair, biased criminal justice system. As a result, hip-hop artists and many Black individuals consider imprisonment as a rite of passage. Such a disconnect may contribute to the introduction of rap lyrics as evidence against rappers, furthering this cycle. Part II will also briefly demonstrate that the biases of prosecutors, judges, and jurors against Black men are consistently perpetuated while similar biases are apparently not held against White rappers or artists in predominately White genres like country and rock. This culture of legal bias contributes to the view of prison as a rite of passage and not a deterrent. I will use lyrics from White rappers and artists from predominately White genres to demonstrate that the biases of prosecutors, judges, and juries impact Black men at a disproportionate rate and therefore contribute to mass incarceration.

Part III will critique two issues inherent in the current evidentiary balancing test, whereby judges admit evidence based on a weighing of probative value against prejudicial potential. The first issue relates to prosecutorial reliance on rap lyrics as true when in reality they may be entirely fictional. The second issue relates to judicial misinterpretation of generally violent lyrics as specific to a particular crime. The racial stereotype of hip-hop as a violent genre has contributed to the misuse of lyrics by both judges and prosecutors such that the creative expression of hip-hop artists has been weaponized by the law to criminalize Black men. Part IV is a call to both federal and state legislatures to promulgate laws that will create a different test for determining whether rap lyrics can be excluded from evidence. Finally, this paper will conclude that the evolution and current trend of hip-hop dictates that criminal justice officials are erroneously using hip-hop to contribute to the mass incarceration of Black men.

I. MASS INCARCERATION OF BLACK MEN

Instead of war on poverty. They got a war on drugs so police can bother me. And I ain't never did a crime I ain't have to do. But now I'm back with the facts, giving it back to you. Don't let 'em jack you up, back you up, crack you up and pimp-smack you up. You gotta learn to hold your own. They get jealous when they see you with your mobile phone. But tell the cops they can't touch this.¹² - 2Pac, California-native and Death Row¹³ rapper

Mass incarceration, reflected in the high incarceration rates among Black men, has resulted in the destabilization of incarcerated Black men's families, social citizenships, and economic opportunities.¹⁴ Black men are six times more likely than White American men to be arrested.¹⁵ Once arrested, Black people are more likely to be convicted and face harsher penalties.¹⁶ Further, one in three Black men will be incarcerated in their lifetime.¹⁷ To put this statistic into personal context, on average, within my three ten year-old nephews' lifetimes, at least one of them will be incarcerated.

Many scholars have explained that the racialized "war on drugs" policies and implicit racial biases and inequities in socioeconomic distribution amongst racial groups have caused legislatures, police officers, and other

¹² 2Pac, *supra* note 6. For lyrics see 2Pac, *Changes*, GENIUS, <https://genius.com/2pac-changes-lyrics> [<https://perma.cc/5WD3-YXGC>] (last visited Apr. 30, 2020).

¹³ Death Row Records is a defunct record label that contributed to the birth of gangsta rap with artists like Suge Knight, Dr. Dre, and Snoop Dogg. See Luchina Fisher, *The Rise and Fall of Death Row Records*, ABC NEWS (July 21, 2008), <http://abcnews.go.com/Entertainment/SummerConcert/story?id=5406064&page=1> [<https://perma.cc/FG4Z-CWVP>].

¹⁴ See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1304 (2004) (explaining mass incarceration as damaging Black social networks, distorting social norms and destroying social citizenship); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) (discussing the legalization of racial profiling in Fourth Amendment law); Robert D. Crutchfield, *Mass Incarceration*, 3 CRIMINOLOGY & PUB. POL'Y 265, 266 (2004); see, e.g., James Forman Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010). See Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 9 (2011) (noting that felon disenfranchisement laws prohibit many Black men from voting in the democratic process).

¹⁵ See *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/8W55-PGPD>] (last visited Apr. 29, 2020).

¹⁶ See *id.*

¹⁷ See *id.*

decisionmakers within the criminal justice system to disproportionately target Black people, specifically Black men, for incarceration.¹⁸ For example, the domestic portion of the Bush Administration's 1989 Bennett Plan¹⁹ and similar racialized drug law enforcement policies²⁰ suspiciously focused street-level narcotics enforcement on the inner-city crack crisis, even though the typical drug user was identified as a White, male, high-school graduate living in a suburban neighborhood.²¹ This targeted enforcement within predominately Black, poor neighborhoods could have been the result of the increase in inner-city drug trading, which left many poor, Black youth with no other viable, legitimate employment option other than participation in the illegal drug trade.²² However, research shows that drugs were also used in White, suburban communities, but enforcement efforts were not focused on those areas.²³

¹⁸ See generally andre douglas pond cummings, *Just Another Gang: When the Cops Are Crooks Who Can You Trust*, 41 HOWARD L.J. 383 (1998) (describing the "siege mentality" of Black men that permeates most large urban police departments while discussing the war on drugs on small scale, Black drug dealers, instead of focusing the war on the source countries and large drug cartels). See Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 46-57 (2011) (describing how the War on Drugs offered White people, opposed to racial reform, the opportunity to express hostility toward Black people and Black progress without being exposed as racist because the War on Drugs was presented as a race-neutral policy); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 589-91 (2010) (finding that, when politicians use "tough on crime" rhetoric, minority incarceration rates have increased, and resulted in the over-representation of minorities in prisons).

¹⁹ For a thorough discussion of the Bennett Plan and its successes and failures, see generally Michael Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795 (1990).

²⁰ The mandatory minimum sentences for crack and powder cocaine created a sentencing disparity in the regulations that left Black people, the predominate users of crack, to be sentenced more harshly than cocaine users, who happened to be predominately White, even though the drugs were similar in substance. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

²¹ See Letwin, *supra* note 19, at 795-796.

²² See Bruce Western, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 225 (2009).

²³ See HAMILTON PROJECT, RATES OF DRUG USE AND SALES, BY RACE; RATES OF DRUG RELATED CRIMINAL JUSTICE MEASURES, BY RACE (2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice [https://perma.cc/4TRU-MMXY] (last visited Feb. 27, 2021) (finding that even though Black and White Americans sell and use drugs at

While the 1980s introduced the “War on Drugs” through drug enforcement policies that targeted Black communities and eventually led to mass Black incarceration, United States policymakers and law enforcement officials have been using drug prohibition and enforcement to lay the foundation of mass incarceration of Black people for at least one hundred years. In 1900, White, Southern legislatures moved to prohibit cocaine and alcohol because the drugs were popular among Black communities, and White lawmakers believed that continued use of the drugs among the Black community would lead it to revolt against the oppressive nature of the Jim Crow South.²⁴ During this time, White Southerners sensationalized the effects of cocaine on Black people.²⁵ Black people who consumed cocaine were believed to have improved marksmanship, increased cunning, and super human strength that would allow them to be immune to .32 caliber bullets.²⁶ These unsubstantiated claims resulted in the disproportionate lynching of Black people, legal segregation, and other mechanisms that restricted sociopolitical power and advancement in the Black community.²⁷

Like Black people in the 1900s who were disenfranchised as a result of racialized drug prohibition policies, some incarcerated Black men today are restricted in their abilities to participate in political and social processes. Incarcerated Black men often become second-class citizens upon release from prison in numerous ways. For example, many Black men may be denied the right to vote upon release, automatically excluded from juries, and discriminated against in employment, housing, access to education, and public benefits.²⁸

In addition to the disenfranchisement of Black men, mass incarceration has detrimental effects on the Black family. Research has shown that milestone transitions from childhood into adulthood, like obtaining a steady job and entering into a healthy marriage, build social relationships that function to deter individuals from becoming offenders.²⁹ Young Black men who are incarcerated before securing a career and building familial bonds are less likely to get married or be a present father figure.³⁰ For Black women who

similar rates, Black Americans are more likely to be arrested for drug-related offenses).

²⁴ See David Musto, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 6 (Oxford Univ. Press 3d. 1999).

²⁵ See *id.* at 7.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See Alexander, *supra* note 14, at 10.

²⁹ See Western, *supra* note 22, at 229–30.

³⁰ See *id.*

are in committed relationships with incarcerated Black men, research has shown that their partners' incarceration can have deleterious socioeconomic effects on both spouses' families all while tearing family relationships apart.³¹ A Black woman's financial stability is endangered during and after her partner's incarceration.³² While he is in prison, she will likely have to earmark funds, accept collect calls, travel to the prison to visit him, and pay for packages to be sent to her incarcerated partner. My childhood memories include my mother's muffled cries as she explained to family and friends that she did not know where she was going to get the funds to put money on my father's "books,"³³ while still managing to keep food on our table. In addition to making financial sacrifices during their incarcerated partners' sentencing, many Black women become the main financial supporters in the Black household once their partners are released from prison as a result of the employment discrimination and stigma that felons face in the lawful employment market.³⁴ Research on the impacts of mass incarceration on the Black family is limited.³⁵ However, an anecdote from my dysfunctional relationship with my father may provide some insight on how mass incarceration contributes to disruption within the Black family.

I spent my eighth birthday in a federal corrections visitor's center in Maryland waiting to speak to my father through a two-way telephone and three inches of bulletproof glass. On the six-hour bus ride from New York to Maryland, I scribbled down all the things I wanted to tell him since I last saw him six months ago. I spent hours on the bus editing and re-editing my notes so my story would fit into the five-minute time allocation my mother assigned to me. When we finally arrived at the visitor's center, my mother told me through tear-filled eyes that we would not be able to see my father. Apparently, a fight erupted within his cell block and all visitations were cancelled as a result. Mass incarceration of Black men strip Black families of an additional support system that is integral to the success and growth of children. The loss of the Black father can be detrimental for teenagers as

³¹ See generally Hedwig Lee & Christopher Wildeman, *Things Fall Apart: Health Consequences of Mass Imprisonment for African American Women*, 40.1 REV. BLACK POL. ECON. 39 (2013).

³² See *id.* at 44.

³³ Putting money on an inmate's "books" refers to depositing money into an inmate's account so the inmate can purchase items from the prison store like envelopes, stamps, shampoo, soap and candy. See *Inmate Commissary*, UNION COUNTY SHERIFF'S OFFICE, http://unioncountysheriff.us/?page_id=644 [https://perma.cc/2XQ2-DWZD] (last visited Apr. 29, 2020).

³⁴ See Lee & Wildeman, *supra* note 31, at 44.

³⁵ See *id.* (explaining that there is small, but growing literature on the effects of mass incarceration on Black familial relationships).

they maneuver through adulthood and must bear the financial and emotional responsibilities of having one fewer adult with whom to discuss their issues and work through their problems.³⁶

At least one hundred years of sensationalized fear, racialized drug law enforcement policies, and the lack of access to legitimate employment opportunities in the Black community have contributed to the mass incarceration of Black men. My story of loss, injustice, and trauma demonstrates how high the stakes are in addressing mass incarceration and the causes of it. Hip-hop's misplaced presence in the criminal justice process is partially responsible for mass incarceration because the genre of music is used by criminal justice officials to stereotype and depict Black men, like my father, as criminals.

II. THE INTERSECTION OF CRIMINAL JUSTICE & HIP-HOP

You have the emergence in human society of this thing called the State. What is the State? The State is this organized bureaucracy. It is the police department. It is the Army, the Navy. It is the Prison System, the Courts, and what have you. This is the State; it is a repressive organization.³⁷ — Dead Prez

Chuck D, frontman for the nationally-recognized Public Enemy and one of the most politically influential hip-hop artists in the country, described hip-hop as “the Black CNN.”³⁸ In the late 1980s and early 1990s, hip-hop served to inform, connect, and provide information about the Black experience to a Black audience.³⁹ Songs like “Fight the Power”⁴⁰ and “The

³⁶ See *id.* at 44.

³⁷ DEAD PREZ, *Police State on LET'S GET FREE* (Loud Records 2000). For lyrics see Dead Prez, *Police State*, GENIUS, <https://genius.com/Dead-prez-police-state-lyrics> [https://perma.cc/ZD9F-PCFM] (last visited Apr. 29, 2020).

³⁸ See Elisabeth Mahoney, *The Black CNN – When Hip Hop Took Control*, THE GUARDIAN (June 25, 2010, 1:45 PM), <https://www.theguardian.com/tv-and-radio/2010/jun/25/black-cnn-hip-hop-took-control> [https://perma.cc/NT2R-YG7S].

³⁹ John Leland, *Armageddon in Effect*, 4 SPIN MAG. 46–48 (Sep. 1988) (quoting Chuck D noting that “Rap serves as the communication that they don’t get for themselves to make them feel good about themselves. Rap is [B]lack America’s TV station. It gives a whole perspective of what exists and what [B]lack life is about”).

⁴⁰ PUBLIC ENEMY, *Fight the Power*, on FEAR OF A BLACK PLANET (Def Jam Recordings 1990) (noting that “our freedom of speech is freedom or death. We got to fight the powers that be”). For full lyrics see Public Enemy, *Fight the Power*, GENIUS, <https://genius.com/Public-enemy-fight-the-power-lyrics> [https://perma.cc/EXK4-W8QE] (last visited Apr. 29, 2020).

Hate that Hate Produced”⁴¹ became rallying cries for the Black community to raise awareness of injustices and incite Black men and women to do something about those injustices. In recent years, through the rise in the commercialization of hip-hop, artists have been divided into two categories: socially conscious rappers⁴² and gangsta rappers. Since gangsta rap has proven to be more popular and lucrative than social conscious rap in the mainstream,⁴³ lyrics that depict Black men as drug dealers and criminals have been fed to a wide audience and may contribute to how society views Black men. Hip-hop as gangsta rap has contributed to the mass incarceration of Black men because such rap music can be used as evidence against gangsta rappers in criminal proceedings, skews how judges, police officers, and jurors perceive Black men, and provides a biased justification for the legal structure’s difference in treatment between rap lyrics and lyrics from other genres.

A. *Rap Lyrics as Evidence in Criminal Proceedings*

Like I talk to Shyste when I shot n—-as. Like you seen him twirl, then he drop, n—-a. And we keep them nine millis on my block, n—-a. And Monte keep it on him, he done dropped n—-as. And Trigger, he be wildin’, he some hot n—-a. Tones known to get busy with them Glocks, n—-a. Try to run down and you can catch a shot, n—-a.⁴⁴ – Bobby Shmurda, Brooklyn-native and former Sony Records rapper

⁴¹ SISTER SOULJAH, *The Hate that Hate Produced*, on 360 DEGREES OF POWER (Epic/SME Records 1992) (observing that “the time for scared, lip-trembling, word-changing, self-denying, compromising, knee-shakin’ black people is over.”). For full lyrics see Sister Souljah, *The Hate that Hate Produced*, GENIUS, <https://genius.com/Sister-souljah-the-hate-that-hate-produced-lyrics> [<https://perma.cc/5PF8-KBUF>] (last visited Apr. 29, 2020).

⁴² Socially conscious rappers are defined as hip-hop artists who, like Common, Talib Kweli, Mos Def, and others, have used rap lyrics to bring light to social, political, and economic issues that plague the Black community. See Tibbs, *supra* note 7, at 57 .

⁴³ See *id.* at 58.

⁴⁴ BOBBY SHMURDA, *Hot N*gga*, on SHMURDA SHE WROTE (Epic/Sony Records 2014). For lyrics see Bobby Shmurda, *Hot N*gga*, GENIUS, <https://genius.com/Bobby-shmurda-hot-nigga-lyrics> [<https://perma.cc/379D-T2MC>] (last visited Apr. 29, 2020).

Prosecutors have been counseling each other on how to use rap lyrics against defendants in criminal trials.⁴⁵ Alan Jackson, former prosecutor at the Los Angeles County District Attorney's Office, has advised prosecutors to introduce juries to the "real defendant."⁴⁶ He further states that the "real defendant" is "a criminal wearing a du-rag and throwing a gang sign."⁴⁷ He further suggests that prosecutors introduce jurors to the "real defendant" through introduction of, amongst other things, music lyrics that "invade and exploit the defendant's true personality."⁴⁸ The prosecutorial tactic of admitting a defendant's rap lyrics into the criminal adjudicatory process is not novel. Rap lyrics authored by criminal defendants have been admitted into evidence against their authors for roughly as long as gangsta rap has been in prominence.⁴⁹ In 1991, prosecutors demonstrated a defendant's knowledge of and intent to distribute drugs carried in two suitcases by admitting the defendant's handwritten rap lyrics into evidence.⁵⁰ The lyrics were: "Key for Key, Pound for pound. I'm the biggest Dope Dealer and I serve all over town. Rock 4 Rock, Self 4 Self. Give me a key let me go to work more Dollars than your average business man."⁵¹

More recently, many courts have allowed rap lyrics to be introduced into evidence against criminal defendants to prove that the defendant committed or intended to commit the crime, and even to demonstrate the defendant's "bad character."⁵² In 2014, the Supreme Court of New Jersey

⁴⁵ See, e.g., ALAN JACKSON, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, AM. PROSECUTORS RES. INST., PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW (2004).

⁴⁶ *Id.* at 15-16.

⁴⁷ *Id.* at 16.

⁴⁸ *Id.*

⁴⁹ In 1991, a federal court allowed rap lyrics written by the defendant to be admitted into evidence. See *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991). In 1994, prosecutors, and eventually the judge, relied on handwritten lyrics found in Francisco Calderon Mora's home to convict him of a crime. See *People v. Olguin*, 37 Cal. Rptr. 2d 596 (Cal. Ct. App. 1994); see also *United States v. Price*, 418 F.3d 771 (7th Cir. 1995); *State v. Deases*, 476 N.W.2d 91 (Iowa App. 1991).

⁵⁰ See *United States v. Foster*, 939 F.2d at 448-49.

⁵¹ *Id.* at 449.

⁵² See, e.g., *United States v. Whitten*, 610 F.3d 168, 215 (2d Cir. 2010) (upholding admissibility of rap lyrics dealing with gang violence); *United States v. Williams*, No. 05-13927, (11th Cir. Oct. 31, 2006) (upholding admission of rap lyrics that described defendants as drug dealers in RICO action); *Holmes v. State*, 608 S.E.2d 726 (Ga. Ct. App. 2004) (finding that the use of defendant's rap lyrics as evidence of defendant's bad character was admissible); *Cook v. State*, 45 S.W.2d 818 (Ark. 2001) (finding that rap lyrics by author were admissible as evidence to demonstrate intent to commit armed robbery); *Montague v. State*, 471 Md. 657

weighed in on the evidentiary admissibility of rap lyrics by aspiring rapper Vonte Skinner to demonstrate motive or intent to commit a crime.⁵³ During Skinner's jury trial, a state witness was allowed to read years-old lyrics to the jury in support of the case against the rapper for attempted murder.⁵⁴ The lyrics read:

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 will drop your Queen and pawn, f—k – f—k wasting around. They don't call me Threat for nothin'.⁵⁵

After the jury convicted Skinner, the Supreme Court of New Jersey reviewed the case on appeal and found that, no matter how repugnant some may consider gangsta rap, Skinner's lyrics could not be admitted into evidence if they did not demonstrate motive or intent, as such admission would otherwise be prejudicial.⁵⁶ Yet, the court did not go so far as to say that rap lyrics could not be admitted into evidence at all. Instead, the court held that rap lyrics and other forms of fictional prose can be admitted into evidence if the writings demonstrate a "strong nexus" between the specific details of the artistic writing and the criminal charges.⁵⁷ Further, the evidentiary value of the artistic writing must outweigh any prejudicial impact the writing will have on the jury's perception of the defendant.⁵⁸ The court's finding in *Skinner* demonstrates that lyrics should be excluded from evidence if the introduction of those lyrics biases the jury against the defendant, such that the probative value of the lyrics is outweighed by the high likelihood of the jury convicting the defendant on the basis of his "bad" character rather than the charged crime.

The New Jersey ruling might have contributed to at least two developments in the law. First, the ruling operates to redress some of the disparities that impact Black men. The court's interpretation of the law limits a prose-

(Md. Ct. Spec. App. 2020), *reconsideration denied* (Jan. 29, 2021) (finding that defendant's rap lyrics are admissible as substantive evidence of defendant's guilt when there is a strong nexus between specific details of the artistic composition and circumstances of the offense for which the evidence is being adduced).

⁵³ See *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

⁵⁴ See *id.* at 239.

⁵⁵ *Id.* at 241.

⁵⁶ See *id.* at 238.

⁵⁷ See *id.* at 239; see also *Hannah v. State*, 23 A.3d 192, 196-201 (Md. 2011) (excluding defendant's rap lyrics from evidence); *State v. Hanson*, 731 P.2d 1140, 1144-45 (Wash. Ct. App. 1987) (reversing a conviction obtained after the prosecutor inappropriately asked defendant about his violent, fictional writings).

⁵⁸ See *Skinner*, 95 A.3d at 239.

cutor's ability to introduce evidence of generally violent hip-hop lyrics without a strong nexus to a crime, which may contribute to ending mass incarceration. Second, the New Jersey justices may be aware of the disproportionate effects of mass incarceration and are interpreting the law to redress some of those disproportionalities. It would not be unusual for the justices in *Skinner* to have ruled in such a way to contribute to social change considering the impact of mass incarceration on Black rappers.⁵⁹ Scholars have analyzed the role of activist judges in ensuring that justice is truly just.⁶⁰ Justice Ginsburg often embodied such a legal philosophy. For example, she famously issued a dissent that compelled Congress to address the wage gap between men and women who engaged in similar work.⁶¹ However, her dissent also encouraged women to champion their own causes, which ultimately led women on a legislative crusade to advocate for themselves.⁶² Thus, like Justice Ginsburg who sought to draw attention to inequalities propagated by the legal system, it is conceivable that the justices of the Supreme Court of New Jersey may have interpreted the law to limit prosecutors' ability to use rap lyrics against Black men after considering the effects of such evidence on mass incarceration.

Further, the Supreme Court of New Jersey's ruling could have influenced prosecutors in other jurisdictions not to introduce rap lyrics into evidence against a criminal defendant.⁶³ However, a closer look at the national

⁵⁹ See, e.g., Lani Guinier, Foreword, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 51 (2008) (explaining that, in certain circumstances judges are motivated to rule in ways allow judges to engage in activism on a social issue).

⁶⁰ See generally Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785 (2007) (describing judicial subversion as a phenomenon of judges intentionally framing the law to achieve a particular outcome).

⁶¹ See Guinier, *supra* note 59, at 41.

⁶² See *id.*

⁶³ On December 16, 2014, four months after the New Jersey court's ruling, Bobby Shmurda, a 20-year-old Brooklyn-native, and twelve of his friends were indicted on murder, assault, weapons possession, narcotics possessions and sales in the East New York and Flatbush areas. While Shmurda's rap lyrics may not have been introduced into evidence against him, there are parallels between Shmurda's lyrics and the indictment. Shmurda's lyrics boast about him "selling crack since like the fifth grade" and using assault rifles to shoot individuals, and claim that his friend Mitch, "caught a body like a week ago." See Zara Golden, *Everything You Need to Know About the Bobby Shmurda Indictment*, THE FADER, Dec. 19, 2014, <http://www.thefader.com/2014/12/19/everything-you-need-to-know-about-the-bobby-shmurda-indictment> [<https://perma.cc/4ZGA-KCTY>]; Gail Sullivan, *How Rapper Bobby Shmurda, Charged in Murder, Drug Trafficking Sting, Became an Alleged Gangster*, WASH. POST (Dec. 19, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/19/hip-hops-bobby-shmurda-charged-in-murder-drug-trafficking->

trend of both introducing and allowing rap lyrics as evidence demonstrates that the court ruling in *Skinner* is an outlier. Recent cases in New York,⁶⁴ California,⁶⁵ Florida,⁶⁶ Texas⁶⁷ and Maryland⁶⁸ demonstrate a pervasive, alternative view to the New Jersey court's interpretation. These kinds of rulings demonstrate that the evidentiary balancing test of admitting rap lyrics as evidence exacerbates the perception of Black men as inherently criminal.⁶⁹

B. *The Criminal Justice System's Perception of Black Men*

Young n——a move that dope. They move that dope, they move that dope.
Young n——move that dope. Young enough to still sell dope. But old

sting/?utm_term=.3015bf10d687 [https://perma.cc/S92Z-8B29]. “To catch a body” refers to having murdered someone. See *Catch a Body definition*, URBANDICTIONARY, <http://www.urbandictionary.com/define.php?term=catch%20a%20body> [https://perma.cc/TF9Q-SK5K] (last visited Apr. 29, 2021).

⁶⁴ In a case involving Brooklyn rapper Tekashi 6ix9ine, prosecutors asked whether the lyrics in his hit song “GUMMO” included any threats against rivals of the Nine Trey Gangsta Bloods. See *United States v. Jones*, Trial Tr. Doc. 304, 166 – 180, Oct. 16, 2019 available at <https://www.courtlistener.com/docket/14608592/340/united-states-v-jones/> [https://perma.cc/CQ82-ELFC] (last accessed Feb. 3, 2021) (hereinafter *Jones* Trial Tr. Doc.).

⁶⁵ Drakeo the Ruler was charged for murder in December 2016 even though investigators learned that Drakeo was not the gunman and even further did not participate in any violence that ensued. See 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> [https://perma.cc/QX6Y-EYG6].

⁶⁶ One such case involved a motion referencing rapper YNW Melly's lyrics to demonstrate evidence of his alleged role in the shooting deaths of two associates. See Victim's Objection and Response to Defendant's Emergency Motion for Victim's Release from Medical Care and Supplemental Emergency Motion for Release from Medical Care, *State v. Demons*, No. 19-001872CF10A (2020), available at <https://floridajustice.com/wp-content/uploads/2020/04/Demons.pdf> [https://perma.cc/WU2M-528L] (last accessed Feb. 3, 2021).

⁶⁷ In April of 2017, after accepting a plea deal for his role in a robbery, 19-year-old Texas rapper Tay-K's music video and rap lyrics were introduced during sentencing. The video showed the then-16-year-old rapper brandishing a gun. See *Rapper Tay-K's Video Used in Murder Sentencing*, BBC News (July 23, 2019), <https://www.bbc.com/news/newsbeat-49080656> [https://perma.cc/7D9F-YA8M].

⁶⁸ The Maryland Court of Appeals held that a defendant's rap lyrics are admissible as substantive evidence of the defendant's guilt when there is strong nexus between specific details of the artistic composition and circumstances of the offenses for which the evidence is being adduced. See *Montague v. State*, 243 A.3d 546 (2020), *reconsideration denied* (Jan. 29, 2021).

⁶⁹ See *infra* Part III.

enough that I knows better. When they saying it's 42 for that white powder, I knows better. Get it, n---a? I nose better, put a smile on the devil's face. Who don't want to sell dope forever?⁷⁰ – Future and Pusha T, commercial rappers

Scholars have diligently identified and challenged the implicit racial biases inherent in the criminal justice system that contribute to the mass incarceration of Black men.⁷¹ Police practices often target Black people and other communities of color more than White individuals and communities.⁷² Research also shows that police are more likely to target Black people for traffic and walking stops to search their person and car.⁷³ Once formally in the criminal justice system, Black people are exposed to additional racial biases. Research shows that prosecutorial implicit biases can negatively influence prosecutorial discretion and lead to decisions that disproportionately impact Black people more than their White counterparts.⁷⁴ Black people are more likely to be detained pending trial due to high-set bails⁷⁵ and must rely on public defenders for legal representation.⁷⁶ Once convicted, Black defendants are sentenced to longer sentences than similarly situated White defendants. Further, research has found that juries are more likely to sentence Black defendants to death when the victim of the crime was a White person.⁷⁷ Undoubtedly, bias and stereotypes of Black men play a significant role in the racialization of the criminal justice system. Gangsta rap, which is predominately associated with the Black community, may contribute to how police officers, prosecutors, and jurors view Black defendants. In one study attempting to determine whether a song will evoke harsher reactions merely

⁷⁰ FUTURE, *Move that Dope*, on HONEST (Epic Records 2014). For lyrics, see Future, *Move that Dope*, GENIUS, <https://genius.com/Future-move-that-dope-lyrics> [<https://perma.cc/XNX2-25RM>] (last visited Apr. 29, 2020).

⁷¹ See generally PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 36-37 (2010); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013); William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417 (2012).

⁷² See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling Is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 378-79 (1999).

⁷³ Quigley, *supra* note 71, at 418-19.

⁷⁴ See generally Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

⁷⁵ See Quigley, *supra* note 71 at 419-20.

⁷⁶ See *id.* at 420.

⁷⁷ See Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 575-77 (2011).

by being identified as rap,⁷⁸ researchers demonstrated that when White subjects believed lyrics were identified as rap, the lyrics were judged significantly more negatively⁷⁹ than when the White subjects thought the same lyrics were attributed to a predominately White genre, like folk or country music.⁸⁰ This may explain why I have been unable to find convictions of White artists after the submission into evidence of similarly violent lyrics. Even Eminem, a White rapper, has bragged about raping women,⁸¹ but those lyrics have yet to be brought against him to establish his criminality or violent behavior in any legal proceedings. Further, it seems as though Black rappers are punished for lyrics praising the use of illicit drugs, while White artists are praised for similar lyrics. For example, Rock & Roll Hall of Famers Guns 'N Roses have celebrated heroin addiction.⁸²

Stereotypes⁸³ can be reinforced when a person cannot challenge their preconceived notions about a group of individuals due to a lack of interaction with members of the stereotyped group.⁸⁴ The commercialization of gangsta rap provides a global audience, which includes judges, jurors and law enforcement with images of Black men as drug dealing, misogynistic criminals, while the separation of Black and White people in housing and education⁸⁵ serves to perpetuate those stereotypes. Americans are inundated

⁷⁸ See Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCHOL. 2135, 2137-39 (1996).

⁷⁹ The subject believed that the lyrics were offensive and a threat to society. See *id.* at 2140.

⁸⁰ See *id.* at 2141.

⁸¹ In Dr. Dre's song, *Medicine Man*, Eminem raps, "I even make the b*tches I rape cum." For full lyrics, see Dr. Dre, *Medicine Man*, GENIUS, <https://genius.com/Dr-dre-medicine-man-lyrics> [<https://perma.cc/XC98-29CJ>] (last visited Apr. 29, 2020); see also *Eminem Gets 2 years' Probation for Gun Charge*, CNN, (Apr. 10, 2001) <http://www.cnn.com/2001/LAW/04/10/eminem.sentencing.02/index.html> [<https://perma.cc/SQ6E-4V6Z>]. Even when Eminem's lyrics were the basis of a slander case against the rapper, the case was dismissed because the lyrics convey signals to a reasonable person that the lyrics should not be taken literally. See *Bailey v. Mathers*, No. 252123, 2005 Mich. App. LEXIS 930 (Mich. Ct. App. 2005).

⁸² For full lyrics, see Guns 'N Roses, *Mr. Brownstone*, GENIUS, <https://genius.com/Guns-n-roses-mr-brownstone-lyrics> [<https://perma.cc/UY83-VK8X>] (last visited Apr. 29, 2020).

⁸³ See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 191 (1954) (discussing stereotypes as favorable or unfavorable exaggerated beliefs associated with a category intended to justify an individual's conduct toward that category).

⁸⁴ See GARY W. POTTER & VICTOR E. KAPPELER, *CONSTRUCTING CRIME: PERSPECTIVES ON MAKING NEWS AND SOCIAL PROBLEMS* (Waveland Press 2006).

⁸⁵ See Greg Toppo, *GAO Study: Segregation Worsening in U.S. Schools*, USA TODAY (May 17, 2016), <http://www.usatoday.com/story/news/2016/05/17/gao-study-segregation-worsening-us-schools/84508438/> [<https://perma.cc/R3XL-35BR>]; U.S.

with lyrics that boast of Black men being savages,⁸⁶ “sell[ing] work,”⁸⁷ “f—k[ing] b—ches”⁸⁸ and “getting money,”⁸⁹ but are not exposed to Black men at school or in their neighborhoods who are not dealing drugs or disrespecting women. As a result, the stereotype of the Black man as a deviant permeates American society and contributes to the negative perception that juries and criminal justice officials have of Black men, resulting in the group’s mass incarceration.

C. Prison as Rite of Passage, Not Deterrent

You know they got me trapped in this prison of seclusion. Happiness, living on the streets is a delusion. Even a smooth criminal one day must get caught. Shot up or shot down with the bullet that he bought. Nine-millimeter kickin’, thinkin’ about what the streets do to me.⁹⁰ – 2Pac

There are at least four theories of punishment – retribution, deterrence, incapacitation, and rehabilitation.⁹¹ The United States’ criminal justice philosophy is largely based on retribution and incapacitation intended to prevent criminal activity.⁹² However, the unfair and racially biased mass

GOV’T ACCOUNTABILITY OFFICE, GAO-16-345, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY RACIAL DISPARITIES AND ADDRESS DISCRIMINATION (Apr. 2016); Stephen L. Ross & Margery Austin Turner, *Housing Discrimination in Metropolitan America: Explaining Changes Between 1989 and 2000*, 57 SOC. PROBLEMS 152 (2005).

⁸⁶ See Migos, *Bad and Boujee*, on CULTURE (300 Entertainment 2020) (noting that their “n—as is savage, ruthless.”). For full lyrics see Migos, *Bad and Boujee*, GENIUS, <https://genius.com/Migos-bad-and-boujee-lyrics> [<https://perma.cc/E5W4-8QAE>] (last visited Apr. 29, 2020).

⁸⁷ Migos, *T-Shirt*, on CULTURE (300 Entertainment 2020). Selling work is interchangeable with the term moving work and is defined as selling narcotics like marijuana or cocaine. See *Moving Work*, URBANDICTIONARY, <http://www.urbandictionary.com/define.php?term=moving%20Work> [<https://perma.cc/5RLA-48HL>] (last visited Apr. 29, 2020).

⁸⁸ See Jr. M.A.F.I.A., *Get Money*, on CONSPIRACY (Big Beat Records 1995). For full lyrics see Jr. M.A.F.I.A., *Get Money*, GENIUS, <https://genius.com/Junior-mafia-get-money-lyrics> [<https://perma.cc/HZV9-LZ8H>] (last visited Apr. 29, 2020).

⁸⁹ *Id.*

⁹⁰ 2Pac, *Trapped*, on 2PACALYPSE NOW (Interscope Records 1991). For full lyrics see 2Pac, *Trapped*, GENIUS, <https://genius.com/2pac-trapped-lyrics> [<https://perma.cc/MKE7-PFJ2>] (last visited Apr. 29, 2020).

⁹¹ See, e.g., Paul Butler, *Much Respect: Toward A Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 984 (2004).

⁹² See andre douglas pond cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515, 515-16 (2010).

incarceration of Black men greatly limits that supposed deterrent effect. In the song *Do Your Time*, Ludacris declares that “the justice system’s f—up” because it disproportionately impacts half of his Black brothers who are still incarcerated.⁹³ Similarly, Phife Dawg, a member of the renowned rap group A Tribe Called Quest, expresses that many Black men believe their only available options are death or life in prison.⁹⁴ Unfortunately, some Black men may not be deterred from engaging in criminal activity because they already have a heightened chance of being incarcerated at some point in their life anyway. As a result, incarceration does not operate to deter crime in the Black community or stigmatize ex-prisoners to the extent that it does in other racial groups.⁹⁵ In my neighborhood of South Jamaica, Queens, individuals released from prison are viewed as survivors of war.⁹⁶ They are not stigmatized, but instead honored for their survival. This celebration of incarceration operates to make an individual feel proud and showcases the recently incarcerated individual as someone to be emulated. This may have the unintended consequence of contributing to a young, Black man’s willingness to participate in criminal activity because he believes he will be celebrated for surviving incarceration.

Hip-hop artists reinforce incarceration as a rite of passage by “shouting out”⁹⁷ prisoners in correctional facilities.⁹⁸ Shouting out incarcerated men also acknowledges that they are in prison partly because of the racial bias and inequities inherent in American society.⁹⁹ Specifically, rappers view the

⁹³ See LUDACRIS, *Do Your Time*, on RELEASE THERAPY (Def Jam Recordings 2006). For full lyrics see Ludacris, *Do Your Time*, GENIUS, <https://genius.com/Ludacris-do-your-time-lyrics> [<https://perma.cc/BY9X-9QQS>] (last visited Apr. 29, 2020).

⁹⁴ See A TRIBE CALLED QUEST, *Whateva Will Be*, on WE GOT IT FROM HERE. . . THANK YOU 4 YOUR SERVICE (Epic Records 2016). For full lyrics see A Tribe Called Quest, *Whateva Will Be*, GENIUS, <https://genius.com/A-tribe-called-quest-whateva-will-be-lyrics> [<https://perma.cc/G452-7LHA>] (last visited Apr. 29, 2020).

⁹⁵ See Butler, *supra* note 91, at 985 (explaining that because the American criminal justice system is unfair, law breakers are glorified or not viewed as criminals).

⁹⁶ In his song, *A Ballad for the Fallen Soldier*, Jay Z identifies incarcerated individuals as “P.O.W.’s that still in the war for real.” JAY Z, *A Ballad for the Fallen Soldier* on THE BLUEPRINT 2: THE GIFT & THE CURSE (Def Jam/Island Def Jam 2002). For full lyrics see Jay Z, *A Ballad for the Fallen Soldier*, GENIUS, <https://genius.com/Jay-z-a-ballad-for-the-fallen-soldier-lyrics> [<https://perma.cc/SE3L-YWXJ>] (last visited Apr. 29, 2020).

⁹⁷ Shout-out is defined as a public expression of gratitude or thanks. See *Shout-out definition*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=shout-out> [<https://perma.cc/8FZ6-7SPB>] (last visited Apr. 29, 2020).

⁹⁸ See Cummings, *supra* note 92, at 542.

⁹⁹ See Butler, *supra* note 71, at 998.

rampant poverty and joblessness within Black communities as an intentional construct that incarcerated individuals rightly rebel against in an effort to survive.¹⁰⁰ Viewing prison as a rite of passage is problematic for lawmakers because prison is not intended to serve as a ceremonious stage in an individual's life. Yet, the racial inequities in housing, employment, education, and criminal justice that were created and reinforced by lawmakers have caused the Black community to perceive the function of incarceration differently than any other racial group.

III. ISSUES WITH THE PROBATIVE VERSUS PREJUDICIAL BALANCING TEST

Mass incarceration, the perception of hip-hop and Black men as inherently violent, and the view of prison as a natural occurrence in an unfair criminal justice system all contribute to the imbalance of the current test used to determine whether rap lyrics should be excluded as evidence of a rapper's guilt in the commission of a crime. Many state evidence rules are derived from the Federal Rules of Evidence.¹⁰¹ State and federal courts have established rules that involve a balancing test to determine the exclusion of evidence.¹⁰² Essentially, under many state and federal courts' current Rules of Evidence, if prosecutors can show that a rapper's lyrics establish his motive, intent, or identity, then most judges will deem the lyrics admissible as evidence of the rapper's involvement in the crime. However, state and federal courts have held that a probative versus prejudicial balancing test can be used to ensure a criminal conviction does not hinge on a rapper's lyrics alone, as demonstrated in *Skinner*. Under the balancing test, a rapper's lyrics can be excluded if admission of the lyrics is unfairly prejudicial when

¹⁰⁰ See *id.*

¹⁰¹ See Fed. R. Evid. 403. See generally Alan D. Hornstein, *The Maryland Rules of Evidence - the New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1033 (1995) (describing that by late 1988 thirty-five states, the military, Guam and Puerto Rico adopted rules based on the Federal Rules of Evidence).

¹⁰² See *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (finding that rap lyrics and tattoos are properly admitted where they are relevant, and their probative value is not substantially outweighed by the danger of unfair prejudice); *United States v. Carpenter*, 372 F. Supp. 3d 74, 76-77 (E.D.N.Y. 2019) (holding that the defendant's rap music videos and lyrics were relevant, and the probative value of videos and lyrics was not substantially outweighed by danger of unfair prejudice). State courts have also defined "unfair prejudice" in describing circumstances when evidence, like rap lyrics, would be ruled inadmissible. See generally *State v. Logue*, 436 P.3d 136 (Utah Ct. App. 2018); *State v. Hernandez*, 911 N.W.2d 524 (Neb. 2018); *Pierce v. State*, 807 S.E.2d 425 (Ga. 2017); *State v. Thompson*, 802 S.E.2d 623 (S.C. Ct. App. 2017).

weighed against the lyrics' probative value. There are at least two issues with this test: (A) prosecutorial reliance on rap lyrics operates under the false assumption that the lyrics are actually true and (B) judges inaccurately interpret generally violent lyrics as specific to a crime.

A. *Prosecutorial Reliance on Rap Lyrics Does Not Account for the Reality that the Rapper's Lyrics May Be Untrue or Fabricated*

First, some judges fail to recognize that prosecutorial reliance on lyrics to establish rappers' guilt operate from the mistaken assumption that the lyrics are actually true. In a case brought by the United States Attorney for the Southern District of New York, Brooklyn rapper Tekashi 6ix9nine admitted that his rap lyrics were fictitious and based on an arrangement struck between himself and the Nine Trey Gangsta Bloods.¹⁰³ In exchange for a portion of Tekashi's royalties, the Nine Trey Gangsta Bloods granted Tekashi protection and allowed him to present the persona of a violent, drug-selling Blood.¹⁰⁴ More plainly, even though Tekashi was never initiated into any recognized Blood set,¹⁰⁵ and therefore never a Blood, his viral lyrics consistently made reference to being a Blood,¹⁰⁶ using Blood language¹⁰⁷ and living a Blood lifestyle.¹⁰⁸ In essence, Tekashi's rap lyrics were fictitious. While Tekashi's lyrics were not ultimately used against him to establish his criminality, other rappers' appeals to exclude lyrics as evidence on the basis of fictionality have been denied.¹⁰⁹ In accepting rappers' lyrics as true, prosecutors and courts do not account for the reality that a defendant's lyrics are, in fact, purely fictional, which would certainly lead to the exclusion of such evidence since its probative value would be substantially outweighed by unfair prejudice against the rapper. Few would argue that Bob Marley actually "shot the sheriff,"¹¹⁰ or that Johnny Cash really "shot a

¹⁰³ See *Jones Trial Tr. Doc.*, *supra* note 64.

¹⁰⁴ See *id.* at 185.

¹⁰⁵ See *id.*

¹⁰⁶ See 6IX9INE, *Billy*, on DAY69 (Sony Music Group 2018).

¹⁰⁷ See 6IX9INE, *Blood Walk* (Tenthousand Projects 2018).

¹⁰⁸ See *id.*

¹⁰⁹ See *Montague v. State*, 243 A.3d 546 (Md. 2020), *reconsideration denied* (Jan. 29, 2021).

¹¹⁰ BOB MARLEY & THE WAILERS, *I Shot the Sheriff*, on BURNIN (Island Records 1973). For lyrics, see Bob Marley & The Wailers, *I Shot the Sheriff*, GENIUS, <https://genius.com/Bob-marley-and-the-wailers-i-shot-the-sheriff-lyrics> [https://perma.cc/9B6G-LH3V] (last visited Apr. 29, 2020).

man in Reno just to watch him die.”¹¹¹ In relying on rappers’ lyrics to establish guilt, prosecutors are failing to recognize that those lyrics are more likely a reflection of fictional stories that the artist deems aesthetically pleasing or appealing to hip-hop consumers.

B. Judges’ Inaccurate Interpretation of Generally Violent Lyrics as Specific to a Crime

Second, the probative versus prejudicial balancing test poses an issue for the defendant when judges interpret a rapper’s generally violent lyrics as specific to the charged crime. In this section, I will analyze a case from Maryland’s highest court to demonstrate that inaccurately interpreting generally violent rap lyrics as specific to a crime can tip the scale to prejudice the defendant and therefore should be excluded. Recently, in *Montague v. State*, the Maryland Court of Appeals upheld the admissibility of Lawrence Montague’s jailhouse rap lyrics as substantive evidence in establishing his alleged guilt in a murder case.¹¹² In January 2017, George Forrester was shot and killed by a drug dealer after Forrester attempted to buy cocaine with a counterfeit \$100 bill.¹¹³ Relying on the testimony and identification provided by a single witness, the decedent’s cousin, a grand jury indicted Montague for Forrester’s murder.¹¹⁴ Three weeks before trial, Montague made a call from the Anne Arundel County Detention Center to an unidentified male and recorded the following rap, which was later uploaded to Instagram:

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 /

¹¹¹ JOHNNY CASH, *Folsom Prison Blues*, on AT FOLSOM PRISON (Columbia Records 1968). For lyrics see Johnny Cash, *Folsom Prison Blues*, GENIUS, <https://genius.com/Johnny-cash-folsom-prison-blues-lyrics> [https://perma.cc/68SK-EXGN] (last visited Apr. 29, 2020).

¹¹² See *Montague*, 243 A.3d at 552.

¹¹³ See *id.*

¹¹⁴ See *Montague*, 243 A.3d at 551, *reconsideration denied* (Jan. 29, 2021); see also Phil Davis, *Man Found Guilty of Murder in Annapolis Shooting* (Nov. 2, 2017, 1:20 PM), <https://www.capitalgazette.com/news/crime/ac-cn-annapolis-murder-guilty-1103-story.html> [https://perma.cc/K6N7-CVC4].

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.¹¹⁵

After Montague recorded his rap, the person on the other end of the telephone cautioned Montague against publishing the lyrics on social media.¹¹⁶ However, Montague insisted and even stated “I’m Gucci.”¹¹⁷ It’s a rap. F—k they can do for – about a rap?”¹¹⁸ Montague’s usage of the phrase, “I’m Gucci” is relevant here and can be interpreted to mean that his rap could not possibly be interpreted in connection to the murder charges he was facing at the time. After all, his lyrics do not refer to any specific aspects of the murder charges brought against him. He does not claim to be a drug dealer. Nor does he claim to have shot or killed anyone. Instead, the lyrics in the jailhouse rap speak to general violence, which the court in *Skinner* viewed as not enough to tip the scale in favor of admitting such lyrics as evidence of rappers’ guilt. Unlike the lyrics in *Holmes v. State*, in which the defendant’s lyrics mirrored the details of a robbery and murder in which the assailants wore ski masks, turned out the victim’s pockets, and tore a necklace from the victim’s throat, Montague’s lyrics do not detail selling drugs to Forrester, receiving a counterfeit \$100 bill from Forrester, or shooting him as a result.¹¹⁹ Similarly, Montague’s case is unlike that of *Greene v. Commonwealth*, in which the rapper was charged with the murder of his wife and was found to have released the following eerily descriptive rap immediately after her death:

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 . . .¹²⁰

¹¹⁵ See *Montague*, 243 A.3d at 554.

¹¹⁶ See *id.*

¹¹⁷ “I’m Gucci” is a slang term, based on the luxury fashion brand, meaning okay. See *Gucci definition*, URBANDICTIONARY, <https://www.urbandictionary.com/define.php?term=gucci> [<https://perma.cc/6HPE-V6P2>] (last visited Feb. 3, 2021).

¹¹⁸ See *Montague*, 243 A.3d at 554.

¹¹⁹ See *Holmes v. State*, 129 Nev. 567, 306 P.3d 415, 417 (Nev. 2013). See also *Montague*, 243 A.3d at 554.

¹²⁰ *Greene v. Commonwealth*, 197 S.W.3d 76, 86 (Ky. 2006).

Even though Montague's jailhouse rap speaks of violence in generalities, like the lyrics in *Skinner*, Montague's lyrics were deemed admissible at trial¹²¹. On appeal of the trial court judge's decision to admit Montague's lyrics into evidence, the Maryland Court of Appeals did not focus on the general language in Montague's lyrics, but on the closeness in time between the composition of the lyrics and the commission of the crime¹²². The court reasoned that because Montague's rap was composed three weeks before trial, the probative value of the lyrics was high and would overcome any concerns about prejudicing the jury.¹²³ The court further demonstrated that the rap lyrics in *Skinner* were composed before the crime took place and possessed a weak temporal nexus with the alleged crime, whereas in Montague's case the lyrics provided much more reliable evidence of guilt.¹²⁴ Therefore, despite the lack of any specific details in the lyrics relating to the charged crime, the court applied the balancing test and admitted the evidence.

The Court of Appeals of Maryland seemed unwilling to heed the New Jersey Supreme Court's advice¹²⁵ in *Skinner* to approach rap lyric evidence with "caution." Instead, the Maryland court rushed to the conclusion that there was a temporal nexus that increased the lyrics' probative value. A more cautionary approach to the lyrics in *Montague*, like that applied in *Skinner*, would likely have resulted in a lack of finding a temporal nexus due to the absence of any specific admissions in the rap. Further, such an approach would not have to rely on an alternative, unconvincing argument that the "stop snitching" references in Montague's lyrics were intended to intimidate witnesses because the trial was scheduled to take place in three weeks. The Court of Appeals of Maryland mistakenly found a nexus, between general lyrics and a specific crime, that did not exist. The only evidence establishing criminality against the rapper was the witness testimony and identification of a woman related to the deceased who only identified Mr. Montague after she was apprehended for unrelated warrants.¹²⁶ Mr. Montague, as a result, was essentially on trial for his lyrics, which tipped the scales to prejudice the defendant and, therefore, should have been excluded. The Maryland court's decision in *Montague* is a catastrophic legal blow to hip-hop as art and those of us who are avid consumers of it.

¹²¹ Compare *Montague*, 243 A.3d at 554 with *State v. Skinner*, 95 A.3d 236, 241 (N.J. 2014).

¹²² *Montague*, 243 A.3d at 557.

¹²³ See *Montague*, 243 A.3d at 565

¹²⁴ See *id.* at 561-67

¹²⁵ See *Skinner*, 95 A.3d at 253.

¹²⁶ See *Montague*, 243 A.3d at 551.

IV. CALL FOR LEGISLATIVE INTERVENTION

Current sociopolitical and legal regimes continue to perpetuate mass incarceration through an attack on hip-hop, its consumers, and Black men, thereby also impacting Black families and communities. Lyrics that reveal the first-hand experience of how one survives violent, poverty-stricken, predominately black neighborhoods can be completely foreign to judges, jurors, and prosecutors who were not raised in similar environments. These lyrics can distort a rapper's innocence by painting him as a bad individual to a judge and jury instead of a survivor of his or her socio-economic circumstances. Intervention is necessary to ensure a genre sculpted and consumed by Black people is not weaponized against the community it was designed to serve. The calls for racial justice and equity during the summer of 2020 demanded that federal legislatures analyze every way in which the criminal justice system is disproportionately impacting Black Americans.¹²⁷

One potential solution to address the gross imbalance inherent within the probative versus prejudicial balancing test is to abandon the test and replace it with a subjective standard. Specifically, when determining whether rap lyrics are admissible, an inquiry into the meaning of the lyrics to the rapper should be considered. This approach to the lyrics centers the rapper's lyric within the community that the genre was intended to serve. Additionally, the ease with which rap lyrics can be admitted into evidence should be analyzed. Further, courts should raise the bar for admission of generally violent rap lyrics to account for the disparate treatment of Black men, especially in cases in which the jury relies on only a few pieces of evidence to convict a defendant.

CONCLUSION

Unfortunately, KRS-One's 1993 lyrics from *Sounds of Da Police*¹²⁸ are still largely true. Due to systematic injustices, Black men are concentrated in poverty-stricken, war-torn public housing complexes in densely populated, metropolitan areas. They are restricted in educational opportunities, which contributes to the lack of gainful and legitimate employment in the

¹²⁷ Following George Floyd's murder, Black Lives Matter and the Movement for Black Lives began the process of drafting the BREATHE Act, a federal bill that calls for divestment from current policing systems and the investment in new forms of public safety. See Electoral Justice Project, *What is the Breathe Act*, MOVEMENT FOR BLACK LIVES (last accessed Apr. 12, 2021), [https://breatheact.org/learn-more/\[https://perma.cc/J6RT-46B6\]](https://breatheact.org/learn-more/[https://perma.cc/J6RT-46B6]).

¹²⁸ See KRS-ONE, *supra* note 1.

future. As a result, many Black men are relegated to either using or selling illicit drugs, which is the first link in the never-ending chain of mass incarceration. Law enforcement officers begin to target these predominately Black neighborhoods and arrest Black men at higher rates than they arrest White people, even though research suggests that illegal drug use is just as prevalent in White communities. Prosecutorial discretion allows for the introduction of rap lyrics, a poetic outlet for many men, as evidence, which contributes to mass incarceration. Then, even after being released from prison, Black men are faced with institutional barriers to successful re-entry.

The current legal scheme of probative versus prejudicial treatment continues to tip the scales against rappers, which reinforces biased views of Black men and hip-hop. Prosecutors' reliance on lyrics as true and judges' interpretations of general lyrics to establish a connection to a specific crime contribute to the legal assault on hip-hop. To attain justice, state and local legislatures must act to ensure that either the balancing test is replaced with a more subjective assessment of rap lyrics or that the bar to admit rap lyrics as evidence is raised. Until then, I am dreaming of "better days, better days. Hey, better days. Got me thinking about better days"¹²⁹ for the contemporary Black man and, ultimately, the country as a whole.

¹²⁹ 2PAC, *Better Dayz*, on BETTER DAYZ (Insomniac/Interscope Records 2002). For lyrics, see 2Pac, *Better Dayz*, GENIUS, <https://genius.com/2pac-better-dayz-lyrics> [<https://perma.cc/D9MV-KRQ4>] (last visited Apr. 29, 2020).