

# RAPP SNITCH KNISHES: THE DANGER OF USING GANGSTER RAP LYRICS TO PROVE DEFENDANTS' CHARACTER

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*Rap Snitches, Telling all their business/ Sit in the court and be their own star witness/ Do you see the perpetrator? – Yeah I'm right here/ Fuck around, get the whole label sent up for years.*<sup>1</sup>  
-- From Rapp Snitch Knishes (2004)

## INTRODUCTION

Suppose the year is 1842. The dismembered body of a man has been found beneath the floorboards of a home in the city of Baltimore. The prime suspect in this homicide is current Baltimore resident, Edgar Allan Poe. The prosecution seeks to enter into evidence a short story that the defendant has been preparing for publication. In this story, the narrator murders a man who has, as the narrator describes it, a “vulture-eye,” and cuts the body to pieces in his bathtub and buries the remains below his floorboards. The victim in the case at hand had a lazy eye and the home under which he was buried did not belong to Mr. Poe. Despite the differences between the novel and the real-life case, the prosecution seeks to have Mr. Poe’s short story presented to show that Mr. Poe had the intent to commit the crime, knowledge of methods of homicide and disposal of evidence, and a plan to commit homicide and dispose of the evidence. Should the admission of Mr. Poe’s in-progress short story be admitted?<sup>2</sup>

Evidence is anything offered to the court to be shown to a jury to persuade it of the “existence or nonexistence of a fact.”<sup>3</sup> Rule 401 of the Federal Rules of Evidence requires that evidence be relevant.<sup>4</sup> To be

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1. MF DOOM FEAT. MR. FANTASTIK, *Rapp Snitch Knishes*, on MM.. FOOD (Rhymesayers Entertainment 2004).

2. See EDGAR ALLEN POE, *The Tell-Tale Heart*, in vol. B THE NORTON ANTHOLOGY OF AM. LITERATURE 691-95 (Julia Reidhead ed., 8th ed. 2012).

3. See *Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

4. See FED. R. EVID. 401.

relevant, evidence must be both probative and material.<sup>5</sup> Evidence is probative when it “[t]end[s] to prove or disprove” a fact in question.<sup>6</sup> Evidence is material when it has “some logical connection with [a] consequential [fact].”<sup>7</sup> Relevant evidence is admissible unless prohibited by another rule of evidence.<sup>8</sup> One prohibitive rule of evidence which almost all evidence is subject to is Federal Rule of Evidence Rule 403 (hereinafter “Rule 403”).<sup>9</sup> Under this rule, evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.<sup>10</sup> Unfair prejudice exists when evidence tends to lead one to make a decision on an improper basis.<sup>11</sup>

Tay-K 47 (born Taymor McIntyre) was a 17-year-old African-American gangster rap artist from Arlington, Texas, who will be tried as an adult for a murder that came as a result of a home invasion.<sup>12</sup> While awaiting sentencing under house arrest, Tay-K 47 cut his ankle monitor and fled to New Jersey.<sup>13</sup> After three months on the lam, Tay-K 47 released the music video for a song titled *The Race* on YouTube.<sup>14</sup> Tay-K 47 was apprehended by law enforcement that same day.<sup>15</sup>

*The Race* refers to Tay-K 47’s run from the law.<sup>16</sup> The lyrics of the *The Race* are offensive on their face and include “shoot a fuckboy in his motherfucking face,” “beat it up, where I nut? Shorty face,” and “pop a nigger then I go out my way.”<sup>17</sup> In the music video, Tay-K 47 is seen toting a gun, flashing gang signs, and standing next to a wanted poster with his face on it.<sup>18</sup>

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5. See *id.*; FED. R. EVID. 401(b).

6. See *Probative*, BLACK’S LAW DICTIONARY (10th ed. 2014).

7. See *Material*, BLACK’S LAW DICTIONARY (10th ed. 2014).

8. See FED. R. EVID. 402.

9. See GEORGE FISHER, EVIDENCE 42-43 (Robert C. Clark et al. eds., 3d ed. 2013).

10. See FED. R. EVID. 403.

11. See FED. R. EVID. 403 advisory committee’s note to 1972 proposed rules.

12. See Joe Coscarelli, *Tay-K was a 17-Year-Old ‘Violent Fugitive.’ Then His Song Went Viral*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/arts/music/tay-k-the-race-criminal-charges.html>; Kay Wicker, *Amateur Rap Lyrics are Being Used as Evidence Across the Country*, THINKPROGRESS (Sept. 1, 2017, 10:30 AM), <https://thinkprogress.org/rap-lyrics-evidence-texas-acb3870f7d2c/>.

13. See Coscarelli, *supra* note 12; Wicker, *supra* note 12.

14. See Coscarelli, *supra* note 12; *TAY-K X THE RACE #FREETAYK*, YOUTUBE (June 30, 2017), <https://www.youtube.com/watch?v=OYhXJaEbw7c>; Wicker, *supra* note 12.

15. See Coscarelli, *supra* note 12; Wicker, *supra* note 12.

16. See *TAY-K X THE RACE #FREETAYK*, *supra* note 14 (“Fuck a beat, I was tryn’a beat a case/ but I ain’t beat that case, bitch, I did the race.”); see also Coscarelli, *supra* note 12.

17. See *TAY-K X THE RACE #FREETAYK*, *supra* note 14.

18. See *id.*

The benefit brought to Tay-K 47 by the success of *The Race* may be outweighed by a threat it may pose against him at his upcoming trial.<sup>19</sup> *The Race* has become a viral hit and has made its way onto the billboard charts, peaking at the 44th spot.<sup>20</sup> It has garnered both sympathy and infamy for Tay-K 47.<sup>21</sup> Freestyles have been made over the beat of *The Race* by big names in the current hip-hop scene, such as Isaiah Rashad and Lil' Yachty, who have expressed their concern and support with the refrain "free Tay-K."<sup>22</sup> While Tay-K 47 has earned around 600 to 700 thousand dollars through a deal with record label 88 Classic, his successful rap career has already had costly repercussions.<sup>23</sup> In March 2017, a judge denied Tay-K 47 bail, in part due to the judge's feelings toward *The Race* and the reception it has received, stating, "I don't know how many people are supposed to die and I don't know why we . . . as a country seem to glorify bad acts by putting out records and videos."<sup>24</sup> Increasingly, aspiring gangster rap artists are being made to answer for their artistic expression at trial.<sup>25</sup> Tay-K 47's lyrics are likely to be used against him even further when his case goes to trial.<sup>26</sup>

Gangster rap lyrics have proven to be highly effective evidence against defendants.<sup>27</sup> Although a fairly new form of art, rap music has risen to a prominent place in American culture.<sup>28</sup> As it has developed and evolved over the years, several sub-genres of rap have emerged.<sup>29</sup> The focus of this article will be the sub-genre of gangster rap. Gangster rap artists seek to present their harsh environment through their lyrics.<sup>30</sup> As such, gangster rap lyrics deal

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19. See Coscarelli, *supra* note 12.

20. See Eddie Fu, *A Texas Judge Denied Tay-K Bail Partially Based on His Hit Song "The Race"*, GENIUS (March 9, 2018), <https://genius.com/a/a-texas-judge-denied-tay-k-bail-partially-based-on-his-hit-song-the-race>; Wicker, *supra* note 12.

21. See Fu, *supra* note 20.

22. World Star Hip-Hop, Lil Yachty "The Race Freestyle" (Tay-K Remix) (WSHH Exclusive – Official Audio), YOUTUBE (Aug. 15, 2017), <https://www.youtube.com/watch?v=beVp061ijmE>; see Isaiah Rashad – The Race Freestyle (Tay-K), YOUTUBE (Sept. 28, 2017), [https://www.youtube.com/watch?v=Rf4S\\_44jkAY](https://www.youtube.com/watch?v=Rf4S_44jkAY).

23. See Fu, *supra* note 20.

24. *Id.*

25. See Wicker, *supra* note 12.

26. See *id.*

27. See Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 (2007); Wicker, *supra* note 12.

28. See *State v. Skinner*, 95 A.3d 236, 245 (N.J. 2014).

29. See Milan Harris, *The Evolution of Hip-Hop and Its Many, Many Subgenres*, ODYSSEY (Dec. 18, 2016), <https://www.theodysseyonline.com/evolution-hip-hop-subgenres/>.

30. See Brief for Marion B. Brechner First Amendment Project et al. as Amici Curiae Supporting Petitioner, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-985), 2014 WL 4180919 at \*13 [hereinafter *Elonis Brief*].

heavily with violence, drugs and gangs.<sup>31</sup> This article will focus specifically on gangster rap lyrics, which are frequently used by prosecutors against criminal defendants.<sup>32</sup> This article will argue that any analyses done under the Federal Rule of Evidence 404(b) (hereinafter “Rule 404(b)”) without taking into account gangster rap’s uniqueness is incomplete and should be reversible in such an analyses’ failure to take into account the substantial potential of prejudice that arise out of the genre’s complexities.

One means of introducing these lyrics as evidence has been as admissible character evidence under Rule 404(b).<sup>33</sup> This rule prohibits the use of “evidence of a crime, wrong, or other act” to prove a defendant’s character in order to show that the defendant acted according to that character in the situation in question.<sup>34</sup> Such evidence may be allowed in, however, if used for a proper, independently relevant purpose.<sup>35</sup>

In a majority of cases in which gangster rap lyrics are introduced as evidence against the criminal defendants who wrote them, the evidence submitted under Rule 404(b) has been found to be admissible.<sup>36</sup> Along with a few other cases, *State v. Skinner* stands in contrast with the majority of decisions dealing with this topic.<sup>37</sup> In *Skinner*, the New Jersey Supreme Court held that the danger of undue prejudice outweighed the probative value of the prosecution’s extensive reading of the defendant’s lyrics to the jury.<sup>38</sup> In doing so, the court recognized the unique problems that this sort of evidence presents.<sup>39</sup>

Part I of this article explains the analysis used to determine the admissibility of past act evidence under Rule 404(b) and examines the cases that have had the most significant effect on this sort of evidence. Special attention will be paid to the New Jersey Supreme Court’s decision in *State v. Skinner*, which stands out from the majority of decisions dealing with gangster rap lyrics by taking into account the uniquely prejudicial nature of such evidence. Part II explains how the history, customs and subject matter

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31. See Immortal Technique, *Is Gangsta Rap Hip Hop?*, HIP HOP DX (Dec. 29, 2006), <https://hiphopdx.com/editorials/id.692/title.is-gangsta-rap-hip-hop-by-immortal-technique#>.

32. See Dennis, *supra* note 27 at 2-3. This article will not address other sub-genres of rap. For a hyperbolic and humorous example of the phenomenon which this paper addresses, see *Key And Peele: Killer Concept Album* (Comedy Central television broadcast Aug. 5, 2015).

33. See FED. R. EVID. 404(b).

34. See *id.*

35. See *id.*

36. See generally Dennis, *supra* note 27.

37. See Michael Gregory, *Murder Was the Case That They Gave Me: Defendants Rap Lyrics as Evidence in a Criminal Trial*, 25 B.U. PUB. INT. L.J. 329, 332 (2016).

38. See *State v. Skinner*, 95 A.3d 236, 253 (N.J. 2014).

39. See *id.* at 238.

of gangster rap lyrics make them especially vulnerable to creating undue prejudice in jurors who are unfamiliar with the genre. Part III demonstrates why allowing gangster rap lyrics to be presented as evidence is so dangerous that its admissibility must be viewed under a special lens. Finally, this article's proposal will expand the *Skinner* court's holding to adequately protect criminal defendants who have written gangster rap lyrics, as well as preserve the benefits derived from such expression.

## I. LEGAL STANDARD AND RELEVANT CASE LAW

This section identifies and explains the rules of evidence used when gangster rap lyrics are presented against the criminal defendants who wrote them. Next, this section will provide a survey of cases in which this issue has developed.

### A. Rule 404(b) Admissibility Analysis

Evidence of a past crime, wrong or other act is generally not admissible because it may lead jurors to make the inference that the defendant who has committed some unsavory act in the past has acted in accordance with that prior bad conduct in the situation at hand.<sup>40</sup> There is a two-step process to analyzing the admissibility of such evidence.<sup>41</sup> The first step is to show that the evidence is being used for a proper purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>42</sup> In other words, the purpose for which the evidence is being introduced must be relevant, independent from showing that the defendant has a negative character trait or a propensity to commit the act in question.<sup>43</sup>

After a proper, independently relevant purpose has been identified, the next step is twofold.<sup>44</sup> First, it must be determined whether the danger of unfair or undue<sup>45</sup> prejudice outweighs the probative value of the evidence.<sup>46</sup> "No mechanical solution is offered" for making this determination.<sup>47</sup> The

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40. See FED. R. EVID. 404(a); *Bryant v. State*, 802 N.E.2d 486, 499 (Ind. Ct. App. 2004).

41. See FED. R. EVID. 404(b) advisory committee's note to 1972 proposed rules.

42. *Id.*

43. See FED. R. EVID. 404(b).

44. See FED. R. EVID. 404(b) advisory committee's note to 1972 proposed rules.

45. The word "undue" is used in Rule 404(b), while "unfair" is used in Rule 403. FED. R. EVID. 403; see also FED. R. EVID. 404(b) advisory committee's note to 1972 proposed rules.

46. See FED. R. EVID. 404(b).

47. *Id.*

determination is to be made according to the Rule 403.<sup>48</sup> According to the advisory notes of Rule 403, unfairly prejudicial evidence is evidence that has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>49</sup> The other aspect of the second step comes from the advisory notes of Rule 404(b), which require that the availability of other means of proof be taken into account.<sup>50</sup> If a proper purpose for introducing evidence of past acts has been identified and the prosecution has shown that the evidence of a past act is not unduly prejudicial under the guidance of Rule 403 and in light of the availability of other means of proof, the evidence may be admitted against a defendant.<sup>51</sup>

### B. *Relevant Case Law*

The following section examines how courts have dealt with gangster rap lyrics and similar evidence being presented against the author of the works in question using the standard explained above. The survey begins with the use of violent fiction being used against the defendant in *State v. Hanson*.<sup>52</sup> Next, *United States v. Foster* will serve as an example of how defendant-written gangster rap lyrics can be presented for the purposes listed in Rule 404(b).<sup>53</sup> The Sixth Circuit case, *United States v. Stuckey*, serves as an example of courts allowing gangster rap lyrics to be admitted as a result of a misunderstanding of gangster rap and its effect on jurors, under what this note will argue is a misunderstanding of the genre, an underestimation of the prejudice that comes along with such evidence, and an overestimation of jurors’ ability to separate the defendant from their art.<sup>54</sup> The 2001 case of *State v. Cheeseboro* from South Carolina will serve as an example of when gangster rap lyrics are admitted despite the danger of undue prejudice of the lyrics outweighing their probative value.<sup>55</sup> Finally, special attention will be paid to *State v. Skinner*, in which the Supreme Court of New Jersey ruled the defendant’s gangster rap lyrics to be impermissible and held that absent a “direct connection” between the lyrics and the crime being charged, gangster rap lyrics should not be admitted against their author.<sup>56</sup>

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48. *See id.*

49. FED. R. EVID. 403 advisory committee’s note to 1972 proposed rules.

50. *See* FED. R. EVID. 404(b) advisory committee’s note to 1972 proposed rules.

51. *See id.*

52. *State v. Hanson*, 731 P.2d 1140 (Wash. Ct. App. 1987).

53. *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991).

54. *United States v. Stuckey*, 253 Fed. Appx. 468 (6th Cir. 2007).

55. *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001).

56. *State v. Skinner*, 95 A.3d 236, 253 (N.J. 2014).

### 1. *State v. Hanson*

The case of *State v. Hanson* serves as a precursor to the relevant body of case law.<sup>57</sup> In *Hanson*, the defendant was on trial for first degree assault.<sup>58</sup> On cross examination, the defendant was questioned about a fiction novel that he had written, part of which contained violence.<sup>59</sup> The fiction was presented under Washington Rules of Evidence, ER 404(a).<sup>60</sup> Rule 404(a) of the Washington Rules of Evidence is substantially similar to Rule 404(a) of the Federal Rules of Evidence.<sup>61</sup> Both Rules state that evidence of a person's character or character trait is not admissible if used to show that the person acted in accordance with that trait in the case at hand.<sup>62</sup> Though not entirely on point, this case is valuable for purposes of this article because of the court's comments about the probative value of artistic expression, as well as the danger of undue prejudice it presents.<sup>63</sup> The Washington Appellate Court stated that the writings were "simply not probative" and could only be found to be so if they accepted "the proposition that an author's character can be determined by the type of book that he writes."<sup>64</sup> The court flatly rejected such a proposition.<sup>65</sup> The *Skinner* court would later come to a similar conclusion about the probative value of gangster rap lyrics.<sup>66</sup>

### 2. *United States v. Foster*

The seminal case involving the use of defendant-written gangster rap lyrics under Rule 404(b) is the 1991 Seventh Circuit case of *United States v. Foster*.<sup>67</sup> After getting off of a train, the defendant was approached by law enforcement agents.<sup>68</sup> When it was discovered that there were narcotics in the defendant's bags, he claimed not to have knowledge of how much narcotics were in the bag.<sup>69</sup> The defendant's lyrics, which said that he was

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57. *See Foster*, 939 F.2d at 456.

58. *See State v. Hanson*, 731 P.2d 1140, 1142 (Wash. Ct. App. 1987).

59. *See id.* at 1143 n.3.

60. *See* WASH. R. EVID. ER 404(a); *Hanson*, 731 P.2d at 1144-45.

61. *See* FED. R. EVID. 404(b); WASH. R. EVID. ER 404(a).

62. *See* FED. R. EVID. 404(b); WASH. R. EVID. ER 404(a).

63. *Hanson*, 731 P.2d at 1144-45.

64. *Id.* at 1145.

65. *See id.*

66. *See State v. Skinner*, 95 A.3d 236, 251-52 (N.J. 2014).

67. *See United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

68. *See id.* at 448.

69. *See id.* at 449.

“the biggest dope dealer”<sup>70</sup> and made use of “drug code words,”<sup>71</sup> were admitted under Rule 404(b) for the purpose of showing knowledge and intent.<sup>72</sup> The court said that the lyrics need not prove that the defendant had knowledge, but only need to make it more probable that the defendant had knowledge of narcotics trafficking.<sup>73</sup> For the final part of the Rule 404(b) analysis, the court left the weighing of probative value against a potential danger of undue prejudice to the discretion of the trial court.<sup>74</sup> In doing so, the court failed to acknowledge the uniqueness of this sort of evidence.

Here, the prosecution used the defendant’s gangster rap lyrics to show knowledge and intent. The following case serves an example of how a lack of appreciation for the unique nature of gangster rap lyrics as evidence can be taken as far as allowing gangster rap lyrics to serve as an admission by a defendant.

### 3. *United States v. Stuckey*

In *United States v. Stuckey*, the defendant’s lyrics were presented by the government, not as Rule 404(b) evidence, but as “autobiographical statements of acts relevant to the case.”<sup>75</sup> The court stressed the relevance of the defendant’s lyrics to the facts of the case, saying “Stuckey’s lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the streets – precisely what the government accused Stuckey of doing.”<sup>76</sup>

While the lyrics may have fit with the facts of this case, it is important to note that such violent imagery is a common feature of gangster rap lyrics.<sup>77</sup> The court made what this article will argue is a dubious assumption in concluding its analysis of the admission of the defendant’s lyrics by asserting that rap’s current place in culture makes it unlikely for a reasonable juror to attribute violent tendencies to an individual because they have written rap lyrics.

In the past two cases, the danger of undue prejudice from admitting gangster rap lyrics was not found to substantially outweigh their probative

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70. *Id.*

71. The defendant’s lyrics used the words “key” and “rock” which the government asserted were common code words used in the trafficking of cocaine. *See id.* at 449 n.1.

72. *See id.* at 456.

73. *See id.*

74. *See id.* at 457.

75. *United States v. Stuckey*, 253 Fed. Appx. 468, 483 (6th Cir. 2007). The Court noted that if the lyrics were presented under Rule 404(b), they would be admissible, as they would tend to show “knowledge, preparation, plan, and arguably modus operandi.” *Id.* at 482.

76. *Id.*

77. *See* *Elonis Brief*, *supra* note 30, at 13.



value.<sup>78</sup> In *State v. Cheeseboro*, this was not the case, but the gangster rap lyrics in question were admitted regardless.<sup>79</sup>

#### 4. *State v. Cheeseboro*

The case of *State v. Cheeseboro* is an example of when gangster rap lyrics are found not to be admissible, but the conviction based on those lyrics was not reversed because the appellate court made a finding that there was no reversible error.<sup>80</sup> The defendant was convicted of three counts of armed robbery, three counts of kidnapping, two counts of murder, and one count of assault and battery with intent to kill.<sup>81</sup> The lower court found that the defendant's lyrics were relevant to prove the defendant's violent disposition because they mentioned not leaving prints at the scene of the crime, as well as leaving bodies in a pool of blood.<sup>82</sup> As in *Stuckey*, these references are common tropes in gangster rap.<sup>83</sup> Although the danger of undue prejudice outweighed the probative value, the court found that it was not a reversible error since there were also letters which demonstrated the defendant's violent disposition.<sup>84</sup> The court reasoned that since the letters tended to prove the same things as the lyrics did, there was no harm to the defendant in the defendant's lyrics being presented to the jury.<sup>85</sup>

In *Foster*, *Stuckey*, and *Cheeseboro*, gangster rap lyrics were admitted. The court in *Skinner* decided differently by viewing gangster rap lyrics and their effect on juries in a different, more appropriate light.<sup>86</sup>

#### 5. *State v. Skinner*

The court in *State v. Skinner* approached the issue of admitting gangster rap evidence in a way that acknowledges the dangers of such evidence. The defendant was on trial for a fatal shooting.<sup>87</sup> The prosecution performed a reading of thirteen pages of lyrics the defendant had written.<sup>88</sup> Describing the lyrics, the court noted they were "replete with expletives and included graphic depictions of violence, bloodshed, death, maiming, and

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78. See *Stuckey*, 253 Fed. Appx. at 483; *Foster*, 939 F.2d at 457, 458.

79. See 552 S.E.2d 300, 312-14 (S.C. 2001).

80. See *id.* at 550.

81. See *id.* at 533.

82. See *id.* at 550.

83. The defendant raised this argument. See *id.*

84. See *id.*

85. See *id.*

86. See *State v. Skinner*, 95 A.3d 236, 253 (N.J. 2014).

87. See generally *id.*

88. See *id.* at 241.

dismemberment.”<sup>89</sup> The content of the lyrics did not correlate to the facts of the case at hand.<sup>90</sup> Significantly, “the state did not attempt to clarify or explain the lyrics in any way, despite their heavy use of slang and otherwise esoteric language.”<sup>91</sup>

The lyrics were presented under the New Jersey Rules of Evidence Rule 404(b)<sup>92</sup> to show the defendant’s motive and intent.<sup>93</sup> The court gave the rationale for Rule 404(b), explaining that its purpose “is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn’t worry overmuch about the strength of the government’s evidence.”<sup>94</sup>

In weighing probative value against the danger of undue prejudice, the court found that the lyrics were highly prejudicial and carried “little to no probative value.”<sup>95</sup> To illustrate its opinion, the Court noted that one would not think that Bob Marley had shot a sheriff or that Edgar Allen Poe had a body beneath his floorboards simply based on their artistic works.<sup>96</sup> The court makes a clear statement of instruction to future courts, saying that the “[d]efendant’s lyrics should receive no different treatment.”<sup>97</sup>

The *Skinner* court stressed the delicate nature of this issue, urging that “extreme caution must be exercised when expressive work is involved, particularly when such expression involves social commentary, exaggeration, and fictional accounts.”<sup>98</sup> Synthesizing precedent on the issue, the court notes that when faced with similar evidence, other jurisdictions will “rarely admit artistic works against a criminal defendant where those works are insufficiently tethered to the charged crime.”<sup>99</sup> The Court’s final holding was that absent a “direct connection to the specifics of the offense for which [the lyrics are] offered,” rap lyrics may not be used as evidence of motive and intent.<sup>100</sup> Further, if there is a sufficient connection, the probative value of the lyrics must also outweigh the danger of undue prejudice.<sup>101</sup>

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89. *Id.*

90. *See id.*

91. *Id.*

92. Rule 404(b) of The New Jersey Rules of Evidence are substantially similar to the corresponding rule in The Federal Rules of Evidence. *Compare* FED. R. EVID. 404(b) *with* N.J. R. EVID. 404(b).

93. *See Skinner*, 95 A.3d at 240-41.

94. *Id.* at 249.

95. *Id.* at 251.

96. *See id.*

97. *Id.*

98. *Id.* at 253.

99. *Id.*

100. *Id.*

101. *See id.*

The New Jersey Supreme Court's holding in *Skinner* was a big step in the right direction for the issue of the admissibility of defendant-written gangster rap lyrics. The *Skinner* Court's holding avoided the mistakes of underestimating the uniquely provocative nature of gangster rap lyrics and overestimating their probative value as testimony or indication of personal experiences.<sup>102</sup>

The following section will examine gangster rap's history and customs to demonstrate how and why presenting defendant-written gangster rap lyrics are likely to poison a jury against the author.

## II. WHAT MAKES GANGSTER RAP UNIQUELY LIKELY TO PRODUCE UNDUE PREJUDICE

Gangster rap lyrics present a unique danger when introduced as evidence to jurors who are unfamiliar with the genre's history, customs, and messages.<sup>103</sup> Gangster rap's origins rise out of troubled communities and its continuing narrative is one that documents the story of those communities and their citizens.<sup>104</sup> Further, this communal narrative should not be confused with a factual journal or a personal diary.<sup>105</sup> Finally, gangster rap lyrics often use graphic, violent language, and imagery to get their message across, which may be misinterpreted by jurors to indicate that the artist themselves, have a violent disposition.<sup>106</sup> In light of the factors mentioned above, gangster rap lyrics are best interpreted literarily, rather than literally. Any analysis done under Rule 404(b) without taking into account gangster rap's uniqueness is incomplete and should be reversible in its failure to take into account the substantial potential for prejudice that arise out of the genre's complexities.

### A. *History of Gangster Rap*

When one looks at the history of gangster rap, it becomes clear that the goal of the genre's message is not to glorify its subject matter, but to report on the conditions of the environments in which the artists are living. Gangster rap is a modern development of African-American storytelling in which the artists comment on the reality of their communities.<sup>107</sup> Without this

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102. *See generally id.* at 253.

103. *See Dennis, supra* note 27, at 3.

104. *See Elonis Brief, supra* note 30, at 6-7.

105. *See Dennis, supra* note 27, at 25.

106. *See Skinner*, 95 A.3d at 253.

107. *See Elonis Brief, supra* note 30, at 3.

contextual background, gangster rap's depiction of unpleasant subject matter is likely to be misunderstood.

For as long as there has been oppression of African-Americans in America, there has been artistic and intellectual expressions made in response.<sup>108</sup> This can be seen in spirituals during slavery, to *The Souls of Black Folk* during Reconstruction, to jazz, to poets such as Langston Hughes, to soul and finally to hip-hop.<sup>109</sup> A significant predecessor to gangster rap was *The Message* by Grandmaster Flash and the Furious Five, which lamented life in The Bronx with the chorus "Don't push me/ 'Cause I'm close to the edge/ . . . It's like a jungle sometimes/ It makes me wonder how I keep from going under."<sup>110</sup> Similarly, gangster rap rose out of the dire conditions in South-Central Los Angeles during the 1980's.<sup>111</sup> An early example is Toddy Tee's *Batteram*, which addresses the use of the B-100 armored vehicle, also known as the batteram, by LAPD to "flatten out" suspected crack houses.<sup>112</sup> N.W.A. put gangster rap in the public eye with their violent, provocative hits *Straight Outta Compton* and *Fuck Tha Police*.<sup>113</sup>

In its early days, gangster rap was known as reality rap.<sup>114</sup> When one examines the genre in the context of a continuing cultural narrative, the accuracy of that moniker becomes apparent. While the message of gangster rap reports the conditions of the artists culture, the effects are personal to the author, and as such, gangster rap artists often present their lyrics in the first-person.<sup>115</sup>

### B. Gangster Rap's Use of a First-Person Perspective

When gangster rap lyrics are presented in a first-person perspective they are best understood as a narration rather than a personal diary or a factual journal.<sup>116</sup> To properly understand gangster rap lyrics, one must be able to

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108. See generally *id.*

109. See generally *id.*

110. See GRAND MASTER FLASH AND THE FURIOUS FIVE, *The Message*, on *THE MESSAGE* (Sugar Hill Records Ltd. 1982).

111. See Elonis Brief, *supra* note 30, at 13; see also Aimee Kuvadia, *The Hidden History of Compton Hip-Hop: Part One*, KINDLAND (Mar. 17, 2016), <http://www.thekindland.com/culture/the-hidden-history-of-compton-hip-hop-part-one-1118>.

112. See Dennis Romero, *The Militarization of Police Started in Los Angeles*, LA WEEKLY (Aug. 15, 2014, 6:04 AM) <http://www.laweekly.com/news/the-militarization-of-police-started-in-los-angeles-5010287>; TODDY TEE, *Batteram*, on *THE ULTIMATE COLLECTION*, VOL. 1 (1985).

113. See Elonis Brief, *supra* note 30, at 17-18; see also Justin Kautz, *N.W.A.*, BRITANNICA, <https://www.britannica.com/topic/NWA> (last visited Sept. 18, 2018).

114. See Immortal Technique, *supra* note 31.

115. See Dennis, *supra* note 27, at 25.

116. See *id.*

distinguish the writer from the speaker.<sup>117</sup> The speaker may be a creation of the writer's imagination,<sup>118</sup> an actual person other than the writer,<sup>119</sup> or a compilation of individuals or mosaic of the writer's community.<sup>120</sup> A failure to make the distinction between writer and speaker will cause jurors to view artistic narratives as written confessions.<sup>121</sup>

It is a flawed notion to think that the violence presented in gangster rap is indicative of violence on the part of the writer.<sup>122</sup> Gangster rap artists seek to present the unfortunate reality of their communities through their lyrics, so it is not surprising that the subject matter would be violent.<sup>123</sup> Moreover, an attempt by gangster rap artists to whitewash their depiction of the struggles of their communities would be dishonest, and undermine the social value of the genre.<sup>124</sup>

Another issue arising from confusion brought on by a misunderstanding of the first-person perspective used in gangster rap is that, in many cases, the artist has never been involved in the life they are writing about.<sup>125</sup> A prime, almost too accurate-to-be-true example of this is the Miami based rapper Rick Ross ("Ross").<sup>126</sup> Born William Leonard Roberts II, Ross took his stage name from the infamous Los Angeles crack dealer, Freeway Rick Ross.<sup>127</sup> Ross's lyrics are violent and make frequent references to being a drug

117. *See id.* at 23-26.

118. *See* GRAND MASTER FLASH AND THE FURIOUS FIVE, *The Message*, on THE MESSAGE (Sugar Hill Records Ltd. 1982). This song depicts the points of view and stories of several fictional, but realistic, individuals.

119. *See* KENDRICK LAMAR, *Sing About Me*, on GOOD KID, M.A.A.D CITY (Top Dawg Entm't., Aftermath Entm't., Interscope Records 2012). The first two verses are from the perspectives of individuals who are siblings of people Lamar had mentioned in other songs.

120. *See* Dennis, *supra* note 27, at 21; *see also* KENDRICK LAMAR, *Alright*, on TO PIMP A BUTTERFLY (Top Dawg Entm't., Aftermath Entm't., Interscope Records 2015). Although presented as a first person narrative, *Alright* is intended to depict the frustrations of the inner-city community as a whole, rather than Kendrick Lamar's personal feelings. "I'm Fucked up/ Homie, you fucked up/ But if God got us, then we gon' be alright." *Id.*

121. *See* Dennis, *supra* note 27, at 25-26.

122. *See* State v. Skinner, 95 A.3d 236, 251-52 (N.J. 2014); State v. Hanson, 731 P.2d 1140, 1144-45 (Wash. Ct. App. 1987).

123. *See* Dennis, *supra* note 27, at 18.

124. *See id.* at 20.

125. *See* Elonis Brief, *supra* note 30, at 15.

126. *See* Johnny Diaz, *Rick Ross: What You Need to Know About the Miami Hip-hop Mogul*, SUN SENTINEL (Mar. 5, 2018, 4:15 PM), <http://www.sun-sentinel.com/features/fl-fea-rick-ross-in-the-news-20180305-story.html>; *Rap Lyrics in Court: Art Vs. Evidence*, NPR (Apr. 1, 2014, 11:06 AM ET), <http://www.npr.org/2014/04/01/297705052/rap-lyrics-in-court-art-vs-evidence>.

127. Joe Mozingo & Veronica Rocha, *Former L.A. Cocaine Kingpin 'Freeway' Ricky Ross Arrested in Sonoma County*, L.A. TIMES (Oct. 23, 2015), <http://www.latimes.com/local/lanow/la-me-ln-freeway-ricky-ross-arrested-20151023-story.html>; Mike Sager, *Rick Ross Drug Dealer Profile*, ESQUIRE (Sep. 25, 2013), <http://www.esquire.com/news-politics/a25818/rick-ross-drug-dealer-interview-1013/>.

kingpin.<sup>128</sup> Ross's true story is quite different.<sup>129</sup> Prior to becoming a hip-hop artist, Ross worked as a corrections officer.<sup>130</sup> Such a stark contrast is not uncommon in hip-hop.<sup>131</sup> For example, Lil Yachty, Vince Staples, Tyler the Creator and Kendrick Lamar all deal extensively with drug and alcohol use in their lyrics, yet openly live sober, "straight edge" lifestyles.<sup>132</sup> These artists illustrate the flaw in equating the speaker in a first person artform, with the writer.

### C. *The Extreme, Graphic Nature of Gangster Rap*

An understanding of both gangster rap's purpose as a depiction of reality, and gangster rap's custom of exaggeration is crucial to properly interpret gangster rap lyrics. When an artist's lyrics deal primarily with violent subject matter, as most gangster rap lyrics do, those lyrics are better understood as an exposition of a troubling reality, rather than an indication of an obsession or glorification of violence.<sup>133</sup> In an interview with CNN, Eazy-E stated that he did not "[t]hink gangster rap promotes violence at all" and that what gangster rappers are doing is reporting the street's perspective.<sup>134</sup>

Considering that, in many cases, gangster rap is a report of the conditions in the artist's community, it is understandable that the violence described would be so provocative and visceral. Using Eazy-E as an example once more, this was evident in an interview with him and fellow member of N.W.A., MC Ren, that took place during the 1993 Los Angeles Riots.<sup>135</sup> Eazy-E and MC Ren saw their city being torn apart by a riot that was triggered by the acquittal of the police officers who beat Rodney King.<sup>136</sup> Eazy-E said, "somebody should . . . do a song called fuck the police."<sup>137</sup>

128. See RICK ROSS, *Hustlin'*, on PORT OF MIAMI (Def Jam Recordings 2006); RICK ROSS, *Rich Off Cocaine*, on DEEPER THAN RAP (Def Jam Recordings 2009).

129. See Elonis Brief, *supra* note 30, at 15.

130. See *id.*; Sager, *supra* note 127; *Rap Lyrics in Court*, *supra* note 126.

131. See Cassidy Kakin, *Lil Yachty, Vince Staples & Hip-Hop's Quiet 'Straight Edge' Revolution*, DJBOOTH (Jan. 19, 2017), <https://djbooth.net/features/2017-01-09-hip-hop-straight-edge-revolution>.

132. See *id.*

133. See Elonis Brief, *supra* note 30, at 13.

134. Bout Dat Online, *Rare Eazy E Interview on "Gangster Rap" and Being a "Real Nigga,"* YOUTUBE (Jan. 8, 2016), <https://www.youtube.com/watch?v=q22thqbvw8k>.

135. Jesus Rojas, *Eazy-E & MC Ren – Interview During the L.A. Riots & Song "Fuck Tha Police" (1992)*, YOUTUBE (May 1, 2017), [https://www.youtube.com/watch?v=IWv3AP\\_k2yA](https://www.youtube.com/watch?v=IWv3AP_k2yA).

136. See *id.*; *Los Angeles Riots Fast Facts*, CNN (April 23, 2017), <http://www.cnn.com/2013/09/18/us/los-angeles-riots-fast-facts/index.html>.

137. See Rojas, *supra* note 135.

After being reminded that he had done so two years earlier, he noted that “a lot of people didn’t like the song, but now they understand.”<sup>138</sup>

Put simply, the lyrics in gangster rap are offensive because the situations that they are addressing are themselves, offensive. When facing such situations directly, it can fairly be said that the angry, violent, and often upsetting response is proportionate. A jury who is not facing, and likely has not faced, that same situation and is not familiar with the genre will not fully grasp the gravity of the situation, and therefore find the expression to be unnecessarily offensive and be poisoned against the defendant as a result.<sup>139</sup>

The lucrative box office sales brought in by action movies makes it unmistakable that violence sells.<sup>140</sup> This is true for gangster rap as well.<sup>141</sup> While often morally repugnant, the violence on display in gangster rap lyrics is exciting.<sup>142</sup> For many, success as a gangster rap artist depends on producing violent lyrics.<sup>143</sup> When this is the case, admitting gangster rap lyrics as evidence against the writer amounts to punishing defendants for attempting to meet consumer demands.

Now that the historical, cultural, artistic, and economical aspects of gangster rap have been briefly expounded upon, the following section will examine the specific issues involved in the use of defendant-written gangster rap lyrics in criminal trials.

### III. THE PROBLEMS WITH ADMITTING GANGSTER RAP LYRICS UNDER RULE 404(B)

Allowing gangster rap lyrics to be admitted under Rule 404 presents many dangers and practical pitfalls. Gangster rap has value as revolutionary and artistic expression.<sup>144</sup> By allowing such evidence to be used against criminal defendants, this expression is stifled.<sup>145</sup> No other artistic expression, musical or otherwise, is used as commonly as evidence against criminal defendants as gangster rap lyrics, leaving certain minority demographics to be disproportionately affected by this practice.<sup>146</sup> Finally, and most

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138. See *Los Angeles Riots Fast Facts*, *supra* note 136.

139. See *State v. Skinner*, 95 A.3d 236, 249 (N.J. 2014).

140. See *2017 Domestic Grosses*, BOX OFFICE MOJO (Oct. 2017), <https://www.boxofficemojo.com/yearly/chart/?yr=2017>. Seven of the top ten grossing films were action films as of November 1, 2017.

141. See *Elonis Brief*, *supra* note 30, at 15.

142. See *id.*

143. See *id.* at 13.

144. See *id.*; *Immortal Technique*, *supra* note 31.

145. See *State v. Skinner*, 95 A.3d 236, 245 (N.J. 2014) (summarizing an amicus brief by the New Jersey Chapter of the American Civil Liberties Union presented on behalf of the defendant).

146. See *Dennis*, *supra* note 27, at 2.

significantly, there is a substantial danger of undue prejudice in this type of evidence that outweighs its probative value.

#### A. *Chilling Speech*

Allowing defendant-written gangster rap lyrics to be used under Rule 404 presents troubling public policy issues in terms of expression. If this practice continues, aspiring gangster rap artists may hold back in their depiction of the hardships facing their community or avoid gangster rap as an artistic outlet altogether.

Gangster rap lyrics serve as both political and artistic expression and may be stifled in both respects when the writers of these lyrics realize that they may have to answer for their expression in court.<sup>147</sup> Fitting with its role as a continuation of African-American expression, gangster rap serves as a political expression through a call and response method.<sup>148</sup> The call comes in the form of reporting the street's perspective.<sup>149</sup> There is a hope that the response will come in the form of changed attitudes, discourse, legislation, and ultimately conditions, as a result of the call.<sup>150</sup> This response will not be possible if the callers, the writers of gangster rap lyrics, are discouraged or intimidated from calling out. Admission of gangster rap lyrics at trial will likely have this chilling effect. While the practice of admitting gangster rap lyrics against criminal defendants does not directly restrict this political speech, it has a strong indirect impact and is therefore violative of the spirit of the First Amendment.<sup>151</sup>

Analogous to the concern brought on by the use of gangster rap lyrics as evidence is Justice Harlan's concern in his dissent in *United States v. White*.<sup>152</sup> In that case, the majority found that placing a wire on the friend of the defendant to record an incriminating statement did not constitute an unreasonable search under the Fourth Amendment.<sup>153</sup> Justice Harlan argued that "were third-party bugging a prevalent practice, it might well smother that spontaneity – reflected in frivolous, impetuous, sacrilegious, and defiant

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147. See *Elonis* Brief, *supra* note 30, at 13, 21; *Immortal Technique*, *supra* note 31.

148. See generally Nathan Keegan, *Call-And-Response: An Ancient Device Surfaces in Usher's "Love in This Club"*, *ELEMENTS* (Fall 2009), at 1, 9-11; *Immortal Technique*, *supra* note 31.

149. See *Bout Dat* Online, *supra* note 134.

150. See generally *Immortal Technique*, *supra* note 31.

151. The court summarized an amicus brief on behalf of the defendant which argued that "because rap lyrics are often a vehicle for social and political commentary . . . admitting defendant's lyrics would run the risk of chilling otherwise valuable speech." *State v. Skinner*, 95 A.3d 236, 245 (N.J. 2014).

152. See generally 401 U.S. 745 (1971).

153. See *id.* at 754.



discourse – that liberates daily life.”<sup>154</sup> While the two situations have their obvious differences, the concern of honest, “defiant” speech being stifled is shared. Similarly, if the admittance of gangster rap lyrics is “prevalent practice,” it will likely discourage artists from writing the brutally honest lyrics that wrench the heart and conscience of the listener that make up gangster rap.

The threat to gangster rap as political and artistic expression described above will only intensify if courts do not move in the direction taken by *Skinner*. To demonstrate this, the following section will demonstrate how gangster rap lyrics have been singled out amongst other forms of expression.

### B. *The Disproportionate Use of Gangster Rap Lyrics as Evidence Under Rule 404(b)*

Gangster rap lyrics are admitted as evidence against criminal defendants more frequently than any other form of artistic expression.<sup>155</sup> This has a disproportionate effect on minority communities which produce a majority of gangster rap lyrics.<sup>156</sup> In instances when works of other mediums and genres are presented as evidence, they are treated differently, as is seen in empirical studies as well as the case of *State v. Hanson*.<sup>157</sup> Since it has gained national notoriety, gangster rap has faced opposition from authorities.<sup>158</sup> Since gangster rap music is viewed differently and used more frequently as evidence against criminal defendants than other forms of artistic expression, it stands to reason that it should be analyzed under a different, more scrutinizing lens.<sup>159</sup>

#### 1. Courts Have Treated Gangster Rap Lyrics Differently Than Other

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154. *Id.* at 787.

155. *See* Dennis, *supra* note 27, at 2.

156. *See* Erik Nielsen, ‘Rap On Trial’: Why Lyrics Should Be Off-Limits, ROLLING STONE (May 3, 2017, 8:05 PM), <http://www.rollingstone.com/culture/rap-on-trial-why-lyrics-should-be-off-limits-w479827>.

157. *See* 731 P.2d 1140, 1145 (Wash. Ct. App. 1987); Nielsen, *supra* note 156. A 1994 study showed that subjects were more likely to find lyrics offensive when told they were rap lyrics, than they were when told that the same lyrics were country or folk lyrics. *See generally* Carrie B. Fried, *Bad Rap for Rap: Bias in Reaction to Music Lyrics*, 26 J. APPLIED SOC. PSYCHOL., 2135 (1996).

158. *See* Elonis Brief, *supra* note 30, at 17-18.

159. *See* Dennis, *supra* note 27, at 2.

### Art Forms

Several commentators have noted the different reaction to violent content when presented in gangster rap and in other art forms.<sup>160</sup> In her article, *Poetic (In)Justice? Rap Music Lyrics as Art, Life and Criminal Evidence*, Andrea Dennis notes that courts are more likely to separate the writer from the speaker when it comes to mainstream musical genres such as Country, a genre which also features outlaw protagonists, arguing that Johnny Cash's claim that he "shot a man in Reno" would not be taken literally, but as artistic expression.<sup>161</sup> Rapper Bushwick Bill, a member of "The Geto Boys," compared his lyrics in the groups song *Mind of a Lunatic* as being "like Alfred Hitchcock in 'Psycho,'" suggesting that "[h]e came at it from a criminal's point of view" and asked why his record could not receive "the same respect."<sup>162</sup> Similarly, the majority in *Hanson* held that "[a] writer of crime fiction . . . can hardly be said to have displayed criminal propensities through works he or she has authored."<sup>163</sup> This logic is sound and its application should extend to gangster rap, even when one takes into account the personal and often detailed violence depicted in gangster rap.

### 2. The Adversarial Relationship Between Gangster Rap and The Law

Unsurprisingly, gangster rap and law enforcement have often butted heads.<sup>164</sup> This presents a very real danger of undue prejudice, as jurors will likely view the police as the protagonist.<sup>165</sup> N.W.A.'s *Fuck Tha Police*, a staple of gangster rap and one of its earliest hits, drew the disgusted attention of the FBI.<sup>166</sup> Assistant Director of the FBI, Milt Ahlerich who wrote a letter to the group's record label, prompted police departments across the country to disrupt the group's concerts.<sup>167</sup> The best remembered example of this took place at a show in Detroit, Michigan, when police officers stormed the stage, ending N.W.A's show when the group attempted to perform *Fuck Tha Police*.<sup>168</sup> Later, one of the officers involved explained the polices actions

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160. See *State v. Skinner*, 95 A.3d 236, 251 (N.J. 2014); Dennis, *supra* note 27, at 2; Nielsen, *supra* note 156.

161. Dennis, *supra* note 27, at 15.

162. Richard Harrington, 'Geto Boys' Gets a Lift, WASH. POST (Sept. 19, 1990), [https://www.washingtonpost.com/archive/lifestyle/1990/09/19/geto-boys-gets-a-lift/f9069efe-467f-4897-9bbe-bf7f68071233/?noredirect=on&utm\\_term=.a38d386c9bd7](https://www.washingtonpost.com/archive/lifestyle/1990/09/19/geto-boys-gets-a-lift/f9069efe-467f-4897-9bbe-bf7f68071233/?noredirect=on&utm_term=.a38d386c9bd7).

163. *Hanson*, 731 P.2d at 1144.

164. See *Elonis Brief*, *supra* note 30, at 17-18.

165. *Id.*; Dennis, *supra* note 27, at 2-4.

166. See *Elonis Brief*, *supra* note 30, at 17-18.

167. See *id.*

168. See Rolf Potts, *The Great Rap Censorship Scare of 1990*, CUEPOINT (May 25, 2016), <https://medium.com/cuepoint/the-great-rap-censorship-scare-of-1990-115edc69a62f>.

saying, “We just wanted to show the kids that you can’t say ‘fuck the police’ in Detroit.”<sup>169</sup>

C. *Gangster Rap Lyrics Are Highly Vulnerable to Misunderstanding*

When gangster rap lyrics are presented as evidence against criminal defendants, they are often brought in under the exception allowed in Rule 404(b).<sup>170</sup> There are several factors that should be found to cause such evidence to fail in the balancing of probative value and danger of undue prejudice. Gangster rap lyrics are vulnerable to misinterpretation when presented to jurors who are unfamiliar with the genre.<sup>171</sup> Racial biases may also play a significant role in how jurors view gangster rap lyrics.<sup>172</sup> A 1996 study showed that test subjects found lyrics to be more offensive when told they were written by a black artist than a white artist.<sup>173</sup> Such evidence also fails the balancing of probative value and danger of undue prejudice when one considers the availability of other evidence.<sup>174</sup>

Gangster rap is a unique genre that has developed a culture of its own with a rich history, language, and ideology.<sup>175</sup> As with any culture, when one looks in from the outside, there is bound to be a cultural barrier to some degree that will interfere with proper understanding. As a relatively new form of expression, some may not readily accept gangster rap as a legitimate artform.<sup>176</sup> This issue is exacerbated by the fact that gangster rap’s violent and facially offensive nature is likely to be unpalatable to many jurors.<sup>177</sup> Another problem facing gangster rap music is an overestimation by courts of the general populations familiarity with gangster rap.<sup>178</sup>

An example of someone unfamiliar with the genre misunderstanding gangster rap lyrics can be seen in a YouTube video in which a mother records herself detailing her shock and distress over hearing Vince Staples’ *Norf Norf*, an explicit song describing life on the north side of Long Beach,

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169. *Id.*

170. See FED. R. EVID. 404(b); Dennis, *supra* note 27, at 1; Gregory, *supra* note 37, at 331-32, 334-35; Bethany J. Peak, *Catching A Bad Rap: The Use Of Rap Lyrics As Evidence in Criminal Trials*, NAT’L B. ASS’N. MAG., Dec. 2014, at 14.

171. See *Elonis Brief*, *supra* note 30, at 3.

172. See Fried, *supra* note 157, at 2139-41; Peak, *supra* note 170, at 15.

173. See Fried, *supra* note 157, at 2139-41.

174. See FED. R. EVID. 404(b); *State v. Skinner*, 95 A.3d 236, 253 (N.J. 2014).

175. See *Elonis Brief*, *supra* note 30, at 2-3.

176. See *id.* at 21-22.

177. See *Skinner*, 95 A.3d at 249.

178. See *United States v. Stuckey*, 253 Fed. Appx. 468, 484 (6th Cir. 2007); Dennis, *supra* note 27, at 13.

California, on the radio.<sup>179</sup> In the video, the woman reads the lyrics in their entirety, fighting back tears throughout.<sup>180</sup> The woman who made the video received considerable criticism, but was defended by Vince Staples, who tweeted “the woman in that video is clearly confused on the context of the song which causes her to be frightened.”<sup>181</sup> As mentioned earlier, the *Skinner* Court noted the failure of the government to even “attempt to clarify or explain [the defendant’s] lyrics in any way, despite their heavy use of slang and otherwise esoteric language” after presenting said lyrics to the jury.<sup>182</sup> The Court was correct in its criticism given the susceptibility to misunderstanding and prejudice of not only the defendant’s lyrics, but almost all gangster rap lyrics.

Gangster rap lyrics do not beat around the bush when addressing issues.<sup>183</sup> Writers of gangster rap lyrics get their point across through the use of “violent, profane, and disturbing” language and imagery.<sup>184</sup> Such language is bound to have an effect on listeners.<sup>185</sup> When read to a jury tasked with deciding whether a defendant has committed a crime, that effect will likely be negative.<sup>186</sup> Jurors are likely to equate the writer and the speaker and attribute the manners of the speaker to the writer.<sup>187</sup> The court in *Skinner* acknowledges that “violent, degrading rap lyrics” may “poison the jury against the defendant,” noting that “[n]ot all members of society recognize the artistic or expressive value in graphic writing about violence and a culture of hate and revenge.”<sup>188</sup> Even when instructions are given to jurors to understand that gangster rap is a form of art, it is a dangerous notion to think that a juror not familiar with the genre will be able to mechanically separate their emotional response from their determination of guilt, so as to not be unduly prejudiced by the lyrics.<sup>189</sup>

In *State v. Skinner*, it was argued by the prosecution that “gangsta rap, of the type authored by defendant, is a multi-million-dollar industry, often sponsored by major corporations” and that the genre’s “prevalence . . . in

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179. See Ernest Cline, *White Women Recites NorfNorf Lyrics by Vince Staples*, YOUTUBE (July 21, 2017), [https://www.youtube.com/watch?v=\\_q99NRupLBc&t=701s](https://www.youtube.com/watch?v=_q99NRupLBc&t=701s).

180. See *id.*

181. Complex News, *Vince Staples Defends Woman Who Cried Over ‘Norf Norf’ Lyrics*, DAILYMOTION, <https://www.dailymotion.com/video/x5wusfh> (last visited Dec. 23, 2018).

182. *Skinner*, 95 A.3d at 241.

183. See *Elonis* Brief, *supra* note 30, at 13.

184. *Skinner*, 95 A.3d at 238; see also *Elonis* Brief, *supra* note 30, at 13.

185. See *Skinner*, 95 A.3d at 249.

186. See *id.* at 251.

187. See *Dennis*, *supra* note 27, at 24-25.

188. *Skinner*, 95 A.3d at 249.

189. See *Dennis*, *supra* note 27, at 28-29.

today's society" made it unlikely that introduction of such lyrics "would be unlikely to inflame the passions of a jury or irreparably prejudice [a] defendant."<sup>190</sup> This argument suffers from several weaknesses. First, the government assumes that when general members of society are confronted with gangster rap lyrics, that their passions are not inflamed against the speaker simply because they have heard something similar in the past. The mere fact that individuals have heard similar expression before does not mean that when they hear it again they will interpret the lyrics with an objective mind and not make judgements about the writer of the lyrics.<sup>191</sup> The opposite may be true. A juror may carry their existing distaste for gangster rap lyrics into the courtroom and become even more prejudiced against the defendant than they would have been had this been their first exposure to gangster rap.<sup>192</sup>

Second, this argument ignores that when gangster rap is played on the radio or television, the lyrics will likely have been censored, taking away a significant measure of their impact.<sup>193</sup> When gangster rap lyrics are read to a jury, they are left as written with all their violence, profanity and vulgarity intact.<sup>194</sup> The *Skinner* court was correct in rejecting the arguments regarding gangster rap's popularity.

#### IV. PROPOSAL

The *Skinner* court made substantial progress in protecting defendants from falling victim to the unduly prejudicial practice of admitting gangster rap lyrics as evidence. The holding in that case provided safeguards for when such evidence is found to be admissible.<sup>195</sup> More importantly, it laid out in clear terms that without a "direct connection" between the content of the lyrics and the offense which the lyrics are offered to prove, it should not be admitted under Rule 404(b).<sup>196</sup> The court held that when such a connection does exist, the evidence must still pass the balancing test of Rule 403.<sup>197</sup>

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190. 95 A.3d at 245.

191. A 1996 study suggests a knowledge of rap will cause someone to be more prejudiced against it. *See generally* Fried, *supra* note 157.

192. *See generally id.*

193. *See* FCC, THE PUBLIC AND BROADCASTING: GETTING THE MOST SERVICE FROM YOUR LOCAL STATION 15 (2008), <https://www.fcc.gov/sites/default/files/public-and-broadcasting.pdf>.

194. *See Skinner*, 95 A.3d at 241.

195. In concluding its opinion, the Court cautioned future courts to redact admitted gangster rap lyrics with care. *See id.* at 253.

196. *See id.*

197. FED. R. EVID. 403; *see also Skinner*, 95 A.3d at 253.

While *Skinner* is a step in the right direction, its protections should be extended to fully avoid the misuse of gangster rap to punish individuals accused of crimes. The court was correct in finding that the probative value of gangster rap lyrics is outweighed by its risk of undue prejudice when there is no direct connection between the lyrics and the offense at issue.<sup>198</sup> This holding should be followed to make defendant's written gangster rap lyrics presumptively unduly prejudicial. This presumption should be overcome only when a direct connection is present. Second, *Skinner*'s holding applied specifically to use of lyrics to show motive and intent.<sup>199</sup> To adequately serve its purpose, the holding in *Skinner* should apply to all purposes that may make evidence admissible under Rule 404(b). Finally, when gangster rap lyrics are admitted under Rule 404(b) when there is no "direct connection," or when there is but the evidence does not satisfy Rule 403 balancing, courts should find that such an error was harmful and reversible as the admission of that evidence will most likely have an effect on a juror who is not familiar with gangster rap lyrics.

*A. A Presumption of Undue Prejudice for Defendant Written Gangster Rap Lyrics*

The *Skinner* court's holding that there must be a "direct connection" between the lyrics offered and the offense at issue is crucial to properly analyzing the admissibility of gangster rap lyrics. The court came to this holding after performing survey of how other jurisdictions have handled similar cases.<sup>200</sup> The Court's reasoning was that otherwise, admitting the lyrics "risk[s] unduly prejudicing the jury without much, if any, probative value."<sup>201</sup> This would be an appropriate bright line rule, though the Court did not present it as such. When gangster rap lyrics are presented as evidence under Rule 404(b) against a criminal defendant who wrote them and there is not a direct connection between the content of the lyrics and the offense at issue, the probative value will be outweighed by the danger of undue prejudice brought on by using the lyrics as evidence. A rebuttable presumption of a substantial danger of undue prejudice when there is no showing of a direct connection would account for the unique nature of gangster rap lyrics that cause it to be highly prejudicial and barely probative.

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198. See *Skinner*, 95 A.3d at 253.

199. See *id.*

200. See *id.*

201. *Id.*

*B. Application to All Purposes Listed Under Rule 404(b)*

The prosecution in *Skinner* used the defendant's lyrics to show intent and motive.<sup>202</sup> The court confined its holding to these purposes.<sup>203</sup> The Court would have been justified in and done well to extend its holding to all purposes that may be used under Rule 404(b). There is no distinction made between the different purposes proposed in Rule 404(b) and the accompanying notes do not suggest any should be made.<sup>204</sup> Therefore, confining the *Skinner* holding to only intent and motive would be unnecessary and arbitrary. Were the court in *Foster* to follow this article's proposal, the lyrics would not be presented to the jury against the defendant.<sup>205</sup> There, the defendant was apprehended with a bag containing drugs while traveling by train.<sup>206</sup> The defendant's lyrics made no reference to a suitcase or to his trip.<sup>207</sup> Despite this, the court allowed the lyrics to be admitted under Rule 404(b) because the lyrics made it more probable that the defendant had knowledge of narcotics trafficking.<sup>208</sup> Under *Skinner*, where its holding extended to knowledge as well as motive and intent, such a low bar for admissibility would not be sufficient, and the prejudicial lyrics would not be admitted against the defendant.

*C. No Admission When Other Evidence Is Available For the Same Purpose*

Both the *Skinner* court and the notes to the Federal Rules of Evidence Rule 404(b) give an instruction to consider the availability of other evidence available to serve the same purpose that the evidence of a past act is being used to show.<sup>209</sup> While the introduction of a defendant's lyrics can strengthen the prosecution's point,<sup>210</sup> this slight bump in credibility to the prosecution's argument is not justified in light of the significant risk of prejudice it creates toward the defendant. For this reason, gangster rap lyrics should not be admitted when other evidence is available for the same purpose.

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202. *Id.* at 238.

203. *See id.* at 253.

204. *See generally* FED. R. EVID. 404(b).

205. There, the defendant's lyrics were presented to show knowledge of narcotics trafficking. *See United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991).

206. *See id.* at 448-49.

207. *See id.* at 449.

208. *See id.* at 455.

209. *See* FED. R. EVID. 404(b); *State v. Skinner*, 95 A.3d 236, 253 (N.J. 2014).

210. *See Foster*, 939 F.2d at 455.

*D. No Finding of Harmless Error*

The issue of using gangster rap lyrics as evidence is one that requires “extreme caution.”<sup>211</sup> As such, when gangster rap lyrics are allowed to be presented without a direct connection or when they fail to satisfy the Rule 403 balancing test or other evidence is available for the same purpose, admission of gangster rap lyrics should invariably be found to be a reversible error. As demonstrated throughout this article, gangster rap is uniquely prone to poison a jury against a defendant. Further, admission of evidence of this sort discourages individuals from writing gangster rap lyrics, thereby stifling speech, suppressing a cultural outlet, and eliminating the benefits brought on by gangster rap to members of society apart from the individual defendants put on trial.<sup>212</sup>

If this article’s proposal regarding findings of a harmless error were adopted by the court in *Cheeseboro*, the defendant would not fall victim to the potential extra prejudice brought on by the admission of his lyrics. The court did not reverse the lower court’s decision because it said that there is other evidence which served the same purpose as the defendant’s lyrics.<sup>213</sup> This was not harmless, however, since defendant’s lyrics can be said to demonstrate more than just the violent disposition shown in the letters he had written. A juror may find that by writing these lyrics, the defendant not only has a violent disposition, but is flaunting his violent acts and taunting his victims. The admission of the lyrics was not harmless because the lyrics were a more sensational and prejudicial form of evidence than the other, proper forms of evidence available to the prosecution. Following the rules of this proposal, the jury’s finding as to the defendant’s violent disposition would be based only on the letters he had written, removing the danger of the jury’s passion being inflamed by the defendant’s lyrics.

CONCLUSION

A presumptive rule against the use of defendant written gangster rap lyrics will adequately exercise the “extreme caution” that the *Skinner* Court prescribed. Such a rule recognizes and preserves the social value of gangster rap. It will also quell the effects brought on by what has been a disproportionate use of gangster rap lyrics as evidence under Rule 404(b). Most importantly, the use of gangster rap lyrics is simply too unduly

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211. See *Skinner*, 95 A.3d at 253.

212. See *Elonis Brief*, *supra* note 30, at 24.

213. See *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001).



prejudicial and of little probative value without a direct connection to the offense at issue.

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