

# From Slavery to Hip-Hop: Punishing Black Speech and What’s “Unconstitutional” About Prosecuting Young Black Men Through Art

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*Writing rap lyrics—even disturbingly graphic lyrics, like defendant’s—is not a crime.*<sup>1</sup>

Our criminal justice system is in an existential and constitutional crisis. We no longer know who we are or who we want to be. Over the past two decades, America has waged an increasingly punitive war on crime, and the casualties of that war have disproportionately been people of color; most specifically the young Black<sup>2</sup> men and

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

2. Professor Kimberlé Crenshaw has explained that “Black” deserves capitalization because “Blacks like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Le-gitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine A. MacKinnon, *Feminism, Marxism, Method and*

women of the hip-hop generation.<sup>3</sup> These inequities—though dramatic—are not new. Disparate racial impact is an undeniable fact of the criminal justice system.<sup>4</sup> Further, it has historical roots to the African American experience. Simply, punishment has always been imposed differentially through overt legalized racial caste systems: from Slavery, through Reconstruction, through Jim Crow segregation, into the Civil Rights and post-Civil Rights era, and now into the post-Racial era.<sup>5</sup>

Today the source of legalized racial inequality is more discreet: it is the result of layers of discretionary decision-making and complex socioeconomic and cultural dynamics, both inside and outside American law.<sup>6</sup> The causality has either become less visible or more difficult to remedy and thus led to a subsequent increase in

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*State: An Agenda for Theory*, 7 Signs 515, 516 (1982)). Additionally, Professor Neil Gotanda contends that the capitalization of Black is appropriate since it “has deep political and social meaning as a liberating term.” Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 4 (1991). We take the position that Professors Crenshaw and Gotanda are correct for both stated reasons, therefore throughout this Article when we reference people of African descent, individually or collectively, the word “Black” will be presented as a proper noun.

3. ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 1, 1–4 (2016). According to Hinton, mass incarceration is not a product of the American War on Drugs, as many others have argued. Instead, the increase in the prison population is a direct product of the social welfare programs of the Lyndon Administration at the height of the Civil Rights Era. *Id.* See also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012). See also 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, 47–54 (2012) [hereinafter Tibbs, *From Black Power to Hip Hop*].

4. See, e.g., *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICY MAKERS*, The Sentencing Project, 2008, <http://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf>.

5. The best comprehensive study of African American history and its intersection with American punishment schemes is James Campbell’s *Crime and Punishment in African American History*. JAMES CAMPBELL, *CRIME AND PUNISHMENT IN AFRICAN AMERICAN HISTORY* (2016). According to Campbell, “The African American history of criminal justice is an integral part of the history of the black freedom struggle . . . In the aftermath of both the American Civil War and the modern Civil Rights Movement, for example, criminal justice mechanisms were used to strip large numbers of African Americans of recently acquired citizenship rights.” *Id.* at 2.

6. Alexander, *supra* note 3. As Alexander explains, “It is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So, we don’t. Rather, . . . we use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind.” *Id.* at 2.

inequality. The number of people in federal prison has increased by more than 790%, and the corresponding socioeconomic burdens touch entire communities.<sup>7</sup> Further, political forces have failed to realize and address the problem in human dimensions.<sup>8</sup> This legal blindness is the product of a series of crime-fighting actions that are premised on *bad faith*: which in existential phenomenological language is a flight from freedom in an effort to hide from human beings.<sup>9</sup>

There is a new form of policing and prosecutorial decisionmaking that is as dangerous as it is unconstitutional. It involves prosecutors using amateur rap music videos—sometimes with scant additional evidence—to prosecute and convict Black men.<sup>10</sup> These efforts are not happenstance. Instead, they are the result of targeted intentional actions specifically aimed at criminalizing young Black and Brown men—who are most likely to listen to, write, and produce rap music. In 2004, Los Angeles Assistant District Attorney Alan Jackson published a paper for the American Prosecutors Research Institute in which he suggested that prosecutors introduce rap lyrics as evidence of a defendant’s personality.<sup>11</sup> Jackson advised:

Perhaps the most crucial element of a successful prosecution is introducing the jury to the real defendant. Invariably, by the time the jury sees the defendant at trial, his hair has grown out

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7. Carey L. Biron, *U.S. Prison Population Seeing “Unprecedented Increase”* (Feb. 4, 2013), <http://www.ipsnews.net/2013/02/u-s-prison-population-seeing-unprecedented-increase/>. In a lecture at The Ohio State University, Assistant Director to the Sentencing Project and the author of *Race to Incarcerate*, Marc Mauer stated, “we have the incongruity of the wealthiest society in human history using prison to a degree previously unknown in any democratic society.” Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 607 (2004).

8. The political forces, by which we mean the police and prosecutorial function of the criminal justice system as well as political pundits, enacted and implemented a “tough on crime” movement that cued the dialog for political sensibility at the expense of human sensitivity. *Id.*

9. LEWIS GORDON, *BAD FAITH AND ANTIBLACK RACISM* (2013). As Gordon explains, “antiblack racism may embody the extreme poles of possibility of a university humankind; it wrenches human beings into the most extreme visual metaphors of difference.” *Id.* at 1.

10. Erik Nielson, *Prosecuting Rap Music*, HUFFINGTON POST (May 26, 2013, 4:41 PM), [http://www.huffingtonpost.com/erik-nielson/prosecuting-rap-music\\_b\\_2956658.html](http://www.huffingtonpost.com/erik-nielson/prosecuting-rap-music_b_2956658.html).

11. Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION (Apr. 2004), [http://www.ndaa.org/pdf/gang\\_cases.pdf](http://www.ndaa.org/pdf/gang_cases.pdf).

to a normal length, his clothes are nicely tailored, and he will have taken on the aura of an altar boy. But the real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way to introducing a jury to that person. Through photographs, letters, notes and even music lyrics, prosecutors can invade and exploit the defendant's true personality. If, in fact, we suspect someone of a crime and in their possession we find either rap music, rap lyrics, etc., that tends to corroborate other evidence we have against that person, why should you be able to get a pass just because you call it art?<sup>12</sup>

Herein lies the problem. The nearsightedness of Attorney Jackson's commentary is disturbing, namely because confronting the reality of a prosecutorial paradigm that punishes people for their speech is not "getting a pass just because you call it art."<sup>13</sup> Instead, it is about protecting the fundamental right to free speech—even if you don't agree with the manner, content, or message of the speech. It is a fundamental right promised by the United States Constitution.<sup>14</sup> Thus, Jackson's prosecutorial paradigm raises serious ethical questions about using hip-hop lyrics as a proxy to criminalize race. Those lyrics are presented at trial, sometimes remixed together by taking snippets of different songs, not to prove that the defendant actually committed the crime, but as Attorney Jackson stated, to *paint a picture* of the defendant's propensity or motive to commit violent acts.<sup>15</sup> The fact that Jackson thinks "the real defendant is a criminal

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12. *Id.* at 15–16.

13. Victoria M. Walker, *A State Court Says Rap Lyrics Can't be Used as Evidence in a Criminal Trial*, NPR (Aug. 6, 2014, 12:02 PM), <http://www.npr.org/sections/codeswitch/2014/08/06/338303043/a-state-court-says-rap-lyrics-cant-be-used-as-evidence-in-a-criminal-trial>.

14. The First Amendment states in relevant part, "Congress shall make no law . . . abridging the freedom of speech," which includes freedom to use certain offensive words and phrases to convey political messages, U.S. CONST. Amend. I; *see, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971). A perfect example of a rap song that would fall into this category would be the 1988 hit single, "Fuck tha Police" performed by controversial rap group N.W.A. N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Priority Records 1988).

15. *See, e.g.*, Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, N.Y. TIMES (Jan. 13, 2014), [http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html?\\_r=0](http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html?_r=0) (discussing ways in which prosecutors misrepresent rap lyrics of defendants to portray them as "rhymed confessions."); *see also* Matthew Pulver, *America's Hip Hop Travesty: How Rap Lyrics Are Being Used in Court—to Police Black Speech*, SALON (Feb. 8, 2015, 5:58 AM),

wearing a do-rag and throwing a gang sign,” speaks to how this practice is almost exclusively premised upon and reserved for the stereotypes of young Black men: based on a racial style of dress and physical presentation.<sup>16</sup>

The practice is not a solo act; the police are also complicit. Some police departments have organized “Hip-Hop Task Forces” to develop, and in some cases construct, criminal cases at the precise moments that they are otherwise unconstructable.<sup>17</sup> According to FBI Intelligence Analyst Donald Lyddane,

In today’s society, many gang members compose and put their true-life experiences into lyrical form. Many are able to record their lyrics at local recording studios, produce CDs, DVDs, and videos, and distribute these items to local music stores by using the proceeds of illegal criminal activities. Law enforcement officials must remain mindful of such money laundering schemes and the opportunities to obtain inculpatory evidence in gang-related investigations and cases. It is equally important to recognize that the lyrics demonstrate that the gangster lifestyle has become mainstream. It is now popular to be a “gangsta,” the contemporary idiom for gangster.<sup>18</sup>

Using rap music at trial has appeared in scholarly journals, newspaper op-eds, blog websites, radio outlets, and many pundits agree: there is something fundamentally immoral, unethical, and

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[http://www.salon.com/2015/02/08/americas\\_hip\\_hop\\_travesty\\_how\\_rap\\_lyrics\\_are\\_being\\_used\\_in\\_court\\_to\\_police\\_black\\_speech/](http://www.salon.com/2015/02/08/americas_hip_hop_travesty_how_rap_lyrics_are_being_used_in_court_to_police_black_speech/).

16. Jackson, *supra* note 11, at 16 (emphasis added). As *Wall Street Journal* columnist Shelly Branch explains, “[a] doo rag is a simple piece of nylon mesh designed to tie snugly over the head. Long a fixture of inner-city life, doo rags were most commonly worn by black men between trips to the barber, either to preserve a style or cover up hair too kinky to comb.” Shelly Branch, *If You Don’t Have a ‘Do,’ Why Wear a Doo Rag: White Suburbia’s New Import Is the Inner City’s Hair Tamer*, WALL ST. J. (Sept. 12, 2003, 12:01 AM), <http://www.wsj.com/articles/SB106331677785644700>.

17. Dasun Allah, *NYPD Admits to Rap Intelligence Unit*, VILLAGE VOICE (Mar. 16, 2004, 4:00 AM), <http://www.villagevoice.com/news/nypd-admits-to-rap-intelligence-unit-6407962> (describing the suspect NYPD’s Hip-Hop Task Force created to conduct surveillance on people “in and around the hip-hop music scene”).

18. Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. ATTY’S BULL., at 1 (May 2006), <https://www.justice.gov/archive/olp/pdf/gangs.pdf>.

tragic about manipulating the legal system to prosecute young Black men just because they happen to like, listen to, and write rap music.<sup>19</sup> Further, there are significant constitutional concerns because the prosecutions infringe on free speech guarantees, and perhaps equal protection ones as well, since hip-hop, a musical genre that is predominantly populated by young Black men, is the only genre of art targeted in this way.<sup>20</sup>

This Article agrees with popular opinion; however, it extends the argument by claiming that the prosecution of hip-hop is not solely about rap lyrics. Instead, we argue that prosecuting hip-hop fits within a specific historical paradigm, connected to Slavery, of policing Black speech, based on White psychic fantasies of Black criminal deviance, thereby subjecting Black people to hyper-policing and hyper-criminalization.<sup>21</sup> Simply, using hip-hop rap music to

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19. According to staff writer Victoria M. Walker, “[i]t’s hard to know just how many have admitted rap lyrics into evidence, but the American Civil Liberties Union of New Jersey identified 14 cases and the New York Times reported that there were at least three-dozen similar cases in the past years.” Victoria M. Walker, *Anything You Can Spit Can Be Used Against You*, NPR (Aug. 3, 2014, 2:33 PM), <http://www.npr.org/sections/codeswitch/2014/08/03/336344620/anything-you-can-spit-can-be-used-against-you>. For a discussion of the legal merits against using rap music at trial, see the lead article by Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007).

20. This is despite clear and convincing evidence that expressions of criminal culpability appear in nearly every other form of artistic expression including satire, novels, short stories, country-western music, and of course rock and roll. As Professors Erik Nielsen and Charis Kubrin poignantly state, “Nobody believes that Johnny Cash shot a man in Reno or that Bret Easton Ellis carried out the gory murders described in ‘American Psycho.’” Nielsen & Kubrin, *supra* note 15.

21. In his SALON article, Matthew Pulver briefly explains the historical punishment of Black Speech. According to Pulver:

Black speech has always been policed. Many Southern colonies and states outlawed literacy among slaves. Black speech during the century of Jim Crow was regulated by legal and extralegal means. The FBI monitored civil rights leaders’ speech, both public and private, and sought to “neutralize” leaders who spoke against the white order. Even in the present, President Obama has been seen to tightly manage his rhetoric on race. First Amendment notwithstanding, speech has never been free for black Americans.

Pulver, *supra* note 15. See also SOME NOTES ON NEGRO CRIME PARTICULARLY IN GEORGIA, 55–57 (W.E. Berghardt Du Bois ed., 1904). This report, edited by W.E.B. Du Bois, argues that slavery was not a check on inherent criminal tendencies but, instead, an institution that encouraged criminal behavior. In discussing the “[f]aults of the Negroes” in the “[c]auses of Negro [c]rime[.]” such as “[l]oose idea of property” and “[s]exual looseness,” the report cites Sidney Olivier noting:

target criminal behavior is more about criminalizing young Black men for *what they say*, under the premise that it exposes *what they do*.<sup>22</sup> And, unfortunately, it works; but not because hip-hop lyrics prove the state's case beyond a reasonable doubt. That is far from the case. Rather, it works because it is grounded in the history of policing and anti-Blackness in American law.<sup>23</sup>

This Article proceeds in three parts to deconstruct the process of prosecuting hip-hop as a moment representing bad faith in our criminal justice system. Part I takes an historical approach and argues that Attorney Jackson's paradigm for using the words of Black hip-hop artists to criminalize them fits within the long history of policing Black speech in American law. Although he presents it as such, his idea is neither new nor innovative. Rather, the pattern of punishing

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All these faults are real and important causes of Negro crime. They are not racial traits but due to perfectly evident historic causes: slavery could not survive as an institution and teach thrift; and its great evil in the United States was its low sexual morals; emancipation meant for the Negroes poverty and a great stress of life due to sudden change. These and other considerations explain Negro crime.

*Id.* at 56. In delineating the “[f]aults of the whites” in producing “Negro criminality[,]” the report notes “a double standard of justice in the courts,” “[e]nforcing a caste system in such a way as to humiliate Negroes and kill their self-respect[,]” and foster “[p]leonage and debt-slavery . . . .” *Id.* at 56–57, 59.

22. By this we mean, that more emphasis is placed on using the lyrics of rap artists as a basis for proving their motive or propensity to commit a crime at the exclusion of actual proof beyond a reasonable doubt that they committed the criminal act. In that sense, black men, particularly rap artists are punished more for *what they say*, than *what they actually do*. This phenomenon is explained well in Jack Hamilton's article, *Rhyme and Punishment*, where he states, “Black music has disproportionately suffered the scourge of literalism.” Jack Hamilton, *Rhyme and Punishment: Prosecutors Are Using Rap Lyrics as Evidence in Criminal Trials. That Needs to Stop*, SLATE (Mar. 21, 2014, 11:17 AM), [http://www.slate.com/articles/arts/culturebox/2014/03/hip\\_hop\\_and\\_criminal\\_justice\\_the\\_absurd\\_literalism\\_of\\_prosecutors\\_using.html](http://www.slate.com/articles/arts/culturebox/2014/03/hip_hop_and_criminal_justice_the_absurd_literalism_of_prosecutors_using.html).

23. The “dirty base of anti-blackness,” is a coined term of art that I use to describe how racial stereotyping, centered on the characterization of Black men as criminal, dominates the legal discord on the tragic policing of Black men. For a discussion on hyper-policing and racial stereotypes, see Donald F. Tibbs & Tryon P. Woods, *The Jena Six and Black Punishment: Law and Raw Life in the Domain of Nonexistence*, 7 SEATTLE J. FOR SOC. JUST. 235 (2008); Donald F. Tibbs, *Who Killed Oscar Grant?: A Legal-Eulogy of the Cultural Logic of Black Hyper-Policing in the Post-Civil Rights Era*, 1 S.U.J. RACE, GENDER & POVERTY 1 (2011). See also the excellent work by Dr. Tryon Woods, namely his article *Beat it Like a Cop*, which explores the ethic political context in which Black art, Black performance, and Black social movement find expression in the sexualized violence of the Prison Industrial Complex. Tryon P. Woods, *Beat It Like a Cop: The Erotic Cultural Politics of Punishment in the Era of Postracialism*, 31 SOC. TEXT 21 (2013).

Black people for their words can be resurrected from U.S. Slavery in the 1800s, during which time prosecutors punished the words of slaves under laws specifically targeting Black speech.<sup>24</sup> It details how in the founding moments of our republic, many Southern colonies were concerned with slave revolts and the rumors of those revolts.<sup>25</sup> In response, slaves were prosecuted on the flimsiest evidence that their words were proof of their intentions, motives, and future impending actions. However, historians agree that the law during the time was focused on manipulation of racial fears rather than evidence

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24. For example, the State of Alabama had a series of slave laws relating to the First Amendment Freedom to Speech and Assembly. Excerpted in part from the Alabama Code of 1883, there were Literacy Laws which read:

Any person who shall attempt to teach any free person of color, or slave, to spell, read or write, shall, upon conviction thereof by indictment, be fined in a sum not less than two hundred fifty dollars, nor more than five hundred dollars.

Ala. Slave Code § 31 (1833).

There were Freedom of Assembly laws as well:

If any white person, free negro, or mulatto, shall at any time be found in company with slaves, at any unlawful meeting, such person being thereof convicted before any justice of the peace, shall forfeit and pay twenty dollars for any such offence, to the informer, recoverable with costs before such justice.

*Id.* § 10.

If any slave, without a written permission from the owner, master, or overseer of said slave, shall be found in company with a free negro or person of color, in the dwelling-house or outhouse of said free negro or person of color, said free negro or person of color shall receive the same punishment, in the same manner, as is proscribed by the provisions of the fifteenth section of this act.

*Id.* § 36.

Additionally, slaves could not testify in criminal or civil trials, thereby further punishing their speech:

No slave shall be admitted a witness against any person, in any matter, cause, or thing whatsoever, civil or criminal, except in criminal cases, in which the evidence of one slave shall be admitted for or against the evidence of another slave.

*Id.* § 4.

A complete archived version of the Alabama Slave Codes can be accessed electronically via the Alabama State Archives. *Slaves and Free Persons of Color*, AIKIN DIGEST LAWS THE STATE OF ALABAMA, at 391 (1833), <http://www.archives.state.al.us/cornerstone/slavecode1833/page01.html>.

25. For an excellent discussion of the tragedy of rumor slave revolts, see THOMAS J. DAVIS, A RUMOR OF REVOLT: THE "GREAT NEGRO PLOT" IN COLONIAL NEW YORK x-xiii, 250-63 (1985).

of a crime.<sup>26</sup> Categorized as the “loose talk of aggrieved and embittered men,” punishing slave rumors of revolt can easily be translated into punishing the speech of hip-hop artists today.”<sup>27</sup>

Part II extends the history by connecting the “loose talk of aggrieved and embittered [slaves],” to the “loose talk of aggrieved and embittered [hip hop artists]”<sup>28</sup> by narrating a true to life case of Mr. Vonte Skinner—a young Black man punished solely on the basis of his speech.<sup>29</sup> Mr. Skinner was convicted of a homicide and sentenced to thirty years imprisonment after the prosecution read thirty pages of hip-hop lyrics that he had written in a notebook.<sup>30</sup> His case demonstrates, most notably, the questionable ethics of prosecutors, as well as the integrity of the court, to use hip-hop namely because all of his lyrics were written before the alleged crime for which he was charged, and none of the lyrics referenced the victim he was accused of killing.<sup>31</sup> After Mr. Skinner was sentenced to thirty years in prison, he appealed his case to the New Jersey Supreme Court, which overturned his conviction and ordered a new trial.<sup>32</sup> We argue that Skinner’s case is a perfect example of the existential crisis facing the legal system that routinely targets, criminalizes, and punishes Black men for what that say, even if unconnected to what they do.<sup>33</sup>

Part III extends the existential argument of prosecuting hip-hop to the realm of constitutional concerns by analyzing the Supreme Court

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26. For an excellent discussion on the rise of racial fear and Slave Codes see *Slave Codes*, U.S. HIST., <http://www.ushistory.org/us/6f.asp> (last visited Sept. 12, 2016). See also A. Moore, *8 Reasons Why White People Fear Black People*, ATLANTA BLACK STAR (Sept. 24, 2014), <http://atlantablackstar.com/2014/09/24/8-reasons-why-white-people-fear-black-people/>.

27. Although hip-hop artists and slaves share very personal life experiences, they connect over the fact that they both engage in loose talk by aggrieved and embittered men. For slaves, the loose talk centered on revolt, resurrection, rebellion, or planned escape. For hip-hop artists, the loose talk centers on re-establishing Black male masculinity, Black empowerment, and critiques of race, law, policing, and punishment. See RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH 240–41* (1964) [hereinafter WADE, *SLAVERY IN THE CITIES*].

28. See WADE, *The Veasy Plot*, *infra* note 47, at 160.

29. *State v. Skinner*, No. A-2201-08T2, 2012 N.J. Super. Unpub. LEXIS 2069, at \*17 (N.J. Super. Ct. App. Div. Aug. 31, 2012), *aff’d*, 95 A.3d 236 (N.J. Sup. Ct. 2014).

30. *Id.* at \*1–2.

31. See *id.* at \*1.

32. *State v. Skinner*, 95 A.3d 236 (N.J. Sup. Ct. 2014).

33. *Id.*

opinion in *Elonis v. United States*.<sup>34</sup> Anthony Doug Elonis was charged with the federal crime of using the internet to issue threats to his ex-wife, an elementary school, and an FBI agent.<sup>35</sup> However, the words captured for the threat were Mr. Elonis's lyrics posted on his Facebook page, which he argued were protected by the First Amendment's prohibition against abridging free speech.<sup>36</sup> Ruling in Mr. Elonis's favor, the Court stated that, although true threats are not protected by the First Amendment, the expression of threats that appear in gangster rap music require more than objective analysis.<sup>37</sup> Instead, they require proof of the subjective intent that the defendant intends to carry out the crimes he is alleged to express in his music.<sup>38</sup> Thus, *Elonis* stands for the proposition that prosecuting hip-hop now requires more than just putting a Black face to the music and claiming that hip-hop lyrics tell the entire truth. We conclude the Article with explaining that *Elonis* hopefully stands for an end to the efforts of Attorney Jackson and other prosecutors who fail to see that using hip-hop lyrics to criminalize young Black men is not about effective and creative prosecutions. Instead, it is rooted in their desire to punish young Black men and further contribute to our problem of mass incarceration by criminalizing these individuals for what they say, rather than what they do.

#### I. PUNISHING BLACK SPEECH: THE SLAVERY NARRATIVE

Rebellions beget rebellions.<sup>39</sup> In fact, rebellions and rumors of rebellions were an important part of the experience and institution that came to be known as American Slavery.<sup>40</sup> Over time, however, contemporaries facing the threat and those recollecting its aftermath often expressed doubt about the shape and substance of slave rebellions.<sup>41</sup> Nat Turner's Revolt in Southampton County, Virginia in

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34. *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015).

35. *Id.*

36. *Id.*

37. *Id.* at 2004.

38. *Id.*

39. See Moore, *supra* note 26.

40. See Justin Behrend, *Rumors of Revolt*, N.Y. TIMES: OPINIONATOR (Sept. 15, 2011, 9:30 PM), [http://opinionator.blogs.nytimes.com/2011/09/15/rumors-of-revolt/?\\_r=0](http://opinionator.blogs.nytimes.com/2011/09/15/rumors-of-revolt/?_r=0).

41. Herbert Aptheker, *American Negro Slave Revolts*, 1 SCI. & SOC'Y 512 (1937).

1831, one of the deadliest slave uprisings in the United States, left many doubting what upstart Blacks had intended to do in full.<sup>42</sup>

But what happens when the revolt was nothing more than a verbal expression? What about when it was nothing more than speech—words that precede action? In other words, not every slave revolt was real. Sometimes, the threat of slaves speaking of revolt was all that was needed to punish them. Few rumored rebellions are more prominent in what historian Michael Johnson has designated “the pantheon of rebels against slavery” than Denmark Vesey’s plot in Charleston, South Carolina in 1821 and 1822.<sup>43</sup> Prosecution resulted in thirty-five Black men executed at the gallows and forty sentenced to exile. Whether the conviction was constitutional troubled contemporaries, as well as those who have looked back on the events through the lens of history.<sup>44</sup>

While historians have argued that Vesey was the grandest of conspiracies in scope and strategy, Johnson claimed that the so-called Vesey Conspiracy was “an insurrection that, in fact, was not about to happen . . . .”<sup>45</sup> Vesey and the other men were not guilty of organizing an insurrection; rather than revealing a portrait of thwarted insurrection, he claimed that “witnesses’ testimony discloses glimpses of ways that reading and rumors transmuted White orthodoxies into Black heresies.”<sup>46</sup> Historian Richard C. Wade even went so far as to dismiss the conclusion that Vesey should even be categorized as an insurrection. Instead, he thought it was “probably

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42. For a brief description of the Nat Turner rebellion, see Jennifer L. Larson, *A Rebellion to Remember: The Legacy of Nat Turner*, DOCUMENTING THE AMERICAN SOUTH (Sept. 5, 2016), <http://docsouth.unc.edu/highlights/turner.html>. Additionally, on October 7, 2016, actor Nate Parker will release and star in his movie *The Birth of a Nation*, which takes its name from D.W. Griffith’s film about the birth of the Ku Klux Klan (*Birth of a Nation*), but tells the story of race and rebellion as part of the African American spirit from the Slave era. See Rebecca Ford, ‘*Birth of a Nation*’: *The Slave-Revolt Movie That Will Have Sundance Talking*, HOLLYWOOD REPORTER (Jan. 20, 2016, 9:30 AM), <http://www.hollywoodreporter.com/features/birth-a-nation-slave-revolt-857177>.

43. Michael P. Johnson, *Denmark Vesey and His Co-Conspirators*, 58 WM. & MARY Q. 915, 915 (2001).

44. See Douglas M. Coulson, *Distorted Records in “Benito Cereno” and the Slave Rebellion Tradition*, 22 YALE J.L. HUMAN. 1, 8–12 (2010) (providing a historical review of the trial record of the Vesey plot).

45. Johnson, *supra* note 43.

46. *Id.* at 916.

never more than loose talk by aggrieved and embittered men.”<sup>47</sup> That goes directly to a persistent problem in evaluating slave conspiracies, and sometimes other conspiracies, too: a fundamental misunderstanding of Black speech in regard to the law.

A primary goal of the Slave Codes was to suppress “loose talk by aggrieved and embittered men.”<sup>48</sup> Simply, slaves did have protected free speech during the Slave era. Anglo-American law prohibited slaves from speaking in specified ways; it recognized speech as a dangerous form of action that, if unrestrained, threatened social order.<sup>49</sup> Thus, Black speech was criminalized and slaves were prevented from speaking as well as learning to read and write through Literacy Laws.<sup>50</sup> Literacy Laws not only targeted speech, so too was assembly or gatherings where rebellious slaves could organize.<sup>51</sup> For example, in 1800, Gabriel Prosser, a literate slave, planned a rebellion in Richmond, Virginia, but it was suppressed and he was hanged before it could take place.<sup>52</sup> Subsequently, the Virginia Legislature passed the Virginia Revised Code of 1819:

That all meetings or assemblages of slaves, or free negroes or mulattoes mixing and associating with such slaves at any meeting-house or houses, . . . in the night; or at any SCHOOL OR SCHOOLS for teaching them READING OR WRITING, either in the day or night, under whatsoever pretext, shall be

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47. Richard C. Wade, *The Vesey Plot: A Reconsideration*, 30 J.S. HIST. 143, 160 (1964) [hereinafter Wade, *The Vesey Plot*]. See also WADE, SLAVERY IN THE CITIES, *supra* note 27, at 228–41. For a counter-narrative on Wade’s assessment of The Vesey Plot, note the works to which his article directly responds DOUGLAS R. EGERTON, HE SHALL GO OUT FREE: THE LIVES OF DENMARK VESEY (1999); DAVID ROBERTSON, DENMARK VESEY (1999); and EDWARD A. PEARSON, DESIGNS AGAINST CHARLESTON: THE TRIAL RECORD OF THE DENMARK VESEY SLAVE CONSPIRACY OF 1822 (1999).

48. Wade, *The Vesey Plot*, *supra* note 47, at 160.

49. See, e.g., *Slave Codes*, ALABAMA DEP’T OF ARCHIVES & HIST., TEACHER RESOURCES (Sept. 4, 2001), <http://users.wfu.edu/zulick/340/slavecodes.html>; *Slave Codes*, BOUNDLESS, <https://www.boundless.com/u-s-history/textbooks/boundless-u-s-history-textbook/slavery-in-the-antebellum-u-s-1820-1840-16/slavery-in-the-u-s-122/slave-codes-653-10159/> (“Slave codes were laws that were established in each state to define the status of slaves and the rights of their owners.”) (last visited Jan. 4, 2017).

50. See ALABAMA DEP’T OF ARCHIVES & HIST., *supra* note 49.

51. *Id.*

52. See *Gabriel’s Conspiracy*, AFRICANS IN AMERICA (1998), <http://www.pbs.org/wgbh/aia/part3/3p1576.html> (giving an online historical lesson plan for Africans in America).

deemed and considered an UNLAWFUL ASSEMBLY; and any justice of a county, . . . wherein such assemblage shall be, either from his own knowledge or the information of others, of such unlawful assemblage, . . . may issue his warrant, directed to any sworn officer or officers, authorizing him or them to enter the house or houses where such unlawful assemblages, . . . may be, for the purpose of apprehending or dispersing such slaves, and to inflict corporal punishment on the offender or offenders, at the discretion of any justice of the peace, not exceeding twenty lashes.<sup>53</sup>

Among the pantheon of Black men punished for “loose talk,” the Vesey prosecution shared elements with the New York Conspiracy of 1741. “The Great Negro Plot[,]” as historian Mat Johnson called it,<sup>54</sup> charged that the accused Black men had “spoke” to set Manhattan afire, loot and steal, murder and rape, and then escape by setting sail from New York harbor. A series of fires stirred popular apprehension and triggered the prosecution. At the start, a broad-based consensus among shaken Whites supported the prosecution in hope of thwarting the threat. As feelings of security strengthened, however, support for the prosecution waned. In the end, critics pilloried the prosecutors’ means, methods, and motives. What the prosecutors offered as confessions were among the most criticized elements, as critics challenged accuracy and authenticity.<sup>55</sup>

Unlike the prosecution of Black men during the Slave era, prosecutors today should take care to avoid the undertow of punishing Black speech. Criticized for being chameleon-like because prosecutors can shape it for their own purpose,<sup>56</sup> punishing speech

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53. William Goodell, *Original Documents: Acts Against the Education of Slaves South Carolina, 1740 and Virginia, 1819*, PBS (2004), <http://www.pbs.org/wnet/slavery/experience/education/docs1.html>.

54. MAT JOHNSON, *THE GREAT NEGRO PLOT: A TALE OF CONSPIRACY AND MURDER IN EIGHTEENTH CENTURY NEW YORK* (2007).

55. For a detailed historical analysis of the New York Plot of 1741, including empirical data, see THOMAS J. DAVIS, *THE NEW YORK CONSPIRACY* appendix (1971); and THOMAS J. DAVIS, *RUMOR OF REVOLT* ix–x (1990).

56. For a reference to the law as “chameleon-like,” see *Krulewitch v. United States*, 336 U. S. 440, 447 (1949) (Jackson, J., concurring) (reversing conspiracy conviction on ground of error in trial court’s admitting a hearsay statement made after completion of an illegal scheme-

invites incredulity. It seems often to cry out for more than appears. Just like slave rebellions, “loose talk by aggrieved and embittered men”<sup>57</sup> may be only that: loose talk. And if such is enough for the law, it often is not enough for onlookers—those outside the ambit of the threat prosecutors project, and who truly understand hip-hop. The threat is the crux: it is what prosecutors, popular sentiment, and critics all turn on. Unfortunately for some, Black speech, similar to the Slave era, still tends to be accepted as “real” to the degree the threat it appears to pose is accepted as real: that Blackness is to be feared, ostracized, and treated as different rather than embraced and valued in America’s monolithic cultural society.

## II. PUNISHING BLACK SPEECH: THE HIP-HOP NARRATIVE

### A. *A Brief History of Hip-Hop*

Although hip-hop is a complex counter-culture comprised of four elements,<sup>58</sup> it is widely considered to describe rap music, also known as “MCing” or “rhyming” which philosopher Cornel West described as “singing paideia[,]” the deep education that informs and transforms us to shift from bling-bling to a quest for freedom.<sup>59</sup> Most notably, hip-hop rap music is deeply connected to race—originating in the predominantly Black and economically depressed South Bronx section of New York City in the late 1970s.<sup>60</sup>

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here interstate trafficking in prostitution in violation of the Mann Act, then 18 U.S.C. § 399 [now §2422]).

57. Wade, *The Veasy Plot*, *supra* note 47, at 160.

58. See Zack O’Malley Greenburg, *The Man Who Invented Hip Hop*, FORBES (July 9, 2009, 4:00 PM), <http://www.forbes.com/2009/07/09/afrika-bambaataa-hip-hop-music-business-entertainment-cash-kings-bambaataa.html>.

59. Cornel West, *Hip Hop Heals: Why a College Professor Groves*, HEAL YOUR LIFE (Oct. 24, 2010, 10:00 AM), <http://www.healyourlife.com/hip-hop-heals>.

60. Jonah Hahn, *The Politics of Race in Rap*, HARV. POL. REV. (June 8, 2014, 11:51 PM), <http://harvardpolitics.com/books-arts/politics-race-rap>. See also ADAM BRADLEY & ANDREW DUBOIS, *THE ANTHOLOGY OF RAP* (2011); ADAM BRADLEY, *BOOK OF RHYMES: THE POETICS OF HIP-HOP* (2009); JEFF CHANG, *CAN’T STOP WON’T STOP: A HISTORY OF THE HIP-HOP GENERATION* (2005); Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on Paradigm,”* in *HIP HOP AND THE LAW* 47–61 (2015); Donald F. Tibbs, *Hip Hop and the New Jim Crow: Rap Music’s Insight on Mass Incarceration*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 209 (2015).

Rap music was ushered onto the national stage with the release of the Sugarhill Gang's song "Rapper's Delight" in 1979.<sup>61</sup> Soon afterwards, several other artists entered the fray each introducing their own style of "rapping" over music.<sup>62</sup> During the 1980s, rap music became more mainstream and economically profitable. Spirited by the rap group trio Run-D.M.C., who fused rap with hard rock, rap style and dress was introduced to the larger world.<sup>63</sup> Also, several new record labels took advantage of the growing market for rap music. For example, Russell Simmons, the brother of Run, eventually founded Def Jam Records and featured three rap innovators: LL Cool J, rap's first romantic superstar; The Beastie Boys, a White trio that broadened rap's audience and popularized digital sampling (composing with music and sounds electronically extracted from other recordings); and Public Enemy, who invested rap with radical Black political ideology and built on the social consciousness of Grandmaster Flash and the Furious Five's "The Message" (1982).<sup>64</sup>

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61. See Kiah Fields, *Today in History: Sugarhill Gang Releases 'Rapper's Delight' 37 Years Ago*, SOURCE (Sept. 16, 2016), <http://thesource.com/2016/09/16/today-in-hip-hop-history-sugar-hill-gang-releases-rappers-delight-37-years-ago/>. Fields remarks that the significance of Rapper's Delight was its releasing hip-hop from the taboo of musical stigmatization. According to Fields,

What "Rapper's Delight" did was make it "ok" to listen to and support rap music out in the open. Before this single, Hip Hop was an urban taboo. Upon it's [sic] release, the connotation transformed from one synonymous with the ghetto to a new and hip musical genre. In a way "Rapper's Delight" gentrified Hip Hop in a way that made it profitable. Without it, the culture would not be a powerful as it is today.

*Id.*

62. "Rapper's Delight": *The One-Take Hit*, NPR MUSIC (Dec. 29, 2000, 12:00 AM), <http://www.npr.org/2000/12/29/1116242/rappers-delight>. To fully support this proposition, watch the original video of the performance of Rapper's Delight by the Sugarhill Gang. *The Sugarhill Gang—Rapper's Delight (Official Video)*, YOUTUBE (Aug. 24, 2015), <https://www.youtube.com/watch?v=mcCK99wHrk0>.

63. For visual explanations of the style and dress of Run-D.M.C., see generally RUN DMC: THE OFFICIAL WEBSITE OF RUN-DMC, <http://www.rundmc.com/history/>. For a description of their collaboration with rock group Aerosmith, where the two groups co-wrote and performed the popular rap single Walk this Way, see Geoff Edgers, *The Collaboration That Altered Music—and Popular Culture*, WASH. POST (May 18, 2016), <https://www.washingtonpost.com/graphics/lifestyle/walk-this-way/>. An original video of the collaboration can be see at <https://www.washingtonpost.com/graphics/lifestyle/walk-this-way/>.

64. For a brief history of Def Jam Records since the 1980s, see DEF JAM RECORDINGS, <http://www.defjam.com/timeline/> (last visited Sept. 14, 2016).

The most significant response to rap music dominance in African American culture, however, came from Los Angeles, beginning in 1989 with a little known group called N.W.A. (Niggaz With Attitude).<sup>65</sup> N.W.A.'s first album, *Straight Outta Compton*, featured West Coast rap superstars—Ice Cube, Eazy E, and Dr. Dre—utilizing a brash bombastic rap style to narrate graphic, frequently violent, tales of real life in inner city Compton.<sup>66</sup> Their story was captured in bio with the same title and was critically acclaimed as the must-see movie of the hip-hop generation.<sup>67</sup> Also, Los Angeles rap stars such as Ice-T (remembered for his 1992 single “Cop Killer”) and Snoop Dogg (cousin of Dr. Dre) from Long Beach gave rise to the popularity of the new genre known as gangsta rap. Los Angeles-based record label Death Row Records built an empire around Dr. Dre, Snoop Dogg, and the rapper-actor Tupac Shakur, and entered in to a rivalry with New York City’s Bad Boy Records. This developed into a media-fueled hostility between East Coast and West Coast rappers, which culminated in the still-unsolved murders of wildly gifted Shakur and New York rapper Christopher Wallace, also known as the Notorious B.I.G.<sup>68</sup>

Between the 1980s and 1990s, hip-hop became a cultural movement where rapping, verbal speech, became the influential component of the art form.<sup>69</sup> During the 1990s, rap groups such as the Wu-Tang Clan from New York City’s Staten Island, dominated the genre. Their style was popularized by utilizing a combination of street credibility, neo-Islamic mysticism, and kung fu lore making

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65. For a brief history of N.W.A., including insights into each of the original artists and a musical timeline, see NWA WORLD, <http://www.nwaworld.com> (last visited Sept. 14, 2016).

66. *Id.*

67. Brian Hiatt, *14 Things We Learned about ‘Straight Outta Compton,’* ROLLING STONE (Aug. 13, 2015), <http://www.rollingstone.com/music/news/14-things-we-learned-about-straight-outta-compton-20150813>. See also Anthony D’Alessandro, *Compton’s 60.2M Opening is Tentpole Turf*, DEADLINE HOLLYWOOD (Aug. 17, 2015, 4:31 PM), <http://deadline.com/2015/08/straight-outta-compton-man-from-u-n-c-l-e-weekend-box-office-1201499183/>.

68. Dorian Linskey, *Tupac and Biggie Die as a Result of East/West Coast Beef*, GUARDIAN (June 12, 2011, 19:16 EDT), <https://www.theguardian.com/music/2011/jun/13/tupac-biggie-deaths>.

69. See *Hip Hop Music and Cultural Movement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/hip-hop>.

them one of the most complex groups in the history of rap.<sup>70</sup> Also, Sean Combs (known as “Puffy,” “Diddy,” “Puff Daddy,” and “P.Diddy”), performer, producer, and president of Bad Boy Records, popularized his record label by popularizing himself; namely by making multiple changes to his official name;<sup>71</sup> while the Fugees mixed pop music hooks with politics and launched the solo careers of Wyclef Jean and Lauryn Hill.<sup>72</sup> The 2000s, cemented the nascent careers of Shawn Corey Carter, better known by his hip-hop nom de plume, Jay-Z, and the musical producer and artist Kanye West. Other artists, such as Nas, Lil Wayne, 50 Cent, Eminem, T.I., and The Game each followed, with Wiz Kalifah, Nicki Minaj, Drake, and most presently popular Kendrick Lamar.<sup>73</sup>

### B. “Loose Talk by Aggrieved and Embittered Men”

To all that has been said about hip-hop thus far, there should be little disagreement that it has always been music categorized as, and organized around, political speech or “loose talk by aggrieved and embittered men.”<sup>74</sup> In that sense, the popular culture narratives of modern-day hip-hop easily connect to the plantation narratives of

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70. For a brief history of the Wu-Tang Clan, see *Home of The Wu-Tang Clan & Killa Beez*, WUTANGCORP.COM, <http://www.wutang-corp.com> (last visited Sept. 14, 2016).

71. Bad Boy Entertainment, *Puff Daddy & The Family*, <http://puffdaddyandthefamily.com> (last visited Sept. 14, 2016). See also Madeline Boardman, *Sean Combs Becomes Puff Daddy Again in Time for ‘Big Homie’ Single*, HUFFINGTON POST (Mar. 25, 2014, 9:28 AM), [http://www.huffingtonpost.com/2014/03/25/sean-combs-puff-daddy-big-homie\\_n\\_5027256.html](http://www.huffingtonpost.com/2014/03/25/sean-combs-puff-daddy-big-homie_n_5027256.html).

72. Alec Foegen, *The Fugees: Leaders of the New Cool*, ROLLING STONE (Sept. 5, 1996), <http://www.rollingstone.com/music/features/the-fugees-19960905>.

73. While it is difficult to rank rap superstars, mostly because the listing depends on individual tastes of the musical genre, the majority of top rap superstars of all times comes from the 2000s era of rap music. See Insanul Ahmed et al., *The 10 Best Rappers of the 2000s*, COMPLEX MUSIC (Aug. 26, 2013), <http://www.complex.com/music/2013/08/best-rappers-of-2000s/>. See also Brandon I. Brooks, *Hip Hop Legends: Top 10 Rap Stars of All-Time*, L.A. SENTINEL (Apr. 23, 2010), <https://lasentinel.net/hip-hop-legends-top-10-rap-stars-of-all-time.html>.

74. Wade, *The Veasy Plot*, *supra* note 47, at 160. Journalist Davey D details the historical connection between Hip Hop and political speech. He explains how hip-hop connects to the politics of Black empowerment that began during the civil rights movement into the era of Black Power. See generally Davey D, *Hip Hop Has Always Been Political*, HIP HOP & POLITICS (Jan. 26, 2012), <http://hiphopandpolitics.com/2012/01/26/hip-hop-has-always-been-political/>.

slave songs. And in many ways, their brand on the music is the same. They both contain Black speech centered around hidden messages of resistance to White supremacy deeply embedded in cultural connotations of Black expressivism.

Today, hip-hop manifests the collective historical experience of Black speech in its vast body of musical literature. American novelist Harold Courlander once commented that “it would be possible to put a large body of Negro religious songs together in a certain sequence to produce an oral counterpart of the Bible; if printed, they would make a volume as thick as the Bible itself.”<sup>75</sup> We would predict that Courlander would cast rap music in the same light today—particularly as it pertains to the dialectical struggle between Black freedom and the American Criminal Justice System.<sup>76</sup>

Hip-hop, unfortunately, is mischaracterized and misunderstood. Critics lambast hip-hop as the evil twin of Black music and the wrecking-ball of Black (or American) culture.<sup>77</sup> Many fail to situate the intellectual, emotional, and experiential space that enables millions to transcend the “language” of hip-hop for some of its strong

75. HAROLD COURLANDER, *NEGRO FOLK MUSIC, U.S.A.* 43 (1963).

76. See Andre Douglas Pond Cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515 (2010). See also PAUL BUTLER, *LET’S GET FREE: A HIP HOP THEORY OF JUSTICE* (2009).

77. Leslie Larson, *Ben Carson Says Hip-Hop is Hurting African-American Communities*, BUS. INSIDER (Apr. 6, 2015, 3:32 PM), <http://www.businessinsider.com/ben-carson-blasts-hip-hop-2015-4>. See also Dr. Boyce Watkins, *Michael Eric Dyson, Yes Hip Hop is Destroying the Black Youth*, THYBLACKMAN.COM (Feb. 26, 2012), <http://thyblackman.com/2012/02/26/michael-eric-dyson-yes-hip-hop-is-destroying-the-black-youth/>.

Artist Tupac takes up this issue in his 1996 hit song, *How Do You Want It*, where he discusses how critics are lambasting rap music and its artists instead of upholding the cultural value of the art form.

Delores Tucker, you’re a motherfucker,  
 Instead of trying to help a nigga you destroy a brother.  
 Worse than the others—Bill Clinton, Mr. Bob Dole,  
 You’re too old to understand the way the game is told.  
 You’re lame so I got to hit you with the hot facts,  
 Want some on lease? I’m making millions, niggaz top that.  
 They want to censor me, they’d rather see me in a cell,  
 living in hell—only a few of us will live to tell.  
 Now everybody talking bout us I could give a fuck,  
 I’d be the first one to bomb and cuss.  
 Nigga tell me how you want it

TUPAC SHAKUR, *How Do You Want It*, on *ALL EYEZ ON ME* (Death Row Records 1996).

cultural and legal criticisms. In other words, most find it difficult to peel back the many layers of rap music as did the slave overseers failed to peel back the many layers of plantation slave songs.<sup>78</sup> But, similar to slave songs, hip-hop is a form of Black speech. However, rather than making songs about escaping from anti-Blackness, it instead produces songs that confronts anti-Blackness head-on. It tells us what it means to be a young Black male, frequently subjected to unconstitutional searches and seizures.<sup>79</sup> It tells us what it means to be the victim of mass incarceration and the racialized War on Drugs.<sup>80</sup> It tells us what it means to be blamed for your own death,

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78. Consider, for example, the Negro Spiritual “Wade in the Water,” which was sung by African and African American slaves working on the plantation. The partial lyrics to the song are:

(Chorus)  
 Wade in the water  
 Wade in the water, children,  
 Wade in the water  
 God’s a-going to trouble the water  
 Well, who are these children all dressed in red  
 God’s a-going to trouble the water  
 Must be the children that Moses led  
 God’s a-going to trouble the water

*Wade in the Water*, NEGRO SPIRITUALS, [https://www.negrospirituals.com/songs/wade\\_in\\_the\\_water.htm](https://www.negrospirituals.com/songs/wade_in_the_water.htm) (last accessed Nov. 11, 2016). The song itself relates biblical stories present in both Old and New Testaments. The verses reflect the Israelites’ escape out of Egypt as found in the Chapter 14 of the book of Exodus. The chorus refers to healing as referenced in John 5:4, which reads “For an angel went down at a certain season into the pool, and troubled the water: whosoever then first after the troubling of the water stepped in was made whole of whatsoever disease he had.” *John 5:4* (King James). Beyond its biblical connections, the song contains explicit instructions on how to avoid capture. It recommends leaving dry land and taking to the water as a strategy to evade pursuing bloodhounds. Further, if “God’s gonna trouble the water,” then accordingly whichever slave steps into the water afterwards would be made whole; or said differently “set free.” For a good history of the significance of slave songs as Negro Spirituals, see C. Michael Hawn, *History of Hymns: “Wade in the Water,”* UMC DISCIPLESHIP MINISTRIES, <http://www.umcdiscipleship.org/resources/history-of-hymns-wade-in-the-water>. See also Yolanda Y. Smith, *A Spirituality of Teaching Black Women’s Spirituality and Christian Education*, RELIGIOUS EDUC. ASS’N, <http://old.religiouseducation.net/Resources/Proceedings/12ASpiritualityofTeachingREAPresentation9-07.pdf> (last accessed Nov. 11, 2016); THOMAS L. WEBBER, *DEEP LIKE THE RIVERS: EDUCATION IN THE SLAVE QUARTER COMMUNITY 191–205*, 207–08 (1978).

79. Tibbs, *From Black Power to Hip Hop*, *supra* note 3.

80. A perfect example is Lil Wayne’s 2008 hit, *Don’t Get It (Misunderstood)*, where toward the end of the song he discusses the problems associated with the War on Drugs targeting young Black men. The relevant lyrics are:

when you are completely innocent. It tells us what it means when post-Racial becomes the code word for the new anti-Black. It even contains diatribes on mass incarceration<sup>81</sup> and the hyper-policing of young Black men for drug possession and trafficking.<sup>82</sup>

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I was watching t.v. the other day, right  
 Got this white guy up there talking about black guys  
 Talking about how young black guys are targeted  
 Targeted by who? America  
 You see one in every hundred Americans are locked up  
 One in every nine black Americans are locked up  
 And see what the white guy was trying to stress was that  
 The money we spend on sending a mothafucka' to jail  
 A young mothafucka' to jail  
 Would be less to send his or her young ass to college  
 See, and another thing the white guy was stressing was that  
 Our jails are populated with drug dealers,  
 You know crack cocaine stuff like that  
 Meaning due to the laws we have on crack cocaine and regular cocaine  
 Police are only, I don't want to say only right, but shit  
 Only logic by riding around in the hood all day  
 And not in the suburbs  
 Because crack cocaine is mostly found in the hood  
 And you know the other thing is mostly found in you know where I'm going  
 But why bring a mothafucka' to jail if it's not gon' stand up in court  
 Cause this drug ain't that drug,  
 You know level three, level four drug, shit like that  
 I guess it's all a misunderstanding,  
 I sit back and think, you know us young mothafuckas you know that 1 in 9  
 We probably only selling the crack cocaine because we in the hood

LIL WAYNE, *Don't Get It (Misunderstood)*, on THA CARTER III (Cash Money Records 2008); *DontGetItLyrics*, METRO LYRICS, <http://www.metrolyrics.com/dontgetit-lyrics-lil-wayne.html> (last accessed Nov. 11, 2016).

81. A perfect line from a popular Hip Hop song on Mass Incarceration is Ice Cube's 1990 hit song, *The N\*gga You Love to Hate* on his solo debut album *AmeriKKKa's Most Wanted*. The relevant lyrics are:

They say keep em on gangs and drugs,  
 You wanna sweep a n\*gga like me up under the rug.  
 Kicking shit called *street knowledge*,  
 Why more n\*ggas in the pen than in college.

ICE CUBE, *The N\*gga You Love to Hate*, on *AMERIKKKA'S MOST WANTED* (Priority Records 1990).

82. An excellent example of a song that presents a narrative about the hyper-policing of young Black males for drug related crimes is Chamillionaire's 2006 song, *Riding*, on his album *The Sound of Revenge*. The relevant lyrics are:

Do what you thinkin so, I tried to let you go  
 Turn up a blink of light and I swang it slower

Consider, for example, rapper Ice Cube's 2008 video for his song *Gangsta Rap Made Me Do It* that contains hidden messages in plain view.<sup>83</sup> It opens with dark screen set in a futuristic classroom in the year 2020. A teacher, addressing an innocent-looking group of white children, is dressed with a tight fitting military-style uniform reminiscent of the style worn by military officers in Nazi Germany, and flanked by two American flags. He paces back and forth as he condemns gangsta rap for the vices of society:

Prior to gangsta rap music, the world was a peaceful place.

And then all of that changed.

Violence, rape, murder, arson, theft, war,

They're all things that came about as a result of gangsta rap music.<sup>84</sup>

Suddenly, a child raises his hand and asks "but wasn't Compton dangerous before gangsta rap?" The teacher yells in response,

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A nigga upset for sure cause they think they know that they catchin me with plenty of  
the drink and dro

So they get behind me tryin to check my tags, look at my rearview and they smilin

Thinkin they'll catch me on the wrong well keep tryin

Cause they denyin is racial profiling

Houston, TX you can check my tags

Pull me over try to check my slab

Glove compartment gotta get my cash

Cause the crooked cops try to come up fast

And been a baller that I am I talk to them, giving a damn bout not feeling my attitude

When they realize I ain't even ridin dirty bet you'll be leavin with an even madder

mood

I'mma laugh at you then I'mma have to cruise I'm in number two on some more DJ

Screw

You can't arrest me plus you can't sue

This a message to the laws tellin them WE HATE YOU

I can't be touched or tell 'em that they shoulde known

Tippin' down, sittin' crooked on my chrome

Bookin' my phone, tryin' to find a chick I wanna bone

Like they couldn't stop me I'mma 'bout to pull up at your home and it's on

CHAMILLIONAIRE, *Riding*, THE SOUND OF REVENGE (Universal Records, 2006).

83. Ice Cube, *Gangsta Rap Made Me Do It*, YOUTUBE (July 22, 2014), <https://www.youtube.com/watch?v=1WkvomHrfVo>.

84. *Id.*

Wrong! Compton was a nature preserve for bunny rabbits!<sup>85</sup>

The room darkens and Ice Cube's face is projected on a screen, rapping that gangsta rap is allegedly the root of all crimes. The chorus targets gangsta rap and shows several video clips of actual shootings in the U.S. and Iraq, the Columbine Massacre, as well as the Virginia Tech Massacre the infamous image of Cho pointing a gun. It also features footage of the Michael Richards Laugh Factory incident (where he viciously screamed "he's a nigger" to a black patron who heckled him)<sup>86</sup> and Don Imus, who referred to the Rutgers women's basketball team as "nappy headed hos . . ." <sup>87</sup> The continuous chorus reminds us that of everything that is wrong with a world that blames young black men for creating gangsta rap. The chorus repeats, Ain't nothing to it, gangsta rap made me do it.<sup>88</sup>

*C. A Troublesome Narrative of Prosecuting Hip-Hop: The Case of Vonte Skinner*

Most troubling about prosecuting rap music are the human tragedies associated with the hyper-criminalization of young Black male art. The human tragedies are the stories of young Black men who have had their lives ruined by Attorney Jackson's scheme. While many stories are tragic, perhaps none is worse than the case of Vonte Skinner.<sup>89</sup>

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85. *Id.*

86. Stephanie Webber & Ingrid Meilan, *Michael Richards: My Racist Outburst During 2006 Stand Up Gig was a 'Reality Check,'* U.S. MAG. (Oct. 23, 2015, 12:05 PM), <http://www.usmagazine.com/celebrity-news/news/michael-richards-my-racist-outburst-in-2006-was-a-reality-check-20152310>. For a video of the incident, where Richards can be seen screaming the racial epithet, see <https://www.youtube.com/watch?v=BoLPLsQbdt0>.

87. Judy Faber, *CBS Fires Don Imus Over Racial Slur*, CBS NEWS (Apr. 12, 2007, 7:53 AM), <http://www.cbsnews.com/news/cbs-fires-don-imus-over-racial-slur/>.

88. ICE CUBE, *supra* note 81.

89. For an excellent critique of the Skinner case, see generally, Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, N.Y. TIMES (Jan. 13, 2014), [http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html?\\_r=0](http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html?_r=0).

On the night of November 8, 2005, Vonte Skinner was arrested for a drug deal gone awry.<sup>90</sup> Although he was at the scene of alleged crime, he was not involved in any way. Nonetheless, during the investigation, prosecutors focused on him not because of his guilt, but rather because they had a prized possession: his rap lyrics, his “loose talk.” The police investigation discovered several notebooks filled with rap lyrics written by Mr. Skinner, mostly composed over a period of three to four years prior to the alleged crime. The lyrics were written in first person, identifying the narrator as “Threat” while referencing the name as a tattoo on his arm and giving his date of birth. The words depict violent acts of murder and rape, as well as profanity, expletives, and racial epithets. However, none of the lyrics made reference to the victim of the shooting or any specifics related to the events in question. Mr. Skinner’s rap moniker is “Threat.”<sup>91</sup>

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90. *State v. Skinner*, No. A-2201-08T2, 2012 N.J. Super. Unpub. LEXIS 2069 (Super. Ct. App. Div. Aug. 31, 2012), *aff’d*, 95 A.3d 236 (2014). The specific facts of Mr. Skinner’s case can be read online free of charge at Leagle. *State v. Skinner*, LEAGLE (2012), <http://www.leagle.com/decision/In%20NJCO%2020120831288/STATE%20v.%20SKINNER?>.

91. *See State v. Skinner*, 2012 N.J. Super. Unpub. LEXIS 2069 (Super. Ct. App. Div. Aug. 31, 2012). Interestingly, the name Threat is also the name of the seventh track on Jay Z’s 2003 popular album *The Black Album*. The song references how society views Jay Z as a “Threat” different from other popular culture artists. Simply, his loose-talk references how he is viewed as a loose threat:

This is a unusual musical I conducting  
 You looking at the black Warren Buffett so all critics can duck sic  
 I don’t care if you C. Delores Tuck-it  
 Or you Bill O’Reilly, you only rylin me up  
 For three years, they had me peein out of a cup  
 Now they bout to free me up, whatchu think I’m gon’ be, what?  
 Rehabilitated, man I still feel hatred  
 I’m young black and rich so they wanna strip me naked, but  
 You never had me like Christina Aguilery-y  
 But catch me down the Westside, driving like Halle Berry  
 Or the FDR, in the seat of my car  
 Screaming out the sunroof death to y’all  
 You can’t kill me, I live forever through these bars  
 I put the wolves on ya, I put a price on your head  
 The whole hood’ll want ya, you starting to look like bread  
 I send them boys at ya, I ain’t talking bout Feds  
 Nigga them body-snatchers, nigga you heard what I said

JAY Z, *Threat*, on *THE BLACK ALBUM* (Roc-A-Fella Records 2003). Additionally, the song offers a vocal appearance by comedian Cedric the Entertainer who makes threats as “Threat” to remind the listener what “Threat” will do to you if you fail to respect his male bravado.

At the conclusion of the investigation, Mr. Skinner was charged with several crimes: attempted murder, aggravated assault resulting in serious bodily injury, aggravated assault with a deadly weapon, unlawful possession of a weapon, and possession of a weapon with an unlawful purpose. These charges were levied only after the victim, Lamont Peterson, identified him as the shooter.<sup>92</sup> Like many eyewitness cases where a biased victim stands to gain, the prosecution worried that Mr. Peterson's inconsistent statements would result in an acquittal. Therefore, the State needed to bolster Mr. Peterson's testimony and to do so, it turned to the only words they had from Mr. Skinner: his "loose talk" rap lyrics. To draw upon the narratives of Black male criminality, the prosecution used redacted portions of Mr. Skinner's rap lyrics depicting him as a violent, sadistic street thug. However, none of the lyrics either described or were remotely relevant to the crime charged. In other words, they were just loose talk by an aggrieved and embittered man.

The State attempted to convince the jury of his guilt by portraying him as a violent, homicidal, Black male. However, "there was no evidence that [Mr. Skinner] did any of the acts he wrote about in his lyrics or had any knowledge of the subject matter of his work beyond what might be seen in a violent movie."<sup>93</sup> Even so, the State and multiple judges viewed Mr. Skinner's words not as vocalization of his struggles, but as prior bad acts that would have been viewed differently had motive and intent been in dispute. Although the State claimed the lyrics were not offered to establish Mr. Skinner was a bad person, using words and expressions as a means to establish the general culture of violence courts associate with rap lyrics is an attack on the very character of the artists. Because Mr. Skinner's

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Yeah I'm threatening ya, YEAH I'm threatening ya!  
Who you thank you dealing with?  
They call me Chris, nigga I been making threats  
since I been in kindergarten nigga!  
Huh, ask about me, see if you ain't heard

*Id.* Suffice it to say, that Mr. Skinner's rap moniker as "Threat" is neither original, nor without a contextual framing opportunity. *Id.*

92. State v. Skinner, 95 A.3d 236, 240 (2014).

93. State v. Skinner, No. A-2201-08T2, 2012 N.J. Super. Unpub. LEXIS 2069, at \*18 (Super. Ct. App. Div. Aug. 31, 2012), *aff'd*, 95 A.3d 236 (2014).

lyrics contained detailed accounts of random acts of violence, the prosecution argued they “illuminate[d the] defendant’s motive and willingness to resort to violence.”<sup>94</sup>

Herein lies the problem: Mr. Skinner was neither new to nor unversed in rap music. He composed rap lyrics as a form of self-expression since childhood, and some of his work was produced under a rap music label.<sup>95</sup> Samples of his lyrics depict “a world where violence is so intense and so all-pervasive that it makes the reader hold his or her breath.”<sup>96</sup> The images created are of communities plagued with violence and death, where young, Black males in particular are not safe. In these environments, individuals must watch their backs and follow certain codes to survive.<sup>97</sup> What the lyrics do not depict are realistic, personal accounts of the crimes that Mr. Skinner may or may not have committed.

Like the “loose talk” of slave rebellions, many aspects of Mr. Skinner’s rap lyrics and his subsequent trial surrounded the code of the street. The victim and key eyewitness to the shooting stated on several occasions that he could not testify or name Mr. Skinner as the shooter because the code of the street required him to take revenge on his shooter and not be a snitch.<sup>98</sup> The prosecution focused on this “code” to equate Mr. Skinner’s alleged motive with a subculture of violence demonstrated by his violent and profane lyrics. Although Mr. Skinner’s conviction was overturned because of the use of his lyrics, the New Jersey Supreme Court did not focus on the lyrics as a form of expression protected by the First Amendment, but instead bolstered the prosecution’s arguments that the inherent nature of Mr. Skinner’s lyrics was unfairly prejudicial character evidence.<sup>99</sup> While it was fortunate for Mr. Skinner that his conviction was overturned, classifying rap lyrics as inherently prejudicial “paint[s] a picture” of the artist that plays to systemic stereotypes of young Black male

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94. *Skinner*, 95 A.3d at 244.

95. *Id.* at 240.

96. Brief for Am. Civil Liberties Union of New Jersey as Amici Curiae Supporting Respondent, *State v. Skinner*, 95 A.3d 236 (2014) (No. A-2201-08T2).

97. *Id.* at 1, 11.

98. *Skinner*, 95 A.3d at 239.

99. *Id.* at 242.

lifestyles; in Attorney Jackson's racist words, "do-rag wearing" gangsters.<sup>100</sup>

Looking to the purpose of evidentiary rules, rap lyrics, by their violent nature, are inadmissible propensity evidence.<sup>101</sup> The *Skinner* court redeemed itself somewhat by reasoning that the act of Black men loosely talking as aggrieved and embittered men, or simply writing disturbing lyrics, is not a crime, a bad act, or wrong even when written about subjects or lifestyles that are "condemned as anti-social, mean-spirited, or amoral."<sup>102</sup> The court's analysis, albeit beneficial for Mr. Skinner, made some grave social mistakes. While it ensured a level of protection Black artists have previously not experienced, it did so for reasons that are not warranted or justified. It assumes that all rap artists, especially young Black males, are prone to commit crimes and only bad people would write such graphic depictions of life. It fails to take into account that rap artists are using this form of artistic expression as "loose talk" which allows them to come to terms with the failure of White civil society to protect them from the historical, social, emotional, and legal violence of American day-to-day life. Further, the court failed to consider the many other ways that an artist could express the struggles of the minority community that would not be considered propensity evidence—or any evidence at all.

Just as White slave owners interpreted the emotional cries of slaves as intentions to revolt, today's judicial system is applying literal interpretations to Black expression (rap lyrics) and making inaccurate assumptions that they are depicting "true-life, self-referential stories . . ." <sup>103</sup> Rap lyrics are not "inherently truthful,

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100. Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & Arts 1 (2007).

101. According to Rule 404(a), Character Evidence, a defendant's character is not admissible to prove that on a particular occasion the defendant acted in accordance with that character trait. FED. R. EVID. 404(a). The purpose of this rule is to invalidate prosecutorial evidence that uses the defendant's character traits as a proxy for actual proof that the defendant committed the crime. The main goal of Rule 404(a) is to ensure sure that all evidence presented against the defendant is directly related to the current crime which he is being charged, rather than propensity evidence. See also Kenneth J. Arenson, *The Propensity Evidence Conundrum: A Search for Doctrinal Consistency*, 8 U. NOTRE DAME AUSTL. L. REV. 31, 31–32 (2006).

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

103. Dennis, *supra* note 19, at \*4.

accurate, self-referential depictions of events, nor necessarily representative of an individual's mindset.”<sup>104</sup>

### III. A CONSTITUTIONAL CONCERN: THE “LOOSE TALK” OF ANTHONY ELONIS

In the spirit of prosecuting Black men for their speech, or “loose talk” rap lyrics, the State returned to another unethical crime scene in the case of Anthony Elonis. This case went beyond the State and made its way into the hallowed halls of the United States Supreme Court. It should stand to reason then that the decision would be the law of the land—which ultimately was good for hip-hop, but bad for unethical punishment schemes posed by Attorney Jackson. Unlike Mr. Skinner, however, Mr. Elonis was not accused of committing an actual crime. Rather, his prosecution occurred because his rap lyrics were used to charge him with making a “real threat”<sup>105</sup> over the internet to federal agents, an elementary school, and his wife. Mr. Elonis and Mr. Skinner are connected: The Supreme Court charged Mr. Elonis with using the “loose talk” that actually was Mr. Skinner’s moniker: real threat.

After being married for nearly seven years, in May 2010, Mr. Elonis’s wife left with their two young children.<sup>106</sup> Mr. Elonis developed a new online persona (referring to himself as “Tone Dougie”) styled around violent rap lyrics as a mechanism for overcoming his heartbreak. He claimed his violent lyrics were therapeutic and helped him deal with his pain. While prefaced with disclaimers that the lyrics were “fictitious” and artistic speech, Mr. Elonis’s posts frequently contained depictions of violent threats against co-workers, friends, and his ex-wife.<sup>107</sup> After being fired from an amusement park for posting a demeaning photograph of a co-worker on Facebook, he took to his online persona asking whether the facility could be secure against him and intimating he had keys to

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104. Dennis, *supra* note 19, at \*4.

105. Interestingly, Mr. Elonis was criminally charged with, and the Supreme Court considered the very danger of, using words that actually were Skinner’s rap moniker. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015).

106. *Id.* at 2004.

107. *Id.* at 2005.

the park and “sinister plans for all [his] friends . . . .”<sup>108</sup> This post became the basis for Count One of his indictment—threatening park patrons and employees.

Soon after he was fired, Mr. Elonis created an adaptation of a satirical sketch substituting his ex-wife as the main character.<sup>109</sup> The sketch revolved around things it was illegal to say such as “it’s illegal for me to say I want to kill my wife[,]” and “I really, really think someone out there should kill my wife[,]” while including an accurate diagram of his ex-wife’s home, with instructions on where to fire a mortar launcher.<sup>110</sup> The Court granted his ex-wife a three-year protection-from-abuse (PFA) order against him. Mr. Elonis subsequently referred to the PFA in another Facebook post where he asked if the PFA was thick enough to stop a bullet. Additionally, he wrote that he had “enough explosives to take care of the State Police and the Sheriff’s Department.”<sup>111</sup> This post became this basis for Counts Two and Three of his indictment—threatening his wife and law enforcement officers.

During the same time frame, Mr. Elonis, writing that he had “had about enough[,]” wrote in a separate Facebook post that there were “[e]nough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined and hell hath no fury like a crazy man in a Kindergarten class . . . .”<sup>112</sup> Threatening a school was Count Four of his indictment. An FBI agent saw the post and decided to visit Mr. Elonis and question him about his postings. After the visit, Mr. Elonis took to Facebook to rant about the visit and described the vicious way in which he wanted to kill the agent and wrote that “little did [they] know, [he] was strapped wit’ a bomb . . . .”<sup>113</sup> This in turn led to Count Five.

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108. *Id.* (quoting an entry on Mr. Elonis’s Facebook page).

109. *Whitest Kids U’ Know, It’s Illegal to Say...*, YOUTUBE (May 2, 2007), <https://www.youtube.com/watch?v=QEQOvyGbBY&feature=youtu.be>.

110. *Id.*; *Elonis*, 135 S. Ct. at 2005.

111. *Elonis*, 135 S. Ct. at 2006.

112. *Id.*

113. *Id.*

After a grand jury indictment, Mr. Elonis claimed “his posts emulated the rap lyrics of the well-known performer Eminem . . . .”<sup>114</sup> He argued that the government had failed to prove that he intended to threaten anyone and that his lyrics were a form of free expression. The prosecution presented Elonis’s ex-wife and co-workers; during testimony, they stated they “felt afraid,” and viewed Mr. Elonis’s posts as “serious threats.”<sup>115</sup> In closing arguments, the government sealed Mr. Elonis’s fate by emphasizing to the jury that “it was irrelevant whether Elonis intended the postings to be threats—it doesn’t matter what he thinks.”<sup>116</sup> Mr. Elonis was convicted on four of the five counts and was sentenced to imprisonment for three years and eight months, and three years’ supervised release. On appeal, the Court further disagreed with Elonis holding that “only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat[.]” mattered to his conviction.<sup>117</sup>

To accept the reasoning of the Third Circuit Court of Appeals would be to accept that the First Amendment is an empty promise to Black people and Black speech.<sup>118</sup> As demonstrated in *Skinner*, “one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views.”<sup>119</sup> It is not presumed that Bob Marley shot the sheriff or that Edgar Allan Poe buried a man beneath his floorboards because they

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114. *Id.* at 2007. See also EMINEM, *I’m Back*, on THE MARSHALL MATHERS LP (Interscope Records 2000). The relevant lyrics are:

I take seven (kids) from (Columbine), stand ‘em all in line

Add an AK-47, a revolver, a nine a MAC-11 and it oughta solve the problem of mine  
and that’s a whole school of bullies shot up all at one time Cause (I mmmmm) Shady,  
they call me as crazy as the world was over this whole Y2K things.

*Id.*

115. *Elonis*, 135 S. Ct. at 2007.

116. *Id.* (internal quotation marks omitted).

117. *Id.*

118. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 271 (1964) (“It is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for ‘vigorous advocacy’ no less than ‘abstract discussion.’” First Amendment “protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”) (internal citations omitted).

119. *State v. Skinner*, 95 A.3d 236, 251 (N.J. 2014).

chose to write on those subjects.<sup>120</sup> Similarly, a hip-hop artist who has written about his ill-will and hatred toward his wife and the police does not justify prosecution.

The Supreme Court, however, agreed with *Elonis*. The Court held that, absent proof of intent to cause actual harm, language does not constitute a threat—regardless of how a victim may feel. The Court stated that Mr. *Elonis*'s conviction “was premised solely on how his posts would be understood by a reasonable person . . . .”<sup>121</sup> Basing criminal convictions on a reasonable person standard is inconsistent with the underlying principle of criminal law—*mens rea*.<sup>122</sup> Criminal intent is necessary for a crime under the law. Therefore, absent a showing of actual intent by Black men who write hip-hop lyrics to harm the person who feels threatened, a hip-hop song is nothing more than political or social speech, regardless of how vicious or degrading the words. Perhaps, now post-*Elonis*, it deserves the category of constitutionally-protected “loose talk by aggrieved and embittered men.”<sup>123</sup>

While the facts of *Elonis* are distinct from *Skinner*, the cases are linked by the government's failure to treat rap lyrics as nothing more than Black speech and art—both protected by the Constitution. The failure to see rap lyrics as Black speech, however, resurrects the problem to a racial level beyond the legal one. Like all languages that exist inside a culture, rap lyrics, also, are a foreign language that

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120. BOB MARLEY, *I Shot the Sheriff*, on BURNIN' (Island Records 1973); Edgar Allan Poe, *The Tell-Tale Heart*, in THE PIONEER (James Russell Lowell ed., 1843). See also Eminem & Kim, MARSHALL MATHERS LP (Aftermath, Interscope 2000) (singing about killing his daughter's mother who leaves him for another man); DMX, *Bring Ya Whole Crew*, on FLESH OF MY FLESH, BLOOD OF MY BLOOD (Ruff Ryders, Def Jam 1998) (referencing necrophilia and cutting heads with machetes and tearing open rib cages).

121. *Elonis*, 135 S. Ct. at 2011.

122. *Mens rea* is simply Latin for a “guilty mind.” Francis Bowes, *Mens Rea*, 45 HARV. L. REV. 974, 974 n.3 (1932).

There are two conditions to be fulfilled before penal responsibility can rightly be imposed . . . One is the doing of some *act* by the person to be held liable . . . The other is the *mens rea* or guilty mind with which the act is done. It is not enough that a man has done some act which on account of its mischievous results the law prohibits; before the law can justly punish the act, an inquiry must be made into the mental attitude of the doer.

*Id.* (quoting SALMOND, JURISPRUDENCE (3d ed. 1910) § 127).

123. Wade, *The Veasy Plot*, *supra* note 47, at 160.

deserves to be evaluated and deconstructed by rap linguists who understand the cultural aspects of rap that include a racial sensitivity in its analysis.<sup>124</sup> While the social construction of Black men as true threats remains part of the American criminal justice lexicon, the reality of rap lyrics as proof positive of that true threat is dismantled. Simply, true threats are generally defined as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>125</sup> Without an understanding of how rap lyrics are created and the purpose behind this genre of art, courts frequently mistake fictional and emotional accounts of violence and rage as an actual threat against persons depicted.<sup>126</sup> Or simply, the courts are comfortable with using rap music as a proxy for criminalizing race. Either way, it is unethical, immoral, and unconstitutional.

#### CONCLUSION

Because of its malleability, punishing hip-hop allows prosecutors to simplify the necessarily complex by projecting their perception as reality; as was done in Vonte Miller’s case. Perception is real, but it also varies. Here lies the central problem for hip-hop: what perception will the course of events support? Within the legal system, prosecutors and jurors need only share the same perception. Elsewhere, the shared perception that sustained the prosecution may appear as no more than a fundamental circularity, one declaring that

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124. Andreas Staehr & Lian Malai Madsen, *Standard Language in Urban Rap: Social Media, Linguistic Practice and Ethnographic Context*, 94 TILBURG PAPERS IN CULTURAL STUD. (2014) (opining that to fully understand the change in language of modern hip-hop, one must look to the ethnographic and sociolinguistic context).

As an aside, I was called to testify in the criminal case against amateur rap artist Mr. Darren Wright whose amateur YouTube rap video was used by the prosecutor to frame Mr. Wright’s admission of guilt in committing a homicide. My testimony, which eventually got me interested in the subject of this Article, ultimately got Mr. Wright’s charge reduced, but it was not enough to earn him an acquittal for his loose talk.

125. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

126. Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man’s Lyric Become Another’s Crime?*, 38 COLUM. J.L. & ARTS 1, 5 (2014) (“separating graphic language and emotional exaggeration from genuine threats is an old First Amendment problem.”) (quoting Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL OF RTS. J 551, 577 (2002)).

the threat was real because we perceived it as real. As in the *Elonis* case, the perception shapes the reality; it does not so much fabricate grumbling and complaining as it fashions grumbling and complaining which may be commonplace, into dangerous expression by directing the talk to a specific, and usually horrific, end. Like punishing the “loose talk by aggrieved and embittered [slaves],”<sup>127</sup> punishing hip-hop also creates a context of community peril, and it is that peril and the various perceptions of that peril on which we should fruitfully focus, rather than on the prosecutor’s statement of the case.

The prosecution of hip-hop hinges on what is considered “evidence.” Hip-hop lyrics, as nothing more than “loose talk by aggrieved and embittered [Black] men” should cause us pause in the world of prosecutorial discretion. As Professor Johnson concluded with slave rebellions, “it is time to pay attention to the ‘not guilty’ pleas of almost all the men who went to the gallows, to their near silence in the court records, to their refusal to name names in order to save themselves.”<sup>128</sup> We should revisit the wisdom of punishing Black people by prosecuting their art or artistic expression. The fundamental inquiry should not paint Blacks as fallen heroes; but rather, should focus on evaluating life events in a way that honors the history of Black existence.

Attorney Jackson’s prosecutorial scheme, to use rap lyrics to expose “the real defendant [as] a criminal wearing a do-rag and throwing a gang sign,”<sup>129</sup> is not only disconcerting, but it is also of grave constitutional concern: it specifically targets Black men for what they say, rather than for what they do. Other scholars have disclaimed this attempt to use rap music as anything more than “loose talk” as an approach to criminal justice that reeks of prosecutorial desperation. Although prosecuting the “loose talk” of hip-hop shares commonalities with prosecuting the “loose talk” of slave rebellions, there are some differences. Unlike the era of Slavery, the First Amendment of the United States Constitution protects speech. But, not just White speech. It also protects Black speech, even if it is

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127. Wade, *The Veasy Plot*, *supra* note 47, at 160.

128. Johnson, *supra* note 43, at 971.

129. Jackson, *supra* note 11, at 16.

nothing more than the “loose talk by aggrieved and embittered men.”<sup>130</sup>

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130. Wade, *The Veasy Plot*, *supra* note 47, at 160.