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The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence

MICHAEL CONKLIN*

This Article is a review of Rap on Trial: Race, Lyrics, and Guilt in America. The book largely focuses on the dangers of allowing rap lyrics to be presented as evidence in criminal trials. The authors posit that the fictitious and hyperbolic nature of rap lyrics are misrepresented by prosecutors as autobiographical confessions that document illegal activity and violent character traits of defendants. The authors compare rap to other musical genres and conclude that racism is the underlying cause for why the genres are treated differently in court. The authors also advocate for evidence nullification and argue for a complete ban on all rap-related evidence at trial. This Article assesses both the strengths and weaknesses of the evidence presented to support these claims. Furthermore, this Article discusses pragmatic issues such as how the author's advocacy for their more extreme proposals may be counterproductive to enacting their more reasonable proposals.

INTRODUCTION

This Article is a review of *Rap on Trial: Race, Lyrics, and Guilt in America*, written by University of Richmond professor Erik Nielson and University of Georgia Law School professor Andrea L. Dennis.¹ The book largely focuses on the dangers of allowing rap lyrics to be presented in criminal trials—what the authors refer to as “rap on trial.” The authors posit that the fictitious and hyperbolic nature of rap lyrics are misrepresented by prosecutors as autobiographical confessions that document illegal activity and violent character traits of defendants. The authors compare rap to other musical genres and conclude that racism is the underlying cause for why the genres are treated differently in court. This Article provides an assessment of both the strengths and weaknesses of the evidence presented to support these claims.

The authors make a number of strong points regarding this relevant and amorphous issue. These include a general lack of understanding of the genre from judges and the double standard regarding how amateur and mainstream rap lyrics are treated. Unfortunately, the authors do not stop there. They go on to advocate for more extreme positions, such as evidence nullification and a blanket ban on all rap-related evidence at trial. Unfortunately, the casual reader will likely remember the extreme positions rather than the more reasonable ones. This extreme approach is also counterproductive in that it allows their critics to dismiss the issue of rap on trial

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1. ERIK NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* (2019).

altogether by focusing on the undesirable nature of the extreme points, thus avoiding the need to engage with the more reasonable ones.

I. ADVOCACY PIECE

The authors are up-front about how the book is an advocacy piece and not a neutral examination of the issue. If there was any doubt as to what the authors want readers to conclude after reading the book, they end with a call to action: “Start now. Join the movement. Together, let’s change who makes the front-line decisions about rap on trial.”² This partisan tone is both a blessing and a curse to the reader. The passion that the authors demonstrate for their position makes for an engaging read. However, the one-sided presentation also results in information presented in a carefully curated manner. At times, the authors’ goal of guiding the reader to their side is heavy-handed. The authors also demonstrate little willingness to interact with opposing views.

The one-sided nature of the book also leads to the peculiar practice of accepting the claims made by rappers as fact while statements made by law enforcement officials and prosecutors are viewed skeptically. One example is the assertion that “police pulled [rapper] Boosie over, and before letting him go, they threw thousands of dollars of his cash across a freeway.”³ The citation for this claim is only a YouTube video of Boosie himself making the accusation.⁴ Elsewhere in the book, when multiple DEA agents made sworn statements about stopping a suspect who was later found to be transporting a kilogram of cocaine and ten gallons of PCP, the DEA agents’ description of the event was referred to only as a “claim.”⁵

Another example of the selective nature of how the book presents information is that of Jamal Knox, an amateur rapper whose lyrics were admitted as evidence against him.⁶ The *Knox* case is discussed at great length in the book. Despite this, a significant amount of relevant information regarding the case is concealed from the reader. The authors mention that Knox’s lyrics included: “Let’s kill these cops cuz they don’t do us no good.”⁷ But they neglect to mention that two of the police officers called out by name in Knox’s rap were scheduled to testify against him in a pending illegal firearms case.⁸ Another omission from the *Knox* case is that the rap song that referenced killing the police officers also provided the times the officers got off work.⁹ One final omission is how the court analyzed Knox’s rap lyrics when making the decision of whether or not to admit them as evidence. The authors promote the

2. *Id.* at 163.

3. *Id.* at 4.

4. *Id.* at 175 n.6.

5. *Id.* at 59. This default trust of defendants and mistrust of law enforcement officials is perhaps a function of one of the author’s history as a public defender. *Id.* at 205.

6. *Id.* at 101–02.

7. *Id.* at 102.

8. Stephanie Sofer, *First Amendment – True Threat Doctrine – Pennsylvania Supreme Court Finds Rap Song a True Threat*. – *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018), 132 HARV. L. REV. 1558, 1559 (2019).

9. *Id.* at 1560.

notion that courts are clueless as to how to handle rap lyrics throughout the book.¹⁰ But in the *Knox* case—which is used by the authors as an example of how courts do not make the proper decision—the court explicitly appears to have a proper understanding of the rap music genre. The court accepted as true Knox’s contention that rap songs frequently “include violent references” and “fictitious or fanciful descriptions of criminal conduct.”¹¹ The court even cited an article from one of the authors of *Rap on Trial* “acknowledg[ing] the importance of contextualizing the lyrics.”¹² After this thorough analysis of rap music, the court nevertheless found the specific threats in Knox’s song to be “of a different nature and quality.”¹³ The court’s careful consideration of how to view rap lyrics was not mentioned by the authors.

Another peculiar omission from the book is references to studies that demonstrate the harmful effects of “gangsta rap” music. One study found that exposure to violent rap music videos increased acceptance of violence, increased likelihood of engaging in violence, and increased acceptance of violence toward women.¹⁴ The authors also make bold assertions regarding issues that are ultimately unknowable. For example, they claim that the majority of cases involving innocent defendants result in convictions.¹⁵

II. RAP VERSUS OTHER MUSICAL GENRES

The authors are quick to point out that rap lyrics—compared to other musical genres—are disproportionately used against defendants in court proceedings.¹⁶ But rap music is a different genre than other musical genres.¹⁷ Therefore, this does not *per se* mean that rap music is receiving discriminatory treatment. In order to prove discrimination, the authors would need to show that there is no relevant difference between rap music and other musical genres that could substantiate the disparate treatment. No doubt understanding this, the authors make multiple, unpersuasive attempts at equating rap to other musical genres.

One such example is the claim that rap music is comparable to country music, “which has many of the same themes.”¹⁸ This may be true broadly speaking, in that both genres cover themes such as murder. But there is a wide spectrum of how to

10. *Id.* at 10.

11. *Commonwealth v. Knox*, 190 A.3d 1146, 1160 (Pa. 2018).

12. *Id.*

13. *Id.*

14. James D. Johnson, Lee Anderson Jackson & Leslie Gatto, *Violent Attitudes and Deferred Academic Aspirations: Deleterious Effects of Exposure to Rap Music*, 16 *BASIC & APPLIED SOC. PSYCHOL.* 27 (1995).

15. NIELSON & DENNIS, *supra* note 1, at 166. It is ultimately unknowable how many “innocent” defendants are convicted because any attempt to classify defendants as innocent or guilty would involve such immense speculation as to render the finding irrelevant.

16. *Id.* at 7 (“No other fictionalized form, musical or otherwise, is treated this way in court. . . . It’s not music on trial. It’s only rap.”).

17. A 2019 survey that analyzed the Billboard.com “Hot 100” list found that rap music contains misogynistic lyrics at a rate almost ten times that of pop, country, and R&B. Kayla Gray, *Evidence of Rape Culture in Modern Music*, 7 *CLA J.* 35, 42–43 (2019) (Rap/Hip-Hop 76%, R & B 8%, Pop 8%, Country 8%, Rock 0%, Christian 0%, Dance/Electronic 0%).

18. NIELSON & DENNIS, *supra* note 1, at 18.

cover a theme like murder. The television shows *Oz* and *Mr. Rogers' Neighborhood* both covered the themes of loss of life and conflict, but it would be highly misleading to claim that the two shows are comparable because they share “many of the same themes.” An example of how two songs can cover the same theme in very different ways is found in the authors’ reference to a study that attempts to analogize Ice-T’s “Cop Killer” with The Kingston Trio’s “Bad Man’s Blunder.”¹⁹ Ostensibly, the songs are both about the musician killing a police officer. However, listening to both songs reveals that the similarities end there. Even the titles demonstrate significant differences. “Bad Man’s Blunder” explicitly portrays the person who killed the police officer as “bad.” Furthermore, the perpetrator in The Kingston Trio song was apprehended and sentenced to ninety-nine years of hard labor, therefore portraying a cautionary tale with even the murderer concluding that “this whole thing has been a lesson to me.”²⁰

Ice-T’s “Cop Killer,” however, is explicitly “dedicated” to the Los Angeles Police Department (“Bad Man’s Blunder” only references the killing of an unidentified “deputy”).²¹ Furthermore, Ice-T cajoles his audience by singing: “Don’t be a pussy . . . sing along, cop killer!”²² Ice-T also engages in positive reinforcement by asking his audience “What are you gonna be when you grow up?” and when they enthusiastically answer “cop killer!” he praises their decision by responding “Good choice.”²³



Given the topic of racial discrimination and musical genres, it is interesting to note the difference between how The Kingston Trio is portrayed on their album cover and how Ice-T is portrayed on his. The Kingston Trio album cover shows the three

19. Carrie B. Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705, 710 (1999).

20. THE KINGSTON TRIO, *Bad Man's Blunder*, on *STRING ALONG* (Capitol Records 1960).

21. BODY COUNT, *Cop Killer*, on *BODY COUNT* (Warner Bros. Records 1992).

22. *Id.*

23. *Id.* This part of the song has a recorded group of people who chant the “cop killer” answer to Ice-T’s question.

white men wearing dress shirts and friendly smiles.²⁴ Conversely, on Ice-T's album cover is a drawing of a very muscular man with "Cop Killer" tattooed across his chest, a clenched fist holding a chain, a revolver in his waistband, a menacing scowl, and blacked-out eye sockets.²⁵ It is possible that if the races were swapped (resulting in a menacing white man with weapons and friendly, smiling black men wearing dress shirts) racial stereotypes would result in this hypothetical white "Cop Killer" song being received more favorably than the real-life version by a black man. But regardless, in this hypothetical, the white "Cop Killer" song would clearly still be viewed as more problematic than the black "Bad Man's Blunder" song.

The authors frame the issue as rap (which is viewed negatively) versus all other music genres (which are not). But different musical genres beyond just rap are viewed negatively. For example, rock music is viewed more negatively than country and pop music.²⁶ This is no surprise to anyone who has listened to these genres. Even a non-English speaker could conclude that rock—and especially heavy metal—has a more aggressive and threatening tone than country and pop.

Furthermore, other musical genres that are associated with black culture do not have the same image issue as rap music. Gospel, soul, reggae, and R&B are also associated with black culture, but do not evoke the same negative reactions as rap music. This piece of information—which the book leaves out—weakens the claim that the reason rap is viewed negatively is primarily because of racial stereotypes.

The authors point to a 1999 study that found identical lyrics are viewed more negatively if they are said to be from a rap song than from a country music song.²⁷ The authors of *Rap on Trial* conclude that this must be due to how rap music is associated with black culture and therefore receives racist treatment.²⁸ However, they neglected to mention a later, related study that was conducted to measure what role race plays in how rap music is perceived. The study concluded that the race of the rapper had no effect on how the lyrics were viewed.²⁹

The strongest evidence presented by the authors that racism is the underlying factor in the treatment of rap music at trial is that, although rap and heavy metal are both viewed negatively, they are viewed negatively for different reasons.³⁰ Namely, heavy metal is viewed negatively because it is perceived as potentially harmful to its listeners, while rap is viewed negatively because it is perceived as promoting its listeners to harm others.³¹ The authors extrapolate from this study that rap is viewed

24. THE KINGSTON TRIO, *STRING ALONG* (Capitol Records 1960).

25. BODY COUNT, *BODY COUNT* (Warner Bros. Records 1992).

26. Mary E. Ballard, Doris G. Bazzini & Alan R. Dodson, *Genre of Music and Lyrical Content: Expectation Effects*, 160 J. GENETIC PSYCHOL. 476 (1999).

27. NIELSON & DENNIS, *supra* note 1, at 18.

28. *Id.*

29. Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCHOL. PUB. POL'Y & L. 280 (2016). This study essentially replicated the 1999 study but with the utilization of different, randomly-assigned surveys. Participants were either told the musicians of the different genres were black or white. In the rap music genre, the white musician was viewed more negatively than the black musician.

30. NIELSON & DENNIS, *supra* note 1, at 91.

31. *Id.*

from the lens of the dangerous black man stereotype.³² But this conclusion does not take into account how rap and heavy metal are very different musical genres. Therefore, regardless of race, it is no surprise that they would be viewed differently. After all, the R&B musical genre is viewed differently than rap even though they are both associated with black culture. And as mentioned above, a study specifically designed to measure if racial stereotypes are responsible for views of rap music found no correlation.³³

An interesting comparison is made to Johnny Cash, who, as the authors point out, was never really in Folsom Prison and did not “[shoot] a man in Reno just to watch him die.”³⁴ The authors cite these Cash lyrics to illustrate that, despite their violent subject matter, “no prosecutor would have attempted to use Cash’s music to show he committed homicide”³⁵ While true, this is in no way equivalent to the examples provided for how rap music is used at trial. Other than the song, there is no reason to believe Cash killed a man in Reno. If there were evidence that he did, then the song would likely be admissible.³⁶ Perhaps Cash’s song would not be as persuasive to a jury as a rap song with the same lyrics. But regardless, it is not intellectually honest to equate Cash’s lack of prosecution for homicide based solely on a vague song lyric to that of Jamal Knox, a man with a pending illegal firearms charge who threatened to kill the police officers scheduled to testify against him.³⁷

The authors posit that “rap [is] singled out” and that, “without question, race is central” as to why.³⁸ They claim that country and rock music do not receive the same treatment at trial as rap because “those are primarily white forms of entertainment.”³⁹ The possibility that rap is treated differently because it is different is never seriously addressed. This is an unfortunate omission because readers would benefit from an honest discussion of the topic. Namely, whether the differences between rap and other musical genres (as discussed in this Article) justify the disparate treatment rap receives at trial.

Note that it is not the position of this Article that rap music receives perfectly fair treatment at trial, nor that its treatment at trial is in no way related to racial stereotypes. Rather, the point of this Section is to demonstrate that there are powerful counterarguments that need to be honestly engaged with in order for the authors to substantiate their claims.

III. RAP VERSUS OTHER ARTISTIC EXPRESSIONS

The authors go outside the category of music to draw more comparisons to rap music. In one example they compare rap artists to crime novelists and screenwriters

32. *Id.* at 91–92.

33. Dunbar et. al., *supra* note 28.

34. Nielson & Dennis, *supra* note 1 at 85.

35. *Id.* at 86.

36. Evidence is generally admissible if its probative value is greater than its prejudicial effect. *Cf.* FED. R. EVID. 403 (establishing that a court may exclude evidence “if its probative value is substantially outweighed by a danger of,” *inter alia*, “unfair prejudice”).

37. NIELSON & DENNIS, *supra* note 1, at 101–02.

38. *Id.* at 21.

39. *Id.* at 25.

of horror films.⁴⁰ They even claim that using a rapper's lyrics at trial is the equivalent of using an actor's lines against him in court.⁴¹ The notion that Vin Diesel, an actor who sometimes plays the role of a violent criminal, is in any way comparable to Jamal Knox who, again, named witnesses in his upcoming trial and threatened to kill them, is self-evidently absurd.

Another comparison made in the book is that of rap music and the speech of the Westboro Baptist Church (WBC).⁴² The WBC is a group that protests soldiers' funerals with signs that read "God hates fags" and "Pray for more dead soldiers."⁴³ The authors point out that the WBC's message is offensive and yet the Supreme Court in *Snyder v. Phelps* ruled 8-1 to protect the speech.⁴⁴ The authors compare the WBC case to that of Jamal Knox, as if they are demonstrating some type of inconsistent application of the law.⁴⁵ But this comparison fails because the two are not analogous in any meaningful way. If the WBC said "Let's kill these [gay people identified by name] because they don't do us any good," and also included the places of employment and work hours for the people they were threatening to kill, that speech would likely not be protected—just as the similar speech from *Knox* was not protected.⁴⁶ Therefore, the WBC comparison is counterproductive when used in an attempt to demonstrate an alleged free-speech double standard.

Although never addressed in the book, standup comedians are perhaps more analogous to rappers than other musicians and are clearly more analogous than action movie actors. Like rappers, standup comedians often maintain their on-stage persona in real life. Also, standup comedians commonly exaggerate stories and mix truth with fiction to maximize the effect their art has on the audience. While there is likely not much case law on using standup comedy routines in criminal proceedings, an analysis of the censorship efforts against white and black comics would be relevant to the authors' claim of racial discrimination as the root of *Rap on Trial*.

IV. RACE

Readers may be surprised to learn that the book is almost as much about race as it is about rap music. Potentially because of this focus on race, the authors neglect to cover highly relevant cases that involve white musicians. After all, if the same practice happens to white defendants, this undercuts the authors' proposed argument that rap on trial is primarily about racial discrimination. This omission is unfortunate because there are few cases available to analyze the topic. The following are examples of cases involving white defendants that readers of *Rap on Trial* would have greatly benefited from exposure to.

40. *Id.* at 16.

41. *Id.* at 80.

42. *Id.* at 105.

43. *Signs*, WESTBORO BAPTIST CHURCH, <https://www.godhatesfags.com/signs/index.html> (<https://perma.cc/K2M8-7KP5>).

44. 562 U.S. 443 (2011); NIELSON & DENNIS, *supra* note 1, at 105–06.

45. NIELSON & DENNIS, *supra* note 1, at 106–07.

46. And even this more analogous hypothetical is generous because it does not stipulate that the gay people WBC is advocating for the murder of were scheduled to be witnesses against them for illegal firearms related charges.

A. Cameron Todd Willingham

The case of Cameron Todd Willingham is touted by many death penalty abolitionists as the most probable example of a factually innocent person being executed in the modern era of the death penalty.⁴⁷ Willingham, a white male, was convicted and executed for intentionally setting a house fire to kill his children.⁴⁸ At his trial, a psychologist who never met with Willingham and had never published research in the area of sociopathic behavior nevertheless testified that Willingham was a sociopath based in part on heavy metal posters Willingham had on his walls.⁴⁹ The psychologist used Willingham's Iron Maiden and Led Zeppelin posters to conclude, "[m]any times individuals that have a lot of this type of art have interest in satanic-type activities."⁵⁰

B. Insane Clown Posse

The Insane Clown Posse is a rap group composed of white members. An image closely associated with the rap group is a silhouette of a man running with a hatchet.⁵¹ In 2011, the FBI designated fans of the Insane Clown Posse (self-identified as "Juggalos") as a gang in the National Gang Threat Assessment report.⁵² This designation caused people to be detained as members of a crime syndicate for simply displaying the "hatchetman" image on their automobiles.⁵³ The topic of how rap music is unfairly associated with gang activity is discussed at length in *Rap on Trial*. For example, the authors argue against the practice of using rap lyrics to add gang enhancement charges.⁵⁴

47. Michael Conklin, *White Paper: Innocent or Inconclusive? Analyzing Abolitionists' Claims About the Death Penalty*, NEB. L. REV.: BULL. (Sept. 4, 2018) at 4, <https://lawreview.unl.edu/downloads/Conklin%20-%20Innocent%20or%20Inconclusive%20PDF.pdf> (<https://perma.cc/DN44-MX49>).

48. David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Aug. 31, 2009), <https://www.newyorker.com/magazine/2009/09/07/trial-by-fire> (<https://perma.cc/KQ4V-RZ8J>).

49. *Id.*

50. *Id.*

51. Techdirt, *Appeals Court Dismisses Gang Designation Lawsuit Against the FBI Brought by Insane Clown Posse Fans*, ABOVE L. (Jan. 5, 2018), <https://abovethelaw.com/2018/01/appeals-court-dismisses-gang-designation-lawsuit-against-the-fbi-brought-by-insane-clown-posse-fans/> (<https://perma.cc/LFB4-YA9C>).

52. *Id.*

53. *Id.* A state trooper detained someone for an hour because they had the "hatchetman" image displayed on their automobile. The state trooper searched the car and interrogated the driver. No ticket or citation was issued. The Sixth Circuit granted the Department of Justice's 12(b)(6) motion to dismiss on the grounds that gang threat assessments cannot be reviewed by the court because it is not a "final agency action and was committed to agency discretion by law." *Id.*

54. NIELSON & DENNIS, *supra* note 1, at 124.

C. Elonis v. United States

For a book that focuses on the use of rap lyrics at trial, there is a surprising lack of coverage of *Elonis v. United States*—one of the only Supreme Court cases to cover the topic. The authors of *Rap on Trial* even acknowledge it as “the highest-profile case involving rap as evidence.”⁵⁵ The Supreme Court reversed *Elonis*’s conviction for posting threatening rap lyrics on Facebook.⁵⁶ An explanation for this peculiar lack of attention to arguably the most relevant court case on the topic is hard to imagine until one discovers that Anthony *Elonis* is white.⁵⁷ The authors’ limited coverage of *Elonis* also conveniently leaves out the actual lyrics in question. Anthony *Elonis* directed the threats at his wife, police, a specific FBI agent, and a kindergarten class.⁵⁸ The posts included the following (after his ex-wife received a protection-from-abuse order (PFA) against him): “Fold up your PFA and put it in your pocket. Is it thick enough to stop a bullet?”⁵⁹ Other threats included: “I’ve got enough explosives to take care of the State Police and the Sheriff’s Department”⁶⁰ and “Enough elementary schools in a ten mile radius [for me] to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a Kindergarten class. The only question is . . . which one?”⁶¹ Another potential explanation for why the authors did not adequately cover *Elonis* is that the Supreme Court ruled 8-1 in favor of the amateur rapper, thus setting an emphatic precedent and contradicting the claim that aspiring rappers are treated unfairly in the current legal system.⁶²

The authors frequently attempt to associate rap music with Latinos, often referring to how rap music is associated with the “black and Latino” community.⁶³ Meanwhile, the relevance that whites have had on the genre is downplayed. And this is despite the relative influences on the genre from whites and Latinos. The top ten highest selling rap albums of all time feature three albums from white rappers and none from Latino rappers.⁶⁴ An online poll with over four million votes places white rapper Eminem as the greatest rapper of all time.⁶⁵ There are no Latino rappers in the top

55. *Id.* at 15.

56. *Elonis v. United States*, 135 S. Ct. 2001, 2006 (2015).

57. E. Kent Winward, *Bad Rap Lyrics Crux of First Amendment Case*, STANDARD EXAMINER (Sept. 26, 2014), <https://www.standard.net/news/business/bad-rap-lyrics-crux-of-first-amendment-case/articlef77610b6-22d5-515c-97c5-4cba1be3e866.html> (<https://perma.cc/RV56-FK63>) (Referring to *Elonis*’s attempt to “jump start [his] career as the next great white rapper.”)

58. *Elonis v. United States*, 135 S. Ct. 2001, 2005–06 (2015).

59. *Id.* at 2006.

60. *Id.*

61. *Id.*

62. *Id.* at 2004.

63. NIELSON & DENNIS, *supra* note 1, at 10, 18, 23, 73, 74, 108, and 144.

64. Henry Adaso, *The 10 Best-Selling Rap Albums Ever*, LIVEABOUTDOTCOM (Aug. 14, 2018), <https://www.liveabout.com/best-selling-rap-albums-ever-2858056> (<https://perma.cc/BF5C-79J8>).

65. *The Greatest Rappers of All-Time*, RANKER, <https://www.ranker.com/crowdranked-list/the-greatest-rappers-of-all-time> (<https://perma.cc/QFC3-24JV>) (last visited Oct. 29, 2019). Eminem also has four of the top-ten rated best rap songs of all time. *Id.*

forty of the list.⁶⁶ White rapper Vanilla Ice’s song “Ice Ice Baby” was the first rap song to ever hit number one on Billboard’s pop chart.⁶⁷ And whites make up the majority of rap consumers in the United States.⁶⁸ The insistence of the authors to label rap as a “black and Latino” art form—while downplaying the influence from whites—is likely in furtherance of the desired conclusion that rap music’s treatment is the result of racist motivations.

In the forward to the book, the possibility that the disparate treatment rap receives at trial could be a function of prosecutors and police officers simply not understanding the genre is explicitly rejected.⁶⁹ But this is a plausible explanation, especially considering that a large portion of the book discusses how people do not properly understand the genre of rap music because it is a “highly complex art form.”⁷⁰ The only evidence in the book that treatment of rap is not attributable to a non-racist lack of understanding is that “Hip Hop has become one of the most popular and influential genres of the last century.”⁷¹ While true, this does not refute the possibility that many people nevertheless do not understand the genre. Regardless, the authors are resolute in promoting the idea that racist motivations are ultimately behind how rap is treated at trial.

As evidence of the racial discrimination underlying rap on trial, the authors point out that there are few instances of the practice involving white defendants.⁷² Not discussed is the relevance of an even greater disparity. Namely, the lack of female defendants in rap on trial cases.⁷³ After all, if disparate outcomes based on race are evidence of discrimination against blacks in favor of whites, then that same logic would maintain that the even greater disparate outcomes based on gender provide even stronger evidence of discrimination against males in favor of females. Considering this male/female disparity serves to illustrate the absurdity of using rap on trial rates without controlling for any relevant variables involved.

66. *Id.*

67. Sidney Madden, *Today in Hip-Hop: “Ice Baby” Becomes First Rap Single to Hit No. 1 on the Billboard Hot 100*, XXL (Nov. 3, 2016), <https://www.xxlmag.com/news/2016/11/today-hip-hop-ice-ice-baby-first-rap-single-no-1-billboard-hot-100/> (<https://perma.cc/8S3P-GC28>).

68. Christina Montford, *When It Comes to Rap Music, Are White Boys Really Doing All the Buying?*, ATLANTA BLACK STAR (Nov. 6, 2014), <https://atlantablackstar.com/2014/11/06/really-listening/> (<https://perma.cc/3WRM-98X5>).

69. NIELSON & DENNIS, *supra* note 1, at x (“I am sometimes asked whether this is all a big misunderstanding. Is it just that police don’t understand hip hop, so they mistakenly view it as a threat? Are prosecutors treating violent rap lyrics as confessions of criminal behavior because they are simply ignorant about conventions of the genre? The answer is no. . . . People understand it well enough.”).

70. *Id.* at 139.

71. *Id.* at x.

72. *Id.* at 71.

73. *Id.*

V. PROPOSED BAN ON ALL RAP LYRICS AT TRIAL

The authors propose “rap shield rules” to “*completely* ban the use of rap lyrics, videos, or promotional materials as evidence in criminal proceedings.”⁷⁴ This suggestion is problematic for a number of reasons, including its ad hoc nature and the difficulty of defining “rap lyrics, videos, or promotional materials.”

Throughout the book the authors are emphatic in their claim that the treatment rap receives in the courtroom is due to racist stereotypes.⁷⁵ But even if this is assumed to be true, it is nevertheless peculiar to expressly advocate for banning only rap music at trial. The reason why rap artist defendants should receive special protections that other musicians are denied is never addressed.

The authors posit the idea of banning rap music from trial but never offer sample legislation that would achieve this goal. Perhaps this is because the task of defining “rap lyrics, videos, or promotional materials” would likely prove insurmountable. In many of the cases described in the book, the lyrics are just words written down in a notebook.⁷⁶ Despite the authors’ assertion,⁷⁷ there is no requirement that rap lyrics even rhyme.⁷⁸ To further complicate the task of defining rap music, lines between musical genres are often blurred. For example, “rap metal” combines rap and heavy metal. It is unclear under the authors’ proposed rap shield rule if rap metal artists would be protected. The rule would also lead to absurdities, such as a collaboration between a rapper and a country musician resulting in the song being admissible against the country singer but not the rapper.⁷⁹ Also, where exactly is the line between rap lyrics and poetry? And what about a country music cover of a rap song?

Since the authors’ proposal is a per se blanket ban with no exceptions, it would ironically harm some rapper defendants in certain situations. For example, a rapper who wanted to enter into evidence his music video footage to prove he was in a certain location during the perpetration of the crime he is alleged to have committed would be barred from doing so.

Recognizing the unlikelihood of accomplishing a rap shield rule, the authors also present less audacious alternatives to combatting the rap on trial issue. They present a strong case for facilitating the ability of defense attorneys to present expert witnesses to refute the prosecution’s claim that rap lyrics should be interpreted

74. *Id.* at 157 (emphasis added). The authors also suggest less extreme measures, such as providing defense attorneys with increased access to rap expert witnesses in order to rebut prosecution claims. However, the authors only present these measures as sub-optimal to the ultimate remedy of completely banning rap lyrics as evidence at trial. *Id.* at 154.

75. See *supra* note 38.

76. *Id.* at 13.

77. *Id.* at 17 (“Rap music is an art form, told in rhymed verse . . .”).

78. Shaun Letang, *Do Lyrics Have to Rhyme? Common Myths Broken Down!*, MUSIC INDUSTRY HOW TO (Aug. 25, 2019), <https://www.musicindustryhowto.com/do-lyrics-have-to-rhyme-common-myths-broken-down/> (<https://perma.cc/AUC7-Q8WF>).

79. One example of a rap/country collaboration is “Old Town Road” by Lil Nas X featuring Billy Ray Cyrus. LIL NAS X, *Old Town Road (Remix)*, on 7 (EP), (Columbia 2019) (feat. Billy Ray Cyrus). It is the fastest song ever to reach ten million units sold. Lorraine Wheat, *Lil Nas X’s ‘Old Town Road’ Featuring Billy Ray Cyrus Is Certified Diamond*, VARIETY (Oct. 23, 2019), <https://variety.com/2019/music/news/lil-nas-x-old-town-road-billy-ray-cyrus-certified-diamond-1203380313/> (<https://perma.cc/G9AG-WA2W>).

literally.⁸⁰ The authors provide examples that call into question the qualifications of “expert” witnesses who testify for the prosecution. In some instances, these experts’ knowledge of rap music not only falls short of the standard of “expert” but does not even rise to the level of average rap consumer. In one example, the alleged expert testified for the prosecution that “to ‘ride’ is to shoot If you’re a rider, you’re a shooter.”⁸¹

The authors acknowledge that there are unfortunately substantial impediments to the commonsense solution of providing expert witnesses on rap music for the defense. These include the limited amount of expert witnesses on rap music available, the lack of knowledge that such experts exist, and the limited financial resources of public defenders.⁸² Given how significant it is for the defense to be able to rebut the claims of the prosecutor’s expert witnesses, it is surprising that the alternative of a uniform jury instruction is not mentioned in the book.

A second, practical solution to the problem of rap on trial presented by the authors is to provide training to judges regarding the prejudicial nature of rap music and how it is commonly misinterpreted by non-consumers of the art form.⁸³ This could be accomplished at the annual meetings, professional organization gatherings, and training sessions that judges attend.⁸⁴ It is unfortunate that these two common-sense proposals will likely be overshadowed by the more extreme blanket-ban proposal.

The authors have a rather problematic response to the notion that, in limited instances, some rap lyrics should be allowed at trial. In the *Knox* case, for example, the state supreme court explained:

If this Court were to rule that Appellant’s decision to use a stage persona and couch his threatening speech as “gangsta rap” categorically prevented the song from being construed as an expression of a genuine intent to inflict harm, we would in effect be interpreting the Constitution to provide blanket protection for threats, however severe, so long as they are expressed within that musical style.⁸⁵

The authors of *Rap on Trial* view this position as “bordering on the absurd.”⁸⁶

Even when discussing narcocorridos, the authors do not advocate for the ability to use the lyrics at trial.⁸⁷ Narcocorridos are songs commissioned by drug traffickers that even the authors acknowledge are “often journalistic recounts of actual activities

80. NIELSON & DENNIS, *supra* note 1, at 154. One of the authors, Erik Nielson, became such an expert witness.

81. *Id.* at 123. The author of this Article has not been an avid consumer of rap music since the 90s, and even he knows that this is blatantly incorrect. As the authors accurately explain, to ride either means to literally ride in a car, or if used figuratively it means “to be loyal or devoted.” *Id.*

82. *Id.* at 155.

83. *Id.* at 158–59.

84. *Id.*

85. *Commonwealth v. Knox*, 190 A.3d 1146, 1161 (Pa. 2018).

86. NIELSON & DENNIS, *supra* note 1, at 108–09.

87. *Id.* at 115–16.

of drug traffickers.”⁸⁸ Why a piece of evidence that functions as a “journalistic recount of actual activities” should never be admissible at trial is never addressed.

VI. TRUTH OR FICTION?

The authors’ position on rap music creates an interesting dilemma when advocating against its use at trial. The authors celebrate how rap music provides an accurate representation of the lives of the artists who perform the songs, and the forward even explicitly refer to rap as “truth.”⁸⁹ However, when addressing rap on trial, they backpedal and instead say that “[r]ap is best understood as fictional.”⁹⁰ The authors acknowledge this inconsistency and refer to it as “the trickiest part[] of interpreting rap music In other words, how do we make sense of a music that, on one hand, gleefully distorts reality but then, on the other hand, claims to be ‘keepin’ it real’?”⁹¹ Unfortunately, the question is never adequately answered.

It is true that some rap lyrics are clearly hyperbolic and not to be taken literally. For example, rappers do not own “platinum football fields,”⁹² and “diamonds [the] size of yield signs.”⁹³ But the use of hyperbolic language does not serve to turn the entire genre into fiction any more than someone saying “I’m literally so mad I could explode,” serves to turn everything else that person says into fiction. It is misleading to claim that rap lyrics are purely “fictional” on the grounds that they often contain exaggerated, fanciful language. Rapper Snoop Dogg raps about life in California, his friend Dr. Dre, smoking marijuana, and his murder trial—all things that are very real. Fictional would be if Snoop Dogg rapped about being a female insurance salesman in Iowa.

Contrary to the authors’ claim that rap music is fictional, a staple of the genre is that it is rooted in real experiences. Rappers frequently attest that they are “keeping it real” and “spitting the truth.”⁹⁴ The authors try to parse this out by explaining that when rappers are “spitting truth,” it is not literally the truth.⁹⁵ Rather, it is true to the genre and the genre allows for falsehoods.⁹⁶ But this clever word play goes against the long tradition of rap as truth. Chuck D., a rapper from the group Public Enemy, explained how rap is used to convey accurate information by saying that it is “the black CNN.”⁹⁷ And KRS One says that rap is “all about reality.”⁹⁸

88. *Id.* at 115.

89. *Id.* at xi.

90. *Id.* at 115.

91. *Id.* at 54.

92. BIG TYMERS, *#1 Stunna*, on I GOT THAT WORK (Cash Money Records, 2000) (feat. Lac, Juvenile & Lil Wayne).

93. CLIPSE, *Ride Around Shining*, on HELL HATH NO FURY (Re-Up Gang, Zomba 2006) (feat. AB-Liva).

94. NIELSON & DENNIS, *supra* note 1, at 55 (“There’s no shortage of rappers who assure us that their lyrics are, in fact, *real*.” (emphasis in original)).

95. *Id.* at 55–56.

96. *Id.*

97. *Id.* at 55.

98. *Id.*

On this topic of fiction versus reality, the authors do point out an interesting double standard. Famous rappers' lyrics are more likely to be deemed "fictional, fantastical, and for pure entertainment," while lyrics from amateur rappers are not afforded the same deference.⁹⁹ This results in the following paradox: how can amateur rappers become professionals (at which point their lyrics will not be used against them) if they are punished for writing such lyrics while amateurs?

VII. CELEBRATING OFFENSIVE SPEECH

The authors of other books that likewise call for less censorship are careful not to be viewed as personally approving of the offensive speech they are trying to protect. They often explicitly make the distinction that while they are advocating for the protection of a certain offensive message, that does not mean that they share the speaker's opinion on the subject. Given the extreme nature of the speech that is up for debate on free-speech issues—and the difficulty some anti-free-speech advocates have in differentiating between protecting speech and agreeing with it—this is a wise tactic. The authors of *Rap on Trial*, however, use the opposite strategy and expressly endorse the often violent, sexist, misogynistic, and homophobic messages promoted in some rap music.¹⁰⁰ The forward to the book proclaims, "These are voices we should be encouraging."¹⁰¹

An example of this is found in the authors' discussion of Ice-T's controversial 1992 song "Cop Killer."¹⁰² There, they praise the song for "voicing the frustrations that many people in this country felt."¹⁰³ Lyrics to "Cop Killer" include:

I'm a motherfuckin' cop killer
 Cop killer, I know your family's grievin' fuck 'em!
 I got this long-assed knife, and your neck looks just right
 Die, die, die, pig, die¹⁰⁴

As previously mentioned, the song even contains a part where Ice T encourages crowd members to aspire to be cop killers.¹⁰⁵

99. *Id.* at 16.

100. Dunbar, Kubrin & Scurich, *supra* note 28, at 281.

101. NIELSON & DENNIS, *supra* note 1, at x.

102. It is interesting to note that "Cop Killer" is a counterproductive song for the authors to reference. Despite its clearly offensive and threatening nature—even black leaders such as Jesse Jackson condemned the song—it never received any negative treatment in the courts. Fried, *supra* note 19, at 705. Not surprisingly, groups of local police voiced their opinion that the record label, Time Warner, should not sell music that promotes killing cops. The decision to remove the song from the album came from Ice-T and not any court order. Furthermore, Ice-T never faced any criminal charges due to the song. Michael Christopher, *25 Years Ago: Ice-T Decides to Pull 'Cop Killer' From Body Count's Controversial Debut*, DIFFUSER (Aug. 4, 2017), <https://diffuser.fm/ice-t-cop-killer-body-count/> (<https://perma.cc/DJV7-V2K8>).

103. NIELSON & DENNIS, *supra* note 1, at xi.

104. BODY COUNT, *supra* note 20.

105. *See supra* Section II.

VIII. TROUBLING ADVICE

The authors provide many pieces of troubling advice throughout the book. Some of the advice is aimed at aspiring rappers, some to the public at large, and some to future jurors. In the book's forward, amateur rappers who make threats of violence in their music are encouraged—not to refrain from the threatening behavior—but rather to “cloak your truth in some mystery” in order to avoid legal consequences.¹⁰⁶ The book even provides specific examples to aid in the practice. “If the police officer's real name is William Bradley, then change it to Bradford Williams . . . In this environment, that's the best thing you can do.”¹⁰⁷ Very telling is that this advice is presented immediately following the story of Jamal Knox. Out of all the potential advice that could be given to an amateur rapper whose lyrics threaten to kill police officers by name, strategies on how to get away with the practice are far from “the best.”

The authors explicitly call on jurors to “refuse to use [rap-related evidence] in making your decision . . . Ignore the [rap music] evidence wholesale, and reject any related testimony or opinion from the government's law enforcement witness.”¹⁰⁸ No doubt cognizant of how radical this blanket refusal to consider evidence is, the authors anticipate the following objection from their reader: “Won't I get in trouble?” “No. No, you won't,” they respond.¹⁰⁹ But this response may be too emphatic for the claim they are making.

While jurors are clearly allowed to evaluate the evidence they are presented, advocacy for a blanket refusal to even consider an entire category of evidence is problematic.¹¹⁰ It is also interesting to point out that this proposed ban only pertains to when the prosecution is the side presenting it. Jurors are of course free to reach the conclusion that the prosecution's testimony on rap music is unpersuasive. But to refuse to even consider the evidence before it is given appears to go against the juror's duty to consider the evidence. An analogy will likely help illuminate the problem. A juror is free to listen to the defense witnesses' testimony about how the defendant was not at the scene of the crime and conclude that the witness is lying. But for a juror to go into a trial with his mind already made up that, no matter what, no defense attorney's witness is to be believed when testifying as to the location of the defendant at the time of the crime, seems to violate the juror's duty to consider the evidence.

In their continued attempt to get jurors to per se exclude the prosecution's evidence and testimony regarding rap music, the authors explain that jurors are “finders of fact and can use their judgment in accepting or rejecting evidence as credible in whole or in part.”¹¹¹ While this statement is true, it is deceptive to present

106. NIELSON & DENNIS, *supra* note 1, at xi. It is interesting to note that this quote refers to threats to kill police officers as “truth” and not “fiction.”

107. *Id.*

108. *Id.* at 159.

109. *Id.*

110. Using Michigan's Model Criminal Jury Instruction as an example, it instructs jurors that their “decision should be based on all of the evidence, regardless of which party produced it.” MICH. MODEL JURY INSTR. CRIM. § 3.5(8) (2019).

111. NIELSON & DENNIS, *supra* note 1, at 160.

in this context. Yes, jurors are to use their judgment to accept or reject evidence. But this presumes that the juror will first listen to the evidence *before* rejecting it. Possibly, in an effort to avoid criticism and professional repercussions, the authors state that jurors must “listen to the entire case with an open mind and follow the judge’s instructions.”¹¹² But this statement contradicts the advice that, no matter what, jurors should never consider the evidence presented by the prosecution regarding rap music. That is clearly the opposite of listening to the entire case with an open mind.

As if a blanket refusal to consider all rap-related evidence from the prosecution was not extreme enough, readers are then told they can “go a step further” and engage in jury nullification.¹¹³ “Maybe, for instance, you decide that in prosecutions of nonviolent crimes, you will automatically acquit if the state introduces rap as evidence.”¹¹⁴ “While judges may tell you otherwise . . . we are here to tell you it’s legal.”¹¹⁵ Lawyers can be held in contempt for telling a jury that same statement.¹¹⁶ Given the authors’ emphasis on race throughout the book, it is interesting to note that jury nullification was frequently used to acquit white defendants who committed crimes against newly freed blacks.¹¹⁷

CONCLUSION

The subject matter of the book is interesting and controversial. The authors write in an engaging style, and their provocative opinions on the subject are highly captivating. However, a more balanced approach that presented likely objections would have been welcomed. It also would have more effectively advanced the authors’ position by allowing them the opportunity to proactively address the objections. Had the authors used such an approach, skeptical readers would be confronted with the counterarguments to their objections and receptive readers would become better equipped to address objections from skeptics.

Regardless of the criticisms provided in this Article, rap on trial is an issue that judges should be educated on. The potential for misuse is particularly troubling because—as any trial attorney will attest—trials are not primarily about presenting evidence.¹¹⁸ Rather, they are about telling the jury a story.¹¹⁹ Rap lyrics taken out of context can provide a distorted story about the defendant. Despite its flaws, *Rap on Trial* will hopefully start a conversation and raise awareness on this fascinating and important subject.

112. *Id.*

113. *Id.* at 161.

114. *Id.*

115. *Id.*

116. Monroe H. Freedman, *Jury Nullification: What It Is, and How to Do It Ethically*, 42 HOFSTRA L. REV. 1125, 1125–26 (2014).

117. Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 123 (1996).

118. NIELSON & DENNIS, *supra* note 1, at 93.

119. *Id.*