RAP AS A PROXY FOR BLACKNESS: HOW THE PROSECUTION OF RAP LYRICS CONTINUES TO UNCONSTITUTIONALLY RESTRICT FREE SPEECH RIGHTS

*Austin Vining**

Abstract

Increasingly, prosecutors have charged rap artists under various true threats statutes based solely on the content of their song lyrics despite artists' First Amendment freedom of speech claims. This Article examines the progression of the true threats jurisprudence and its application to cases involving rap lyrics while also taking a critical look at the barriers Black Americans have faced in attempting to exercise their constitutionally protected right to free speech. Next, this Article contemplates various free speech theories which provide the basis for protecting the types of speech often at issue in rap music cases. Finally, this Article concludes by suggesting that courts should import the third prong of the *Miller* test, which requires an analysis of "*whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value*." In doing so, courts would strike a more appropriate balance between prosecutors' interests and defendants' First Amendment rights.

---

* Graduate Research Fellow, Marion B. Brechner First Amendment Project, University of Florida, Gainesville, Fla.; B.A., 2014, Psychology, Louisiana Tech University; B.A., 2014, Journalism, Louisiana Tech University; M.A., 2016, Journalism, University of Mississippi; J.D. Candidate, Levin College of Law, University of Florida; Ph.D. Candidate, Mass Communication, University of Florida. The author would like to thank Professor Michelle S. Jacobs for her comments on an earlier draft of this Article.

INTRODUCTION

After a 2012 scuffle with law enforcement that ultimately led to their arrests, Jamal Knox and Rashee Beasley wrote and recorded a rap song titled "Fuck the Police."[1] The video, uploaded to YouTube, features the pair "looking into the camera and motioning as if firing weapons."[2] The lyrics include "descriptions of killing police informants and police officers."[3] The lyrics specifically refer to Officer Kosko and Detective Zeltner, the law enforcement agents involved in the 2012 incident.[4] The lyrics[5] suggest that the artists know when Kosko and Zeltner's shifts are over and that the crimes noted in the song might occur where the officers sleep.[6] Further, the rap mentions Richard Poplawski, who had previously killed three police officers in Philadelphia.[7] In the background of the song, both police sirens and gunfire can be heard.[8] The pair were charged with two counts of terroristic threats and witness intimidation.[9]

"Fuck the Police" was the sole basis for the witness intimidation and terroristic threats charges.[10] The full lyrics of the rap were reported in the court's decision; however, a sample edited for length is provided here:

> [Chorus:] If y'all want beef we can beef/I got artillery to shake the mother fuckin' streets/If y'all want beef we can beef/I got artillery to shake the mother fuckin' streets.
>
> . . .
>
> [Verse 1:] This first verse is for Officer Zeltner and all you fed force bitches/And Mr. Kosko, you can suck my dick you keep on knocking my riches/You want beef, well cracker I'm wit it, that whole department can get it/All these soldiers in my committee gonna fuck over you bitches/Fuck the, fuck the police, bitch, I said it loud.

1. Commonwealth v. Knox, 190 A.3d 1146, 1148–49 (Pa. 2018).
2. *Id.* at 1149.
3. *Id.*
4. *Id.*
5. *Id.* at 1149–50.
6. *Id.* at 1149.
7. *Id.* at 1149–50.
8. *Id.* at 1149.
9. *Id.* at 1150–51.
10. *Id.* at 1151.

> The fuckin' city can't stop me/Y'all gonna need Jesus to bring me down/ And he ain't fuckin' wit you dirty devils/We makin' prank calls, as soon as you bitches come we bustin' heavy metal.
>
> So now they gonna chase me through these streets/And I'ma jam this rusty knife all in his guts and chop his feet/You taking money away from Beaz and all my shit away from me/Well your shift over at three and I'm gonna fuck up where you sleep.
>
> . . .
>
> [Verse 2:] I ain't really a rapper dog, but I spit wit the best/I ain't carry no 38 dog, I spit with a tec/That like fifty shots nigga, that's enough to hit one cop on 50 blocks nigga/I said fuck the cops nigga/They got me sittin' in a cell, watchin' my life just pass me, but I ain't wit that shit/Like Poplawski I'm strapped nasty.
>
> . . .
>
> [Verse 3:] They tunin' in, well Mr. Fed, if you can hear me bitch/Go tell your daddy that we're boomin' bricks/And them informants that you got, gonna be layin' in the box/And I know exactly who workin', and I'm gonna kill him wit a Glock/Quote that.
>
> Cause when you find that pussy layin' in the street/Look at the shells and put my shit on repeat, and that's on Jesus' blood/Let's kill these cops cuz they don't do us no good/Pullin' your Glock out cause I live in the hood/You dirty bitches, bitch![11]

With this evidence in mind, the court set out to find whether criminal liability could be based on rap lyrics containing threatening verses to law enforcement officers.[12]

Knox argued that the lyrics were protected by the First Amendment[13] and that any conviction based on his speech would be a violation of constitutional rights.[14] The lyrics,[15] Knox contended, were "merely artistic in nature" and "never meant to be interpreted literally."[16] Further, Knox "consider[ed] himself a poet, musician, and entertainer. Rap music

---

11. *Id.* at 1149–50.
12. *Id.* at 1148.
13. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").
14. *Knox*, 190 A.3d at 1151.
15. *See id.* at 1148–50 and accompanying text.
16. *Id.* at 1153.

serve[d] as his vehicle for self-expression, self-realization, economic gain, inspiring pride and respect from . . . peers, and [for] speaking on public issues including police violence, on behalf of himself and others . . . ."[17]

In *Knox*, the court set out to determine "whether the song communicated a 'true threat' falling outside First Amendment protections."[18] Holding that the lyrics constituted a "true threat directed to the victims," the court rejected the First Amendment claim and found Knox and Beasley guilty.[19] The Supreme Court denied certiorari.[20]

The Supreme Court rarely takes true threats cases, and when it does, decisions are often narrow.[21] Scholars have criticized the Court for taking a minimalistic approach to the issue.[22] Professors Clay Calvert and Matthew Bunker attribute constitutional avoidance, judicial minimalism, and partisanship as factors that have "thwarted the advancement and coherence of First Amendment doctrine, if not tossed it into greater confusion" since 2011.[23]

This lack of clarity has had especially severe consequences in the context of rap music.[24] However, it is naïve to believe the sole issue in the prosecution of rap lyrics are the words themselves; rap is often used as a proxy for Blackness in the courts.[25] In an amicus brief submitted in *Knox* by rap music scholar Erik Nielson,[26] rap artist Michael Render

17. *Id.*

18. *Id.* at 1149.

19. *See id.* at 1151 (quoting Commonwealth v. Knox, Nos. 201206621, 201303870, 201304264, slip op. at 19–20 (C.P. Allegheny Aug. 11, 2015).

20. Knox v. Pennsylvania, 139 S. Ct. 1547 (2019).

21. *See* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 954 n.20 (2016) (citing Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149, 164 (2013)) (observing that prior to *Elonis*, "the Court had not squarely addressed a true threats case in more than a decade").

22. *See id.* at 951 nn.58–59, 951–52 n.60 (citing Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 42 (2011); A.E. Dick Howard, Essay, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 84 (2012)).

23. Calvert & Bunker, *supra* note 21, at 951–52.

24. *See infra* note 28, at 22.

25. *See id.* at 2–3.

26. Erik Nielson is Associate Professor of Liberal Arts at the University of Richmond, where his research and teaching focus on hip hop culture and African American literature. He has published widely on African American music and poetry, with a particular emphasis on rap music, and has served as an expert witness or consultant in dozens of criminal cases involving rap music as evidence. Brief for Michael Render ("Killer Mike"), Erik Nielson et al. as Amici Curiae Supporting Petitioner at 1, Knox v. Pennsylvania, 139 S. Ct. 1547 (2019) (No. 18-949).

("Killer Mike"),[27] and other academic and industry leaders, *amici* argued that "rap music has been the subject of unique scrutiny in determining when speech constitutes a true threat of violence and thus falls outside the ambit of First Amendment protection, in part because of its close association with the [B]lack men who historically have created it."[28] Attorney David Morrow further criticized the court's decision in *Knox*, noting that it "demonstrates a complete lack of understanding" about the rap genre.[29] "The idea that someone could receive between two and six years in prison for rap is not just an injustice," Morrow wrote, "[i]t is objectively wrong."[30]

Over time, rap music became more than artistic expression and artists began addressing social and political issues, bolstering the argument it should be protected under the First Amendment.[31] As highlighted in the Nielson/Render amicus brief, "[r]appers used their platform to raise awareness about the problems facing urban America, and they became more comfortable challenging public figures and institutions that appeared uninterested in, or downright hostile to, America's most vulnerable citizens."[32] In the 1980s, rap groups started using their power to take on the country's most powerful and targeted issues, ranging from inequality and inner-city drug use to racism and police brutality.[33]

While lyrics from rap and hip hop have been prosecuted under a number of different offenses—including obscenity,[34] incitement to violence,[35] and others[36]—this Article aims to address prosecution under the true threats carveout[37] from the First Amendment. This Article especially takes aim at the often-overlooked factor that race plays in the prosecution of rap lyrics by applying a critical race theory lens.[38]

First, Part I looks at the progression of true threats jurisprudence through three major cases.[39] Next, Part II provides a historical primer on the barriers placed on Black Americans' free speech rights, a struggle that

---

27. Michael Render ("Killer Mike") is a Grammy-award winning rapper, community activist, and highly regarded author and public speaker who lectures on a wide range of issues, particularly those related to race, social inequality, and police brutality. His father was an Atlanta police officer. *Id.*

28. *Id.* at 2–3.

29. David Morrow, *Freedom to Rap*, 23 TYL 3, 3 (2019).

30. *Id.*

31. Brief in support for the Petitioner, *supra* note 26.

32. *Id.*

33. *Id.*

34. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 582 (S.D. Fla. 1990).

35. *See* Davidson v. Time Warner, Inc., No. Civ. A. V–94–006, 1997 WL 405907, at *1 (S.D. Tx. Mar. 31, 1997).

36. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 387–88 (5th Cir. 2015).

37. Watts v. United States, 394 U.S. 705, 708 (1969).

38. *See infra* Part III.

39. *See infra* Part I.

continues today.[40] Then, Part III examines how rap has become a proxy for Blackness and the effect that has had on stifling constitutional protections.[41] Part IV examines popular free speech theories that would provide rationale for protecting the type of speech implicated in *Knox*.[42] Finally, this Article concludes by suggesting a possible path forward to protect rap artists' speech under the First Amendment.[43]

I. PROSECUTION UNDER STATE AND FEDERAL THREATS STATUTES

This Part considers three cases that collectively trace the evolution of the true threats doctrine, from its initial carveout from First Amendment protection to its more recent application to rap music cases.[44] The theme drawn from true threats jurisprudence shows that the Court's reluctance to address the First Amendment in its rare recent decisions has left lower courts without exact rules to apply when considering charges based on lyrics.[45] Additionally, the muddled tests currently in use are not adequate for determining rap lyrics constitute true threats because courts and juries often lack the cultural context to fully understand the speech.

A. Watts v. United States[46]

The true threats doctrine was established in the 1969 landmark case *Watts v. United States*.[47] Watts, an 18-year-old rally attendee, was discussing police brutality when an older attendee suggested that the young people present should seek more education before voicing their opinions.[48] Watts responded:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.[49]

After which, Watts was arrested and charged under a 1917 statute prohibiting any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . ."[50]

---

40. *See infra* Part II.
41. *See infra* Part III.
42. *See infra* Part IV.
43. *See infra* Part V.
44. *See infra* Part I, Sections A–C.
45. *See* Calvert & Bunker, *supra* note 21, at 944 & 951–52.
46. 394 U.S. 705 (1969).
47. *Watts*, 394 U.S. at 705.
48. *Id.* at 705–06.
49. *Id.* at 706.
50. *Id.* at 705–06 (alteration in original).

A jury upheld Watts' conviction, and the United States Court of Appeals of the District of Columbia affirmed the judgment.[51] Upon review, the Supreme Court found the statute constitutional on its face.[52] However, it noted the need to distinguish criminal speech from that which is constitutionally protected under the First Amendment.[53] The Court ultimately held that Watts' speech, which was political in nature, did not rise to the level of true threat prohibited by the statute.[54]

In its decision, the Supreme Court built on its opinion from five years prior in *New York Times Co. v. Sullivan*,[55] opining that laws concerning speech must be weighed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials."[56] Key to Watts' success was the context in which he spoke.[57] The Court noted that as Watts argued, his statement was nothing more than "a kind of very crude offensive method of stating a political opposition to the President,"[58] and given the conditional nature of Watts' proclamation and the audience's reaction, little room was left for an alternative interpretation.[59]

Scholars have criticized *Watts* for its failure to define true threats.[60] As Professor Frederick Schauer astutely notes, *Watts* "provides virtually no information on just what a threat *is* other than what Watts said was not one."[61] Instead, true threats jurisprudence has largely evolved in the circuit courts, which have adopted various tests. Professor Jessica Miles explains that "[u]nder the objective test, the fact finder asks if a reasonable listener, or, in some jurisdictions, a reasonable speaker or reasonable person, would find the communication at issue to be threatening."[62]

Complicating matters further, Professor Jennifer Rothman observes that many circuit courts "have allowed for the admission of the alleged

---

51. *Id.* at 706.
52. *Id.* at 707.
53. *Id.*
54. *Id.* at 708.
55. 376 U.S. 254 (1964).
56. *Watts*, 394 U.S. at 708 (quoting *Sullivan*, 376 U.S. at 270).
57. *Id*. at 708
58. *Id.*
59. *Id.*
60. Clay Calvert, Emma Morehart & Sara Papdelias, *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime*, 38 COLUM. J.L. & ARTS 1, 7 (2014).
61. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 211 (2003).
62. Jessica Miles, *Straight Outta SCOTUS: Domestic Violence, True Threats, and Free Speech*, 74 U. MIAMI L. REV. 711, 716 (2020).

victim's reaction as evidence of how a reasonable person would interpret the statement."[63] This subjective audience-reaction test is the third factor in the ill-defined federal true threats jurisprudence. It should be noted that the Supreme Court has yet to weigh in on the validity of the reasonable-speaker, reasonable-listener, or audience-reaction tests.[64] As described in the introduction, this uncertainty has left a fog over true threats jurisprudence.[65]

B. Elonis v. United States[66]

The Supreme Court took up its first and only true threats case involving song lyrics in 2014.[67] Anthony Elonis took to Facebook posting "self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement."[68] In the posts, Elonis often included several disclaimers noting that the lyrics were not intended to be taken as truth and that he believed he was exercising his First Amendment rights.[69] However, many who saw the posts considered them threatening.[70] Elonis' boss ultimately fired him for threatening a co-worker, and his wife was granted a protection order.[71]

Elonis argued that his speech was protected by the First Amendment as "constitutionally protected works of art."[72] Similar to the arguments presented in *Knox*,[73] Elonis contended his speech was similar to that of rappers and singers performing shows or releasing recorded music.[74] In his brief, he included a lengthy excerpt with the lyrics of a famous rapper who rapped about killing his ex-wife.[75] Elonis hoped to juxtapose his expression with other popular art and thereby enjoy the same First Amendment protections.[76]

However, the Court narrowly decided the case on the *mens rea* issue and therefore avoided addressing the First Amendment arguments.[77]

---

63. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 288 (2001).

64. *Id.*

65. *See supra* notes 19–21.

66. 135 S. Ct. 2001 (2015).

67. *Id.*

68. *Id.* at 2002.

69. *Id.* at 2005–06.

70. *See id.* at 2006 (noting Elonis's wife, *inter alia*, felt "extremely afraid for [her] life").

71. *Id.* at 2005–06.

72. *Id.* at 2016 (Alito, J., concurring in part and dissenting in part).

73. Commonwealth v. Knox, 190 A.3d 1146, 1148 (Pa. 2018), *cert. denied sub nom.* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019).

74. *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

75. *Id.*

76. *See id.*

77. *Id.* at 2012.

Scholars have criticized the case for failing to clarify the constitutional issue of when speech falls into unprotected territory under the true threats carveout of the First Amendment.[78] Further, the Court was given the opportunity to address true threats made in the context of the Internet and social media, another opportunity on which it punted.[79]

Despite avoiding the constitutional issue, *Elonis* does represent a departure from the traditional rap-music based prosecution.[80] Here, the Court's holding on the *mens rea* issue established that the prosecution must prove that a defendant intended to actually carry out any alleged threats.[81] Professor Donald Tibbs praises this development as "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."[82]

However, other scholars have noted that deciphering artists' intent has not been a straightforward endeavor.[83] Rap music often depicts violence, especially gang violence, although such depictions are often exaggerations.[84] As one scholar, Erin Lutes explains, "[i]n spite of the creative license that many rappers take when crafting their songs, scholars have noted that the legal system has increasingly used rap lyrics as evidence as if the words were truthful and autobiographical."[85] Lutes highlights that this sort of interpretation raises particular concerns "in the context of criminal trials because it allows prosecutors to prove various elements of crime by circumstantial evidence that was crafted to glamorize either fictionalized or grossly exaggerated depictions of badness—often of the same type of criminal behaviors for which a particular defendant may be on trial."[86]

Likewise, Professors Clay Calvert and Matthew Bunker write that the true threats doctrine places a tremendous burden on speakers to clarify their messages.[87] In the context of rap music, the pair explain that "the

78. *See* Calvert & Bunker, *supra* note 21, at 943–44, 946.

79. *See id.* at 944.

80. *See* Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 42 (2016).

81. *Id.*

82. *Id.*

83. *See* Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 84 (2019) (describing "[d]eciphering such intent from song lyrics" as a "precarious undertaking").

84. *Id.* at 84–85.

85. *Id.* at 85 (internal quotations omitted).

86. *Id.*

87. Clay Calvert & Matthew D. Bunker, *Know Your Audience: Risky Speech at the Intersection of Meaning and Value in First Amendment Jurisprudence*, 35 LOY. L.A. ENT. L. REV. 141, 201 (2014).

messages are conveyed in an artistic genre of music that is heavily stigmatized and that features narrative conventions that might not be understood by a reasonable jury serving as a surrogate for a reasonable person."[88] In other words, context is key in determining true threats, and most courts and juries do not have the requisite familiarity with rap music to understand the context. With this in mind, Professors Calvert and Bunker suggest that a reasonable person probably should not take Elonis's lyrics as literal.[89]

C. People v. Oduwole[90]

In 2011, Olutosin Oduwole was charged with "the intent to commit the offense of making a terrorist threat" pursuant to Illinois state law.[91] The basis for the charges was a piece of paper with the handwritten words:

> I Lead She a follower, I'm Single and I'm not wit her, but she gott a throat deeper than a Sword Swallower/glock to the head of
>
> . . .
>
> SEND 2 to . . . paypal account if this account doesn't reach $50,000 in the next 7 days then a murderous rampage similar to the VT shooting will occur at another prestigious highly populated university. THIS IS NOT A JOKE![92]

The note was found in Oduwole's unattended vehicle before it was towed from the Southern Illinois University—Edwardsville campus.[93] The officer who found the paper slightly protruding from the center console acknowledged that a person outside of the vehicle would not be able to read the note.[94]

Later that day, a warrant was served on Oduwole's on-campus apartment.[95] Among other things, police seized a gun, ammunition, and nearly 2,000 pages of writings.[96] The officer who reviewed the writings

---

88. *Id.* at 202.
89. *Id.* at 204.
90. 985 N.E.2d, 316 (Ill. App. Ct. 2013).
91. *Id.* at 318.
92. *Id.* 318, 320. The State and Oduwole agreed to the facts that "Seung-Hui Cho, a full-time student, armed with a 9-millimeter. Glock and a .22-caliber Walther pistol, shot and killed 32 people, students and faculty, on the campus of Virginia Tech, and then killed himself." *Id.* at 318. The top lines were written in black ink and the lines at the bottom were written in blue ink. *Id.* at 320.
93. *Id.* at 320.
94. *Id.* at 320–21.
95. *Id.* at 321.
96. *Id.*

testified that "a large percentage of the notebook entries appeared to be rap lyrics and writings related to the defendant's aspiring rap career" and that "some of the same symbols and words that were present on the paper seized from the defendant's vehicle were also present in the notebooks."[97]

During cross-examination, one of the officers involved in the case acknowledged that there was no evidence that Oduwole was going to communicate the contents of the paper to anyone.[98] However, the officer testified that he regarded the lines as a threat to the college community.[99] The officer stated that "he could not possibly consider" the words Oduwole had written "to represent creative writing, given that the Virginia Tech incident occurred three months prior and given his knowledge of [Oduwole's] Internet purchase of four handguns."[100] The parties stipulated that Oduwole had opened a PayPal account under an alias two months before the note was seized.[101]

A promoter of rap music, including Oduwole's, testified that some of Oduwole's lyrics were violent and "that violent lyrics are common in the rap industry."[102] However, the promoter testified that Oduwole was not "a violent person," but rather "a nice person."[103] Another individual, who was present at Oduwole's apartment at the time of his arrest, testified that Oduwole "came up with the idea for the Virginia Tech rap lyrics while they watched an episode of 'Law and Order.'"[104] Finally, University of California Professor Dr. Charis Kubrin, an expert in the field of rap music, testified that the paper seized from Oduwole's vehicle "constituted the formative stages of a rap song."[105]

A jury convicted Oduwole of attempting to make a terroristic threat.[106] However, on appeal, an Illinois appellate court partially reversed the judgment, finding that the state failed to meet its burden of proving that Oduwole had taken a "substantial step," as required to prove an inchoate offense.[107]The court declined to address any other issues raised by Oduwole.[108]

Professor Andrew Kerr used Oduwole's lyrics to make the keen observation that artistic value of lyrics can be assessed "*only when rapped*

97. *Id.*
98. *Id.* at 322.
99. *Id.*
100. *Id.*
101. *Id.* at 322.
102. *Id.* at 323.
103. *Id.*
104. *Id.*
105. *Id.* at 328–29.
106. *Id.* at 316.
107. *Id.* at 324–26
108. *Id.* at 327.

by a rapper."[109] He compared the Oduwole lyrics, which appear to be "a rough draft of some kind of personal poem or rap," to the lyrics of a popular rap song, which as written, would make little sense to most readers.[110] This assessment carries significance as artists increasingly attempt to invoke First Amendment protections for their lyrics based on the artistic nature of the speech. If the artistic value cannot be determined until the lyrics are performed by the artists, such is the appropriate context in which the lyrics should be presented at trial.

In reviewing *Oduwole* and similar cases, criminologist Adam Dunbar found that prosecutors generally follow the same playbook in prosecuting rap lyrics.[111] First, they "treat rap lyrics as literal, self-referential narratives that can be easily interpreted by the lay public."[112] Second, "[p]rosecutors reinforce the first-person narrative perspective by reading the lyrics at trial like a journal entry, without rhyme or music."[113] And finally, they "claim that the lyrics are simply a reflection of the rapper's lifestyle."[114] Dunbar's research indicates this problematic because the mere label of rap music induces negative evaluations, even when controlling for the actual lyrics.[115]

Professors Charis Kubrin and Erik Nielson called *Oduwole* a "blatant criminalization of rap lyrics."[116] The scholars lambast the trial court's opinion for its potential chilling effect on rappers.[117] "Without the First Amendment protecting these artists," they write, "it would not be surprising if [other artists] began following Oduwole by modifying their art to avoid prosecution."[118] Professors Kubrin and Nielson note that in the aftermath of this decision, freedom of speech now comes with a racial caveat.[119]

This Part shows the unclear development the present-day true threats jurisprudence. The Supreme Court's reluctance to further define the doctrine has left a series of piecemeal tests and questions of constitutional validity. Further, these tests lack the appropriate consideration of context—and all-too-important key in determining whether speech qualifies as a true threat, thus evading First Amendment protection. This failure to consider context is especially poignant in cases involving rap

109. Andrew J. Kerr, *Aesthetic Play and Bad Intent*, 103 MINN. L. REV. 83, 94 (2018).

110. *Id.* at 93.

111. Adam Dunbar, Charis E. Kubrin, and Nicholas Scurich, *The Threatening Nature of 'Rap' Music*, PSYCHOL., PUB. POL'Y, & L., 280, 289 (2016).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185, 194 (2014).

117. *Id.* at 201–02.

118. *Id.* at 202.

119. *Id.*

lyrics, where juries typically lack the understanding necessary to make such determinations within the genre. The next Part focuses on the unequal history and development of free speech protections for Black people in the United States.

II. LEGAL ISSUES INVOLVING RACE AND THE FREEDOM OF SPEECH

Throughout the United States' history, Black Americans have not had access to the rights and privileges afforded to their white counterparts.[120] Enshrined in the Constitution is the Framers' intent that enslaved people were second-class citizens.[121] However, some seem disillusioned that the First Amendment transcends race—that somehow this law is unique among others in its ability to provide equal protection to people of color.[122] How quickly some forget that when the First Amendment was ratified, many Black Americans were considered property.[123]

A. *America's Origin*

In the free speech context, unjust restrictions on Black rights trace back to America's slave era.[124] In response to conspiracies regarding slave rebellions, the Slave Codes were enacted to protect the social order by criminalizing Black speech and assembly and also preventing Black people from learning to read and write.[125] Sometimes, the mere mention of revolt was all that was needed for prosecution.[126] One such rumored rebellion in Charleston, South Carolina in the early 1820s led to the execution of thirty-five Black men and forty more exiled.[127]

120. *See infra* Part II, Sections A, B, C.

121. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. IV, § 2, cl. 3. *See also* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 311 (1988) (noting that "the Constitution contains a number of specific provisions such as the fugitive slave clause and the three-fifth compromise which plainly recognize the existence of the institution of slavery").

122. Cass R. Sunstein, *Free Speech and Democracy*, 6 DRAKE L. REV. 25, 27 (1995); *see generally* Korematsu v. United States, 323 U.S. 214, 234–35 (1944) (Murphy, J., dissenting) (noting that the exclusion order for the internment of Japanese Americans during WWII was "an obvious racial discrimination" that "depriv[ed] all those within its scope of the equal protection of the laws guaranteed by the Fifth Amendment").

123. *See generally* Dred Scott v. Sandford, 60 U.S. 393, 393 (1856).

124. Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 42–45 (2016).

125. *Id.* at 44.

126. *Id.* at 43.

127. *Id.*

B. *The Civil Rights Era*

During the late 1950s and early 1960s, various states attempted to shut down NAACP chapters on the basis of refusing to submit membership lists.[128] This behavior was a direct infringement on the members' right to freedom of association, which is covered under the First Amendment freedom of speech.[129] The Supreme Court ultimately ruled this practice unconstitutional in the 1964 landmark decision in *NAACP v. Alabama*.[130]

More recently, a report from the Department of Justice showed that the rights of Black people were infringed during the protests in Ferguson, Missouri.[131] There, law enforcement officials arrested people for a number of constitutionally protected activities including "talking back to officers, recording public police activities, and lawfully protesting perceived injustices."[132] According to the report, "[Ferguson Police Department's] suppression of speech reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism."[133]

III. RAP MUSIC AS A PROXY FOR BLACKNESS

As detailed in Part II, the United States has continually thwarted Black Americans' First Amendment rights to free speech and free expression.[134] Part I shows the way this recurring issue has manifested in the prosecution of rap lyrics.[135] While not all of the defendants in the rap music trials are Black,[136] the artform's origin and cultural connection with Black America cannot be overlooked when considering this issue.

Viewing rap lyrics in their proper context is vital. The lyrics, while sometimes provocative, violent, and profane, do not actually communicate true threats.[137] The judiciary has repeatedly ignored this nuanced truth.[138] Other types of music, including country music, echo similar themes of violence—yet reactions have not included the prosecution of the artists.[139] In the Nielson/Render amicus brief for *Knox*,

128. *See, e.g.*, NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 289–90 (1964); Bates v. City of Little Rock, 361 U.S. 516, 517 (1960); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 295 (1961).

129. *NAACP*, 377 U.S. at 308.

130. *Id.* at 310.

131. U.S. DEP'T OF JUST., C.R. DIV., THE FERGUSON REPORT: DEPARTMENT OF JUSTICE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 27–28 (2015).

132. *Id.* at 24.

133. *Id.* at 28.

134. *See supra* Part II.

135. *See supra* Part I.

136. *See* Calvert & Bunker, *supra* note 21.

137. Brief in support for the Petitioner, *supra* note 26.

138. *Id.*

139. *Id.* at 20.

the authors note that "[r]esearch tells us that listeners unfamiliar with hip hop culture may have difficulty being reasonable when it comes to rap music because it often primes enduring stereotypes about the criminality of young Black men, its primary creators."[140] They add that "[i]n the criminal justice system, the results of this racial bias are evident in the disparate treatment that people of color face at virtually every phase of the criminal justice process."[141]

Social scientist Carrie Fried conducted a study asking participants to read lyrics and identify if they were from rap or country songs.[142] The lyrics used in the study were actually from an American folk song.[143] However, when asked a series of opinion questions including "[t]his song promotes violence, riots, and civil unrest" and "[t]hey should ban such songs entirely," the participants who labeled the lyrics as rap reported significantly more negative reactions than those who identified the folk song lyrics as country.[144]

The study suggests that rap songs are significantly more likely to be perceived as dangerous and offensive.[145] Fried posited that "[o]ne reason that rap music, in particular, receives negative reactions may be that it is seen as a predominantly Black form of music."[146] Further, Fried explained that "[r]ap music, because of its association with African American culture, is judged through the tainted lens of a Black stereotype which includes traits such as violence, hostility, and aggression."[147]

When coupled with the United States' treatment of Black Americans, the evidence in this Part strongly suggests that the prosecution of rap lyrics is an unconstitutional restriction on free speech.[148] As *Knox* and the cases in Part I illustrate, the judiciary has not been keen to acknowledge any racial connection in the rap lyrics cases.[149] Such an acknowledgement would be a beneficial step in securing equal protection in these types of cases.

IV. FREE SPEECH THEORIES PROVIDE RATIONALES FOR PROTECTING LYRICS

This Part looks at three popular free speech theories: democratic self-governance, the safety-valve theory, and self-actualization. It is important

140. *Id.* at 19.

141. *Id.* at 19–20.

142. Carrie B. Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705, 709 (1999).

143. *Id.* at 710.

144. *Id.* at 710–11.

145. *See id.* at 716.

146. *Id.* at 707.

147. *Id.*

148. *See supra* Part II.

149. *See supra* Introduction and Part I.

for free speech doctrine to be rooted in theory, and each of the theories provided offers an underlying basis for protecting rap and hip hop lyrics under the First Amendment.[150]

A. *Democratic Self-Governance*

The values enshrined in the First Amendment freedom of speech are often promoted as a means to protecting the democratic self-governance in the United States.[151] The best known advocate for the democratic self-governance theory, Alexander Meiklejohn, valued speech primarily for its contribution to people's ability to govern themselves.[152] Above all, Meiklejohn emphasized the importance of informed voters.[153] For him, the purpose of free speech "is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[154] Because of this belief, Meiklejohn believed that "no idea, no opinion, no doubt, no belief, no counter belief, no relevant information" should be kept from the public.[155] As noted, rap and hip hop lyrics are frequently used to critique political and social issues, as artists seek to inform listeners about corruption and other injustices. Such expression fits squarely within the Meiklejohn's desire for a well-informed electorate.

B. *Safety-Valve Theory*

Related to democratic self-governance theory, the safety-valve theory promotes the freedom of expression as a way to produce gradual change in society.[156] By allowing dissent, individuals can peacefully advocate for their ideas in a democratic way.[157] As Professor Thomas Emerson wrote, stifling free speech would "leav[e] those suppressed either apathetic or desperate. It thus saps the vitality of the society or makes resort[ing] to force more likely."[158] Essentially, without free speech, critics would be driven underground where their ideas may eventually bottle up into violent reactions.[159] The safety-valve theory suggests that rap and hip hop artists' freedom of speech allows for healthy forms of expression, which otherwise could bottle up and result in dangerous, disruptive conduct.

---

150. *See infra* Part IV, Sections A–C.
151. KENT R. MIDDLETON ET AL., THE LAW OF PUBLIC COMMUNICATION 30 (2016).
152. *Id.*
153. *Id.* at 31.
154. *Id.*
155. *Id.*
156. *Id.* at 32.
157. *Id.*
158. *Id.*
159. *Id.*

C. *Self-Actualization*

Third and finally, the theory of self-actualization comes from the recognition that speech not only promotes societal values, but it also enriches the life of the speaker.[160] As Professor Thomas Emerson posited, the right to freedom of speech "derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being."[161] Likewise, Professor Laurence Tribe considers freedom of speech a fundamental good, that is, "an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be."[162] As rap and hip hop artists are permitted to freely express themselves, they are allowed to engage in a basic human right, and they are more fully able to participate in the human experience.

CONCLUSION

The Supreme Court's reliance on judicial minimalism and constitutional avoidance has left a cloud of confusion around true threats jurisprudence.[163] With the Court rejecting certiorari on recent cases like *Knox*,[164] it is essentially endorsing the decisions made by the lower courts. However, the failure to address the First Amendment arguments regarding the higher protection due to artistic and political expression is an affront to constitutional rights.[165]

Though ratified more than 200 years ago, the First Amendment's guarantees to all Americans have been a false promise.[166] Part II details instances from the inception of the United States to recent years in which Black Americans have been oppressed through the restriction of their free speech rights.[167] While the United States has made progress in racial equality, the prosecution of rap lyrics merely serves as the next step in a pattern of unconstitutionally denying privileges guaranteed to all Americans.

This Article argues that the primary reason rap and hip hop lyrics are not afforded the same First Amendment protection as other genres is because of their strong association with Black culture.[168] Research shows that with that association comes negative stereotypes including "violence,

160. *Id.*
161. *Id.* at 32.
162. *Id.*
163. *See* Calvert & Bunker, *supra* note 21, at 950–51.
164. *See* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019) (mem.).
165. *See supra* Part IV, Sections A, C.
166. *See supra* Part II.
167. *See supra* Part II.
168. *See supra* Part III.

hostility, and aggression."[169] These negative associations are especially poignant when mostly white judges and juries are asked to make determinations about true threats statutes and their application to rap lyrics.

Existing theories for protecting free speech bolster the argument that song lyrics, especially those with political messages, should fall within the protection of the First Amendment.[170] One of the hallmarks of free speech theory posits that political expression should receive the utmost protection.[171] Further, allowing such speech promotes social stability and reifies the natural right humans have to express themselves.[172]

How then, should this problem be addressed? As with many other issues in First Amendment jurisprudence, the judiciary is particularly well-situated to address the issue.[173] As more rap lyrics end up on trial, the Supreme Court should grant certiorari and provide meaningful First Amendment analysis to the issue, abandoning its practice of judicial minimalism and constitutional avoidance.[174] Looking to other First Amendment doctrines would give the Court an opportunity to import safeguards that would allow the true threats carveout to stand without offending the rights of rap and hip hop artists.

The third prong of the *Miller* test provides a potential path forward.[175] In *Miller v. California*, the Supreme Court established a test for determining obscene speech, another categorical exemption from free speech rights.[176] The three-prong test first asks whether "'the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest."[177] Next, courts must consider "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[178] Finally, and relevant to the current analysis, the *Miller* test requires consideration of "*whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value*."[179]

---

169. Fried, *supra* note 143, at 707.

170. *See supra* Part IV.

171. *See supra* Part IV, Section A.

172. *See supra* Part IV, Sections B, C.

173. *See, e.g.*, William Van Alstyne, *Interpreting* This *Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 FLA. L. REV. 209, 211–12 (1983) (describing the assumption that the judiciary would feel bound to protect the freedoms guaranteed by the Bill of Rights).

174. *See* Calvert & Bunker, *supra* note 21, 944–45.

175. *See* Miller v. California, 413 U.S. 15, 39 (1973).

176. *Id.* at 39.

177. *Id.*

178. *Id.*

179. *Id.* (emphasis added).

By importing the third prong of the *Miller* test[180] to true threats analyses, an essential constitutional safeguard would be put in place for rap and hip hop artists. As music is inherently artistic and rap music is often political, this necessary protection would include much of the speech from the aforementioned cases.[181] Without this protection as precedent, courts have repeatedly rejected artists' legitimate First Amendment defenses, and presently, there is nothing to suggest that similar prosecution of rap and hip hop lyrics will not continue. Given the United States' abysmal track record pertaining to the protection of minority's rights, this measure is long overdue to ensure the equal protection of all Americans' First Amendment rights.

180. *Id.*

181. *See* Calvert & Bunker, *supra* note 21, at 974.