

Washington University

Law Review Online

VOLUME 101

2023

WHEN TO ADMIT ART AS EVIDENCE

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*“I’ve never written a lyric. Ever. I really haven’t. I kind of just freestyle. I just go with it as it comes. I never really wrote anything down.”*¹

Young Thug (2021)

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Jeffery Lamar Williams, better known as Young Thug, is the latest high-profile rapper to have his rap “lyrics” potentially entered into evidence as part of a criminal trial. Young Thug himself faces several racketeering, drugs, and weapons-related charges. The rap clique he co-founded, Young Slime Life (YSL), has been branded by Atlanta District Attorney as a street gang, whose affiliate members together face well over sixty separate criminal charges, ranging from car hijacking to aggravated assault to

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1. Danil Boparai, *Young Thug: “What Keeps Me Motivated? Family, Friends, Million Dollar Cars,”* I-D (Dec. 15, 2021), <https://i-d.vice.com/en/article/g5qqj4/young-thug-interview> [https://perma.cc/GR5K-XHZY].

murder.² The case is sprawling. As is Young Thug’s vast catalog, from which the District Attorney intends to isolate some snippets of vocalizations as evidence of Young Thug’s alleged crimes. In this Article, I suggest why this is problematic. But given the practical reality facing Young Thug, I offer a compromise position that comports with how the Constitution thinks about art and evidence law, and that also does justice to Young Thug’s innovative form of music. In the first line of this Article, I place “lyrics” in quotation marks not to express skepticism toward rap as a genre, but to question whether a form of music as daringly sonic as Young Thug’s can be legibly reduced to the supposed text that undergirds it. I argue, consistent with my prior work on constitutional art speech, that it cannot. Here I make the limited claim that in keeping with evidence rules like Georgia Code section 24-4-403 (whether probative value of evidence is substantially outweighed by the danger of unfair prejudice), the District Attorney may enter tracks like “Eww” (2014) or “Slime Shit” (2018) into trial as the office intends to do later this year, but only in their original audio form, in full (not as parsed snippets), and without lyric sheets. As a corollary claim, I argue that the court need not invite experts (whether police or “rap scholars”) to try to make sense of Young Thug’s music. It doesn’t need any explanation. Like most all popular music, its only measure is whether it is enjoyable for an audience.

In this Article, I first provide background as to why rap as a genre is particularly vulnerable to being misunderstood, and why legislative moves to restrict the use of rap in court are so important. I then describe how the Constitution thinks about art speech and use this framing to position how art-rap like that of Young Thug should be curated and presented in court as evidence. Finally, I argue against the use of experts (whether for prosecution or defense) in explaining art-rap to a jury. A juror can recognize its sonic function on her own.

I. WHY RAP IS VULNERABLE TO BEING MISUNDERSTOOD

The use of rap lyrics as courtroom evidence has been rightly criticized by scholars, musicians, and activists as irrelevant and stereotypic.³ Rap

2. E.g., Sarah Kearns, *Young Thug Will Face 8 of 65 Potential Charges Against YSL in Upcoming RICO Trial*, HYPEBEAST (Jan. 5, 2023), <https://hypebeast.com/2023/1/young-thug-8-charges-upcoming-rico-trial> [https://perma.cc/XP7P-3JB7]; Zoe Guy, *Everything We Know About YSL’s RICO Case*, VULTURE (Nov. 4, 2023), <https://www.vulture.com/article/ysl-young-thug-gunna-arrest-charges-explained.html> [https://perma.cc/Q6M5-EE84].

3. See, e.g., Spearlt, *The New Rap Sheet: Prosecuting Crimes, Chilling Free Speech*, 104 JUDICATURE 85, 85–87 (2020); Olafimihan Oshin, *Killer Mike Says Rap Lyrics Shouldn’t Be Used as Criminal Evidence Amid Case Against Young Thug, Gunna*, HILL (June 20, 2022, 3:38 PM), <https://thehill.com/blogs/in-the-know/3530064-killer-mike-says-rap-lyrics-shouldnt-be-used-as-criminal-evidence-amid-case-against-young-thug-gunna/> [https://perma.cc/X6X4-CEM8].

lyrics are motivated by an aesthetic impulse rather than the documentary intent to transcribe one's actual experience or plans. Much has been written about the etiology or source of creative inspiration.⁴ Still, for many established artists, their own process of aesthetic creation remains mysterious. The court in *Alfred Bell & Co. v. Catalda Fine Arts* cited the "thunderclap" theory of copyright to comment on the striking kind of serendipity that commonly catalyzes the artist.⁵ This is manifested by the many musicians who experiment with "automatic writing"⁶ (unconscious vocals) or otherwise "write" their vocalizations only in their head. Top-echelon rapper Jay-Z is well-known for writing and reciting his "lyrics" aloud (and never reduced to paper), often during a simultaneous recording session for a new song.⁷ This organic technique goes to the sonic, immediate nature of his genre.

But most importantly, as an *artform*, rappers develop songs to be listened to and enjoyed, whether because the music is itself euphonic or catchy, or because it is intended to be received by listeners as interesting and provocative. The delivery (or style of vocalization) of the rapper is essential to its sonic impact.⁸ The rapper may modulate or vary her tempo to wrap around a beat; she may enunciate to draw attention. Or, for melodic rappers like Young Thug and his ilk, he may elide syllables and then solder entire lines into one sing-songy sprint to the end of a verse. Important to delivery is the subtext of the rapper's own persona. She may play off her identity to build a more rich, layered narrative, or surprise listeners by subverting listener expectations.⁹

For this Article on rap and the criminal law, I echo the many other authors who have pointed out that historically rappers relied on puffery and

4. See Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 423 (2017) ("Answering that question by reference to the intentions of the work's creator makes sense only if one adopts a substantive, and deeply contested, view about how intentions, meaning, and value interact in the context of art."). Soucek generally refers to PAISLEY LIVINGSTON, *ART AND INTENTION: A PHILOSOPHICAL STUDY* (2005).

5. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951).

6. See, e.g., *Deerhunter* by Gary Canino, BOMB MAG. (Apr. 8, 2013), <https://bombmagazine.org/articles/deerhunter/> [<https://perma.cc/SRP5-K7X9>] (in which Deerhunter mastermind Bradford Cox comments on his automatic writing technique, "Yeah, I didn't even have any concepts going in. I just started recording. I don't know how that happens. Sometimes people call 'bullshit! Those lyrics are too complicated to have just been made up!'").

7. E.g., Taylor McCloud, *Pharrell Describes Jay-Z's Writing Process as "Weird" but "Amazing"*, HOT NEW HIP HOP (Nov. 30, 2021), <https://www.hotnewhiphop.com/414577-pharrell-describes-jay-zs-writing-process-as-weird-but-amazing-news> [<https://perma.cc/8RAY-KQF2>].

8. E.g., Jayson Greene, *Evolve with the Flow: How Drake and Kendrick Found Their Voices*, PITCHFORK (Apr. 8, 2015), <https://pitchfork.com/features/overtones/9623-evolve-with-the-flow-how-drake-and-kendrick-found-their-voices/> [<https://perma.cc/Z2AN-ZGJJ>] (observing that "[y]our voice is the entirety of your instrument as a rapper" before describing the ways that vanguard rappers Drake and Kendrick Lamar have experimented with their delivery to modulate sonic impact).

9. See, e.g., Andrew Jensen Kerr, *Rap Exegesis: Interpreting the Rapper in an Internet Society*, 7 COLUM. J. RACE & L. 341, 345 (2017).

bravado to construct a performative identity separate from their everyday selves.¹⁰ And certain subgenres of rap, not unlike outlaw country or darker forms of metal, make use of violent tropes and stock stories of street crime to convey an atmosphere of suspense.¹¹ This is all to say, as is generally true with all art media, that rap should not be taken at face value, and that any criminal subject matter should be viewed very skeptically as a truthful representation of actual experience.

But the vocal delivery of rap and its cultural framing as a form of Black art makes rap particularly vulnerable to being misunderstood as literal. First, traditional rapping can be heard as adjacent to rhythmic talking, and this familiar kind of delivery perhaps makes its content feel more like anecdotal storytelling rather than the creative formation of an insular universe for audio effect.¹² This problem is compounded when rap as a sonic creation (what we hear) is reduced to liner notes to be studied as text (songs are songs, and song lyrics are not meant to be read and parsed). Second, rap music cannot be dissociated from its history as a primarily Black artform. This frames how certain audiences—especially new or unintended audiences—are unfortunately more likely to discount its aesthetic nature, and with that, view component parts such as lyrics as biographical rather than as fictional, non-sequitur, or atmospheric. For example, in a now well-known series of psychological studies on societal perceptions of rap, study participants were provided identical lyrics but were separately primed by being instructed that the lyrics were either from a rap or country song. Study participants found the identical “rap lyrics” to be more offensive, more *literal*, and more in need of regulation than the equivalent country lyrics.¹³

The overuse of rap lyrics as evidence in criminal trials is well-documented. The foundational scholarly contribution, “Rap on Trial,” was published by Professors Charis Kubrin and Erik Nielson in 2014.¹⁴ It cataloged the many uses of rap as evidence in criminal trials, including the lyrical output of amateur rappers as well as established rappers.¹⁵ Since then

10. E.g., Brief of Michael Render (“Killer Mike”) et al. as Amici Curiae Supporting Petitioner, *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019) (No. 18-949) (citing Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 40–41 (2007)).

11. See generally Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360 (2005).

12. This problem is likely exacerbated with the amateur distribution of rap music on an unmediated Internet, which obscures the usual institutional context of a published rap song. See, e.g., P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM’NS & ENT. L.J. 37, 50 (2015).

13. Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 PSYCH., PUB. POL’Y & L. 280, 286 (2016) (expanding on the original study described in Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135 (1996)).

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

15. *Id.* at 186 (noting that professional rapper Lil Boosie’s lyrics (now known as Boosie Badazz) were entered under a murder charge).

it has become so commonplace for prosecutors to enter rap lyrics that Professor Kubrin and her colleague Jack L. Lerner have been prompted to develop and distribute an e-book, *Rap on Trial: A Legal Guide for Attorneys*, that outlines the many potential issues that defense attorneys face regarding the use of rap and how to respond given the many judicial responses to precedent situations.¹⁶

As a response to the overuse of rap lyrics as evidence in criminal trials, scholar-activist coalitions have moved to achieve legislative reform to limit how aesthetic works—most notably rap lyrics—are used in court.¹⁷ In October 2022, California Governor Gavin Newsom signed into law a bill that requires judges to consider the potential for racial bias before allowing “creative expressions” to be entered as evidence.¹⁸ A broader petition to “Protect Black Art” from being used as criminal evidence in other jurisdictions outside of California has many prominent supporters from the law and art worlds.¹⁹ A topical motivation for this “Protect Black Art” petition is the case of Young Thug, the protean Atlanta rapper known for his wildly innovative and consequential form of “melodic rap,” a style that has also been characterized as alien,²⁰ unintelligible,²¹ and as I wrote in a prior article, one that “experiment[s] with the limits of both identity and language.”²² For Young Thug, what we refer to as “words” are closer to sonic fragments meant to be cobbled together, and then either deconstructed or detonated, for listener enjoyment. They are certainly not to be read as mere text separate from his stylized delivery and musical tracking.

I use the Young Thug case to offer a limited proposal for how prosecutors might enter art into a criminal trial setting. My recommendation is consistent with my own descriptive theory of how the U.S. Constitution

16. Jack I. Lerner, Charis E. Kubrin ET AL., *RAP ON TRIAL: A LEGAL GUIDE FOR ATTORNEYS 1* (Version 1.0 2021) (cataloging case law on evidentiary challenges related to probative value, unfair prejudice, cumulative evidence, character evidence, and hearsay, as well as First Amendment challenges related to threats, incitement, gang affiliation, jury selection, and expert witnesses).

17. Natalie Neysa Alund, *California Governor Gavin Newsom Signs Bill Limiting Use of Rap Lyrics as Evidence in Court*, USA TODAY (Oct. 3, 2022, 1:00 PM), <https://www.usatoday.com/story/news/politics/2022/10/03/california-rap-lyrics-court-evidence/8167269001/> [<https://perma.cc/B8YT-XXJJ>].

18. *Id.*

19. ART ON TRIAL: PROTECT BLACK ART, <https://www.protectblackart.co/> [<https://perma.cc/HGA2-8X62>]; see, e.g., Rivea Ruff, *Protect Black Art: Artists, Labels, Scholars Sign Open Letter Urging Legislators to Limit Use of Rap Lyrics in Court*, ESSENCE (Nov. 2, 2022), <https://www.essence.com/celebrity/protect-black-art-open-letter/> [<https://perma.cc/85HT-32RJ>].

20. Devin Friedman, *Young Thug Is an ATLien*, GQ (Feb. 16, 2016), <https://www.gq.com/story/young-thug-best-rapper-alive-interview> [<https://perma.cc/VTB6-R72B>].

21. See, e.g., Lucas Garrison, *What the Fuck Is Young Thug Saying? (A Very Serious Lyrical Analysis)*, DJBOOTH (Mar. 9, 2018), <https://djbooth.net/features/2014-03-25-young-thug-what-is-he-saying> [<https://perma.cc/X3WA-DQME>] (“Some love him, some hate him, but *nobody* understands what he’s saying because he raps like his mouth is full of peanut butter coated marbles.”).

22. Kerr, *supra* note 9, at 345.

considers “art speech,” and the related question as to whether the U.S. Constitution cares about evidence law and the entering of creative expression as evidence of a separate offense.²³ In short, I think that the U.S. Constitution covers art speech when it is good, and that the U.S. Constitution does not care about evidence law so much. That said, I agree with the legislative moves of these scholar-activist coalitions, and I think that the use of rap in a courtroom trial is so overwhelmingly likely to be more prejudicial than probative, that certain presumptions against judicial use should be built into our criminal procedure. I also disagree with Young Thug’s lyrics being cited as “overt acts” for the separate racketeering charges he and his co-conspirators face. My proposal is, again, thus a limited one. That for the upcoming trial of Young Thug, and for other rappers of his “melodic” kind and aesthetic pedigree who are unprotected by legislation like that in California, judges should consider my compromise position for when to admit evidence: the judge may enter the rap song as evidence, but only *in* its original sonic medium and only *without* explanatory commentary from police or so-called “experts” on rap music. Let the jury listen to Young Thug’s undeniably emotive and visceral form of music played aloud, and then let them try to discern any rational connection between the “unique vocabulary of squeals and squawks”²⁴ in his tunes to the alleged robbery and cocaine sales he took part in. This is the only way to maintain the integrity of our jurisprudence in this substantive area and to strike the right balance of possible prejudice and probative insight that informs the balance of when to admit art as evidence.

II. RAP AS ART

I begin by distinguishing how art speech is treated for constitutional and evidentiary purposes. This distinction has sometimes been conflated by scholars and activists, in part because of the oblique way in which “art speech” was validated by our legal institutions prior to the Internet.²⁵ A straightforward example of this distinction is the person who admits to having already killed someone as compared to one who plans to kill someone in the immediate future. There is nothing unconstitutional about

23. See, e.g., Andrew Jensen Kerr, *Art Threats and First Amendment Disruption*, 16 DUKE J. CONST. L. & PUB. POL’Y 173, 190–93 (2021).

24. Sheldon Pearce, *Young Thug Defies Expectations Again*, NEW YORKER (Oct. 20, 2021), <https://www.newyorker.com/culture/listening-booth/young-thug-defies-expectations-again> [https://perma.cc/UD73-XC3F] (“Since his days on the mixtape circuit, in the early twenty-tens, Young Thug has been a weirdo rapper who relies on an extraterrestrial approach to using Auto-Tune, a cartoonish disposition, and a unique vocabulary of squeals and squawks.”).

25. See, e.g., Megan Butler, *First Amendment Advocates Slam Use of Rap Lyrics as Evidence*, COURTHOUSE NEWS SERV. (May 23, 2022), <https://www.courthousenews.com/first-amendment-advocates-slam-use-of-rap-lyrics-as-evidence/> [https://perma.cc/C5KH-3CG8].

saying that you have already killed someone. It can be true or false. But even if true, it doesn't necessarily put any particular person on notice that they themselves are in danger (unless the context of the speech act suggests "I have killed before, and I will kill (you) next . . .").²⁶ It is part of one's freedom of expression to make this confession, but your confession may be used as evidence against you in court.

In contrast, the forward-looking claim that one will kill (a particular person) in the immediate future is perceived as a manifestation of physical violence, and thus puts the listener in fear of their own safety. For constitutional purposes, the directed threat is not properly conceived as a speech act at all.²⁷ As recently confirmed by Justice Kagan in *Counterman v. Colorado*, "[t]rue threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection."²⁸ The true threat may be fairly punished as a public wrong.

But the Constitution insulates "art speech" from criminal punishment, at least when the aesthetic product is *good*, an evaluation traditionally made by market players in the artworld. My argument here is institutional and depends on the very *lack* of precedent cases in which published artwork has been analyzed as a true threat. Professors Kubrin and Nielson in their 2014 article described the case of Olutosin Oduwole, a (very) amateur writer who sketched out a draft of a violent rap lyric and was then arrested for making terroristic threats (the conviction would be later overturned).²⁹ Since then the U.S. Supreme Court has been prompted to consider the possibility of an "art threat" in the cases of *Elonis v. United States*,³⁰ *Bell v. Itawamba County School Board*,³¹ and *Knox v. Pennsylvania*.³² However, the Court has retreated from the question of whether "good art" (at a professional quality) may be understood as a true threat. The answer is no, and the reason is simply because our First Amendment category of "art speech" is based on a cultural value that we appreciate good art for intrinsic reasons,³³ and so a piece of good art cannot simultaneously be covered by the Constitution while conceptualized as a threat (i.e., as a non-speech act). From the rap

26. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (establishing relevance of context as a factor in true threats analysis).

27. See, e.g., Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 593 (2000).

28. *Counterman v. Colorado*, 143 S. Ct. 2106, 2111 (2023).

29. Kubrin & Nielson, *supra* note 14, at 193–94.

30. *Elonis v. United States*, 575 U.S. 723 (2015).

31. *Bell v. Itawamba Cnty. Sch. Bd.*, 136 S. Ct. 1166 (2016).

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

33. Kerr, *supra* note 23, at 204–06 (explaining that good art is covered by the First Amendment simply because it is culturally important speech); see also Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1089 (2016) ("[A] cultural account of public discourse gives a much better account of why lots of expression that seems to have little to do with popular self-government, including art and instrumental music, enjoys full First Amendment protection.").

world, consider the potentially violent speech acts of Tupac Shakur directed toward the Notorious B.I.G. in “Hit ‘Em Up”³⁴ or lyrics from Eminem’s oeuvre directed toward his estranged ex-wife.³⁵ There is no reason for these vocalizations to be covered as political speech. They are covered simply because they are art speech, as courts assume these raps to be sufficiently aesthetic if listeners happen to pay for them.

The crux for us today is that traditionally we delegated these evaluative decisions about art speech to cultural gatekeepers like art museums, film producers, and, of course, record labels. Courts (and everyone else) assumed that if an artwork was sold in a marketplace that it must also be good (i.e., our standard for art speech), and so judges did not have to broach the seemingly irresolvable question of whether a speech act was sufficiently aesthetic to be covered by the Constitution.³⁶ This institutional deference is especially valuable in a world of abstract art, pop art, and the sonic experimentalism of rappers like Young Thug. Courts avoided the difficult problem of aesthetic relativism first identified by Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*³⁷ and later perceived by Justice Scalia in *Pope v. Illinois*.³⁸

However, with the Internet and the amateur dissemination of artwork to an expansive online audience, courts have been prompted to think about the relationship of the First Amendment to potentially threatening rap.³⁹ We can no longer rely on our cultural gatekeepers (today’s internet rappers have of course bypassed them with YouTube, etc.⁴⁰), but prior courts have provided some guidance. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, Justice Souter reassured American readers that their First Amendment certainly covers the meaning-resistant artwork of Jackson Pollack, Arnold Schoenberg, and Lewis Carroll.⁴¹ In *Kleinman v. City of*

34. Stereo Williams, *Tupac’s ‘Hit ‘Em Up’: The Most Savage Diss Track Ever Turns 20*, DAILY BEAST (July 12, 2017, 7:39 PM), <https://www.thedailybeast.com/tupacs-hit-em-up-the-most-savage-diss-track-ever-turns-20> [https://perma.cc/F8VB-DZHL].

35. E.g., *Kim (song)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Kim_\(song\)](https://en.wikipedia.org/wiki/Kim_(song)) [https://perma.cc/U5CV-HLMP].

36. Kerr, *supra* note 23, at 175.

37. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (observing that most judges are not trained to evaluate either the avant-garde or lowbrow forms of artwork).

38. *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring) (“[I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value.”).

39. Prior to Internet platforms like YouTube most all commentators assumed art speech could not be threatening. As recently as 2008 Professor Eberle wrote, “it is hard to imagine art speech constituting incitement, threats or fighting words. Instances of art speech almost never involve violence or threatened violence germane to these categories of unprotected speech.” Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 25 (2007).

40. See, e.g., Kyann-Sian Williams, *The Story of SoundCloud Rap in 15 Seminal Songs*, NME (Jan. 13, 2021), https://www.nme.com/en_asia/features/best-soundcloud-rap-songs-ever-juice-wrld-lucid-dreams-xxxtenacion-2856161 [https://perma.cc/3YKH-VW4L].

41. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

San Marcos, the Fifth Circuit confirmed that the *Hurley* dicta is limited to “great art” like the pioneering artists namechecked by Justice Souter, but the court chose to not elaborate a detailed hierarchy for how the First Amendment might apply to utilitarian objects with “expressive elements” like the repurposed junked car at issue.⁴²

I have argued previously for why and how rap should be considered art speech.⁴³ Most important to my analysis for this Article is that, as a sonic medium, rap can only be evaluated as sufficiently *good* for First Amendment purposes based on *listener* reaction.⁴⁴ We like music because of the way that it sounds, and even if the vocal impact of a song’s lyrics informs our listener experience, this sonic evaluation can’t be distilled to a quality judgment about the lyrics-as-written. Song lyrics are often ad hoc, prosaic, repetitive, or conversational. Songwriters and rappers improvise them aloud while working on melody or beat accompaniment, etc. Vanguard rappers like Jay-Z and Young Thug are typical in writing their verses in their own head or simultaneous to recording.⁴⁵ Anyway, this common creative process makes the near obsession with rap-as-text by other legal scholars and jurists misguided and conceptually wrong. We don’t decide whether we like the film adaptation of *2001: A Space Odyssey* based on its written screenplay, and we don’t decide whether we like a Young Thug song based on how someone on the Internet has transcribed his vocalized “lyric” as a liner note. For courts to then reduce a sonic artform to one very *non*-sonic element (a text version of a vocal performance) of its production creates a gulf between what the artist disseminated and what a judge or jury evaluates as probative.

The Constitution understands rap to be an art, and an exclusively sonic one, given how it is perceived and consumed by audiences. For melodic rappers like Young Thug, the vocalizations are themselves a form of instrumentation, which cannot itself be reduced and parsed to text. Although the Constitution does not insulate Young Thug’s songs from being entered into courtroom evidence, the prior analysis does suggest that courts must still treat them as the songs they are.

III. RAP AS EVIDENCE

Again, the Constitution does not care much about evidence law. Professor Frederick Schauer is to my knowledge the first scholar to

42. Kleinman v. City of San Marcos, 597 F.3d 323, 326–27 (5th Cir. 2010).

43. Kerr, *supra* note 23; *see also* Andrew Jensen Kerr, Response, *The Use of Cultural Authority in Constitutional Argument*, 74 VAND. L. REV. EN BANC 215, 235–38 (2021).

44. Kerr, *supra* note 23, at 181–82.

45. Boparai, *supra* note 1.

comment on the coverage boundaries of the First Amendment.⁴⁶ The First Amendment certainly covers political speech, even if provocative, and even if the speech is crude or inelegant. It also covers art speech, again even if provocative, but only so long as it's good. It doesn't cover yelling fire in a crowded theater,⁴⁷ making true threats,⁴⁸ and by most estimations, prior statements that evidence modus operandi or confessing to having committed a crime one is accused of.⁴⁹ There is sparse case law here, especially at the Supreme Court.⁵⁰ In *Dawson v. Delaware*, Justice Rehnquist authored a majority opinion that suggested that statements about one's abstract political beliefs (e.g., being a "revolutionary") are disfavored as far as being admitted as evidence, but are not per se barred by the First Amendment.⁵¹ While the Constitution does cover a political speech act ("I hate long-hair members of X political party, and I hope someone cuts off their ponytails") from a criminal threat or incitement charge, it does not insulate this same political speech act from being entered into court if one finds scissors and clumps of hair in their trash. We are not criminalizing the speech act as itself hateful or intimidating; rather we are citing the speech act as evidence of having done some other criminal thing (apparently, criminal assault by cutting someone's hair).

This is why the legislative moves by these scholar-activist coalitions are so important. There is no constitutional requirement to exclude as evidence the creative expressions of rappers and other artists. I have recited some of the reasons why rap lyrics are most always more prejudicial than probative (aesthetic impulse, puffery, genre expectations, sonic stylings for listener effect). This problem is compounded when it comes to Black rappers, and especially young or amateur rappers who are still developing their skill. My own observation is that there is a general correlation between talent and didacticism or obviousness in lyric construction. In the turn to the "melodic rap" of today (a rap subgenre only recently derided as "mumble rap"⁵² or

46. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 267–82 (surfacing the coverage question).

47. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J., opinion of the court).

48. *Counterman v. Colorado*, 143 S. Ct. 2106, 2111 (2003).

49. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1783–84 (2004) ("Less visibly still, much the same degree of First Amendment irrelevance holds true for the content-based regulation of . . . *virtually the entirety of the law of evidence* . . . and that vast domain of criminal law that deals with conspiracy and criminal solicitation." (emphasis added) (footnotes omitted)).

50. See Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 647–53 (2019).

51. *Id.* at 650–51 (discussing *Dawson v. Delaware*, 503 U.S. 159 (1992)).

52. E.g., Adam de Paor-Evans, *Mumble Rap: Cultural Laziness or a True Reflection of Contemporary Times?*, CONVERSATION (Oct. 18, 2017, 11:05 AM), <https://theconversation.com/mumble-rap-cultural-laziness-or-a-true-reflection-of-contemporary-times-85550> [https://perma.cc/5RVK-G73A].

“warble rap”⁵³ for its emphasis on sonic atmosphere over intelligibility), many professional rappers experiment with a contorted or sing-songy vocal delivery that both pushes on the textures of their “words,” and makes use of interjection and non-sequitur to add immediacy and surprise to their songcraft. Anyway, most good rappers avoid being too direct or overt, because this kind of straightforward rapping is less likely to captivate a listener, unless that rapper is unrivaled in terms of storytelling (e.g., Kendrick Lamar) or technical competence (e.g., Freddie Gibbs). Unfortunately, our young or amateur rappers are those most likely to use a heavy-handed delivery that accentuates the assumed literality of their lyrics. Court presumptions against using these amateur attempts at rap music as evidence when they are likely to trigger racial bias are thus so essential.

IV. THE CASE OF YOUNG THUG

But Young Thug is eminently talented. And eminently weird. His extraterrestrial⁵⁴ approach to rapping transformed the “rap game” as is said, and along with other Atlanta natives like Lil Yachty, Lil Baby, Playboi Carti, etc., and other pedigreed American rappers like Lil Durk and Lil Uzi Vert, has modeled a new subgenre of rap that has become so successful that it has earned its own category (“melodic rap”) at the Grammy Awards, one that replaced the prior disjunctive category of “best rap/sung collaboration” that assumed rapping to be a separate form of vocalization.⁵⁵ Young Thug makes rap-as-art. It is also impossible to reduce it to rap-as-text, and thus also likely impossible for *any* commentator (whether a so-called expert or not) to make much legible sense as to what his raps “mean” or what they are trying to achieve, other than to be *good rap*. In his immersive 2016 interview for *GQ*, Devin Friedman described Young Thug as “literally . . . famous for being unintelligible” and “the most successful lyricist in the history of the world whose thing is that you can’t understand what the fuck he’s talking about.”⁵⁶ Cultural commentator Shea Serrano made a similar observation about “warble rappers” like Young Thug on their use of sound

53. Charley Locke, *Young Thug Isn’t Rapping Gibberish, He’s Evolving Language*, WIRED (Oct. 15, 2015, 2:28 PM), <https://www.wired.com/2015/10/young-thug-evolution-of-language/> [<https://perma.cc/UM7E-TQB3>].

54. Pearce, *supra* note 24.

55. E.g., Matthew Ismael Ruiz, *Future, Drake, and Tems Win Best Melodic Rap Performance for “Wait for U” at 2023 Grammys*, PITCHFORK (Feb. 5, 2023), <https://pitchfork.com/news/future-drake-and-tems-win-best-melodic-rap-performance-for-wait-for-u-at-2023-grammys/> [<https://perma.cc/YS74-ZM7G>]; Mesfin Fekadu, *Grammy Awards Take Steps to Prevent Conflicts of Interest after Ex-CEO’s Rigging Accusations*, USA TODAY (June 10, 2020, 8:57 AM), <https://www.usatoday.com/story/entertainment/music/2020/06/10/grammy-awards-tweak-nomination-rules-rap-r-b-and-latin-categories/5332527002/> [<https://perma.cc/EM5A-VZHE>].

56. Friedman, *supra* note 20.

as a prism for emotion: “it’s never about what these guys are saying, it’s about how they’re saying it, what they’re doing with their voices.”⁵⁷

The raps at issue, “Eww” (2014) and “Slime Shit” (2018), fit within this paradigm.⁵⁸ District Attorney Fani Willis wants to enter “Eww” into court because of a possible reference to an alleged robbery. If one listens to the time mark of the rapped track, the lyric sounds like an alien zephyr of sound. Any words are, at least for me, indecipherable. Young Thug’s first verse in “Slime Shit” (which refers to “cooking white bricks,” i.e., cocaine) is also extremely stylized.⁵⁹ Some of the articulations in this track are discernable as words. But the moody atmosphere, contorted delivery, and use of interjection subverts any listener expectation that there is an ultimate purpose or theme to the song other than random puffery and sonic resonance.

Young Thug was a muse for my own early entries into the academic literature on law and rap,⁶⁰ and I’m saddened by the irony that he is now a subject of scholarship not just for his genre-shifting talent, but because he himself faces his own legal troubles. It is with pause that I offer one limited compromise proposal for how a judge might balance the evidentiary factors when considering whether to enter Young Thug’s lyrics into court, as the District Attorney intends to do. My proposal is a straightforward one that also fits jurisprudentially within my prior theorizing: let the jury listen to Young Thug’s sonic output, but without any explanation or commentary from police or a so-called defense “expert” on rap. Young Thug’s music is meant to be heard, but not to be made sense of. Any attempts to distill his music into some uniform meaning will only detract from whatever value it possesses for a listener.

My argument is a practical solution for a very pragmatic area of law: how to balance fairness to the defendant while allowing the prosecution to try to prove its case. It also aligns with how the Constitution thinks about art and evidence, and it suggests the futility of explicating the work of Young Thug by comparing him to other transformative artists. Trying to explain why Young Thug’s aesthetic output works as music is about as fruitful as a prosecutor trying to explain why Marcel Duchamp’s “Fountain” (a wall urinal) works as art, or why the celebrated MoMA staring contest of

57. Locke, *supra* note 53.

58. *Eww Lyrics*, GENIUS (Apr. 20, 2014), <https://genius.com/Young-thug-eww-lyrics> [<https://perma.cc/Q2P5-XRZV>]; *Slime Shit Lyrics*, GENIUS (Mar. 25, 2016), <https://genius.com/Young-thug-slime-shit-lyrics> [<https://perma.cc/MWZ8-FU52>].

59. *At Young Thug’s Blockbuster Trial, Rap Lyrics Are Used as Evidence*, ECONOMIST (Feb. 23, 2023), <https://www.economist.com/culture/2023/02/23/at-young-thugs-blockbuster-trial-rap-lyrics-are-used-as-evidence> [<https://perma.cc/TYL4-RJ26>]; *Slime Shit Lyrics*, *supra* note 58.

60. E.g., Andrew J. Kerr, *Aesthetic Play and Bad Intent*, 103 MINN. L. REV. HEADNOTES 83, 91–92 (2018).

Marina Abramovic works as performance. These artists transcended their medium to create something altogether novel and independent of the material parts (or physical actions) that comprised it. I suppose a prosecutor cannot be prevented from explaining why a Warhol *Campbell's Soup* print is a playful meditation on consumerism in a hypothetical incident involving tomatoes,⁶¹ or how the ululating squelches and exclamatory yeas make Young Thug's music so spry. But it is still conceptually wrong for a prosecutor to attempt to connect Young Thug's parsed, reduced-to-text lyrics to a bevy of separate criminal charges. For the District Attorney to have to rely on something as mundane and effable as *written* language to rationalize Young Thug for the sake of a legal syllogism subverts the very premise of his aesthetic output, as a form of music that challenges the inherent limitations of words and assumptions about what they should do.

A pedantic reader can parse bits from his liner notes to suggest the "furtherance" of his conspiracy (again, as the prosecution apparently plans to do with random lines from "Slime Shit"). But this takes away from the non-sequitur, atmospheric quality of his music in which no single line can be interpreted as formative to the song's meaning, if it has one at all. It also does injustice to an innovative artist who never meant for us to try to read his vocalizations as text.

Indeed, I argue that no expert be invited to try to explain the purpose of Young Thug's oeuvre, or to give meaning any individual songs that are played in full by District Attorney Willis. There is precedent of rap scholars being invited to explain rap as a genre. Typically, this has taken the form of showing how a tradition of hyperbole and the construction of an aesthetic persona creates an artificial sense of "realness" when in fact a rapper's storytelling is fictional, or to provide definition for slang terms that might otherwise be misinterpreted by unfamiliar audiences.⁶² Or in converse, these "experts" might include street police who rely on their own experience to define seemingly opaque or innocuous language as insider slang for drugs or other illicit paraphernalia or activity.⁶³ Expertise is an awkward concept here for a few reasons. First, my own sense of the rap professoriate is that their scholarship focuses on an historical understanding of rap as coming from broader Afrocentric storytelling traditions and the lyrics-forward rap of the 1980s and 1990s that was typified by didacticism and intelligibility

61. Cf. Stephen Gruber-Miller, *Man Accused of Throwing Tomatoes at Trump Arrested*, IOWA CITY PRESS-CITIZEN (Jan. 27, 2016), <https://www.press-citizen.com/story/news/crime-and-courts/2016/01/27/man-accused-throwing-tomatoes-trump-arrested/79399992/> [<https://perma.cc/373F-JBDN>] ("University of Iowa police arrested a man accused of throwing tomatoes at Donald Trump at a rally in Iowa City on Tuesday night.")

62. See, e.g., Dennis, *supra* note 10, at 40–41.

63. *At Young Thug's Blockbuster Trial, Rap Lyrics Are Used as Evidence*, *supra* note 59.

in rap delivery.⁶⁴ This style of conscious or political rapping is certainly still important to rap. But it seems strange for our rap professoriate to bring their scholarship to the outré, sonic-forward work of Young Thug, an artist who has very little in common with the generations of lyrical rappers before him.

It is also unnecessary for an expert to bother to explain a Young Thug song because the notion of “meaning” is oblique to the vital purpose of his oeuvre, to simply make *music*. There is nothing here outside of our common knowledge or experience. A juror does not need any additional context to recognize that Young Thug makes *songs*. They are not Borgesian puzzles to be decoded by a lexicographer of the esoteric, but simply the sonic output of a music-forward artist. It is orthogonal to focus on supposed meaning when the only measure of his music is whether it is enjoyable to an audience. In *Hurley*, Justice Souter affirmed that a statement or event can be *expressive* without having to convey meaning.⁶⁵ To impose meaning on a rap or rapper that doesn’t subscribe to the assumptions of such a reductive concept undermines the point of it all.

Again, if the court determines that a Young Thug song must be played, then play it in full. If a member of the prosecution can explain why it works as music, then they have a more facile sense of language and more penetrating musical intelligence than I do. And if they still want to foist an explanation onto the song during closing argument, then they won’t be the first lawyer to impose a narrative logic onto the non-linear, in-flux world that the rest of us live in, and that Young Thug’s dynamic music personifies.⁶⁶ Trials are constructions that provide an artifice of causality to our human lives. That we all know and understand, as it reinforces our sense that punishment is deserved for those who make bad choices that necessarily lead to future bad outcomes.⁶⁷ But there is something very incongruous about the linkage in this causal chain being the slippery rap of Young Thug. To me it’s weird, but I’m just someone who has listened to his music for a near-decade for non-instrumental reasons. Let the jury decide on their own whether the prosecutor office’s stylized brand of logic works for them.

64. See *Hip-hop in Academia*, WIKIPEDIA, https://en.wikipedia.org/wiki/Hip-hop_in_academia [<https://perma.cc/73JU-WSUN>].

65. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 566–81 (1995).

66. Cf. Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 99–101 (Peter Brooks & Paul Gewirtz eds., 1996) (“Life is not a purposive narrative that follows Chekhov’s canon. Events are often simply meaningless, irrelevant to what comes next; events can be out of sequence, random, purely accidental, without purpose. . . . When we import the narrative form of storytelling into our legal system, we confuse fiction with fact and endanger the truth-finding function of the adjudicative process.”).

67. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 16–17 (2015) (summarizing retributive justifications for criminal punishment).