Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?

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ABSTRACT

This Article examines the complex and unsettled state of the true threats doctrine through the lens of the equally complicated, controversial and multi-faceted musical genre of rap. Rap, although generally protected by the First Amendment, is frequently caught in the crosshairs of criminal prosecutions focusing on whether or not it constitutes a true threat of violence. Ultimately, this Article offers suggestions for how to clarify the doctrinal issues, with rap illustrating and supporting those ideas.

INTRODUCTION

In analyzing whether the First Amendment guarantee of free speech[1] safeguards the right to wear a jacket emblazoned with the expletive-imbued message "Fuck the Draft" in a public courthouse, the Supreme Court wrote more than forty years ago in *Cohen v. California* that "one man's vulgarity is another's lyric."[2] Professor Alex Long recently pointed out that "the success and widespread appeal of gangsta rap proves Justice John Marshall Harlan's observation in *Cohen*."[3] But the *Cohen* aphorism also illustrates a more pernicious problem when it comes to the

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1. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. Cohen v. California, 403 U.S. 15, 25 (1971).

3. Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 543 (2007).

intersection of rap lyrics and the First Amendment. In particular, the maxim demonstrates the difficulty of distinguishing between protected, artistic musical expression[4] and unprotected threats of violence.[5]

The relevance of this problem is more than academic or speculative. While it is clear that rap music generally is protected by the First Amendment,[6] rap lyrics sometimes constitute unprotected threats of violence.[7] In November 2013, for instance, two Pennsylvania men—twenty-two-year-old Rashee Beasley and nineteen-year-old Jamal Knox—were convicted of making terroristic threats based on a rap video that named two police officers who had previously arrested Beasley and Knox.[8] Allegheny County Judge Jeffrey Manning concluded the video was "not protected by the First Amendment because it far exceeds what the First Amendment allows."[9]

The video, which was posted on YouTube in 2012, "mentions convicted cop killer Richard Poplawski and advocates killing city officers."[10] The song included, among others, the lyrics "let's kill these cops 'cause they don't do us no good"[11] and "[w]ell, your shift over at 3, and I'm gonna [expletive] up where you sleep."[12] The video included two photographs, one featuring Beasley and Knox, who rapped under the stage names Mayhem Mal and Soulja Beaz, "posing in white shirts and another showing them posing in camouflage inside a convenience store."[13]

This case is not isolated. In 2011, a twenty-six-year-old aspiring rapper named

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4. *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *see also* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as *musical and dramatic works*, fall within the First Amendment guarantee." (emphasis added)).

5. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (observing that the First Amendment permits states to ban true threats of violence).

6. Betts v. McCaughtry, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) ("It is undisputed that rap music constitutes speech protected by the First Amendment."). In addition to the true threats doctrine, another exception to First Amendment protection for rap music would occur if the lyrics were held to be obscene. *See* Luke Records, Inc. v. Navarro, 960 F.2d 134, 138–39 (11th Cir. 1992) (reversing an obscenity conviction arising from the lyrics of "As Nasty As They Wanna Be" by the rap group 2 Live Crew).

7. *See* Jones v. Arkansas, 64 S.W.3d 728, 737 (Ark. 2002) (holding "that because [defendant] Jones's rap lyrics constituted a true threat to Arnold, the rap song is not protected by the First Amendment").

8. Paula Reed Ward, *Pittsburgh Rappers Convicted After Threats Against Police in YouTube Video*, PITTSBURGH POST-GAZETTE (Nov. 21, 2013), http://perma.cc/78QN-24LU.

9. *Id.*

10. Adam Brandolph, *Judge Appoints New Lawyer for East Liberty Man Accused of Making Video Critical of Police*, PITTSBURGH TRIB.-REV. (Sept. 30, 2013), http://perma.cc/4DJ3-UECF. Poplawski was sentenced to death by a twelve-person jury in June 2011 for killing three Pittsburgh police officers in April 2009. Paula Reed Ward, *Poplawksi Gets Death*, PITTSBURGH POST-GAZETTE, June 29, 2011, at A1.

11. Margaret Harding, *Online Rap Video Urges Killing of Pittsburgh Police*, PITTSBURGH TRIBUNE-REV. (Nov. 17, 2012), http://perma.cc/XMF4-9THC.

12. Liz Navratil, *2 Rappers Sought for Video Threats on Police*, PITTSBURGH POST-GAZETTE, Nov. 17, 2012, at B1.

13. *Id.*

Olutosin Oduwole was sentenced to five years in prison for what he maintained "were merely possible lyrics for a rap song."[14] In March 2013, however, an Illinois appellate court reversed Oduwole's conviction for attempting to make a terrorist threat.[15] The appellate court noted that an expert witness, Dr. Charis Kubrin of the University of California–Irvine, testified that the writings in question "constituted the formative stages of a rap song."[16]

Numerous other courts in the past three years, in fact, addressed similar issues arising either at or near the intersection of rap lyrics and true threats,[17] including the Court of Appeals for the Third Circuit in September 2013 in *United States v. Elonis*.[18] As counsel for Anthony Elonis noted to the Supreme Court in the petition for a writ of certiorari, the online postings that landed Elonis in trouble with the law were "frequently in the form of rap lyrics" and "the language was—as with popular rap songs addressing the same themes—sometimes violent."[19]

This spate of cases may seem somewhat surprising because it has been more than twenty years since Ice-T's metal band, Body Count, released "Cop Killer"[20]—a song, described by one federal appellate court as a "virulent rap song,"[21] that

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14. Terry Hillig, *Attorneys Plan Appeal of Student's Sentence*, ST. LOUIS POST-DISPATCH, Dec. 22, 2011, at A4.

15. People v. Oduwole, 985 N.E.2d 316 (Ill. App. Ct. 2013), *appeal denied*, 2013 Ill. LEXIS 796 (Ill. May 29, 2013).

16. *Id.* at 324–25.

17. *See, e.g.*, United States v. Jeffries, 692 F.3d 473, 475–82, *cert. denied*, 134 S. Ct. 59 (2013) (analyzing a song done in a style that was "part country, part rap, sometimes on key, and surely therapeutic"; describing it as "unusual or at least a sign of the times that the vehicle for this threat was a music video" and concluding that the defendant "cannot insulate his menacing speech from proscription by conveying it in a music video"); Baumgartner v. Eppinger, 2013 U.S. Dist. LEXIS 139639, at *15–19 (N.D. Ohio Sept. 27, 2013) (rejecting a challenge to a "conviction and sentence for intimidation and retaliation related to the posting of a modified version of a rap song on the Internet," and noting that "[t]he victims in the underlying case at bar fled the State of Ohio for a period of time after Petitioner posted the altered rap song on the Internet"); TC v. Valley Cent. Sch. Dist., 777 F. Supp. 2d 577, 590–92 (S.D.N.Y. 2011) (discussing a student's claim that his public school violated his First Amendment right of free speech "when he was punished for possessing his rap song," in which he "talks about shooting 'niggas' and makes other racial references," and finding that student's claim survived a motion to dismiss because, in part, there was no indication the student "shared the lyrics, that they were viewable on his desk or otherwise published to [his] classmates or teachers"); In re S.W., 45 A.3d 151 (D.C. 2012) (addressing whether the defendant's modified version of a Lil Wayne song constituted a true threat); Holcomb v. Virginia, 709 S.E.2d 711 (Va. Ct. App. 2011) (considering whether lyrics posted on MySpace by the defendant, who considered himself something of a rap lyricist, constituted a true threat).

18. United States v. Elonis, 730 F.3d 321 (3d Cir. 2013). In *Elonis*, the Third Circuit noted the target of the threats testified that the defendant, Anthony Elonis, "rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of marriage" and that "the lyric form of the statements did not make her take the threats any less seriously". *Id.* at 325.

19. Petition for Writ of Certiorari at 5, Elonis v. United States, 2013 U.S. Briefs 983 (Feb. 14, 2014) (No. 13-983) [hereinafter Elonis Petition]. The Court granted certiorari and oral argument is scheduled for December 1, 2014. Elonis v. United States, 134 S. Ct. 2819 (2014) (grant of certiorari); *see* SUPREME COURT OF THE U.S., OCTOBER TERM 2014, MONTHLY ORAL ARGUMENT CALENDAR FOR THE SESSION BEGINNING DECEMBER 1, 2014 (2014), *available at* http://perma.cc/KDB9-HPAT (oral argument schedule).

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

21. United States v. Jefferson, 974 F.2d 201, 208 (D.C. Cir. 1992). Although "Cop Killer" was recorded by a prominent rap artist (Ice-T) and features a "rap mentality," "it technically is not a rap

caused cultural controversy with lyrics such as "I'm 'bout to bust some shots off / I'm 'bout to dust some cops off" and "fuck the police."[22] Indeed, as Professor Linda McClain wrote back in 1994 regarding the turmoil caused by that song, "The controversy over rap lyrics is part of a larger debate over representations of violence and the alleged link to violent and other anti-social behavior, particularly when an audience of young people and the possibility of imitative conduct are involved."[23] But deciding what constitutes a true threat of violence and in particular when rap lyrics constitute such a threat remains unsettled.

True threats, which represent one of only a handful of categories of speech falling outside the ambit of First Amendment protection,[24] are defined generally by the Supreme Court as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[25] As this Article illustrates, however, the true threats doctrine today is plagued by disagreements among lower courts over nuances that arguably leave rap music caught in its crosshairs.[26]

This Article thus uses rap music as a vehicle for analyzing these problems because, like the true threats doctrine itself, rap music is complex, constituting "an urban, often urbane, melange of politics, rock 'n roll, rhythm and blues, African vocal traditions, and modern technology."[27] In addition, because rap often features a political component—speech at the heart of First Amendment protection[28]—it exacerbates problems in deciphering what constitutes a true threat. Moreover, rap

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song" because it was "recorded and released by Ice-T's speed metal band, Body Count." Jon Christopher Wolfe, Comment, *Sex, Violence and Profanity: Rap Music and the First Amendment*, 44 MERCER L. REV. 667, 668 n.5 (1993).

22. *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 2–4 (1994) (setting forth these and other lyrics to "Cop Killer").

23. Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1063 n.294 (1994).

24. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (identifying "true threats," along with incitement of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography and fraud, as unprotected categories of expression); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) (noting that the First Amendment does "not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with real children").

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

26. *See, e.g.*, United States v. Elonis, 730 F.3d 321, 323 (3d Cir. 2013) (finding that a jury is not required to find that "the defendant subjectively intended his statements to be understood as threats" in order to find that the statements were a true threat, and noting the disagreement on this question between the Court of Appeals for the Ninth Circuit and a majority of the federal appellate circuits); United States v. Turner, 720 F.3d 411, 420 n.4 (2d Cir. 2013) (observing that since the Supreme Court's ruling in the true threats case of *Virginia v. Black*, 538 U.S. 343 (2003), "some disagreement has arisen among our sister circuits regarding whether *Black* altered or overruled the traditional objective test for true threats by requiring that the speaker subjectively intend to intimidate the recipient of the threat," and including a dissenting opinion that concluded that the speech in question was not a true threat, as the majority found it, but rather constituted an incitement of violence).

27. Jeffrey B. Kahan, *Bach, Beethoven and the (Home)Boys: Censoring Violent Rap Music in America*, 66 S. CAL. L. REV. 2583, 2583 (1993).

28. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010) (opining that political speech "is central to the meaning and purpose of the First Amendment").

frequently embraces hyperbole,[29] and the Supreme Court made it clear forty-five years ago that political hyperbole, standing alone, does not amount to a true threat.[30] Furthermore, although some forms of rap music may contain violently themed lyrics, the Supreme Court was unequivocal in *Brown v. Entertainment Merchants Ass'n* that there is no exception to First Amendment protection for violence-based entertainment content.[31]

All of these complexities are arguably compounded because, as Jason Powell notes, rap is "not an area of expertise for the average judiciary. In spite of the fact that hip-hop is now a well-recognized and accepted genus of music, it is mostly a foreign language to courts, and is treated accordingly."[32]

This is particularly troubling in true threats cases because the central factual question in them is "the meaning that is properly assigned to a speaker's communication. The assignment of meaning is typically bound up with its cultural context, which frequently extends far beyond the speaker's literal words."[33] As indicated by the oral argument before the Supreme Court in *Air Wisconsin Airlines Corp. v. Hoeper*, sorting out the meaning of words is never easy.[34] Ultimately, then, "[s]eparating graphic language and emotional exaggeration from genuine threats is an old First Amendment problem."[35]

The issues, then, that this Article tackles are the problems in determining whether or not any particular instance of rap music constitutes a true threat of violence. These are very different questions from another important issue—one already addressed elsewhere—of whether rap lyrics may be admitted as evidence to prove the commission of another crime[36] or when rap music or rappers allegedly

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29. *See* Jennifer C. Lena, *Social Context and Musical Content of Rap Music, 1979–1995*, 85 SOC. FORCES 479, 489 (2006) (noting "the surface-level tension that *exaggerated violence* in hardcore rap provokes between reality and art" (emphasis added)).

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

31. Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2735 (2011) (striking down a California statute restricting minors' ability to purchase and rent violent video games, emphasizing that the Court has "made clear that violence is not part of the obscenity that the Constitution permits to be regulated" and noting that "speech about violence is not obscene").

32. Jason E. Powell, Note, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 480 (2009).

33. Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1359 (2006).

34. *See* Transcript of Oral Argument at 12–14, 33–34, Air Wis. Airlines Corp. v. Hoeper, 134 S. Ct. 852 (2014) (No. 12-315), *available at* http://perma.cc/Z2T2-AR8P (debating the meaning of words, including what constitutes an exaggeration and how different statements might have different effects on listeners); *see also* David G. Savage, *Justices Hear 'Unstable Pilot' Dispute*, L.A. TIMES, Dec. 10, 2013, at A9 (reporting on the *Air Wisconsin* oral argument, and noting Justice Sotomayor's query to attorney Jonathan Cohn, "Isn't there a difference between saying someone's angry and someone's mentally ill?," and to which Cohn responded by ""defend[ing] the manager's choice of words, saying many people might use terms like 'he lost it' or he 'went off the deep end' to express the same concern").

35. Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL OF RTS. J. 551, 577 (2002).

36. *See* Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 (2007) (examining the admission of defendant-authored rap lyrics as evidence of crimes); Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, N.Y. TIMES, Jan. 14, 2014, at A27 (noting that "[r]ap lyrics and videos are turning up as evidence in courtrooms across

incite violence.[37]

Part I of this Article provides a primer on the true threats doctrine, including both its uncertainties and unsettled aspects, as well as its ostensible distinction from another category of unprotected expression that might be considered its close legal cousin—incitement to violence. Moving in interdisciplinary fashion to literature from outside the law, Part II sets forth an overview of the historical, political, cultural and racial aspects of rap music that may, perhaps subtly and even imperceptibly, initially tilt the scales of justice against defendants charged with making true threats in the form of rap lyrics. Part III then bridges true threats and rap music, as it uses hypothetical situations to explore and analyze problems with the true threats doctrine. Finally, the Article concludes in Part IV by offering several suggestions for how the Supreme Court could help to clarify these doctrinal issues, particularly as they affect rap.

I. THE TRUE THREATS DOCTRINE: REALITIES, UNCERTAINTIES AND CIRCUIT SPLITS

This Part has two sections. Initially, Section A provides an overview of the true threats doctrine, including the Supreme Court's development of the doctrine through two major cases. Section B then highlights the current splits of authority among lower courts regarding what precisely a true threat entails, as well the problem that arises in distinguishing between true threats and incitement to unlawful conduct.

A. SUPREME COURT RULINGS FROM *WATTS* THROUGH *BLACK*

Among the few so-called "categorical carve-outs" of expression that are not protected by the First Amendment is the niche known as true threats.[38] Indeed, as one federal appellate court recently observed, "[t]hreats generally are not entitled to First Amendment protection."[39] True threats are not safeguarded by the Constitution because, as a matter of public policy, it is desirable:

> (1) to protect people from the fear of violence; (2) to prevent the disruption that this fear engenders; (3) to incarcerate people who have identified themselves as likely to carry out a threatened crime before they have the opportunity to perpetrate the crime; and (4) to prevent people from being coerced into acting against their will.[40]

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the country with alarming regularity," and asserting that in 2013, "the American Civil Liberties Union of New Jersey found that in 18 cases in which various courts considered the admissibility of rap as evidence, the lyrics were allowed nearly 80 percent of the time").

37. For instance, California-based rapper Tyler, the Creator, was arrested in March 2014 for allegedly inciting a riot at the annual South by Southwest festival in Austin, Texas. *Rapper Charged with Inciting Riot at SXSW*, WASH. POST (Mar. 15, 2014), http://perma.cc/69F7-AUTU.

38. *See* Carey v. Wolnitzek, 614 F.3d 189, 199 (6th Cir. 2010).

39. United States v. Keyser, 704 F.3d 631, 638 (9th Cir. 2012).

40. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 290–91 (2001).

Thus, all state and federal statutes that purport to regulate threats must be measured against and comply with the Supreme Court's true threats jurisprudence.[41] As one federal appellate court wrote in 2013, the nation's high court "taught us to interpret threat statutes in light of the First Amendment."[42]

The Supreme Court ruled forty-five years ago in *Watts v. United States* that "a threat must be distinguished from what is constitutionally protected speech."[43] The case pivoted on eighteen-year-old Robert Watts' statement during a rally on the Washington Monument grounds in August 1966: "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."[44] Watts was convicted, based on this statement, of threatening President Lyndon Baines Johnson under a federal statute.[45] The Supreme Court reversed, concluding that Watts' "only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.'"[46]

Watts has been criticized by many First Amendment scholars, including Professor Frederick Schauer, who asserts that the case "provides virtually no information on just what a threat *is* other than that what Watts said was not one."[47] Although the *Watts* Court, indeed, failed to provide a concise definition of true threats,[48] the case made it clear that "political hyperbole" of the kind used by Robert Watts does not rise to the level of a true threat—especially when the words, which must be "[t]aken in context," are "expressly conditional" upon future events transpiring, and when the reaction of the audience is taken into account.[49] *Watts* thus "lays the foundation on which the Court builds its understanding of how to distinguish protected speech or expressive conduct from unprotected threats."[50] Specifically, "content and context . . . were central to the Court's analysis."[51] Other courts today agree that content and context are key factors in sorting out true threats from protected expression.[52] Along with the audience's reaction, the

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41. *See* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 937 (2002) ("Under the majority approach, courts treat the First Amendment as intermingled with the statutory construction.").

42. United States v. Stock, 728 F.3d 287, 294 (3d Cir. 2013).

43. 394 U.S. 705, 707 (1969).

44. *Id.* at 706.

45. *Id.* at 705 & n.* (citing 18 U.S.C. § 871(a) (1964)).

46. *Watts*, 394 U.S. at 708.

47. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 211 (2003).

48. Lauren Gilbert, *Mocking George: Political Satire as "True Threat" in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843, 868 (2004) ("Despite *Watt*'s speech-protective language, the Supreme Court[] fail[ed] to articulate a clear standard in that case . . . .").

49. *Id.*; *see also* Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. C.R.-C.L. L. REV. 335, 340 (2004) (asserting that, in *Watts*, "[t]he context of the words used, their conditional nature, and the reaction of the listeners all suggested to the Court that the defendant meant only to be critical of the government, rather than actually to threaten the President's life").

50. Blakey & Murray, *supra* note 41, at 932.

51. Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 559 (2004).

52. *See, e.g.*, Citizen Publ'g Co. v. Miller, 115 P.3d 107, 114–15 (Ariz. 2005) ("[T]he presence of

variables of content and context thus are sometimes described as "the three *Watts* factors."[53]

After *Watts*, the Court largely "has left the development of true threat analysis to the circuit and state courts."[54] Indeed, as Professor Mark Strasser observed in 2011, the Court has provided "little guidance with respect to what constitutes a threat that is outside First Amendment protection. State and lower federal courts have been trying to make sense of this area of the law, sometimes seeking to refine what the Court has said and sometimes striking out on their own."[55] Professor Lauren Gilbert concurs, writing that:

> [T]he Supreme Court's failure to articulate a clear standard in that case or subsequent cases for what constitutes a true threat has contributed to the doctrinal confusion that has persisted for more than thirty years. Subsequent criminal cases in the various circuits involving threats to the President and other government officials have departed from *Watts*, often upholding jury verdicts of guilty despite evidence that the statements were not intended as threats.[56]

Indeed, this lack of high court leadership is one of the major problems with the refinement of the true threats doctrine.

Perhaps the Supreme Court's most significant post-*Watts* effort to refine the true threats doctrine came in its 2003 opinion in *Virginia v. Black*.[57] In that case, the Court considered the constitutionality of a state statute that banned cross burning done with an intent to intimidate.[58] Writing a key portion of the Court's opinion in which four other justices joined, Justice O'Connor opined that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[59] She elaborated that a "speaker need not actually intend to carry out the threat" in order for the speech to fall outside of the scope of First Amendment protection.[60] O'Connor added that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[61]

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a true threat can be determined only by looking at the challenged statement in *context*. . . . Given both *the content and the context* of the statement at issue here, we conclude that it is not a constitutionally proscribable true threat." (emphasis added)).

53. *See, e.g.*, Nina Petraro, Note, *Harmful Speech and True Threats:* Virginia v. Black *and the First Amendment in an Age of Terrorism*, 20 ST. JOHN'S J.L. COMMENT. 531, 546 (2006).

54. Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 680.

55. Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 368 (2011).

56. Gilbert, *supra* note 48, at 868.

57. Virginia v. Black, 538 U.S. 343 (2003).

58. *Id.* at 347–48.

59. *Id.* at 359.

60. *Id.* at 360.

61. *Id.*

B. THE POST-*BLACK* PROBLEMS WITH TRUE THREATS

Black, unfortunately, did not resolve the issue of what constitutes a true threat. There is a circuit split on the question of intent in the aftermath of *Virginia v. Black*, specifically on the difference between objective intent and subjective intent.[62]

In other words, does it matter under the true threats doctrine what the speaker-defendant actually (subjectively) intended the message to mean or, conversely, does it only matter that the speaker-defendant intended to transmit the message and that the interpretation or meaning of the message is measured by some objective, reasonable-person approach? A subjective intent test "would require specific intent by the speaker as to the audience's interpretation."[63] Under an objective test, the question generally is whether "a reasonable person would perceive the threat as real."[64]

Does *Black*, then, require "that a defendant subjectively intend to threaten,"[65] as the defendant in *United States v. Elonis* asserted? In that case, the defendant argued that *Black*'s "definition of true threats means that the speaker must *both* intend to communicate *and* intend for the language to threaten the victim."[66] Or does *Black* only require, under an objective standard, consideration of "whether a reasonable observer would perceive the threat as real"?[67] Put slightly differently, does *Black* require that "a reasonable recipient would have interpreted the defendant's communication as a serious threat to injure"?[68] This "reasonable-person" standard:

> [W]innows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made: A juror cannot permissibly ignore contextual cues in deciding whether a "reasonable person" would perceive the charged conduct "as a serious expression of an intention to inflict bodily harm."[69]

And among courts that have adopted an objective intent requirement, there is even a disagreement as to precisely which perspective should be taken when viewing the message. Should it be that of a reasonable sender, a reasonable recipient/hearer or simply an objectively reasonable person?[70] In the Second Circuit, for instance, the test is "whether an ordinary, reasonable recipient who is

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62. *See* United States v. Clemens, 2013 U.S. App. LEXIS 24488, at *21–29 (1st Cir. Dec. 10, 2013).

63. Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 SW. L. REV. 43, 48 (2011).

64. United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012), *cert. denied*, 134 S. Ct. 59 (2013).

65. United States v. Elonis, 730 F.3d 321, 327 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014).

66. *Id.* at 329 (emphasis added).

67. *Jeffries*, 692 F.3d at 479.

68. United States v. Niklas, 713 F.3d 435, 440 (8th Cir. 2013).

69. *Jeffries*, 692 F.3d at 480 (quoting United States v. Alkhabaz, 105 F.3d 1492, 1495 (6th Cir. 1997)).

70. United States v. White, 670 F.3d 498, 510 (4th Cir. 2012).

familiar with the context of the [communication] would interpret it as a threat of injury."[71] While the vast majority of federal appellate courts have held that the true threats doctrine merely requires some form of an objective intent standard,[72] the Ninth Circuit has, post-*Black*, "analyzed speech under both an objective and a subjective standard."[73] As the Ninth Circuit recently opined, "in order to be subject to criminal liability for a threat, the speaker must *subjectively intend* to threaten."[74] In the Ninth Circuit, after *Black*, it is "not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death."[75] Instead, as the Ninth Circuit reasoned:

> Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech. The difference is that with respect to some threat statutes, we require that the purported threat meet an objective standard *in addition*, and for some we do not.[76]

Importantly, the Ninth Circuit is not alone in subscribing to the belief that a subjective intent on the part of the speaker is a requirement of the true threat doctrine. The highest appellate courts in at least three states—Massachusetts,[77] Rhode Island[78] and Vermont[79]—fall in line with the Ninth Circuit's view.

Furthermore, there is even a state-versus-federal split of authority in some regions of the country, under which the highest appellate state court requires one

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71. United States v. Turner 720 F.3d 411, 420 (2d Cir. 2013) (citing United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006)).

72. *See* Mason, *supra* note 63, at 61 ("[A]ll circuits but the D.C. Circuit have ruled on the 'true threat' test, and all, with the lone exception now of the *Bagdasarian* [Ninth Circuit] court, continue to use an objective, reasonable-person test. Two circuits—the Sixth and the Seventh—have noted in dicta the possible effect of *Black* on the objective test, but both found reasons not to decide the issue." (citations omitted)); *see also* Charlotte Taylor, *Free Expression and Expressness*, 33 N.Y.U. REV. L. & SOC. CHANGE 375, 417 (2009) ("[M]ost circuits ask whether a reasonable speaker or reasonable listener would have understood a given speech act to be a threat.").

73. Fogel v. Collins, 531 F.3d 824, 831 (9th Cir. 2007).

74. United States v. Keyser, 704 F.3d 631, 638 (9th Cir. 2012) (emphasis added).

75. United States v. Bagdasarian, 652 F.3d 1113, 1116 (9th Cir. 2011).

76. *Id.* at 1117 (emphasis added).

77. O'Brien v. Borowski, 961 N.E.2d 547 (Mass. 2012). The Supreme Judicial Court of Massachusetts opined in *O'Brien* that:

> [T]he "true threat" doctrine applies not only to direct threats of imminent physical harm, but to words or actions that—taking into account the context in which they arise—cause the victim to fear such harm now or in the future and *evince intent on the part of the speaker or actor to cause such fear.*

Id. at 556 (emphasis added). In considering the constitutionality of a state harassment statute, the court added that "[t]he intent requirements in the act plainly satisfy the 'true threat' requirement that the speaker *subjectively intend* to communicate a threat." *Id.* at 557 (emphasis added).

78. State v. Grayhurst, 852 A.2d 491, 515 (R.I. 2004). ("[Defendant's] statements *clearly evince defendant's subjective intent* both to harm Ms. Grayhurst and to compel her to pay him money or reconcile against her will. As such, they constitute genuine threats . . . and are unprotected by the First Amendment." (emphasis added)).

79. Vermont v. Miles, 15 A.3d 596 (Vt. 2011). The Supreme Court of Vermont wrote in *Miles* that without a finding that the defendant's "statement represented *an actual intent* to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat." *Id.* at 599 (emphasis added).

standard of intent, while the federal appellate circuit that geographically covers that same state requires a different standard of intent. For instance, in 2011 the Supreme Court of California openly disagreed with the Ninth Circuit's conclusion that subjective intent must exist for a statement to constitute a true threat.[80] Similarly, in another post-*Black* decision, the Supreme Court of Washington wrote that, "We have adopted an objective standard for determining what constitutes a true threat."[81] Both California and Washington fall within the geographic confines of the Ninth Circuit.[82]

While arguments against imposing a subjective intent requirement hinge on the additional barriers to successful prosecution it might pose, a 2013 article in the *Harvard Law Review* asserts that:

> The means of demonstrating subjective intent, chiefly through circumstantial evidence, closely track the mens rea element required in most criminal statutes, and such evidence is likely to overlap significantly with the kind submitted under an objective standard. Prosecutors are experienced in proving states of mind, and the subjective standard would require only that threat statutes incorporate a mental state analysis akin to those required of criminal prosecutions.[83]

Beyond the question of intent, another major problem today is the possible conflation of—or confusing overlap between—the true threats doctrine and the Supreme Court's incitement jurisprudence under *Brandenburg v. Ohio*.[84] In *Brandenburg*, which was decided the same year as *Watts* and which "brought into power the modern-day incitement test,"[85] the Court held that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[86]

Professor Susan Gilles recently wrote that this three-part test, which requires intent to incite, a likelihood of inciting and the temporal imminence of incitement,

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80. People v. Lowery, 257 P.3d 72, 77 n.1 (Cal. 2011) ("We are not persuaded by the quite recent decision in *United States v. Bagdasarian* . . . in which the United States Court of Appeals for the Ninth Circuit concluded that in *Virginia v. Black* . . . the high court held that every statute criminally punishing threats must include as an element of proof the defendant's subjective intent to make a threat." (internal citations omitted)).

81. State v. Johnston, 127 P.3d 707, 710 (Wash. 2006).

82. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, GEOGRAPHIC BOUNDARIES OF THE UNITED STATES COURT OF APPEALS AND UNITED STATES DISTRICT COURTS (2014), *available at* http://perma.cc/R7Z2-7GSX.

83. *First Amendment – True Threats – Sixth Circuit Holds that Subjective Intent Is Not Required by the First Amendment when Prosecuting Criminal Threats,* United States v. Jeffries, 126 HARV. L. REV. 1138, 1145 (2013).

84. Brandenburg v. Ohio, 395 U.S. 444 (1969).

85. John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 438 (2002).

86. *Brandenburg*, 395 U.S. at 447.

is "remarkably protective of speech."[87] Unlike the ambiguity regarding whether or not the true threats doctrine requires a subjective intent, *Brandenburg* entails a "requirement to prove subjective intent and not just tendency."[88] It thus would seem odd that while a subjective intent for others to cause violence clearly is required under incitement jurisprudence,[89] no such subjective intent is required under the true threats doctrine.

The doctrinal confusion stems from the fact that a true threat may be considered to be a "type of violence advocacy,"[90] and some argue that courts should "broaden the true threat standard to allow for penalizing or regulating incitement."[91] As Professor Strasser recently wrote:

> [T]he Court has employed true threat jurisprudence in a way that practically extends an invitation to lower courts to circumvent *Brandenburg* protections. Until the Court addresses what to do when expression might reasonably be described *both* as constituting incitement of illegal activity and as constituting an actual threat of serious harm, the jurisprudence in this area will continue to be in disarray.[92]

Professor Strasser adds that the "Court has never faced the difficulties posed for First Amendment jurisprudence by the possibility that particular expression might reasonably be construed as (1) advocacy, (2) a true threat, or (3) both."[93] Strasser contends that "the Court has pretended that there was only one characterization that might reasonably be offered and then has analyzed whether the expression was protected in light of the chosen characterization."[94] Ultimately, as another article notes, "the line between 'threat' cases under *Watts* and 'incitement' cases under *Brandenburg* is somewhat blurred."[95]

Part of the problem relates to who, under the true threats doctrine, should be considered as possible perpetrators that ostensibly will commit the underlying violence. Can a true threat exist when the threatened violence will occur *not* at the hands of the communicator/speaker, but will be carried out by someone either referenced in the communicator's message or who might simply read it and commit the act? In other words, to constitute a true threat, must the person who

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87. Susan M. Gilles, Brandenburg v. State of Ohio*: An "Accidental," "Too Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517, 522 (2010).

88. Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on* Virginia v. Black, 54 CATH. U. L. REV. 1, 32 n.207 (2004).

89. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1636 (2013) (noting that incitement "is speech that *intends* and is likely to produce imminent lawless action" (emphasis added)).

90. Emily Buchanan Buckles, *"Context Matters": The Free Speech Legacy of Sandra Day O'Connor*, 16 TEX. WESLEYAN L. REV. 323, 348 (2010).

91. Kenneth Lasson, *Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty*, 27 WHITTIER L. REV. 3, 62 (2005).

92. Mark Strasser, *Mill, Holmes, Brandeis, and a True Threat to* Brandenburg, 26 BYU J. PUB. L. 37, 63 (2011) (emphasis added).

93. *Id.* at 72.

94. *Id.*

95. Ashley Packard, *Threats or Theater: Does* Planned Parenthood v. American Coalition of Life Activists *Signify that Tests for "True Threats" Need to Change?*, 5 COMM. L. & POL'Y 235, 248 (2000).

communicates the alleged threat be the same person who will *also* purportedly carry it out—what might be called a *first-person, threat-of-violence* scenario—or can the person who will carry it out be someone else—a *third-person, threat-of-violence* scenario? Is the latter scenario—the third-person, threat-of-violence situation—more akin to an incitement scenario than a true threat?

This issue recently arose in the Court of Appeals for the Second Circuit. In her June 2013 dissent in *United States v. Turner*, Circuit Judge Rosemary Pooler wrote that "in determining whether speech is a purported threat, we must make sure that the speech is not instead advocacy protected by *Brandenburg*."[96] She reasoned that the true threats doctrine requires that the message recipient be fearful of the execution of the threat *by the speaker*, while the incitement/advocacy doctrine under *Brandenburg* entails the exhortation of *others* to commit violence.[97] The problem, Pooler observed, is that "[s]peech may be ambiguous as to *who* will cause injury and still constitute a threat."[98] A single statement, she wrote, could be both a true threat and an incitement because "[s]peech may threaten violence that the speaker controls and exhort others to act, directing the speech to both the victim and third parties."[99] In *Turner*, Judge Pooler concluded that the defendant's "communications were advocacy and not a threat," and thus she dissented from the majority, which found the messages were a threat.[100]

The two-judge majority in *Turner*, however, seemed unfazed by the distinction between who might carry out the violence—the speaker or a third party—in determining that the defendant's communications were true threats.[101] The majority, in rejecting Judge Pooler's view and that of the defendant, opined that:

> This argument . . . relies overmuch on the literal denotation and syntax of Turner's statements, refusing to acknowledge that threats—which may be prohibited, consistent with the First Amendment—need be neither explicit nor conveyed with the grammatical precision of an Oxford don. Turner's conduct was reasonably found by the jury to constitute a threat, unprotected by the First Amendment; it need not also constitute incitement to imminent lawless action to be properly proscribed.[102]

In summary, true threats jurisprudence today is plagued by splits of authority and ambiguity. It is into this haziness that rap music sometimes falls when lyrics allude to or directly reference violence. But rap itself is an exceedingly complex genre, and the next Part illustrates this by providing context for meaning and understanding that courts and jurors, ideally, should consider when sorting out whether a specific instance of rap music constitutes an unprotected threat.[103]

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96. United States v. Turner, 720 F.3d 411, 431 (2d Cir. 2013) (Pooler, J., dissenting).
97. *Id.* at 431–32.
98. *Id.* at 432.
99. *Id.* at 434.
100. *Id.*
101. *Id.* at 424–25 (majority opinion).
102. *Id.* at 425.
103. If there is "no question that a defendant's speech is protected by the First Amendment," then a court may dismiss a threat charge as a matter of law. United States v. Viefhaus, 168 F.3d 392, 397 (10th Cir. 1999). However, it is generally left to a jury, rather than a judge, to determine if the speech in

II. PUTTING RAP INTO CONTEXT: A PRIMER ON THE COMPLICATED NATURE OF A MUSICAL GENRE

> *"Shit, I'm just a crazy sociopath that gets off playin' you stupid fucks like a fiddle. And if y'all didn't hear, I'm gonna be famous cause I'm just an aspiring rapper who likes the attention who happens to be under investigation for terrorism cause y'all think I'm ready to turn the Valley into Fallujah."*[104]

That was part of a Facebook post authored by Anthony Elonis and "styled as a rap song" about a visit he received from two FBI agents investigating previous violence-themed posts.[105] Another piece of the same post, which also was penned in rap format, comprised the basis of Count Five of a criminal indictment against Elonis[106] for violating a federal statute prohibiting threats of violence.[107] A jury convicted him on Count Five, and in September 2013, the Court of Appeals for the Third Circuit affirmed that decision.[108] In his February 2014 petition for a writ of certiorari, Elonis asserted that the Facebook posts leading to his arrest were merely fictitious and therapeutic raps, sometimes modeled on those of Eminem.[109]

Does or should it matter that Elonis' posts ostensibly took the form of rap lyrics? It arguably should matter considerably because, as noted earlier, context is a key

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question constitutes a true threat or whether it is protected political expression. United States v. Davila, 461 F.3d 298, 304 (2006); United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990); United States v. Leaverton, 835 F.2d 254, 257 (10th Cir. 1987).

104. Elonis Petition, *supra* note 19, at 12 (emphasis added).

105. *See id.*

106. The other part of the posting, which came immediately before the italicized quotation that starts Part II of this Article, provides:

> You know your shit's ridiculous
>
> when you have the FBI knockin' at yo' door
>
> Little Agent Lady stood so close
>
> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat
>
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?
>
> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!]

United States v. Elonis, 730 F.3d 321, 326 (3d Cir. 2013).

107. *See* 18 U.S.C. § 875(c) (2012) ("Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.").

108. *Elonis*, 730 F.3d at 327, 335.

109. Elonis Petition, *supra* note 19, at 5.

factor in determining whether speech constitutes a true threat under *Watts*.[110] This Part thus explores, in interdisciplinary fashion, the contextual factors and elements that often comprise rap music. These factors might help jurors to better understand and decode whether any given message that purports to be First Amendment-shielded rap music rises to the level of an unprotected threat.

For instance, Anthony Elonis proclaims in the lyrics quoted above that he is "*just a crazy sociopath* that gets off playin' you stupid fucks."[111] Should a reasonable person take it seriously that Elonis is a crazy sociopath? Probably not. Charis Kubrin, an associate professor of criminology, law and society at the University of California–Irvine, explains that rappers often use lyrics to build identities and reputations—or simply "reps," in the parlance of rap.[112] "At the top of the hierarchy is the 'crazy' or 'wild' social identity," Kubrin writes.[113] She elucidates:

> As a way to display a certain predisposition to violence, rappers often characterize themselves and others as "mentally unstable" and therefore extremely dangerous. Consider Snoop Dogg and DMX, both of whom had murder charges brought against them in the 1990s: "Here's a little something about a nigga like me / I never should have been let out the penitentiary / Snoop Dogg would like to say / That I'm a *crazy* motherfucker when I'm playing with my AK [AK-47 assault rifle]."[114]

In other words, a reasonable person who understands the nature of rap music arguably would suspect, if not outright know, that Elonis was merely posing to develop what Kubrin refers to as "the 'crazy' persona."[115] Indeed, much of rap is about projecting images—not necessarily realities—of rappers "as assassins, hustlers, gangstas, madmen, mercenary soldiers, killas, thugs, and outlaws."[116] A 2005 law journal article adds that rap artists often claim "that their 'rap persona' is merely a fictional identity built from a hyperbolic extension of their own personal emotions and experiences. In essence, they claim to be role playing."[117] Another article wryly notes that "in many instances the posturing of rappers amounts simply to marketing ploys designed to provide a safe fantasy for suburbanites."[118]

Jurors need to understand such distinctions between fictional images and real-world realities when sorting out what really is a true threat of violence. As the Supreme Court intimated in *Ashcroft v. Free Speech Coalition*, when striking down a federal statute banning fictional images of child pornography, there is a clear

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110. *See supra* notes 49–53 and accompanying text.

111. *See supra* note 104 and accompanying text (emphasis added).

112. Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 370 (2005) [hereinafter Kubrin, *Gangstas, Thugs, and Hustlas*].

113. *Id.*

114. *Id.* (emphasis added).

115. *Id.*

116. *Id.* at 369.

117. Sean-Patrick Wilson, Comment, *Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 357 (2005).

118. Long, *supra* note 3, at 533.

difference between protected fantasy and unprotected reality.[119]

With the *Elonis* sociopath example in mind, Section A immediately below provides a brief primer on the nomenclature of rap, while Section B that follows sets forth an overview of the many elements and variables that comprise rap music.

A. UNPACKING THE TERMINOLOGY: HIP HOP, RAP & GANGSTA RAP

Rap music "is the verbal and musical domain of hip-hop, an expressive oral form through which personal and social perspectives are amplified."[120] As an early scholarly article on the topic explains, rap music, which dates back to the late 1970s,[121] "comes from the youth subculture known as hip hop, a movement that also encompasses breakdancing and more recent dances, graffiti art, fashion, and figures of speech."[122] Rap thus is merely one component or facet of the larger culture of hip hop,[123] which also encompasses "a style of dress, dialect and language, [a] way of looking at the world, and an aesthetic that reflects the sensibilities of a large population of youth born between 1965 and 1984."[124] Hip hop today is "a United States phenomenon and a global cultural and entertainment movement."[125] And while it started in the South Bronx in the early 1970s, now "mainstream hip-hop has evolved into a largely commercial enterprise targeting a young and white buying audience."[126]

Although rap today earns "increasing social acceptance and cultural legitimization," it is firmly rooted in cultural controversy.[127] Like jazz and rock before it, rap "has been critically reviewed as a corrosive influence on young and impressionable listeners."[128] Thus, when any example of rap music today is brought into the legal system because it allegedly is a threat, both it and its author arguably face an uphill battle and start with a negative bias against them because

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119. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250–51 (2002) (distinguishing actual and virtual child pornography).

120. Murray Forman, *Conscious Hip-Hop, Change, and the Obama Era*, 54 AM. STUD. J. 3, 3 (2010) [hereinafter Forman, *Conscious Hip-Hop*], *available at* http://perma.cc/K6ZJ-N65B.

121. *See* Jeanita W. Richardson & Kim A. Scott, *Rap Music and Its Violent Progeny: America's Culture of Violence in Context*, 71 J. NEGRO EDUC. 175, 182 (2002) ("The mass appeal of rap music is generally considered to have begun in 1979. At the time the Sugar Hill Gang's 'Rappers Delight' reached number 36 on the Billboard charts and sold two million copies.").

122. Elizabeth A. Wheeler, *"Most of My Heroes Don't Appear on No Stamps": The Dialogics of Rap Music*, 11 BLACK MUSIC RES. J. 193, 194 (1991).

123. *See* Christina M. Baker et al., *Digital Expression Among Urban, Low-Income African American Adolescents*, 42 J. BLACK STUD. 530, 533 (2011) (asserting that rap "reflects a larger hip-hop culture").

124. Derrick P. Alridge & James B. Stewart, *Introduction: Hip Hop in History: Past, Present, and Future*, 90 J. AFR. AM. HIST. 190, 190 (2005).

125. Andre Douglas Pond Cummings, *A Furious Kinship: Critical Race Theory and the Hip-Hop Nation*, 48 U. LOUISVILLE L. REV. 499, 512 (2010).

126. Margaret Hunter, *Shake It, Baby, Shake It: Consumption and the New Gender Relation in Hip-Hop*, 54 SOCIOLOGICAL PERSP. 15, 16 (2011).

127. *See* Julian Tanner et al., *Listening to Rap: Cultures of Crime, Cultures of Resistance*, 88 SOC. FORCES 693, 693 (2009).

128. *Id.*

rap, as a genre, carries with it the heavy baggage of negative controversy. Indeed, the mainstream press has frequently connected both violence and crime to rap.[129] Adding to that stigmatizing load is the fact that criminality has "become sedimented in the popular lexicon as the key or trademark term for the subgenre" of rap known as gangsta rap.[130]

The general category of rap music, in fact, has several subgenres, only one of which is gangsta rap.[131] Sparked by the 1988 N.W.A. songs "Gangsta Gangsta" and "Fuck the Police," gangsta rap prominently emerged in the late 1980s and early 1990s.[132] During this time, gangsta rap gained "notoriety, in part, due to its misogynous themes, encouragement of hypermaterialism, violent lyrics, and the behavior of some of its artists."[133] Its roots are "traced to early depictions of the hustler lifestyle and blaxploitation movies of the 1970s, which glorified blacks as criminals, pimps, pushers, prostitutes, and gangsters."[134] Some attribute the increased focus on the kind of violently explicit lyrics that pervade gangsta rap to the commercial forces of big record labels.[135] That is, certain elements within gangsta rap "have come to spread and define rap music as a whole" due to the commercial success of the subgenre.[136]

In summary, gangsta rap is a negatively stigmatized subgenre of a larger category of music called rap. Rap, in turn, is only one aspect of a much bigger cultural movement and lifestyle known as hip-hop.[137]

B. THE COMPLEXITY OF MEANING AND MULTIPLE COMPONENTS OF RAP

In an early article examining rap, Richard Shusterman succinctly captures the

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129. Scott Appelrouth & Crystal Kelly, *Rap, Race and the (Re)Production of Boundaries*, 56 SOC. PERSP. 301, 310 (2013).

130. Murray Forman, *'Represent': Race, Space and Place in Rap Music*, 19 POPULAR MUSIC 65, 78 (2000).

131. *See* Justin A. Williams, *The Construction of Jazz Rap as High Art in Hip-Hop Music*, 27 J. MUSICOLOGY 435, 436 (2010) (noting that other subgenres, in addition to gangsta rap, include jazz rap and pop rap).

132. *See* Jennifer C. Lena, *Social Context and Musical Content of Rap Music, 1979–1995*, 85 SOC. FORCES 479, 489 (2006) (noting a "large-scale shift toward hardcore lyrics after 1988"); *see also* David A. Canton, *The Political, Economic, Social, and Cultural Tensions in Gangsta Rap*, 34 REVIEWS AM. HIST. 244, 244–45 (2006).

133. Richardson & Scott, *supra* note 121, at 177.

134. Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 112, at 360.

135. As one scholarly article puts it:

> The explosion of sexually and violently explicit lyrics, and the sub-genre such lyrics create (i.e., "gangsta" rap), occurred soon after the major labels got into the rap business. The major labels created an environment in which a rapper's main focus became money, not music, and what is the best way for a rapper to make money in a society in which sex and violence sell? To rap about sex and violence.

Mtume ya Salaam, *The Aesthetics of Rap*, 29 AFR. AM. REV. 303, 304 (1995).

136. Guillermo Rebollo-Gil & Amanda Moras, *Black Women and Black Men in Hip Hop Music: Misogyny, Violence and the Negotiation of (White-Owned) Space*, 45 J. POPULAR CULTURE 118, 125 (2012).

137. *See* Richardson & Scott, *supra* note 121, at 177 ("Rap music is not synonymous with hip-hop but rather a subset of the hip-hop culture." (citation omitted)).

multifaceted and intricate nature of the meaning of rap music and, in turn, why it is exceedingly difficult to sort out whether any specific instance of it constitutes a true threat.[138] Specifically, Shusterman asserts that examining rap lyrics "will reveal in many rap songs not only the cleverly potent vernacular expression of keen insights but also forms of linguistic subtlety and multiple levels of meaning whose polysemic complexity, ambiguity, and intertextuality can sometimes rival that of high art's so-called 'open work.'"[139] Adding to the problem of deciphering meaning is the reality, as Professor Kubrin notes, that "listeners interpret music in multiple ways" and "rap and its lyrics are appropriated and embedded into specific individual, familial, and community fields of reference."[140]

Rap music is freighted with multiple components of American life. As Professor Forman notes, "Rap and hip-hop are . . . inextricably entwined with race, cultural politics, ideology, and communication in contemporary America."[141]

Among its many facets, rap music sometimes is political. A 1991 article in *Black Music Research Journal* contends that rap may, in fact, "be the most political medium in the country."[142] Indeed, rap's origins are inextricably tied to politics, with the first political rap song arguably being 1982's "The Message" by Grandmaster Flash and the Furious Five.[143] A recent article explains that "[r]ap originated in the late 1970s in the South Bronx during a time marked by extreme political conservatism and economic downfall" and that it:

> [Q]uickly became one of the premier forms of expression for the youngest members of the inner city black and Latino communities in New York, which were the hardest hit by the conservative politics and the economic decline during said epoch. Rap then, irrespective of its particular subject matter and stated purpose during its initial stages, must be viewed as an important socio-political innovation.[144]

While "The Message" may have been the first political rap song, a recent article in *Journal of Black Studies* explains that "[i]n 1988, two albums in particular—Public Enemy's 'It Takes a Nation of Millions to Hold Us Back' and NWA's 'Straight Outta Compton'—marked an important shift whereby rap became a vehicle for political discourse. Both albums fearlessly attacked law enforcement in particular."[145] A 1993 scholarly article elaborates that:

> [H]ard-core rappers detail the unemployment, mis-education, discrimination, homicides, gang life, class oppression, police brutality and regressive gender politics that dominate the lives of many black youth. The macho boasting, misogyny, violent fantasies and false consciousness exist side by side with an immature, but clear,

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138. Richard Shusterman, *The Fine Art of Rap*, 22 NEW LITERARY HIST. 613 (1991).

139. *Id.* at 615.

140. Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 112, at 366.

141. Forman, *Conscious Hip-Hop*, *supra* note 120.

142. Wheeler, *supra* note 122, at 194.

143. George Ciccariello Maher, *Brechtian Hip-Hop: Didactics and Self-Production in Post-Gangsta Political Mixtapes*, 36 J. BLACK STUD. 129, 140 (2005).

144. Rebollo-Gil & Moras, *supra* note 136, at 119.

145. Erik Nielson, *"Can't C Me": Surveillance and Rap Music*, 40 J. BLACK STUD. 1254, 1257 (2010).

> critique of authority, a loathing of the oppressive character of wage labour, a hatred of racism and an exposé of Reaganism.[146]

And while gangsta rap often is the target of criticism, its artists claim "they are simply expressing a social perspective on reality among the urban under-classes, occupying a role as 'ghetto street reporters' or constructing fictional narratives that relate to actual conditions in America's larger cities."[147]

In addition to political commentary, violence is a popular theme in rap music and, in particular, gangsta rap. Indeed, "rap music has appropriated homicide as a central theme in lyrical compositions."[148] One study published in 2009 found that "the emergence of gangster rap is very strongly associated with increases in violent lyrical content."[149] For instance, Professor Jeffrey Ogbar notes that between 1992 and 2006, "only two adult solo male rappers . . . ha[d] gone platinum without killing 'niggas,' referencing bitches, hos, and nihilistic violence on an album."[150] Blending with the violence, then, is politics, as Professor Ogbar asserts that "explicit political commentaries are made by commercial rappers that address war, poverty, and police brutality in very sophisticated and highly racialized discourses."[151] Public Enemy, for instance, offered "biting criticism of prisons, white supremacy, political corruption, and police brutality."[152]

Rap is also a form of art, poetry and fantasy. In fact, "gangsta rap operates within a well-documented poetic tradition within African American culture that ritualizes invective, satire, obscenity and other verbal phenomena with transgressive aims."[153] Its linguistic violence involves "performance, play and perhaps even social messages all at the same time."[154] The violent imagery, in part, sometimes embraces the fantasy of violent revolt.[155] The hyper-materialism (driving Lexuses and drinking Cristal, for example), in turn, reflects "the gaudy fantasy world of some rappers."[156] Professor Kubrin explains in a 2006 article that:

> For some scholars, rappers represent black poets of the contemporary urban scene . . . who use music as a vehicle for telling the history of African American culture . . . .

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146. Clarence Lusane, *Rap, Race and Politics*, 35 RACE CLASS 46, 50 (1993).

147. Forman, *Conscious Hip Hop*, *supra* note 120.

148. Gwen Hunnicutt & Kristy Humble Andrews, *Tragic Narratives in Popular Culture: Depictions of Homicide in Rap Music*, 24 SOC. F. 611, 612 (2009).

149. Denise Herd, *Changing Images of Violence in Rap Music Lyrics: 1979–1997*, J. PUB. HEALTH POL'Y 395, 402 (2009).

150. JEFFREY O. G. OGBAR, HIP-HOP REVOLUTION: THE CULTURE AND POLITICS OF RAP 29 (2007).

151. *Id.* at 40.

152. *Id.* at 105.

153. Ralph M. Rosen & Donald R. Marks, *Comedies of Transgression in Gangsta Rap and Ancient Classical Poetry*, 30 NEW LITERARY HIST. 897, 897 (1999).

154. Annette J. Saddick, *Rap's Unruly Body: The Postmodern Performance of Black Male Identity on the American Stage*, 47 DRAMA REV. 110, 110 (2003).

155. Donn C. Worgs, *"Beware of the Frustrated . . . ": The Fantasy and Reality of African American Violent Revolt*, 37 J. BLACK STUD. 20, 35 (2006).

156. Jeffrey O. G. Ogbar, *Slouching toward Bork: The Culture Wars and Self-Criticism in Hip-Hop Music*, 30 J. BLACK STUD. 164, 169 (1999).

> For others, rap music serves as an expressive artistic outlet for a marginalized urban social bloc . . . a contemporary response to joblessness, poverty, and disempowerment . . . , and an art form that reflects the nuances, pathology, and most importantly, the resilience of America's black ghettos.[157]

Finally, rap music also often is equated with black America and thus it is not only political in nature, but also racialized as "a product of black culture."[158] A study published in 2013 observes "[a]ll that was right and wrong with rap was read as a reflection of black America. Positioned in the press as a black musical form that sprang from black inner-city neighborhoods, the violence associated with rap was de facto black violence."[159] The same study notes that because it often was "[c]onnected to drugs, gangs, and the glorification of sexual domination through lyrics, the real life experiences of rappers, or audiences' imaginations, public definitions of the artistic value of rap and its political message were also filtered through the music's racial identification."[160] Ultimately, as one article explains, "[t]here is little doubt that rap serves as a key contributing factor in the social construction of African-American culture."[161] In fact, "[f]rom the start, the public viewed hip-hop culture and rap music through a racist lens."[162]

In summary, then, rap is a complex genre. Its very nature compounds the difficulties with the already muddled true threats doctrine described in Part I when a specimen of rap is accused of being a true threat. It is not hard to speculate that the legal deck may be stacked decidedly against rap music, replete with its negative stereotypes of violence and nihilism,[163] when its authors are accused of embedding threats in lyrics. Indeed, although much of it may now be commercialized and mainstreamed[164] as part of the "mass commodification of rap music,"[165] rap long has existed "as a form of oppositional culture."[166] And when it is brought into court as an alleged true threat, it supposedly stands in opposition to the First Amendment. As Professors Erik Nielson and Charis Kubrin wrote in January 2014, rap today is "as vulnerable as ever to judicial abuse."[167]

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157. Charis E. Kubrin, *"I See Death Around the Corner": Nihilism in Rap Music*, 48 SOC. PERSP. 433, 433–34 (2005) (citations omitted) [hereinafter Kubrin, *"I See Death Around the Corner"*].

158. Shusterman, *supra* note 138, at 621.

159. Appelrouth & Kelly, *supra* note 129, at 312.

160. *Id.*

161. Hunnicutt & Andrews, *supra* note 148, at 613.

162. Rachel E. Sullivan, *Rap and Race: It's Got a Nice Beat, but What About the Message?*, 33 J. BLACK STUD. 605, 607 (2003).

163. *See* Kubrin, *"I See Death Around the Corner," supra* note 157, at 453 ("Nihilism, and issues related to death and dying, not only comprises an important part of the street code but emerges as a significant theme in rap music.").

164. Michael Quinn, *"Never Shoulda Been Let Out the Penitentiary": Gangsta Rap and the Struggle Over Racial Identity*, 34 CULTURAL CRITIQUE 65, 67–68 (1996) (describing the commercialization and mainstreaming of rap music).

165. Charise Cheney, *In Search of the "Revolutionary Generation": (En)gendering the Golden Age of Rap Nationalism*, 90 J. AFR. AM. HIST. 278, 279 (2005).

166. Theresa A. Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40 SOC. PERSP. 265, 280 (1997).

167. Nielson & Kubrin, *supra* note 36, at A27.

With Nielson and Kubrin's timely warning in mind, the next Part of this Article bridges problems with the true threats doctrine and the negative stereotypes and multiple meanings of rap music. Using hypothetical examples, Part III illustrates that if context really is a key factor in sorting out what constitutes a true threat, then jurors must be instructed to take into account the contextual variables that surround rap.

III. ANALYZING RAPS AS THREATS: SOME LESSONS ABOUT VANTAGE POINTS THROUGH THE RAP LENS

This Part illustrates the gravity of the problems with today's true threats doctrine described in Part I through the lens of rap music reviewed in Part II. In the process, this Part provides hypothetical examples that demonstrate how radically different legal conclusions might be reached, depending on the judicial approach adopted for true threats and the evidence, including expert testimony, courts admit to help jurors understand rap-message meaning.

Before going further, it is important to recall that, regardless of whether courts employ an objective or subjective intent approach, circumstantial evidence likely will be used by jurors to determine intent.[168] Just as circumstantial evidence is relevant to proving the subjective state of mind requirement of actual malice in defamation law,[169] so too is it relevant in proving the subjective state of mind of intent in true threats cases. Furthermore, part of that circumstantial-evidence evaluation in true threats cases involves considering "the totality of the circumstances and not just the words in isolation."[170] In brief, circumstantial evidence related to rap music may be admitted to provide context—a key factor dating back to *Watts*[171]—for interpreting the meaning of rap-formatted messages.

Finally, it is clear that other contextual factors—ones beyond rap music itself—should be considered by jurors in true threats cases involving rap messages. For instance, if the rap takes the form of a video posted on YouTube, jurors might consider and evaluate whether the medium of YouTube itself is one on which rap messages should be taken seriously as threats or whether the raps represent public posturing. Video images arguably can supplement, complement, enhance or even contradict the meaning of the written or spoken words of a rap. Similarly, if the rap is publicly posted in the form of written lyrics on Facebook, should this social media context make a difference? An extended discussion of such issues is beyond the scope of this Article, which focuses solely on the contextual variable of rap itself, not the medium through which it is conveyed.

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168. United States v. Clemens, 738 F.3d 1, 12 (1st Cir. 2013).

169. *See, e.g.*, Dongguk Univ. v. Yale Univ., 734 F.3d 113, 123 (2d Cir. 2013) ("Actual malice can be established using circumstantial evidence.").

170. United States v. Fullmer, 584 F.3d 132, 154 (3d Cir. 2009).

171. *See supra* notes 49–53and accompanying text.

A. ON OBJECTIVE APPROACH TO THREATS: WHAT DOES "REASONABLENESS" MEAN IN INTERPRETING RAP LYRICS?

If, as the majority of jurisdictions currently do,[172] a court embraces an objective test that pivots on hypothetically "reasonable" interpretations of messages written in the form of raps, then the threshold question relates to *vantage point.* Specifically, the issue is whether the rap message should be interpreted from the perspective or vantage point of: (1) a *reasonable recipient* of the message (or a reasonable person in the position of the recipient or a reasonable person in the position of the target-victim); (2) a *reasonable sender* of the message (or a reasonable person in the position of the defendant who sent or otherwise communicated the message) or, even more speculatively and amorphously, (3) a *reasonable person.*

Courts adopting an objective test disagree on the proper approach for sorting out meaning, as a quick review of very recent cases illustrates. For instance, in 2013 the First Circuit wrote in *United States v. Clemens* that it has adopted the second option, namely "an *objective defendant* vantage point standard post-*Black.*"[173] A Connecticut appellate court elaborated, in also adopting this standard, that the test is whether a "*reasonable speaker*" would foresee that the actual recipient, under the circumstances in question, would "believe that [the recipient] will be subjected to physical violence upon his person."[174]

In contrast, in 2012 the Sixth Circuit opined in *United States v. Jeffries* that the focus must be "the effect on *a reasonable listener* of the speech."[175] Still different, in 2013 the Eleventh Circuit held in *United States v. Martinez* that, in general, "[a] true threat is determined from the position of *an objective, reasonable person.*"[176] In 2004, the Fifth Circuit also embraced this more general standard, writing that "[s]peech is a 'true threat' and therefore unprotected if *an objectively reasonable person* would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'"[177]

While the Ninth Circuit has held that, after *Black*, a subjective intent test must be read into *all* speech-based threat statutes, the Ninth Circuit also holds that *some* threats statutes must be analyzed under both a subjective and objective approach.[178] Under its objective approach, the issue becomes how a reasonable person in the position of the recipient would interpret the message.[179]

The next critical question becomes, under any of these three objective standards: What should courts and jurors expect a reasonable person to know and understand about rap music? The answer likely varies depending upon the facts of the case,

172. *See supra* note 72 and accompanying text.
173. *Clemens*, 738 F.3d at 12.
174. Connecticut v. Krijger, 24 A.3d 42, 50 (Conn. App. Ct. 2011) (emphasis added).
175. United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2012) (emphasis added).
176. United States v. Martinez, 736 F.3d 981, 988 (11th Cir. 2013) (emphasis added).
177. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (emphasis added).
178. United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011).
179. *Id.* at 1122.

with the actual knowledge of (and background with) rap music of both the defendant and the alleged victim possibly playing significant roles. It is clear, however, that a reasonable person standard "forces jurors to examine the circumstances in which a statement is made" and, under it, "[a] juror cannot permissibly ignore contextual cues."[180]

Imagine, for instance, that the target or victim of a rap-based message is a police officer who works on a gang task force and, due to his knowledge, training and experience, is acutely familiar with rap, including the posturing and personas that rappers often take on, as well as rap's frequent violent and political, anti-police themes. This officer thus might be referred to, for shorthand purposes, as the "rap-literate target."

This contextual background seems very relevant under an objective-recipient standard. To provide breathing room for the First Amendment interest in free speech, jurors should be asked to consider whether a reasonable police officer, one who is familiar with rap music, would take the message as a threat. And what if the police officer specifically knew that the speaker-defendant was a rapper before the officer received the threat? The jury, then, should be required to consider whether a reasonable police officer, who is familiar with rap music *and* who is familiar with the speaker-defendant's rapping background, would interpret the message as a true threat.

In such a scenario, the meaning of a hypothetical rap directed at an officer and posted on YouTube with the seemingly straight-forward lyrics "I know you, you know me / gonna kill this cop, let's all be free" becomes much more complex. Is it artistic and political hyperbole—the stereotypical, anti-cop rhetoric and rant engaged in by a rapper, perhaps trying to maintain his street credibility if the officer in question had previously arrested him? Would a reasonable police officer in the position of this one therefore feel less threatened or more threatened?

Furthermore, a speaker-defendant who has a demonstrated or proven background either as a rapper or as a serious fan of rap music should, in the First Amendment interest of protecting his speech rights, have these aspects of his background admitted as evidence. As the Seventh Circuit wrote in 2008 in considering a true threats case, "[c]ontextual information—especially *aspects of a defendant's background* that have a bearing on whether his statements might reasonably be interpreted as a threat—is relevant and potentially admissible *regardless of whether the recipient or targeted victim had full access to that information.*"[181]

What if, in contrast to the police officer (the rap-literate target) hypothetical addressed above, the target or alleged victim of the defendant's rap message has no background whatsoever in rap music and its conventions? This person can be dubbed the "rap-ignorant target."

A crucial question for this scenario is whether this rap-ignorant target is even a "reasonable" person or whether the law today, given the vast popularity of hip

180. *Jeffries*, 692 F.3d at 480.

181. United States v. Parr, 545 F.3d 491, 502 (7th Cir. 2008) (emphasis added).

hop,[182] should assume that a reasonable person of a certain age—surely someone from the so-called "hip hop generation"[183]—would have at least some minimal background with rap.

This rap-ignorant target thus illustrates yet another fundamental problem with the current true threats doctrine—namely, the assumptions (more cynically put, the guesses) that jurors must make about the kind of baseline or foundational knowledge and background about particular genres of music and writing that people (in particular, the targets of supposed threats) possess. Just as courts today in defamation cases regarding reputational harm assume that reasonable readers will be able to recognize satire by its literary conventions,[184] so too should they assume that reasonable people will be able to recognize rap and factor that in when deciding whether or how such context affects message meaning.

This is not, of course, to say that simply because a message takes the form of a rap that it never constitutes a true threat or that writers of raps are immunized from criminal threats prosecution. As the Sixth Circuit wrote in 2012 in a threats case involving a defendant who posted a YouTube video of himself singing a song that was "part country, part rap," a person cannot dodge a threats prosecution "merely by delivering the threat in verse or by dressing it up with political (and protected) attacks on the legal system."[185] Elaborating on this point, the Sixth Circuit explained, with an aged but apt pop cultural reference, that:

> Had Bob Dylan ended "Hurricane" with a threat to kill the judge who oversaw Rubin Carter's trial, the song's other lyrics or the music that accompanied them would not by themselves have precluded a prosecution. In the same way, [defendant] Jeffries cannot insulate his menacing speech from proscription by conveying it in a music video or for that matter by performing the song with a United States flag burning in the background.[186]

What is important, at least from the perspective of safeguarding First Amendment interests and erring on the side of free speech, is that courts: (1) take into account the actual knowledge and background with rap music when the target or victim is a rap-literate target and (2) attribute some minimal understanding of rap's conventions—the understanding that a hypothetical reasonable person would have—to the rap-ignorant target.

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182. *See* Cummings, *supra* note 125, at 512 ("Hip-hop artists regularly top the United States and international record sales charts.").

183. Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the "War on" Paradigm*, 15 J. GENDER RACE & JUST. 47, 56 (2012).

184. *See* Farah v. Esquire Mag., 736 F.3d 528, 536–39 (D.C. Cir. 2013) (addressing, in the context of a defamation case, how reasonable readers would understand satire). The law of defamation "developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements." Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990). In particular, "[s]ince the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements." *Id.* at 11.

185. United States v. Jeffries, 692 F.3d 473, 475, 482 (6th Cir. 2012).

186. *Id.* at 482.

But even that does not end the troubles with the vantage point issue in the true threats doctrine. What happens if the target of the rap message is a person who, although not quite completely ignorant of rap music, accepts as realities the negative, violent and racist stereotypes associated with gangsta rap that he has read about in the news media?[187] Such a target might take the rap message more seriously as a threat if it comes from a black rapper. In brief, the racial stereotypes associated with gangsta rap today could possibly lead to an incorrect interpretation of the meaning of a rap message and the subsequent wrongful incarceration of its speaker.

Yet another predicament exists when the objective approach used in a true threats case focuses on the viewpoint taken by an objective sender-defendant and whether or not he should have foreseen that the rap message would be taken as a threat by the recipient.[188] A sender-defendant who is a rapper might easily have a skewed perspective about rap messages—one such that he would naturally, albeit perhaps naively, believe that everyone else (like himself) understands rap music's conventions and would never take the words in a rap literally. In other words, there could be a dangerous disconnect of interpretation and understanding between the rap-literate defendant and the rap-ignorant target. A rap-literate defendant who was unaware of his target's ignorance of rap's conventions thus could be held criminally accountable for something he (wrongly) assumed the target would not take seriously. From a pro-First Amendment perspective, this is a troubling result that illustrates a flaw with the true threats doctrine. Indeed, a rap-literate defendant could be held liable here because he negligently or accidentally misjudged the perspective and view the recipient would take.

B. A SUBJECTIVE APPROACH TO INTENT

Under a subjective approach, a rapper-defendant is held criminally responsible only if he actually (subjectively) intended the rap message in question to be interpreted by its target as a threat of imminent bodily harm or death.[189] This standard ramps up the First Amendment protection for the speaker, as the prosecution would need to demonstrate beyond a reasonable doubt—and most likely through circumstantial evidence—the mindset of the rapper at the time he or she communicated the message in question.

A subjective intent approach also eliminates the problem that exists for miscommunication and misjudgment of meaning in the rap-literate defendant and rap-ignorant target scenario. Furthermore, a subjective intent requirement ends the current oddity under which the incitement-to-violence doctrine per *Brandenburg v. Ohio* entails such an intent requirement,[190] but the true threats doctrine, at least as it now is interpreted by a majority of courts, does not.

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187. *See supra* Part II (describing the negative images of rap music).

188. *See supra* notes 173–174 and accompanying text (describing this approach).

189. *See supra* note 63 and accompanying text.

190. *See supra* notes 85–89 and accompanying text (addressing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

IV. CONCLUSION

This Article, in Part I, examined and explained the multiple problems and predicaments that plague the modern-day true threats doctrine. These difficulties and troubles range from splits of authority over whether or not the subjective intent of the defendant-sender is doctrinally relevant, to disagreements about the proper vantage point that must be taken if an objective approach to meaning is deployed, to the lack of clarity, in some instances, between the doctrines of true threats and incitement to violence.

The Article furthermore explored, in Part II, the complicated and controversial nature of rap music. Significantly, it addressed the political, violent, racial, artistic and cultural context that surrounds the genre of rap and, more specifically, the subgenre of gangsta rap. It also described how rappers often adopt artificial personas and describe fantasy violence.

The muddled true threats doctrine and the music known as rap collide today at a dangerous First Amendment intersection. The problems are not likely to go away soon, with one February 2014 newspaper article noting that "YouTube is awash with hundreds of hip-hop music videos—ranging from amateurish cellphone recordings to slick, nearly professional-grade productions—featuring young men representing various neighborhoods, brandishing guns and firing off challenges to rivals."[191] Beyond YouTube, violence also seems to be a key element in the growing commercialization of rap music that won't soon disappear.

Given the negative, violent and race-based stereotypes that sometimes surround rap music, jurors must be exposed to evidence regarding other aspects of the genre to help prevent them from reaching a verdict tainted by misconceptions and, worse yet, racism about an artistic medium. The Supreme Court now has the opportunity to either accept or reject this point since it has granted the petition for a writ of certiorari in the case of *United States v. Elonis* described earlier in this Article.[192]

Ultimately, neither *Watts* nor *Black*—the Supreme Court's two leading true-threats opinions—addressed or otherwise involved a dispute centering on an alleged threat that was cloaked in or woven into the format of a genre of artistic expression. While that pair of cases made it plain that context matters, the Court now needs to clarify how a non-traditional mode of artistic and political expression affects the contextual analysis and, in turn, the assumptions that can be made about people's understanding (or lack thereof) of that context. The Court should also address whether, in fact, the actual knowledge of the target or recipient with the genre (as described earlier in this Article, a rap-literate target versus a rap-ignorant target) should be considered, not simply what a reasonable target would hypothetically and speculatively know.

Furthermore, the Court must adopt a test that, at minimum, considers the

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191. Robert Rogers, *Cyberspace Emerges as Law Enforcement's New Battleground*, SAN JOSE MERCURY NEWS (Feb. 21, 2014), http://perma.cc/H3WX-YS37.

192. Elonis v. United States, 134 S. Ct. 2819 (2014) (grant of certiorari); *see* Supreme Court of the U.S., October Term 2014, Monthly Oral Argument Calendar for the Session Beginning December 1, 2014 (2014), *available at* http://perma.cc/KDB9-HPAT (oral argument schedule).

perspective of a speaker-defendant who is familiar with the artistic genre in question, even if the Court also and additionally requires that the perspective of a reasonable recipient or a reasonable target be considered. To only consider the perspective of a reasonable recipient or target means that a speaker-defendant could be criminally punished for something that is, quite literally, lost in translation.