

# ART THREATS AND FIRST AMENDMENT DISRUPTION

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## ABSTRACT

*The novel problem of art threats, typified by threatening rap lyrics, has destabilized our First Amendment regime. We have traditionally relied on industry gatekeepers like music labels or museum curators to determine what counts as art. However, with the advent of the Internet, amateur artists can share their aesthetic output with a public audience, bypassing the threshold quality control work of the Art World. This has forced courts to acknowledge foundational questions about what kind of art is covered by the First Amendment. In brief, it covers “good” art.*

*In this paper I offer a synthetic conception of the First Amendment that contextualizes this aesthetic gatekeeper problem within a freedom of speech doctrine that has been forced to distinguish art from threat. I echo the claims of law and rap scholars that the amateur attempt at rap should be interpreted within a permissive standard for political speech, but I remind this scholarly network that our category of art speech still connotes a threshold level of quality. Young artists need help with self-editing; they do not need to be punished. But this does not mean the amateur attempt at art should be reified as good art within our constitutional law doctrine. I thus consider some pragmatic solutions for how either civil society or the state can mirror the essential quality control work done by prior Art World actors. My thinking is informed by a noble understanding of rap as well as the cultural assumptions that explain the boundaries of the First Amendment.*

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## I. HOW WE FRAME ART

Rapper Yasiin Bey (better known as “Mos Def”) recently debuted an immersive exhibit at the Brooklyn Museum for his newest album, *Negus*.<sup>1</sup> It was a novel approach, especially compared to the industry trend of “bundling” music with apparel or other merchandise to improve album sales or streaming numbers.<sup>2</sup> Whereas many recording artists are experimenting with marketing strategies to popularize their music, Bey chose to intentionally limit initial access to his newest release. He relied instead on exclusivity, critical reputation and aesthetic experience to distinguish his album from the infinite amount of new music available on the internet. Bey’s strategy is also an explicit

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1. *yasiin bey: Negus*, BROOKLYN MUSEUM (Nov. 15, 2019), [https://www.brooklynmuseum.org/exhibitions/yasiin\\_bey\\_negus](https://www.brooklynmuseum.org/exhibitions/yasiin_bey_negus).

2. Anne Steele, *Want an Album With That T-Shirt? Billboard Tightens Rules on Bundling Music and Merchandise*, WALL STREET J. (Nov. 26, 2019), <https://www.wsj.com/articles/want-an-album-with-that-t-shirt-billboard-tightens-rules-on-bundling-music-and-merchandise-11574776800>.

nod to the notion that rap is *art*, and that like conventional visual installations, his music is best appreciated in a museum context.

It is no longer avant-garde to observe how the institutional processes of the Art World (i.e., record labels, critics, and fans) frame our understanding of whether something is received as “art” rather than mere craft or kitsch. For example, Bey’s experimental brand of rap music registers as aesthetic in part because of the initial decision of museum curators to present it and record labels to distribute it. The community of rap critics verified Bey’s status as a rapper, so audiences are primed to hear his innovative musical gestures as *raps*.

There is a qualitative boundary separating Bey’s work from the amateur attempt at rap because other gatekeepers acknowledged its value first. For most of the twentieth century, courts were able to delegate the question of “What is art?” to market players.<sup>3</sup> Once someone purchased a sculpture, visual painting, a ticket to a play, or a musical recording, a judge could cite to these economic decisions as evidence of the artfulness of a given work. This allowed courts to avoid the difficult problem of aesthetic relativism first identified by Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*<sup>4</sup> and later echoed by Justice Scalia in *Pope v. Illinois*.<sup>5</sup> Judges deferred to institutional gatekeepers and the context of an artwork to determine whether an unconventional piece had aesthetic value and thus protection under the First Amendment.<sup>6</sup>

So, it did not matter that parents thought their six-year-old child was capable of producing a Jackson Pollock look-alike.<sup>7</sup> The Art World loved Pollock, and this institutional pedigree made his artwork

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3. See Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 836–39 (noting that Courts have resigned themselves to reaching “bald” conclusions about an object’s art status without including adequate analysis to support their statements). See also, e.g., *Parks v. LaFace Records*, 329 F.3d 437, 463 (6th Cir. 2003) (confirming it is not the role of judges to make individualized aesthetic determinations); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 409 (Cal. 2001) (confirming that courts are not to value one form of depiction over another); *Gracen v. Bradford Exchange*, 698 F.2d 300, 304 (7th Cir. 1983) (explaining that originality in copyright law is a legal standard).

4. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

5. *Pope v. Illinois*, 481 U.S. 497, 504–05 (1987) (Scalia, J., dissenting).

6. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253–54 (1995) (finding that the institutional context of an art exhibition like Marcel Duchamp’s readymade sculpture, *Fountain*, reinforced its First Amendment protections).

7. See Ellen Winner, *Could Your Child Really Paint That?*, WALL STREET J. (Oct. 19, 2018), <https://www.wsj.com/articles/could-your-child-really-paint-that-1539959482> (referring to recent academic studies that show even the untrained eye can detect quality differences in abstract artwork).

something separate and unique from the haphazard paint splatters of a kindergartener. Indeed, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, Justice Souter remarked that the First Amendment “unquestionably shielded . . . [the] painting of Jackson Pollock, music of Arnold Schoenberg, [and] Jabberwocky verse of Lewis Carroll.”<sup>8</sup> But because free speech doctrine is commonly understood to protect the transmission of *ideas*, judges and scholars have struggled to articulate a principle for why First Amendment doctrine protects aesthetic items like abstract art,<sup>9</sup> nonsensical poetry, or atmospheric lyrics in rap songs.<sup>10</sup>

It is difficult to identify a factual hypothetical for when the legality of a Jackson Pollock painting might be legitimately challenged. His 160-square-foot canvas “Mural” (1943) could be distracting as a public art installation for passing motorists, but to my knowledge there are no Pollocks visible from roadways.<sup>11</sup> Like much of modern or contemporary art, the fact that Pollock’s art does not convey a “particularized message” places it outside the purview of the criminal law. Rather, we can read Justice Souter’s line in *Hurley* as reflecting the facile logic of “*Why not?*” We assume there to be little damage done to First Amendment doctrine by name-checking Pollock’s work, and it helps to reassure Americans of the prestige value of the First Amendment. We all agree the First Amendment is special, and so it should of course protect unique forms of expression like the paintings of Jackson Pollock and the poetry of Lewis Carroll that are part of our cultural canon.<sup>12</sup> What is there to lose?

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8. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). Justice Souter’s passing reference suggests that this is a shared presumption of the legal community and does not require logical explication. However, prior to opinion in *Hurley* it was unclear if art had First Amendment Status. *See also* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment*, 1987 WIS. L. REV. 221, 222 (“[M]ost commentators consider artistic expression as subservient to, and derivative of, political expression; they determine the first amendment value of artistic expression primarily, if not solely, by its resemblance to political expression.”).

9. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 111 (1996) (The Supreme Court “should consciously elevate art to the top of the First Amendment’s pyramid of protection, alongside political speech,” suggesting that at the time of writing it was not part of the normative hierarchy).

10. *See, e.g.*, Amy Adler, *A Decision for the Ages: A Symposium Marking the Centenary of Masses Publishing Co. v. Patten*, 50 ARIZ. ST. L.J. 687, 711 (2018) (“The difficulty of reducing art works to ‘ideas’ or ‘messages’ has been a recurrent problem in free speech law and theory.”).

11. *See, e.g.*, Mark Tushnet, “Art and the First Amendment” in *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 72 (Mark Tushnet et al. eds.) (2017).

12. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary*

Outside of outlier cases like *Cincinnati v. Contemporary Arts Center*,<sup>13</sup> where Robert Mapplethorpe's photography was contested as obscene, it has been challenging for scholars to identify possible examples of criminal artwork.<sup>14</sup> As recently as 2008 Professor Edward J. 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."<sup>15</sup> The concept of an "art threat" was incongruent with a free speech doctrine that does not recognize threats as speech and was difficult to even conceptualize for an Art World where aesthetic expression is assumed to be polysemic and received by a general audience.

The advent of internet rap and performance art has disrupted this First Amendment regime. These novel media are distinguished from traditional art forms in their unmediated presentation, which facilitates them being viewed as threatening to certain audiences. When Marina Abramovic stares at us in the MoMA we sense her aesthetic aura and recognize it as a curated experience.<sup>16</sup> It is not simply "staring" in the mundane sense; rather the preternatural ability of Abramovic transforms this otherwise quotidian event into an artful experience. It does not feel threatening. Still, it is an experience that challenges the epistemological limits of human language: how to articulate in words what makes Abramovic's elevated form of staring different from our own? What if I recorded a video of me staring into my iPhone camera lens and uploaded it to YouTube and captioned it as "art"? Would my saying, "It's art" make it so? Or what if I uploaded a selfie video in which I blithely repeat the line "I will kill the person I don't like," and refer to it as a "rap" in the thumbnail? Has it become a rap? There might not be an articulable way to distinguish my seemingly literal threat from a similar lyric by an established rapper. We can cite to the musicality and flow of the actual rapper, and we can contextualize the

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*Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1787–1800 (2004) (considering "the magnetism of the First Amendment").

13. 566 N.E.2d 207 (Ohio Mun. Ct. 1990).

14. See Alex Palmer, *When Art Fought the Law and the Art Won*, SMITHSONIAN MAG. (Oct. 2, 2015), <https://www.smithsonianmag.com/history/when-art-fought-law-and-art-won-180956810/>.

15. Edward J. Eberle, *Art as Speech*, 11 U. PA. J. L. & SOC. CHANGE 1, 1 (2008).

16. See, e.g., Michael Zhang, *Sitting, Staring, and Crying with Marina Abramovi at MoMa*, PETAPIXEL (Apr. 23, 2010), <https://petapixel.com/2010/04/23/sitting-staring-and-crying-with-marina-abramovic-at-moma/> (explaining that visitors sit and stare back at Abramovic for long periods of time, and many are in fact moved to tears).

line as a layer in the song’s sonic texture. Still, these are distinctions separate from the surface language of the line in itself: “I will kill the person I don’t like.”

The First Amendment treats a professional rap differently than my amateur attempt. But this incongruous treatment is problematic because it requires an implicit qualitative judgment of when a rap is artful. This paper builds on the work of Jed Rubenfeld<sup>17</sup> and Genevieve Lakier,<sup>18</sup> who have deconstructed the conceptual integrity of high-value and low-value speech in First Amendment doctrine.<sup>19</sup> Because certain categories of speech are seen as low-value (such as inciting or threatening speech), it is easier to make content-based judgments about the kinds of speech that can be lawfully regulated. We might not often think about true threats doctrine explicitly in these terms, but a statute that criminalizes threatening speech is equivalent to a form of content-based discrimination in which the government favors non-threatening speech over threatening speech.

These content-based restrictions are informed by broader cultural intuitions of what the First Amendment is meant to *cover*. In realist terms, it covers what we, as a legal culture, think it should. This explains why the First Amendment has been interpreted to protect not just core speech rights like political speech, but also the art speech of Jackson Pollock and Lewis Carroll. For example, in *Kleinman v. City of San Marcos*, the Fifth Circuit held that the First Amendment covers only *great art*.<sup>20</sup> The First Amendment makes quality distinctions. Courts used to be able to rely on institutional gatekeepers to discern them.

By definition, user-generated internet content bypasses the quality control work of Art World gatekeepers.<sup>21</sup> Here, I focus on the precise

17. Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 823 (2001) (“The freedom of speech, as we actually know it and have it in this country, is irreconcilable with high-value/low-value thinking.”).

18. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015) (introducing a theory that First Amendment protections only minimally extend to low-value speech).

19. By “modern First Amendment doctrine,” I refer to the First Amendment as interpreted after Justice Holmes’ iconic dissent in *Abrams v. United States*, which urged restraint in suppressing free speech unless that speech presents an imminent danger. 250 U.S. 616, 624 (1919). See, e.g., Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1278 n.97 (2005) (suggesting that the prevailing view among academics—that Schauer himself does not support—is that “the First Amendment started in 1919” when the *Abrams* opinion was written).

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

21. Prior scholarship has identified the gatekeeper problem in the context of fake news or defamatory or hostile speech. See, e.g., Thomas E. Kadri & Kate Klonick, *Facebook v. Sullivan*:

issue of who makes threshold decisions about whether something is art at all. When does the amateur attempt at making a work of art—like a rap song—become “art speech” for constitutional purposes? This has direct implications for First Amendment blackletter doctrine which assumes that if something qualifies as “art,” it cannot simultaneously be a true threat.

My central claim is that the Art World’s threshold decision to present an artwork or publish a music album effectively insulates the work from a true threats analysis because courts have deferred to the aesthetic judgment of these institutional gatekeepers. Courts did not need to cite to these “authorities” in their opinions because the assumption that professional art could not be threatening was so pervasive. But with the advent of the internet, courts must now grapple with the reality of true threats in rap form.

In the last five years, the Supreme Court has been asked three times to resolve the question of rap threats but has avoided directly confronting the issue each time. In *Elonis v. United States*, defendant Anthony Elonis posted to Facebook violent rap lyrics that seemed to threaten his wife and a federal investigator. Chief Justice Roberts retreated from the question of whether the aesthetic quality of the rap lyrics might be relevant to a threats analysis, and instead decided the case based on the defendant’s subjective intent.<sup>22</sup> In *Bell v. Itawamba County School Board*, the Supreme Court denied certiorari for a case in which a high school student was suspended for a violent rap about his two gym teachers who were accused of lewd behavior.<sup>23</sup> And in 2019, the Supreme Court denied certiorari for *Knox v. Pennsylvania*, in which an amateur rapper argued that his violent lyrics should have been interpreted non-literally, even though he referred *by name* to the law enforcement officers who had arrested him.<sup>24</sup>

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*Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 76 (2019) (“In the new speech ecosystem brought about in part by platforms like Facebook, people can be thrust into the public sphere and bypass the gatekeeping function of the traditional press.”); Erin Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69, 71 (2017) (“As the role of information gatekeeper starts to pass from journalists at legacy news organizations to engineers, coders, and designers, the very nature of the Fourth Estate and the news it produces is changing.”).

22. *Elonis v. United States*, 135 S. Ct. 2001, 2022 (2015).

23. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

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

*Knox v. Pennsylvania* inspired this paper on the relationship between aesthetic quality and First Amendment coverage. The core question for courts in cases like *Knox* is “When should seemingly literal speech acts be interpreted non-literally?” Prior to the internet, we implicitly assumed that certain kinds of non-literal speech or expressive acts were “art” and thus endowed with constitutional protection. This paper explains how we have traditionally deferred to the judgment of institutional gatekeepers to make these threshold decisions of what counts as art in the First Amendment context. But because the internet has progressively eroded the role of these gatekeepers, this question is all the more urgent for courts to answer. A well-intentioned (but confused) law and rap academic community (a mix of legal scholars, sociologists, criminologists and pedigree rappers) argues for blanket First Amendment coverage of rap lyrics and their insulation from use as courtroom evidence.<sup>25</sup> However, this is not how the First Amendment is meant to work.<sup>26</sup> I expand on the coverage-protection distinction to explain how the First Amendment art speech doctrine should apply to rap music, and argue for coverage of rap lyrics based on the quality of the rap or rapper, or on membership in a sort of rap guild. Unfortunately, rap is a shape-shifting genre that defies easy categorization, and one that depends on fickle notions of reputation and public perception. Rap has also been traditionally characterized as a transgressive art form, so conditioning First Amendment coverage on group membership might be inconsistent with the very ethos of this musical form.

In this Article, I analyze how internet rap raises foundational problems in how the First Amendment regime distinguishes speech acts. I review recent cases concerning rap lyrics, like the Supreme Court’s decision in *Elonis v. United States*, to suggest how we should think about separate categories of art speech and political speech. This raises difficult questions about First Amendment coverage: How do we

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25. See, e.g., Erik Nielson, ‘*Rap on Trial*’: Why Lyrics Should Be Off-Limits, ROLLING STONE (May 3, 2017), <https://www.rollingstone.com/culture/culture-news/rap-on-trial-why-lyrics-should-be-off-limits-116368/> (describing the use of rap lyrics as evidence).

26. See *Knox*, 190 A.3d at 1161 (“More generally, if this Court were to rule that Appellant’s decision to use a stage persona and couch his threatening speech as ‘gangsta rap’ categorically prevented the song from being construed as an expression of a genuine intent to inflict harm, we would in effect be interpreting the Constitution to provide blanket protection for threats, however severe, so long as they are expressed within that musical style. We are not aware of any First Amendment doctrine that insulates an entire genre of communication from a legislative determination that certain types of harms should be regulated in the interest of public safety, health, and welfare.”).

define the boundaries of “art speech” when perceptions of artfulness—especially in the context of abstract or otherwise meaning-resistant art works—had previously been based on the critical reception of our institutional gatekeepers? I consider how either civil society or the state can mirror the essential quality control work done by prior Art World actors so that we can maintain the integrity of the First Amendment regime while providing a space for amateur artists to experiment with provocative ways of expressing themselves.

## II. WHAT ART IS AND WHAT ART DOES

Rap is evaluated by audiences comparably to other gestalt art forms like pop art,<sup>27</sup> given its referential nature. The pop art movement inspired Arthur Danto to unpack how material objects are transformed into “art,” based on the work’s institutional context, and by how the Art World presents and values it.<sup>28</sup> For example, Warhol’s iconic *Campbell’s Soup Cans* depicts a seemingly mundane subject. But the iterated presentation of the Warhol imagery inspires a deeper sort of mentation among viewers that allows for playful critique of notions of art and advertisement. The Art World viewed it as transformative.<sup>29</sup> Still, it might be impossible for the viewer to articulate what, if anything, distinguishes the surface quality of the Warhol painting from that of the original consumer product.

Rap shares this same core dilemma. I make the descriptive claim in this paper that we evaluate the quality of a rap track based on its sonic impact. Although lyrics help to shape the texture of a song and contour the listener experience, it is wrong to equate song lyrics with written poetry.<sup>30</sup> Rap lyrics do not serve the same function as written poetry, and rap—like any form of music—is not foremost a literary art. Nevertheless, judges typically *read* rap lyrics in isolation when they engage in a true threats analysis. This is problematic because *no* interpreter, whether a court or a music critic, can answer the threshold

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27. See *pop art*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/pop%20art> (last visited Nov. 22, 2020) (defining pop art as “art in which commonplace objects (such as road signs, hamburgers, comic strips, or soup cans) are used as subject matter and are often physically incorporated in the work”).

28. Arthur Danto, *The End of Art: A Philosophical Defense*, 37 *HIST. & THEORY* 127, 128 (1998).

29. *Id.* at 141 (observing the paradigm-shifting impact of Warhol’s art).

30. See, e.g., @sad13, TWITTER (Aug. 7, 2019, 7:42 PM), <https://twitter.com/sad13/status/1159248479694147584> (referring to David Berman from *Silver Jews* when she tweeted “songwriting is NOT poetry, it’s crazy one person was so good at both”).

art speech question of whether a rap is *good* by thinking about lyrical meaning divorced from a rap track’s sonic experience. Indeed, the brilliant rap and the genuinely awful attempt at rap might each be *read* as wooden and mundane on their own, making it impossible for a judge to discern what, if anything, makes rap “art.”<sup>31</sup> The transcribed lyric sheet of both the brilliant rap and the awful attempt at rap may “look” the same to a reader, to the extent that neither reads as literary or artful. We only know if a rap is good, or even a rap at all, by *listening* to it.

Rap lyrics, like most song lyrics, are better understood as *vocalizations* that comprise only part of a broader experience—that is, the song. And so, like most song lyrics, these vocalizations might be nonsensical or improvised and may not necessarily be intended to convey meaning. For this reason, the majority of rap lyrics should be interpreted as non-literal. The industry’s transition to “ambient” and “mumble” rap exemplifies why: These rap genres emphasize sonic atmosphere over intelligibility. We now focus less on what rappers *say*, and more on how they *sound*.<sup>32</sup>

For example, Tyler the Creator, the 2020 Grammy award winner for Best Rap Album, has argued for a deeper interpretation of his own lyrics, lamenting that “most people just read the surface.”<sup>33</sup> An age-old adage cautions against judging books by their covers, but what does it mean to look beyond the surface of a *spoken* word? It is unusual to think of spoken language as a mere vehicle for some alternative or hidden meaning, or, in some cases, a lack of meaning.

Although this paper will not attempt define what art is, it accounts for how the label of “art” affects First Amendment analysis: Categorizing speech as “art” (1) makes it potentially non-literal and (2) renders it culturally significant, and thus worthy of First Amendment protection.<sup>34</sup> After Joseph Frederick unveiled his “BONG HiTS 4 JESUS” banner at a 2002 Olympic Torch relay, the Court deemed it

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31. *Id.*

32. See, e.g., Kathy Iandoli, *The Rise of ‘Mumble Rap’: Did Lyricism Take a Hit in 2016?*, BILLBOARD (Dec. 21, 2016), <https://www.billboard.com/articles/columns/hip-hop/7625631/rise-of-mumble-rap-lyricism-2016> (describing the mystique of rap where lyrics are nearly incomprehensible to the lay listener).

33. Tyler, *the Creator Reveals Range of Anti-Homophobia Merchandise*, NME (May 8, 2015), <http://www.nme.com/news/tyler-the-creator-3/85233> (quoting Tyler the Creator as saying, “I’m legit one of the least homophobic guys to walk this earth but most people just read the surface”).

34. See Post, *supra* note 6, at 1256 (Post constructs his own graphical table of how communication medium and First Amendment interests intersect).

nonsense of the mundane kind.<sup>35</sup> But if he had directly quoted Lewis Carroll's work, for example, nonsensical as it is, perhaps the same banner would have then been interpreted as art, and thus protected by the First Amendment.

Although Lewis Carroll's stories have been read against opium culture,<sup>36</sup> he never argued for drug use in public schools or made direct threats of violence in his works. Indeed, the contained universe of most *any* fictional literary work makes it difficult for a novel's narrative depiction of violence to feel like a genuine threat to a living person. This prosaic fact informs our collective sense of why "it [was] hard to imagine art speech constituting incitement, threats or fighting words."<sup>37</sup>

In "Rap on Trial," the foundational 2014 paper on the use of rap lyrics in American courts, Professors Charis Kubrin and Erik Nielson recorded the notable example of an *amateur* attempt at rap being charged as a threat.<sup>38</sup> The authors also cited to how professional rapper Lil Boosie's (now Boosie Badazz) lyrics were entered in evidence for a separate murder charge.<sup>39</sup> Still, there is an essential distinction between a published rap lyric being used as evidence of motive or confession and a rap song being criminalized as a threat *in itself*. The First Amendment is only relevant to the latter issue of art threats. I don't know of any cases in which a published rap lyric by a professional rapper has itself been criminalized as a threat.

### III. THE ART WORLD AS GATEKEEPER

Our First Amendment regime developed in a market of scarce public speech. There has historically been a limited supply of newspapers and broadcasting outlets, and courts broadly deferred to news publishers' judgments as to whether a news bit was relevant or significant.<sup>40</sup> These threshold choices about "newsworthiness" (i.e.,

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35. *Morse v. Frederick*, 551 U.S. 393, 402 (2007).

36. *Is Alice in Wonderland Really About Drugs?*, BBC (Aug. 20, 2012), <https://www.bbc.com/news/magazine-19254839>.

37. Eberle, *supra* note 15, at 25.

38. Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185, 193–94 (2014) (discussing "the case against Olutosin Oduwole, a Black student at Southern Illinois University, whose rap lyrics alone were viewed as such a danger to the public that he was charged with attempting to make a terrorist threat" which "was so unsettling in its blatant criminalization of rap lyrics that it independently drew the attention of both authors and became the catalyst for their subsequent collaboration in this article").

39. *Id.* at 186.

40. Kadri & Klonick, *supra* note 21, at 54 (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496–97 (1975) in which the Court emphasized that "the reliance must rest upon the judgment of

what counts as news) determined who qualified as a “public figure” in defamation suits.<sup>41</sup> This analysis is obviously complicated in our new internet world of Twitter and Facebook.

Similar, courts relied on the Art World to manage the boundaries of “art speech.” Prior to the internet, gallery owners, museum curators, record label execs, literary agents, Hollywood producers and film festival committees exercised broad control in deciding which artists were seen or heard. With the internet, these barriers to entry have eroded. Now the novice or the untalented can upload their attempts at art directly to the internet for unlimited, and perhaps permanent, distribution. The internet has democratized access to distribution channels for talented artists who otherwise lack the resources or connections to break through to a commercial market. This is a very good thing.

On the other hand, threshold determinations of artfulness made by Art World gatekeepers once directly informed whether a given work or expressive act may be scrutinized as a threat. This quality control work is no longer done. The Supreme Court has avoided the issue of art threats, as seen most recently in the denial of certiorari in *Knox v. Pennsylvania*.<sup>42</sup> But the problem of how to distinguish artful “good” rap from non-rap still lurks.<sup>43</sup> Are courts avoiding this problem because they do not recognize it as a proper constitutional question, or because they recognize that other social institutions are better positioned to manage this culture-inflected issue? This is a profound question considering the prior *quasi-legal* work done by Art World gatekeepers.

When the Art World made these sorts of threshold judgments, it effectively determined which speech or expressive acts were covered by the First Amendment. If the Art World validates a contested speech act as aesthetic, then it cannot be seen as threatening. Conversely, a speech act that is cognizable as a personalized threat cannot simultaneously possess aesthetic intent. For First Amendment doctrine,

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those who decide what to publish or broadcast.”).

41. *Id.* at 42–51 (describing how defamation, invasion of privacy, and intentional infliction of emotional distress substantiate tort claims rooted in the First Amendment).

42. 139 S. Ct. 1547 (2019).

43. See generally Andrew J. Kerr, *Aesthetic Play and Bad Intent*, 103 MINN. L. REV.: HEADNOTES 83 (2018) (detailing various problems with making judicial inferences from rap lyrics, including discerning intent of lyrics, what constitutes “art” and what is non-performative, etc.).

this distinction is binary. Either there is violent intent behind what you say, *or* there is aesthetic intent, but there cannot be both.<sup>44</sup>

Doctrinally, a true threat is not even regarded as a speech act for First Amendment purposes, which is why violent intent and aesthetic intent are mutually exclusive. A true threat puts the listener in danger of life and limb, and thus it is not protected speech. Rather, the threat isn't really speech in the First Amendment sense of the word at all. It's criminalized as the verbal manifestation of a violent physical threat.

The complication with this binary regime is that it ignores the reality that many speech acts have blended intent. A rapper—like many artists—might first be inspired to write a song out of emotions like anger or rage. Many artists might harbor bad intent at some point in their creative process. But professional artists are also socialized to an Art World in which audiences expect a piece to stand on its own, to be a thing unto itself. This generic posture is not very difficult to achieve for a visual artist. When art doesn't use words, it's hard for any single audience member to assume a violence-tinged piece is aimed at them—for example, the recent gun-centric installations of celebrated sculptor Michael Murphy.<sup>45</sup>

Musicians of course use words as part of the aesthetic materials that contribute to the construction of their songs. I acknowledge that many musicians want their words to convey meaning. Even so, it is rare for song lyrics to be heard as a personalized threat to a unique audience member. The singer-songwriter tradition relies on the anonymized “you” (or perhaps a substitute name like Layla<sup>46</sup>) when describing a real muse. The identity of a past lover is made opaque and general by substituting a pronoun for that person's name. Any of us could be this “you” if we wish to be, but none of us must be this “you” (or have to admit to being the “you”)<sup>47</sup> if the lyricist derides the song's object. The

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44. See Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1347 (2006) (describing the “threat exception” as statements that do not express intent to inflict harm); see also Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 593 (2000) (“The standard for regulating threats should reflect this underlying assumption that true threats are something other than constitutionally protected speech, and the converse assumption that expression containing threatening language that is predominantly intended to communicate ideas or viewpoints is constitutionally protected speech.”).

45. E.g., Alice Yoo, *130 Suspended Toy Guns Form a Map of the USA*, MYMODERNMET (Oct. 1, 2014), <https://mymodernmet.com/michael-murphy-gun-country/>.

46. *The Real ‘Layla’ Talks About George Harrison and Eric Clapton*, ABC NEWS (Dec. 20, 2007), <https://abcnews.go.com/GMA/SummerConcert/story?id=3546199&page=1>.

47. Cf. Elyse Dupre, *Alanis Morissette Addresses Rumors ‘You Oughta Know’ Is About Ex*

de-contextualization of the typical song lyric gives it a universal aspect that facilitates connection with and among listeners.

However, much of contemporary rap comes from a storytelling tradition in which the rapper interweaves narrative description with structural moves like repetition or outro commentary.<sup>48</sup> This narrative might rely on elements of an artist's personal and collective experiences, and it occasionally might include graphic description of the rapper's fantasies. Notable instances of the seemingly literal rap threat are heard in popular songs like Tupac Shakur's "Hit 'Em Up"<sup>49</sup> (disclaiming that "this ain't no freestyle battle"<sup>50</sup> prior to lyrically attacking Biggie Smalls and other rivals) as well as Eminem's repeated violent references to his ex-wife Kim Mathers in peak-career albums like *The Slim Shady LP* and *The Marshall Mathers LP*.<sup>51</sup> This kind of violence-tinged storytelling is not exclusive to rap: Bob Dylan appeared to fantasize about the death of General McNamara in "Masters of War."<sup>52</sup>

Still, Tupac, Eminem, and Bob Dylan are each considered front-rank in their respective genres. Threshold quality control decisions to produce and distribute their music inform the law's treatment of their potentially threatening lyrics. These are "easy cases" to the extent that they are disposed of prior to litigation. But what if we were not able to delegate this work of scrutinizing aesthetic intent to institutional gatekeepers?<sup>53</sup> Here the Art World was effectively tasked with a true threats analysis to determine whether the aesthetic value of these Tupac or Eminem tracks outweighed the potentially threatening nature

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*Dave Coulier*, EONLINE (Dec. 6, 2019), <https://www.eonline.com/news/1100258/alanis-morissette-addresses-rumors-you-oughta-know-is-about-ex-dave-coulier> (describing the subject of Alanis Morissette's "You Oughta Know").

48. The outro of Kendrick Lamar's song "m.A.A.d. city" provides an excellent example, in which the listener can hear a conversation between two men. SEE KENDRICK LAMAR, *M.A.A.D. CITY* (Interscope Records 2012).

49. Stereo Williams, *Tupac's 'Hit 'Em Up': The Most Savage Diss Track Ever Turns 20*, THE DAILY BEAST (July 12, 2017), <https://www.thedailybeast.com/tupacs-hit-em-up-the-most-savage-diss-track-ever-turns-20>.

50. *Hit 'Em Up (2Pac)*, GENIUS.COM, <https://genius.com/2pac-hit-em-up-lyrics> (last visited February 20, 2021).

51. *E.g.*, *Kim (song)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Kim\\_\(song\)](https://en.wikipedia.org/wiki/Kim_(song)) (last visited February 20, 2021).

52. See Tom Robbins, *Robert S. McNamara: Master of War*, THE VILLAGE VOICE (July 7, 2009), <https://www.villagevoice.com/2009/07/07/robert-s-mcnamara-master-of-war/> (noting that "Bob Dylan urged [people] to stand over McNamara's grave . . .").

53. See generally Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (explaining that exploring "easy cases" in the law tell us something about the harder cases, and what make them hard).

of their lyrics. This is a nexus of the *Watts* factors of context, content and audience reception. The Art World can rightly think of itself as the intended audience for a rap. It also possesses the expertise to make evaluative decisions about content. And once the Art World has made this threshold quality control decision as to artfulness, legal actors can defer to the context of an economic market for these albums<sup>54</sup> and trust that a minimum level of aesthetic intent went into their creation. We acknowledge that there is blended aesthetic/bad intent in the construction of some songs that enter our musical canon. Courts rely on the evaluations of market actors both (1) to dispose of these fact-laden analyses and (2) to maintain the conceptual integrity of a freedom of speech doctrine that is forced to distinguish art from threat.

#### IV. WHAT COUNTS AS A RAP?

I do not attempt to resolve the perennial philosophical debate surrounding aesthetic intent in this paper.<sup>55</sup> The creative process necessarily involves some degree of serendipity. Artists themselves might not be able to discern the motivations behind their own artwork or song lyric. Rappers rely on a kind of muscle memory that allows them to riff on tropes in the corpus and layer the internal meaning of their songs. They are acculturated to the “language game” of rap, in which they both internalize the conventions of the genre, and also press on these same rules and boundaries to distinguish their own flow and lend an element of improvisation and surprise.<sup>56</sup> They search for the novel gesture that feels effortless. You don’t win the #rapgame by trying too hard, or by telling the listener that you are a real rapper and rapping a rap about what you will do to the listener. That will not fly today – it is an amateur attempt to play the game by including some overt signposts to a dated form of the genre.

The problem for the law and rap community is that, generally, the literality of rap lyrics is inversely related to the quality of the song. It is

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54. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903) (famously discerning commercial value as an index of artistic progress).

55. 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).

56. See Joseph Blocher, *Nonsense and the Freedom of Speech*, in *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 116–18 (Mark Tushnet et al. eds., 2017) (introducing the Wittgensteinian concept of a language game in the context of nonsense speech).

almost always the novice who chooses to rap with such specificity that his lyric could be perceived as a personalized threat. The best rappers (at least since Tupac and Eminem) simply do not rap like this much anymore. Kendrick Lamar’s *Good Kid M.A.A.D. City* (2012) is a remarkable album that creates a cinematic experience for the listener. Its violent references are retrospective and internal to the narrative logic of the album. It does not speak directly to a present listener. Most popular rappers aim to create an atmosphere or make critical commentary rather than to make individualized statements about a particular listener. Insular references appeal to fewer people, and thus engage only a limited audience. Real rappers perform for a generalized audience.

The relationship between quality and literality frames the recent line of cases submitted to the Supreme Court (*Elonis*, *Bell*, *Knox*). In each of these cases the posted or rapped lyric is so specific in its object that it could threaten an intended audience member. It is also unclear whether these attempted raps meet the threshold evaluative standard of *rap-as-art*.

#### A. *Elonis v. United States: Do Elonis’s posts count as “raps”?*

*Elonis v. United States* was the first rap threat case reviewed by the Supreme Court.<sup>57</sup> In this case, Anthony Elonis had uploaded to his Facebook page lyrics that made direct reference to actual events in his personal life and described violent acts toward his soon-to-be ex-wife and a federal investigator.<sup>58</sup> For example, after a state judge granted Elonis’s wife a three-year restraining order, Elonis wrote, “Fold up your [protection-from-abuse order] and put it in your pocket/ Is it thick enough to stop a bullet?”<sup>59</sup> After a female FBI agent visited his home, Elonis wrote

*You know your s\*\*\*’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 b\*\*\*\* ghost  
Pull my knife, flick my wrist, and slit her throat*

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57. Pierce, *infra* note 95, at 52.

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

59. *Id.* at 2006.

*Leave her bleedin' from her jugular in the arms of her partner.*<sup>60</sup>

These shared posts were only written (Elonis had never actually recorded the rap) and their coarse directness makes them feel like Elonis' violent intentions were literal. Their lack of artfulness explains why we receive them as threatening.

The Third Circuit noted that Elonis had little personal history of rapping.<sup>61</sup> Chief Justice Roberts also questioned the aesthetic value of Elonis's raps.<sup>62</sup> Roberts employed the interesting use of quotation when referring to Elonis's Facebook posts, observing that after Elonis' wife left him he began "posting self-styled '*rap*' lyrics."<sup>63</sup> It is unclear whether Roberts is merely quoting from the record or if he is expressing skepticism about whether Elonis's lyrics merit the aesthetic label of "rap." But even if Elonis's words feel crude and boorish, they are also inflected with tropes common to rap and parody music. Elonis even assumes an alternative moniker "Tone Dougie" and disclaims that his lyrics are "fictitious" and bear no "intentional resemblance to real persons."<sup>64</sup> His posts include meta-commentary on the nature of his posting: "Me thinks the Judge needs an education/ on true threat jurisprudence."<sup>65</sup> He tells his readership that, although his lyrics are publicly shared, they are "[F]or me. My writing is therapeutic."<sup>66</sup> This is certainly a plausible reading, and it is true that many people over-share personal thoughts on the internet.

Chief Justice Roberts avoided the precise question of whether these posts were sufficiently artful to be recognized as raps. Instead, the Court read a scienter requirement into the true threats analysis and held that because of Elonis's direct references to the fictitious and cathartic nature of these raps, he did not possess the necessary *mens rea* to make a true threat with these posts.<sup>67</sup> We can read this avoidance of a discussion on artfulness as reflecting a broader concern about the conceptual integrity of the true threats doctrine. If Roberts described the lyrics as art or actual raps, we might question his judgment. If

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60. *Id.*

61. *United States v. Elonis*, 730 F.3d 321, 325 (3d Cir. 2013) ("Ms. Elonis further testified that Elonis rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of marriage.").

62. *See Elonis*, 135 S. Ct. at 2004 (calling Elonis's post "self-styled 'rap' lyrics").

63. *Id.*

64. *Id.* at 2005.

65. *Id.* at 2006.

66. *Id.* at 2005.

67. *Id.* at 2012.

Roberts derided them as non-art, it would be difficult for him to tell Elonis' ex-wife or investigating agent that they should interpret his statements non-literally.

In dissent, however, Justice Alito dismissed the cathartic value of a potentially threatening post. He also questioned if the aesthetic intention of a posted lyric necessarily shields it from true threats analysis, worrying that this rule “would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar.”<sup>68</sup>

#### V. ART AS COVER? OR COVERING ART?

Implicit in Justice Alito's analysis is the concern that a bad-intentioned speaker can simply declare her own speech as “art” and receive First Amendment coverage. That by pretextually checking off certain signifiers of rap, an ill-intentioned speaker can self-create the magic legal status of “art speech” and shield her actually threatening speech from a true threats analysis. There is a dangerous alchemy here. A private actor can marshal the force of the law simply by inserting some slangy language or making familiar references. This conflicts with our core constitutional principle that we cannot “permit every citizen to become a law unto himself” by empowering him to determine that his own speech act receives special constitutional protection.<sup>69</sup> It just cannot be this easy to avoid criminal sanctions when the harm remains the same.

This echoes the argument about barriers to entry and the gestalt nature of contemporary art. We share an expectation of the time and effort that goes into a novel, the instrumentation that goes into a rock album, or the vocal refinement that makes a song R&B. But rap (along with performance art and pop art) relies on a gestalt sense of quality that is internal to those in the community. Critics and record label executives decide what counts as rap and who does it well. It might not matter much if I scribble a *Campbell's Soup* can and declare it “art,” because it is no threat to safety. But if I parrot the cadence and word usage of a popular rap song in a threatening diatribe, I can potentially be covered by the First Amendment and thus endowed with certain positive entitlements against the state and other individuals. Rap music is not easy to fake, but rap lyrics might be.

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68. *Id.*

69. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

The literal interpretation of “speech” as including only spoken language feels under-inclusive. We assume that text, or written work, is covered, too. The Supreme Court has also expanded “speech” to refer to other sorts of speech-like or expressive kinds of conduct. Notably, in *Citizens United v. FEC*, we were reminded that corporations speak through their spending.<sup>70</sup> We also speak when we wear a black armband in school,<sup>71</sup> when we tape a peace sign to an American flag,<sup>72</sup> when we make decisions about who may or may not march in a parade,<sup>73</sup> and even when we design a wedding cake (but, importantly, only if it is a *beautiful* wedding cake).<sup>74</sup> What is the doctrinal boundary for this kind of expressive conduct? The First Amendment cannot cover *all* of the ways we express ourselves. Jed Rubenfeld hypothesized how breaking the speed limit could be a profound form of expression for the sports car-loving libertarian.<sup>75</sup> Still, a judge would certainly toss out a First Amendment defense to a speeding ticket as frivolous.

Discerning the boundaries of the First Amendment requires identifying the usual constitutional two-step framework for deciding whether a government action comports with the Constitution.<sup>76</sup> First, we look to the Constitution to check off if a certain kind of action is *covered* by its text (e.g., if a particular class of government investigations counts as a “search” or “seizure” per the Fourth Amendment, such as rifling through your glove compartment). Only *then* do we ask whether a specific search is *protected*, given our standards of reasonable suspicion or probable cause.

This threshold question is commonly ignored in First Amendment analysis, in part because of the vagueness issue identified above.

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70. See *Citizens United v. FEC*, 558 U.S. 310, 346–47 (2010) (holding that, under the First Amendment, funding of political broadcasts cannot be limited based on the corporate identity of the speaker).

71. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (holding that wearing of armbands to communicate a certain view is “akin to ‘pure speech’” and is entitled to First Amendment protection).

72. See *Spence v. Washington*, 418 U.S. 405, 406–07 (1974) (holding a Washington state law that prohibited appellant from displaying an American flag affixed with a black peace symbol impermissibly infringing on appellant’s First Amendment right to expression).

73. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (holding, under the First Amendment, the state may not compel private citizens organizing a public demonstration to include groups with a message antithetical to the organizer’s message).

74. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018) (“The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.”).

75. Rubenfeld, *supra* note 17, at 772–75.

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

“Seizure” is fairly precise word<sup>77</sup>; “speech” is not. It is so difficult to chart the boundaries of constitutional speech that most would rather assume coverage than define where the exact boundaries of speech coverage are.

In part, this reflects our assumptions about the institutional context of public communication, and how formal vetting channels like publishers or curators used to make threshold decisions about aesthetic quality. We could fairly ignore the coverage question concerning “art speech” because the Art World already managed it. The coverage question was outsourced.

The law and rap community is certainly not unique in conflating coverage questions about art speech with normative questions about courtroom use of rap lyrics. Scholars have produced important academic research on the overuse of rap in courtroom litigation. Professors Andrea Dennis and Erik Nielson’s recent *Rap on Trial* is a comprehensive look at the unwise, and sometimes unscrupulous, ways that prosecutors have entered drafted lyrics or recorded rap songs as courtroom evidence: as a confession of having committed a crime, or as demonstrating a motive to commit a crime.<sup>78</sup> There are two problems here. First, rap should only rarely be used in court, considering its weak probative value. Second, if it is going to be used, we shouldn’t be under-inclusive. Singling out rap as a criminalized musical genre has obvious racial implications given the strong associations between rap and Black culture.

The use of rap as evidence is an important socio-legal problem, but it is not a *First Amendment* problem. In short, the First Amendment does not cover evidence law — as legal doctrines, they exist in separate spheres.<sup>79</sup> The First Amendment does not insulate either non-literal or artful speech from courtroom use. Privilege exceptions are made in evidence law for things like doctor-patient or spousal communication because we value trust and candor in these specified relationships. But First Amendment values are mostly irrelevant to evidence law. If I write and publish a song about killing a man in Reno “just to watch him die,”

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77. Schauer, *supra* note 12, at 1772–73 (explaining the coverage question in the context of the Fourth Amendment is determined by the scope of the “comparatively clear” word “seizure”).

78. Erik Nielson & Andrea L. Dennis, *Rap on Trial*, BOS. REV. (Nov. 8, 2019), <http://bostonreview.net/arts-society/erik-nielson-andrea-l-dennis-rap-trial>.

79. Schauer, *supra* note 12, at 1783–84 (“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).

and then a corpse is discovered near my hotel during my documented stay there, then my lyric can surely be entered as evidence to my motive or as a confession.<sup>80</sup> It doesn't matter if my song is rollicking or penetrating or chart-topping. Its Art World status is independent to its status as potential courtroom evidence. Of course, my own defense attorneys would contest the lyric's probative value by suggesting it is pure fiction that merely reflects my broader oeuvre as a singer-songwriter. A jury could then weigh these competing considerations as to the sincerity of my song and its status as a genuine confession. We don't like having to specify with nicety if or how much art represents reality, and so we delegate this difficult, perhaps un-articulable, decision to the factfinder.

What the law and rap communities seem to confuse here is how the First Amendment treats art speech in a true threats analysis as compared to in the evidentiary context. The Johnny Cash song "Folsom Prison Blues" is surely covered as art speech by the First Amendment. It is validated by the Art World and has been received by fans and critics as a wonderful example of song craft. Ex ante, we allow this speech act to be part of our public sphere because it does not strike fear in any particular listener. The reference to a Reno murder is internal to the song's narrative logic. Ex post, we might discover that this lyric was confessional of an actual killing. But it retains its First Amendment coverage even if it is later marshaled as evidence. This speech act does not target anyone today.

Doctrinally these are separate issues. True threats doctrine presents the First Amendment problem of whether a potentially threatening speech act can be vocalized *at all*. It frames whether the speech act may be part of the public sphere, or if it can instead be criminalized. The non-literal nature of attempted rap lyrics is generally sufficient to put prosecutors or judges on notice of the weak probative value of rap as evidence. But a song or rap must also be *good* for the First Amendment to protect the potentially threatening lyric as art speech from a true threats analysis.

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80. *But see* the amicus brief submitted by ACLU of New Jersey in *Skinner v. New Jersey Dept. of Corrections*, 2016 WL 3063727, at \*3 (2013) (suggesting that Johnny Cash's "Folsom Prison Blues" should not even be admitted as evidence of motive and intent), <https://www.aclu-nj.org/cases/state-v-skinner>.

## VI. RAP IN POLITICAL AND AESTHETIC CONTEXT

The most recent rap case petitioned for Supreme Court review, *Knox v. Pennsylvania*, can be unpacked as both a political speech case and as an art speech case. Before analyzing the precise lyrical issue prompted in *Knox*, I first contextualize this case within the framing moves made by the law and rap community in the form of repeat amicus briefs. In each of *Elonis*, *Bell*, and *Knox* the law and rap community submitted amicus briefs in support of the aspiring rapper facing a true threats prosecution or school suspension.<sup>81</sup> Despite some stylistic distinctions in these briefs, they make broadly similar arguments. The main points are echoed by amicus submissions from kin advocacy groups and art scholars in these cases.

In general, these briefs illuminate a cultural history of rap that informs a non-literal interpretation of rap lyrics. They examine '70s and '80s street culture, as well as the contemporary political and social unrest, which, taken together, gave rise to rap as a music genre. Each refers to examples of important songs from the rap corpus in which the artist uses violence for aesthetic effect or to sublimate their own aggression. The briefs identify general characteristics common across the genre of rap music, including typical lyrical moves made by rappers, to demonstrate how these genre expectations provide a model or template for the aspiring rapper. The argument is that influential artists have rapped in often seemingly violent or threatening ways, and as an aesthetic community, we have interpreted them non-literally. So, when aspiring rappers make the same lyrical moves, we should interpret these amateur attempts the same way: non-literally. These would-be rappers are simply participating in an aesthetic discourse.

These briefs are essential for two reasons: (1) They situate an unfamiliar reader/listener like a judge for this particular kind of speech act, and (2) they suggest the political nature of rap. There is value in detailing this kind of unspoken context for rap music. Rappers participate in a language game with an internal set of rules that are known to fans and critics. An individual rapper can assume that if

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81. See Brief for Marion B. Brechner First Amendment Project et al. as Amici Curiae Supporting Petitioner at 2–3, *Elonis v. United States*, 135 S. Ct. 2001 (2015); see also Brief for Erik Nielson et al. as Amici Curiae Supporting Petitioner at 3–4, *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016); see also Brief of Amici Curiae Michael Render (“Killer Mike”), Erik Nielson, and Other Artists and Scholars in Support of Petitioner at 2–3, *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018), *cert. denied sub nom. Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019).

someone purchases their album or streams their song, listeners are already acculturated to the conventions of the genre and will interpret the lyrical moves against this implied context. However, when a rap is heard—or worse, *read*—by a court unfamiliar with this background context, then the individual judge is unable to construct legible meaning of a contested lyric. These amicus briefs provide the Supreme Court with a sort of playbook—familiarizing judges, who largely came of age before the advent and mainstreaming of rap in America, with the genre’s familiar patterns.

These amicus briefs also play a critical role in explaining how rap often bleeds into political speech. In doing so, they expand our collective conception of what political speech encompasses and thus, what speech is protected by the First Amendment. Political speech is core to the First Amendment. We protect it because vibrant dissent is necessary to democratic self-government and our education as citizens.<sup>82</sup> Political speech can take many shapes. Quintessentially, it’s the flyer of the pamphleteer, the speech of the soapbox contrarian or an op-ed in your local newspaper. But what these amicus briefs emphasize is that rap is founded on political subtext—a common example is rap’s critique of police. Rap, much like your typical political speech, functions as a First Amendment “safety valve,” allowing rappers to vent anti-authority aggression and to lament systemic racism and police brutality. We can hear rap, even rap made of violent, inchoate lyrics, about “the system” and law enforcement to be a covered form of political speech. For example, NWA and Ice-T have been valorized by the Art World. But even if they had self-published their anti-police raps<sup>83</sup> their message could be conceptualized as political speech. In short, without the historical context, a judge might not be able to identify or understand a rap’s subtextual political message.

But there are two core doctrinal problems with the arguments advanced by the law and rap community. First, the early demographic history of rap does not map squarely onto who produces or consumes rap music today. Statistical disciplines like criminology show the odious

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82. Schauer, *supra* note 12, at 1785 n.104 (identifying important political speech theories “based on self-government or democratic deliberation”).

83. *E.g.*, *Fuck tha Police*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Fuck\\_tha\\_Police](https://en.wikipedia.org/wiki/Fuck_tha_Police) (last visited Feb. 21, 2021) (“a protest song by American hip hop group N.W.A.”); *Cop Killer (song)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Cop\\_Killer\\_\(song\)](https://en.wikipedia.org/wiki/Cop_Killer_(song)) (last visited Feb. 21, 2021) (Ice-T collaboration with metal band Body Count).

racial patterns at work in who ends up in jail after drafting rap lyrics. But a threats analysis works at the *individual* level to discern one's intent. If any American, regardless of race or class, is allowed to dress up a true threat by parroting a rap lyric, allowing them to do so obscures the relevant historical genealogy of rap and distorts criminal law doctrine. For example, Anthony Elonis was a white man without a history of writing, let alone vocalizing, raps.<sup>84</sup> Do we need to situate his Facebook post within a cultural tradition of protest rap? We can assume that the amicus briefers were worried about the background subtext of a generation of young black men who are too eager to share their amateur raps on the internet, and thus argue for a kind of blanket coverage that protects sympathetic black voices as well. But this individual-group conflation points to the tensions in operationalizing a normative socio-legal critique and encourages the amici to ignore the problem of artfulness.

The second doctrinal problem is that these briefs make assumptions about aesthetic quality based on genre conventions. They cite to a few important rap songs that have included potentially threatening lyrics as evidence of a genre-wide convention, and then situate Elonis's lyrics about his wife, Bell's lyrics about his gym teachers, or Knox's lyrics name-checking his arresting officers as merely following that genre convention. The mistaken logic is that "if those prior raps are violent, and these contested lyrics are also violent, then these contested lyrics must be raps as well." But this reasoning largely ignores the important gatekeeper function of the Art World: It forgets that these cited rap songs were already vetted as artful before they became popular or influential. The amici's point conflates prior raps' descriptive use of violence and their constitutionality as proxy for all raps' constitutionality. But it is important to distinguish those raps, which had been validated by the Art World and were thus received by listeners as both non-literal and aesthetic even though their raps happened to detail violence, from the unartful attempted raps at issue in *Elonis*, *Bell*, and *Knox*. Artfulness is the constitutional linchpin: It is why we cover (and the only reason why we are able to cover) the apolitical, potentially threatening raps of Eminem and Tupac.

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84. *United States v. Elonis*, 730 F.3d 321, 325 (3d Cir. 2013) ("Ms. Elonis further testified that Elonis rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of marriage.").

## VII. ONE CASE, TWO WAYS

A. *Was Jamal Knox doing political speech?*

Jamal Knox was arrested as part of a routine traffic stop that escalated when he and a co-defendant fled the vehicle on foot.<sup>85</sup> He was apprehended, and police discovered fifteen bags of heroin on his person along with a wad of cash.<sup>86</sup> He was charged for a number of crimes, including providing a false name and possessing a stolen gun.<sup>87</sup>

While his case was pending, Knox and his co-defendant wrote and recorded a rap song titled “Fuck the Police.”<sup>88</sup> Knox’s lyrics vivify his animosity toward the local Pittsburgh police unit. Most of the lyrics are rote puffery and flexing typical of gangster rap. But Knox also adds a granular level of detail in his first verse that makes his amateur rap uniquely threatening: He “refer[s] to Officer Kosko and Detective Zeltner by name” and insults them in language too graphic for the text of this paper.<sup>89</sup> In doing so, the rap is transformed into a particularized threat to these two law enforcement officers, triggering a true threats analysis.

The specificity of this reference negates its generic value as anti-police political speech. It is a distortion of the concept of political speech to claim that it includes name-dropping private individuals. The rap scholars’ brief observes without citation that “rap music and other forms of political protest do indeed single out people by name.”<sup>90</sup> It is certainly true that rap lyrics, like those of many musical genres, have referred explicitly to elected politicians, well-known bureaucrats, and other popular artists.<sup>91</sup> But when a lyricist makes direct reference to a public official, we interpret the reference to be mere fantasy or reflective of a broader ideological critique because of the nonliteral nature of rap as art. A recent well-known example of this kind of political namedrop is “FDT” (2016) by rappers YG and Nipsey Hussle. “FDT” is short for “Fuck Donald Trump,” and was written in response

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85. Commonwealth v. Knox, 190 A.3d 1146, 1148 (Pa. 2018).

86. *Id.*

87. *Id.* at 1149.

88. *Id.* Not to be confused with “Fuck Tha Police” by iconic rap group N.W.A., *supra* note 83.

89. *Id.* at 1149–50.

90. Brief of Amici Curiae Michael Render (“Killer Mike”), Erik Nielson, and Other Artists and Scholars in Support of Petitioner at 17, Commonwealth v. Knox, 190 A.3d 1146 (Pa. 2018), *cert. denied sub nom.* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019).

91. See, e.g., EMINEM, ‘TILL I COLLAPSE (Interscope Records 2001) (rapping about his “beef” with Nas, JAY-Z, and a number of other popular artists).

to Trump’s divisive 2016 presidential campaign.<sup>92</sup> The celebrity of Donald Trump gives the song a popular appeal that made the rap a topical political anthem. It is a critique of Trump’s persona and campaign message—not a literal description of what these rappers want to happen to Trump in real life. This public/private distinction is consistent with how we think about reputation more generally in the law. For example, private persons need to prove mere negligence in a defamation suit because private individuals are unable to marshal the resources to defend themselves against a defamatory statement.<sup>93</sup> Likewise, we interpret raps about famous people non-literally in part because as public officials, they attract public attention. We assume from there that public critique is a normal consequence of placing yourself in the public discourse.

In *Knox*, both Officer Kosko and Detective Zeltner are employees of the state. They each wear a police badge, the chevron of authority. But when Officer Kosko is not in uniform, he’s a private citizen. On the other hand, elected public officials are always on the job. It is less clear whether regular state employees, even those who work in law enforcement, always personify the state. If an individual police officer is already well-known because of alleged wrongdoing, then she is a viable target for political speech. But threatening an otherwise unknown law enforcement officer offers no public appeal and instead personalizes a song, so that the officer reasonably feels in danger of her own safety. Whereas referring generically to a “cop who arrested me” would universalize the experience and imbue the lyric with political gravity.

#### *B. Was Jamal Knox doing aesthetic speech?*

A similarly difficult question is whether Knox’s rap qualifies as art under the First Amendment. *Kleinman* interpreted *Hurley* to mean that the first Amendment only covers “great art.”<sup>94</sup> We should not read *Hurley*’s references to Lewis Carroll and Jackson Pollock to suggest that only art that is the standard of our cultural canon is covered by the First Amendment. Rather, the Court was simply citing well-known

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92. See, e.g., Christopher R. Weingarten, *YG Talks Summer Protest Anthem ‘FDT (F—k Donald Trump)’*, ROLLING STONE (Sept. 1, 2016), <https://www.rollingstone.com/music/music-features/yg-talks-summer-protest-anthem-fdt-f-k-donald-trump-249942/>.

93. See Michael Pierce, *Prosecuting Online Threats After Elonis*, 110 NW. U. L. REV. 995, 1003 (2016) (arguing courts should apply a hybrid approach that “focus[es] on the identity of the target and impose[s] a higher mens rea standard when the target is a public figure”).

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

examples of seemingly “meaningless” art to illustrate a doctrinal point—that art does not have to convey a particularized meaning qualify as art. Furthermore, institutional gatekeepers have long distinguished art from non-art, but certainly there has been art of variable quality published or curated since time immemorial. This paper does not propose a neat standard for the threshold art vs. non-art distinction under First Amendment doctrine. Rather, my proposed working test is that for a rap to become “art speech” it must be cognizable as *rap-as-art*. Essential to evaluating if a rap is artful is how it impacts a listener.

Any honest reviewer would remark that “Fuck the Police” by Knox and Beasley is much better than its transcribed lyrics alone would indicate. This supports the observation that lyrical quality is generally a weak index of the overall listenability of a rap song. Knox and Beasley are each competent rappers—they can flow in the pocket and vary their delivery in response to beat shifts. The most interesting bar is when Knox states: “My momma told me not to put this on CD/ but I’m gonna make this fuckin’ city believe me.”<sup>95</sup> This seems to echo the same meta-awareness observed in Elonis’s references to the risky nature of distributing threatening lyrics and his disclaimers about the veracity of his own lyrics. We can plausibly interpret this line to suggest a similar kind of aesthetic awareness on the part of Knox and to reinforce the rap’s non-literal intent. This might read too much into the meaning of Knox’s lyrics. But this fourth wall reflection on how audiences might receive his lyrics goes to the constructedness of the song and suggests that he aims to rap for a generalized audience.

*Knox* is a tough case. This is in large part because the First Amendment paradigm requires distinguishing aesthetic intent from a subjective intent to threaten—under blackletter doctrine, a speech act cannot have blended intent. A threat is conceptualized as a kind of physical action, which allows us to make a content-based value judgment and thus disfavor the speech. This creates strange outcomes such as where a rap could pass First Amendment muster if it was minimally artful yet extremely threatening.<sup>96</sup> If a rap meets the

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95. *Commonwealth v. Knox*, 190 A.3d 1146, 1150 (Pa. 2018).

96. Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 202 (2012) (suggesting the need for a balancing test); *see also* Rubinfeld, *supra* note 17, at 829 (noting the converse to this problem, “[a]s far as *Brandenburg* is concerned, a person who deliberately incites others to commit a minor offense is in the same position as a person who incites others to riot. In both cases, the speech is equally unprotected.”).

threshold standard of artfulness, then we are simply indifferent to the intensity or directness of the threat. It is already in the covered zone of art speech. We can put an “explicit” label on its album cover and prevent it from being played on the radio or at schools. But it cannot be criminalized once it is deemed art speech.

Of course, this is not the calculus that was used prior to modern First Amendment doctrine,<sup>97</sup> nor is it the kind of decision-making process that has ever been used by the Art World. Rather, we can assume that institutional gatekeepers employed a sort of balancing test that considered both the aesthetic value of the song and how a potentially threatening line might sound. The more reputable an artist is the more likely a record label A&R or a record producer would publish the potentially threatening line.<sup>98</sup> And presumably, a competent record producer would likely suggest editing a line like the one in “Fuck the Police” that individuated local police officers.

Other approaches to unpacking criminal and aesthetic intent have been proposed. Justice Alito in his *Elonis* dissent offered a recklessness test for art threats in which the speaker or artist acknowledges how an audience is likely to receive a posted or recorded lyric.<sup>99</sup> This audience-awareness approach would require the artist to consider the medium of expression and her expected audience. In other words, would-be rappers should recognize how posting lyrics on the internet may distort a post from its original context or intended meaning.<sup>100</sup> The permanence of internet communication reifies the “present-ness” of a communicative act, extending the lingering sense of threat that a reader might feel.<sup>101</sup> At the same time, an artist can claim that sharing a rap publicly on the internet demonstrates that she expects a generalized audience of listeners.<sup>102</sup>

Alito’s test is novel because it contemplates that aesthetic and bad intent might co-exist. Indeed, Alito himself might not realize how this

97. See, e.g., Lakier, *supra* note 18, at 2179–82 (explaining the difference between First Amendment jurisprudence in the eighteenth and nineteenth century and the Court’s approach to freedom of speech and expression in the twentieth century).

98. For example, Tupac’s references to east coast rap foes in “Hit ‘Em Up” or Eminem’s repeat references to his ex-wife in his early oeuvre.

99. *Elonis v. United States* 135 S. Ct. 2001, 2014–16 (2015) (Alito, J., dissenting).

100. P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 50 (2015).

101. John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL’Y 631, 633 (2016).

102. Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1166–67 (2013).

synthetic understanding of intent may destabilize the very core of the First Amendment regime. It also seems to require that judges perform a quality control role, previously assigned to the Art World, and forces the artist to consider both her likely audience and whether a listener will reasonably assume that a rap is targeting them as an individual. The problem with this audience-aware approach is that it favors the known over the unknown artist.<sup>103</sup> There is a real fear that a recklessness standard might chill the kind of provocative art speech that we *want* to encourage in our First Amendment culture. For example, an unknown artist might be discouraged from taking creative risks, thereby perpetuating her status as an unknown artist. Still, the Alito test is an important innovation because it reminds us of the real reason that we cover art speech—not because it contributes to our marketplace of ideas, vitalizes our political discourse, or empowers speaker autonomy, but because there is a qualitative aesthetic value internal to First Amendment culture.<sup>104</sup>

## VIII. WHY WE COVER ART

### A. *A Marketplace of Art Speech*

It is necessary to understand the legal moorings of art speech before considering possible ways to cover and secure it in our post-gatekeeper world. Justifying protection on a Holmesian marketplace of ideas principle has little merit. That is because the First Amendment largely does not care about the idea represented in a given artwork, or if it represents one at all. There are two theories of aesthetic experience: mentalists, who focus on how the mind receives an artwork in context, and sensualists, who consider how people experience pleasure through art.<sup>105</sup> Each is consistent with the fact that an artwork does not have to convey an effable idea to nevertheless be artful. This is also true of rap, especially in the new paradigm of a rap world where sound is prioritized over meaning. For example, I have listened to “EARFQUAKE,” the standout single from Tyler the Creator’s 2020 Grammy-winning rap album *IGOR*, innumerable times over the last year, but I still have no clue what rapper Playboi Carti is even saying

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103. Kerr, *supra* note 43, at 90.

104. Tushnet, *supra* note 96, at 173 (suggesting that we assume nonrepresentational art is covered “because we think that such art is, in some sense, a ‘good thing’”).

105. See, e.g., Peter Brooks, *An erotics of art*, N.Y. TIMES (Sept. 14, 1975), <https://www.nytimes.com/1975/09/14/archives/an-erotics-of-art-the-pleasure-of-the-text-sz.html>.

on his signature guest verse.<sup>106</sup> It's clearly awesome. It's also unintelligible to the casual listener. For the reader's convenience, here are some of the song's lyrics<sup>107</sup>:

*We ain't gotta ball, D. Rose, huh*  
*I don't give a fuck 'bout none', huh*  
*Beamin' like fuck my lungs, huh*  
*Just might call my lawyer, huh*  
*Plug gon' set me up, huh (Yeah)*  
*Bih', don't set me up (Okay)*  
*I'm with Tyler, yuh (Slime)*  
*He ride like the car, huh*  
*And she wicked, huh, yuh*  
*Like Woah Vicky, huh, yeah (Like Woah Vicky)*  
*Oh, my God, hold up, um*  
*Diamonds not Tiffany, huh, yeah (Woah, woah)*  
*So in love*  
*So in love*

It is still not wholly obvious to me what Playboi Carti is rapping about, but I am confident that having completed this rap-reading exercise will have a negligible impact on my future enjoyment of listening to this song. The reason I like it is because of its sonic impact. The marketplace of ideas is irrelevant here, because no coherent idea is communicated.

### *B. Art speech as political speech*

Other theorists have argued that art speech is covered by the First Amendment because exposure to art elevates our political sensibility. These post hoc moves to cover art speech confuse the benefits of an arts education with the precise First Amendment question of why or how we determine that certain artworks are covered. Marci Hamilton suggested in her article, "Art Speech," that aesthetic expression is a kind of pre-verbal or non-discursive form of political expression.<sup>108</sup>

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106. See *Earquake*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Earquake> (last visited Feb. 20, 2021) (noting that the song features a guest appearance of "American rapper Playboi Carti").

107. *EARQUAKE*, GENIUS.COM, <https://genius.com/Tyler-the-creator-earquake-lyrics> (last visited Feb. 20, 2021).

108. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 103–09 (1996).

Others have viewed the arts as inspiring anti-government criticism or imagination that are fundamental to self-government.<sup>109</sup> Even Alexander Meiklejohn, who is recognized as advocating for limiting First Amendment protections to political speech, argued that “literature and the arts must be protected by the First Amendment ... [because] they lead the way toward sensitive and informed application and response to the values out of which the riches of the general welfare are created.”<sup>110</sup> These connections feel tenuous because of the breadth and generality of the argument.<sup>111</sup> Many human activities “lead the way” to an appreciation of constitutional values; for example running a small business, or even ticket scalping might inspire reflection on First Amendment values.<sup>112</sup> A political speech rationale lacks explanatory power here.

### C. Art speech as autonomy

The marketplace of ideas and political speech theories of why the First Amendment covers art each have an instrumental orientation: to improve the quality and range of our ideas, or to rarefy our political sensibility. The other theory that has been proposed by scholars is the deontological value of speaker autonomy.<sup>113</sup> This theory posits that the First Amendment incorporates an expansive notion of speech because speech is important in itself, expression nurtures inchoate thoughts, and speech helps us explore the frontiers of our imagination and develops our sense of self.<sup>114</sup> This kind of identity value converges with Justice Kennedy’s thinking about personal destiny and vision of self.<sup>115</sup> But this

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109. See *id.* at 76 (“Art permits individuals to experience alternative worlds, thereby providing an efficient and effective means of testing the status quo without risk.”); see also Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1580–81 (1984) (noting that some art has “emotive” content that is “not devoid of political content” and may “undermine the assumption of systemic order and stability”).

110. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257.

111. See Blocher, *supra* note 56, at 131 (observing that Meiklejohn’s argument “may be a bit of stretch”).

112. Tushnet, *supra* note 96, at 173.

113. See generally T. M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541 (2011); see also Eberle, *supra* note 15, at 19 (arguing for art coverage based on theories of self-realization).

114. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (describing free speech as a vehicle for self-realization).

115. Cf. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (“*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”).

autonomy value alone does not explain what distinguishes art speech from the Jed Rubinfeld example of the sports car-loving libertarian who feels the urge to express herself by breaking the speed limit.<sup>116</sup> An autonomy rationale could be marshaled to justify any and all of the many quotidian or anti-social things said or done each day. It simply covers too much.<sup>117</sup>

#### *D. Art speech as culturally important speech*

The best explanation of why art speech is covered by the First Amendment, or why *any* sort of speech is covered by the First Amendment, is because it is core to our First Amendment culture.<sup>118</sup> Professor Schauer encouraged us to

consider the possibility that the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, *cultural*, historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed.<sup>119</sup>

Dean Post echoes this same culture-based intuition, writing that the boundaries of the First Amendment are “anthropologically apparent.”<sup>120</sup> The First Amendment covers things that we like (good art), and it covers things that we usually do not like (crude political speech, ignorant speech), but we tolerate it because we want to serve other cultural goals like having a vibrant democracy or protecting the free trade of ideas.<sup>121</sup>

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116. This is a widely shared critique. *See, e.g.*, Gey, *supra* note 44, at 12 n.38 (citing Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971)) (“[T]he important point is that these [autonomy] benefits do not distinguish speech from any other human activity.”); *see, e.g.*, Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 772 (1986) (noting that theories of “self-expression” are insufficient because “they do not distinguish speaking from a wide range of other self-expressive activities that fall outside the purview of the first amendment”).

117. *See* Scanlon, *supra* note 113, at 546 (“The chief problem with ‘autonomy’ is that it is commonly understood in too many different ways.”).

118. *See* Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 YALE J.L. & HUMAN. 227, 228 (2009) (referring to Professor Adler’s own scholarly project as a “cultural theory of the First Amendment”).

119. Schauer, *supra* note 12, at 1787.

120. Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 623 (2011).

121. In terms of Bobbitt’s modalities, the former reason is ethical, the latter reasons are prudential. *See, e.g.*, Philip Bobbitt, *Methods of Constitutional Argument*, 23 U. BRIT. COLUM. L. REV. 449, 453, 457 (1989) (describing prudential and ethical arguments).

Tautological as it may be, we like good art because we like good art. But the quality control work of prior institutional gatekeepers gave content to this notion of “good art.” Without these gatekeepers, the law community is forced to define the general principles that delimit First Amendment coverage.

Take, for example, Lewis Carroll’s “Jabberwocky.” Joseph Blocher’s recent contribution on nonsense speech is an erudite look at defining and valuing the use of nonsense in society, and elegantly situates Justice Souter’s reference to “Jabberwocky” in *Hurley*.<sup>122</sup> I first explicate a threshold issue that is both obvious yet essential: “Jabberwocky” was not shared by an unknown author on an internet forum. Rather, it was written by the celebrated author Lewis Carroll, and included as part of his novel, *Through the Looking-Glass, and What Alice Found There*, the sequel to *Alice’s Adventures in Wonderland*.<sup>123</sup> This background context primes the reader to recognize it as literary writing. It has already met the threshold standards of the Art World (here, the world of literary publication), and it is read against this implicit quality control work. Lewis Carroll was himself a lecturer at Oxford. Certainly, this credential adds an aura of reputation and quality surrounding his work. Finally, Jabberwocky is not simply nonsense. It is lyrical and full of whimsy, and reading Jabberwocky is a pleasurable aesthetic experience. It is *really good nonsense*.<sup>124</sup>

In short, the First Amendment covers good art. But the coverage question remains largely unarticulated because it depends on naturalized perceptions about art that are part of our “social milieu.”<sup>125</sup> Prior to the internet, courts and legal officials deferred to institutional gatekeepers and the consumer art market for determinations of art speech. We can critique the normative legitimacy of such a regime. Certainly, record executives and other Art World players might be more motivated by profit than elevating public taste. But this is a descriptive account of how the prior First Amendment regime worked. Now amateur artists—like amateur rappers—can disseminate their attempts at art to an internet audience, thereby circumventing the

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122. See generally Blocher, *supra* note 56.

123. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 19–20 (1872).

124. Perhaps the context of it being a novel is irrelevant to its aesthetic value. See Susan Stuart, *Shibboleths and Ceballos: Eroding Constitutional Rights Through Pseudocommunication*, 2008 B.Y.U. L. REV. 1545, 1546 (2008) (“*In the context of Lewis Carroll’s children’s story*, Jabberwocky has no meaning, at least that an adult audience could discern.” (emphasis added)).

125. Schauer, *supra* note 12, at 1787.

traditional role of the “gatekeeper.”

The problem for internet rappers is that some of these potential audiences might not “get it” or have a desire to learn how to appreciate rap. Therefore, I argue (1) for a civic response to the gatekeeper problem by institutionalizing a rap guild or (2) to re-imagine the state’s role in doing quality control work that used to be done by record labels.

## IX. PROPOSALS

### A. *A rap guild*

My first proposal is that rappers create a sort of self-regulated guild based on internal standards of quality to recreate the work once done by institutional gatekeepers. This move would add a layer of institutional credibility for unsigned rappers or rappers who choose to self-release their music and make membership based on community standards of aesthetics rather than relying on the marketing calculi of record label execs.<sup>126</sup> A rap guild would not manage individual rapper’s choices as to what or when to release music to the internet, and so its “quality control” work would be limited to membership decisions. This is consistent with the evolutionary nature of rap. The social definition of rap seems to be *whatever the aesthetic output is of people who look or act like rappers*.<sup>127</sup> This lack of a rigid sonic template for rap is liberatory and exciting in some ways and informs recent aesthetic moves like the sing-songy trap of Young Thug and Travis Scott, or emo-rap of Lil Peep and Juice WRLD. But this rapper-inflected definition of rap is also problematic. When genre-hopping musicians like Drake<sup>128</sup> or Tyler the Creator<sup>129</sup> aim to expand their catalog and produce non-rap

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126. Cf. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 508 (2001) (observing how certain cultural groups have First Amendment expression protections because of constructed notions of insularity and group membership).

127. Cf. Schauer, *supra* note 19, at 1275 (“[W]e investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution whose identity and boundaries are at least moderately identifiable. If so, then we might develop a kind of second-order test. If there is a reporter’s privilege, for example, we might ask not whether this exercise of the privilege serves primary First Amendment purposes, but instead simply whether the person claiming the privilege is a reporter.”).

128. Joey Nolfi, *Drake Disputes His Grammy Category: ‘Hotline Bling’ is ‘Not a Rap Song’*, ENT. WKLY (Feb. 19, 2017), <https://ew.com/grammys/2017/02/19/drake-grammys-hotline-bling-not-rap-song/>.

129. Toyin Owoseje, *Tyler, The Creator Slams Grammys’ ‘Urban’ Category as a Politically Correct Version of the N-word*, CNN (Jan. 27, 2020), <https://www.cnn.com/2020/01/27/entertainment/tyler-the-creator-grammys-intl-scli/index.html>.

songs, the music industry still categorizes these R&B or pop songs as “rap.”

There are also core critiques about the viability or ethos of such a guild. It admittedly would be quite difficult to administer a guild made up of likely hundreds of thousands of wannabe rappers. The Screen Actors Guild (SAG) provides a helpful analogy. Perhaps the threshold institutional setting of a Hollywood film explains in part why we never see criminal cases related to statutory rape or contributing to child delinquency. In a way, the Hollywood depictions of these crimes still satisfy their strict liability nature. It would be similarly surprising to see an actor’s film work cited as evidence in a courtroom. Because the SAG does the *ex-ante* work of declaring who is an “actor” (analogous to a rapper in the context of this proposal), we assume work performed by guild members is a professional attempt at “art” and thus has zero legal relevance. Another way to frame this is that the Art World, or SAG, is making the kinds of *quasi-legal* decisions I referred to earlier about aesthetic quality through its selection of members that we as social actors rely on and defer to. These “easy cases” are never thought to be litigated. But perhaps a scene depicting statutory rape in a low-budget homemade indie film would be received differently by a court. Another example is a stand-up comedian making a statement that would be considered defamatory when being interviewed on the nightly news but would be dismissed as a “joke” if recited on stage as part of a bit. The institutional context distinguishes these seemingly congruent acted scenes or lies/jokes. But hard cases still present themselves, such as a comedian on a news-inflected talk show<sup>130</sup> or naturalistic forms of performance art.<sup>131</sup> The problem is that the provocative artist might be intentionally *trying* to blur and complicate contextual boundaries. Indeed, that might be the very point of the artwork or performance. As a result, art threatens is “a very non-legal area of law” that is perhaps best managed outside of courts.<sup>132</sup>

I sense that the law and rap community is trying to make a similar argument that all rap should be assumed to have zero legal relevance,

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130. See, e.g., Joseph Ax, *Trump Withdraws “Orangutan” Lawsuit Against Comic Bill Maher*, REUTERS (Apr. 2, 2013), <https://www.reuters.com/article/entertainment-us-usa-trump-lawsuit/trump-withdraws-orangutan-lawsuit-against-comic-bill-maher-idUSBRE9310PL20130402> (revealing that Donald Trump withdrew his lawsuit against Bill Maher for calling Trump the son of an orangutan).

131. See, e.g., Tushnet, *supra* note 11, at 184–85 (2012) (noting that performance art that would include defacing public property should violate the First Amendment).

132. Kerr, *supra* note 43, at 102.

for either threats analysis or probative value in evidence. To this extent the creation of a rap guild similar to the Screen Actors Guild could help them achieve these desired ends. But the SAG is also a labor union, and this professional distinction allows it to control membership based on pay stubs or other gatekeeper determinations of quality. My rap guild proposal is specifically non-economic in nature, which complicates membership evaluation.

Finally, we might wonder if a rap guild conflicts with the very ethos of rap. Rap is commonly thought of as a transgressive genre. Perhaps an institutional organization is at odds with an anarchic, rebellious ethos that still manifests in many kinds of rap today. I am certainly open to other novel forms of gatekeeping that maintain the integrity of this ever-evolving genre. I am also unsure if today's rappers are necessarily anarchic, or at least any more anarchic than any other genre of musicians. Some of our most famous rappers are known for their organizing abilities and entrepreneurial talent.

#### *B. The State as Quality Control Worker?*

My second proposal is that the state enters the quality control space that used to be managed by record labels or other gatekeepers like book editors or film producers. At first blush, this might feel strange. After all, political speech is core to freedom of speech jurisprudence, and we typically interpret this to mean dissent. There seems to be an obvious conflict of interest in allowing the state to do the work of editing anti-state speech; it is the literal definition of censorship.

My proposal is limited to the production and distribution of art speech. As I have argued, the jurisprudential basis for art speech is not that it contributes to the marketplace of ideas or vitalizes democratic self-government, but our shared sense that the First Amendment should cover quality aesthetic expression for values internal to our constitutional culture. There might not be any blackletter doctrine for this. But nor are there any recorded cases of published rap or art being deemed a true threat by a court. The only distinction between a song like Tupac's "Hit 'Em Up" and Jamal Knox's "Fuck the Police" is that Tupac is considered a great rapper. In just the last half-decade, three amateur rap threat cases have petitioned the Supreme Court for certiorari. A fourth is inevitable.

The jurisprudential basis for art speech is the seeming tautology that we like good art. It is not that controversial to think the government should help people improve the quality of their art. Every

day, governments make aesthetic decisions on which kind of art to fund, or to curate in museums.<sup>133</sup> Still, as rappers use words as part of the construction of their songs, it is understandable why it might feel icky if a government employee is influencing which words are vocalized in a rap. This might faintly echo the problem of coercive thought in *Barnette v. West Virginia*.<sup>134</sup>

I counter that this might depend on our rhetoric about the state, and how we understand the precise job description of the quality control worker. If the state is depicted as an Orwellian surveillance regime, which has a monopoly on the use of violence, then this might feel scary. But if we equate the state with a licensed social worker or public-school guidance counselor, then maybe readers can be more sanguine about this kind of quality control work. Amateur rappers or performance artists do not benefit from the professional editing work of record label or publishing house. A school counselor who is able to explain to students why name-checking a private individual is received differently than rapping about an institution or “the system” is not necessarily distorting the identity of a student’s rap song, but she might help this student avoid school suspension or a court visit.<sup>135</sup> This growing-pain concern is an important one in the context of rap threats, where a subtext for cases like *Elonis* is the very many young people who are simply writing their way through their early development as a rapper. Likely, most of these potential art speech cases are already managed by institutions like schools. We have in-person social spaces that allow for managing and editing the misfires of the young artist so that she can develop a sensibility of what is aesthetic, yet provocative. The internet is less good at this.

In *Bell v. Itawamba County School Board*, the Supreme Court denied certiorari in a case involving a novice rapper who posted to Facebook and YouTube a recording of a rap he wrote about allegations concerning the lewd behavior of two gym coaches at his Mississippi high school.<sup>136</sup> Like the aesthetic output of most teenagers, Taylor Bell’s

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133. Soucek, *supra* note 55, at 384–85.

134. See Enrique Armijo, *The Freedom of Non-Speech*, 33 CONST. COMMENT 291, 314–16 (2018) (contextualizing art speech within theories of First Amendment protection to not use words, associated with scholars like Louis Michael Seidman and Martin Redish).

135. Interestingly, YG was visited by Secret Service after he released a music video and was pressured to omit a line for the published album version that made reference to cartel kingpin El Chapo. Adelle Platon, *YG Says Secret Service Reached Out Following Release of Anti-Trump Song, May Try to Take His Album Off Shelves*, BILLBOARD (Apr. 27, 2016), <https://www.billboard.com/articles/columns/hip-hop/7348438/yg-secret-service-donald-trump-afd>.

136. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert denied* 136 S. Ct. 1166,

lyrics lacked sophistication and tact. But they also inflected some topical rap devices (e.g., “Run up on T-Bizzle” echoes the lexicon of Snoop Dogg) and rhymed.<sup>137</sup> It was a clear attempt at rap, even if not a very good one. It also mentioned inserting “a pistol down [one of the coach’s] mouth” and referred to these coaches and the school by name.<sup>138</sup> Bell was suspended for seven days and had to spend the rest of the grading period (approximately six weeks) at the county alternative school.<sup>139</sup> An en banc Fifth Circuit panel upheld the school board’s decision.<sup>140</sup>

This case is further complicated by the fact that school administrators must balance individual rights of self-expression with the exigencies of moral education and discipline.<sup>141</sup> But this same mandate for moral education could re-frame how school personnel managed Taylor Bell’s case. A seven-day suspension, six weeks at the county alternative school and not being allowed to attend school functions feels like quite a draconian sentence for an *attempted rap*. Perhaps instead a counselor could have worked *with* Bell to edit or remove these lyrics after his internet posts were discovered by school administration. The First Amendment acts as a sort of social safety valve.<sup>142</sup> We should allow individuals to vocalize anti-social or violent thoughts so they do not manifest as violent *action*. This safety valve function informs the history of “battle rapping,” in which live participants in a freestyle “cypher” traded barbs and insults in rhyme form.

But the problem today is that an amateur rapper might think they are merely performing something like a “battle rap” when the internet listener (e.g., Bell’s gym coach) is unaware of this genre context. A battle rap that is not rapped in-person in direct view of the audience, but that is instead posted to an unmediated internet is likely received quite differently. In Wittgensteinian terms, Bell was using rap-like language for an audience who was not part of the relevant rap language

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1166 (2016).

137. *Bell*, 799 F.3d at 384.

138. *Id.*

139. *Id.* at 385.

140. *Id.* at 389.

141. *See id.* at 389–90 (noting that a student’s First Amendment rights must be “tempered” in light of the specific functions of school and education). *See also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (noting that a student “may express his opinions . . . if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others”).

142. THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

game. It is an example of cultural discord that seems resolvable outside of an institutional setting. We should consider non-legalist<sup>143</sup> responses to what are social problems prompted by our evolving internet speech culture.

### CONCLUSION

Rap is art. However, that does not mean that all who attempt to rap are necessarily artists or record artful songs. This is axiomatic of all musical genres and all forms of art. The word “art” is commonly assumed to connote a threshold of quality. We apply this word only to paintings, or songs, or performances that are *good*. And so, although my paper clarifies that the First Amendment does not necessarily cover the written or recorded raps of amateur rappers, it also reminds the legal world that not all rap speech is equal. This is a good thing as well.

The law and rap community seems to want to insulate attempts at rap from both courtroom use and threats analysis. But while their motivations are sympathetic, their logic functions to deny the nobility of rap as compared to other music genres. There is a legitimation cost to declaring that all attempted raps are covered by the First Amendment, that bad rap, or even Justice Alito’s feigned rap, is equal to good rap.<sup>144</sup> This reinforces a societal perspective that rap is simple, unrefined, rote or juvenile.<sup>145</sup> That it’s a kind of folk tradition rather than an aesthetic form of music.

This kind of popular, or folk, approach to rap is reflected in perhaps the most formative contribution to law and rap scholarship, Paul Butler’s “Much Respect: Toward a Hip-Hop Theory of Punishment.”<sup>146</sup> Butler’s groundbreaking paper cites to rap as a form of cultural authority, as an index of community views about different theories of criminal jurisprudence. His paper reflects a novel way to approach issues of community justice and can be situated within his wider intellectual project on jury nullification.<sup>147</sup>

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143. See generally JUDITH N. SKLAR, *LEGALISM* (1964) (describing why legalism as theory does not appropriately balance morality and politics).

144. Cf. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1405–12 (2009) (discussing the “legitimation costs” of the creation of a constitutional right to abortion).

145. Cf. Anthony Kronman, *Is Poetry Undemocratic?*, 16 *GA. ST. U. L. REV.* 311, 312–13 (1999) (positing that poetry has aristocratic inclinations).

146. Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 *STAN. L. REV.* 983 (2004).

147. See generally Paul Butler, *Racially-Based Jury Nullification: Black Power in the Criminal*

But to the extent his paper is a theory of folk jurisprudence, and how ideas about criminal justice percolate through a community of rappers and rap audiences, then his theory is necessarily more about *ideas* than about the aesthetic quality of rap. Ideas were likely much more important to early genres of rap, like the political rap of Public Enemy in the 1980s or the conscious rap of the 1990s associated individuals like Mos Def and Common. Today ideas don't matter as much in rap. However, if we build a theory of rap based in its idealized vision of justice, this leads the law and rap community to think about the demographics of rappers and the other societal problems they face. This all sounds good in theory. But it also causes us to forget the fundamental qualitative determinations that go into the production and distribution of rap as an *art*. This aesthetic basis of rap justifies its constitutional coverage as art speech. Prior to the internet we didn't need to think about these aesthetic thresholds because published rap had necessarily been vetted (and likely edited) in the quality control work of our gatekeepers. But now that the amateur rapper, or the feigned rapper, can simply upload their seemingly threatening rap to the internet, we need to rethink fundamental coverage questions. These are broad principles, and they seem to reduce to facile metrics like likeability and quality.<sup>148</sup> This makes the coverage boundaries feel a bit non-legal and perhaps beyond judicial ken. But maybe this is a reason why we should finesse these boundaries and allow new sorts of intervention to help with the quality control work that the old gatekeepers no longer do, so that we can help young artists learn the recognized boundaries of their artform *outside* of the court system.

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*Justice System*, 105 YALE L.J. 677 (1995) (arguing for the increased consideration of race by black jurors in criminal cases involving black defendants).

148. Cf. Post, *supra* note 6, at 1272 (“The most general statement of this point is that all legal values are rooted in the experiences associated with local and specific kinds of social practices.”).