

UVA LAW | Rap on Trial

ANNE COUGHLIN: Welcome, everyone. My name is Anne Coughlin and I'm a professor here at UVA Law School. I'm really overjoyed to see you and to welcome you to our panel today, which we're calling Rap on Trial. The panel is part of a larger gathering that's taking place over the two days, today and tomorrow, here in Charlottesville and at UVA. The title of the larger gathering is Narrating Rap, Narrating Law, and the gathering is a production of UVA's new Sound Justice Lab.

So I wanted to take a couple of minutes telling you about our lab and what we think it is that brings us to the room Nomi Dave and Bonnie Gordon are both professors of music, and I am happy to join them as one of the co-directors directors of the Sound Justice Lab. We've been collaborating for many years. We've been focusing on gender justice issues on an array of anti-racist initiatives, both here at the University of Virginia and in Charlottesville and at times the county and the state of Virginia. So we thought it would be really fun, interesting, productive, to see if we could get some grant money to support some of our work. And so we started looking around for pots of money at UVA and so forth where we could submit proposals.

And we heard that UV's Democracy Institute was funding what are called democracy labs. The Democracy Institute has now been folded into and is part of the Karsh Institute so I want to be very clear that we are grateful to the Karsh Institute as well as to the Democracy Institute. So we hear, Oh my goodness, there's this thing called a democracy lab, that sounds really cool. Let's go ahead and apply to be one of those. And so then we had to do a bunch of paperwork and my own students will know how obsessed I am with the meaning of words. I'm always fussing at them, like, Look in the dictionary. What does this word mean, and so forth, before you speak. So I was driving everyone crazy because I kept obsessing over this word, lab.

Like what is a lab? And we had to persuade the people with the pots of money why they should give money to us, a lab. And I'm looking around at the three of us thinking, I'm not sure what that means. So I look in the dictionary, and I discovered that lab is a room or building equipped for scientific experiments or for the manufacture of drugs or chemicals. Right. So I'm kind of like, Whoa. How is this all going to work out? We've got this proposal and these serious people that are going to read it.

So finally, after quite a bit of obsessing, Bonnie's husband-- who I don't think is here, so I get to tell the story-- he's an environmental scientist with a special interest in global biogeochemistry, so he's sort of the scientist that we consulted. And he said, I think should stop agonizing and just ask yourselves the following question: what happens when you mix together two musicians and a lawyer? Right? What does the resulting-- I'm going to use the word alchemical-- compound look like? What exactly does this compound of the three of you look like? And then since you're not inert but endowed with consciousness and voices, what do you sound like?

And so today, my feeling is that I'd like to say this is our coming-out party. This is the first sort of formal event that we've had. The lab just went live this fall. This is what we look like. This is what we hope to look like. This is what you look like. But that's our agenda, is to bring folks like you together in a space to experiment talking to each other about difficult social justice questions.

So I wanted to just say a couple more things. The larger questions that our lab focuses on include, which voices does our law valorize? Which voices does it silence? Which voices does it villainize and even punish? What happens to our law, to the political process, yes, to the democratic process, to institutional arrangements, when we are inattentive to or omit the voices of people of color, of women, of Indigenous folks, of our LGBTQ companions? We believe-- that is, Bonnie and Nomi and I believe-- that those voices go somewhere, and our agenda includes listening, looking for them, finding them, and then amplifying them, getting ourselves out of the way and amplifying the voices of others.

I'm on the verge of turning things over to our wonderful moderators, but I'm just going to ask you to bear with me for a couple more minutes. First, of course, I want to say a word of thanks to our generous co-sponsors. They include the University of Virginia School of Law the Center for the Study of Race and Law, the Black Law Students Association, the Carter G. Woodson Institute, the Department of Sociology, the Department of Music. And we also want to give a very special word of thanks to the Jefferson School African-American Heritage Center which will be hosting our creative workshops and hip hop showcase tomorrow evening. We encourage you to join us for that as well.

And then I also wanted to pause and give a really warm welcome to some folks who've traveled here from out of town to participate and to share their voices with us as parts of our gathering. So we have with us Andrea Dennis and Erik Nielson. They are the authors of the award-winning book *Rap On Trial*. We shamelessly stole the title of their book for this panel, and they've been great not to make any fuss about that. Andrea is a professor of law at the University of Georgia, and Erik is a professor of Liberal Arts at the University of Richmond.

We also have with us Mickey Factz who is a master emcee. He's the founder and the dean of students at Pendulum, Inc., which is a school of hip hop lyricism that was founded in 2021 where he offers master classes in lyricism and practical skills. He's going to be leading the creative workshops tomorrow, which is really cool. Thank you so much for joining us.

We also have with us Anthony Kwame Harrison who drove here from Virginia Tech, and we're just so grateful to you for spending those hours on the road. He is the Edward S. Diggs professor in humanities and professor of sociology. He also has a joint appointment in Africana Studies at Virginia Tech. Kristin Henning comes to us from-- there she is-- from Washington, DC. She is the Bloom professor of law and director of the Juvenile Justice Clinic and Initiative at the Georgetown Law School. We have with us, we're terribly excited, to welcome Corey Myles, assistant professor in the Department of Sociology and Africana Studies program at Tulane he has a book forthcoming I urge you to Google Corey miles and check out the new book. We also have with us Angelique Phipps. She is a public relations expert and a brand strategist. She serves clients in a whole array of industries, and her special focus is on social justice communication.

So all of these folks are in the house, and we're just delighted to have you here. Now, I have the great pleasure of introducing our two moderators who gave generously of their time to be here. They are Kim Forde-Mazrui and Keegan Hudson. Kim Forde-Mazrui is a professor of law here at the University of Virginia School of Law. He is also the director of the Center for the Study of Race and Law. His scholarship focuses on equal protection, especially including race and sexual orientation. He has a very distinguished bio, and again, I encourage you to check it out online and to get to more about Kim and Kim's work.

I'm also delighted that Keegan Hudson agreed to join us as a moderator. He is a second year student at the law school, and he is the president of the Black Law Students Association here. Before coming to UVA, he served in the office of South Carolina congressman James Clyburn as staff assistant to the Majority Whip. He graduated cum laude from Alcorn State University in 2020, and I have to especially point out that he played football there which is an incredible accomplishment. During his studies as an undergraduate, he also served as a legislative intern for the House Committee on Homeland Security and the Congressional Black Caucus. So I'm now going to put things in the hands of Kim and Keegan, and they are going to take it away.

**KIM FORDE-
MAZRUI:**

Thank you, Anne, and thank you for including us in this really exciting and important discussion. So I'll just tell you kind of the format. Keegan, and I are just going to share the moderating duties, and we will go into-- the speakers will go in the order that they're here. Mac Phipps, Darrell Brown, Molly Conger, and Eden Hileman, and we'll introduce each one briefly because you do have their bios before they speak. And then when each of them has spoken, we will open up to questions, so please, please get ready to ask questions when we get to that time. So take it away, Keegan.

**KEEGAN
HUDSON:**

Yes, sir. Thank you, professors, for the wonderful introductions, and I guess I'll start with introducing our first panelist for today. Our first panelist is Mr. Mac Phipps, a rapper/songwriter from New Orleans, Louisiana best known for his work with No Limit Records. His 1998 album *Shell Shocked* reached number 11 on the Billboard 200 and number four on the top hip hop charts. Then in 2001, Mr. Phipps was wrongfully convicted of manslaughter after an individual was killed at one of his shows. The prosecution relied heavily on Mac's lyrics as evidence. Still, he dedicated his time to uplifting his peers while incarcerated. He was even given a Lifetime Achievement Award for his service. After serving 21 years, Mac was finally granted clemency. These days, while still seeking full exoneration, he spends time mentoring and creating music. This year, he's released five singles and has an EP upcoming October 31st called *Sun in the City*. Without further ado, Mr. Mac Phipps.

[APPLAUSE]

MAC PHIPPS:

So good afternoon, everyone. My name is actually McKinley Joseph Phipps, Jr., more commonly known as Mac Phipps. Just to tell you a little bit about me. Y'all can hear me well? Y'all good? All right. So I grew up in New Orleans, born and raised. I come from a family of six, I'm the oldest. And my parents have been together now for like 46 years, and they were both artists. They were visual artists, and I remember them listening to a lot of music in the house when I was a kid. I think at around seven years old, I fell in love with this thing called hip hop. It just spoke to me. It resonated with me, and I began writing song lyrics when I was a kid. And I knew at seven years old what I wanted to do with the rest of my life. I know that sounds weird, but I really knew what I wanted to do with the rest of my life.

So I started on this journey, letting anybody who would listen to me hear me, and I eventually landed a record deal in 1988 when I was about 11 years old, and I met a guy whom now is a legend. His name is *Matty Fresh*, and he produced my first record. And I released it I think at 12 like sometime in between the summer of after seventh grade. And it was exciting. I loved it. And it was something that kept me out of trouble and kept me away from doing some of the things that many of my friends were doing in the streets.

And then at the time, there were-- East Coast was my heaviest hip hop influence. I was influenced by artists like *Rakim*, who, to this day, I credit for being my very first professor, if that makes any sense. *Rakim* was able to accomplish what my teachers couldn't accomplish, and that was to get me to read. And I excelled at English and literature because I would listen to his songs and the things he would say, and it would make me go get to encyclopedias. We didn't have Google back then, y'all. We didn't have phones. So I used to go to the library so I can read about the people and places that he mentioned in his songs. And I became a straight-A student because of that.

And I think back then, you had a lot of different artists, you had a lot of-- at the turn of the late '80s, early '90s, you had-- hip hop was taking its form in different regions. You had artists from the West Coast that were more of the "gangsta" style. You had conscious emcees, you had battle rappers. And I considered myself a battle rapper. I grew up loving to hear the rappers go at it and prove who was more dominant, who was better. And so that's sort of the vein that shaped and formed my style.

My daddy was a Vietnam veteran, so with him, I used to watch a lot of military movies, and I was always fascinated with the military. The camouflage and the camaraderie of the soldiers. So that was my thing. And in my family, everybody thought I was going to the military because I loved the military. I mean, well, I did I joined the No Limit Army, you what I mean? So Master P even called himself the colonel for those who know. And it was something that just spoke to me.

And so around late '90s is when I met this guy Master P. And while his style of hip hop was totally different from what I enjoyed-- I liked more conscious lyricism-- it was something about the conversation I had with him that just-- he had a way of making you believe that this is about to be bigger than life. so I signed with him. And within a couple of months, I was making more money than I had ever made in my life. And at 20, I was able to buy my parents a home, and everything seemed great. Traveled around the world with Snoop Dogg, we went on tour like all over Europe, and I've been to like 20 different countries, and everything just seemed to be going well.

And one night, I came from a concert, and my mother-- I came from off tour, actually, and I had promised my mother that I would be at this event she was having at a nightclub in the place outside of New Orleans called Saint Tammany. So before we get in-- before I get into the night, I want to just give you all a little bit about Saint Tammany.

Saint Tammany, the sit-ins in Saint Tammany Parish was called Slidell. And at that time, a man named David Duke-- has anybody ever heard of David Duke? David Duke was actually the chairman of the Republican Committee in Saint Tammany at that time. It was a very conservative parish and just straightforward. They didn't want-- they didn't want many Blacks particularly from New Orleans in that area. So this was the mindset of that particular parish. And a lot of that parish was formed out of what was called the White flight, back in the days in New Orleans when a lot of people from-- a lot of whites from New Orleans started to move outside of the city because the city was being heavily populated with Blacks. So this is the backdrop on which all of this happened.

And so I went to this club. And around midnight, a little past midnight, a fight broke out on the dance floor and a shot was fired. And I think about 45 minutes to an hour later, detectives was at my house. And they surrounded the house, they pulled me out, and I was arrested. I was put under arrest because witnesses had said they'd seen me with a gun, and that they'd seen me ultimately, they'd seen me shoot someone. So I went to the interrogation room, I talked to the detectives, and at the time, the person who was shot was still alive. And the whole while I was being questioned, I was secretly and quietly praying that the person who was shot would live because I felt if he lived, then he would be able to tell them who shot him, right?

Well, I think halfway through the questioning, someone came, whispered to the detective, and then he turned to me and he said, This investigation has shifted from an aggravated assault to a murder because the person had lost their life. And I remember when he said that, I just felt an overwhelming sense of fear because I knew that from that point on, my life was going to change. And I remember sitting in that room and thinking about everything that I had done up until that point in my life because I think subconsciously, I just knew that this would be the last day that I would see that house that I bought.

And so they took me from there, they did some stuff with my hands with fingerprints. I was booked as a fugitive, and then I was brought to the parish jail. While at the parish jail, I remember walking on a tear, the tears that they have. And I remember just-- I was in a state of shock for about a week because I really didn't-- I couldn't fathom what was happening. And when you're in situations like that, it makes you question your whole sense of morale. It makes you question even what you believe in because it's like how could this happen when that I didn't do anything wrong.

Well, I was indicted about a week or so later. The guy who actually did it went to the detectives about 10 days after my arrest and he told them he did it. He told them why he did it. I got excited, of course, because I thought that this was my way out. I was going to see the streets again. At my bond hearing, the prosecutor said we have reason to believe that this man was compensated for his confession. Now, I want to put that in perspective. They didn't say that I paid him to kill anyone. They said I paid him to confess to a crime that would send him to prison for the rest of his life.

And I want you young people that's in law school to think about how ridiculous that sounds. What can you pay a man to go spend the rest of his life in prison? But this was the prosecutor's argument. When we got to trial, they didn't have a credible witness. They didn't have any murder weapon. They didn't have anything that could substantially tie me to this crime. So the only thing they felt they could use-- I mean, I had no criminal history. I was gainfully employed. So all they could use was my songs. So they went back to those songs. And I had one song in particular called "Murder Murder Kill Kill." Yeah, I know. I'm the fool who wrote a song called "Murder Murder Kill Kill," but let me tell you about "Murder Murder Kill Kill."

Remember, I told you my dad was in the military guy, right? For those of you who are familiar with military cadences, there is one that says something to the effect, Murder murder murder murder, kill kill kill kill. Well, I remember that from a kid, and I took that and I created a chorus and then I made what I felt was one of the best battle raps I ever wrote and I put it to it. And it was just my way of expressing my dominance over other emcees, if you know about hip hop. But they conveniently used it to tell the jury that this guy is capable of that type of mindset, and therefore is capable of this crime.

They took another song that I used called "Shell Shocked" in which I make a reference to my military father and his love for his children. I said, He gave me his name, he gave me the game. And if you F with me, he'll put a bullet in your brain. Well, the prosecutor said they took both of those songs, they tied them together, and made them one statement to the jury. They said, This young man says murder murder, kill kill. If you F with me, I'll put a bullet in your brain. That is not what I said. But for them, this was convenient.

The jury that was handpicked and selected were already of the mindset of a majority of the people of that parish. They were predominantly over 40. They were all White, and during the voir dire, there were certain questions that were asked, and they asked them like, How do you rate the police? And everybody who was like, I think the police is doing an excellent job, they're perfect. I mean, if they-- one lady even said-- and I have to use my Southern drawl to say this-- well, if he's been arrested, then he had to have done something. That's what she said.

There was another guy who they were asking. He was a professor from Tulane University. He sat there reading a book, and they said, Do you have a problem sending someone to prison for life? He said, Well, if you all want me to send someone to prison for life, you better have some substantial evidence and be able to prove to me beyond a reasonable doubt if you're talking about something as serious as a life sentence. Y'all know what they did with him, got him out of there. We don't want anyone that can think. We don't want anyone that will use their own mind.

So in the end, I listened to the deliberation for hours. And I can hear two women shouting in the deliberation room. And what I can hear from sitting at that table was they were yelling, This is ridiculous this makes no sense. I didn't what was going on in the deliberation room, but when the jurors walked out, I saw two women crying, and I knew right there that my fate had been sealed. So they walked out, and I remember when they read the guilty verdict, I just dropped, and I cried like I held-- I hadn't cried in a year and nine months because being in jail, you have to maintain a tough image because things happen. And you have to be ready to protect yourself at all times.

So I couldn't show any fear. I was scared to death in that place, but I couldn't show no one. But when they read that guilty verdict, I just dropped my head on the table and I cried. I cried for all those months that I was in that place. And I remember just feeling numb. And as we talked about earlier, I was living two realities at one time, if this makes sense. I was the person actually going through this, and I was also a person who was watching the person going through this because I had to emotionally detach myself from it in order to effectively assist my attorneys in helping me get out of prison.

And it was very difficult because no matter how much I tried to look at it from a legal standpoint, it was me. I had to look at my parents when they came to visit me, and we all were pretending. They were pretending for me that everything was OK because they didn't want me to worry. And of course, I pretended for them because I didn't want them to worry. And then I met my wife, and I started pretending for her. I didn't want her to worry. And in the end, what I learned was that if we all just start wanting for others what we want for ourselves, this type of thing wouldn't happen.

If those folks who were sitting in that jury would have saw me as their son, or would have saw me as their neighbor, or part of their community, then I think that they would have viewed this from a different lens, if that makes sense. But that's not what happened. And as a result, I spent 21 years of my life in prison.

And I don't feel sorry for myself. I made myself two promises when I got in that place. What I prayed to, what I prayed to, and I asked for two things. I said, number one, Protect me from myself because I don't what I'm capable of. I don't know what fear can bring you because I was scared to death. And number two, I said, Don't let me become black-hearted hearted. I don't want to be bitter. I don't want to be mad and angry, because I see where anger takes a person. I don't like the way anger feels.

I don't about y'all, but in prison, you see things that you want to forget, but you can't. And even today, I'm out, I enjoy being free. Matter of fact, I think I have a great-- I can't speak for no one else, but I have a great appreciation for everything, even the smallest things. But there are times where I find myself remembering things that brings me back to a different place. So I think that's it. Thank you all for listening.

[APPLAUSE]

KIM FORDE-MAZRUI: Wow, thank you very much for that powerful testimony. So this is a law school, so how does or how should the courts deal with the kind of evidence that was used against Mr. Phipps? And we have our own Professor Daryl Brown to speak to that. And again, in the interest of time, we'll keep it short. I'll just mention, his areas of teaching and scholarship include criminal law, criminal procedure, and evidence, and he's published a long list of articles. He's also one of our graduates, by the way. But he's also known for his outstanding book, *Free Market Criminal Justice, How Democracy and Laissez Faire Undermine the Rule of Law*. And by the way, the speakers should feel free to either speak from where they're sitting or come to the podium.

DARYL BROWN: So thank you, Kim. Really not at all because you haven't learned that the main event goes last and the warm up act goes first, and I don't how I'm supposed to follow Mr. Phipps. I've been out class before in public speaking in many other forums, but this is the worst. So I'm going to talk to you about the evidence rules.

MAC PHIPPS: That's what I want to know about.

DARYL BROWN: Which my evidence students don't want to hear me talk about sometimes. So one response that legislatures in a few-- in three states at least and the Congress have proposed to this misuse of rap lyrics, and really, artistic expression more generally, is to-- depending on what the proposal is or what their approach is-- to just prohibit altogether the use of artistic expression, rap lyrics, and otherwise, or to regulate it under the evidence rules in ways that make it less likely to be used by prosecutors and more correctly and appropriately to be used by prosecutors.

So I just want to describe to you a couple of these bills. There's basically three different versions of how legislators are approaching this problem right now. And California has actually passed their statute. And so we'll see that in action soon. I'll talk about the New Jersey Bill first because it's kind of the strongest version of this kind of proposal to regulate the misuse of hip hop lyrics and other artistic expression. All of these bills define artistic expression fairly broadly. Many of them are quite explicit that the use of hip hop and rap lyrics are the motivation for these proposals, but they all define artistic creative expression much more broadly: word, sounds, movements, genres, visual arts, poetry, literature, on and on.

So what New Jersey does is just deem this kind of artistic expression not relevant to anything, just as a matter of law or as a matter of the evidence rules. So you don't need to much about the evidence rules except that the evidence rules say something sensible, like any evidence that any party introduces should be relevant. It should have something to do with the that and the questions as to what the case is about. And so relevance is really easy and broad and generous. So things that are kind of marginally relevant can be introduced because it might be useful to the jury.

And this proposal would just add a blanket exception to that and say, regardless of anything else, regardless of how relevant they might seem, artistic expressions are just deemed to be not relevant, period. Really strong rule. There's a second rule in which they do effectively the same thing, for the evidence aficionados out there, this is the relevance prohibition, would be added to rule 401. In rule 404, they basically just say the same thing again, and say really can't use it even for this particular purpose to show the various things that are permitted to be used, permitted to be shown by rule 404 be evidence.

But the basic approach is just to outlaw this kind of evidence altogether, this form of expression as evidence. They do the same thing really again and a third rule and the hearsay rule. So if they're introducing someone else's statements out of court for the truth that person seemed to have asserted in their statement, that would be hearsay. There are lots of hearsay exceptions. But the New Jersey proposal would basically just say you can't introduce the artistic expression as hearsay, either. I think just prohibiting it as relevant evidence altogether accomplishes the job, but they do that basically the same thing three different ways.

So I'll just note that this applies only in this proposal to criminal cases with respect to criminal defendants. And so that doesn't apply in civil cases, doesn't apply when one private person sues another. And it doesn't apply with respect to victims' expressions in criminal cases. So it's conceivable that a victim who's a hip hop artist or has other creative expression might have that used against them. You can imagine a scenario where the defendant is trying to portray the victim as the aggressor, and they're using the rap lyrics against them. That use is not prohibited because again, the prohibition on rap hip hop lyrics as relevant evidence is only with respect to the criminal defendants, not in civil cases, and only with respect to the defendant's expression.

So in that sense, it's targeted for these high-profile cases in which prosecutors have used rap lyrics against rap artists to prosecute rap artists. But potentially, there's a gap or a problem there of denying artistic expression or artist of all types the protection of this kind of limitation on rap lyrics when it could be used against them to undermine the prosecution of someone who's harmed them.

I also wondered just parenthetically what might happen in criminal copyright prosecutions if a rap lyrics and artistic expression-- anyone's artistic expression-- is stolen and used for profit. It could be criminal copyright violation. I really doubt prosecutors have come to a lot of-- come to vindicate through criminal prosecutions a lot of copyright violations of this kind of artistic expression. Probably not a big deal as a practical matter, but it could undermine that kind of prosecution, again, if you're barring the defendant's artistic expression.

So that's one version, really strong version, to just kind of bar all this evidence altogether. California has actually passed a law that basically beefs up what the evidence aficionados know as rule 403. If there's some relevant evidence-- but it has some prejudicial effect, meaning, roughly that it's likely to be misused by the jury somehow, so it has some value it is relevant to something in the case, but it's likely to be really misused or prejudicial or evoke biases by the jury or the decision maker-- then the judge can keep out that evidence because it's more likely to do more harm than good, in effect.

And the California rule-- which again takes effect next year, it was passed this fall, signed by the governor this fall-- basically says that while you're doing that kind of balancing test, is it more prejudicial and more harmful than the good it does as relevant evidence? It just directs judges specifically to make sure that when you're thinking about that undue prejudice or that bad effect, that you're treating the expression of the evidence of the defendant's propensity for violence or the general criminal disposition, as well as the possibility that it explicitly injects racial bias into the proceedings, basically just reminding judges or telling judges specifically to think about the misuse of the evidence in this particular way and the kind of racial bias specifically that it might be evoking.

Maybe the weakest of these various proposals, but it's also-- it's probably worth reminding judges or saying that judges and making judges explicitly think about these concerns. It wouldn't be unheard of for judges to ignore that consideration or give it little weight when a party just argued that they should be aware of, say, the racial bias that the evidence might be put to or the effect that it might have

Oh, , that's a weaker limitation on this kind of evidence much weaker than the just prohibition, but it's a somewhat stronger rule probably than the-- it might have some effect more so than the rule that we have now, which has opened rap lyrics and other artistic expression to be admitted in a lot of criminal cases in a lot of states.

The third proposal and the federal model, the New York rule, or the New York proposal, is about the same so I'll just describe this one, added additional rule to the evidence rules that basically is a kind of supercharged version of that balancing test that just gives judges pretty specific instructions on what they should be considering before they introduce artistic expression, and then puts, I would say, a thumb on the scale of not introducing this kind of evidence.

So it roughly says that when the government wants to use this kind of evidence in a criminal case, when a prosecutor wants to use it, they have to prove to the judge by clear and convincing evidence that the defendant intended the literal meaning of that statement that they make-- which I think should be a hard burden for prosecutors to meet--t that the defendant intended the literal meaning of what the lyrics or the artistic expression are, and that the creative expression refers to the specific facts of the crime alleged, not just a general desire to murder or to do any number of things, and that it has distinct probative value, meaning, it's kind of the best evidence available out there to prove this particular point that it's proving. If you have other evidence, you shouldn't be turning to this evidence.

This is just a stronger rule that I think if judges took it seriously, appellate courts made them take it seriously, it would do a lot of work toward keeping out rap lyrics in many of the cases in which it's previously been admitted and may be admitted soon in Atlanta prosecutions and otherwise. So I worry a little bit about the strong version of the New Jersey Bill. If that passes, it just prohibits this kind of evidence. It's possible that there are uses to this kind of evidence, that there are always some unintended effects that are hard to see when you're drafting something this blanket and strong and without exceptions. But it's clearly the strongest rule, and the federal rule is a close second.

Unfortunately, I would predict that the federal rule it doesn't have any hope this current Congress or the Congress that we're about to have in three months. But again, New York has proposed roughly the same rule, the New York Senate has already passed it. Maybe there's some hope of the New York Assembly enacting it. I can't predict New York politics, but I think I'll stop there and let my colleagues talk.

KIM FORDE-MAZRUI:

By the way, he was in within his time. I was just giving him friendly warnings.

KEEGAN HUDSON:

Thank you, professor. Our next panelist is Miss Molly Conger. She is a journalist based right here in Charlottesville, and her work involves investigative reporting on White supremacists, neo-Nazis, and other hate groups in the United States. As you can imagine, she has been very involved in the city's response to the 2017 Unite the Right rally. You can follow Molly @socialistdogmom to stay connected to her and her work. She will be discussing some of the nuances associated with regulating free speech. Molly, thank you for being here, and thank you for your advocacy.

MOLLY CONGER:

Thank you. Am I close enough to the microphone? These people all talk for a living, I listen for a living, so this is unusual for me. So when Anne first told me about this event, the book, the idea of finding a legislative solution to the problem of using rap lyrics against defendants in court, my first thought was, How on Earth are they going to define rap? I'm thinking of like, How is my legislator-- I'm thinking of like a Creigh Deeds or a Tim Kaine-- going to sit down at his desk and proffer a concrete legal definition of what hip hop is?

It's a funny mental image, thinking about these stuffy old men sitting down and defining for the law, what is rap, what is art, what is music? And maybe a literature professor or an ethnomusicologist or someone here can answer that. But the answer here is they didn't. They did not sit down and define what rap is. I guess I didn't realize he was going to go through the text of all the bills first. I pulled up the language from these bills, and the stated intention is to limit the use of a predominantly Black form of expression to make white jurors see a Black defendant in a certain light.

But the law defines this being limited as just creative or artistic expression. And the language is really broad from the federal bill, which, it hasn't passed but, "The expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including music, dance performance art, visual art, poetry, literature, film and other such objects or media." So anything. Literally anything. You could say anything was performance art or was spoken word poetry.

So sitting here in a room full of law professors, I'm hesitant to make a pronouncement about a law, but my reading of these bills is that they can't do anything, or if they were to do anything, it would be too much. It starts off saying creative or artistic expression is inadmissible. That's something, right? But then there's this long list of exceptions. Except if the material has probative value, except if the expression addresses a matter of factual dispute, except if it refers to the specific facts of the crime. It's sort of like the recapitulation at the end of a sonata. Adding this to the end of the rules of evidence is just playing again some of the notes of the piece.

These are already the rules. Judges should already be doing this. It doesn't matter what it is if it's not probative. It wasn't evidence to begin with. So a judge who's inclined to allow bad evidence whose nature would tend to negatively prejudice the jury is going to keep doing that. He's already doing that, they're already doing that everywhere. So we're trying to find a race-blind solution to a narrowly tailored manifestation of a much bigger problem. And there's no race-blind solution to racism. The criminalization of young Black men doesn't start on the exhibit list, it starts with the school resource officer. Long before you get to court, that's already happened

So drawing from some of the examples from the book, you see prosecutors playing rap videos to get a gang enhancement, using the presence of people in the background of the video who happened to be in the gang database to prove that the defendant also belongs in the gang database. The problem here isn't the music video, although the prosecutor may well have chosen that particular piece of evidence to prove that point over some other equally tenuous piece of evidence because he understands the implications that it will conjure. He could have just picked something else.

Young men of color tend to end up tagged in these gang databases just for knowing other Black people because anyone who's ever had contact with a police officer in their neighborhood could end up in that database. And if you know him, if he's your brother, if he's your neighbor, you're in that database, too. It's pure fiction cooked up to make it easier to criminalize a particular community. And you can try to change the rules of Calvin Ball, but you can't win a rigged game. The problem is the database.

Now of course, my second thought when Anne told me about the event was, when I read the text of these laws, is, What else is going to end up excluded? If this works, if this excludes this kind of evidence, what else gets excluded? Because my area of expertise obviously-- you could probably tell-- is not rap music, it's Nazis. And not the historical kind, not members of the German National Socialist Party of the '30s and '40s but American neo-Nazis. And so for the last five years, I've been carefully chronicling all of the legal fallout of the Unite the Right rally.

And so there were a number of trials. I think everyone remembers specifically when James Alex Fields was convicted criminally. He was tried both by the state and the federal government. But there was also a significant civil case that just wrapped up actually this time last year. So in both the civil and criminal cases, there was an avalanche of evidence, more than you usually have, especially in that civil case. You don't usually have access to all of the conspirators' private communications with each other over the course of months while they planned the conspiracy. So it was quite lucky.

Of course, in the Fields case, there was a lot of physical evidence. We had expert witnesses testify to the swabs they took from the cracked windshield, of pieces of blood and tissue that the DNA matched to the victims. We had x-rays of broken bones, photographs of blood and bruises and casts and surgical scars and tearful testimony. But physical and emotional trauma, a man who a man who could never pick up his child again because his shoulders permanently damaged as a scar you see in the mirror that brings back flashbacks every day.

But whether he physically committed that act, whether he was the driver of the car or whether he hit those people, whether those people were hurt, those were never up for dispute. That was not a factual matter that anyone was disputing in that courtroom, not even his defense attorney. The question was intent. And the evidence that proved that intent was memes. His lawyer fought hard to keep memes out of that courtroom. And you could argue that a meme is a form of artistic expression. It's not high art, but it's art. You made it. It's words and images for creative purpose.

And so specifically, the two memes that ended up really sealing the first-degree murder charge, first-degree murder conviction, was a photo that he posted on Instagram twice: a photo of a car ramming into a crowd of people. It's easy to find if you want to find it. It's not necessary, but it looks eerily like the photographs of what he actually did. It's a dark gray car running through a crowd of people, and it's captioned: You have the right to protest, but I'm late for work. That looks like intent to me. That looks like forethought.

The second meme was something that he texted to his mother the day before. So on August 11, 2017 his mother texted-- she knew he was driving here from Ohio, and she just said, like a mother would, she said be careful. Be careful. And he texted back, We're not the ones who need to be careful. And he attached a meme to the text and it was a picture of Adolf Hitler, and underneath his face, it just said, Soon. The implication being, soon, I will do what Hitler did. Soon, I will enact violence against minorities.

And so the Circuit court judge, admitted it over the defense objection. And that was one of their issues on appeal in the state Court of Appeals upheld that, as probative of his state of mind. So in his state trial, the scope of evidence they felt they needed to get that first-degree murder conviction was pretty limited. They just needed those two memes to say, He was planning this. This was something he thought about. This wasn't an accident. This was motivated by a specific hatred, and he obviously thought about it beforehand.

But in that civil case, the *Sines v. Kessler* civil case against all of the organizers of the event-- so not just Fields, but all of the individuals and groups that came together and planned this event-- they used a lot more memes in that because they weren't just trying to prove the overt act. So to prove a civil conspiracy to do racial and ethnic intimidation, you're not just looking at the overt act, you're not just looking at the specific acts of violence committed by individual people at this rally. You're looking at all of these conspirators and their motivation leading up to that because in a conspiracy-- you guys are law students.

So in a conspiracy, you don't have to be the one behind the wheel of the car. You were just part of that planning for the event where that happened as a reasonable consequence of the thing you planned. And so again, luckily for these plaintiffs' attorneys they had months of communications, they had a whole Discord server where thousands of guys were talking about how they were totally going to come to great hate crimes together.

And so among the memes introduced-- I won't get into all of them because we'll be here all night, it was a three week trial. A lot of memes-- Marine Sergeant Michael Chesney posting under the pseudonym Tyrone, a month before the rally, he posted a meme depicting a large combine, like a big piece of farm equipment, captioned: Introducing John Deere's multi-lane protester digester, and he added his comment, Sure would be nice. And it's a joke. Nobody's driving a combine on the streets of Charlottesville. Nobody's hitting it, but with farm equipment, that's a joke.

But in that same conversation, he was asking specific questions about several states. Several states have passed laws releasing drivers from liability if they hit people with their cars who have entered the street as part of a protest. And so he's asking if Virginia was one of those states. So what kind of legal liability would I be exposing myself to if I hit someone with a car? So asking a question about the specific facts of the law, that's innocent enough. Posting a meme, that's just a joke. Those two things together form a pretty dark picture about the kind of intent that was being communicated in this space.

And so in another discussion about what sorts of tools are weapons will be legal to carry-- again, reasonable questions. What's legal for me to do in this place I've never been-- they were discussing sharpening their flagpole points. So you could disguise a weapon as just a prop, like I'm just carrying this American flag, but actually it's a knife. And so one user replied, Impaling people is always the best option, TBH. Which is hyperbolic. That's a joke. He's not actually talking about physically impaling someone all the way through, and then the meme he attached was a picture of a field full of dead bodies impaled on poles. That's hyperbolic. No one's doing that. Those things together with the fact that people did actually sharpen their flagpoles and use them to stab people is indicative of some kind of conspiratorial intent to do that.

And this is just a joke. It's just a joke. It's just a joke. It bears some deconstructing. It's not flippant. That's not just something people toss off, it's intentional. So the actual text of the Daily Stormer Style Guide was introduced as evidence in the Sines trial. So the Daily Stormer is a Nazi propaganda blog, and these guidelines were written by the site's owner, Andrew Anglin who's missing. He's in hiding, but he wrote these instructions for contributors to his website. It's common for a publication to have a style guide that contributors follow, but this style guide was about how to most impactfully communicate violent intent without running afoul of the law.

So this section, the header of the section, is Lulz. L-U-L-Z, doing it for the lulz. "The tone of the site should be light. Most people are not comfortable with material that comes across as vitriolic raging or non-ironic hatred. The indoctrinated should not be able to tell if we are joking or not. There should be a conscious awareness of mocking stereotypes of hateful races racists. I usually think of this as self-deprecating humor. I'm a racist making fun of stereotypes of racists because I don't take myself super seriously. This is obviously a ploy, and I do actually want to gas the anti-Semitic slurs."

So he's saying like, This is how I want you to write. I want you to stay just on the side of what's legal, but communicate really vitriolic violence because we do actually want to do genocide, and we're working towards that together. It's just-- it's a joke. It's just memes. It's for the lulz. It creates plausible deniability and gently eases the reader into becoming more comfortable with extreme ideas.

And later in that same guide, Anglin even says it's illegal to promote violence but "at the same time, it's totally important to normalize the acceptance of violence as an eventuality and inevitability." It almost reads like he read Sartre's essay on anti-Semitism and took those words of caution as advice. There's criticism to be made of Sartre, but I think I come back to this essay a lot because it's still extremely relevant and it's just this quick passage. Never believe that anti-Semites are completely unaware of the absurdity of their replies. They know that their remarks are frivolous, open to challenge. But they are amusing themselves, for it is their adversary who is obliged to use words responsibly since he believes in words. The anti-Semite has the right to play. They even like to play with discourse by giving ridiculous reasons. They discredit the seriousness of their interlocutors. They delight in acting in bad faith since they do not seek to persuade by sound argument, but to intimidate and disconcert. So when somebody says, Debate me, bro, they don't want to debate. This is not a dialogue. This is a power struggle.

So Eric and I actually had a bit of a spirited conversation last night at dinner. I think we have a fundamentally different approach to this topic for a variety of reasons, but one of the examples I raised in that conversation about what kind of creative expression are we going to end up limiting here, was an example that's close to my heart because this man did threaten to murder me on a variety of occasions. But the case that actually came against him was unrelated to the many times he said he was going to put a gun in my vagina and rape me to death with it. Again, that's creative expression. That's-- it's fun, right? It's just a joke.

EDEN HIELMAN: Eric is clarifying that he didn't do that.

MOLLY What?

CONGER:

EDEN HIELMAN: Eric was clarifying he wasn't the one.

MOLLY Oh, no, no, no, no, this podcaster. So this case, he was red-flagged in California. So in California, it's called a
CONGER: gun violence emergency protective order. So after he was publicly identified as the man who makes this podcast anonymously, prosecutors in Sacramento said, I don't think this guy should have a gun. We could have a debate about whether or not red flag orders are helpful or a useful tool, but that's what happened.

So under a pseudonym, this man and several of his friends produce a podcast that's-- it's part just shooting the shit and just making jokes and it's part radio play, so it's performance art. There they're using pseudonyms. They're doing bits and voices and characters. They have recurring characters that they do these little skits. So it's not literal, right? But it's one of these little skits, sort of like an OJ's if I did it, he's talking about how if you were to deface a synagogue, you shouldn't use spray adhesive because that can damage the building. And depending on the amount of damage you do to the building, this could become a felony. So if someone were going to do that, if some guy who's not me did that, you should use tape.

And so that's hypothetical. It's tongue-in-cheek. He's being silly. He's removing himself from it. He's playing a character. But unfortunately, there is surveillance footage of someone who looks a lot like him doing exactly that at a synagogue less than a mile from his mom's house.

So this podcast is pretty good evidence that maybe the guy that defaced that synagogue was Andrew Casarez. Oops, I missed my spot. So over the course of that conversation, I asked Eric, Is it truly your position, then, that if I taped up a sign about something innocuous like a yard sale, I'm having a yard sale, and I tape up a sign in my neighborhood but I accidentally damaged the building, is that fundamentally in the courtroom the same crime as doing the same damage to the building by taping up a flyer covered in swastikas and anti-Semitic slurs? And also, that building is a synagogue. Is the victim of this crime the paint, or is the victim of this crime the congregants of that synagogue who were afraid for their lives?

If the speech itself is excluded-- Oh, God no. So is the crime of burning a cross on someone's lawn, is the victim the grass, or is the victim the person who lives in that house who is terrified? If the speech is excluded, all you have is the property damage. Absent motive, absent the meaning of your actions, the meaning of your words-- if you take all that out-- all that's left is minor property damage, and that's hardly worth bringing to court.

So to a free speech absolutist, to the person whose ideological commitment to absolute, unfettered, , unrestricted speech in all forms, the answer is yes. Those things are the same. Damaging the paint is damaging the paint. But I don't think you can solve a problem whose cause is racism by enabling racism to proliferate without consequence. That's the paradox of tolerance, that tolerance without limits or logic does not dissolve intolerance, it strengthens it. It allows it to take hold and overpower those very tolerant people who looked the other way while they painted tote scopes on their helmet and sharpened their flagpoles.

In the end, American courts have always functioned as a tool to soothe White fears about Blackness as a socially acceptable tool of violence for controlling and suppressing Black communities. . That's the root of policing in America that's the root of our courts. And that's a problem. I don't have a solution for. I just listen, I just take the notes. But trying to condense that problem down into something that's manageable enough to be addressed by tweaking the rules of evidence doesn't even begin to address the problem.

By the time you're sitting in a courtroom on a motion in Limine to suppress a particular piece of evidence, you've already been profiled, harassed, arrested, and charged. Your life is already ruined. You're already halfway to prison. And most people forced into that position only go back to that courtroom one more time after arraignment, and it's for sentencing because almost every case ends in a plea. People don't go to trial. Most defendants don't even get as far as fighting to keep evidence out because they're never putting on any evidence. They're coerced, lied to, and terrified into taking pleas.

Changing the rules of evidence doesn't change what a prosecutor is allowed to tell you he's going to tell the jury. He can lie to you. And they do lie to you, that's their job. And if by some miracle, this legislation is passed in a form that genuinely can exclude in such a broad way these kinds of evidence-- which I am skeptical that that's even possible because we already have rules that judges ignore every day-- what does it really prevent? How many of these cases exist in this perfect rhetorical vacuum where that was the piece of evidence that tipped the scale, not the entire culture of overpolicing Black communities targeting young men of color who live, dress, and express themselves at a particular way, the prosecutors who overcharge those cases to scare you into taking a plea, the jurors who walk into a courtroom thinking, Well, a cop would never lie to me.

Free speech absolutism as a tool to dismantle White supremacist power structures is a fool's errand, and it falls quickly into the paradox of tolerance, allowing all creative expression just blanket to go unchallenged, unquestioned, and be exempt from scrutiny in the courts ends up where everything ends up in the legal system. Best intentions be damned, a system designed to protect and uphold Whiteness is going to keep doing that. So.

[APPLAUSE]

**KIM FORDE-
MAZRUI:**

OK. Thank you. And our last speaker is Eden Heilman, who is the legal director of the Virginia American Civil Liberties Union. Eden in that position has engaged in a broad range of litigation at the state and federal level as well as in administrative proceedings, involving a broad range of topics, including criminal justice, juvenile justice, prison reform, education, disability rights, LGBTQ rights. And Miss Heilman today will talk about the RAP Act, in fact perhaps you could spell out what that stands for and potential First Amendment concerns with restricting artists' speech.

EDEN HIELMAN: Is this on? Is this on? Yes, OK. Y'all, I just got reading glasses so forgive me if I'm trying to figure out the interplay of looking at you and using reading glasses. I'm like, This is weird. OK, first, thank you all very, very much and thank you to the university for inviting me to speak on the panel today and to enjoy to join this incredible slate of co-presenters I particularly want to acknowledge Mac Phipps.

Before I moved to Virginia four years ago, I spent the last 20 years in New Orleans, Louisiana. It is not where I grew up, but it is what I consider to be my home. And I have followed Mac's case closely in the news. He is not lying about St Tammany Parish. It's perhaps one of the most racist places in Louisiana, still to this day. And I just am in awe of you and what you went through, and I just feel incredibly honored to be up here with you, and I just want to say I'm very grateful for that.

So in preparing for this panel today, we were asked by Anne to address specific questions in the context of our roles and experiences. And for me in my role as the ACL U of Virginia legal director, one of the primary questions I was asked is, Do these rap acts, as our professor friend described, provide the appropriate balance of the First Amendment values and the needs of criminal law enforcement? And this was a really hard question for me to answer, and I will tell you why.

First, to be frank, I'm not particularly concerned about the needs of criminal law enforcement. I just, frankly, don't care. In our day-to-day work at the ACL U Virginia, our priorities are, first, protecting First Amendment rights of Virginians, but also to shrink the criminal justice system and to end the system of mass incarceration in Virginia, which we know has oppressed thousands, if not millions, of Black Americans throughout its time. And so for me, it's really hard to think about valuing the needs of a system that has worked to oppress so many people and why that would have value and why we would need to think about that.

So that was a hard, hard, hard cap to put on when thinking about this today. But I do want to take a step back and walk through this a bit and think a little bit about-- And when I say rap act, I'm not just talking about one particular one, I'm talking about the kind of collection and idea of rap acts that we discussed a little bit earlier, and the concept of these and where they stand.

So first, I want to start with just the premise of this, which is that musical expression and other works of art are a form of free speech that are protected by the First Amendment. I think we can probably agree in various forms of what that might look like, and Molly and I might have a difference of opinion as to what is protected works of art and what isn't And I think that there is probably a lot of room for argument there. I probably would argue that a meme is not a protected work of art. I think that there is a lot of gray area there. And I think good lawyering plays a role in this as to arguing what is and what isn't. I would say that music is very clearly a protected form of art. | to me, that wouldn't be a question. And what Mr Phipps went through to me would not be a question. But I do think that is something that would be heavily lawyered in this issue.

In that regard, something like these rap acts are welcome step to me in the right direction in protecting free speech. Do they solve all of the problems? No, they don't. Are they one small step in the right direction? Yes. And I would encourage any state to look at potentially making this small step. Any time a judge would have to sit there and-- most of these acts set a metric of by clear and convincing evidence. They have to kind of take the jury out of the room and look at this particular set of circumstances and take into consideration and make a finding on the record of this particular issue. I think it's only going to benefit to have this on the record.

And so is it a cure-all is it a panacea, for all of the woes of our very racist justice system? Absolutely not. Is it a small step in the right direction. I would arguably say of course it is. Of course, we have seen way too many cases where prosecutors have sought to introduce evidence from art depicting violence and criminal activity in order to prove that the artist themselves is violent or criminal. I'm originally from Gainesville, Florida before I moved to New Orleans, and just this past Friday, a rapper from Jacksonville, which is right near Gainesville, Spinabenz was found not guilty by a jury after the prosecutor tried to use his lyrics against him to convict him of possession of a gun charge. This was actually one of the most absurd cases of this I've ever heard of.

So he has a felony conviction, and so they were trying to charge him with a felony conviction-- a felony possession of a gun conviction. And they used a song of his where the lyric was my Glock cost \$300, and that was the lyric that they used to try and prove that the gun purchased by his girlfriend was in fact his. That was the grounds for the lyric. They also tried to use the timing of the song's release because the song's release date was just weeks after the weapon was purchased by his girlfriend. And so the timing of the release of the song and the song lyric, my Glock cost \$300, was allowed to be admitted as evidence in his case and then allowed to be used against him.

And, fortunately the jury saw through this BS, and found him not guilty. Even though there was no other evidence basically in terms of physical evidence that the gun was in his possession. And again, an example that is truly absurd, but a classic example of trying to use his music to criminalize him for that.

Artist identity has a large impact on how artistic works are perceived. I think we obviously that Black artists and artists with other marginalized identities are especially likely to have their works perceived as criminal. We actually see this, although we see this I think mostly in the context of Black artists and in rap music. We also see this in other contexts, too. So for example, art depicting gay relationships or relationships of transgender characters is more likely to be perceived as sexually explicit than art that is depicted with the exact same content if it is straight and cisgender characters.

So this isn't just-- I mean, although like I said, I think this is highly, highly frequently applied against Black artists and particularly rap music. I do think we see it in other marginalized communities as well. And I think there's a reason for that. Again, we know that any art that challenges power or the challenges of the heteronormative or White power structures are going to be perceived as threats. And that is frequently why you'll see some of this that's counter to that. The sad thing about that in particular is that those I think probably are some of the most valuable art that there is in the universe. We know that art of marginalized groups seeks to speak truth to power. It tells stories of survival and struggle and triumph and family and all these very important things, and yet that's the very art that that's trying to be quashed and anything that chills these perspectives threatens to undermine free expression and really runs the risk of threatening our inclusive democracy as much as possible.

So because these-- especially valuable areas of speech are among those most likely to be chilled by criminal prosecutions. it's our position I think that these rap act type laws are a welcome rebalancing of the threat to free speech that artists can face when they produce art that can be perceived as a threat to power.

Another one of the questions that was asked of the organizers is, Is there a way to distinguish between hip hop lyrics and racist lyrics, which is I think what Molly was getting at. I'm not going to go into a great detail here because I think we're running out of time and I do want to leave a lot of time for the audience to ask questions, but I would argue here that the law is not an appropriate place to make determinations about what does and doesn't count as racist.

I think this is a very dangerous slippery slope and I think we're seeing this currently right now, even in our current state government. We've seen efforts right now in Virginia and elsewhere across the country, for example, to stop teachers from teaching truth about America's history under the concept of divisive concepts, and that is "effort to not be racist." I mean, the reality of it is that if you don't trust the people who are in power in government, you're not going to trust how they define racist speech, and so if you involve the law in defining racist speech, you're not going to like the answer depending on who's in power in government. And so I would argue that the law is the wrong place to have that debate. And so that would be how I would answer that question.

But I want to, again, end there so that we have time for questions and open it up Oh, no, I'm good. I will end it there and open it up for others to ask questions.

KIM FORDE- Thank you very much.

MAZRUI:

[APPLAUSE]