

EXPRESSION NOT CONFESSION: LEGISLATIVE APPROACHES TO RESTRICTING THE ADMISSION OF RAP LYRICS AS EVIDENCE

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“Freddy Mercury did not confess to having ‘just killed a man’ by putting ‘a gun against his head’ and ‘pull[ing] the trigger.’ Bob Marley did not confess to having shot a sheriff. And Johnny Cash did not confess to shooting ‘a man in Reno just to watch him die.’”¹

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1. *Bey-Cousin v. Powell*, 570 F. Supp. 3d 251, 255 (E.D. Pa. 2021) (alteration in original).

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I. INTRODUCTION

California made history and headlines when it became the first state in the country to restrict the admission of a defendant's own rap lyrics into evidence in a criminal proceeding.² Though encompassing all forms of creative expression, California's bill was drafted in response to the pervasiveness of prosecutorial misuse of rap lyrics against criminal defendants going back decades.³ In enacting this landmark legislation, the state legislature cited significant research; for example, a 1999 study conducted at California State University, Los Angeles that found that participants rated a murder defendant more likely to have committed the crime when presented with violent and misogynistic rap lyrics written by the defendant.⁴

Additionally, a trio of studies conducted by psychology researchers at the University of California, Irvine in 2016 suggest that, regardless of the actual content of rap lyrics, simply being labeled as rap was enough to engender negative evaluations among participants.⁵ Rap music scholar Erik Nielson and criminal law professor Andrea Dennis joined forces to identify and document about 500 federal and state cases of what they call "rap on trial," where prosecutors used rap lyrics as evidence against a

2. Kim Bellware, *California Makes It Harder to Use Lyrics as Evidence Against Rappers*, WASH. POST (Oct. 2, 2022, 9:00 AM), <https://www.washingtonpost.com/lifestyle/2022/10/02/california-rap-lyrics-law/>.

3. Morgan Enos, *California Passes the Decriminalizing Artistic Expression Act: Why It's a Win for the First Amendment & Creative Expression*, RECORDING ACAD. (Aug. 26, 2022, 6:03 PM), <https://www.recordingacademy.com/advocacy/news/california-passes-decriminalizing-artistic-expression-act-rap-what-to-know>; see also ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 61–62 (2019) (describing California as the "legal epicenter" of introducing rap lyrics as evidence, as prosecutors in the early 1990s began to use rap to "build cases against alleged gang members").

4. See Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 795 (1999).

5. Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280, 289 (2016). Researchers presented participants with lyrics from a folk song that used a first-person perspective to recount a man's killing of a law enforcement officer and found that participants labeled the lyrics as more offensive, more threatening, and in greater need of regulation when labeled as a rap song compared to when the same lyrics were labeled as a country song. *Id.* at 284.

criminal defendant.⁶ Most recently, in November 2023, a Georgia judge controversially granted prosecutors' request to admit rap lyrics penned by Atlanta rapper Young Thug and other artists on his YSL record label in a high-profile racketeering trial in which prosecutors allege the label is also operating as a criminal enterprise.⁷ Attorneys for the defendants characterized the prosecution's move as an attack on "the right to free speech" and noted that "[t]here is art here, and the art has got to be separated from real life."⁸ California's law, while a step in the right direction, does not go far enough to limit the admission of highly prejudicial rap lyric evidence, which prosecutors far too often use impermissibly to show propensity.

Senators Brad Hoylman-Sigal (D-Manhattan) and Jamaal Bailey (D-Bronx) in the New York State Legislature and Representatives Hank Johnson (D-Ga.) and Jamaal Bowman (D-N.Y.) in Congress have proposed similar bills to assess the relevance and necessity of introducing rap lyrics as evidence in criminal cases.⁹ These proposed bills articulate too high a standard for prosecutors to meet, thereby excluding this type of evidence even where it may be relevant.¹⁰ This Note argues for a modification of the approach proposed by New York lawmakers—taking elements from California's statute—to establish clear guidelines for determining whether a criminal defendant's rap lyrics are admissible as evidence under a standard that is high, but not impossible to meet, where prosecutors can demonstrate the lyrics' relevance and probative value.

This Note will first put rap in context, explaining its origins, its cultural and social role, artistry, and impact. The next section will present psychological research studies finding significant prejudicial effects and biased reactions to rap lyrics, including in judicial settings. The subsequent section summarizes key cases that highlight the core issues that arise from the misuse of rap lyrics as evidence. The final two sections will break down the substance of California's rule and New York's proposed rule and explain why a combination of elements from the two approaches would result in a stronger, more effective rule restricting

6. NIELSON & DENNIS, *supra* note 3, at 12, 69. The authors' research uncovered "rap on trial" cases in almost every state and D.C., with the highest number in California. *Id.* at 69.

7. Joe Coscarelli, *Young Thug Lyrics Will Be Allowed as Evidence in YSL RICO Trial*, N.Y. TIMES (Nov. 9, 2023), <https://www.nytimes.com/2023/11/09/arts/music/young-thug-lyrics-ysl-rico-trial.html>.

8. *Id.*

9. Enos, *supra* note 3.

10. See S. 7527, 204th Leg., 2021–22 Reg. Sess. (N.Y. 2021); H.R. 8531, 117th Cong. (2022) (requiring the Government show by "clear and convincing evidence" that evidence of a defendant's artistic expression should be admitted).

the admission of a defendant's creative expressions as evidence in criminal cases.

II. RAP IN CONTEXT

A. *Origins of Rap Music*

Along with graffiti, DJing, and breakdancing, rapping arose as an element of hip-hop—a cultural movement that originated in New York City's South Bronx in the mid-1970s.¹¹ It was a movement that grew out of despair.¹² Two postwar city planning decisions: the displacement of poor, mostly Puerto Rican families, from Manhattan to the South Bronx and the construction of the Cross Bronx Expressway—which cut through the heart of the neighborhood and prompted widespread flight of residents with the means to move—set in motion the dire conditions that laid the foundation for what would become known as hip-hop.¹³

For the poor, mostly Black, West Indian, and Latino residents who remained, these municipal decisions to drastically alter the fabric of their communities created a neighborhood “plagued by poverty, community decay, and the proliferation of drugs and gang violence in the 1960s and early 1970s.”¹⁴ A 1971 truce initiated by the Puerto Rican gang the Ghetto Brothers prompted some gang members to harness the sense of community they created into healthier, more positive endeavors to improve inner-city life, particularly for youth.¹⁵

Some formed social clubs that built upon the “Three R’s” of gang mentality: reputation, respect, and retaliation, but through creative expression, rather than violence.¹⁶ DJ Afrika Bambaataa did so most prominently, forming what would later become the Universal Zulu Nation, a performing group made up of members of his former gang, the Black Spades.¹⁷ Thus, hip-hop culture developed as a space for youth to create a sense of identity, pride, and status through belonging to a neighborhood crew or posse, where older social institutions had crumbled and failed them.¹⁸

11. FERNANDO OREJUELA, RAP AND HIP HOP CULTURE 15 (2015).

12. *See id.* at 13.

13. *Id.* at 10–11.

14. *Id.* at 10.

15. *Id.* at 13.

16. *See id.* at 12–14.

17. *Id.* at 14–15. The Universal Zulu Nation was first known as the Bronx River Organization before it was renamed. *Id.* at 15. The social club is considered the “model for the emergence of the hip hop community” and remains active today. *Id.*

18. TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 34 (1994).

B. Form and Function

Rap was the last element of hip-hop to emerge, evolving from DJs like Kool Herc “reciting prison-style rhymes” while dropping dance beats called “break-beats” or “b-beats” and “working the turntables.”¹⁹ Later, in order to focus on the music itself, DJs added MCs to take over speaking duties.²⁰ The verbal stylings of MCs developed into more complex raps as MCing evolved into competitive, live “battles” against other MCs, to include boasting, freestyling, and interacting with the crowd to get the loudest and most engaged response.²¹

In rap battles, intricate wordplay using violent rhetoric to leave your opponent in a metaphorical “body bag” is commonplace and is not meant to induce actual violence.²² Like any creative writer, the rapper chooses his words carefully, for a number of reasons; for example, in order to maintain a rhyming pattern, to follow the structure of four beats per bar, or to employ repetition for effect—and to boil lyrics down to their literal meanings is to oversimplify and misunderstand the genre.²³ Central to hip-hop culture is a tradition of creating a persona through self-naming and self-definition, with rappers and other artists often selecting names that suggest a mastery of their craft, “street smarts, coolness, power, and supremacy.”²⁴ Other approaches include using childhood nicknames, self-deprecating names, or expressing a critique of society.²⁵

While a form of entertainment, rapping became a way for marginalized Black voices to express to wider audiences the “pleasures and problems of [B]lack urban life in contemporary America.”²⁶ In the 1980s, deteriorating conditions in urban communities led to the development of “message rap,” a hardcore style that expressed “social and political commentary as well as . . . inner-city rage and resistance.”²⁷ Fittingly, Grandmaster Flash and the Furious Five’s “The Message” is perhaps the most well-known example of message rap.²⁸ It was a critical

19. *Id.* at 51–52.

20. OREJUELA, *supra* note 11, at 4.

21. *Id.* at 4, 52.

22. NIELSON & DENNIS, *supra* note 3, at 51.

23. *Id.* at 48–49.

24. ROSE, *supra* note 18, at 36.

25. *Id.*

26. *Id.* at 2. In hip-hop scholar Tricia Rose’s words, “[r]ap music is a black cultural expression that prioritizes black voices from the margins of urban America.” *Id.*

27. OREJUELA, *supra* note 11, at 107.

28. *Id.* at 108.

and commercial success whose socially conscious lyrics depicted the harsh realities facing Black youth in the inner city.²⁹

Broken glass everywhere
People pissing on the stairs, you know they just don't care
I can't take the smell, can't take the noise
Got no money to move out, I guess I got no choice
Rats in the front room, roaches in the back
Junkies in the alley with a baseball bat³⁰

C. *Rise and Impact of Gangsta Rap*

In the 1990s, as the crack cocaine epidemic raged and incidents of police brutality made national headlines, a form of hardcore rap known as “gangsta rap” would come to dominate the genre, skyrocketing to commercial success and controversy.³¹ Gangsta rappers use graphic language and expletives in their lyrics to depict gang violence, illicit activities, and often, misogyny.³² Nevertheless, in many cases, these rappers were not gang members at all, but used the first person in their lyrics for narrative impact—exemplified by N.W.A.’s album *Straight Outta Compton*—a commercial smash that introduced gangsta rap to the mainstream.³³

The explicit nature of gangsta rap lyrics became the target of parent groups, politicians, ministers, and even civil rights advocates who felt the genre promoted “[B]lack life as being dominated by sex, violence, and obscenity.”³⁴ The intense focus on gangsta rap resulted in Senate hearings in 1994 to debate whether the genre was having a negative

29. *Id.*; see also GRANDMASTER FLASH & THE FURIOUS FIVE, *The Message*, on THE MESSAGE (Sugar Hill Records 1982). “The Message” was only the seventh rap song to chart on Billboard’s Hot 100, going gold in eleven days. *The Message*, GENIUS, <https://genius.com/Grandmaster-flash-and-the-furious-five-the-message-lyrics> (last visited Dec. 19, 2023). The New York Times named it “the most powerful pop single of 1982.” *Id.* (quoting another source). Decades later, the Library of Congress’s National Recording Registry included the song in its archive of “culturally, historically, or aesthetically significant” recordings. *Id.* (quoting another source). Rolling Stone Magazine named it “the best hip hop record of all time.” *Id.*

30. GRANDMASTER FLASH & THE FURIOUS FIVE, *supra* note 29.

31. OREJUELA, *supra* note 11, at 107, 136, 139.

32. *Id.* at 136.

33. *Id.* at 124–25. Ice Cube and most of N.W.A.’s members did not belong to any Los Angeles gang. *Id.* at 125. Another example is Bushwick Bill of the Geto Boys, who conceded that the group’s song “City Under Siege,” which contains explicit lyrics from the perspective of a gangster trying to survive in Houston, was not his own personal experience but based on his observations. *Id.* at 136.

34. *Id.* at 141.

effect on young people.³⁵ Media attention was fixated on gangsta rap, to the expense of other forms of rap, creating a climate where the public questioned the “moral value of all rap music and not just the gangsta-laden material” and largely ignored the positive effects the genre had produced—such as raising awareness of social issues and amplifying the long-marginalized voices of Black youth.³⁶

Although rap was the last element of hip-hop to emerge, it has become its most visible and prominent component in popular culture.³⁷ As the genre has continued to evolve over the years to encompass new styles, the negative connotations attached to rap music from the public and media frenzy of the ‘90s gangsta rap era continue to influence people’s attitudes and perceptions of rap music today.³⁸

III. RESEARCH

A. *Murder Defendant vs. Rapper*

While rap music has a rich cultural history, a robust body of research suggests that mainstream America does not view rap music in a positive light; in fact, several studies reflect quite the opposite.³⁹ Perhaps the most potent and relevant research to the current topic is that of media psychologist Dr. Stuart Fischhoff, who conducted a study to examine the potential prejudicial effect of rap lyrics on jurors’ perceptions of a murder defendant.⁴⁰ With the permission of an actual defendant charged with murder and his attorney, Fischhoff used descriptive, factual information about the defendant—referred to as the “target male” in the study—as well as actual rap lyrics co-written by the defendant, to come up with four conditions to present to a sample of 134 students at California State University, Los Angeles.⁴¹ The sample was diverse in gender, age, and race.⁴²

Under all four conditions, the description of the target male included that he is an eighteen-year-old African American high-school senior who

35. *Id.*; see also *Shaping Our Responses to Violent and Demeaning Imagery in Popular Music: Hearing Before the Subcomm. on Juv. Just. of the Comm. on the Judiciary*, 103rd Cong. 1–2 (1994) (opening statement of Hon. Herbert Kohl, Chairman, Subcomm. on Juv. Just.).

36. OREJUELA, *supra* note 11, at 139; see also Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705, 705–06 (1999).

37. ROSE, *supra* note 18, at 51.

38. See Fried, *supra* note 36, at 706.

39. See A.B. 2799, 2021–2022 Leg., Reg. Sess., 2022 Cal. Stat. 9272.

40. Fischhoff, *supra* note 4, at 795.

41. *Id.* at 798–99.

42. *Id.* at 798.

lives in Southern California, “is a state champion in track, has a good academic record, and is planning on attending college on an athletic scholarship.”⁴³ The description also noted that he is someone who sings at local parties to make extra money.⁴⁴

Under the first condition, the target male was not identified as a murder defendant and no rap lyrics were provided.⁴⁵ Under the second condition, he was identified as a murder defendant, but no lyrics were given.⁴⁶ Under the third condition, the target male was not identified as a murder defendant, but his lyrics were provided.⁴⁷ Finally, the fourth condition identified the target male as a murder defendant *and* provided his rap lyrics.⁴⁸

Researchers presented each participant with one of the four conditions and instructed them to rate the target male using nine personality trait scales: *selfish–unselfish*, *gentle–rough*, *likable–unlikable*, *conceited–modest*, *caring–uncaring*, *truthful–untruthful*, *capable of murder–not capable of murder*, *sexually nonaggressive–sexually aggressive*, and *not a gang member–gang member*.⁴⁹

The results were striking, finding that participants rated the target male most negatively when associated with the rap lyrics—even more negatively than when the target male was identified as a murder suspect without the accompanying rap lyrics.⁵⁰ Researchers noted that “participants were significantly inclined to more negatively evaluate a gangsta’ rap lyricist not accused of murder than a [non-lyricist] accused of murder.”⁵¹

B. *Rap vs. Country*

Lending support to the theory that rap tends to produce negative bias reactions are a series of studies conducted by social psychologist Carrie Fried, who measured bias reactions to rap lyrics in comparison to other

43. *Id.* at 798–99.

44. *Id.* at 799.

45. *Id.* at 798.

46. *Id.* at 799.

47. *Id.*

48. *Id.* The defendant’s lyrics were explicit, containing offensive language and misogynistic themes, and researchers presented them to the participants as written—including misspellings to maintain authenticity. *See id.* at 799–800.

49. *Id.* at 799.

50. *Id.* at 800.

51. *Id.* at 800, 802. For this analysis, researchers compared condition three (no murder-lyrics) ratings to condition two (murder-no lyrics) ratings. *Id.* at 799–800, 802.

genres of music.⁵² In a frequently cited study, Fried presented the same set of song lyrics to 146 participants—ranging in age from twenty to eighty-four.⁵³ The lyrics were from a song called “Bad Man’s Blunder” by American folk group The Kingston Trio about a young man who shoots and kills a police officer intentionally and does not show any remorse.⁵⁴

Well, early one evenin’ I was rollin’ around
I was feelin’ kind of mean, I shot a deputy down
Strollin’ on home, and I went to bed
Well, I laid my pistol up under my head

Well, early in the morning
‘Bout the break of day
I figured it was time to make a getaway
Steppin’ right along
but I was steppin’ too slow
Got surrounded by a sheriff down in Mexico.⁵⁵

Some of the participants were told the lyrics were from a rap song and others were told they were from a country song.⁵⁶

The study revealed that participants rated the lyrics differently based on the information they received about the song’s genre.⁵⁷ Fried noted that “[t]he same lyrical passage that is acceptable as a country song is dangerous and offensive when identified as a rap song.”⁵⁸ The bias was most significant in participants over age forty, who rated the lyrics much more negatively when told they came from a rap song compared to when the same lyrics were labeled as country music.⁵⁹ Interestingly, participants under age forty rated the lyrics similarly, regardless of the label.⁶⁰

Fried offers some potential explanations for the more negative reactions to the lyrics when labeled as “rap.”⁶¹ The first explanation is

52. Carrie B. Fried, *Bad Rap for Rap: Bias Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135, 2136 (1996); *see also* Fried, *supra* note 36, at 708.

53. Fried, *supra* note 36, at 709.

54. *Id.* at 710.

55. THE KINGSTON TRIO, *Bad Man’s Blunder*, on *STRING ALONG* (Capitol Records 1960); *see also* Dunbar et al., *supra* note 5, at 284. The same lyrics were used by researchers in 2016 to replicate Fried’s 1999 study. *Id.*

56. Fried, *supra* note 36, at 709.

57. *Id.* at 715–16.

58. *Id.*

59. *Id.* at 712.

60. *Id.*

61. *Id.* at 716–17.

racial bias, with Fried noting that rap music is viewed as a predominantly Black genre of music and hearing the label “rap” primes the negative culturally held stereotype of urban Blacks.”⁶² Cognitive research has shown that the notion of stereotypes being “primed” or activated, even on a subconscious level, was enough to influence people’s judgment.⁶³

Fried offered a second explanation that a lack of familiarity with rap music may have prompted participants to rate the lyrics more negatively when they were labeled as rap, because significant research suggests that people have more positive reactions to familiar things.⁶⁴ None of the study’s participants identified themselves as fans of rap music.⁶⁵ But those who were parents—and thus expected to be more familiar with rap through their teenage children—rated rap more negatively than non-parent participants.⁶⁶

A decade-and-a-half later, researchers sought to replicate Fried’s 1999 study using the same lyrics, but with a sample that was more representative of the U.S. population.⁶⁷ The researchers also conducted two additional studies to expand upon Fried’s experiment.⁶⁸ The second study was the same format as the first but used different violent lyrics.⁶⁹ The third study not only altered the genre of the lyrics but also the race of the songwriter.⁷⁰ The aim was to see whether Fried’s findings may have been influenced by the time period in which she conducted the study—during the 1990s when racial unrest and scrutiny of rap music was at a boiling point.⁷¹ The researchers were also concerned that Fried’s sample was too limited and that her findings were only representative of the “mid-size southwestern city” where she conducted her study.⁷²

On the contrary, the results of the studies replicated the earlier study’s findings that “participants deemed the exact same lyrics to be more offensive, in greater need of regulation, and more literal when

62. *Id.* at 716.

63. *Id.* at 716–17 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 12 (1989)) (“Even for subjects who honestly report having no negative prejudices against Blacks, activation of stereotypes can have automatic effects that if not consciously monitored produce effects that resemble prejudiced responses.”).

64. Fried, *supra* note 36, at 717.

65. *Id.*

66. *Id.*

67. Dunbar et al., *supra* note 5, at 283.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

characterized as rap compared with country.”⁷³ All three studies showed a genre effect, regardless of the actual lyrics provided or the race of the songwriter.⁷⁴ The study’s authors note that their findings suggest that there are serious implications when allowing the use of rap lyrics in criminal proceedings.⁷⁵ Song lyrics labeled as rap—regardless of actual lyrical content—produced highly prejudicial, negative responses in participants.⁷⁶

IV. KEY CASES

A. McKinley “Mac” Phipps

One of the most high-profile examples of prosecutorial misuse of rap lyrics is the case of McKinley “Mac” Phipps.⁷⁷ In 2000, Phipps was a rising hip-hop star on the verge of national fame after being signed to a major record label, Master P’s No Limit Records.⁷⁸ At twenty-two years old, Phipps was charged with second-degree murder after a young man was fatally shot at one of his concerts.⁷⁹ At trial, the prosecution relied heavily on witnesses who years later recanted their testimony, explaining that they were threatened with jail time if they did not identify Phipps as the shooter.⁸⁰ There was no forensic evidence linking Phipps to the shooting, but what prosecutors did present to the jury was Mac Phipps’s rap lyrics and persona—the “Camouflaged Assassin”—a nickname he earned, not through a reputation for killing, but from his “verbal agility and stage presence.”⁸¹

73. *Id.* at 288.

74. *Id.*

75. *Id.*

76. *Id.* at 289.

77. Skyler Henry & David Morgan, *Should Rap Lyrics Be Used in Criminal Trials? Formerly Incarcerated Rapper Speaks About “Egregious” Conviction*, CBS NEWS (Jan. 9, 2023, 2:55 PM), <https://www.cbsnews.com/news/rap-lyrics-evidence-against-artists-mac-hipps/>.

78. David Lohr, *Prosecutor Used Hip-Hop as a Weapon to Convict Mac Phipps*, HUFFPOST, https://www.huffpost.com/entry/mckinley-mac-hipps-rapper-lyrics_n_6863326 (Dec. 6, 2017).

79. Sidney Madden & Rodney Carmichael, *My Dream Was Being Used Against Me in Court’ Mac Phipps, Lyrics on Trial and a Legacy of Injustice in Louisiana*, NPR (Oct. 23, 2020, 6:00 AM), <https://www.npr.org/2020/10/23/926291759/mac-no-limit-lyrics-on-trial-a-legacy-of-injustice>.

80. David Lohr, *Witnesses: DA Bullied Testimony That Put Rapper Away for 30 Years*, HUFFPOST, https://www.huffpost.com/entry/mckinley-mac-hipps-wrongful-conviction_n_6612074?1426820253 (July 10, 2020).

81. Madden & Carmichael, *supra* note 79 (“‘Murder, Murder, Kill, Kill.’ ‘Pull the trigger, put a bullet in your head,’ [prosecutor] Dearing said to an all-white jury. ‘Those are

Prosecutor Bruce Dearing did not just use Phipps's rap lyrics to make suggestions to the jury about Phipps's character, he did something even more egregious: he misquoted the lyrics. He took them out of context and spliced lyrics from two different songs together to depict Phipps as a cold-hearted, unapologetic killer.⁸² Phipps had no prior criminal record.⁸³ A man named Thomas Williams came forward with his pastor and confessed to the shooting days after Phipps's arrest.⁸⁴ Despite this, prosecutors did not take the confession seriously and sought to discredit Williams's character during the trial.⁸⁵ A nonunanimous jury voting ten-to-two ultimately convicted Phipps of manslaughter and sentenced him to thirty years hard labor.⁸⁶

The prosecutor attempted to circumvent the rules of evidence by heavily quoting Phipps's highly prejudicial and irrelevant rap lyrics in his opening and closing statements, rather than admitting them as evidence.⁸⁷ The strategy worked.⁸⁸ In an interview with HuffPost, jury foreman Robert Hammell openly conceded that the prosecutor's use of Phipps's creative expression made a difference:

"The music—the lyrics—they played all that s**t [in court]," Hammell said. "I don't listen to that s**t, but the music might have been the problem. The rap got his mind all messed up. He was living a life that he thought he was a gangsta. He was making it big time with the gold chains and all that s**t that went with it. To shoot somebody in a public place on the dance floor, you gotta think you're a bad son of a b***h."⁸⁹

some of the lyrics that this defendant chooses to rap when he performs. This is the self-proclaimed 'Camouflaged Assassin.'").

82. Henry & Morgan, *supra* note 77 (statement of McKinley "Mac" Phipps) ("One song was 'Murda, Murda, Kill, Kill,' which was, like, a straight battle rap. The other one was a song called 'Shell Shocked,' and the line that they referred to was actually a line about my father. [The jury] said, '[t]his young man said, *Murder, murder, kill, kill, if you f*** with me, I'll put a bullet in your brain.*'").

83. Madden & Carmichael, *supra* note 79.

84. *Id.*

85. *See id.*

86. *Id.* Phipps's conviction came years before the U.S. Supreme Court's landmark decision abolishing state statutes that allowed nonunanimous juries to convict criminal defendants. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1394–97 (2020) (overturning statutes in Louisiana and Oregon that permitted nonunanimous verdicts for criminal defendants accused of non-petty crimes, on the grounds that the "Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally" and thus requires juries to be unanimous to convict).

87. Lohr, *supra* note 78.

88. *Id.*

89. *Id.* (alterations in original).

The juror's comments reflect what scholars and research suggest, that people who lack familiarity with and appreciation for rap music as an art form, perceive the genre negatively.⁹⁰ In 2021, after Phipps served twenty-one years of his thirty-year sentence, Louisiana Governor John Bel Edwards granted Phipps's clemency petition and released him from prison.⁹¹

B. *State v. Skinner*

While Mac Phipps achieved fame for his lyrical expression prior to his conviction, most cases where prosecutors have used criminal defendants' rap lyrics against them involve amateur rappers who are not famous at all.⁹² *State v. Skinner* is one such case.⁹³ Defendant Vonte Skinner's fight to exclude his rap lyrics as evidence went all the way to the New Jersey Supreme Court.⁹⁴ Skinner was charged with first-degree attempted murder after a criminal associate of his was shot seven times and identified him as the shooter.⁹⁵

During the investigation, police secured a warrant to search Skinner's car and found three notebooks filled with violent and profane rap lyrics written by him.⁹⁶ The State conceded that Skinner wrote many of the lyrics well before the events of the crime for which he was charged took place.⁹⁷ Yet prosecutors still sought to introduce the lyrics as evidence in Skinner's first trial—which ended in a mistrial—and in his retrial.⁹⁸

90. See NIELSON & DENNIS, *supra* note 3, at 48 ("One of the reasons people seem to be threatened by rap is that they simply don't understand the *art* of rap."); see also Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 518–19 (2018). Researchers asked participants in a study to read identical song lyrics labeled as different genres of music and found "[i]n particular, participants who did not listen to rap music, compared to those who did, evaluated the songwriter more negatively when his lyrics were described as rap, suggesting that familiarity with the genre may attenuate the effect of the stereotype." *Id.*

91. Carlie Kollath Wells, *No Limit Rapper McKinley "Mac" Phipps Granted Clemency by John Bel Edwards: "We Are Grateful."* NOLA (Apr. 9, 2021), https://www.nola.com/news/crime_police/no-limit-rapper-mckinley-mac-hipps-granted-clemency-by-john-bel-edwards-we-are-grateful/article_2896517c-9947-11eb-b4ec-d70df042488c.html.

92. See NIELSON & DENNIS, *supra* note 3, at 12.

93. 95 A.3d 236, 238 (N.J. 2014).

94. *Id.* at 236, 238.

95. *Id.* at 239, 241.

96. *Id.* at 240.

97. *Id.*

98. *Id.* at 240–41.

In both trials, the court considered whether to admit the lyrics under Rule 404(b) of the New Jersey Rules of Evidence (“N.J.R.E. 404(b)”), which governs the admissibility of evidence of “other crimes, wrongs, or acts.”⁹⁹ New Jersey’s rule tracks Rule 404(b) of the Federal Rules of Evidence (“FRE 404(b)”) very closely, to exclude evidence of other crimes, wrongs, or acts if used as character evidence to show that a defendant acted in conformity with that trait on a particular occasion.¹⁰⁰ But N.J.R.E. 404(b) allows this type of evidence to be admitted if used for another purpose, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.”¹⁰¹ In both trials, the court admitted the lyrics on the basis that they were relevant to the State’s theory of the defendant’s motive and intent.¹⁰²

At the second trial, the court allowed a detective to read pages upon pages of Skinner’s lyrics depicting graphic descriptions of “violence, bloodshed, death, maiming, . . . dismemberment,” rape, and misogyny.¹⁰³ Some of those lyrics included: “You pricks goin’ to listen to Threat tonight. ‘Cause feel when I pump this P-89 into your head like lice. Slugs will pass ya’ D, like Montana and Rice, that’s five hammers, 16 shots to damage your life, leave you f*****s all bloody” and “I got ya wife tied to the bed and at her throat is a knife.”¹⁰⁴ The lyrics were not connected to specific facts of the defendant’s attempted murder charge, and the State offered them without clarifying or explaining their meaning.¹⁰⁵

The jury convicted Skinner of attempted murder and he received a thirty-year sentence.¹⁰⁶ The appellate division overturned Skinner’s conviction and ordered a new trial, on the grounds that the trial court

99. *Id.*; see also N.J. R. EVID. 404(b).

(1) *Prohibited Uses*. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person’s disposition in order to show that on a particular occasion the person acted in conformity with such disposition.

(2) *Permitted Uses*. This evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Id.

100. Compare N.J. R. EVID. 404(b), with FED. R. EVID. 404(b).

101. N.J. R. EVID. 404(b)(2).

102. *Skinner*, 95 A.3d at 240–41.

103. *Id.* at 241.

104. *Id.*

105. *Id.*

106. *Id.* at 242.

erred in admitting the defendant's rap lyrics as evidence.¹⁰⁷ The court analyzed the admission of Skinner's rap lyrics under the N.J.R.E. 404(b) analysis established in *State v. Cofield*.¹⁰⁸ The *Cofield* analysis contains four elements:¹⁰⁹

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.¹¹⁰

The appellate court held that the defendant's rap lyrics did not pass the *Cofield* test to allow admission.¹¹¹ Under the first prong, a majority of the court found that there was "no genuine dispute over [the] defendant's alleged motive or intent."¹¹² The court also found the lyrics to be highly prejudicial, reasoning that admitting them was unnecessary because the State had other, less prejudicial evidence to support its theory of the defendant's motive and intent.¹¹³

The State appealed to the New Jersey Supreme Court, which heard the case and affirmed the appellate court's ruling.¹¹⁴ The court held that the State's use of the defendant's graphic and profane rap lyrics could easily be interpreted by the fact finder as propensity evidence and that this "prejudicial effect overwhelms any probative value that these lyrics may have."¹¹⁵

The court's opinion also analyzed the appropriateness of using N.J.R.E. 404(b) to determine if a defendant's rap lyrics are admissible as evidence.¹¹⁶ Though the court ultimately decided that the purpose of the rule to act "as a safeguard against propensity evidence that may poison the jury against a defendant" supported its application in this instance,

107. *Id.*

108. *Id.*; see also *State v. Cofield*, 605 A.2d 230, 235 (N.J. 1992) (applying a four-element, fact-intensive inquiry to determine if evidence of "other crimes or wrongs" may be admitted against a criminal defendant).

109. *Skinner*, 95 A.3d at 247; *Cofield*, 605 A.2d at 235.

110. *Id.* (quoting *Cofield*, 605 A.2d at 235).

111. See *id.* at 242–43.

112. *Id.* at 242.

113. *Id.* at 242–43.

114. *Id.* at 238, 243.

115. *Id.* at 251 ("In fact, we detect little to no probative value to the lyrics whatsoever.").

116. *Id.* at 248.

the court also acknowledged that the act of writing rap lyrics is not a crime nor is it a bad act and should not be considered as such.¹¹⁷

To be sure, writing rap lyrics—even disturbingly graphic lyrics, like defendant’s—is not a crime. Nor is it a bad act or a wrong to engage in the act of writing about unpalatable subjects, including inflammatory subjects such as depicting events or lifestyles that may be condemned as anti-social, mean-spirited, or amoral.¹¹⁸

Finally, the court looked to how other jurisdictions have handled similar questions of evidence admissibility, finding that the *Cofield* test’s second and fourth prongs—requiring a specific factual nexus to the crime charged and assessing the probative value against the danger of prejudice, respectively—are the most important elements in determining whether rap lyric evidence is ultimately admitted.¹¹⁹

In sum, it is clear that other jurisdictions rarely admit artistic works against a criminal defendant where those works are insufficiently tethered to the charged crime. The upshot to this approach is that, without a strong connection to the attempted murder offense with which defendant was charged, the admission of defendant’s rap lyrics risked unduly prejudicing the jury without much, if any, probative value.¹²⁰

With the New Jersey Supreme Court’s analysis in mind, it is apparent that the *Cofield* approach, established in *Skinner* to analyze the admission of a criminal defendant’s rap lyrics, influenced the drafting of proposed rules to restrict the use of creative expression as evidence.

V. LEGISLATIVE APPROACHES

A. *California*

California Governor Gavin Newsom signed Assembly Bill 2799 (“A.B. 2799”)—the Decriminalizing Artistic Expression Act—into law on September 30, 2022, after unanimous approval in the California State

117. *Id.* at 249.

118. *Id.*

119. *Id.* at 247, 252–53.

120. *Id.* at 253.

Assembly and Senate.¹²¹ The Act added section 352.2 to the state's evidence code to govern the admissibility of "creative expressions."¹²² The statute requires that the admissibility determination occur pre-trial and outside of the presence of the jury.¹²³ Under the statute, where a party seeks to admit creative expression as evidence, the court must balance the probative value of the evidence against the "substantial danger of undue prejudice" by considering a series of factors.¹²⁴ The factors include that the "expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available."¹²⁵

Additionally, the statute enumerates examples, but not an exhaustive list, of what constitutes "undue prejudice," including the possibility that the fact finder will improperly consider the expression as indicative that the defendant has a propensity for violence or a criminal disposition and that the evidence "will explicitly or implicitly inject racial bias into the proceedings."¹²⁶

Finally, the court must consider, if offered by either party and relevant to issues in the case: (1) testimony from a credible source explaining the genre of expression and its social and cultural context; (2) research showing that the type of expression injects racial bias into proceedings, whether explicitly or implicitly; and (3) evidence that refutes the testimony or research offered under (1) and (2).¹²⁷

California's section 352 is analogous to FRE 403, which weighs in favor of admitting evidence unless admission would waste time or create a "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" that substantially outweighs the probative value of the evidence.¹²⁸

121. August Brown, *Gov. Newsom Signs Bill Restricting Use of Rap Lyrics in Criminal Trials*, L.A. TIMES (Sept. 30, 2022, 4:24 PM), <https://www.latimes.com/entertainment-arts/music/story/2022-09-30/rap-lyrics-bill-governor-newsom-decriminalizing-artistic-expression-act>.

122. CAL. EVID. CODE § 352.2 (West 2023). As defined by the statute, "creative expression" means the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media." *Id.* EVID. § 352.2(c).

123. *Id.* EVID. § 352.2(d).

124. *Id.* EVID. § 352.2(a).

125. *Id.*

126. *Id.*

127. *Id.* EVID. § 352.2(b).

128. Compare CAL. EVID. CODE § 352 (West 2023), with FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

B. New York

Though California lawmakers were the first to codify a rule restricting the use of rap lyrics as evidence, New York lawmakers were the first to introduce legislation on the issue.¹²⁹ Advocates and rap artists celebrated when Senate Bill 7527 (“S. 7527”), dubbed “Rap Music on Trial,” cleared the Senate in May 2022.¹³⁰ Unfortunately, the bill stalled in the New York Assembly.¹³¹ Lawmakers reintroduced the bill for the 2023–2024 legislative session as S. 1738, and retained the same language as the previous version.¹³² Once again, the bill passed the Senate but is stalled in the Assembly.¹³³

New York’s bill is more stringent than California’s law in that it takes a reverse 403 balancing approach that favors exclusion by establishing a presumption of inadmissibility of evidence of a defendant’s creative expression.¹³⁴ The offering party can only overcome inadmissibility through a showing of “clear and convincing evidence” of four articulated elements that must all be satisfied: (1) literal, not figurative meaning, or if expression is derivative, that the defendant had the intention of adopting the literal meaning as the defendant’s own thought or statement; (2) “a strong factual nexus” that the expression refers to specific details of the crime; (3) relevance to a disputed fact issue; and (4) “distinct probative value not provided by other admissible evidence.”¹³⁵

New York’s bill requires that the offering and evaluation of proof of admissibility occur outside the hearing of the jury and defines “creative expression” broadly, in the exact same way as the California law, “including, but not limited to music, dance, performance art, visual art, poetry, literature, film and other such objects or media.”¹³⁶

In a departure from the California law, New York’s bill contains guidance for courts when evidence of creative expression is deemed

129. Bill Donahue, *Law Restricting Rap Lyrics in Criminal Cases Passes NY Senate*, BILLBOARD (May 17, 2022), <https://www.billboard.com/pro/rap-lyrics-law-passes-new-york-senate-young-thug/>.

130. *Id.*

131. Deena Zaru, *California Senate Passes Bill Limiting Use of Rap Lyrics in Court Amid Young Thug Indictment*, ABC NEWS (Aug. 23, 2022, 2:55 PM), <https://abcnews.go.com/US/california-senate-passes-bill-limiting-rap-lyrics-court/story?id=88736307>.

132. Compare S. 1738, 2022–2023 Leg., Reg. Sess. (N.Y. 2023), with S. 7527, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

133. *Senate Bill S1738: 2023-2024 Legislative Session*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/S1738> (last visited Dec. 19, 2023).

134. See Bellware, *supra* note 2.

135. N.Y. S. 1738 § 1(2)(A)–(D).

136. *Id.*; cf. CAL. EVID. CODE § 352.2 (West 2023).

admissible, stating that “the court has a duty to apply careful redactions, provide limiting instructions, and consider the least prejudicial means of presenting the creative expression to the fact-finder.”¹³⁷

C. H.R. 8531: *The RAP Act*

With the backing of more than a dozen music industry groups, a pair of U.S. Congressmen sought to address the issue of rap lyric admissibility at the federal level.¹³⁸ In July 2022, Representatives Hank Johnson (D-Ga.) and Jamaal Bowman (D-N.Y.) introduced House Resolution 8531 (“H.R. 8531”)—the Restoring Artistic Protection Act (“RAP Act”)—a bill that sought to add a rule to the Federal Rules of Evidence limiting the admissibility of a defendant’s creative or artistic expression.¹³⁹

The bill is virtually identical in language and spirit to the one proposed by New York lawmakers—excluding evidence of a criminal defendant’s creative expression, unless the Government can show by “clear and convincing” evidence that the expression meets four elements.¹⁴⁰ The bill was referred to a subcommittee, where it stalled.¹⁴¹ It has not been reintroduced in the subsequent 2023–2024 legislative session.¹⁴²

VI. ANALYSIS

It is not surprising that New York and California were the first states to consider the issue of restricting the admissibility of a defendant’s creative expressions as evidence in a criminal trial, as they are home to the two epicenters of the music industry in the United States—New York City and Los Angeles, respectively.¹⁴³ But where New York lawmakers

137. N.Y. S. 1738 § 1(3); *cf.* CAL. EVID. CODE § 352.2 (West 2023).

138. See Press Release, Hank Johnson, Congressman, GA-4th District, Congressmen Johnson, Bowman Introduce Bill to Protect Artists’ 1st Amendment Rights, (July 27, 2022), <https://hankjohnson.house.gov/media-center/press-releases/congressmen-johnson-bowman-introduce-bill-protect-artists-1st-amendment>.

139. See *id.*

140. See H.R. 8531, 117th Cong., 2nd Sess. (2022); N.Y. S. 1738; see also *supra* Section V.B.

141. See *H.R. 8531-Restoring Artistic Protection Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/8531/text> (last visited Dec. 19, 2023).

142. See *Legislation*, CONGRESS.GOV, <https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%2C%22congress%22%3A118%7D> (last visited Dec. 19, 2023).

143. See Claire Atkinson, *New York Claims to Be the Center of the Music Industry Universe*, N.Y. POST (Mar. 8, 2017, 9:01 AM), <https://nypost.com/2017/03/08/new-york-claims-to-be-the-center-of-the-music-industry-universe/>.

failed to pass their proposed legislation to add a rule of evidence governing the admissibility of creative expressions, California lawmakers succeeded.¹⁴⁴

A. Presumption of Admissibility vs. Inadmissibility

One of the reasons why California's bill had a greater probability of passage is that its rule simply does not offer as much protection as New York's proposed rule.¹⁴⁵ New York's bill "presum[es] at the outset that an artist's creative output is inadmissible unless 'clear and convincing' proof can show otherwise."¹⁴⁶ In contrast, California's law requires courts to consider rap lyrics similarly to other evidence subjected to a discretionary section 352 analysis—the state's equivalent of FRE 403—which favors admission *unless* a balancing test shows the probative value of the evidence is substantially outweighed by an enumerated danger, including unfair prejudice.¹⁴⁷

A presumption of inadmissibility should be a crucial element of any rule of evidence to restrict the admissibility of a criminal defendant's creative expressions—particularly in the case of rap lyrics—which have been shown to produce significant prejudicial effects in and out of courtroom settings.¹⁴⁸ Thus, creative expressions should be subject to a rule of exclusion—like character evidence and evidence of other crimes, wrongs, or acts—because admitting creative expressions as evidence can be just as, if not more, prejudicial and also improperly used by juries to infer a defendant's propensity to act in that same manner.¹⁴⁹

Implementing a rule of exclusion that includes an elements test rather than one that merely suggests factors to consider, New York's bill provides more robust protection against the improper admission of rap lyrics by requiring that the offering party demonstrate that the lyrics' probative value far outweighs the danger of unfair prejudice.¹⁵⁰ This protects not only the criminal defendant, but also the integrity of the proceedings by helping to ensure that the State is supporting its theory of the case using relevant evidence with high probative value.

144. Zaru, *supra* note 131.

145. See Bellware, *supra* note 2.

146. *Id.*; see also S. 7527, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); S. 1738, 2022–2023 Leg., Reg. Sess. (N.Y. 2023).

147. Compare CAL. EVID. CODE § 352 (West 2023), with FED. R. EVID. 403.

148. See Lohr, *supra* note 78; see also Fischhoff, *supra* note 4, at 800.

149. See FED. R. EVID. 404; State v. Skinner, 95 A.3d 236, 249 (N.J. 2014) (“[C]ertain expressive actions, which are not overtly criminal but can be perceived as wrong or bad, can persuade a jury of a defendant's guilt, regardless of the evidence proffered by the State.”).

150. See N.Y. S. 1738.

B. Factors and Considerations

While California's rule does not contain a presumption of inadmissibility, its purpose is to establish a few more hurdles to clear, and additional guidance to consider, when determining the admissibility of creative expression evidence in a pre-trial determination away from the jury.¹⁵¹ On top of the considerations contained in section 352, subsection 352.2(a) advises courts that the creative expression's probative value is minimal, unless it was written or created close in time to the charged crime and is sufficiently similar to the charged crime, or contains factual information related to the crime that is not publicly known.¹⁵²

The first consideration—that the “expression is created near in time to the charged crime or crimes”—is an important factor missing from New York's proposed rule.¹⁵³ Courts have allowed rap lyrics that defendants wrote long before the charged crime to be admitted as evidence, as was the case in *Skinner*.¹⁵⁴ When lyrics have no close, temporal relationship to the charged crime, their probative value is diminished and admitting them would be akin to admitting character evidence. Thus, *when* the defendant wrote the rap lyrics is a key consideration in assessing relevance and should be included in any rule governing admissibility.

The second part of the assessment, deciding whether a creative expression “bears a sufficient level of similarity to the charged crime or crimes,” still leaves a lot of discretion to judges over what constitutes a “sufficient level of similarity”—particularly where many judges do not have the requisite background knowledge to interpret the meaning of rap lyrics.¹⁵⁵ The rule itself addresses this concern by including subsection (b), which requires the court to consider, if offered by either party and relevant: (1) credible testimony explaining the social and cultural context and artistic conventions of the expression; (2) research showing that introducing the particular type of creative expression into the proceedings injects racial bias; and (3) evidence that refutes the testimony or evidence offered under (1) and (2).¹⁵⁶ By requiring the consideration of extrinsic evidence of context, if offered by the parties, the rule allows the judge to have the most complete picture of the potential impact of admitting creative expression evidence, while affording both

151. See CAL. EVID. CODE § 352.2 (West 2023).

152. *Id.* EVID. § 352.2(a).

153. Compare *id.*, with N.Y. S. 1738.

154. See *Skinner*, 95 A.3d at 240.

155. EVID. § 352.2(a); NIELSON & DENNIS, *supra* note 3, at 48.

156. EVID. § 352.2(b).

sides the opportunity to present their strongest cases for exclusion or admission.

California's rule also provides examples of what would constitute "undue prejudice," such as the possibility that the fact-finder will use the creative expression as evidence of the defendant's violent character or criminal disposition or that the introduction of the evidence would insert explicit or implicit racial bias into the trial.¹⁵⁷ It is important that these considerations are explicitly written in the rule as signals to ensure that they are factored in the admissibility analysis.

New York's proposed rule is not only stricter than California's rule because it presumes inadmissibility of a defendant's creative expression at the outset, but because it also contains elements that the court *must* consider to determine if the evidence is strong enough to overcome inadmissibility.¹⁵⁸ Those elements are:

- (a) literal, rather than figurative or fictional, meaning and, where the work is derivative, that the defendant intended to adopt the literal meaning of the work as the defendant's own thought or statement;
- (b) a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged;
- (c) relevance to an issue of fact that is disputed; and
- (d) distinct probative value not provided by other admissible evidence.¹⁵⁹

The first element demonstrates an appreciation of rap as an art form that includes "extensive use of symbolism and metaphor" that often does not evince literal meaning; as noted by Harvard professor and historian Henry Louis Gates, Jr., "rap complicates or even rejects literal interpretation."¹⁶⁰ This element would be the most difficult to discern and would likely require extrinsic evidence—such as expert testimony—as suggested in section 352.2(b) of the California Evidence Code¹⁶¹ to explain whether the author intended to convey literal meaning.

The remaining elements are easier for the fact finder to determine. The second element requires a "strong factual nexus" that the creative

157. *Id.* EVID. § 352.2(a).

158. *See* N.Y. S. 1738 § 1(2).

159. *Id.* EVID. § 1(2)(a)–(d).

160. NIELSON & DENNIS, *supra* note 3, at 50–51. The authors also quote acclaimed rapper and producer Jay-Z as explaining that "[t]he art of rap is deceptive" and "retains mystery." *Id.* at 50.

161. EVID. § 352.2(b).

expression “refers to specific facts of the crime.”¹⁶² This would protect against what happened to Mac Phipps, where the prosecutor used a song called “Shell Shocked”—that Phipps wrote about his father serving in the Vietnam War—to send a message to the jury that Phipps was a violent person who would not hesitate to murder and kill.¹⁶³ The song lyrics bore no resemblance to the facts of the crime for which Phipps was charged—the shooting of a concertgoer at one of Phipps’s concerts.¹⁶⁴ This element is similar to a factor in California’s rule which asks if the creative expression “bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available,” but is more clearly worded.¹⁶⁵

Elements (c) and (d) ensure that creative expression evidence that has the potential to be highly prejudicial is only admitted *if necessary*, because there is no need to introduce the evidence if it is not relevant to a disputed issue of fact or if other admissible evidence would serve the same purpose.¹⁶⁶ Each of the elements in New York’s proposed rule serve a crucial protective role in assessing the admissibility of a criminal defendant’s rap lyrics, and adding the close-in-time requirement from California’s rule would provide a more thorough evaluation of the relevant considerations.

New York’s proposed rule also contains guidance for the presentation of creative expression evidence if admitted—explaining “a duty to apply careful redactions, provide limiting instructions, and consider the least prejudicial means of presenting the creative expression to the fact-finder.”¹⁶⁷ These are important inclusions in the rule because prosecutors have used, and continue to use, criminal defendants’ rap lyrics with little restraint.¹⁶⁸ For example, in Phipps’s case, the prosecutor used the defendant’s rap lyrics in his opening and closing statements out of context to inflame the emotions of the jury¹⁶⁹ or in *Skinner*, where the court permitted a prosecution witness to read multiple pages of the defendant’s rap lyrics without interruption.¹⁷⁰ Protective measures must

162. N.Y. S. 1738 § 1(2)(b).

163. See Lohr, *supra* note 78.

164. *Id.*

165. Compare N.Y. S. 1738 § 1(2)(b), with EVID. § 352.2.

166. See N.Y. S. 1738 § 1(2)(c)–(d).

167. *Id.* § 1(3).

168. See Brendan O’Connor, *Why Are Rap Lyrics Being Used as Evidence in Court?*, VICE (Nov. 3, 2014, 12:30 PM), <https://www.vice.com/en/article/rdaba6/rap-lyrics-as-evidence>.

169. See Lohr, *supra* note 78.

170. *State v. Skinner*, 95 A.3d 236, 241 (N.J. 2014).

be in place, not only when considering admissibility of creative expression, but especially after that evidence is admitted.

C. *Burden of Proof*

Under New York's proposed rule, the party seeking admission has the burden of persuasion to prove that the creative expression evidence satisfies each element by "clear and convincing evidence."¹⁷¹ Clear and convincing is a standard articulating that what the offering party is trying to prove is "highly probable"—a burden of proof below the most stringent "beyond a reasonable doubt," but above "preponderance of the evidence"—which is often explained to mean "more likely than not."¹⁷² The clear and convincing standard is sometimes applied in civil cases involving fraud or constitutional issues, where the stakes are higher than an average civil case.¹⁷³

Generally, the burden of proof on preliminary issues, such as admissibility of evidence, is subject to a "preponderance of the evidence" standard in both civil and criminal cases.¹⁷⁴ It is a barrier to the New York bill's passage that it contains a clear-and-convincing burden of proof—which is an unusually high standard to apply to a preliminary admissibility issue—that could lead to the exclusion of evidence that is relevant.

As the Supreme Court wrote in *Bourjaily v. United States*, "[t]he preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."¹⁷⁵ Thus, the preponderance of the evidence standard would be more appropriate to analyze whether the State has met its burden of showing why a criminal defendant's rap lyrics should be admitted, as it is the same standard used to evaluate the admissibility of other types of evidence.

171. N.Y. S. 1738 § 1(2).

172. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 47 (5th ed. 2018).

173. *Id.* at 48. The author provides two examples where the U.S. Supreme Court held that a clear-and-convincing standard applied: neglect proceedings in juvenile court to decide the permanent termination of parental rights and proceedings to determine if an individual is dangerous enough to warrant being committed to a psychiatric hospital. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) and *Addington v. Texas*, 441 U.S. 418, 433 (1979)).

174. GIANNELLI, *supra* note 172, at 90–91 n.12. Explaining FRE 104, the U.S. Supreme Court noted, "[w]e have traditionally required that these preliminary matters be established by a preponderance of proof." *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

175. *Bourjaily*, 483 U.S. at 175.

VII. CONCLUSION

California's law provided a powerful example for other states to follow in sending the message that presenting rap lyrics as evidence is highly prejudicial and requires a robust admissibility analysis.¹⁷⁶ But the rule of evidence created by California's law can be improved by combining it with elements from New York's proposed rule. First, considering the highly prejudicial nature of rap lyrics when admitted as evidence, any rule governing the admissibility of creative expression should be a rule of exclusion, like New York's proposal. Instead of a standard 403 rule, which favors admissibility,¹⁷⁷ a reverse 403 favors exclusion and can only be overcome if the probative value of the evidence *substantially* outweighs the danger of unfair prejudice.

A rule containing the elements outlined in New York's bill—while adding from California's rule that the creative expression was created close in time to the charged crime—provides a clear rubric for courts to apply. In addition, California's requirement that the court consider extrinsic evidence to provide context if offered by the parties, as well as New York's inclusion of how to treat evidence of creative expressions if deemed admissible should be included in any robust rule.

Finally, the burden of proof for the party seeking admission in New York's bill—clear and convincing evidence—is too high of a standard and not necessary for the rule to provide strong protections against the admission of a defendant's rap lyrics. A preponderance of the evidence standard is appropriate and may help the bill garner more support from those who feel it is excessively restrictive.

California's statute has been subject to criticism for lacking real teeth, as evidenced by prosecutors in the state showing no opposition to the bill's introduction.¹⁷⁸ But perhaps criticism of the new rule is premature, as it has already effected change for at least one criminal defendant in California, whose rap video was admitted as evidence against him in a murder trial that led to his conviction.¹⁷⁹ In *People v. Venable*, a California appeals court ruled that section 352.2 applies retroactively to cases that were pending appeal when the new rule was

176. See Bellware, *supra* note 2.

177. GIANNELLI, *supra* note 172, at 138.

178. Nigel Duara, *Introducing Rap Lyrics at Trial*, CAL MATTERS, <https://calmatters.org/explainers/california-legislature-bills-passed-2022/#09c347f6-0468-44bc-b2ec-f5603e3092e6> (last visited Dec. 19, 2023) (explaining that there was “no official opposition to the bill”).

179. See *People v. Venable*, 304 Cal. Rptr. 3d 731, 733 (Ct. App. 2023).

enacted.¹⁸⁰ The court held that the defendant was entitled to a new trial explaining, “[t]here is substantial doubt whether the trial judge would have admitted the video evidence under the new standard, and it’s clear the prosecution used that evidence to tie [the defendant] to the specific crime.”¹⁸¹

180. *Id.* There is disagreement among California appeals courts whether section 352.2 applies retroactively. See *People v. Ramos*, 307 Cal. Rptr. 3d 258, 271–72 (Ct. App. 2023) (holding that section 352.2 does not apply retroactively because the change in the statute does not impose a lesser punishment or more lenient treatment of a defendant, as dictated by current California Supreme Court precedent).

181. *Venable*, 304 Cal. Rptr. 3d at 740.



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