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Lyrics in Limine: Rap Music and Criminal Prosecutions

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I. Introduction

In the summer of 2022, popular rap artists Young Thug and Gunna were indicted on charges of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as a number of other gang, drug, and firearm-related charges.¹ The indictment relied heavily on the artists' lyrics, using their music as evidence of guilt.² In 2019, Daniel Hernandez, known for his stage name Tekashi 6ix9ine, faced similar charges based on his lyrics.³ Prosecutors have used rap lyrics as evidence of guilt in countless cases in recent years, against well-known stars and amateur artists alike. In 2016, for example, Tommy Mundswell Canady was sentenced to life in prison after a trial where the prosecutors' primary evidence of guilt was a song Canady had released on the digital music platform Soundcloud.⁴ Canady became a suspect only when the victim's father heard the song and believed it to be a confession.⁵ The rest of the evidence against Canady was circumstantial, and Canady continues to assert his innocence.⁶ What he believed when he was arrested to be a "misunderstanding" of his music has led to a life sentence.⁷

Rap lyrics are frequently used against artists in criminal trials.⁸ While there have been hundreds of cases in the past 30 years where rap songs were used to demonstrate guilt, there have been only a handful of analogous cases for other art forms.⁹ The reasons for this are complex. Rap is an art form practiced primarily by people of color who, in many cases, hail from communities that are overpoliced (while under-protected), over-criminalized, and over-incarcerated. Indeed, these harsh realities were central to the art that brought

rap into the American mainstream in the 1980s. The artists and songs that rose to prominence, the music now exalted as classics of the genre, were well-known for dealing openly with these social and political issues and for using depictions of violence, gangs, drugs, and police brutality to challenge the status quo.¹⁰

When rap artists draw on these themes—whether as an homage to the classics or from an independent creative desire to write on those topics—they are often interpreted as admitting to taking part in the scenes they describe. Rappers are not given the artistic leeway that artists of other genres are; there is an insidious bias that often causes audiences to believe that rap music is literal and autobiographical.¹¹ And the problem is that the same bias can impact prosecutors choosing when to introduce lyrics as evidence of guilt, judges deciding when to admit it, and juries weighing whether to convict.

Core First Amendment values counsel strongly against this practice. If the First Amendment stands for anything, it stands for the fundamental proposition that political and artistic speech ought to be protected against state sanction. Courts have expounded time and time again the need to ensure that speech by oppressed groups and political minorities is not chilled by government action. This is true for all artistic expression and particularly true here, where artists in a genre that has its roots in protest and that is historically associated with Black people and other people of color are more likely to be prosecuted based on that art.

As currently written, federal evidentiary rules should also prevent the admission of creative expression as a confession. Under Rule 403 of the Federal Rules of Evidence, courts may exclude evidence whose “probative value is substantially outweighed by a danger of . . . unfair prejudice[.]”¹² It is hard to imagine a category of evidence more deserving of exclusion under this rule. The probative value of rap lyrics is highly questionable. As in many genres, artists often write under fictional personas, reference events in the news (including crimes), and employ lyrical hyperbole. Given the pervasive bias against rap music, jurors are even more likely to incorrectly interpret rap lyrics as literal or believe that rappers are more likely to act violently or engage in

criminal activity.¹³ Thus, rap lyrics have the potential to prejudice jurors in a way that similar lyrics from songs in other genres do not.

This article will discuss the constitutional and evidentiary issues that are prompted by the use of rap lyrics as evidence in criminal trials, evaluate legislative approaches to address the issue, and ultimately propose a new framework for courts to use in evaluating whether lyrics should be admissible in a criminal trial. Ultimately, while we would not argue that rap lyrics should never be introduced as evidence, we believe that the practice is deeply problematic and must be severely curtailed.

II. Overview of the Problem

The use of rap lyrics as evidence against artists is a pervasive problem that distorts the meaning and purpose of the art and creates an unacceptable risk of wrongful prosecutions.

Since its inception, rap music has had an antagonistic relationship with law enforcement.¹⁴ The most iconic example of this is police opposition to N.W.A.'s hit song "Fuck tha Police." The song described instances of police brutality and portrayed a mock trial in which the rappers prosecuted the police department for its actions.¹⁵ Law enforcement responded to the song in a variety of ways, including by attempting to prohibit the song's performance and then arresting the group for defying orders not to perform it.¹⁶ While police argued that the song encouraged violence against officers, N.W.A. insisted that it was not meant to be a literal call to arms but an expression of frustration with abusive policing in minority communities, a fact later borne out by the consent decree the City of Los Angeles entered into with the U.S. Department of Justice to provide federal oversight of the Los Angeles Police Department.¹⁷ Prosecutors have long taken the former view, using rap lyrics as evidence of gang activity and violence.¹⁸

Though rap encompasses a multitude of subgenres and a broad diversity of artistic expression, it found its popular genesis in the 1970s and '80s as music seeking to document and protest conditions of urban life,¹⁹ including police

brutality and mass incarceration born of the War on Drugs, gang violence, and widespread urban decay and unemployment.²⁰ Rap was known for its rawness, its artists' brutal depictions of the challenges they saw around them, and an unapologetic antagonism toward government and law enforcement, who were viewed, at best, as apathetic to and, at worst, willing causes of the problems urban communities faced.²¹ Among other things, rap developed as—and continues to be—an important voice protesting social injustices. However, in spite of this substantial social value added by rap, or perhaps because of the subject of its criticism, it is at particular risk for being weaponized as evidence against rap artists.

Rap's origins and conventions cause it to be misunderstood and mischaracterized. A common theme in rap is artists portraying conditions of violence recast with the narrators, people often victimized under real-world conditions, occupying newfound positions of power. N.W.A.'s "Fuck tha Police" is a prime example of this, and the music of N.W.A. and their contemporaries has been immeasurably influential in rap. As part of a subversive movement, rap's meaning is not always intended to be understood by a mainstream audience.²² Rap developed a lexicon unique to the art form that is ripe for misunderstanding by the uninitiated. For example, and of prime importance to the use of lyrics as evidence in criminal prosecutions, lyrics often employ homicide metaphors. In *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, Andrea Dennis writes:

Homicide serves as a frequent metaphor in rap music lyrics. In homicide metaphors, "violence stands in as a symbolic explication of skill, courage, or power." That is, murder represents one lyricist's ability to defeat or destroy another lyricist through a superior display of verbal dexterity. Reference to weapons, especially firearms, is frequently made in homicide metaphors. Weaponry metaphorically represents the microphone, the tool with which your opponent's defeat takes place.²³

Even when violent lyrics are not used as metaphors, Dennis explains that they

[d]o not necessarily represent depictions of actual violence or an intention to commit violent acts. Instead, “exaggerated and invented boasts of criminal acts should be regarded as a larger set of signifying practices. . . . Growing out of a much older set of cultural practices, these masculinist narratives are essentially verbal duels over who is the baddest motherfucker around.”²⁴

In addition to the fact that lyrics are usually not meant to be taken literally, an artist’s persona is not the same as the artist himself. Rappers regularly take on characters, sometimes characters “genuinely identifiable in the artist’s community,” but often “these characters may be from other forms of popular culture, pulp fiction, and Blaxploitation. Common characters include the outlaw, thug, gangster, pimp, Hollywood-style mafioso, drug dealer, and hustler.”²⁵

Finally, as rap became widely popular, financial pressures pushed artists toward writing more violent lyrics and carrying their rap persona beyond the stage.²⁶ Though the music initially found its listeners primarily in Black and urban communities, it soon had a following of young white suburban listeners.²⁷ This new fan base tended to prefer music that was “more aggressive” and “abrasive.”²⁸ Record companies sought to profit from this by encouraging artists to cater to these tastes.²⁹ In many cases, artists were encouraged to play up violence in their lyrics and persona, with potential profit from their work often hanging in the balance.³⁰ This means that in order for rap to serve as a viable career path, artists have had to adopt a persona that differs from their own.³¹

Rap is a complex genre with conventions that put its artists at high risk of being subject to wrongful prosecution. Thematically, it often portrays violence and expresses anger and frustration at oppressive systems. The genre’s greats have described violent fantasies—including those of revenge—relating to, among others, law enforcement and other rappers. Lyrically, rap encourages artists to take on alternative personas and use violent metaphors including descriptions of murder. Culturally, artists are encouraged to bolster credibility by acting as if their art reflects their personal life rather than scenes they have witnessed or

imagined. Together, these factors create a situation where aspiring artists are likely to release songs that seem—to those unfamiliar with the genre—to be confessions.

This creates a problem within the criminal legal system. Prosecutors argue that rap lyrics are highly probative. In many cases, lyrics ostensibly amount to defendants admitting to the crimes with which they are charged. While defense attorneys can use the history and conventions of rap, the First Amendment principles at stake, and evidentiary principles guarding against unfair prejudice to argue that the lyrics should not be admitted into evidence, the deck is stacked against them. Formal legal protections do little work when the application of those protections is up to judicial discretion. To be clear, there are cases in which lyrics can rightfully be introduced as evidence.³² The mere fact that a defendant classifies his past statements as “rap” is not, under the current legal regime, enough to bar their introduction. But rap lyrics are more often admitted when they should not be, and this error can (and does) ruin lives. Drawing the right line as to what should and should not be permitted is difficult. To date, our legal system has not found a consistent solution. The rest of this article serves, we hope, as a step in the right direction.

III. Current Legal Framework

The admissibility of rap-lyric evidence is determined under principles established by the Constitution and the rules of evidence in the particular jurisdiction. Under First Amendment principles, courts evaluate whether the artist is being sanctioned for creative expression. Prosecutors can argue—usually successfully—that the admission of art as evidence does not sanction the expression but rather the underlying crime.³³ Defendants are also ostensibly protected from the misuse of their lyrics as evidence by Federal Rule 403 (and its state-law equivalents), which permits courts to exclude evidence that is unduly prejudicial.³⁴

Rule 403, however, creates a balancing test that permits admission of potentially prejudicial evidence when it has sufficient probative value.³⁵ In cases involving rap-lyric evidence, the balancing analysis has often led to the

introduction of highly prejudicial evidence based on flawed analyses of its probative nature. As a whole, the current legal framework is inadequate to protect artists from misguided prosecution for their art. Some courts undertake the required analysis with sufficient attention to the essential context, but the application of key protective principles is unacceptably inconsistent.

1. First Amendment

The First Amendment prohibits Congress from making any law “abridging the freedom of speech.”³⁶ Over 30 years ago, the U.S. Supreme Court underscored that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”³⁷ This basic proposition—that the Constitution protects speech offensive to the sensibilities of social and political majorities—is indispensable to a democratic society. In this way, the First Amendment has “a *structural* role to play in securing and fostering our republican system of self-government.”³⁸ It fulfills this role by ensuring that public debate is “uninhibited, robust, and wide-open.”³⁹

The First Amendment affords its highest protection to political speech. Indeed, “there is practically universal agreement that a major purpose” of the First Amendment “was to protect the free discussion of governmental affairs.”⁴⁰ Political speech need not conform to certain social preferences or standards of etiquette to receive constitutional protection. To the contrary, enforcing such arbitrary expectations would contravene core First Amendment values: “in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”⁴¹ Moreover, and all apart from the political, the First Amendment protects *artistic* expression on its own terms.⁴² Rap’s political origins and creative conventions place it at the heart of First Amendment considerations.

Rap’s historical development within the larger hip-hop movement, in conjunction with its motifs and subject matter, illustrates its political nature. As

discussed above, rap “evolved with political overtones, as a means through which Black and Latino youth could comment on and challenge the social conditions they confronted on a daily basis—conditions driven by deindustrialization, economic restructuring, and a precipitous rise in incarceration.”⁴³ Rap’s lineage, tracing back to Afrika Bambaataa⁴⁴ and exemplified by the work of, for example, N.W.A.⁴⁵ and Kendrick Lamar,⁴⁶ is starkly political. The genre emerged as a mode of critiquing power and continues to function in that way. Rap music is a clear example of political speech and runs to the heart of the First Amendment.

In any event, rap’s artistic conventions belie its alleged usefulness as evidence in criminal prosecutions. The genre “resides within a long tradition of African American storytelling and language games that privilege parody, pastiche, and, above all, wordplay.”⁴⁷ Rap, like the art forms that preceded it, engages in the process of “obscuring . . . apparent meaning.”⁴⁸ Its lyrics operate such that “ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited.”⁴⁹ It is characterized by “dense slang, coded reference, intentional mispronunciations, and sometimes blazing fast delivery, all of which defy interpretation at every turn.”⁵⁰ Thus, independent of its political messaging, rap’s methods of artistic expression are occluded and ignored when prosecutors use rap lyrics as evidence for their literal meaning. Rap, entitled to constitutional protection as political and artistic expression, should not be used against its creators as a state-sanctioned cudgel.

These principles notwithstanding, courts often admit rap lyrics as evidence over the constitutional objections of defense counsel. The test frequently employed by the courts is superficially straightforward: Because the “First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent,”⁵¹ admissibility turns simply on “whether the evidence at issue was used for permissible purposes or merely to show [that a defendant is] morally reprehensible due to his abstract beliefs.”⁵²

In the context of simple testimony, this analysis makes sense. If an artist commits a crime and subsequently confesses to so doing, it would not make

sense to exclude his confession on the basis of his First Amendment freedom of speech. Put simply, “[e]vidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.”⁵³

This seemingly intuitive approach loses its footing, however, when applied to creative expression generally and rap specifically. There are key differences between a literal, testimonial confession to a crime and the meaning of lyrics in rap songs. Rap’s political origins and artistic conventions undercut the proposition that rapping about shooting a police officer or joining a “gang”⁵⁴ is evidence of *actually* shooting a police officer or *actually* joining a gang. And yet courts, relying on an overly formalistic First Amendment analysis, often conflate the two, allowing artistic expression to be admitted as evidence over constitutional objection. The limited weight courts have given to constitutional arguments against admissibility is compounded by similar judicial errors made in applying rules of evidence.

2. Rules of Evidence

The safeguards currently provided by provisions in the Federal Rules of Evidence and corresponding state evidentiary rules are similarly insufficient to prevent the misuse of rap lyrics as criminal evidence. Defendants challenging the introduction of their lyrics often rely on Rule 403, which permits courts to exclude relevant evidence if its “probative value is substantially outweighed by a danger of . . . unfair prejudice.”⁵⁵ Courts routinely caution that unfair prejudice does not refer to evidence that will harm a party’s case but to evidence that is likely to cause a factfinder to decide the case on an improper basis.⁵⁶

While Rule 403 arguments sometimes lead to the exclusion of rap-lyric evidence,⁵⁷ more often courts determine that the evidence is probative enough to justify any potential unfair prejudice.⁵⁸ Many of these determinations are the result of a flawed analysis of the prejudicial risk presented by this type of evidence. In other cases, courts have articulated helpful guiding principles for their Rule 403 assessments. As a whole, however,

the outcomes have been too disparate and unpredictable for Rule 403 to serve as a sufficient safeguard.

A significant problem with the Rule 403 analysis in this context is that courts underestimate prejudice where the crimes alleged are more inflammatory than the evidence at issue.⁵⁹ The Second Circuit, for instance, has categorically held that “[e]vidence will not be excluded as unduly prejudicial when it is not ‘more inflammatory than the charged crime.’”⁶⁰ Other jurisdictions, while not necessarily finding that evidence *must* be less inflammatory than the alleged crime to be unfairly prejudicial, tend to reach the same result.⁶¹ The reasoning behind this rule of comparison is that if a jury is already going to have an emotionally charged response to the allegations, the marginal prejudicial effect of the challenged evidence will be negligible.

It is easy, however, to envision the opposite. For example, in a murder trial, evidence of the victim’s killing is likely to invoke emotional responses. This is especially true if there is testimony from the victim’s friends or family. In that context, the introduction of a defendant’s violent lyrics is likely to make the jury—a jury already emotionally primed by the realities of violence brought to light by the trial—unfairly prejudiced against the defendant. People who may in another, neutral context know that art is not autobiographical may view violent lyrics as confessions in this context.

Further, this approach to unfair prejudice fails to take into account the unfair prejudice that can occur by way of racial stereotypes invoked by the bias many hold against rap. These stereotypes might not be invoked by other evidence or allegations, and are therefore not effectively subsumed by the evidence already presented. Research has shown that a large portion of Americans believe that rap artists are more likely to write autobiographically than other artists and that they are more likely to engage in violence or be members of gangs.⁶² As a result, prosecutors who introduce rap lyrics as evidence are also able to subtly introduce these misconceptions likely to be held by at least some jurors. This is true almost no matter how inflammatory the music is and how inflammatory the actual crimes at issue are.

Finally, this analysis is troubling in that it is self-executing for investigators and prosecutors. In Tommy Canady's case, for example, there were no suspects until the father of the victim heard Canady's song.⁶³ Canady's music about violence directly led to his being prosecuted for violence. If the scale for assessing prejudice moves with the severity of the crime alleged, it will be nearly impossible for Rule 403 to be a bar to prejudicial evidence when prosecution follows the art itself.

In some cases, notwithstanding the issues discussed above, courts have used Rule 403 analysis to assess the key societal issues at stake with rap-lyric evidence and sought to develop useful analytical principles.⁶⁴ Courts have used limiting instructions, required that the lyrics admitted contain content that specifically resemble aspects of the allegations, permitted the use of lyrics only to demonstrate familiarity with illicit trades, and barred lyrics when they merely have a tenuous connection to the charged conduct.⁶⁵ As the court in *United States v. Wiley* noted, "the fundamental nature of rap music as a form of artistic expression that frequently features aggressive and hyperbolic language [can] pose too great a risk of undue prejudice."⁶⁶

Although some courts have gotten this analysis right—including, in very particular instances, by admitting the lyrics—the issues at stake are too important and too difficult to be dealt with in such a piecemeal manner. Legislative action is necessary to protect artists against wrongful prosecutions based on their artwork. For difficult evidentiary questions, Rule 403 provides some generalized protection, but it cannot always be relied on to prevent misleading and prejudicial evidence. The challenge presented by rap-lyric evidence requires a distinct legislative approach.

IV. Current Legislative Proposals

In response to attempts by prosecutors to introduce rap lyrics as evidence in criminal proceedings, members of the California legislature have recently passed legislation amending California's rules of evidence and the U.S. Congress has proposed legislative reforms.

California recently amended its rules of evidence⁶⁷ to afford extra protection for “creative expression,” which the law defines as 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.”⁶⁸

The new rule, codified at section 352.2 of California’s Evidence Code, provides that “where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice . . . shall consider”⁶⁹ two specified factors. Namely, an evaluating court must consider that

- (1) the probative value of [creative expression] for its literal truth or as a truthful narrative is minimal unless that 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; and
- (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will . . . treat the expression as evidence of the defendant’s propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.⁷⁰

The first factor accounts for certain conventions of artistic expression generally and of rap in particular. Art is often nonliteral and rap relies on lyrical ambiguity and wordplay that resists a single literal meaning. As such, making explicit that the probative value of creative expression is typically minimal guides judicial evaluation toward exclusion. That said, this guidance is heavily qualified. The law establishes that if creative expression is (1) created “near in time” to the charged crime, (2) bears sufficient similarity to the charged crime, or (3) includes “factual detail” relevant to the charged crime that is “not otherwise publicly available,” the probative value of the expression’s literal meaning may increase.

While the first factor guides judicial evaluation of a creative expression's probative value, the second clarifies the counterweight of undue prejudice. The law emphasizes that a trier of fact may treat creative expression as impermissible propensity evidence and, further, that creative expression may "inject racial bias into the proceedings."⁷¹ Here, California certainly had rap in mind. Its legislative findings are explicit that "a substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence."⁷²

Procedurally, the California law provides that the court, when evaluating admissibility, shall also consider

- (1) Credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression.
- (2) Experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.
- (3) Evidence to rebut such research or testimony.⁷³

The law further demands that decisions on admissibility "shall be heard in limine, outside the presence and hearing of the jury" and requires the court to "state on the record its ruling and its reasons therefor."⁷⁴

The proposal to address this problem that has been advanced in the U.S. Congress has yet to be signed into law. The bill—titled the "Restoring Artistic Protection" or "RAP" Act of 2022⁷⁵—takes a different tack than the California law. Rather than guide a court's evaluations of probative value and undue prejudice, the RAP Act creates a default rule that "a defendant's creative or artistic expression, whether original or derivative, is not admissible against such defendant in a criminal case."⁷⁶ This default rule, however, yields to exceptions enumerated in the bill.

In order to admit creative or artistic expression⁷⁷ under the RAP Act, the government must show by clear and convincing evidence that the defendant intended the *literal meaning* of the expression, whether original or derivative.⁷⁸ This threshold showing, much like California's characterization of what is and is not probative, accounts for the fact that art generally, and rap specifically, often relies on ambiguities and figurative expressions.

If the threshold showing is made, the government must then prove by the same clear and convincing standard that (1) the "creative expression refers to the specific facts of the crime alleged"; (2) the "expression is relevant to an issue of fact that is disputed"; and (3) the "expression has distinct probative value not provided by other admissible evidence."⁷⁹

Procedurally, the RAP Act is much like the California law. Admissibility is to be assessed at a hearing "conducted outside the hearing of the jury"⁸⁰ and the court "shall make its ruling on the record," including its "findings of fact essential to the ruling."⁸¹ Finally, if the court decides to admit evidence of creative or artistic expression, it must "ensure that the expression is redacted in a manner to limit the evidence presented to the jury to that which is specifically excepted" from the default rule of exclusion and, further, must "provide appropriate limiting instructions to the jury."⁸²

Both of these legislative approaches improve on the inconsistent approach taken under the basic First Amendment and Rule 403 principles, and we look forward to seeing the impact that California's legislation will have on future cases. These approaches represent two of a number of possible answers to the question of how courts should assess proposed rap-lyric evidence. In the following section, we assess the wisdom of these and other approaches and lay out a framework that we believe would most effectively distinguish between what should and should not be admitted.

V. Our Proposals

There are at least three distinct approaches to addressing the problem presented by rap-lyric evidence: (1) a constitutional rule, (2) a categorical

legislative ban, and (3) reforms within applicable rules of evidence.

1. A Constitutional Rule

There are clearly First Amendment values at stake when rap lyrics, or any works of creative expression, are used as evidence against artists in criminal prosecutions. Thus, a constitutional rule prohibiting the use of creative expression to inculcate creators for alleged criminal acts has intuitive appeal.

Be that as it may, there are instances in which a criminal defendant's past statement—a confession of guilt, for instance—may be admitted into evidence, its formal artistic label notwithstanding. One can imagine a case in which a defendant had provided a detailed confession (including accurate information about the crime not otherwise publicly known), incorporated a musical accompaniment of that confession, and called it creative expression, be it rap, rock, or country.⁸³

It is dubious that the First Amendment bars a judicial fact finder from considering such evidence. While there are First Amendment principles at work in the context of rap lyrics admissibility, and while judges have underplayed the importance of those principles, it is difficult to argue that the *Constitution* bars the practice entirely. This, however, does not prevent legislatures from passing laws that do.

2. A Categorical Legislative Ban

A law that categorically precludes the admission of creative expression as evidence in criminal proceedings is conceivable. In light of the expressive values at stake, in conjunction with the insidious biases against racial minorities, an overprotective (and overinclusive) approach may be superior to an underprotective (and underinclusive) one. When competing considerations are in play, the law accepts trade-offs. Fourth Amendment jurisprudence,⁸⁴ for instance, prevents certain law enforcement practices that violate privacy rights. The warrant requirement surely comes at the cost of relevant, probative evidence, but constitutional law is clear that the ends do not always justify the

means. One must be secure in their person, houses, papers, and effects, even if that means keeping key evidence out of the hands of police officers and prosecutors.

A categorical evidentiary ban on creative expression would, in some cases, exclude otherwise probative, inculpatory evidence. In line with William Blackstone's admonition that it is "better than ten guilty persons escape, than that one innocent suffer,"⁸⁵ this may be a price well worth paying. The state is often at a resource advantage over criminal defendants. Forcing police investigators to make their case without the aid of creative expression would not ruin their efforts. Imprisoning a person because of their art, especially if that art is the only evidence proffered, *does* ruin their life. A categorical legislative ban, then, is one reasonable path forward.

3. Reforms Within Applicable Rules of Evidence

To the extent reform should allow creative expression to be admitted into evidence, the second path toward reform points toward the rules of evidence. While the California law and the RAP Act are improvements upon the status quo, they do not go far enough. We believe the soundest approach is to combine the strongest elements of both proposals such that admissibility of creative expression is permissible in only the most exceptional cases. To that end, a sound rule of evidence applicable to creative expression would do the following.

First, it would adopt a default rule that creative expression is presumptively inadmissible against its creator, as is proposed by the RAP Act.

Second, it would incorporate the same threshold showings as the RAP Act. Specifically, to overcome that presumption, prosecutors must, by clear and convincing evidence, make four showings: (1) the defendant intended the *literal* meaning of the expression, (2) the expression refers to specific facts of the crime alleged, (3) the expression is relevant to an issue of fact that is disputed, and (4) the expression has distinct probative value not provided by other admissible evidence.

These requirements account for the fact that rap is often viewed as literal and autobiographical when it is not. They ensure that the lyrics are not improperly used as propensity evidence or to make generalizations about a defendant's alleged criminal activity. Instead, lyrics sought to be admitted must refer to *specific* facts relevant to the alleged crimes. Finally, the requirements ensure that lyrics are introduced only when they do *unique* work in the prosecution's case. Under this framework, if a criminal defendant were lawfully arrested while in possession of a firearm, that defendant's lyrics about owning firearms would not be admissible.

Third, it would take a different approach to the balance between probative value and unfair prejudice than either Rule 403 or the California rule. The flaws with Rule 403 are described above. Simply, the way federal courts typically assess unfair prejudice fails to properly account for racial bias and other demonstrated biases associated with rap music. The California rule, though an improvement, is also less than ideal. It holds that the probative value of creative expression for its "literal truth" is "minimal unless that 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."⁸⁶ This language, incorporated into our proposed rule, would provide a "belt and suspenders" approach to evaluating admissibility.

For example, a prosecutorial showing by clear and convincing evidence that a defendant-artist intended the literal meaning of the lyric "I have a motive to commit crimes with a firearm" would work toward overcoming the default rule of inadmissibility. Further, if prosecutors could additionally show that (1) the crime charged involved a firearm; (2) it is disputed whether the defendant-artist did, in fact, have a motive to commit a crime with a firearm; and (3) there is no other evidence that tends to show such motive, those lyrics would be admissible over the default rule. This does not mean, however, that those lyrics would generate probative value sufficient to outweigh the risk of undue prejudice. This balance requires independent analysis, and a sound rule of evidence would, in this context, guide that balance away from admissibility in most cases.

Under the California rule, a creative expression's probative value is more than de minimis only if the expression was (1) created "near in time" to the charged crime, (2) bears sufficient similarity to the charged crime, or (3) includes "factual detail" relevant to the charged crime that is "not otherwise publicly available." Our proposal would change the disjunctive "or" to the conjunctive "and," ensuring that judicial assessment of the probative value of creative expression is tightly circumscribed.

Thus, to admit the lyric "I have a motive to commit crimes with a firearm," prosecutors must *additionally* show that those lyrics were written near in time and are similar to the crime charged and, further, that they reference facts about the crime not otherwise publicly available. Though a scenario in which these requirements are all met is conceivable, it is a remote possibility. In fact, that is the point: It should be difficult to admit a creative expression against its creator.

For assessing undue prejudice, we would adopt the California rule's recognition that such bias "includes, but is not limited to, the possibility that the trier of fact will . . . treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings."⁸⁷

Fourth and finally, a sound rule of evidence would adopt the same procedural requirements as the RAP Act and California rule. Courts shall consider not just the lyrics proffered but also "[c]redible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression," experimental or social science research as to racial bias, and credible rebuttal evidence to the aforementioned.⁸⁸

Admissibility determinations shall "be heard in limine, outside the presence and hearing of the jury," and the court must "state on the record its ruling and its reasons therefor."⁸⁹

VI. Conclusion

Creative expression, especially expression that challenges status-quo political, social, and economic arrangements, is at the heart of First Amendment values. This incontrovertible principle notwithstanding, rap lyrics have been used by prosecutors to put artists behind bars. A genre predominantly created by minority artists is disproportionately treated as inculpatory evidence, representing another racial injustice in a criminal legal system already replete with them. It is not entirely clear which reform would most plausibly, effectively, and morally balance the competing issues at stake. It is clear, however, that doing nothing is not an option. For this reason, we hope that legislation like the RAP Act and California rule continue to gain traction.

Endnotes

1. Amber Corrine, *Young Thug Hit with New Charges, Including Possession of a Machine Gun*, VIBE (Aug. 10, 2022), <https://www.vibe.com/music/music-news/young-thug-new-charges-possession-machine-gun-1234685141>.
2. Amos Barshad, *Young Thug and What Happens When Prosecutors Use Social Media*, WIRED (June 29, 2022), <https://www.wired.com/story/young-thug-and-what-happens-when-prosecutors-use-social-media>.
3. FOX 5 NY., *Citing Tekashi 6ix9ine, Lawmakers Seek Limits to Using Rap Lyrics as Criminal Evidence* (Nov. 19, 2021), <https://www.fox5ny.com/news/ny-rap-lyrics-criminal-evidence-bill>.
4. Jaeah Lee, *This Rap Song Helped Sentence a 17-Year-Old to Prison for Life*, N.Y. TIMES (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html>.
5. *Id.*
6. *Id.*
7. *Id.*

[8.](#) *Id.*

[9.](#) *Id.*

[10.](#) Amici Curiae Brief of the Marion B. Brechner First Amendment Project & Rap Music Scholars (Professors Erik Nielson & Charis E. Kubrin) in Support of Petitioner at 17–18, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983), 2014 WL 4180919, at *7 [hereinafter Amici *Elonis* Brief].

[11.](#) Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 PSYCH., PUB. POL’Y & L. 280 (2016).

[12.](#) FED. R. EVID. 403.

[13.](#) See Dunbar, Kubrin & Scurich, *supra* note 11, at 280.

[14.](#) Andrea L. Dennis, *Black Contemporary Social Movements, Resource Mobilization, and Black Musical Activism*, 79 L. & CONTEMP. PROBS. 29, 47 (2016) (“Once rap music became generally popular and developed ‘overtly political content,’ the criminal justice system began to focus on it. The criminal justice system has been used to punish socially conscious musical expression as subversive and threatening, and as evidence of criminality.”).

[15.](#) N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless Records 1988).

[16.](#) Amici *Elonis* Brief, *supra* note 10, at *17–18. The FBI director famously wrote a letter to N.W.A.’s record label expressing disgust with the song and implicitly demanding that the label stop supporting its production. *Id.*

[17.](#) *Id.*

[18.](#) See Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007) (quoting two pieces of literature directed at prosecutors advising them to seek out rap lyrics to inculcate defendants).

[19.](#) Amici *Elonis* Brief, *supra* note 10, at 6–8.

[20.](#) *Id.*

[21.](#) *Id.* at 10–11.

[22.](#) Erik Nielson, ‘*Can’t C Me*’: *Surveillance and Rap Music*, 40 J. BLACK STUD. 1261 (2010).

[23.](#) Dennis, *supra* note 18, at 22.

[24.](#) *Id.*

[25.](#) *Id.* at 23.

[26.](#) Dre’Kevius O. Huff, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 340 (2018).

[27.](#) *Id.*

[28.](#) *Id.*

[29.](#) *Id.*

[30.](#) *See id.* (stating that record companies “required these lyricists to attain the ‘rapper’ persona, purporting violence and sex, with the implied message being that, if rappers did not fit the mold, they would lose their contract or never get signed in the first place”); *see also* Charis Kubrin & Erik Nielson, Opinion, *A New California Trend—Prosecuting Rap*, L.A. TIMES (Apr. 7, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-kubrin-and-nielson-rap-prosecution-20140408-story.html> (“It is certainly true that gangsta rappers, to establish credibility, often make claims that they live the lives they rap about—that they are ‘keepin’ it real.’ But this is largely a pretense, one that aspiring amateurs feel compelled to embrace in their efforts to succeed in a hip-hop industry that requires its artists to manipulate identity in complex ways.”).

[31.](#) Huff, *supra* note 26, at 340.

[32.](#) See *infra* Parts IV–V.

[33.](#) United States v. Fell, 531 F.3d 197, 229 (2d Cir. 2008).

[34.](#) FED. R. EVID. 403.

[35.](#) *Id.*

[36.](#) U.S. CONST. amend. I.

[37.](#) Texas v. Johnson, 491 U.S. 397 (1989).

[38.](#) Richmond Newspapers v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

[39.](#) N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[40.](#) Mills v. Alabama, 384 U.S. 214, 218 (1966).

[41.](#) Boos v. Barry, 485 U.S. 312, 322 (1988).

[42.](#) See, e.g., Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment’s guarantee”); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Brooklyn Inst. of Arts & Scis. v. City of N.Y., 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

[43.](#) Amici *Elonis* Brief, *supra* note 10, at 6.

[44.](#) See EMMETT G. PRICE, HIP HOP CULTURE 12–13 (2006).

[45.](#) N.W.A., *supra* note 15.

- [46.](#) KENDRICK LAMAR, *ALRIGHT* (Top Dawg Entertainment, Aftermath Entertainment, & Interscope Records 2015).
- [47.](#) Amici *Elonis* Brief, *supra* note 10, at 9 (citing RUSSELL A. POTTER, *SPECTACULAR VERNACULARS: HIP-HOP AND THE POLITICS OF POSTMODERNISM* 18 (1995)).
- [48.](#) HENRY LOUIS GATES JR., *THE SIGNIFYING MONKEY* 53 (1988).
- [49.](#) Amici *Elonis* Brief, *supra* note 10, at 9.
- [50.](#) *Id.* at 10–11.
- [51.](#) *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).
- [52.](#) *United States v. Fell*, 531 F.3d 197, 229 (2d Cir. 2008).
- [53.](#) *State v. Williams*, 2022 Tenn. Crim. App. LEXIS 20, at *65 (Jan. 18, 2022).
- [54.](#) How criminal law defines a “gang,” and how so-called gangs are policed, is itself a problem—definitions are imprecise and liberally interpreted by law enforcement, and the term itself is racialized so that criminal enforcement is racist. For some discussion, see Richard A. Ball & G. David Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining “Gangs,”* 33 *CRIMINOLOGY* 225 (1995); K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-trial Detention*, 23 *ST. THOMAS L. REV.* 620 (2011).
- [55.](#) *FED. R. EVID.* 403.
- [56.](#) *See United States v. Mills*, 367 F. Supp. 3d 654, 671 (E.D. Mich. 2019).
- [57.](#) *See, e.g., United States v. Johnson*, 469 F. Supp. 3d 193, 222 (S.D.N.Y. 2019); *United States v. Stephenson*, 550 F. Supp. 3d 1246, 1255 (M.D. Fla. 2021).
- [58.](#) *See, e.g., United States v. Wilson*, 493 F. Supp. 2d 484, 488–89 (E.D.N.Y. 2006); *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015); *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

[59.](#) *United States v. Wiley*, No. 3:21cr98(JBA), 2022 U.S. Dist. LEXIS 120537 (D. Conn. July 8, 2022).

[60.](#) *See Wilson*, 493 F. Supp. 2d at 462 (quoting *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999)); *Johnson*, 469 F. Supp. 3d at 204 (quoting *United States v. Brown*, No. S2 16 Cr. 559 (DLC), 2017 U.S. Dist. LEXIS 89496, at *2 (S.D.N.Y. June 9, 2017)).

[61.](#) *See United States v. Clarke*, 767 F. Supp. 2d 12, 28 (D.D.C. 2011) (affirming a trial court's reasoning that the danger of unfair prejudice is low when the evidence is not more emotionally charged than other evidence of the charged offense); *People v. Minnifield*, 2014 IL App (1st) 113778-U (Nov. 24, 2014) (affirming finding that a rap "song's probative value was not substantially outweighed by its prejudicial value" because "it was not more inflammatory than the crimes alleged against defendant[]").

[62.](#) *See Dunbar, Kubrin & Scurich*, *supra* note 11 (finding that people who are shown violent lyrics were more likely to find them literal, offensive, and in need of regulation when they were told that the lyrics were of a rap song than of a country song).

[63.](#) *See Lee*, *supra* note 4.

[64.](#) *See Wiley*, 2022 U.S. Dist. LEXIS 120537, at *6 (compiling cases showing the many ways courts have dealt with this issue).

[65.](#) *Id.*

[66.](#) *Id.*

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

[68.](#) CAL. EVID. CODE § 352.2(c).

[69.](#) *Id.* § 352.2(a).

[70.](#) *Id.* § 352.2(a)(1)–(2).

[71.](#) *Id.* § 352.2(a).

[72.](#) Cal. A.B. No. 2799, § 1(a) (citing Stuart P. Fischhoff, “*Gangsta” Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 803 (1999); Carrie B. Fried, *Who’s Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705 (1999); Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIM. 507 (2018)).

[73.](#) CAL. EVID. CODE § 352.2(b)(1)–(3).

[74.](#) *Id.* § 352.2(d).

[75.](#) H.R. 8531, 117th Cong. (2022).

[76.](#) *Id.* § 2(a).

[77.](#) The RAP Act defines “creative or artistic expression” as “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.” *Id.* § 2(e).

[78.](#) *Id.* § 2(b)(1)(A)–(B).

[79.](#) *Id.* § 2(b)(2)–(4).

[80.](#) *Id.* § 2(b).

[81.](#) *Id.* § 2(c).

[82.](#) *Id.* § 2(d)(1)–(2).

83. Jordan Peele and Keegan-Michael Key have used this very scenario to great effect in their sketch comedy. *See* Comedy Central, *Key & Peele–Rap Album Confessions*, YouTube (Aug. 9, 2015), <https://www.youtube.com/watch?v=14WE3AOPwVs>.

84. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Jones*, 565 U.S. 400 (2012).

85. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

86. CAL. EVID. CODE § 352.2(a)(1)–(2).

87. *Id.* § 352.2(a)(1)–(2).

88. *Id.* § 352.2(b)(1)–(3).

89. *Id.* § 352.2(d).

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