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ALL EYEZ ON RAP & HIP-HOP: ANALYZING HOW BLACK EXPRESSION IS CRIMINALIZED
AND THE LANGUAGE OF THE RAP ACT OF 2022

*Maia Young*¹

ABSTRACT

The Black existence, in the United States of America, has always been regarded as a conditional right. Conventionally, Blackness must always be nonviolent and non-disruptive to safely exist. Because of this, Blackness cannot be confined to restraints and disrupts these conventions with acts of joy and creative expression. Black creativity is both unconventional and sacred. Black creative expression documents, preserves, and unifies cultural lived experiences, from a first-hand lens of those oppressed. Creative and artistic expression celebrates the myriad of stories that are a part of the collective Black experience. Yet, Black creative expression is now being weaponized by prosecutors against artists, despite once being employed by artists against societal injustice. Specifically, criminal prosecutors manipulate the context of Black creative expression and seek to admit it into evidence to exploit and penalize artists in a criminal proceeding. Thus, punishing artists for their cadence rather than their conduct. Rap music is not deleterious, it is a transformative musical account of an artist's life and circumstances. Further, this practice imposes a dangerous burden on the criminal legal system to analyze questions of both fact and fiction. This Note will examine the corrupt practice of admitting rap lyrics into evidence against an artist in a criminal proceeding and its impact on rap artists and rap music. This Note will also deconstruct the language of the Restoring Artistic Protection Act of 2022 and offer an alternative critique of the proposed legislation. Ultimately, this Note will argue that rap music and hip-hop culture are innately creative, requiring an artistic interpretation of its content and protection within the criminal legal system. Rap songs are lyrical narratives, not criminal confessions.

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INTRODUCTION

*. . . and on top of all that
 They tryin to blame this rap shit for all of our ills
 Like I can stick you up with a mic
 Like I can rape you with a verse or use a verb as a knife
 Like before Kool Herc, everything was alright
 Like y'all wasn't calling Black women hoes befo' "Rapper's Delight"*²

The trend of allowing rap and hip-hop lyrics to be used as evidence in criminal proceedings subjects Black expression to unfair participation in a system that has historically ignored its people and its protest.³ Linking violence or criminal conduct exclusively to the genres of rap and hip-hop⁴ perpetuates America's thematic history of injustice and misinterpretation of Black life, music, and culture. Stereotypical public opinion of the association between rap and violence "attempt[s] to erase from the consciousness of [Americans] the history of oppression that [gave] birth to hip-hop culture."⁵ Particularly, American media discreetly characterizes rap music as uncontrollably violent while highlighting the art form's rapid popularity and success in the mainstream music industry.⁶ This demonstrates America's obsession to engage with Black art and Black people at its earliest convenience.

The RAP Act of 2022⁷ challenges this norm within the context of the criminal legal system.⁸ The proposed RAP Act of 2022 seeks to amend the Federal Rules of Evidence, as Rule 416, to protect rap artists and their creative expression. However, under listed exceptions, the RAP Act permits a literal interpretation of creative and artistic expression,⁹ failing to fully recognize rap and hip-hop music as a protected art form.¹⁰ Despite this permission, the RAP Act was proposed to counter the criminal legal system's natural inclination to deem rap music as an artist's

² Little Brother, *Sirens* (!LLMIND 2007). ; *See generally* Christina Reyna, Mark Brandt, & G. Tendayi Viki, *Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12(3) GRP. PROCESSES & INTERGROUP RELATIONS 361 (2009) (discussing how negative stereotypes of rap music influence attitudes of Blackness and Black people.)

³ Reyna, et.al, *supra* note 2, at 362.

⁴ Vidhaath Sripathi, *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. GENDER, RACE, & Justice 207, 208 (2021).

⁵ Becky Blanchard, *The Social Significance of Rap & Hip-Hop Culture*, EDGE (July 26, 1999), https://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/socialsignificance.htm.

⁶ *Id.*

⁷ Restoring Artistic Protection Act of 2022, H.R.8531, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/8531>.

⁸ *See* Erica Bryant, *Why We Say "Criminal Legal System," Not "Criminal Justice System"*, VERA INSTITUTE (Dec. 1, 2021), <https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system> (specifying why the term "criminal justice system" is a misnomer because it disregards the treatment, dehumanization, and targeting that regularly occurs to those within the criminal legal system).

⁹ H.R. 8531, 117th Cong. (2022).

¹⁰ *See* Emmerson Sykes & Leila Rafei, *Putting Rap Lyrics on Trial is a Violation of Free Speech*, ACLU (Nov. 9, 2020), <https://www.aclu.org/news/free-speech/putting-rap-lyrics-on-trial-is-a-violation-of-free-speech> (exemplifying how the criminal legal system sees rap music differently than other musical genres and how rap music is not considered, like other musical genres, as a form of artistic expression protected under the First Amendment).

truthful narrative rather than a form of free artistic expression.¹¹ Part I of this Note discusses the history and evolution of rap music and hip-hop, while also looking at how rap music has been historically and contemporarily criminalized. Part II analyzes whether the RAP Act, as is, would ensure the protection of rap music and its artists. Part II also criticizes Factor 1 of the RAP Act and proposes an alternative, such as a balancing test, to ensure that there is no legislative loophole that would unjustly admit rap lyrics. Part III concludes that allowing rap and hip-hop lyrics as evidence in criminal proceedings furthers Black disenfranchisement in America through the criminalization of Black individualized expression.

I. BACKGROUND

A. THE HISTORY AND EVOLUTION OF RAP MUSIC

Rap music relies on the stylistic manipulation of beats, sounds, phrases, and instruments.¹² Black art forms such as jazz, gospel music, soul music, and reggae music have been instrumental in the creation of both rap and hip-hop.¹³ When engaging in a conversation about the rap and hip-hop art forms, it is impossible to diminish the role and impact of Black creativity. Black creativity and expression have roots in everyday forms of resistance, which trace back to enslavement.¹⁴ Enslaved people formed their own methods of communication and entertainment in the form of rhyming games.¹⁵ The impact and intellect of rhyming games are apparent through stories like “Bre’r Rabbit tales” that used metaphors to conceal stories of resistance.¹⁶ In Bre’r Rabbit Tales, the rabbit constantly relies on his wit and adversity to overcome conflict with stronger animals or other forces—symbolizing the lived experiences of enslaved people.¹⁷ These stories exemplify the use of rhyming games, characterizing the enslaved as a rabbit and the master as a fox in disguised stories of the enslaved outwitting slave masters and escaping plantations behind the façade of a comical adventure.¹⁸ Passed down through oral recollection, this folk tale accurately reflected the

¹¹ H.R. 8531, 117th Cong. (2022); Sykes & Rafei, *supra* note 10.

¹² Portia K. Maultsby & Fernando Orejuela, *Timeline of African American Music: Rap/Hip-Hop*, CARNEGIE HALL (2021), <https://timeline.carnegiehall.org/genres/rap-hip-hop>.

¹³ Blanchard, *supra* note 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; “The allegorical symbolism, rooted in slavery and its inequalities, is not hard to decipher: [t]he rabbit is the underdog who constantly has to outwit his more powerful (but dim) master in order to steal his food to survive.” See Nina Martyris, ‘*Tar Baby*’: A Folk Tale About Food Rights, Rooted In The Inequalities Of Slavery, NPR: THE SALT (May 11, 2017), <https://www.npr.org/sections/thesalt/2017/05/11/527459106/tar-baby-a-folktale-about-food-rights-rooted-in-the-inequalities-of-slavery> (explaining the history of Bre’r Rabbit and Bre’r Fox).

¹⁷ *Id.*

¹⁸ Blanchard, *supra* note 5.

perspective of the enslaved experience.¹⁹ Today, rap and hip-hop continue to reflect the lived ideas, experiences, and stories of Black youth and adults alike.²⁰

1. *What is Hip-Hop?*

Contrary to popular belief, there is no stark difference between rap music and hip-hop. Though the terms are used interchangeably, rap stemmed from a culture that is now known as hip-hop.²¹ Today's hip-hop genre evolved from the beginnings of rap.²² Presently, the hip-hop genre is made up of rap styles that are distinct to Black artists based on their region and rhythmic delivery.²³ As rap music evolved, lyrics turned into an expression of personal experiences.²⁴ Rap and hip-hop became less about the introduction of the beats used in songs, and more about the experiences of the person behind them.²⁵ Rap music is something that is done, whereas hip-hop is a lifestyle that is lived.²⁶ Rap intentionally tells a story of the socio-economic, political, and racial issues in society, while being a voice of unity for its listeners.²⁷

Near the end of the twentieth century, subgenres of rap music continued to call attention to growing community concerns although the content of the lyrics distinguished from rap's early beginnings.²⁸ The growing entertainment industry welcomed rap music into mainstream media, which amplified rap's soundscape in entirety.²⁹ Coined "new school" rap, 1990s rap music served as a means of strength and empowerment that engaged the social consciousness of Black America.³⁰ As the Black community became more negatively impacted in the 1990s, the new era of "gangsta rap" arose.³¹ Gangsta rap operates "within a well-documented poetic tradition within African American culture that ritualizes invective, satire, obscenity and verbal phenomena with transgressive aims."³² It provides graphic descriptions of the social ills of a community or street

¹⁹ Martyris, *supra* note 16.

²⁰ Joseph Paul Eiswerth, *Rap Music As Protest: A Rhetorical Analysis of Public Enemy's Lyrics* (Jan. 1, 1995) (M.A. thesis, University of Nevada, Las Vegas) (UNLV Retrospective Theses & Dissertations). <https://digitalscholarship.unlv.edu/rtlds/583/>.

²¹ Jeanita W. Richardson & Kim A. Scott, *Rap Music and Its Violent Progeny: America's Culture of Violence in Context*, *Juvenile Justice: Children of Color in the United States*, Summer 2002, 175, 177. <https://www.jstor.org/stable/pdf/3211235.pdf>.

²² Maultsby & Orejuela, *supra* note 12.

²³ There is no defined sound to rap music and rap styles such as Crunk, Drill Rap, Jazz Rap, or Trap have become popular movements within hip-hop culture since its origin. See Alex Lavoie, *22 Rap Genres That Defined the 50 Year Evolution of Rhyme and Beat*, LANDR BLOG (Aug. 14, 2023), <https://blog.landr.com/rap-styles/> (listing the various types of subgenres within hip-hop culture that have been created since the origin of hip-hop in the 1970s).

²⁴ *'The Anthology of Rap': Lyrics as Poetry*, NPR (Nov. 6, 2020), <https://www.npr.org/templates/story/story.php?storyId=131069750>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Blanchard, *supra* note 5.

²⁸ Maultsby & Orejuela, *supra* note 12.

²⁹ *Id.*

³⁰ Blanchard, *supra* note 5.

³¹ Maultsby & Orejuela, *supra* note 12.

³² Erin Lutes, James Purdon, & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 84 (2019).

culture through the use of metaphors and expressional language.³³ Rappers relied on provocative language to discuss issues impacting their community. “Combining old school boasting with “*bad man*” imagery, the microphone [became] an automatic weapon for an MC to “*murder*” his competitor.”³⁴ Though gangsta rap entwined violence and political criticism, it remained an inspirational and impactful soundtrack to those navigating constant social ills.³⁵

Hip-hop is the accompaniment of rhythmic beats and drum breaks.³⁶ The presence of these methods was primarily intended to show the skill of the producer or turntablist behind the beat.³⁷ Rap music emerged among Black and brown youth in New York City as a minimalist street sound set against formulaic and heavily orchestrated music.³⁸ Disc jockeys (DJs) in dance clubs or local house parties played rap music extensively, helping it gain popularity.³⁹

DJs would converse with the crowd between “extended plays of isolated percussion breaks.”⁴⁰ During these conversations, dancers would showcase acrobatic techniques to snippets of looped instrumental songs— a practice now known as breakdancing.⁴¹ The funk antics of dancers popping and locking influenced the basics of breakdancing.⁴² To keep the attention of the crowd, DJs became masters of ceremonies or microphone controllers (MCs).⁴³ MCs began to incorporate rhyming into their conversations with the crowd.⁴⁴ Echoed by the crowd, rhyming cadences soon developed into the lyrical and oral techniques that hip-hop still relies on today.⁴⁵

Pioneering MCs commandeered the English language and bent it to better reflect their own expression.⁴⁶ To create beats, DJs learned to scratch vinyl records on turntables and sample excerpts of albums and songs.⁴⁷ This musical additive, along with listeners characterizing MCs as storytellers of hip-hop culture,⁴⁸ laid the groundwork for the creation of rap and hip-hop.

2. Prejudice Surrounding Rap Music

In wider society, gangsta rap remains synonymous with controversy, as well as a negative perception of the rap and hip-hop genres.⁴⁹ As gangsta rap became more popular, so too increased

³³ Maultsby & Orejuela, *supra* note 12.

³⁴ *Id.*

³⁵ Sripathi, *supra* note 4, at 213.

³⁶ Blanchard, *supra* note 5.

³⁷ *Id.*

³⁸ Maultsby & Orejuela, *supra* note 12.

³⁹ Blanchard, *supra* note 5.

⁴⁰ Briana Lavon Carter, *Lyrics For Lockup: Using Rap Lyrics to Prosecute in America*, 69 MERCER L. REV. 917, 923 (2018).

⁴¹ Lindsey Anderson Ross, *Don't Call it Breakdancing: The Origin Story of Breaking In Milwaukee*, MILWAUKEE MAG. (Aug. 28, 2019), <https://www.milwaukeeemag.com/dont-call-breakdancing-breakings-milwaukee-origin-story/>.

⁴² *Id.*

⁴³ Carter, *supra* note 40, at 923.

⁴⁴ *Id.*

⁴⁵ NPR, *supra* note 24.

⁴⁶ *Id.*

⁴⁷ Jason E. Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 483 (2021).

⁴⁸ NPR, *supra* note 24.

⁴⁹ Sripathi, *supra* note 4, at 213.

efforts to suppress it.⁵⁰ Gangsta rap was the first introduction to the genre of rap music for many listeners and critics.⁵¹ For many, the entirety of rap music is defined solely by gangsta rap.⁵² Perhaps, the consumerism of gangsta rap supports this restricted view. Ironically, moral outrage over this cultural phenomenon helped popularize gangsta rap, seeing how the sales of these records were a success.⁵³ Gangsta rap artists' descriptions of murder and violence stimulated a suburban white audience in America that misinterpreted its artistry.⁵⁴ Middle-class white Americans perceived the music to be a perpetuation of historic stereotypes of Black Americans instead of an embodiment of artistry and metaphorical wordplay. Middle-class white America viewed Black art and rap music as a monolith, believing that gangsta rap represented the true voice and experiences of Black communities and all of Black America. Gangsta rap artists coining the sub-genre as "Black America's TV station," "the CNN of the streets," and "the last voice of [B]lack people," unconsciously boosted white America's manufactured association.⁵⁵ Artistic metaphors embedded within gangsta rap intend to showcase a rapper's skill, and were not meant to be an interpretation of real acts of violence.⁵⁶

Through its lyricism, rap music confronts hyper policing in Black communities, mass incarceration, and other problems faced by Black and brown communities head on.⁵⁷ Literary tools⁵⁸ creatively conceal the explicit nature of rap artists' confrontations, causing Black expression to be misinterpreted and misunderstood. Critics of rap music fail to understand the emotion, talent, and intellect rap artists imbue their songs due to their misunderstanding of the art form's language and foundational cultural nuances.⁵⁹ Most fail to acknowledge and explore the intricacies of rap music, mirroring the failure of slave overseers to peel back the meanings of plantation slave songs.⁶⁰

Rap music is a powerful force for identity and solidarity.⁶¹ Rap, in essence, is a transformative art form that provides a social commentary, narrowed in the lens of cultural

⁵⁰ *Id.* at 214.

⁵¹ Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 18 (2007).

⁵² *Id.*

⁵³ See Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising From The Use of Rap Lyrics As Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 352 (2005) (detailing how gangsta rap's popularity resulted from listeners' and record companies' curiosity with the violence expressed in gangsta rap's lyricism).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Maultsby & Orejuela, *supra* note 12.

⁵⁷ Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. UNIV. J. OF L. & POL'Y. 33, 51 (2016).

⁵⁸ See, e.g., Cynthia Lee, *Rap Lyrics as Literature*, UCLA NEWSROOM: UCLA MAGAZINE (Feb. 15, 2022), <https://newsroom.ucla.edu/magazine/lectures-lyrics-hip-hop-rap-poetry> (regarding literary tools such as metaphors, rhyme and rhythm, similes, attention to language, imagery, and character personas).

⁵⁹ Tibbs & Chauncey, *supra* note 57, at 51.

⁶⁰ *Id.*

⁶¹ Eiswerth, *supra* note 20.

understanding.⁶² As an art form, rap music deserves the utmost protection within the criminal justice system.

B. CRIMINALIZATION IN RAP MUSIC

Historically, song lyrics were usually admissible in court to hint at one's involvement in criminal activity.⁶³ Now, song lyrics are often presented as autobiographical confessions of culpability.⁶⁴ Prosecutors present lyrics at trial to portray the defendant as one who has the motive or propensity to commit a violent act.⁶⁵

This practice misconstrues the content of rap music, and inadvertently uses rap and hip-hop lyrics "as a proxy to criminalize race."⁶⁶ "By invoking the character evidence rules, prosecutors are able to utilize a defendant's lyrics to show proof of motive or intent behind alleged violent crimes."⁶⁷ Prosecutors utilize a defendant's artistic expression, giving undue prejudice to the defendant and their actions, setting a dangerous precedent.

Prosecutors have also used rap lyrics written by defendants to prove that they actually committed a specific crime.⁶⁸ This prosecutorial technique is not applied sparingly, as rap lyrics have been admitted in hundreds of criminal trials nationwide.⁶⁹ Cases across the country demonstrate prosecutorial attempts to secure easy convictions by presenting lyrics as confessions to juries.⁷⁰ Prosecutors attempt to use rap lyrics against defendants in two ways. First, prosecutors are conscious of juries' implicit bias against rap music and its artists,⁷¹ hoping that they'll conflate

⁶² *Id.*

⁶³ Erik Nielson, *Prosecutors Would Rather Read Rap as a Threat Than as Art*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/opinions/prosecutors-would-rather-read-rap-as-a-threat-than-as-art/2014/12/05/80e77fc8-7b3e-11e4-b821-503cc7efed9e_story.html; "... the real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing the jury to that person. Through ... music lyrics, prosecutors can invade and exploit the defendant's true personality." See Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, AM. PROSECUTORS RSCH. INST. 1, 16 (2004) (showing how the prosecutorial use of music lyrics against a defendant in a criminal proceeding is intended to show the jury the type of "criminal" the defendant is).

⁶⁴ *Id.*

⁶⁵ Tibbs & Chauncey, *supra* note 57, at 36; Lorne Manly, *Legal Debate on Using Boastful Rap Lyrics as a Smoking Gun*, N.Y. TIMES (Mar. 26, 2014), <https://www.nytimes.com/2014/03/27/arts/music/using-rap-lyrics-as-damning-evidence-stirs-legal-debate.html>.

⁶⁶ Tibbs & Chauncey, *supra* note 57, at 36.

⁶⁷ Sripathi, *supra* note 4, at 208.

⁶⁸ Powell, *supra* note 47, at 481; Under the Federal Rules of Evidence, Rule 404 permits admission of other crimes, wrongs, or acts for multiple purposes, including knowledge. FED. R. EVID. 404(b)(2).

⁶⁹ David L. Hudson, Jr., *Rap Music and the First Amendment*, THE FIRST AMENDMENT ENCYCLOPEDIA, MIDDLE TENN. STATE UNIV. (2018); See Nielson, *supra* note 63 (detailing how prosecutors admit and equate rap lyrics as autobiographical confessions of crimes); See *Hip-hop on trial: When can a rapper's lyrics be used as evidence in a criminal case?*, THE CONVERSATION (Sept. 27, 2023), <https://theconversation.com/hip-hop-on-trial-when-can-a-rappers-lyrics-be-used-as-evidence-in-a-criminal-case-205280> (sharing how University of Richmond professor reported hundreds of cases, across a decade, where rap lyrics were introduced as evidence in criminal trials).

⁷⁰ Nielson, *supra* note 63; See generally, *Miller v. California*, 93 S.Ct. 2607 (1973) *Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 WL 405907 (Dist. Ct. S.D. Tex.); *Ward v. State*, 794 S.E.2d 246 (2016); *Joyes v. State*, 797 A.2d 673 (2002); *Holmes v. State*, 306 P.3d 415 (Nev. 2013).

⁷¹ Sripathi, *supra* note 4, at 219.

a defendant's expressions outside of their music with what is depicted in the song.⁷² Second, prosecutors may introduce rap videos into evidence in an attempt to show the "existence of a criminal enterprise, association with other members, familiarity with firearms, and a motive to commit certain crimes."⁷³ By associating rap music and violent crimes, prosecutors create a horrible and restrictive suggestion that the genre, and its artists, glorify or condone violent and other stereotypes mentioned in association with Black art and its people. This association has led to harsh indictments or life sentences for artists.⁷⁴ For instance, popular artists Young Thug and Gunna were indicted in 2022 on gang and firearm-related charges & on charges of violating the Racketeer Influenced and Corrupt Organizations (RICO) Act.⁷⁵ The indictment portrayed the artists as members of a criminal organization and argued that their lyrics and artistic expression were the foundation of their alleged criminality.⁷⁶ Their lyrics were decontextualized and regarded as overt acts of racketeering.⁷⁷ This contention proves that, even in its most figurative state, rap will be blamed for the societal inequalities it has amplified.

1. *Use of Lyrics as Evidence*

Character evidence rules should not apply to song lyrics. Under the Federal Rules of Evidence (FRE), prosecutors can introduce a defendant's lyrics to show proof of, or motive or intent behind, alleged crimes.⁷⁸ Given that the drafters of the FRE did not explicitly address whether or not the rules apply to rap music, the burden of interpretation rests upon the courts.⁷⁹ Even so, drafters included Rule 404—related to the character evidence—in the FRE in order to "prevent juries from wrongfully convicting a defendant based on [their] propensity to commit a certain crime."⁸⁰ The United States Supreme Court has acknowledged that a jury might give undue

⁷² Nielson, *supra* note 63.

⁷³ Hudson, *supra* note 69.

⁷⁴ Kelly McGlynn, Jacob Schriener-Briggs, and Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutions*, AMERICAN BAR ASSOCIATION (Jan. 11, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/#ref22.

⁷⁵ *Id.*; Young Thug and Gunna are popular rap artists who have been indicted in Fulton County, Georgia on numerous charges. Both indictees use rap names, as Young Thug's given name is Jeffery Williams & Gunna's birth name is Sergio Kitchens. Leah Asmelash, *Young Thug's song lyrics are being used as evidence in gang indictment*, CNN:ENTERTAINMENT (May 12, 2022), <https://www.cnn.com/2022/05/11/entertainment/young-thug-ysl-indictment-lyrics-cec/index.html>.

⁷⁶ Amos Barshad, *Young Thug and What Happens When Prosecutors Use Social Media*, WIRED:CULTURE (June 29, 2022), <https://www.wired.com/story/young-thug-and-what-happens-when-prosecutors-use-social-media/>; Fulton County prosecutors allege that Young Thug and Gunna are not solely artists a part of the music collective YSL (understood to be Young Stoner Life), "...but [are a part of the] violent Atlanta gang [titled] 'Young Slime Life' that committed murders, carjackings, drug dealing[,] and other crimes over the course over the decade." Bill Donahue, *Judge Rules Young Thug's Lyrics Can Be Used In YSL Rico Case: 'The First Amendment is Not on Trial'*, BILLBOARD: LEGAL NEWS (Nov. 9, 2023), <https://www.billboard.com/business/legal/young-thug-lyrics-can-be-used-ysl-rico-case-judge-ruling-1235467208/>.

⁷⁷ Maxine Tamsett & Nick Valencia, *Some rap lyrics will be allowed in YSL RICO case, judge rules. Why critics have called that a double standard*, CNN (Nov. 10, 2023), <https://www.cnn.com/2023/11/10/us/ysl-gang-trial-lyrics-evidence/index.html>.

⁷⁸ Sripathi, *supra* note 4, at 208.

⁷⁹ *Id.* at 221.

⁸⁰ *Id.* at 219.

and unjust weight to certain types of evidence.⁸¹ In *Michelson v. United States*, the Court recognized that common law policy forbids the use of any evidence of a defendant's character for the purpose of determining the probability of their guilt.⁸² This evidence is not rejected because the defendant's character is irrelevant, but so that unfair surprise, confusion of issues, and prejudice are prevented.⁸³ Additionally, the Court recognizes that giving undue weight to evidence that describes a defendant's evil character deprives a defendant of their constitutional right to a fair trial.⁸⁴ Admitting rap lyrics as evidence in a criminal trial allows the jury to determine the inherent character of the artist, and of the art form. Because of the vulgarity and profanity of rap lyrics, jurors infer that the defendant is capable of committing the specific crime they are on trial for.⁸⁵

Criminalizing song artists for the content of their lyrics promotes prejudiced decision making in the justice system because the use of lyrics as evidence targets and disproportionately impacts Black artists.⁸⁶ Labeling rap lyrics as criminal also disproportionately impacts the rap music genre.⁸⁷ If rap lyrics continue to be hyper-criminalized during prosecution, such a label will also have a chilling effect on Black speech.⁸⁸ Rap artists will focus more on evading criminal prosecution based on their lyrics, and less on artistic excellence. The hip-hop community is simultaneously under attack and under surveillance.⁸⁹ Both currently and historically, individual rap artists and rap groups have been surveilled—via eavesdropping, tracking, and online monitoring.⁹⁰

Artists have expressed their sentiments toward police or government surveillance in their work.⁹¹ Formed by four Black students at Adelphi University in New York, the rap group Public Enemy challenged the status quo of racial and hip-hop politics from the late 1980s to the 1990s.⁹² Groups like Public Enemy depicted the specter of surveillance in their logo, a silhouetted figure in crosshairs.⁹³ Public Enemy emphasized Black and political ideology in their radical lyricism,

⁸¹ *Id.* at 220; *See e.g.*, *Michelson v. United States*, 335 U.S. 469 (1948) (holding that most courts do not allow prosecutorial admissibility of a defendant's "evil" character to establish a probability of their guilt).

⁸² *Michelson*, 335 U.S. at 475.

⁸³ *Id.* at 476.

⁸⁴ Sripathi, *supra* note 4, at 220.

⁸⁵ Powell, *supra* note 47, at 500.

⁸⁶ "Using rap lyrics as criminal evidence...raises significant questions of racial injustice, especially because the practice targets—or at least disproportionately impacts—Black men." *See* Lutes, Purdon & Fradella, *supra* note 39, at 87.

⁸⁷ Powell, *supra* note 47, at 516; *See Rap on Trial: Conversation with Erik Nielson and Andrea L. Dennis*, VESTOPR (Apr. 17, 2020), <https://vestopr.com/rap-on-trial-conversation-with-erik-nielson-and-andrea-l-dennis/> (demonstrating the relationship between prosecutorial action to admit evidence of rap lyrics against defendants and the racial makeup of rap artists.).

⁸⁸ *Id.*

⁸⁹ Andrea L. Dennis, *The Music of Mass Incarceration*, AMERICAN BAR ASSOCIATION (Dec. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/music-mass-incarceration/.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Greg Tate, *Public Enemy*, ENCYC. BRITANNICA (Nov. 21, 2023), <https://www.britannica.com/topic/Public-Enemy>.

⁹³ Dennis, *supra* note 89.

songs, and album covers, uniforms, and logo.⁹⁴ At first glance, the group's hand-designed logo of a person in the crosshairs of a gun sight can be interpreted as a state trooper because of the person's hat.⁹⁵ However, the logo is emblematic of the perspectives of Black men in America, and is an explicit depiction of the surveillance of Black artists in a police state.⁹⁶ The person in the crosshairs is an African American B-Boy, whose hat design is a reference to a hat initially worn by the hip-hop group Run-D.M.C.⁹⁷ Chuck D, creator of the logo, and frontman of Public Enemy, intended for the logo to symbolize the violence against Black people by law enforcement and state actors.⁹⁸ Additionally, the logo reflected the reality that many rap artists of the time faced as surveillance became more prevalent across the nation.⁹⁹

2. *Similarities Between Black Expression's Historic and Recent Criminalization*

Approximately thirty years ago, the New York City Police Department (NYPD) formed a hip-hop task force targeting rap artists in the city.¹⁰⁰ The establishment of this task force prompted other cities, like Atlanta, Las Vegas, and Miami, to set up their own hip-hop task forces using the same model.¹⁰¹ These units were solely created to keep track of artists' criminal histories, criminal activities, and disputes with other rap artists.¹⁰² Now, that initial unwelcome intrusion into rap and hip-hop culture has transformed into the criminalization of artist's words rather than their actions.

In the context of rap lyrics in criminal proceedings, the sanctity of the Black existence, which is contextual and layered—like the perfect verse over a tight beat,¹⁰³ does not survive prosecutorial discretion. Prosecutors are able to prove elements of a crime by circumstantial evidence. The proposed Restoring Artistic Protection (RAP) Act of 2022 is designed to amend the antiquated application of the character evidence rules and protect a defendant's creative expression.

II. ANALYSIS

As proposed, the RAP Act restricts the admissibility of rap lyrics as evidence except in four instances.¹⁰⁴ Such instances depend on a defendant's literal meaning or intentional adoption

⁹⁴ *In the Crosshairs: Chuck D's Logo for Public Enemy*, NAT'L MUSEUM OF AFRICAN AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/stories/crosshairs-chuck-ds-logo-public-enemy-o> (last visited Mar. 15, 2024).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*; *B-Boy* is a shortened form of break boy. The term *b-boy* derived from the art of breaking, which arose in the 1970s. *Breaking*, THE BREAKS: A BREAKING ENCYCLOPEDIA, <https://thebreaks.org/articles/breaking.html> (last visited Mar. 15, 2024).

⁹⁸ NAT'L MUSEUM OF AFRICAN AM. HIST. & CULTURE, *supra* note 94.

⁹⁹ Dennis, *supra* note 89.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ BROWN SUGAR (Fox Searchlight Pictures Oct. 11, 2002).

¹⁰⁴ Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2nd Sess. 2022).

of a creative expression, the relationship between the alleged crime's facts and the expression, and the expression's relevance and probative value.¹⁰⁵ Though these permissive instances require proof sufficient to pass examination under a clear and convincing evidence standard, the language in Factor 1 of the RAP Act is susceptible to deficient statutory interpretation. Factor 1's definition of original and derivative creative expression¹⁰⁶ is inconsistent with the purpose, intent, and execution of rap culture and music. However, it is first important to provide context of the RAP Act before this Note analyzes the impracticality of the Act's language.

A. WHAT IS THE RAP ACT?

The RAP Act recognizes that freedom of expression and artistic protection are necessary to maintain a society that is free to evolve through art, culture, and expression. Yet, the lack of protection rap and hip-hop artists face ultimately inspired the creation of the Act.¹⁰⁷ The Act was introduced in the United States House of Representatives in July of 2022.¹⁰⁸ Enacting the RAP Act would amend the Federal Rules of Evidence, adding Rule 416 as the final rule.¹⁰⁹ This addition codifies the RAP Act as, "Rule 416: Limitation on admissibility of defendant's creative or artistic expression."¹¹⁰

1. *The Language of the RAP Act*

The Act defines *creative or artistic expression* as, "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements or symbols, including music, dance, performance art, visual art, poetry, literature, film, and other such objects or media."¹¹¹ This definition encompasses rap and hip-hop culture because of the music's reliance on the production or arrangement of words, sounds, movements, and symbols.

Due to the prosecutorial inclination to analyze rap lyrics out of context, evidentiary standards fail to protect rap lyrics in criminal proceedings. Lyrics are regarded as corroborative proof of criminal conduct, rather than displays of creative or artistic skill. In response to this, Congressman Hank Johnson and Jamal Bowman introduced this Act to demand statutory protection for creative and artistic expression.¹¹² According to Congressman Johnson, the bill's enactment would ensure that musical speech and expression is exempt from suppression by the courts, or barred from prosecutorial use.¹¹³ Subject to authorized exceptions, the RAP Act explicitly limits the admissibility of rap or hip-hop lyrics in criminal proceedings,¹¹⁴ and states

¹⁰⁵ H.R. 8531, 117th Cong. (2022).

¹⁰⁶ *Id.*

¹⁰⁷ Press Release, Congressman Hank Johnson, 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> [hereinafter Press Release].

¹⁰⁸ *See Id.*; Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2nd Sess. 2022).

¹⁰⁹ H.R. 8531, 117th Cong. (2022).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See* Press Release, *supra* note 107.

¹¹³ *Id.*

¹¹⁴ H.R. 8531, 117th Cong. (2022).

that, “evidence of a defendant’s creative or artistic expression, whether original or derivative, is not admissible against such defendant in a criminal case.”¹¹⁵ The RAP Act is intended to safeguard freedom of expression and destigmatize rap music, which is an innately Black culture and art form.¹¹⁶ This stigma is prejudicial in its failure to extend to other genres and mediums of art.

The use of violent lyricism found in rap music is central to its establishment as a subject of societal disapproval and debate, though mentions of violence in music are not exclusive to rap or hip-hop.¹¹⁷ Genres such as country and heavy metal contain similar violent content, but are considered less provocative and less harmful.¹¹⁸ There is a threshold of acceptable violence tolerated by the general public, which can change depending on the audience and the artist in question.¹¹⁹ Criticism of the content and lyricism of country or heavy-metal music, or of its mentions of violence or danger, is rare. In contrast, rap music is uniquely subject to harsh societal judgment.¹²⁰

An exclusive focus on the violence mentioned in rap and hip-hop music blatantly disregards the foundation rap music was built upon. Unfortunately, rap music will always appear to clash with the impact of other genres, “...because rap stems from a culture that has been seeped in the fight against political, social, and economic oppression.”¹²¹

It should be noted that there is a genre that is remarkably devoted to violence, as its songs and artistic expressions often describe murder: opera.¹²² In opera,

Male protagonists . . . frequently challeng[e] other males for no other reason than sheer pride. Female characters...are usually portrayed as...shallow and easily manipulated for sexual purposes . . . But opera aficionados understand that violent and sexual themes are conventions within the genre and that it would have been bizarre to treat *Don Giovanni*, *Pagliacci*, or *Rigoletto* as somehow representing the literal wishes of their composers or to interpret the lyrics penned by their librettists as autobiographical admissions of crimes.¹²³

The difference in concern expressed toward pieces from different musical genres appears to be subtle and nonviolent, which contrasts greatly with its impact on society. Lyrics from musical genres that do not arise from the Black experience are not presumed to be oral statements of their

¹¹⁵ *Id.*

¹¹⁶ See generally Press Release, *supra* note 107 (discussing how the judicial system has criminalized Black and brown people, and their creativity).

¹¹⁷ Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 24 J. OF APPLIED SOC. PSYCH. 705, 707 (1999).

¹¹⁸ *Id.*; See also, CANNIBAL CORPSE, HAMMER SMASHED FACE (Metal Blade Records 1996) (portraying extreme violence with heavy metal lyrics like “Eyes bulging from their sockets, [w]ith every swing on my mallet, [s]mash your fucking head in until brain seep in . . .”); See also, JOHNNY CASH, DELIA’S GONE (Columbia Records 1962) (depicting violence in a country song with lyrics like “Delia’s gone, [f]irst time I shot her, I shot her in the side, [h]ard to watch her suffer, [b]ut with the second shot she died . . .”).

¹¹⁹ Fried, *supra* note 117.

¹²⁰ *Id.*

¹²¹ Blanchard, *supra* note 5, at 3.

¹²² Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 SAGE J. OF RACE AND JUST. 1, 2 (2017).

¹²³ *Id.*

belief, intent, or conduct.¹²⁴ These lyrics are not considered to be autobiographical, but purely artistic.

Rap music is denied the same artistic respect as other genres and mediums, especially in the criminal justice system, because of the inequity between Black artists and their counterparts.¹²⁵ The belief that rap exists outside of society's invisible confinements of artistry should not affect the consideration of rap music as an art form at all. Freddy Mercury's utterance of having 'just killed a man' by putting 'a gun against his head' and 'pulling the trigger' did not qualify as a confession, nor did Bob Marley confess to shooting a sheriff.¹²⁶ Moreover, Johnny Cash did not confess to shooting 'a man in Reno, just to watch him die[.]'¹²⁷ This parallel shows the context-based interpretation that music as an artistic genre deserves. Yet, rap lyrics have been used as evidence in hundreds of criminal cases against the artists who authored them.¹²⁸

Rap artists have attempted to survive public scrutiny, either through charges of obscenity, true threat, incitement, or censorship.¹²⁹ Ranging from letters sent by the Federal Bureau of Investigation to a record company about a rap group's song to the prosecution of a record store owner selling a rap album, rap music is hyper-policed and unprotected.¹³⁰ Law enforcement agencies associated public safety with hyper-policing, and failed to acknowledge the conditions that produced rap lyrics. In the midst of excessive surveillance, rap remains an open medium for the stories of those systemically disempowered. The hyper-policing of rap music normalizes an intolerance for Black creative expression and exposes Black artistic speech to state sanction.¹³¹

The RAP Act is the type of Congressional action and protection that adheres to principles embedded in the Constitution. "The Supreme Court has held that 'under the First Amendment, artistic expression compares favorably in importance to purely political speech. Free speech guarantees thus protect the right of audiences to listen as well as the right of musicians to

¹²⁴ Dennis, *supra* note 51, at 15.

¹²⁵ Michael Render & Erik Nielson, *Killer Mike: Free speech – unless it's rap?*, CNN (Feb. 17, 2016), <https://www.cnn.com/2016/02/17/opinions/rap-first-amendment-supreme-court-render-nielson/>; See Jihoon Ko, *Rap in the Courtroom: Evaluating the Implications of State of New Jersey v. Vonte L. Skinner*, COLUM. UNDERGRADUATE L. REV. 1, 3 (2019), <https://www.culawreview.org/journal/rap-in-the-courtroom-evaluating-the-implications-of-state-of-new-jersey-v-vonte-l-skinner> (explaining how the use of rap lyrics against criminal defendants stems from the history of police entities frequently targeting Black and brown artists).

¹²⁶ Press Release, *supra* note 107; *Bohemian Rhapsody*, GENIUS (Mar. 19, 2023), <https://genius.com/Queen-bohemian-rhapsody-lyrics> ("Mama, just killed a man, [p]ut a gun against his head, pulled my trigger, now he's dead . . ."); QUEEN, *BOHEMIAN RHAPSODY* (Warner Music Group 1975); BOB MARLEY & THE WAILERS, *I SHOT THE SHERIFF* (Universal Music Group & Tuff Gong 1973).

¹²⁷ JOHNNY CASH, *FOLSOM PRISON BLUES* (Sun Records, 1957).

¹²⁸ Press Release, *supra* note 107; *E.g.*, In a criminal case where rapper Drakeo the Ruler was accused of supplying weapons used in a murder, the prosecution presented lyrics to the jury, inviting them to read the lyrics as an illustration of Drakeo's culpability. The lyrics were not connected to the accusations, as the lyrics detailed having a rival tied up in the back of a car. S. Flannagan, *Times Rap Lyrics Have Been Used as Evidence*, GRUNGE, (Feb. 2, 2022), <https://www.grunge.com/755086/times-rap-lyrics-have-been-used-as-evidence/>; In 2008, Vonte Skinner's music was presented to a jury during his trial for his involvement in a 2005 shooting. "Though many of Skinner's lyrics did indeed evoke gang culture, none were about the crime in question, and many of the verses predated—and the crime—by several years by the time the jury w[ere] asked to examine them." *Id.*

¹²⁹ Hudson, *supra* note 69.; *See generally*, *Miller v. California*, 93 S.Ct. 2607 (1973)., *Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 WL 405907 (Dist. Ct. S.D. Tex.) (cataloging various instances where rap artists have faced First Amendment challenges).

¹³⁰ Hudson, *supra* note 69.

¹³¹ McGlynn, et al., *supra* note 74.

perform.””¹³² Song lyrics deserve First Amendment protection because song lyrics are categorized as artistic expression.¹³³

Rap lyricism illuminates themes of Black livelihoods, and the mischaracterizing of this illumination solely as criminal conduct blatantly disregards a song’s meaning and message. Yet, the paradoxical reality is that creative expression is statutorily protected in some mediums, and vulnerable in others. If passed, the RAP Act would be the first federal law that restricts the use of song lyrics in court cases.¹³⁴

Though the RAP Act limits the general admissibility of song lyrics, subsection (b) provides exceptions.¹³⁵ Exceptions to the RAP Act require clear and convincing proof, through admissible evidence, in a bench hearing.¹³⁶ Congressman Bowman, the Act’s proponent, recognizes that the prosecutorial process cannot begin with the admissibility of a defendant’s lyrics, absent “hard” proof.¹³⁷ Therefore, subsection (b) permits the consideration of song lyrics as evidence in addition to “hard” proof gathered, rather than the use of lyrics as the prosecution’s sole evidence.¹³⁸

A. SECTIONS OF THE RAP ACT

Subsections (c) and (d) of the Act regulate the procedure of this admissibility. Subsection (c) provides a mandate of the court, in the hearing mentioned in subsection (b), to make a ruling on the record and an inclusion of fact finding essential to its ruling.¹³⁹ Subsection (d) instructs the courts to, if lyrics are found to be admissible, ensure that redaction of the expression occurs to limit the evidence presented to the jury and that the jury is informed of those limiting instructions.¹⁴⁰

1. *Permissible Lyric Admissibility under the RAP Act*

Subsection (b) justifies the admissibility of lyrics in certain criminal proceedings through four exceptions.¹⁴¹ These exceptions account for original and derivative creative expression along with a prescribed definition for each type of expression.¹⁴² Within subsection (b), listed as subsections (1)–(4), the Act tabulates instances that permit song lyric admissibility in criminal

¹³² Shoshana Paget, *Sound on Trial: Rap Music & the U.S. First Amendment*, WORDPRESS: LAW AND THE SENSES (Aug. 1, 2018) <http://lawandthesenses.org/probes/sound-on-trial-rap-music-the-u-s-first-amendment/> (citing *McCullum v. CBS, Inc.*, 202 Cal. App. 3d 989, 999 (1988)).

¹³³ Sykes & Rafei, *supra* note 10.

¹³⁴ Brandon Hill, *New RAP Act Could Be First Federal Law to Limit Lyrics Use in Cases*, OKAYPLAYER (July 28, 2022), <https://www.okayplayer.com/news/rap-act-lyrics-evidence-court-cases.html>.

¹³⁵ H.R. 8531, 117th Cong. § 2(b) (2022).

¹³⁶ *Id.*

¹³⁷ Congressman Bowman likens hard proof to forensic evidence, witness statements, or the confirmation of weapons. See Jackie Padilla, *This congressman wants to decriminalize rap*, POLITICO (Aug. 19, 2022), <https://www.politico.com/newsletters/the-recast/2022/08/19/jamaal-bowman-rap-act-criminal-justice-00052897>.

¹³⁸ *Id.*; H.R. 8531, 117th Cong. (2022).

¹³⁹ H.R. 8531, 117th Cong. (2022).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

proceedings.¹⁴³ Sub-subsection (1)(A) and (1)(B) authorizes the admission of original and derivative expressions.¹⁴⁴ The sub-subsections associate a defendant's intent of a literal meaning, rather than a figurative meaning, to an original expression and the defendant's intent to adopt the literal meaning to a derivative expression.¹⁴⁵ Sub-subsections (2) and (3) authorize the admissibility of creative expression if it refers to facts of the crime alleged and if it is relevant to a disputed issue of fact.¹⁴⁶ Finally, sub-subsection (4) permits the admissibility of a creative expression if the expression's probative value is unprovided by other admissible evidence.¹⁴⁷

This Note focuses particularly on the language and interpretation of Factor 1(A) and Factor 1(B). The focus is on these factors because their practical effect would contradict the purpose of this Act. According to Factors (1)(A) and (1)(B), in a court proceeding, the presiding judge decides which evidence is admissible based on its intended meaning.¹⁴⁸ The only person who is capable of decoding an artist's lyrical intention is the artist, not the presiding judge or the prosecution. Accordingly, rap is rooted in pride and resistance, and will never conform to the narrow command of the courtroom. Rap is defined by its lyrical contexts, formulas, and rhymes intended to convey a message, thus demanding an artistic license in interpretation, rather than a literal one.

2. *Rap Music Should Be Interpreted Artistically, Not Literally*

Literal interpretation is a frequent practice in a legal context.¹⁴⁹ However, a literal interpretation of rap music is inconsistent with rap's purpose, as rap is not to be interpreted literally. Two elements of rap music underscore why the lyrics should not be taken literally: (1) the use of African American Vernacular English (AAVE) in rap lyricism, and (2) the similarities between rap music and poetry. AAVE is distinctive because it embodies certain cultural references, norms, and social situations,

AAVE is a variety of English that evolved from the language spoken by the descendents of Africans who were brought to the North American colonies as slaves . . . [a]fter slavery was abolished, African American speech retained its distinctiveness as a result of continued segregation and the existence of a vibrant African American culture.¹⁵⁰

Moreover, the inclusion and normality of these cultural references are particular and unique to the Black experience. The interpretation that occurs when one is aware of these experiences, either through personal knowledge or cultural awareness, is very different from the interpretation of an unaware listener. "[W]ithout listening to rap [or hip-hop music] and without an appreciation for the structure or the historical and social context that has shaped it as a genre," there is a

¹⁴³ *Id.*

¹⁴⁴ *Id.* at § 2(b)(1)(A); *Id.* § 2(b)(1)(B).

¹⁴⁵ *Id.* at § 2(b)(1)(A).

¹⁴⁶ *Id.* at § 2(b)(2).

¹⁴⁷ *Id.* at § 2(b)(4).

¹⁴⁸ Wilson, *supra* note 53, at 358.

¹⁴⁹ Stoia, et al., *supra* note 122, at 4.

¹⁵⁰ Matthew Feldman, African American Vernacular English in the Lyrics of African American Popular Music 4 (2002) (B.A. thesis, Bryn Mawr College).

misunderstanding of a rap song's message that is entwined in a rhythmic beat.¹⁵¹ So, applying a basic understanding of rap and hip-hop lyrics undermines the expressive nature they possess.

Expression should not be taken literally, but as art—a skill that is worthy of protection. Poetry seeks to question the consensus of society and “[t]he use of imagery in poetry engages us in the same way as it does in rap music.”¹⁵² The creation of a rhythmic presence in rap music is necessary for the message the artist intends to convey through song.¹⁵³ The presence of metaphors in rap music speaks to rap's innate poetic nature.¹⁵⁴ The poetic value of rap music is also found through the use of *rap names*—artistic monikers that rap or hip-hop artists go by. The complex manipulation of identity and the role-play artists identify through their music is central to the rap music genre.¹⁵⁵ The common use of stage names¹⁵⁶ in rap music confirms the figurative nature of the genre.¹⁵⁷ Artists channel these personalities in their expression, often embellishing lyrics aligned with the character they embrace.¹⁵⁸ Adapting an alter-ego personality separates the artist from their art, showing that a rapper's constructed image does not certify their guilt in a criminal proceeding.¹⁵⁹

This is also seen with popular music artists and their commitment to associating a name with their music and their art.¹⁶⁰ A staple of the rap music genre is that rap music and lyricism are rooted in real experiences. However, lyrics are hyperbolic in nature and are not intended to be taken literally.¹⁶¹ An example of this is in “I Gave You Power”, a 1996 song by Nas¹⁶²:

They pull me out, I watch as niggas scattered[.] Makin me kill, but what I feel it
never mattered[.] When I'm empty I'm quiet, findin myself fiendin to be fired[.] A

¹⁵¹ Paget, *supra* note 132.

¹⁵² Amy Smolic, *Is Rap Music Poetry?*, BOWEN ST. PRESS (Sept. 28, 2016), <http://bowenstreetpress.com/blog/2016/9/28/is-rap-music-poetry>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Nielson, *supra* note 63.

¹⁵⁶ The rap artist, Rick Ross, exemplifies the act of artists acquiring stage names that are unrelated to their everyday life. “Rick Ross took his stage name from a West Coast drug kingpin of the 1980s, Freeway Rick Ross.” Lorne Manly, *Legal Debate on Using Boastful Rap Lyrics as a Smoking Gun*, N.Y. TIMES (Mar. 26, 2014), <https://www.nytimes.com/2014/03/27/arts/music/using-rap-lyrics-as-damning-evidence-stirs-legal-debate.html>

¹⁵⁷ Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 SAGE J. OF RACE AND JUST. 185, 197 (2014). When artist Rick Ross debuted as a performer in 2006, his images and rhymes reflected a Miami gangster lifestyle, able to be construed as a reference to his past. However, in reality, Ross was once a corrections officer. Manly, *supra* note 145.

¹⁵⁸ *Id.* at 197.

¹⁵⁹ Wilson, *supra* note 53, at 376.

¹⁶⁰ *E.g.*, artists like Lizzo, Frank Ocean, SZA, and others have adopted stage names that are associated with their artistry and lyricism. SZA, born Solana Imani Rowe, adopted her stage name due to it being an acronym from her own name from the alphabet used in the orthodox Muslim religion. Lizzo, born Melissa Jefferson, adopted her stage name from during her adolescence. Frank Ocean, born Christopher Lonny Breaux, adopted his stage name as a source of empowerment. Kirsten Acuna, *The surprising real names of 30 musicians*, INSIDER, (June 16, 2020), <https://www.insider.com/singers-musicians-real-names>.

¹⁶¹ Michael Conklin, *The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence*, 95 INDIANA L.J. SUPPLEMENT 50, 62 (2020).

¹⁶² Smolic, *supra* note 152.

broken safety, niggas place me in shelves, under beds[.] So I beg for my next owner to be a thoroughbred[.] Keep me full up with hollow heads[.]¹⁶³

At face value, a reader can interpret Nas as the actor by the use of first-person language. Out of context, the lyrics could be interpreted to recount one's involvement in criminal activity. However, a face value interpretation ignores Nas' personification of a firearm throughout this song.

I Gave You Power is a critique of the issue of gun violence in America, through Nas' eyes. The song begins with a monologue that describes feeling expendable, obtainable, and silent—paralleling the concept of a gun.¹⁶⁴ Throughout the song, Nas conveys his personal emotions to induce emotional outcry and outrage against violent gun usage. The expressionism behind this song stemmed solely from Nas' personal experiences and environment.¹⁶⁵ Instead of making the song tough and aggressive as a reaction to gun violence, the song is sad and poetic to illustrate the fictional exhaustion of a gun whose only purpose is to kill.¹⁶⁶ Nas acknowledges this purpose by equating a gun's inutility to dismal silence, desiring to be used and heard again.¹⁶⁷ The song's poetic value is also demonstrative in the cadence of Nas' words and his intentional inclusion of rhyme.¹⁶⁸ This pattern of these lyrics allows the listener to draw a connection to the societal problem depicted in the song and the artist behind it. The incorporation of figurative language through metaphors, similes, hyperboles, alliteration, and onomatopoeia speaks to the song's multi-faceted artistic value.

The genre of rap welcomes the permissible integration of all experiences in its lyrics, whether endured by the author or others, because of the collective experiences faced by Black people in America.¹⁶⁹ Rap music does not stem from individualism, therefore, its authenticity does not preclude the use of fictitious verbiage or "imaginative constructions."¹⁷⁰ Nevertheless, the RAP Act's language instructs rap lyrics to be analyzed literally as a concession of criminal activity.

3. *Dangers of Enacting the RAP Act As Is*

As proposed, the RAP Act silently submits to societal stereotypes of Black people and Black art as expendable and unworthy of suitable statutory security. Factors (1)(A) and (1)(B) of the RAP Act draw a distinction between an artist's "original" and "derivative"

¹⁶³ NAS, *I GAVE YOU POWER* (Columbia Records 1996).

¹⁶⁴ *Id.*

¹⁶⁵ Rob Kenner & Insanul Ahmed, *The Making of Nas' 'It Was Written'*, COMPLEX (July 2, 2016), <https://www.complex.com/music/2016/07/nas-the-making-of-it-was-written>.

¹⁶⁶ See generally Jaeki Cho, *DJ Premier Tells All: The Stories Behind His Classic Records*, COMPLEX (Feb. 18, 2011), <https://www.complex.com/music/2011/02/dj-premier-tells-all-stories-behind-classic-records/i-gave-you-power> (explaining Nas' intent and emotion behind his personification of a gun in *I Gave You Power*).

¹⁶⁷ NAS, *supra* note 163.

¹⁶⁸ *Id.*

¹⁶⁹ Dennis, *supra* note 45, at 21.

¹⁷⁰ *Id.* at 19.

creative expression.¹⁷¹ The Act defines an artist's creative expression as original in that the artist "intended a literal meaning," rather than a meaning that is figurative or fictional.¹⁷² It defines derivative creative expression in that the artist "intended to adopt the literal meaning of the expression as [their] own thought or statement"¹⁷³ Because the Act fails to appropriately protect rap in its definition of original and derivative creative expression, enacting the RAP Act as is will increase the likelihood of rap lyrics' admissibility in a criminal proceeding.

N.W.A.'s song "Fuck Tha Police" demonstrates how dangerous the textual interpretation of the language and statutory definition in Factor (1) of the RAP Act is. An excerpt from MC Ren's verse on the song reads:

I'ma fuck you up
 Make ya think I'm a kick your ass
 But drop your gat, and Ren's gonna blast
 I'm sneaky as fuck when it comes to crime
 But I'm a smoke 'em now, and not next time
 Or any asshole that threatens me
 I'm a sniper with a hell of a scope
 Takin' out of a cop or two, they can't cope with me¹⁷⁴

Since *Fuck Tha Police* is an original expression of N.W.A, Factor (1)(A) of the Act applies, because this work is an original expression of N.W.A. So, factors (2)–(4) and N.W.A.'s literal intent of their expression would determine its admissibility in a criminal proceeding. The lyricism in this song is primarily centered on violence and N.W.A.'s portrayal of that violence, as it relates to the tension between law enforcement and Black Americans.¹⁷⁵ Similar to *I Gave You Power*, *Fuck Tha Police* melodically intertwines poetic and literary elements—indicating the need for a nonliteral interpretation.

Fuck Tha Police opens with members of N.W.A. testifying on behalf of the group, in front of a judge in the fictional case of N.W.A. v. The Police Department.¹⁷⁶ *Fuck Tha Police* presents the Black experience through the literary tool of dramatism. Dramatism is a theory that regards life as a dramatic act, relying on one's language and thought as modes of interaction.¹⁷⁷ "By comparing life to a drama, it is easier to understand why people do the things they do by providing a direct route to human motives and human relations."¹⁷⁸ *Fuck Tha Police* is dramatically composed as it frames the rappers as agents in the legal

¹⁷¹ H.R. 8531, 117th Cong. (2022).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ N.W.A., *FUCK THA POLICE* (Capitol Records, Ruthless Records, 1988); *Fuck Tha Police*, GENIUS, <https://genius.com/Nwa-fuck-tha-police-lyrics> (last visited Mar. 15, 2024).

¹⁷⁵ Paget, *supra* note 132.

¹⁷⁶ *Hip-Hop & Politics: "Fuck Tha Police", N.W.A.*, WORDPRESS, <https://perma.cc/AHL7-LFHD> (last visited Mar. 15, 2024).

¹⁷⁷ Kamilah Stevens, "Tupac Shakur, Hip Hop Music and Popular Culture" (July 15, 2009) (Graduate thesis, University of Northern Iowa) https://aa-voices-museum.uni.edu/sites/default/files/tupac_hip_hop.pdf.

¹⁷⁸ Annelise Green, *The Rhetoric of N.W.A.'s "Fuck Tha Police"*, 6 PEPP. J. OF COMMUN. RSCH., 1, 10 (2018). <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1098&context=pjcr>

system demanding accountability and justice from law enforcement.¹⁷⁹ The lyrics are intended to be testimonies on the reality of police violence for Black and brown people in Compton, California and throughout the country.¹⁸⁰ In the subtle depiction of each rapper's verse as a courtroom testimony, N.W.A. communicates the need for justice and their belief of what should happen within the criminal justice system.¹⁸¹

Characterizing N.W.A. members as soldiers in the midst of war shows the figurative language in *Fuck Tha Police*. Though MC Ren is literal in his rap about being a sniper with a scope and taking out a cop, the language is figurative in that his lyrics are intended to be the violent instrument used to inflict that force. N.W.A.'s revenge narrative¹⁸² of *Fuck Tha Police* is intended to be a retaliatory opposition to the racist and realistic militarization of the Los Angeles Police Department, not N.W.A.'s admission to violence against law enforcement.¹⁸³ Though the song was publicly blamed for attacks on police officers during that time, criminal action was never pursued on behalf of law enforcement entities.¹⁸⁴

The intentional meaning behind an artist's creative expression is disjunctive from the lyrics of that expression and cannot adequately determine one's culpability in a crime. The language of Factor (1)(A) is impractical because a rap artist's intent cannot conform to the binary distinctions of a literal, figurative, or fictional meaning. Subjecting rap lyrics to a literal interpretation revokes the creative license deserved by the rap genre. Furthermore, solely relying on a literal interpretation of rap music perpetually criminalizes it and its censorship. The lyrics of *Fuck Tha Police* are not purely literal, figurative, or fictional, but why should that reality increase the chances of its admissibility? It shouldn't, which is why Factor (1)(A) neglects the contextual and social understanding "*Fuck Tha Police*" entails.

Factor (1)(B) may allow rap lyrics into evidence if the accused intended to adopt the literal meaning of the lyrics as their own thought or statement.¹⁸⁵ A person's own thought or statement cannot be defined by lyricism under a fictional persona. Conflating what an artist writes with how an artist acts dismisses the inventive element demanded by artistic expression. Factor (1)(B)'s standard fails to acknowledge that music as an art form is neither objective in its composition by the artist nor in its appreciation by the listener. The Act's language does not account for the listener's understanding of a creative expression to differ from the intended message and lyricism of the artist. The Act's language also fails to account for the expression's intent to be figurative, regardless of a literal reading or adoption of the expression. Adoption of creative expression is based in opinion, awareness, and understanding—not criminal or violent conduct.

¹⁷⁹ *Id.* at 12.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Kubrin & Nielson, *supra* note 157, at 190.

¹⁸³ Rebekah Alexis Hutten, "Music Was Our Only Weapon": Protest, Misogyny, And Hardness In The Music Of Nwa (Mar. 2016) (B.A. Thesis, Arcadia University) (on file with the University Librarian, Arcadia University); Dennis, *supra* note 89.

¹⁸⁴ Paget, *supra* note 132.

¹⁸⁵ H.R. 8531 § 1(B).

Thus, if one were to express the lyric: “Fuck tha Police” and were to assume that expression and those words in a literal manner, that adoption should not be used against them in a legal context. Fuck Tha Police is a protest song intended to illustrate the antagonistic relationship between Black people and law enforcement entities.¹⁸⁶ One simply thinking or saying “Fuck Tha Police” outside of the context of N.W.A.’s intent is an improper literal adoption of that creative expression. Without adequate statutory protection, rap music’s meaning will continue to be distorted and criminalized.

Additionally, the Act fails to expand on what is considered an intentional adoption. How can one intentionally adopt the literal meaning of a subjective art form? Is the intentional adoption of a literal meaning of the creative expression only limited to a defendant’s own thought or statement? The Act’s inability to clarify this standard allows for immoderate weight to be placed on Black artistry and originality. Undoubtedly, “[u]sing hip-hop [or] rap music to target criminal behavior is more about criminalizing young Black men for what they say, under the premise that it exposes what they do.”¹⁸⁷ Unless amended, the Act’s language will inadvertently preserve this prosecutorial tactic.

4. *Alternatives to Amend the RAP Act’s Language*

To ensure sufficient protection for the accused, the RAP Act must be amended to include a balancing test that considers the likelihood of a jury finding the lyrics prejudicially dispositive of guilt. The RAP Act should parallel legislation recently passed in California.¹⁸⁸ By amending the Evidence Code, California’s legislature added Section 352.2 to regulate the admissibility of creative expressions.¹⁸⁹

Section 352.2 places a clear restriction on the admissibility of *creative expression* in criminal trials unless the expression falls within specified factors.¹⁹⁰ The California bill acknowledges that the miscategorization of rap lyrics risks unfair prejudice by inferring motive or intent that was not, in fact, present or injecting racial bias into the minds of the jury.¹⁹¹ Though the bill itemizes factors in which creative expression could be admissible, it mandates evaluating whether the evidence introduces bias or prejudice into the proceedings.¹⁹² Before deciding whether the *creative expression* is admissible, the bill requires courts to engage in a two-part examination to determine the presence of bias or prejudice in the introduction of evidence.¹⁹³ Courts must consider that:

(1) [t]he probative value of such 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

¹⁸⁶ McGlynn, et al., *supra* note 74.

¹⁸⁷ Tibbs & Chauncey, *supra* note 57, at 39.

¹⁸⁸ 2022 Cal. Legis. Serv. Ch. 973 (A.B. 2799) (WEST)

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

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.¹⁹⁴

If offered and relevant to the issues of the case, the court must evaluate three types of evidence that fall within the bill's specified factors.¹⁹⁵ The court must assess credible testimony, on the genre of the creative expression introduced, about the "social or cultural context, rules, conventions, and artistic techniques of the expression."¹⁹⁶ The court must also assess probative research if it shows that introducing a particular type of *creative expression* implicitly or explicitly injects racial bias into criminal proceedings, as well as evidence that rebuts the proffered research.¹⁹⁷

The RAP Act should include a comparable mandatory consideration of whether the accused intended for the *creative expression* to be a truthful narrative of personal experiences because it contextualizes the *creative expression* in conjunction with the crime alleged.

To demonstrate Section 352.2's utility, *Fuck Tha Police* must be analyzed under the section's various considerations. Under the section's two-part examination, introducing *Fuck Tha Police* as evidence would display the presence of bias or prejudice, thus precluding its admissibility. Applying the examination's first prong, *Fuck Tha Police*'s probative value for its literal truth or as a truthful narrative would be minimal because its creation was not created near in time to a charged crime. Additionally, *Fuck Tha Police* does not bear a sufficient level of similarity to the charged crime nor contains a factual detail not publicly available. In reviewing *Fuck Tha Police*'s lyrics, it is likely that a jury would treat MC Ren's characterization of himself as a sniper with a scope as a tendency to engage in criminal activity or commit violence, which satisfies the examination's second prong. Furthermore, admitting this lyric would explicitly inject racial bias into the proceedings because its admission would fail to contextualize the intent behind *Fuck Tha Police* and the anger expressed by N.W.A. through song. Absent this consideration contained in the second prong of the balancing test, courts would involuntarily participate in the prejudicial interconnection between Black people and criminal activity. Thus, a balancing test, derived from Section 352.2, is a practical solution to the occurring problem of intentionally discrediting rap and hip-hop music, and its artists. Section 352.2's definition of *creative expression* is analogous to the RAP Act, so its framework can be adopted without removing the intent of the RAP Act. Establishing this standard, free from subjective prosecutorial discretion, would incapacitate the criminal justice system's policing of Black speech.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

III. CONCLUSION

Rap and hip-hop music have always been instrumental in the shaping and empowerment of Black people and Black culture. The inclusion of rap music and rap lyrics in criminal proceedings as evidence in favor of the prosecution is biased and prejudiced, rooted in racism and injustice. The tactic of criminalizing Black art and expression inspired the RAP Act and its provisions. On the federal level, the RAP Act would be the first legislative act to propose an amendment to the Federal Rules of Evidence as Rule 416. The cultural colloquialisms, AAVE, and poetic rhythms demonstrate the need for rap and hip-hop music's consideration as a form of literary art, not criminal evidence. The RAP Act's purpose is to restrict the use of song lyrics in criminal proceedings; however, the exceptions within the Act that justify admissibility undermine this purpose. The language and potential statutory interpretation of Factor 1 contradict the limitation that the RAP Act is intended to enable. Without an amendment to this Factor that acknowledges racial bias and prejudice as a basis for this practice, or an exclusion altogether, rap music nor its lyrics will be safe from prosecutorial conduct. Furthermore, the codified silencing and suppression of Black art, creativity, and people will continue. All rap music needs is for the world to finally give it a fighting chance.¹⁹⁸

¹⁹⁸ Smolic, *supra* note 152.