

LYRICAL MURDERERS: WHY WE SHOULD THINK TWICE BEFORE ADMITTING RAP LYRICS IN CRIMINAL CASES

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I. INTRODUCTION

Three friends have been making music together for the past ten years. One day, they all walk into the recording studio for a routine monthly session. Before they begin recording, the group's producer tells the others that he has a story he has been dying to tell. He gives a long-winded story of a murder that occurred a few weeks ago, but the producer's only connection to the events was as the getaway driver for the actual murderer. The producer's twisted story of betrayal and heartbreak is so salacious that as he continues to recount the events, the other two friends begin to bend his words to fit a rhyme and rhythm. Soon thereafter, the three friends, enamored by the storyline, began writing lyrics in the first person and integrating themselves into the narrative. The handwritten lyrics, which are written in their respective notebooks, indicate who will rap each verse. As police continue investigating the murder, they arrest the producer for his involvement as an accomplice after discovering that his car matched the tire marks left at the scene. A search of the producer's belongings leads to the investigation and subsequent arrest of the other two artists, whose notebooks reveal not just detailed descriptions of the events of that day, but also lyrics about gangs, drugs, and violence in general. At trial, the prosecution seeks to admit *all* of the lyrics into evidence.¹

Lyrics should be presumed inadmissible, and courts should adopt a strict Federal Rules of Evidence (FRE) 403 balancing test when considering their actual admissibility. This test should incorporate the Doctrine of Chances, which considers the "number of extrinsic incidents" and "their similarity to

1. This hypothetical represents the harsh reality of the admission of lyrics into evidence.

the facts alleged in the case being tried.”² The new test should determine admissibility by passing the following test, which requires the government to certify the lyrics as the defendant’s own intended statements, assess the amount of existing physical evidence, balance the relevance of the lyrics to the crime charged, and consider the additional race biases found in rap and hip hop music that disproportionately prejudice Black artists on a case-by-case basis.

Using this test, the lyrics may be admitted against the producer to show that his knowledge of the events matches the physical evidence he left at the scene. However, if admitted, the court should still perform an analysis of the racial prejudice and level of violence in the lyrics. If there is no physical evidence linking the other two artists to the crime, the lyrics should not be admissible against them.

Part II of this Note addresses the history of hip hop and rap as a music genre and how courts have historically applied the Federal Rules of Evidence. Part III explains the current state of rap lyrics as evidence, including the approaches taken in a landmark case in New Jersey and in proposed and current legislation in New York, California, and at the federal level. Part IV details a solution where the lyrics should be presumed inadmissible and are only admitted if they pass a test that combines the Doctrine of Chances and the tests established in several jurisdictions. Finally, Part V concludes.³

II. THE HISTORY OF RAP LYRICS AND THE FEDERAL RULES OF EVIDENCE

A. *History of Rap Lyrics as a Genre*

Rap music emerged in the 1970s as Black artists in the United States began rapping as a means of resistance and an expression of Black identity.⁴ Since its inception, rap music has featured “elements of counterculture, anti-authoritarian lyrics, and political criticisms.”⁵ For artists and listeners, rap music provides an expressive outlet for communities of color across the

2. Marjorie A. Shields, Annotation, *Application of “Doctrine of Chances” in Homicide, Sexual Crimes, and other Offenses Against the Person*, 11 A.L.R. 7th Art. 1, §2 (2015).

3. This Note discusses the admissibility of lyrics under the Federal Rules of Evidence, but the rationale is intended to apply equally to any similar or analogous state evidence rules.

4. Reyna Araibi, “Every Rhyme I Write”: *Rap Music as Evidence in Criminal Trials*, 62 ARIZ. L. REV. 805, 805 (2020).

5. Drew Findling, *When Your Art Can and Will Be Used Against You: Hip-Hop, Expression, and the Criminal Justice System*, THE CHAMPION (Dec. 2018), <https://nacdl.medium.com/when-your-art-can-and-will-be-used-against-you-hip-hop-expression-and-the-criminal-justice-d7b4c500efef> [https://perma.cc/3YQQ-2U49].

United States, and its lyrics often touch on political themes such as “racism, mass incarceration, and collateral consequences.”⁶ Over time, hip hop and rap music have grown to become a \$10 billion per year industry.⁷

Rap music as a genre was criticized from its inception.⁸ Even though the genre has experienced success on a global scale, in the late 1980s and early 1990s, the genre fought obscenity wars over the content of its lyrics.⁹ Many claim that these early battles with obscenity arose as systemic efforts to censor rap music and its performers.¹⁰ As the genre evolved, freedom of speech conflicts in rap music intensified, and as the genre achieved commercial success, police and politicians began scrutinizing it even more closely.¹¹

History demonstrates a clear bias towards rap lyrics compared to lyrics found in other genres.¹² In reggae, rock, pop, and country music genres, the lyrics are “rarely criticized for communicating violence despite data that suggest[s] pop music is one of the most lyrically violent genres.”¹³ Instead,

6. *Id.*

7. *Id.*

8. Erin Lutes et al., *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, 79-80 (2019).

9. *Id.* at 81; *see also* Araibi, *supra* note 4, at 819 (“According to scholars, these comments were made in highly racialized contexts, suggesting that they were motivated by both implicit and explicit racial biases” and “Congressman Newt Gingrich told companies to pull advertisements from radio stations that played rap. President George H. W. Bush criticized Ice-T and Body Count for their song ‘Cop Killer.’ Vice President Dan Quayle denounced Tupac Shakur for promoting violence. Second Lady Tipper Gore compared Ice-T to Hitler, and President Bill Clinton said Sista Souljah advocated the killing of white people.”). “Artists like LL Cool J, Too Short, and 2 Live Crew were arrested for performing their music.” *Id.* at 818.

10. *See* Araibi, *supra* note 4, at 818.

11. *Id.* at 807.

12. *See* Lutes et al., *supra* note 8, at 80 (noting that “identical lyrical content in other genres of music are not perceived nearly as negatively and, therefore, are not perceived as requiring regulation”); *see also* Taifha Natalee Alexander, *Chopped & Screwed: Hip Hop From Cultural Expression to a Means of Criminal Enforcement*, 12 HARV. J. SPORTS & ENT. L. 211, 226-227 (2021) (“In one study attempting to determine whether a song will evoke harsher reactions merely by being identified as rap, researchers demonstrated that when White subjects believed lyrics were identified as rap, the lyrics were judged significantly more negatively than when the White subjects thought the same lyrics were attributed to a predominately White genre, like folk or country music.”).

13. Araibi, *supra* note 4, at 807 (noting that “[n]obody thought Bob Marley gunned down a sheriff. Freddie Mercury did not prompt a full-scale investigation when he told the world that he shot a man in the head. Not one member of the band Foster the People faced conspiracy charges for planning a school shooting”); *see also* Dre’Kevius O. Huff, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 336 (2018) (“[I]t is a fair assumption to believe [Carrie] Underwood didn’t really knock out her significant other’s headlights with a baseball bat. No one truly suspects Bob Marley shot the sheriff, or believes that Freddie Mercury killed a man. Country, reggae, and rock, respectively, are not generally associated with violence.”).

society views the lyrics in these genres as “music made by the artist” and not as “statements made by the individual.”¹⁴

Rap music does not enjoy the same luxury of artistic freedom. Over the decades, rap music has been frequently criticized for its depictions of violence, glorification of offensive and criminal behavior, and illustrations of gangs, drugs, and murder.¹⁵ These descriptions, intertwined with references to race and depictions of the Black experience, “inform how society perceives rap music and its artists.”¹⁶

Psychology studies have confirmed the presence of such biases. In 1996, psychologist Carrie Fried gave identical lyrics from a folk song titled “Bad Man’s Blunder” by the Kingston Trio to 118 white participants and manipulated the test by telling the participants that the lyrics were from either a folk, country, or rap song.¹⁷ When the participants were asked how offensive they found the lyrics and whether they thought the lyrics could lead to riots and violence, the study found that respondents were “significantly more negative on all measures” when told that the lyrics were part of a rap song.¹⁸ The study was then repeated with the same lyrics accompanied by a sample picture of the artist, one featuring a black man and another displaying a white man, and when participants thought the artist was black, they again found the lyrics “more offensive and potentially violent.”¹⁹ When a second similar study was conducted twenty years later in 2016, the same conclusion was reached: “the lyrics of rap music are judged more harshly because rap is music associated with Black artists or Black culture. Rap lyrics may be rated as more hostile or aggressive or dangerous because of negative culturally held stereotypes.”²⁰

In a different study, psychologist Stuart Fishcoff examined the effect of rap lyrics on the impartiality of criminal proceedings and found “[the participants’] judgments were more positive when the participants only knew [that the defendant] had been accused of murder than when they knew he was

14. See Huff, *supra* note 13; see also Araibi, *supra* note 3, at 807 (“Instead, reggae, rock, and pop are viewed through the same lens as most art: one of creative license and artistic hyperbole.”).

15. Araibi, *supra* note 4, at 807.

16. *Id.* at 805.

17. *Id.* at 819.

18. *Id.*

19. *Id.*

20. *Id.* at 820. Although Fried concluded that further research was required, the study was duplicated in 2016 by researchers at UC Irvine who found that “what was true then is true now” and that the “total negative reaction to music lyrics increased significantly when participants believed they were given lyrics to a rap song. The researchers also concluded that participants believed rap lyrics were ‘more literal’ than lyrics from other genres.” *Id.*

a rapper not facing murder charges, suggesting that people view being a rap artist as worse than potentially committing murder.”²¹

The racial stereotypes housed in society’s perception of the combined aspects of hip hop shows how people intuitively regard black rap artists as violent criminals. Thus, it comes as no surprise that prosecutors have repeatedly attempted to use rap lyrics as *evidence* of criminal acts.

B. *History of Rap Lyrics as Evidence in Court*

The presence of lyrics as evidence in criminal trials is widespread. Lyrics have been officially identified in over 500 cases across the United States,²² but the actual number of cases using rap lyrics is expected to be in the thousands.²³ Judges tend to admit rap music into evidence “more often than not.”²⁴ A 2019 study conducted by students at the Arizona State University School of Criminology and Criminal Justice revealed that an overwhelming number of prosecutors introduced evidence of rap lyrics against defendants, whereas only a small percentage of defendants presented rap lyrics as exculpatory evidence and that those defendants were generally unsuccessful.²⁵ The study also showed that rap lyric evidence was routinely admitted: “even in cases in which the prejudicial effect of such evidence clearly outweigh[ed] its probative value.”²⁶

However, for prosecutors to admit rap lyrics as evidence in a criminal trial, the lyrics must satisfy the requirements outlined in the Federal Rules of Evidence. Along with weighing the probative versus prejudicial value, the prosecution must also establish that the lyrics are not inadmissible hearsay,

21. See *id.* at 809; see also Lutes, *supra* note 8, at 83. (“The inconclusive psychological science on the link between music and undesirable beliefs and behaviors notwithstanding, there is little doubt that the musical [rap] genre has been socially constructed by moral crusaders as posing a danger to society.”).

22. Araibi, *supra* note 4, at 808.

23. See Nancy Dillon, *New York Lawmakers Introducing Bill to Limit Rap Lyrics as Evidence in Criminal Trials*, ROLLING STONE (Nov. 16, 2021), <https://www.rollingstone.com/music/music-news/ny-state-senators-bill-legislation-rap-lyrics-evidence-criminal-trials-1258767/> [<https://perma.cc/W5VH-NFRD>] (emphasizing that research conducted by Erik Nielson, University of Richmond Professor and co-author of the book *Rap on Trial*, has “uncovered hundreds of cases where rap lyrics and videos were introduced in criminal courtrooms” and Nielson claims that this represents “a tiny fraction of the overall number,” a number he estimates to be “in the thousands.” *Id.* The key “question is whether it’s in the tens of thousands, especially if you include when [rap lyrics and videos] are used to indict people, or used at sentencing”). *Id.*

24. Araibi, *supra* note 4, at 808; see also Lutes et. al, *supra* note 8, at 126 (“Regardless of the specific ways in which prosecutors offer rap evidence, they are overwhelming[ly] successful not only in convincing courts to admit such evidence over defendants’ objections, but also in effectively using the evidence to obtain a conviction.”).

25. Lutes et al., *supra* note 8, at 126.

26. *Id.* at 77.

are relevant, and are not inadmissible character evidence. Although the evidentiary rules have slight variations across states, “every state has some form of these rules, which . . . encompass Federal Rules 401, 402, 403, and 404.”²⁷

1. Hearsay

Generally, hearsay is not admissible unless there is a federal statute, an exception or exemption under the Federal Rules of Evidence (FRE), or an exception prescribed by the Supreme Court.²⁸ The purpose of FRE 802 is “to prohibit the admission of statements that ‘the declarant does not make while testifying at the current trial or hearing’ and that ‘a party offers in evidence to prove the truth of the matter asserted in the statement.’”²⁹ Therefore, since rap lyrics, in most cases, are written outside the courtroom, the prosecution must first overcome a hearsay objection.³⁰

2. Relevance

Under FRE 401, evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.”³¹ According to FRE 402, “relevant evidence is admissible unless any of the following provide otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.”³²

Prosecutors have most frequently introduced rap lyrics as relevant evidence to prove (1) gang affiliation for sentence enhancement purposes; (2) circumstantial evidence of the commission of a crime; (3) direct evidence of communicating a threat; (4) motive, knowledge, intent, identity, or character; or (5) evidence of what incited the commission of a crime.³³

27. Michael Gregory, *Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial*, 25 B.U. PUB. INT. L.J. 329, 333 (2016).

28. FED. R. EVID. 802.

29. Araibi, *supra* note 4, at 825; *see also* FED. R. EVID. 802; FED. R. EVID. 801(c)(1); FED. R. EVID. 801(c)(2).

30. Araibi, *supra* note 4, at 825 (noting that “[w]hen a prosecutor seeks to introduce rap lyrics authored by the defendant to prove the truth of the fact at issue, the lyrics technically fall under this definition of hearsay. However, when the lyrics are both written by and offered against the defendant, they bypass the hearsay prohibition entirely and are considered admissible non-hearsay as an opposing party statement”); *see also* FED. R. EVID. 801(d)(2)(A).

31. FED. R. EVID. 401.

32. FED. R. EVID. 402.

33. Lutes, *supra* note 8, at 77.

3. Inadmissible Character Evidence

After establishing that the lyrics are not hearsay and are relevant, the prosecutor must next show that they are not inadmissible character evidence. Courts are reluctant to admit character evidence due to the inherent danger that the jury will convict the defendant because he or she is a bad person and not because he or she committed the actual offense.³⁴ Under FRE 404(a):

Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait The following exceptions apply in a criminal case: (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: (i) offer evidence to rebut it; and (ii) offer evidence of the defendant's same trait; and (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.³⁵

FRE 404(b) states:

Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.³⁶

Rap lyrics are frequently used to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. However, the "normal subject matter of rap music makes it complicated to meaningfully determine if the lyrics demonstrate [these purposes]."³⁷ In *Tann v. United States*, lyrics were interpreted as evidence of motive after the trial court determined the lyrics were "autobiographical in that they discussed the 22nd Street Crew and its membership, living by the code required by the gang, selling drugs, killing snitches, and killing

34. *State v. Skinner*, 218 N.J. 496, 514 (2014) (citing *State v. Cofield*, 127 N.J. 328, 336 (1992)).

35. FED. R. EVID. 404(a).

36. FED. R. EVID. 404(b).

37. Araibi, *supra* note 4, at 832; *see also* Gregory, *supra* note 27, at 335 ("A defendant's lyrics have been offered against him to show that he had 'knowledge' of the 'language' of drug dealing or to show a 'state of mind' to 'resort to violence.'").

rivals.”³⁸ In that case, since the conspiracy charge was contested, the court determined that the evidence was probative to solve this issue.³⁹

In *State v. Hopson*, the court used rap lyrics to establish that the defendant had knowledge of the criminal activity.⁴⁰ Although the lyrics in *Hopson* were not autobiographical, they were admitted to contradict the defendant’s assertion that he was unaware of the term “pimping.”⁴¹ Similar to the holding in *Hopson*, in *United States v. Foster*, the court admitted rap lyrics because “the simple act of writing the lyrics showed that the defendant knew specific drug terminology.”⁴² In *People v. Acosta*, the court admitted rap music video evidence because an eyewitness testified that the gun in the video “looked like the gun she saw in the defendant’s possession the night of the murders” and “the forensic evidence from the bullet,” along with “absence of a casing at the murder scene, was consistent with use of a revolver like the one shown in the videos.”⁴³ This evidence was offered to prove the identity of the murderer as the defendant.⁴⁴

The most recent high-profile use of rap lyrics as evidence in a criminal trial arose from the indictment of “Young Thug” and “Gunna,” also known as Jeffrey Lamar Williams and Sergio Kitchens, respectively.⁴⁵ The indictment also included a considerable number of other fellow record label members.⁴⁶ Based on violations of Georgia’s anti-gang and racketeering laws, the state filed a 220-count indictment against twenty-six individuals.⁴⁷ Fulton County District Attorney Fani Willis stated that those identified in the

38. *Tann v. United States*, 127 A.3d 400, 469 (D.C. 2015).

39. *Id.*

40. *See State v. Hopson*, No. 66957-5-I, *5 (2012).

41. *Id.* at *7, 14.

42. *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991) (finding that “[the lyrics] indicated, at a minimum, that Foster was familiar with drug code words and, to a certain extent, narcotics trafficking, a familiarity that made it more probable that he knew that he was carrying illegal drugs. Foster’s knowledge, moreover, was relevant to the charges that he faced and was, in Foster’s words, ‘the only issue in the case’”); *see also* Araibi, *supra* note 4, at 831.

43. *People v. Acosta*, No. C074628, 2016 WL 5361785, at *4 (Cal. Ct. App. Sept. 26, 2016).

44. *Acosta*, 2016 WL 5361785, at *4 (finding that “[t]hese facts supported the prosecution’s theory, and they cast doubt on defendant’s claim that someone else shot Slape”); *see also* Lutes et al., *supra* note 8, at 115-16.

45. *See* Ethan Millman, *Georgia DA Prosecuting Young Thug and Gunna Defends Citing Rap Lyrics as Evidence: ‘I’m Going to Use It,’* ROLLING STONE (Aug. 29, 2022), <https://www.rollingstone.com/music/music-news/fulton-county-da-rap-lyrics-evidence-young-thug-gunna-1234584227/> [<https://perma.cc/ZYJ7-HRKK>].

46. *Id.*

47. Tat Bellamy-Walker, *Georgia DA Fani Willis Says Rap Lyrics Will Continue to Be Used in Criminal Cases*, NBC NEWS (Sept. 1, 2022, 12:23 PM), <https://www.nbcnews.com/news/nbcblk/georgia-da-fani-willis-says-rap-lyrics-will-continue-used-criminal-cas-rcna45680> [<https://perma.cc/A58L-9Z9Q>].

indictment rapped about the offenses in their music.⁴⁸ Willis stated that she had no intention to stop citing lyrics in criminal indictments “any time soon.”⁴⁹ She further stated: “I think if you decide to admit your crimes over a beat, I’m going to use it Don’t confess to crimes on rap lyrics if you do not want them used – or at least get out of my county.”⁵⁰ In response to this high-profile indictment, California and the federal government proposed new legislation⁵¹ to prevent the admission of lyrics as evidence in criminal trials.

4. Prejudicial v. Probative Value

Since shocking and violent rap lyrics have a strong tendency to bias a jury⁵², courts have recognized that because “rap lyrics may employ metaphor, exaggeration, and other artistic devices and can involve abstract representations of events or ubiquitous storylines,” their probative value must outweigh the potential prejudicial effect of the “risk of the statements ‘being misunderstood or misused as criminal propensity or bad act evidence.’”⁵³ This balancing of potential prejudice and probative value requires a careful FRE 403 analysis.

Under FRE 403, the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.⁵⁴ Although the plain language of FRE 403 does not define “unfair prejudice,” the Federal Rules Advisory Committee explained that unfair prejudice is “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”⁵⁵

Based on the obscenity wars⁵⁶ at rap music’s inception, the heightened criticism despite the presence of equally or more violent depictions in other

48. *Id.*

49. Millman, *supra* note 45.

50. Bellamy-Walker, *supra* note 47.

51. *See id.*; New York also proposed legislation for limiting the use of rap lyrics in criminal trials back in 2021. *See* S. 7527, 116th Cong. (N.Y. 2021); *see also* Justin Curto, *A New York Bill Could Limit Use of Rap Lyrics in Court*, VULTURE (Nov. 17, 2021), <https://www.vulture.com/2021/11/ny-bill-limiting-rap-lyrics-in-criminal-trials-proposed.html> [https://perma.cc/FNR3-GZGA].

52. Lutes et al., *supra* note 8, at 114.

53. *Id.*

54. FED. R. EVID. 403.

55. *See* FED. R. EVID. 403 advisory committee note to 1972 proposed rule.

56. *See* Lutes et al., *supra* note 8, at 81; Araibi, *supra* note 4, at 818-19.

genres⁵⁷, and society's implicit racial bias toward the music, as most rap artists are people of color⁵⁸, "the likelihood of unfair prejudice posed by using rap music as evidence is undeniable."⁵⁹ The risk of unfair prejudice is heightened by the fact that rap artists face a double stereotype: prejudice as a rapper and prejudice as a person of color.⁶⁰ The use of a limiting instruction is a common method courts employ to mitigate any severe prejudicial effect when admitting such evidence.⁶¹ In general, however, courts should be extremely cautious when assuming that a limiting instruction will eliminate the substantial prejudice to the defendant. As a leading scholar on the issue, Professor Andrea Dennis wrote that "courts are either underestimating the prejudicial impact of the lyrics on jurors or overestimating the ability of jurors to ferret out their biases and prevent those biases from impacting their decision-making."⁶²

III. THE CURRENT STATE OF RAP LYRICS AS EVIDENCE

A. *The State v. Skinner Illustration*

One of the most influential cases on the use of rap lyrics in criminal trials is the New Jersey case, *State v. Skinner*.⁶³ In *Skinner*, defendant Vonte Skinner was charged with several degrees of attempted murder, including first-degree attempted murder.⁶⁴ When police searched Skinner's car, they found three notebooks filled with rap lyrics authored by the defendant, many of which contained violent and profane lyrics written in the first person.⁶⁵ Skinner began rapping as a form of self-expression as a child, and the state conceded that "many of the lyrics found in defendant's car and read to the jury were composed long before the circumstances underlying the instant

57. Araibi, *supra* note 4, at 807; *see also* Huff, *supra* note 13, at 336.

58. Araibi, *supra* note 4, at 807; *see also* Lutes et al., *supra* note 8, at 83.

59. Araibi, *supra* note 4, at 833 ("When rap lyrics are admitted as evidence, they trigger implicit biases resulting in an undue tendency of individual jurors to make a decision based on their emotional reaction to the music and the subsequent negative judgements of its author, rather than based on an assessment of the merits.").

60. *Id.*

61. *Id.* at 835-36 ("The majority of courts still admit rap music despite frequent objections by defense counsel who cite the risk of unfair prejudice under Rule 403. If anything, the judge instructs jurors that the lyrics are to be used for a limited purpose, but it is highly doubtful that these instructions are effective at preventing juries from improperly considering evidence.").

62. *Id.* at 836.

63. New Jersey v. Skinner, 218 N.J. 496, 500 (2014).

64. *Id.* at 503.

65. *Id.* at 502.

offense took place.”⁶⁶ The Supreme Court of New Jersey determined that the lyrics “plainly depict[ed] various crimes and other bad acts, but those crimes and acts were unconnected to the specific facts of the attempted-murder charge . . . and [t]he state did not attempt to clarify or explain the lyrics in any way, despite their heavy use of slang or otherwise esoteric language.”⁶⁷ In determining whether the lyrics should be admitted, the court employed the four-part test established in *State v. Cofield*.⁶⁸ The *Cofield* court held that lyrics should be admitted on a case-by-case basis by applying the following elements:

(1) [t]he evidence of the other crime must be admissible as relevant to a material issue; (2) [i]t must be similar in kind and reasonably close in time to the offense charged; (3) [t]he evidence of the other crime must be clear and convincing; and (4) [t]he probative value of the evidence must not be outweighed by its apparent prejudice.⁶⁹

Under the first element, which addresses relevance under FREs 401 and 402, the *Skinner* court rejected the State’s argument that the defendant’s lyrics were relevant as evidence of motive or intent. The *Skinner* court reasoned that the prosecution was only using the lyrics to bolster their other evidence of motive, and the significant number of times the victim was shot demonstrated that the element of intent was not in dispute.⁷⁰ The court also found that the “closeness in time” requirement of element two was also not satisfied because the lyrics could only show motive of the crime charged if a juror could believe they were related to the defendant’s state of mind at the time of the shooting, which was unlikely given that many of the lyrics were written years earlier.⁷¹ Under element three, which addresses the relevant standard of other evidence of the crime, the state determined this element was not met because there was an “utter” lack of clear and convincing evidence that the misconduct that the defendant rapped about was misconduct he had actually committed, and therefore the lyrics could only be considered a “fictional account.”⁷² Finally, under the last element, the court found that “[t]he prejudicial effect overwhelm[ed] any probative value that these lyrics may have”⁷³ under FRE 403, because the “defendant’s graphically violent rap lyrics could be fairly viewed as demonstrative of a propensity toward

66. *Id.* at 503.

67. *Id.* at 505.

68. *Id.* at 515.

69. *New Jersey v. Cofield*, 127 N.J. 328, 338 (1992).

70. *Skinner*, 218 N.J. at 519-20.

71. *Id.* at 520.

72. *Id.* at 521.

73. *Id.*

committing, or at the very least glorifying, violence and death,” and because jurors were left to wonder whether the defendant’s writings were anything but fictional.⁷⁴ The court ultimately held that “rap lyrics, or like fictional material, may not be used as evidence of motive and intent except when such material has a direct connection to the specifics of the offense for which it is offered in evidence and the evidence’s probative value is not outweighed by its apparent prejudice.”⁷⁵

B. State Legislation Limiting the Admission of Creative Expression as Evidence in Court

1. New York Legislation

The New York Senate introduced Bill S7527 on November 17, 2021, to amend the criminal procedures for admitting evidence of a defendant’s creative expression.⁷⁶ The Bill defines “creative expression” 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.”⁷⁷ The Bill proposed to limit the admissibility of creative expression by prohibiting lyrics in a criminal trial unless the lyrics are determined to be relevant and admissible based on a hearing conducted outside the presence of the jury.⁷⁸ Following this hearing, the court must make an on-the-record statement of the findings of fact essential to the court’s decision.⁷⁹ The Bill also proposed: to overcome the inadmissibility presumption, the proffering party must prove by clear and convincing evidence that the defendant’s creative expression (A) was literal and the defendant intended to adopt the work’s literal meaning as his own thought (not figurative or fictional); (B) has a “strong factual nexus” between the facts and the crime charged; (C) has relevance to a disputed fact; and (D) has distinct probative value not included in the other admissible evidence.⁸⁰ The Bill also proposes that “where the court admits creative expression as criminal evidence, the court has a duty to apply careful redactions, provide

74. *Id.*

75. *Skinner*, 218 N.J. at 525.

76. S. 7527, 238th Sess. (N.Y. 2021).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

limiting explanation . . . instructions, and consider the least prejudicial means of presenting the creative expression to the fact-finder.”⁸¹

2. California Legislation

In February 2022, Assemblyman Reginald Jones-Sawyer introduced Assembly Bill 2799, which would restrict the use of rap lyrics, and, more broadly, creative works as evidence in criminal proceedings.⁸² The Bill was introduced to the California Senate shortly after the national coverage of the indictment of rappers Young Thug, Gunna, and several other members of their record label.⁸³ This Bill was passed on September 30, 2022.⁸⁴

Assembly Bill 2799 defines “creative expression” 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 objects of media.”⁸⁵ The Bill provides that in order to admit “creative expression” as evidence in a criminal trial, the court will consider the probative value of the creative expression for its literal truth “minimal” unless the expression is created “near in time” to the charged offense(s), has a significant level of similarity to the charged offense(s), or includes details of facts that are not otherwise available publicly.⁸⁶

The Bill also states that “undue prejudice” includes the possibility that the trier of fact will treat the lyrics as propensity evidence for violence or “general criminal disposition” and perpetuate the presence of racial biases.⁸⁷ Then, if creative expression evidence is proffered and relevant, the court must also consider any additional relevant evidence, including testimony on the genre of creative expression (“social context, rules, conventions, and typical artistic techniques”), research demonstrating introductions of racial biases into the proceedings, and evidence to rebut that same research/testimony.⁸⁸ Finally, under this Bill, the admissibility of creative expression “shall be

81. *Id.*

82. Livia Albeck-Ripka, *California Bill Could Restrict the Use of Rap Lyrics in Court*, N.Y. TIMES (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/arts/music/california-rap-lyrics-bill-young-thug.html> (last visited Apr. 10, 2023).

83. *See id.*; *see also* Bellamy-Walker, *supra* note 47.

84. A.B. 2799, Reg. Sess. (Cal. 2022); *see also* Kim Bellware, *California Makes It Harder to Use Lyrics as Evidence Against Rappers*, WASH. POST (Oct. 2, 2022), <https://www.washingtonpost.com/lifestyle/2022/10/02/california-rap-lyrics-law/> [<https://perma.cc/56EA-HLBA>].

85. A.B. 2799, Reg. Sess. (Cal. 2022).

86. *Id.*

87. *Id.*

88. *Id.*

heard in limine and determined by the court, outside the presence and hearing of the jury . . . [but] [t]he court shall state on the record its ruling and its reasons therefor.”⁸⁹

C. Federal Legislation Limiting the Admission of Creative Expression as Evidence

On July 27, 2022, Congressmen Jamaal Bowman and Hank Johnson introduced the Restoring Artistic Protection Act (RAP Act) “to protect artists from the wrongful use of their lyrics against them in criminal and civil proceedings.”⁹⁰ The RAP Act defines “creative expression” similar to the California Bill⁹¹ and would amend the Federal Rules of Evidence by adding “Rule 416. Limitation on the admissibility of defendant’s creative or artistic expression.”⁹² The proposed amendment would make a defendant’s creative or artistic expression inadmissible in a criminal trial unless it falls into one of the exceptions in Section B, including the expression: (1) was intended as a literal meaning; (2) references the specific facts of the crime alleged; (3) is relevant to a disputed issue; and (4) has probative value unavailable from the other admissible evidence.⁹³

Congressman Johnson stated the need for the RAP Act arose because “[w]ithout further Congressional action, the freedom of speech and of artist expression present in music will continue to be stifled, and that expression will be chilled, until the voices behind that protected speech are silenced.”⁹⁴ Congressman Bowman echoed these concerns when he stated, “[w]e cannot imprison our talented artists for expressing their experiences nor will we let their creativity be suppressed.”⁹⁵

89. *Id.*

90. Press Release, Rep. Jamaal Bowman, Congressmen Bowman, Johnson Introduce Bill to Protect Artists’ 1st Amendment Rights (July 27, 2022).

91. The RAP 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. H.R. 8531, 117th Cong. § 2(e) (2022).

92. *Id.*

93. *Id.*

94. Virginia Langmaid, *RAP Act Would Ban Lyrics from Being Used as Evidence in Criminal Cases*, CNN (July 29, 2022), <https://www.cnn.com/2022/07/29/politics/lyrics-evidence-court-rap-act-house-bill/index.html> [<https://perma.cc/8UVL-PKHY>].

95. *Id.*

IV. SOLUTION: A NEW TEST FOR LYRICS

Lyrics should be presumed inadmissible, but this presumption may be overcome by a modified FRE 403 balancing test that combines the elements from the Doctrine of Chances, *Skinner*, and proposed and current state and federal legislation.

A. *The Problem: Why Lyrics Should Be Presumptively Inadmissible*

All lyrics, but especially rap lyrics, should be presumed inadmissible similar to the approach followed in the proposed New York Bill and the RAP Act, because of First Amendment concerns, heightened prejudice, and the ineffectiveness of limiting instructions.

Rap lyrics are generally afforded first amendment protection.⁹⁶ Moreover, the United States Supreme Court has “recognized that offensive language is constitutionally protected because one man’s vulgarity is another’s lyric.”⁹⁷ Admitting lyrics into evidence in a criminal trial is problematic because lyrics are an art form that may be just as based on personal experience as they are on creative storytelling. Lyrics, like any other form of art, can consist of things done, heard, witnessed, or even imagined.⁹⁸ Rap lyrics often include “puffery” exaggerations to fit into the “violent nature” for which the genre has become recognized.⁹⁹

When addressing First Amendment concerns, it is important to remember that “writing rap lyrics—even disturbingly graphic lyrics—is not a crime. Nor is it a bad act or wrong to engage in the act of writing about unpalatable subjects, including inflammatory subjects such as depicting events or lifestyles that may be condemned as antisocial, mean spirited, or amoral.”¹⁰⁰

Generally, courts would not punish a defendant for merely having knowledge of an event, nor would they punish other creatives for merely telling a story.¹⁰¹ Murder mystery novel writers, horror movie producers, violent video game makers, and writers of crime-themed television programs, whose works often depict highly graphic scenes of violence and murder that are often more graphic than lyrics, are not the target of criminal investigations.¹⁰² Even pop, rock, country, or reggae artists are not generally

96. Lutes, *supra* note 8, at 83-84.

97. *Id.*

98. Huff, *supra* note 13, at 335.

99. *Id.*

100. *New Jersey v. Skinner*, 218 N.J. 496, 517 (2014).

101. Huff, *supra* note 13, at 365.

102. *Id.*

associated with violence.¹⁰³ Why should rap lyrics be denied the same “nonliteral interpretation”¹⁰⁴ as other forms of music and art?

The lack of equal treatment is particularly apparent when the lyrics are only vague or general depictions of violence, drugs, and gangs to match the genre and are unrelated to the crime charged.¹⁰⁵ Punishing rap artists for mere references to drugs, gangs, and violence without physical evidence violates the First Amendment and has a high tendency to “produce a chilling effect on the rap industry if rappers must keep a watchful eye for the looming specter of prosecution.”¹⁰⁶ It is even possible that “[r]appers may stop producing music if they must choose between disingenuity by censoring themselves or ‘keeping it real.’”¹⁰⁷ This disconnect between reality and creative storytelling is the reason why lyrics should only be admitted under very limited circumstances.

The lack of equitable treatment between rap and other genres also highlights the inherent racial biases in society’s attitude toward rap music in general. During the genre’s infancy, its lyrics provoked so much outrage that law enforcement and politicians condemned the music as “sick” and “obscene,” and members of Congress called the genre “vile” and “despicable.”¹⁰⁸ Many early rappers were arrested for obscenity just for performing their lyrics.¹⁰⁹ The lingering consequences of these biases against rap music continue today¹¹⁰ and are easily carried into the jury deliberation room.

Due to the genre’s association with violence, “courts began to disregard the notion of artistic license afforded to other genres of music and instead condemned rap for its content.”¹¹¹ As the “[u]se of rap lyrics has even begun to shape investigative methods by police,”¹¹² prosecutors have “take[n] advantage of rap stereotypes to win cases.”¹¹³ Now, “instead of prosecutors and law enforcement conducting boots-to-the-ground investigations to collect real evidence and solve cases, prosecutors utilize the indoctrinated

103. *Id.* at 336.

104. *See id.* at 336 (“Rap music, however, is scarcely afforded the luxury of a nonliteral interpretation of its lyrics.”).

105. Araibi, *supra* note 4, at 833.

106. Huff, *supra* note 13, at 335.

107. *Id.*

108. Araibi, *supra* note 4, at 818.

109. *Id.*

110. *See* Araibi, *supra* note 4, at 834-46.

111. Huff, *supra* note 13, at 337.

112. *Id.* at 358.

113. *Id.*

prejudices we have and use them against defendants.”¹¹⁴ The reliance on rap lyrics as evidence against a criminal defendant has prompted law enforcement to “mine the internet for leads,” often using SoundCloud tracks and YouTube videos for clues rather than focusing on physical evidence.¹¹⁵ For these reasons, rap lyrics should be held to a heightened standard in an FRE 403 analysis for their prejudicial effect.

The likelihood for the public to misunderstand the artistic elements of the music and ignore its artistic value leads many jurors to accept the lyrics as true depictions rather than as creative storytelling.¹¹⁶ Due to the overwhelmingly damaging amount of bias and the fact that rap music emerged as counterculture through anti-authoritarian values and from political criticism with lyrics often depicting violence and illegal activity, a limiting instruction is unlikely to mitigate the damage caused by the substantial prejudice against rap artists in criminal trials.¹¹⁷ Lastly, since the purpose behind the inadmissible character rule is to exclude “evidence that the defendant is prone to commit crimes or is otherwise a bad person,”¹¹⁸ and because lyrics about violence are generally highly prejudicial propensity evidence, the court should consider all lyrics, especially rap, as presumptively inadmissible.

B. The Solution: A Lyric-Specific Balancing Test

While rap lyrics should be considered presumptively inadmissible, courts could consider admitting them as evidence under a Doctrine of Chances theory. The Doctrine of Chances “is sometimes cited to justify admitting evidence of extrinsic acts to prove intent, knowledge, or absence of mistake or accident.”¹¹⁹ In this doctrine, the key factors are the “number of extrinsic incidents” and their “similarity to the facts alleged in the case being tried.”¹²⁰ Using this approach, the court should adopt a modified FRE 403 balancing test designed specifically for all song lyrics that integrate

114. *Id.*

115. *Id.*

116. Gregory, *supra* note 27, at 335.

117. See *New Jersey v. Skinner*, 218 N.J. 496, 517 (2014) (finding that “[t]he admission of defendant’s rap writings bore a high likelihood of poisoning the jury against defendant, notwithstanding the trial court’s limiting instruction”); see also Araibi, *supra* note 4, at 835-36 (emphasizing that “[i]f anything, the judge instructs jurors that the lyrics are to be used for a limited purpose, but it is highly doubtful that these instructions are effective at preventing juries from improperly considering the evidence”); Gregory, *supra* note 27, at 335 (“The inclusion of a limiting instruction, however, is not likely to remedy the risk of unfair prejudice against a defendant.”).

118. Gregory, *supra* note 27, at 335.

119. Shields, *supra* note 1, at Art. 1, §2.

120. *Id.*

Skinner's test and elements of the proposed and current state and federal legislation. The new balancing test should consider: (1) the defendant's intent behind the lyrics, (2) the amount of physical evidence of the crime charged absent the song lyrics, (3) the relatedness in subject matter and closeness in time between the content of the lyrics and the physical evidence, and (4) a heightened prejudice analysis given society's history of bias against Black people and rap as a music genre.

1. Determination of the Artist's Intent

The intent aspect of the new test incorporates the requirement from the proposed New York Legislation and the RAP Act that, in order to admit lyrics under an exception, the government must prove "by clear and convincing evidence" that, if the expression was original, then the "defendant intended a literal meaning" and, if the expression was derivative, the defendant "intended to adopt the literal meaning" as his own thought or statement.¹²¹ Under this test prong, courts should consider "co-writers" and the development of the lyrics, the physical form in which the lyrics were found, expert testimony regarding common tropes and themes in the genre, and other similar factors.

For instance, the more co-writers or people with input on the lyrics, the less likely the lyrics represent the defendant's original thoughts, and the more likely the edits were made for artistic purposes and not as an attempt to be more truthful. When analyzing the physical form of the lyrics, it can be argued that a vocal lyric recorded and released on an MP3 file is more likely to have been edited, re-recorded, and/or changed from the artist's original intended meaning than, for example, a personal notebook with handwritten, early versions of lyrics. Similar to California's Bill discussed above, evidence of the social context, rules, conventions, and artistic elements of the genre, as well as research into whether a particular type of expression introduces racial bias into the proceedings,¹²² could help a trier of fact in separating true statements from common themes. Therefore, the court should first determine that the defendant intended the literal meaning of the lyrics.

2. Amount of Physical Evidence

Before song lyrics can be admitted, other "clear and convincing" physical evidence must be introduced.¹²³ The standard for "clear and

121. H.R. 8531, 117th Cong. § 2 (2022); S. 7527, 238th Sess. (N.Y. 2021).

122. A.B. 2799, Reg. Sess. (Cal. 2022).

123. The new test incorporates the "clear and convincing" requirement from the proposed New York Bill, the test used in *New Jersey v. Skinner*, 218 N.J. 496 (2014), and the RAP Act. *See S.*

convincing” evidence is “an intermediate standard appropriate when the ‘interest[s] at stake . . . are deemed to be more substantial than mere loss of money.’”¹²⁴ Whether the evidence meets this standard is determined by a judge.¹²⁵ A standard requiring “clear and convincing” evidence provides enough physical evidence to raise suspicion of the defendant’s guilt, thereby rebutting the idea that the lyrics were “solely” choices of artistic expression.¹²⁶ Additionally, as a higher standard of proof, the “clear and convincing” standard gives the court sufficient information apart from the lyrics to show how the lyrics connect to the crime.

While the approach taken in the New York, California, and federal bills do consider elements such as a “factual nexus,”¹²⁷ “sufficient level of similarity,”¹²⁸ “refer[ing] to specific facts of the crime alleged”¹²⁹ between the creative expression and the specific facts of the case, the bills fail to make clear how much *independent* physical evidence should be necessary before that comparison can be made.¹³⁰

The level of the independent evidence should itself rise to “clear and convincing” since anything less stringent would be an unconvincing link between the actual crime and the defendant and would fail to identify how much evidence is required to evaluate the next factor. Additionally, the level of evidence cannot exceed “clear and convincing,” meaning that the other evidence cannot rise to the level of “beyond a reasonable doubt”¹³¹ because

7527, 238th Sess. (N.Y. 2021) (noting that “the proffering party must affirmatively prove by clear and convincing evidence”); *Skinner*, 218 N.J. at 336 (“evidence of the other crime must be clear and convincing”); H.R. 8531, 117th Cong. § 2 (2022) (requiring the government “in a hearing conducted outside the hearing of the jury,” to offer proof “by clear and convincing evidence”).

124. Richard Hussein, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1406 (1990).

125. FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.”)

126. Rebutting the idea that the lyrics were solely choices of artistic expression incorporates the first element of the proposed New York Bill and RAP Act. See S. 7527, 238th Sess. (N.Y. 2021) (requiring “literal, rather than figurative or fictional, meaning and, where the work is derivative, that the defendant intended to adopt the literal meaning of the work as the defendant’s own thought or statement”); H.R. 8531, 117th Cong. § 2 (2022).

127. S. 7527, 238th Sess. (N.Y. 2021).

128. A.B. 2799, Reg. Sess. (Cal. 2022).

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

130. Unlike New York, California, and federal proposed legislation, the New Jersey v. *Skinner*, 218 N.J. 496 (2014) test accounts for independent evidence. *Skinner*, 218 N.J. at 515 (“[T]he evidence of the other crime must be clear and convincing.”).

131. S. 7527, 238th Sess. (N.Y. 2021) (the proposed Bill suggests that the lyrics should provide “distinct probative value not provided by other admissible evidence,” implying that the other admissible evidence should not rise to “beyond a reasonable doubt” because it would defeat the purpose of admitting the lyrics); see also H.R. 8531, 117th Cong. § 2 (2022) (the fourth element of

the lyrics would become cumulative evidence of the defendant's guilt and would therefore be unnecessary. Therefore, the lyrics should only be admitted if their admission is enough to raise all evidence from a level of "clear and convincing" to "beyond a reasonable doubt."

3. Relatedness of the Lyrics and Closeness in Time

The court should only admit the lyrics if there is "clear and convincing" evidence that the lyrics have a sufficient connection (related details and closeness in time) to the crime charged.¹³² Vague descriptions of general criminal acts as evidence of a crime directly oppose the public policy underlying the rule prohibiting character evidence.¹³³ Additionally, even showing that the crime charged appears in the lyrics is insufficient. This is because when the lyrics match the topic of the crime charged, a jury may evaluate the defendant's character as someone prone to commit that crime, and they will wonder whether the defendant had done such things despite anything to suggest the lyrics were more than fictional.¹³⁴ To further illustrate this point, suppose a defendant is on trial for drug distribution. The defendant's lyrics referencing, for example, drug *use*, should not be admitted to link him to a drug *distribution* charge absent additional evidence connecting the defendant to drug distribution at the crime scene. Instead, the lyrics should demonstrate a sufficient connection by providing specific details of the crime, along with evidence that the lyrics were written close in time¹³⁵ to the crime charged, such that a reasonable judge could conclude that they connect the defendant to the criminal act.

the RAP Act incorporates a requirement similar to the proposed New York legislation by stating that "the expression has distinct probative value not provided by other admissible evidence").

132. This element of the new test for lyrics combines similar elements of the proposed New York Bill and the test used in *Skinner*. See S. 7527, 238th Sess. (N.Y. 2021) (requiring a "strong factual nexus"); see also *New Jersey v. Cofield*, 127 N.J. 328, 338 (1992) ("similar in kind and reasonably close in time to the offense charged"). Cf. H.R. 8531, 117th Cong. § 2 (2022) (stating that "the creative expression refers to the specific facts of the crime alleged" but does not consider an appropriate length of time between writing or discovering the lyrics and the event of the crime); A.B. 2799, Reg. Sess. (Cal. 2022) (requiring that creative expression is "created near in time to the charged crime or crimes [and] bears a sufficient level of similarity to the charged crime or crimes").

133. *Skinner*, 218 N.J. at 517; Gregory, *supra* note 27, at 350.

134. Gregory, *supra* note 27, at 335.

135. "Closeness in time" incorporates the second element of the *Skinner* test, which was applied after the court found little probative value in lyrics written years before the charged crime. See Araiabi, *supra* note 4, at 833.

4. Consideration of the Heightened Prejudice of Rap Lyrics

Finally, when examining the admissibility of rap lyrics, the court must also consider the heightened prejudice caused by societal biases throughout the history of rap music. Given society's deeply engrained attitudes towards rap music, both from a racial and lyrical content perspective, rap lyrics must have strong probative value to outweigh their substantial prejudicial effect. Therefore, unless the details in the lyrics directly relate to the crime, meaning they relate to a fact or element in dispute, they should be inadmissible.¹³⁶ In making the FRE 403 determination, similar to the California Bill, the trier of fact should be able to consider "experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings."¹³⁷ This will help achieve the goal of curtailing the admission of lyrics to very limited circumstances.

V. CONCLUSION

According to FRE 404, lyrics may be admissible as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Nonetheless, because rap lyrics are a form of artistic expression that combines symbols of personal experience with elements of fictional events and exaggerations, because they receive more heightened scrutiny from society than the lyrics of most other genres due to rap's history and society's inherent racial biases, and because a limiting instruction is generally ineffective to eliminate undue prejudice, rap lyrics should be presumed inadmissible. If the prosecution wishes to overcome this presumption, the court should adopt a modified test based on the Doctrine of Chances, the *Skinner* test, and the proposed and current state and federal legislation to analyze the defendant's intent behind the lyrics, the amount of other physical evidence, the relatedness and closeness in time of the lyrics to the crime charged, and the heightened prejudicial effect of using rap lyrics in general. Only if the lyrics overcome this threshold should they be admitted into evidence in a criminal case.

136. The proposed New York and California Bills, the test used in *Skinner*, and the RAP Act all support this position. See S. 7527, 238th Sess. (N.Y. 2021) (requiring "relevance to an issue of fact that is disputed"); see also *Cofield*, 127 N.J. at 338 (specifying that "[t]he evidence of the other crime must be admissible as relevant to a material issue"); A.B. 2799, Reg. Sess. (Cal. 2022) (noting the importance of "factual detail not otherwise publicly available"); H.R. 8531, 117th Cong. § 2 (2022) ("(3) that 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.").

137. A.B. 2799, Reg. Sess. (Cal. 2022).