

## Notes

# Rap Snitches: A New Framework to Evaluate Rap Lyrics and Creative Expressions as Evidence

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*Rap music has earned its prominent place in American music culture.<sup>1</sup> It provides a unique creative outlet for artists to share their experiences and criticize the systems in which they live. Rap lyrics, often metaphorical or exaggerated, have been weaponized by prosecutors to attack the character of artist-defendants at a level not seen with other modes of creative expression. The lyrics of an artist are turned against them in a manner that invites unfair prejudice and improper character evidence into legal proceedings. In the 2020s, major progress has been made to curb this practice, with several jurisdictions introducing legislation that would limit the use of creative expression, such as rap lyrics, as evidence in trials. While these proposed laws are a significant step to protecting creative expression, they leave gaps that allow prosecutors to continue their misuse of lyrics as evidence. This Note argues that an effective creative expression evidence rule must have the following characteristics: (1) a presumption of inadmissibility, (2) a distinct framework to investigate whether a lyric can be properly interpreted literally, thereby rebutting the presumption of inadmissibility, (3) an exception for lyrics that create a cause of action by themselves, and (4) a requirement that creative expression evidence be presented to a jury in the least prejudicial medium available. This Note invites legislators wishing to protect creative expression to consider Rule X, a model rule that combines the strengths of current legislation to strike a balance between protecting creative expression and ensuring such expression cannot be used to shield wrongdoings or genuine confessions with immunity.*

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1. The title to this Note references the song “Rapp Snitches Knishes” by MF DOOM, which references the trend of rap lyrics being used as evidence of their creator’s criminal intent in trials. MF DOOM, *Rapp Snitches Knishes*, on Mm..Food (Rhymesayers Ent. Nov. 17, 2004).

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## INTRODUCTION

Most avid music listeners can quickly think of a song lyric describing an act of violence or illegal conduct. Whether it be Johnny Cash's "But I shot a man in Reno just to watch him die,"<sup>2</sup> Maroon 5's "Six foot tall, Came without a warning, so I had to shoot him dead,"<sup>3</sup> or Foster the People's "You better run, better run, outrun my gun,"<sup>4</sup> depictions of violence are a theme in popular music that transcend both time and genre. Despite this ubiquity, hip-hop, or rap music, is singled out for these depictions. Since its inception, rap music has been used as evidence of criminal conduct or intent, essentially weaponizing the artist's creation against them.<sup>5</sup> Professor Erik Nielson has identified close to 700 cases since the 1980s in which rap lyrics were used as evidence, and estimates that this figure represents only a small fraction of cases in which a rap artist's art has been weaponized against them.<sup>6</sup> Rap lyrics have been used to justify arrests, convince defendants to accept plea bargains, and dubiously establish the elements of a crime to juries during trial,<sup>7</sup> with prosecutors filling evidentiary gaps with song lyrics that are meant to be metaphorical or exaggerated.<sup>8</sup> Lyrics have similarly been used to establish cases for defamation, obscenity, and true threats.<sup>9</sup> This leaves artists in fear that their work will be used against them in both civil and criminal contexts, making them less willing to share their thoughts and experiences with the world. This effect, known as chilled speech, has been identified by courts as an indication that First Amendment rights have been violated.<sup>10</sup>

Historically, the admissibility of rap lyrics was evaluated under unfair prejudice and character evidence rules; however, there are apparent inconsistencies in how courts apply these general evidence rules to rap lyrics.<sup>11</sup> This exposes the need for explicit legislation to protect artists and their creative expression. In 2022, the arrest of GRAMMY-winning rap artist Young Thug and subsequent prosecutorial use of his lyrics brought the music industry

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2. JOHNNY CASH, *Folsom Prison Blues*, on JOHNNY CASH WITH HIS HOT AND BLUE GUITAR! (Sun Records Oct. 11, 1957).

3. MAROON 5, *Wake Up Call*, on IT WON'T BE SOON BEFORE LONG (A&M Octane Records May 16, 2007).

4. FOSTER THE PEOPLE, *Pumped Up Kicks*, on TORCHES (Columbia Records May 23, 2011).

5. Paul Meara, *Lyrics on Trial: A History of Rap Bars Used in Court and How Precedent may Effect Young Thug's Fate*, BET (Nov. 21, 2023, 09:00 AM), <https://www.bet.com/article/w9idu1/rap-lyrics-court-history-young-thug-trial>.

6. Erik Nielson, *Mapping Rap on Trial*, RAP ON TRIAL (2023), <https://www.rapontrial.org/>.

7. *Id.*

8. See, e.g., *An Ode to the Corny, Cringeworthy Rap Brag*, DJBOOTH (May 30, 2017), <https://djbooth.net/features/2017-05-30-ode-to-the-corny-cringeworthy-rap-brag/>.

9. *Agnant v. Shakur*, 30 F. Supp. 2d 420, 423 (S.D.N.Y. 1998).

10. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

11. *Compare State v. Skinner*, 218 N.J. 496, 502–03 (2014) (finding rap lyrics written by the defendant were highly prejudicial evidence with little to no probative value), with *Montague v. State*, 471 Md. 657, 667 (App. Ct. 2020) (holding the defendant's rap lyrics are relevant because they have probative value).

together to urge lawmakers to end this tactic with legislation that explicitly protects lyrics and other modes of creative expression.<sup>12</sup> Coinciding with this movement, both state and federal lawmakers introduced bills to protect artist expression, providing a framework for courts to follow whenever prosecutors attempt to enter a creative expression into evidence.<sup>13</sup> While these rules, including California Evidence Code Section 352.2,<sup>14</sup> instruct judges to view art-based evidence through a different lens than other types of evidence, their frameworks fail to minimize the prejudice and bias that contaminates fact finders when art is used as evidence.

This Note seeks to evaluate the current legislation intended to protect creative expression and proposes that lawmakers adopt a model rule that combines their strengths and prevents the introduction of undue prejudice towards artist-defendants whose work is used against them in trial. Part One provides an overview of rap music's history of controversy, and how its content has historically been used to convict its creators. Part Two introduces proposed legislation in California, New York, and at the federal level designed to address the problematic weaponization of creative expression as evidence against rap artists. Part Two also evaluates how California laws are applied in criminal trials. Part Three compares these laws and proposes a uniform model rule ("Rule X") to guide legislatures in drafting evidence rules for creative expression. Part Three argues that to avoid the unique dangers of undue prejudice that creative expressions as evidence presents, a model rule should: (1) apply in both criminal and civil trials, (2) require that the expression be presented in the medium with the least likely possibility of introducing prejudice, (3) establish a presumption of inadmissibility with clear factors to overcome this presumption, and (4) permit carve-outs for cases in which the lyrics themselves provide for a cause of action, such as defamation, obscenity, and threats. Part Four contains the proposed language for Rule X, which can serve as a guide to legislatures wishing to enact a creative expression evidence law. Finally, Part Five concludes that this distinct framework is required to fairly evaluate the admissibility of creative expressions.

## II. RAP MUSIC IS A TARGET FOR CENSORSHIP AND EVIDENCE OF CRIMINALITY

From its inception in the 1970s, to having its own GRAMMY category today, rap music has become a key component of American music history.<sup>15</sup> A

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12. Deena Zaru, Ashan Singh, Tenzin Shakya & Sally Hawkins, *'Protect Black Art': How the Indictment of Young Thug and Gunna Sparked a Movement*, ABC NEWS (Oct. 15, 2022, 12:39 PM), <https://abcnews.go.com/US/protect-black-art-indictment-young-thug-gunna-sparked/story?id=91395434>.

13. *Id.*

14. CAL. EVID. CODE § 352.2 (West 2025).

15. For an overview of rap music's history as a genre, see generally Portia K. Maultsby & Fernando Orejuela, *Timeline of African American Music: Rap/Hip-Hop*, CARNEGIE HALL (2021), <https://timeline.carnegiehall.org/genres/rap-hip-hop>.

rap song can be identified by its rhyming lyrics, drum- and bass-heavy instrumentals, and an artist's lyrical "flow," or the ability to quickly string together clever sentences in time with the song's instrumentals.<sup>16</sup> Despite descriptions as shallow,<sup>17</sup> rap music has evolved into many sub-genres that capture and combine a wide range of experiences, from "gangsta rap," which focuses on gang culture and displays of bragging,<sup>18</sup> to "conscious rap," which seeks to inform its listeners of social and political issues.<sup>19</sup> Rap music has become a conduit for African-American communities to build a platform to share their experiences and criticize the systems in which they live.<sup>20</sup> As rap music entered the mainstream, the lyrics of rap music began to combine catchy, party-inducing rhymes with more political themes of generational poverty, police brutality, and gang violence.<sup>21</sup> But with lyrics that are often violent or sexually explicit,<sup>22</sup> rap music has found its place in the history of creative expression censorship.

#### A. A HISTORY OF AMERICAN MUSIC CENSORSHIP CAMPAIGNS

Music as an art form has been the subject of censorship campaigns throughout modern American history. In the 1950s, rockstar Elvis Presley notoriously had to be filmed from the waist up during a performance on The Ed Sullivan Show, after widespread concern was voiced from parents and citizens.<sup>23</sup> While this was primarily due to the alleged "youth-corrupting" nature of the musician and his infamous hip movement,<sup>24</sup> rather than concern over his lyrics, parents' concern for their children eventually became a common source of many such censorship campaigns.

Perhaps the most well-known campaign related to lyrics was the creation of the Parents' Music Resource Center ("PMRC"), which resulted in the now-iconic Parental Advisory logo conspicuously displayed on many album covers.<sup>25</sup> The campaign began in the 1980s after Tipper Gore, wife of congressman and

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16. For a discussion on "flow," see generally Rob Level, *What Is Flow in Rap? An Easy to Understand Break Down of Rap Flow*, SMART RAPPER, <https://www.smartrapper.com/what-is-flow-in-rap/> (last visited Aug. 20, 2025).

17. E.g., John H. McWhorter, *Rap Only Ruins*, MANHATTAN INST. (Aug. 10, 2003), <https://manhattan.institute/article/rap-only-ruins>.

18. See *Evolution of Gangsta Rap*, RECORDING ARTS CANADA (Feb. 18, 2020), <https://recordingarts.com/record/evolution-of-hip-hop/gangsta-rap/>.

19. See Rachel Hope, *Conscious Rap's Origin Story: The Music & Movement Revisited*, SOUND OF LIFE (Aug. 19, 2022), <https://www.soundoflife.com/blogs/mixtape/conscious-rap-origins>.

20. See *id.*

21. *Id.*

22. E.g., Abigail Habtehans, *The Demonization of Rap Music and Its Roots*, THE REGISTER FORUM (Jan. 13, 2024), <https://registerforum.org/19949/opinion/the-demonization-of-rap-music-and-its-roots/>.

23. Alli Patton, *Remember When: Elvis Was Censored from the Waist Down on 'The Ed Sullivan Show'*, AM. SONGWRITER (Jan. 8, 2023, 11:08 AM), <https://americansongwriter.com/remember-when-elvis-was-censored-from-the-waist-down-on-the-ed-sullivan-show/>.

24. *Id.*

25. Lulu Hardy, *The PMRC vs. Music: How the "Parental Advisory" Sticker Came to Be, and Why It's Still Important*, FIREBIRD MAG. (Jan. 3, 2025), <https://firebirdmagazine.com/music-history/the-pmrc-vs-music>.

eventual Vice President Al Gore, gifted a Prince CD to her daughter.<sup>26</sup> After hearing Prince's sexually explicit lyrics, Gore teamed up with Susan Baker, wife of the then Secretary of Treasury, to fight back against music that "put the moral development of their children at risk."<sup>27</sup> The collaboration led to the formation of the PMRC, which established a powerful media presence to advance its belief that "obscene" music was a serious problem for parents.<sup>28</sup> The coalition's goal was to require a rating system for music that placed warning labels on albums with explicit content.<sup>29</sup> The PMRC garnered support primarily among Christian and family value organizations.<sup>30</sup> Its opposition, led by the Recording Industry Association of America ("RIAA"), claimed that the PMRC's goals amounted to no more than censorship by a "self-appointed watchdog of public morals."<sup>31</sup>

However, combined with a strong media presence, the PMRC's support was enough to put the federal government on notice. In 1985, the Senate Commerce Technology and Transportation Committee initiated a hearing to investigate the controversy surrounding music lyrics and their effects on children.<sup>32</sup> Before the hearing was over, the two sides reached a compromise: record labels under the RIAA would either place a warning label on their explicit albums or print the lyrics themselves directly on the cover.<sup>33</sup> Thus, the easily recognizable "PARENTAL ADVISORY – EXPLICIT CONTENT" label was born, which now graces an overwhelming majority of rap albums today.<sup>34</sup>

Rap music is particularly prone to the type of scrutiny and criticism handed out by the PMRC and like-minded supporters. The lyrics of rap songs commonly include profanity and references to violence and drug use.<sup>35</sup> In fact, academic studies have reported positive correlation between listening to rap music and problematic behavior, including substance abuse and aggression.<sup>36</sup> While all genres of music contain violent lyrics, rap music is subject to a level of public scrutiny not seen in other genres. For example, a study published in the *Journal of Experimental Criminology* found that violent lyrics labeled as rap music were more likely to be associated with crime and violence than lyrics labeled as other

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26. *Id.*

27. Avery Anderson, *Parental Advisory: Tipper Gore and the PMRC*, 5 WOMEN LEADING CHANGE: CASE STUD. ON WOMEN, GENDER, & FEMINISM 31, 32 (2020).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See *Record Labeling: Hearing on Contents of Music and the Lyrics of Records Before the Comm. on Com. Sci. and Transp.*, 99th Cong. 529 (1985).

33. Chase Chastagner, *The Parents' Music Resource Center: From Information to Censorship*, 18 POPULAR MUSIC 179, 184 (1999).

34. See *Parental Advisory Label*, RIAA, <https://www.riaa.com/resources-learning/parental-advisory-label/> (last visited Aug. 21, 2025).

35. See Habtehans, *supra* note 22.

36. See generally Meng-Jinn Chen, Brenda A. Miller, Joel W. Grube & Elizabeth D. Waiters, *Music, Substance Use, and Aggression*, 67 J. STUD. ON ALCOHOL & DRUGS 373 (2006) (finding a positive association between listening to rap music and alcohol use, drug use, and aggressive behaviors).

genres.<sup>37</sup> Further, a different study published by the American Psychological Association found that participants deemed identical lyrics more literal and in greater need of regulation when they were characterized as rap versus country.<sup>38</sup>

Issues emerge when these perceptions and parental concerns extend beyond social discourse and into the legal system. As a result of this pervasion, a fact finder's moral disdain for rap music can cloud their ability to view evidence objectively. Prosecutors have weaponized this disdain in their practice of using rap lyrics as evidence of criminal wrongdoing or intent.<sup>39</sup>

#### B. PROSECUTOR'S USE OF LYRICS TO TARGET RAP'S BIGGEST NAMES

The practice of using rap lyrics as evidence has been around almost as long as rap itself, and many of the genre's biggest names have had the very same words that made them famous used against them in court. For example, in 1996, Calvin Broadus, known to the general public as Snoop Dogg, faced trial for murder.<sup>40</sup> As part of their case, the prosecution used the rapper's lyrics as evidence of guilt.<sup>41</sup> One such lyric was "Cause it's 1-8-7 on a undercover cop," which references California's penal code for murder.<sup>42</sup> However, Snoop Dogg was not on trial for the killing of a cop, bringing the lyric's relevance into question.<sup>43</sup> In fact, the song "Deep Cover," the source of the lyric, was recorded for the soundtrack of a movie revolving around an undercover police officer.<sup>44</sup> Given this context, it is likely that the prosecution understood that this lyric had no concrete connection with the charged crime. Presenting the lyric as evidence likely only served as an attempt to persuade a jury that Snoop Dogg had a criminal nature unconnected to the charged crime, as they hoped it would help them achieve a conviction.<sup>45</sup>

The most recent use of rap lyrics as evidence to make headlines is the trial of Young Thug. The GRAMMY-winning rapper was arrested in May of 2022 under charges related Georgia's racketeering laws.<sup>46</sup> During extensive pre-trial

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37. Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 521 (2018).

38. Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y. & L. 280, 287 (2016).

39. Kelly McGlynn, Jacob Shriner-Briggs & Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutions*, AM. BAR ASS'N (Jan. 11, 2023), [https://www.americanbar.org/groups/communications\\_law/publications/communications\\_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/#18](https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/#18).

40. Tina Daunt, *Rapper Snoop Doggy Dogg Is Acquitted of Murder*, L.A. TIMES (Feb. 21, 1996, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1996-02-21-mn-38322-story.html>.

41. 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/>.

42. *Id.*; SNOOP DOG, *Deep Cover*, on DEEP COVER (GF Studios Apr. 9, 1992).

43. Daunt, *supra* note 40.

44. *Id.*

45. Bellware, *supra* note 41.

46. Alexandra Del Rosario, *Young Thug's RICO Trial Has Finally Started. What You Need to Know—From YSL to Lyrics*, L.A. TIMES (Nov. 27, 2023, 5:00 AM PT), <https://www.latimes.com/entertainment-arts/music/story/2023-11-27/young-thug-trial-ysl-rico-case-explained#:~:text=In%20May%202022%2C%20Young%20Thug,offense%20dating%20to%20May%202018>.

hearings, the judge overseeing the trial had to consider whether to admit seventeen sets of Young Thug's lyrics as evidence.<sup>47</sup> While the defense argued that the use of lyrics as evidence violates the artist's freedom of speech and "effectively denies rap music the status of art," the judge was convinced by the prosecution's argument that the lyrics "prove the nature of [Young Thug's alleged gang] as a racketeering enterprise."<sup>48</sup> These cases, old and new, highlight the ongoing use of lyrics as evidence even where their relevance is questionable.

### C. PROBLEMATIC USE OF THE CURRENT RULES OF EVIDENCE TO ADMIT RAP LYRICS INTO EVIDENCE

Rap lyrics are primarily analyzed as evidence under the character evidence rule. Governed by the Federal Rules of Evidence (FRE) and equivalent state evidence codes, the rule generally states that "[e]vidence 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."<sup>49</sup> Further, the rule often provides that evidence of other wrongs or acts is not admissible to show that a defendant would commit the charged crime in conformity with these other acts.<sup>50</sup> With this rule in mind, it is plausible to see how rap lyrics could be used to illustrate a defendant's morally distasteful character and propensity for violence. The violent lyrics often found in rap music are interpreted more literally than similar lyrics of other genres.<sup>51</sup> These literal interpretations could lead a fact finder to conclude that a rap artist has a propensity for violence that mirror's their lyrics, an outcome that seems to violate character evidence rules. However, the character evidence rules provide several exceptions that allow prosecutors to use rap lyrics despite their effect on juries.<sup>52</sup> For example, evidence regarding other crimes, wrongs, or acts by a defendant may be admissible if entered to prove elements of a crime such as intent, motive, opportunity, or knowledge.<sup>53</sup> If a prosecutor can argue that a defendant's lyrics make one of these elements more or less likely to a fact finder, then they can be entered as evidence under these rules regardless of whether or not the jury will form an opinion about the defendant's character.

Without specific rules protecting creative expression, the defense's best counterargument in this situation is to claim that the admission of rap lyrics

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47. Deena Zaru, *Judge Rules Rap Lyrics Can 'Conditionally' Be Used as Evidence in Young Thug Trial*, ABC NEWS (Nov. 9, 2023, 10:19 AM), <https://abcnews.go.com/US/judge-rules-rap-lyrics-conditionally-evidence-young-thug/story?id=104760646>.

48. *Id.*

49. See, e.g., FED. R. EVID. 404(a)(1); ALA. R. EVID. § 404(a); CAL. EVID. CODE § 1101(a) (West 2025).

50. E.g., FED. R. EVID. 404(b).

51. Dunbar et al., *supra* note 38.

52. Vidhaath Sripathi, *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. GENDER RACE & JUST. 207, 223 (2021).

53. E.g., FED. R. EVID. 404(b).

violates FRE 403, which allows, but does not require, a court to “exclude relative evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presently cumulative evidence.”<sup>54</sup>

It can be reasonably argued that rap lyrics inherently invite unfair prejudice when used as evidence in trial. In 1999, Stuart P. Fischoff, a psychology professor, released a report that found “showing participants . . . rap lyrics exerted a significant prejudicial impact on the evaluation of a person, and particularly when the person was accused of murder.”<sup>55</sup> There is also the danger that people will interpret rap lyrics as literal, regardless of the context in which they are presented.<sup>56</sup> It is possible, if not likely, that many judges and jurors do not relate to the experiences lived by rap artists that shape their music. This makes it unlikely that judges and jurors can understand the often metaphorical or exaggerated nature of rap music, resulting in their strict and literal association with the character of lyrics and the real life character of the artist.<sup>57</sup> There is a real danger that artists can be convicted at least in part due to negative associations tied to their creative expression, rather than their factual ties to a charged crime.<sup>58</sup> Further, given the relative novelty of rap music as a genre, it is very unlikely that the drafters of the FRE considered the impact of using lyrics on jurors. Because of the inherent dangers of prejudice when using rap lyrics as evidence, courts must evaluate their admissibility under a different standard.<sup>59</sup>

The historical misuse of rap lyrics in trials has been a subject of scrutiny across legal scholarship. By considering the rulings courts have made using the framework discussed above,<sup>60</sup> prior scholarship has worked within the broad unfair prejudice and character evidence rules and advocated for broad, defensive use of rap experts to ensure the right interpretation of lyrics are used in court.<sup>61</sup> This research has been immensely valuable in articulating the problematic use of rap lyrics by prosecutors and the inadequacy of evaluating lyrics under broad evidence rules such as FRE 404 and FRE 403. Until now, however, a lack of political support has hindered any ability to properly evaluate formal proposed solutions to the problems of using rap lyrics as evidence.

This Note seeks to further this discussion by evaluating the new frameworks that U.S. lawmakers have proposed to analyze the admissibility of

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54. FED. R. EVID. 403.

55. Stuart P. Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 803 (1999).

56. Sripathi, *supra* note 52.

57. McGlynn et al., *supra* note 39.

58. See Fischoff, *supra* note 55.

59. For further discussion on the prejudicial nature of rap lyrics as evidence, see generally Sripathi, *supra* note 52.

60. Bryce Kasamoto, State v. Williams: *The Court of Criminal Appeals of Tennessee Incorrectly Allowed Rap Lyrics as Evidence to Prove the Character of the Accused*, 57 CREIGHTON L. REV. 467, 469 (2024).

61. Lucy J. Litt, *From Rhyming Bars to Behind Bars: The Problematic Use of Rap Lyrics in Criminal Proceedings*, 92 UMKC L. REV. 121, 148 (2023).

rap lyrics into evidence. The novelty of this proposed legislation provides a unique opportunity to both predict the hypothetical effects of such legislation and observe the real effects in California, where an evidentiary framework for rap lyrics has been enacted. Further, by combining the strengths and reducing the weaknesses of these existing frameworks, this Note's proposed model rule, Rule X, minimizes the problematic use of rap lyrics in a way that is supported by both legal scholars and lawmakers.

### III. LEGISLATION HAS BEEN INTRODUCED TO CREATE A NEW FRAMEWORK TO ANALYZE THE ADMISSIBILITY OF RAP LYRICS AS EVIDENCE

In the 2020s, substantial progress has been made to draw public attention to the improper use of lyrics as evidence in trial. The music, media, and legal communities have joined forces to highlight the issues that this practice produces and convince lawmakers that legislative and legal reform is required to address them. As a result, several jurisdictions have introduced or enacted legislation that attempts to create explicit protections for artists when their creative expression is used in court.

#### A. THE “PROTECT BLACK ART” MOVEMENT SPURS A LEGISLATIVE RESPONSE

In November 2022, after decades of enduring the practice of using song lyrics as evidence of criminal intent, the music industry and legal scholars united to spark a social movement by publishing an open letter in the *New York Times* and the *Atlanta Journal-Constitution* titled “Art on Trial: Protect Black Art” (“Protect Black Art”).<sup>62</sup> The purpose of the letter, according to Warner Music Group, the drafter and publisher of the letter, was to urge both state and federal legislatures to put explicit limits on the use of creative expression in criminal trials, beyond the protections afforded by current law.<sup>63</sup> Among the list of supporters are artists in the hip-hop and rap genre like Drake, Future, and Ice-T, as well as prominent artists in other genres of music, such as Alicia Keys, Coldplay, and Morgan Wallen.<sup>64</sup> Institutional supporters include Warner Music Group, the American Civil Liberties Union, TikTok, Spotify, and other industry leaders.<sup>65</sup> Finally, legal scholars from schools such as Harvard, Yale, and Stanford have signed their names in support of this movement.<sup>66</sup> The letter emphasized that creative expression is “rooted in what artists see and hear” and that art is a product of “vision and imagination,” rather than literal expressions

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62. *Artists, Industry Leaders, Legal Experts Join Together to Protect Black Art*, WARNER MUSIC GRP. (Nov. 1, 2022), <https://www.wmg.com/news/artists-industry-leaders-legal-experts-join-together-to-protect-black-art>.

63. *Id.*

64. ART ON TRIAL: PROTECT BLACK ART, <https://www.protectblackart.co/> (last visited Aug. 21, 2025).

65. *Id.*

66. *Id.*

of experience and acts committed.<sup>67</sup> The letter also highlighted that prosecutors' use of creative expression not only disregards First Amendment protections of speech and expression, but also targets marginalized communities that use creative expression to tell the world of their struggles and triumphs.<sup>68</sup> The Protect Black Art movement sparked a political reaction in April 2023, when leaders from entertainment industries joined federal lawmakers in Washington, D.C. to reintroduce the Restoring Artistic Protection Act, a proposed federal law that would limit the use of creative expression, including rap lyrics, in criminal trials.<sup>69</sup>

#### B. CALIFORNIA'S CREATIVE EXPRESSION LAW

Around the same time as the Protect Black Art movement's emergence, California became the first state to enact legislation explicitly addressing, and limiting, the use of rap lyrics in criminal proceedings.<sup>70</sup> AB-2799, which was enacted in September 2022, is intended to "ensure that the use of an accused person's creative expression will not be used to introduce stereotypes" and to "recognize that the use of rap lyrics . . . as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice."<sup>71</sup> In support of this law, the California state legislature produced findings that identify a "significant risk of unfair prejudice when rap lyrics are introduced into evidence."<sup>72</sup>

Prior to AB-2799, California's evidence code mirrored the federal rule: evidence may be excluded if its probative value is substantially outweighed by the probability that it will create substantial danger of undue prejudice, waste time, confuse the issues, or mislead the jury.<sup>73</sup> This framework allowed prosecutors to introduce lyrics as evidence without first showing that the lyric was meant to be understood literally or establishing a factual connection between the lyric and the charged crime. So long as the lyric, understood literally, related to the charged crime, fact finders would be able to deploy any preconceived biases towards rap music to associate the character of the lyrics with the character of the artist-defendant.<sup>74</sup>

AB-2799, which creates Section 352.2 in the California Evidence Code, adds additional stipulations and considerations a court must take into account

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67. *Id.*

68. *Id.*

69. *Music Industry Leaders Bring 'Protect Black Art' Movement to Capitol Hill*, ABC NEWS (Apr. 27, 2023, 5:24 PM), <https://abcnews.go.com/Politics/music-industry-leaders-bring-protect-black-art-movement/story?id=98906473>.

70. Assemb. 2799, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

71. *Id.*

72. *Id.*

73. CAL. EVID. CODE § 352 (West 2025); 28 U.S.C. § 403.

74. For more discussion on the biases associated with rap music, see Dunbar & Kubrin, *supra* note 37.

when determining whether to admit rap lyrics into evidence.<sup>75</sup> First, the amendment establishes that a creative expression's probative value as literal truth is "minimal" unless (1) it was created near in time to the charged crime, and (2) the expression is sufficiently similar to the charged crime or contains facts that are not otherwise publicly available.<sup>76</sup> Second, the amendment stipulates that two forms of undue prejudice include the possibility that an expression will be seen as a propensity for general criminal disposition and the possibility that the expression will explicitly or implicitly introduce racial bias in the proceedings.<sup>77</sup> Finally, the new legislation instructs California courts to consider two specific contexts regarding the creative expression being offered as evidence.<sup>78</sup> First, a court must consider any credible testimony regarding the cultural context, conventions, and artistic techniques related to the genre of the offered expression; and second, a court must consider "social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings."<sup>79</sup>

The 2022 amendment to the California Evidence Code is a significant step not only to protect rap artists from the prejudice and bias that accompanies their lyrics in court, but all artists in their expression. Section 352.2 defines "creative expression" broadly to include artistic mediums such as music, literature, and film, all of which receive the same protections as rap lyrics.<sup>80</sup> However, the amendment only applies in criminal proceedings, meaning that an artist's work can be used against them almost without limit in civil proceedings.<sup>81</sup> When an artist fears the consequences of a civil suit, which can be as drastic as financial devastation, they may be discouraged from fully fleshing out their beliefs and experience in their expression. Combatting chilled speech concerns and ensuring that creativity can thrive is a major purpose of a law protecting creative expression. Further, without an explicit presumption of inadmissibility, the negative biases that often accompany rap lyrics can taint the prejudicial versus probative value balancing test. By assigning a "minimal," yet tangible, probative value to rap lyrics without any showing, a judge blinded by bias may admit lyrics despite fully assessing the potential dangers of unfair prejudice. An explicit presumption of inadmissibility requires a prosecutor to show a real factual connection between lyrics and the charged crime, thereby demonstrating a lack of, or at least palatable level of, prejudice. To fully protect artists and minimize unfair prejudice, a creative expression law must apply in both criminal and civil cases, and establish a presumption of inadmissibility for creative expression evidence.

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75. Assemb. 2799, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

76. CAL. EVID. CODE § 352.2(a) (West 2025).

77. *Id.*

78. *Id.* § 352.2(b).

79. *Id.*

80. *Id.* § 352.2(c).

81. *Id.*

### 1. California's Section 352.2's Effect in Criminal Trials

Despite its novelty, Section 352.2 has already been used by defense lawyers in California courts in an attempt to protect artists from their work being used against them. In *People v. Venable*, the defendant, Venable, was convicted of first-degree murder and attempted murder stemming from a gang-related shooting on Medical Center Drive, which led to one death by a gunshot wound to the head.<sup>82</sup> As part of their evidence, the prosecution introduced a rap music video in which Venable and other known gang members flashed gang signs and displayed guns, drugs, and money.<sup>83</sup> An expert witness for the prosecution testified that one line in the song, “[s]lid up Medical, left that . . . head gone,” must have referenced the alleged crime because “no one had been shot in the head on Medical Center since 2007.”<sup>84</sup> The video was played by the prosecution twice during the presentation of their evidence and a third time during closing statements, where the prosecutor guided the jury to infer that Venable was the person referenced in the lyrics introduced as evidence.<sup>85</sup>

On appeal, Venable argued that the trial court judge erred by allowing the prosecution to present the rap video as evidence by citing the new California law.<sup>86</sup> California's Fourth District Court of Appeal agreed, finding that Evidence Code Section 352.2 “likely would have influenced the trial in Venable's favor,” reversing the judgment, and remanding for a new trial.<sup>87</sup> In their opinion, the court concluded that there is “no question that the . . . admission of the rap evidence in this case did not comply with [Section 352.2's] requirements for admission of creative expression.”<sup>88</sup> The court stated that the combination of the rap video's offensive language, depictions of guns and drugs, references to violent gang activity, and young black men being the majority of the people involved, made it such that the video's admission “may have had the precise effects the [California] Legislature sought to avoid.”<sup>89</sup> The court acknowledged that only one line of the song, referenced above, “could be interpreted as referring to the shooting in this case,” but stated that the rest of the lyrics had nothing to do with the charged crime in this case.<sup>90</sup> Despite this possible interpretation, the court explained that this lyric did not indicate that “the rapper or others in the video had personal knowledge or involvement in the shooting, only that they had heard about it.”<sup>91</sup> Even the prosecution's expert agreed with this, interpreting the lyric to mean that the rapper had “heard a [gang] member

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82. *People v. Venable*, 88 Cal. App. 5th 445, 447 (2023).

83. *Id.*

84. *Id.* at 452–53.

85. *Id.* at 456.

86. *Id.* at 447.

87. *Id.* at 448.

88. *Id.* at 455.

89. *Id.*

90. *Id.*

91. *Id.*

shot someone else . . . on Medical Center.”<sup>92</sup> In reversing the judgment, the court also pointed out that even though Venable appeared in the rap video, he did not rap or otherwise speak in it.<sup>93</sup>

Although the appellate court did not specify how the trial court erred in admitting the video with respect to Section 352.2, their opinion indicates that the trial court was correct in finding that the lyrics used overcame the presumption of minimal probative value. Rather, the deficiencies in the trial court’s compliance with the new Section 352.2 likely stemmed from not recognizing the danger of undue prejudice in this case. It is possible that the prosecution would be able to overcome this presumption. The parties did not dispute that the rap video was created near the time of the alleged crime. Further, the prosecution made a showing that the lyrics in the video were similar to the charged crime through its expert testimony.<sup>94</sup> Despite this showing, the court likely found that the probative value of the rap video was substantially outweighed by undue prejudice created for two reasons. First, the video was used beyond the context of the charged crime. Despite the fact that only one lyric in the entire song had any relevance to the charged crime, the prosecution played the video in its entirety three times during the course of the trial.<sup>95</sup> It is likely that the court found that the video’s depiction of drugs, weapons, and gang activity beyond the one lyric served no purpose other than to lead a jury to believe that the defendant had a criminal disposition, which is an explicit definition of undue prejudice under Section 352.2.<sup>96</sup> The second reason for the court’s finding of undue prejudice likely stems from the defendant’s distinct lack of involvement with the creative expression used against him in court. Not only did the court find that the music video did not indicate personal involvement with the charged crime for anyone present in the video, the prosecution’s own expert conceded that the one lyric relevant to the crime indicated that an entire gang was taking credit for the charged crime, not any single individual.<sup>97</sup> This, combined with the fact that the defendant did not say anything in the video, likely further led the court to conclude that the video’s admission only served to introduce unfair prejudice in the proceeding.

In reaching its decision, the appellate court in *Venable* found that Section 352.2 applied in cases on appeal at the time of its effective date.<sup>98</sup> Other appellate courts in California have also been instructed to revisit trial rulings with Section 352.2 in mind, but many have found that it does not apply retroactively, thereby disregarding any discussion surrounding an expression’s

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92. *Id.* at 453.

93. *Id.* at 455.

94. *Id.* at 452–53.

95. *Id.* at 456.

96. CAL. EVID. CODE § 352.2(a) (West 2025).

97. *Venable*, 88 Cal. App. 5th at 453.

98. *Id.* at 456.

introduction of undue prejudice or racial bias.<sup>99</sup> Going forward, however, California courts cannot avoid this discussion whenever a prosecutor attempts to enter a creative expression into evidence. Upcoming analyses by California courts will reveal whether a creative expression is being used fairly for its probative value, thereby ensuring that an artist's own creation cannot be used unfairly against them during a criminal trial. This will allow for a greater assessment of the law's application and effectiveness.

By stipulating explicit opportunities for prejudice, Section 352.2 puts judges on notice that they must consider creative expressions more carefully than other types of evidence. Further, by requiring a factual nexus between the expression and the charged crime, judges can assess whether an expression was meant to be taken literally by an artist. This framework also puts artists on notice that their expressions may be used against them if this nexus is established, providing ample room for metaphorical expression while not allowing artists to confess to crimes without consequence in the name of art. But these protections only go so far. While this provides adequate protection for criminal defendants, civil defendants must be granted the same protections to avoid the speech chilling effects of improper use of creative expression in trial. Further, an explicit presumption of inadmissibility for creative expression evidence is required to minimize the potential for unfair prejudice to negatively affect an artist-defendant's trial.

### C. PROPOSED NEW YORK AND FEDERAL LAWS FOR ADMITTING CREATIVE EXPRESSIONS AS EVIDENCE

While California is the only jurisdiction that has enacted legislation expressly limiting the use of rap lyrics and other forms of creative expression in criminal trials, it is not the only jurisdiction that has proposed such legislation. New York, the birthplace of rap music,<sup>100</sup> as well as the federal government, have considered changing evidence rules to protect creative expression.

New York's Senate Bill S7527 adds a section to the state's rules of evidence to ensure "that criminal defendants are tried based upon evidence of criminal conduct, not the provocative nature of their artistic works and tastes."<sup>101</sup> S7527 creates a presumption of inadmissibility for a defendant's creative or artistic expression.<sup>102</sup> To overcome this presumption, the prosecution must make four showings by clear and convincing evidence: (1) the expression's literal, rather than figurative, meaning, and that the defendant intended to adopt the literal meaning of the work as the defendant's own thought or statement, (2) a strong factual nexus indicating that the creative expression refers to the specific

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99. See *People v. Ramos*, 90 Cal. App. 5th 578, 596 (2023) ("Evidence Code section 352.2 does not apply retroactively."); *People v. Slaton*, 95 Cal. App. 5th 363, 376 (2023).

100. See Maultsby & Orejuela, *supra* note 15.

101. S. 7527, 2021–2022 Reg. Sess. (N.Y. 2021).

102. *Id.* § 1.

facts of the crime alleged, (3) the expression's relevance to a disputed issue of fact, and (4) the expression's distinct probative value that cannot be provided by other admissible evidence.<sup>103</sup> Even if the prosecution is able to overcome this presumption, courts have a duty under S7527's new rule of evidence to "apply careful redactions [to the expression], provide limiting instructions, and consider the least prejudicial means of presenting the creative expression to the fact finder."<sup>104</sup> The bill has passed in the New York State Senate, and is currently awaiting a vote in the State Assembly.<sup>105</sup>

S7527 ensures that if a New York artist's expression is to be used against them in court, only the relevant portion will be presented. For example, if Venable was tried under S7527, the prosecution would likely have been severely limited in how it could use the contentious rap video as evidence, rather than being able to present the video in its entirety during trial. Assuming that the prosecution could overcome the presumption of inadmissibility for the one lyric relevant to the charged crime, it is likely that the duty imposed upon a court by S7527 would require them to redact the rest of the lyrics from the song since they were found to be totally unconnected to the charged crime. Further, in order to present the expression in the least prejudicial manner, a court would consider only presenting audio from the song, rather than the video. If the prosecution needed to tie the defendant to the video, it is likely that a court would be required to consider showing a clip of the defendant in the video without drugs, weapons, gang references, or other possible sources of prejudice to the extent feasible. By modifying how a creative expression can be presented as evidence in a criminal trial, S7527 strikes a balance between protecting a defendant from having their art be used as a source of prejudice against them in a trial, while still allowing the prosecution to introduce valuable evidence which can help a fact finder.

However, similar to California's Section 352.2, S7527 only applies in criminal cases, which means that artists may still be attacked for their creative expressions in the civil context. Another shortcoming of the proposed New York law is that it allows courts to present the creative expression evidence in whichever medium it chooses. As discussed in Part Four of this Note, requiring a court to present the lyrics in the least prejudicial medium possible is necessary to minimize the risk of unfair prejudice in trials with creative expression evidence. By instructing a court to merely "consider" how to present creative expression evidence, the proposed New York law invites unfair prejudice by allowing judges to admit unnecessary audio or visual components of a creative expression. To protect artists and minimize unfair prejudice in trials, a creative expression law must apply in all cases and require a judge to present creative expression evidence in the least prejudicial medium available.

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103. *Id.*

104. *Id.*

105. *Id.*

The trend of introducing legislation to protect creative expression made its way to Washington, D.C. in April 2023, when H.R. 2952, known as the “RAP Act of 2023,” was introduced in the United States House of Representatives.<sup>106</sup> The Bill would amend the FRE “to limit the admissibility of evidence of a defendant’s creative or artistic expression against such defendant.”<sup>107</sup> Like its New York equivalent, the RAP Act would establish a presumption of inadmissibility for all creative or artistic expressions, which can only be overcome by four clear and convincing showings: (1) that a defendant intended the expression’s literal meaning, (2) the expression refers to the alleged crime or complaint, (3) the expression is relevant to a disputed issue of fact, and (4) that the expression has distinct probative value that is not provided by other admissible evidence.<sup>108</sup> If the prosecution is able to overcome this presumption, the RAP Act prescribes a familiar duty for a court to provide limiting instructions to juries and redact the expression “to limit the evidence presented . . . to that which is specifically excepted.”<sup>109</sup> The RAP Act of 2023 was never put to a vote and, as a result, “died” in January 2025 with the changing of Congress.<sup>110</sup> Unlike California and New York state laws, the RAP Act would have applied in all federal cases, criminal, civil, or otherwise, meaning artists would be protected in all federal contexts. However, the proposed law may still have allowed unfair prejudice and bias into an artist’s proceedings. By not requiring an expression to be presented to the fact finder in the least prejudicial medium, aspects of a creative expression may be used against a defendant unfairly. The need for presenting an expression in the least prejudicial medium is further discussed in Part 4B.

#### IV. CREATING A MODEL RULE TO GUIDE LEGISLATURES IN LIMITING CREATIVE EXPRESSIONS USED AS EVIDENCE

On their own, the legislation introduced at the federal level, in California and in New York, are substantial steps in protecting artists and curtailing prosecutorial misuse of creative expression in trial. By combining the strengths of this legislation, however, a creative expression evidence rule can be an airtight framework that minimizes the danger of unfair prejudice in legal proceedings where creative expression is necessary to assist a fact finder. This model rule, Rule X, draws from the strengths of existing law and goes further by (1) providing protection for artist-defendants in both civil and criminal cases, (2) requiring courts to present the creative expression evidence in the least prejudicial medium available, (3) establishing a presumption of inadmissibility for all creative expression evidence, and (4) allowing creative expression

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106. H.R. Res. 2952, 118th Cong. (2023).

107. *Id.*

108. *Id.*

109. *Id.*

110. *H.R. 2952—RAP Act of 2023*, CONGRESS.GOV (Apr. 27, 2023), <https://www.congress.gov/bill/118th-congress/house-bill/2952?s=1&r=4>.

evidence to be used freely in cases such as defamation, where the expression itself creates the cause of action. Rule X maximizes artist protection by minimizing the danger of unfair prejudice.

#### A. RAP LYRICS SHOULD BE LIMITED AS EVIDENCE IN BOTH CRIMINAL AND CIVIL TRIALS

In order to fully effectuate a protection for creative expression, every state whose constitution provides a free speech right should explicitly protect such expressions in both criminal and civil cases. The legislators behind the RAP Act understood this. The proposed RAP Act set out to restrict the use of a creative expression against a general defendant, without reference to criminal or civil proceedings.<sup>111</sup> Further, the RAP Act would have explicitly required a showing that “in a civil case, that the creative expression refers to the specific facts alleged in the complaint.”<sup>112</sup>

A model rule addressing creative expression as evidence should apply in both criminal and civil cases for two reasons. First, it should apply in both types of cases because the risk of prejudice is present in both. One of the primary motivating factors for legislatures who have introduced laws protecting creative expression is concern over the danger that the expression’s use as evidence will make the fact finder unduly prejudiced against a defendant.<sup>113</sup> It is very unlikely that a fact finder, particularly a jury, would be any less prone to undue prejudice resulting from a creative expression in a civil case than a criminal case. There is a plausible counterargument that the use of creative expression in civil trials should be subject to lower standards of review, given that civil defendants often have fewer protections than criminal defendants.<sup>114</sup> For example, criminal defendants are protected by a high burden of proof, where the prosecution must show guilt beyond reasonable doubt, while civil defendants are protected merely by a preponderance of the evidence.<sup>115</sup>

Because of these differences, some may argue that it should be easier to overcome a presumption of inadmissibility to enter creative expressions into evidence against civil defendants. However, given the importance of First Amendment protections in American legal history,<sup>116</sup> all artist-defendants should be protected from having their work used against them. The idea that an

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111. See H.R. Res. 2952, 118th Cong. (2023); S. 7527, 2021–2022 Reg. Sess. (N.Y. 2021).

112. H.R. Res. 2952, 118th Cong. (2023).

113. S. 7527, 2021–2022 Reg. Sess. (N.Y. 2021); Assemb. 2799, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

114. See *Criminal Defense vs. Civil Law: Understanding the Differences and Why It Matters*, MCKAMEY DEFENSE LAW <https://www.mckameydefenselaw.com/criminal-defense-vs-civil-law-differences> (last visited Sept. 17, 2025).

115. See *Difference Between Preponderance of Evidence and Beyond a Reasonable Doubt*, LAW OFF. OF JONATHAN F. MARSHALL (Apr. 15, 2025), <https://www.newjerseycriminallawattorney.com/blog/preponderance-evidence-vs-beyond-reasonable-doubt>.

116. See generally *What Does Free Speech Mean?*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-free-speech-mean> (last visited Aug. 23, 2025).

evidence rule should apply in both criminal and civil cases is not new in the American legal system. After all, the FRE apply in both criminal and civil cases.<sup>117</sup> This means that, at the federal level, the rules surrounding relevance, unfair prejudice balancing, and character evidence govern both kinds of cases. Rule X has goals similar to these rules, as it requires that creative expression evidence makes the charged crime more or less likely, similar to relevance, as well as requires presenting the least prejudicial medium of the creative expression evidence, thereby minimizing the danger of unfair prejudice in light of its probative value. If a creative expression evidence rule does not apply in civil cases, plaintiffs could weaponize creative expression in the same manner as prosecutors, therefore realizing the dangers of unfair prejudice articulated above. Second, Rule X should apply in both types of cases because if it does not, the result may be the chilling of speech. An artist should not be at risk of their creative expression being used prejudicially against them whether they are on trial for murder or for breach of contract.

#### B. RESTRICTING THE MEDIUM IN WHICH CREATIVE EXPRESSIONS ARE PRESENTED AS EVIDENCE IS CRITICAL TO AVOID UNDUE PREJUDICE

Even when a creative expression is factually relevant to a crime, its presentation to the fact finder may still result in a significant amount of unfair prejudice being introduced and used against an artist. To address this concern, New York's proposed law instructs courts to consider less prejudicial methods of presenting creative expressions to a fact finder is absent in the federal legislation. Consequently, a federal court may include any expression in its original medium so long as some aspect of it overcomes the presumption of inadmissibility. Whether overlooked or disregarded by legislatures seeking to protect creative expressions, the medium on which an artist chooses to express themselves could have tremendous impact on a fact finder if shown during a trial.

Artists are careful in selecting the medium on which they present their art. In fact, an artist's ability to effectively convey their ideas and feelings depends in large part on the medium used.<sup>118</sup> For example, the Mona Lisa would not have the same effect on viewers if its intended evocation of feeling were simply put into words in a brochure. Similarly, many readers are disappointed when their favorite novel is adapted into a movie. This is because the medium on which one views ideas conveyed with a creative expression can have as much of an impact as the ideas themselves. In the legal context, the medium in which a creative

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117. Penny White, *Federal Rules of Evidence: Role of Judges in the Evidentiary Process*, THE NAT'L JUD. COLL., (Jan. 15, 2015), <https://www.judges.org/news-and-info/judicial-news-judicial-edge-federal-rules-of-evidence/>.

118. *Medium Matters: A Journey Through the World of Artistic Expression*, ROCKY MOUNTAIN COLLEGE OF ART + DESIGN., (Jan. 11, 2024), <https://www.rmcad.edu/blog/medium-matters-a-journey-through-the-world-of-artistic-expression>.

expression is presented to a fact finder can result in differing levels of unfair prejudice. For example, if lyrics are relevant to a trial, presenting the music video that showcases the lyrics can invite unfair prejudice due to the visual component of the video, when the audio components would have sufficed.

Therefore, whenever a court accepts a creative expression into evidence, parties should be required to present the expression in the most objective way possible, such that it retains its relevance to the case and avoids introducing undue prejudice against a defendant. For example, consider a music video that has two people, A and B. A sings the entirety of the song's lyrics, while B dances in the background. At one point in the song, A references a shooting that had occurred recently. During this reference, B is in the background brandishing a knife in view of the camera. Eventually, B is arrested for the shooting that was referenced in the video. During trial, the prosecution wishes to enter the video into evidence, claiming the relevant lyric ties B to the shooting. The lyric could be presented to a jury in two ways: (1) reading it aloud from a transcript or (2) playing the video out loud on a screen. When using the transcript, the words are presented objectively, allowing both the prosecution and defense to make arguments solely based on the contents of the lyrics. When using the video, both sides can make the same arguments, but now a jury would see B with a knife at the same time. B is on trial for a shooting, so a knife is likely to be irrelevant. B is not the one singing, and it is already established that the lyrics alone are enough to connect B to the crime. However, when the lyrics are accompanied by a person with a weapon, they may have a different effect on the listener than if they had just read the lyrics on a transcript.

The key question to consider: what is the difference in effect? If the lyrics are violent, a video allows a viewer to connect these lyrics with a face, inherently establishing a link between the person and the words. One familiar with rap music knows the prevalence of violent themes and understands that the words in a rap song are often representative of a metaphorical or community experience, rather than a literal personal one. However, one unfamiliar with rap music may be shocked by the lyric's content, and in that moment of shock, forever connect the face in a video to the violence in the lyrics. A prosecutor's use of this connection led to a finding of prejudice by the court in *Venable*.<sup>119</sup> While it is true that the lyrics alone may be interpreted differently by different people, the addition of a visual component adds another layer of subjectivity, due to the differing connections people make between what they see and what they hear.<sup>120</sup>

In the context of a trial, the danger of this connection becomes even more severe. This is especially true when the face of the connection is charged with a violent crime, and the common juror is predisposed to the idea that the person they are viewing has committed a crime, since the prosecution is telling them so.

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119. *People v. Venable*, 88 Cal. App. 5th 445, 455, 458 (2023).

120. *Hindsight Attribution: Video Evidence*, CRITICAL INCIDENT REV., <https://criticalincidentreview.com/hindsight-attribution-video-evidence> (last visited Sept. 17, 2025).

In this hypothetical scenario, the only plausible purpose of showing the rap video, rather than reading a transcript of the lyrics, would be to connect B to the song's lyrics in a way that transcends the plain meaning of the words, to the extent that it makes B appear to be capable of, or prone to, the violence contained within the words. The video in this scenario does not and cannot make a fact more or less likely to a fact finder, in contrast to the transcript. The only difference is what results from the addition of personal feelings that arise from that subconscious connection between a creative expression and the source of the expression. In these situations, it is possible that a judge or juror could believe an allegation more or less likely to be true, not due to some sort of factual showing, but due to personal feelings towards a defendant invoked by a piece of evidence.<sup>121</sup> This is tantamount to prejudice.

This is the exact type of undue prejudice feared by legislatures in California and New York when they drafted legislation to protect creative expression.<sup>122</sup> However, without controlling for how the prosecution presents creative expressions in court, it is still very possible for undue prejudice to be introduced into the proceedings along with the expression. To apply this control, legislation must impose a duty on courts to consider the least prejudicial way to present a creative expression in court, like the New York law. A reasonable argument against this duty is that it would increase motion hearings and trial lengths. A judge needing to determine how to present creative expressions in a proceeding would need to hear both sides, analyze, and then modify the expression to fit the chosen medium. While this process would likely raise court costs and reduce proceeding efficiency, the constitutional value of speech and the need to avoid undue prejudice justifies this cost. The unique danger of undue prejudice presented by rap music and other creative expressions that combine multiple sense components requires that a creative expression evidence law impose a duty on courts to both redact the expression as needed and present the evidence in the least prejudicial medium that maintains its relevance.

### C. A PRESUMPTION OF INADMISSIBILITY IS REQUIRED FOR A CREATIVE EXPRESSION EVIDENCE RULE

The most significant difference between the enacted California law and the proposed New York and federal laws is the establishment of a presumption of inadmissibility for creative expressions. Lawmakers need to recognize that such a presumption is required in order to effectuate the goals of legislatures seeking to protect creative expression from abuse in courts.

While the proposed legislation in New York and the federal government begin with a general statement declaring creative expression to be inadmissible,<sup>123</sup> California has no such declaration. California Evidence Code

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121. *Id.*

122. See Assemb. 2799, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

123. S. 7527, 20212022 Reg. Sess. (N.Y. 2021); H.R. Res. 2952, 118th Cong. (2023).

Section 352.2 instead includes factors for a court to consider when weighing the probative value of the expression and its danger of prejudice, essentially expanding FRE 403 analysis for creative expression, rather than presuming inadmissibility.<sup>124</sup> The relevant language states:

[T]he court, while balancing the probative value of [a creative expression] against the substantial danger of undue prejudice . . . shall consider, in addition to the factors listed in Section 352, . . . the probative value of such expression for its literal truth or as a truthful narrative is minimal . . . and [] undue prejudice includes, but is not limited to, the possibility that the trier of fact will . . . treat the expression as evidence of the defendant's propensity for violence or general criminal disposition . . .<sup>125</sup>

One could interpret this language to effectively create a presumption of inadmissibility by setting a floor for a creative expression's probative value. The California rule further clarifies that a creative expression's probative value can only be increased by a showing of specific factors, such as the expression's creation near in time to the charged crime or a level of similarity between the crime and expression that could not be explained with publicly available information.<sup>126</sup> The rule also explicitly identifies the sources of undue prejudice that are unique to creative expression, and specifically rap lyrics, which can help courts understand the specific dangers of prejudice without needing to understand the culture behind the creative expression. This notice, combined with a default minimum probative value, will prompt courts to apply a different framework for creative expressions than they would for other types of evidence.

However, there is an interpretation issue that may give courts discretion to weigh a creative expression's probative and prejudicial values in the same manner as they would with any other type of evidence. The rule instructs a court to consider an expression's minimal value and unique danger of prejudice in addition to all other factors used to weigh probative and prejudicial values. By combining rather than separating a creative expression analysis with other types of evidence, it is very possible that courts in California could continue to admit creative expression under the same logic they have used for decades, so long as they merely consider the new guidelines. If there were an explicit requirement that courts consider the probative value of a creative expression in a vacuum, the danger of unfair prejudice is minimized. To effectively address a legislature's concern over the unique prejudicial nature of creative expression as evidence, an explicit presumption of inadmissibility and distinct analytic framework is required.

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124. CAL. EVID. CODE § 352.2(a) (West 2025).

125. *Id.*

126. *Id.*

#### D. PER SE APPROPRIATE USES OF RAP LYRICS AS EVIDENCE

It would be imprudent to create a uniform ban on admitting lyrics as evidence, which would effectively create an impenetrable shield with which any person could confess to a crime or commit a legal wrongdoing with complete immunity. Until now, this Note has focused on the use of lyrics as circumstantial or tangential evidence to prove intent or motive. There is a distinct use for lyrics that may be immune to the criticism of the practice: lyrics which themselves create a particular cause of action. Three causes of action that are especially relevant to rap lyrics and their history are defamation, obscenity, and threats.<sup>127</sup> In such cases, the artist's statement, or lyric, is an act itself, rather than a piece of evidence used to infer that the artist committed some other act. The character evidence considerations are not applicable in these cases, as the only factual inquiry is whether an artist made the lyric and the lyric itself fits the definition of defamation, obscenity, or threat.<sup>128</sup> The artist's character is often irrelevant to the elements of these causes of action. Further, the balancing test between the probative and prejudicial values of the creative expression is inapplicable for similar reasons. Since the lyric itself is the ultimate fact at issue, its probative value is at its highest. However, even without the ability to object to improper character evidence or unfair prejudice, a lawyer could still object to the use of creative expression in these cases under a rule like Rule X. Since the goal of Rule X is to minimize the danger of unfair prejudice, it should not be applicable in cases where the danger of unfair prejudice is at its lowest, and the lyric's introduction into evidence is necessary to prosecute these crimes. When the lyric itself provides a cause for action, such as defamation, obscenity, or threats, Rule X should not be applied.

Rap music likely provides grounds for countless claims of defamation. Bragging about oneself is a pillar of the genre.<sup>129</sup> And putting oneself on a pedestal while speaking negatively about others go hand-in-hand. However, the negative impact defamation has on its victim is likely multiplied when the defamatory statement is published through lyrics with the possibility of reaching a broad audience, especially in the case of Tupac, who has sold over seventy-five million records worldwide.<sup>130</sup> Tupac Shakur, considered by many to be the greatest rapper of all time,<sup>131</sup> was the subject of a defamation lawsuit several

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127. To learn more about these exceptions, *see, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964) (holding that “libel can claim no talismanic immunity from constitutional limitations.”); *Roth v. United States*, 354 U.S. 476, 492 (1957) (holding that “obscenity is not expression protected by the First Amendment.”).

128. *Id.*

129. *See DJBooth, supra* note 8.

130. Zack O’Malley Greenburg, *Tupac Shakur Earning Like He’s Still Alive*, FORBES (May 31, 2011, 4:35 PM), <https://www.forbes.com/sites/zackomalleygreenburg/2011/05/31/tupac-shakur-earning-like-hes-still-alive/?sh=4f1ffcd7641e>.

131. *See, e.g.*, L-FRESH the LION & Rosa Gollan, *Tupac Was One of the Greatest Rappers of All Time, and Here’s Why*, AUSTRALIAN BROAD. CORP. (Sept. 5, 2017), <https://www.abc.net.au/news/2017-09-06/tupac-was-one-of-the-greatest-rappers-of-all-time-heres-why/8870400>.

years after his death in 1996.<sup>132</sup> The plaintiff in that case alleged that Tupac's lyric, "while I take you back and lace this rap a real live tale about a snitch named Haitian Jack, knew he was working for the fed," was about him and referred to him as an undercover federal agent against the rapper.<sup>133</sup> Ultimately, the court sided with the defendant-rapper, concluding that the lyrics were not libelous per se and the plaintiff did not adequately show special damages required for a finding of liability.<sup>134</sup>

Given the current state of social media, music streaming platforms, and the ability of a song to quickly become viral, one defamatory lyric can subject an individual to society's judgment on unprecedented levels. To protect individuals from a level of societal prejudice that would likely not occur if published in some other fashion, or at least provide them with a remedy if they become victim to it, creative expressions should not be immune to defamation claims. In fact, American defamation law has developed a burden of proof framework when the underlying statements are disguised as fiction or couched in a creative expression.<sup>135</sup> A defamation plaintiff must show that the defamatory statements are "of and concerning" the plaintiff in order to unmask the fictitious disguise put on the statements.<sup>136</sup> While this requirement is traditionally applied to literature and film, it is just as applicable to rap lyrics. With this showing requirement, which balances protecting creative expressions while not allowing creators to completely exploit this protection, it is reasonable to allow a "carve-out" for defamatory statements in a rule like Rule X.

Like defamation law, laws prohibiting obscenity have been used to target rap music. In a landmark act of rap censorship, a judge in Broward County declared the album "As Nasty As They Wanna Be" by rap-group "2 Live Crew obscene under a Florida statute.<sup>137</sup> As a result, the Sheriff's Department distributed the declaration to stores that may have been selling the record in the county, along with a warning that further sales would result in the arrest of the store's managers.<sup>138</sup> Under threat of arrest, all stores in the county, even those that were not visited personally by the Sheriff's Department, stopped selling the album.<sup>139</sup> On appeal, the Eleventh Circuit found that no evidence was presented to show that the album lacked any artistic value, an element required to overcome the First Amendment's protection, and held that the Sheriff's Department could no longer interfere with its sale and distribution.<sup>140</sup> The idea that music has inherent artistic value, and therefore should categorically be

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132. *Agnant v. Shakur*, 30 F. Supp. 2d 420, 421 (S.D.N.Y. 1998).

133. *Id.* at 422.

134. *Id.* at 426.

135. Berna Warner-Fredman, *Defamation in Fiction: With Malice Toward None and Punitive Damages for All*, 16 LOY. L.A. L. REV. 99, 104 (1983).

136. *Id.* at 105.

137. *Skywalker Records v. Navarro*, 739 F. Supp. 578, 583 (S.D. Fla. 1990).

138. *Id.*

139. *Id.*

140. *Luke Records v. Navarro*, 960 F.2d 134, 138–39 (11th Cir. 1992).

excepted from obscenity statutes, has garnered judicial support.<sup>141</sup> Further, the stance that obscenity statutes should be abolished has support in various academic groups.<sup>142</sup> However, while obscenity is still upheld as a constitutional limitation on First Amendment protections, allowing a blanket immunity for creative expression from obscenity claims would incentivize abuse through shielding obscenity behind an instrumental. Therefore, as long as obscenity statutes are upheld, creative expressions, particularly song lyrics, should be subject to them without additional protection from Rule X.

Perhaps the most common causes of action with rap lyrics at its base are threats. One such example is *Jones v. State*, in which a fifteen-year-old was found to have committed the offense of “terroristic threatening.”<sup>143</sup> In this case, the threat was delivered directly to its victim in the form of a written rap song and contained the lyrics “[m]y hatred and aggression will go towards you . . . . I’ll murder you before you can think twice, cut you up and use you for decoration to look nice.”<sup>144</sup> The court found that the lyrics constituted a threat because of the victim’s reaction, the absence of a condition, the direct communication of the lyrics between the defendant and the victim, and the victim’s reasonable belief that the defendant had the capacity to carry out violence contained in the lyrics.<sup>145</sup>

U.S. courts have long held that threats “must be distinguished from what is constitutionally protected speech.”<sup>146</sup> In light of this, legislation protecting creative expression should not attempt to make it immune to claims of threat. That being said, no uniform test has been articulated to determine whether certain speech constitutes a threat. The apprehension in analyzing potentially threatening speech is amplified in the context of rap lyrics due to the method in which these lyrics are communicated to their target. Often, songs are recorded and released to the general public, meaning the song is not directly communicated to its target. Further, the extensive use of aliases, metaphors, and innuendos make it difficult for a fact finder who is unfamiliar with the genre to fully understand the meaning of the words at issue. This Note will not attempt to resolve this problem, but instead will simply conclude that Rule X should not be applied to claims of legitimate threat, despite rap lyrics’ value as a creative expression.<sup>147</sup>

The ability of rap lyrics to give rise to a legal claim themselves, as opposed to their use as mere evidence of their creator’s intent, calls for a distinction in

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141. *Id.* at 135.

142. Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 22 (2005).

143. *Jones v. State*, 64 S.W.3d 728, 737 (Ark. 2002).

144. *Id.* at 730.

145. *Id.* at 736.

146. *Watts v. United States*, 394 U.S. 705, 707 (1969).

147. For a discussion on rap lyrics and threat doctrine, see Clay Calvert, Emma Morehart & Sarah Papadelias, *Rap Music and the True Threats Quagmire: When Does One Man’s Lyric Become Another’s Crime?*, 38 COLUM. J.L. & ARTS 1, 2 (2014).

any rule that addresses a creative expression's use in trial. Without this distinction, court efficiency would drastically decrease as judges juggle evidence and tort rules. Staunch proponents of the music industry may argue that there should not be any "carve-out" exceptions for using creative expressions as evidence, as this would stifle creative expression. This is particularly true for rap music, whose foundations rest on creative methods of bragging and dissing, and therefore relies on exaggeration towards oneself and others. However, to avoid the confusion and inefficiency that would accompany conflicting evidence and tort rules, a creative expression evidence rule should have "carve-outs" for expressions whose content provides the basis for the legal claim, such as cases of defamation, obscenity, and threats.

#### V. PUTTING IT ALL TOGETHER: A MODEL EVIDENCE RULE FOR CREATIVE EXPRESSIONS

Effective legislation to limit the admissibility of creative expression must have the following: (1) applicability in both criminal and civil cases, (2) a presumption of inadmissibility for creative expression evidence, (3) instructions to redact and present the expression differently as necessary, and (4) carve-outs for expressions that create a cause of action by itself. With this in mind, this Note presents Rule X as a model rule for legislatures who wish to protect artists from the unique dangers presented by their expression's use as evidence:

"Rule X. Limitation on admissibility of defendant's creative or artistic expression.

- (a) Creative and Artistic Expressions Inadmissible—Except as provided in subsections (b) and (c), evidence of a defendant's creative or artistic expression, whether original or derivative, is not admissible against such defendant.
- (b) Exception—A court may admit evidence described in subsection (a) if the Government or Plaintiff, in a hearing conducted outside the hearing of the jury, proves by clear and convincing evidence—
  - (1) if the expression is original, that defendant intended a literal meaning, rather than figurative or fictional meaning; or if the expression is derivative, that the defendant intended to adopt the literal meaning of the expression as the defendant's own thought or statement;
  - (2) in a criminal case, that the creative expression refers to the specific facts of the crime alleged; or in a civil case, that the creative expression refers to the specific facts alleged in the complaint;
  - (3) that the expression is relevant to an issue of fact that is disputed; and
  - (4) that the expression has distinct probative value not provided by other admissible evidence.
- (c) Exception—A court may admit evidence described in subsection (a) if the expression itself forms the primary foundation for the alleged crime or

wrongdoing at issue, including, but not limited to, claims of defamation, obscenity, or true threats.

(d) Ruling on the Record—In any hearing under subsection (b), the court shall make its ruling on the record, and shall include its findings of fact essential to its ruling.

(e) Court Duties Following Admission of Expression—If the court admits any evidence described in subsection (a) pursuant to the exceptions under subsections (b) or (c), the court has a duty to—

(1) ensure that the expression is redacted in a manner to limit the evidence presented to the jury to that which is specifically excepted under subsections (b) or (c);

(2) provide appropriate limiting instructions to the jury; and

(3) ensure that the expression is presented to the factfinder in the least prejudicial means possible, such that the expression maintains its relevance to the proceeding. This may include, but is not limited to, removing an audio or visual component from the expression.

(f) Definition—In this section, the term “creative or artistic expression” means “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.”

Rule X combines the strengths of the two state laws and proposed federal law. The proposed federal law, the RAP Act of 2023, meets most of the requirements for effective protection of creative expression. As such, sections X(a), X(b), X(d), X(e)(1), X(e)(2), and X(f) mirror the language found in the RAP Act.<sup>148</sup> However, Rule X adopts the practice of presenting a creative expression in the least prejudicial medium, as required by New York’s S7527.<sup>149</sup> This will minimize the potential prejudice and bias introduced at trial. For example, a lyric transcript would be read in place of playing the music video to remove any visual component of a creative expression, such as a depiction of drugs or violence, that would be irrelevant to the proceeding at hand and only serves to shock and unfairly prejudice the fact finder.

Rule X meets all the requirements for effective legislation meant to protect creative expressions. Section X(a) establishes a presumption of inadmissibility, while section X(b) provides a distinct analytic framework to overcome this presumption. By referring to “defendant” generally, Rule X will apply in all cases criminal and civil, ensuring that artists can be protected in every context. Section X(c) creates a carve-out for well-established exceptions to First Amendment protections, to ensure that an artist cannot commit a wrongdoing without repercussion by hiding behind a form of expression. Section X(d) provides a measure of accountability by the courts, ensuring that a defendant is

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148. See H.R. Res. 2952, 118th Cong. (2023).

149. S. 7527, 2021–2022 Reg. Sess. (N.Y. 2021).

fully aware of the reasons why their expression is not protected in a certain case. Section X(e) addresses the unique dangers of prejudice that accompany creative expression by imposing a duty on courts to only allow a relevant portion of an expression in the medium that is least prejudicial to the defendant. The practice of redaction and modifying the medium presented will minimize the danger of introducing unfair prejudice in a trial. Section X(f) provides an adequately broad definition of creative expression that has been adopted by all three jurisdictions with this type of legislation, ensuring that artists of all types are secure in their expression. By protecting all artists in most contexts to minimize the risk of unfair prejudice, Rule X effectively combats the speech chilling effects of prosecutorial misuse of creative expressions in trials.

#### CONCLUSION

Rap music has cemented its significance in American music and earned its place in the history of American culture. But along the way, it has been weaponized in a way that is distinct from other mediums of creative expression: its use by prosecutors as evidence of its creator's criminal intent. The unique undue prejudice that is introduced with rap lyrics in legal proceedings calls for a unique set of rules to ensure that an artist's constitutional rights are protected.

Legislation proposed by California, New York, and the federal government provides a strong foundation for ensuring this protection, but individually, they do not go far enough. Rule X combines the strengths of these rules into a comprehensive framework that reflects the constitutional value of creative expression and protects artists from the unfair prejudice that may accompany their work's introduction as evidence in trial.

The framework of Rule X maximizes artist protections and minimizes the danger of unfair prejudice in artist's trials. By applying in both criminal and civil trials, Rule X curbs the chilled speech effects posed by other laws. Requiring that courts present creative expression evidence in the least prejudicial medium ensures that relevant evidence is not tainted by unnecessary audio or visual components that poses risks of unfair prejudice. Establishing a presumption of inadmissibility for creative expression evidence ensures that admitted creative expressions have a strong factual nexus to the charged crime. Finally, Rule X is flexible by allowing creative expression evidence in cases such as defamation, where the expression itself creates a cause of action.

To avoid the unique danger of undue prejudice associated with rap lyrics and other creative expression, and to protect creative expression, which has a high constitutional value, all jurisdictions should adopt a distinct evidentiary framework to use when considering the admission of creative expressions as evidence, using Rule X as guidance.