

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

suggest[s] pop musi

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*

2023]

are relevant, and are not inadmissible character evidence. Although the

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 the ⁴¹ Similar to the holding in *Hopson*, in *United States v. Foster*, the court admitted rap

⁴² In *People v. Acosta*, the court admitted rap music video evidence because an eyewitness testified that the gun in the

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

indictment rapped about the offenses in their music.⁴⁸ Willis stated that she

49

do not want them used lyrics if you
 this high-profile indictment, California and the federal government proposed
 new legislation⁵¹ to prevent the admission of lyrics as evidence in criminal
 trials.⁵⁰ In response to

4. Prejudicial v. Probative Value

Since shocking and violent rap lyrics have a strong tendency to bias a jury⁵² exaggeration, and other artistic devices and can involve abstract representat

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

undue tendency to suggest decision on an improper basis, commonly, though

55

Based on the obscenity wars⁵⁶ 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, 238th 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.

⁶⁶ The Supreme Court of New Jersey determined that the lyrics 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 sl

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*

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

satisfied because the lyrics could only show motive of the crime charged if a

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

that the misconduct that the defendant rapped about was misconduct he had actually committed, and therefore the lyrics could only be considered a

⁷² Finally, under the last element, the court found that

⁷³ cally 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.

but fictional.⁷⁴

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

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

creative expression.⁷⁶ The B

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,

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

⁷⁹ The Bill also proposed: to overcome the inadmissibility presumption, the proffering party must prove by clear and

ral meaning as his own

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 B

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-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 B

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

⁸⁵

a significant level of similarity to the charged offense(s), or includes details of facts that are not otherwise available publicly.⁸⁶

that

the trier of fact will treat the lyrics as propensity evidence for violence or

⁸⁷

Then, if creative expression evidence is proffered and relevant, the court must also consider any additional relevant evidence, including testimony on the

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

89

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

On July 27, 2022, Congressmen Jamaal Bowman and Hank Johnson

from the wrongful use of their lyrics against them in criminal and civil

90

California Bill⁹¹ and would amend the Federal Rules of Evidence by adding the

92

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

expression present in music will continue to be stifled, and that expression

94

Congressman Bowman echoed these concerns when he stated, imprison our talented artists for expressing their experiences nor will we let their creativity be s

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

language is constitu

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

99

When addressing First Amendment concerns, it is important to 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

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 antisocial, mean spi

W* n7n1G[(97)] TJETQq0.00000912 0 612 792 reW* nBT/F1 11 Tf1

associated with violence.¹⁰³ Why should rap lyrics be denied the same
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

effect on the rap industry if rappers must keep a watchful eye for the looming
¹⁰⁶

producing music if they must choose between disingenuity by censoring
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

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.

the notion of artistic license afforded to other genres of music and instead condemned rap for its content ¹¹¹ of rap lyrics has even begun

¹¹²

113

Skinner st and elements of the proposed and current state and federal

. . . are deemed to be more substantial than mere loss of
judge.¹²⁵ ¹²⁴ Whether the evidence meets this standard is determined by a

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 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 demonstrating that the introduction of a particular type of expression¹³⁷ 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,