

RESTRICTING THE USE OF RAP LYRICS AS EVIDENCE IN
COURTS: A TARGETED APPROACH TO TACKLING
DISCRIMINATION IN CRIMINAL PROCEDURE

by
Paige M. Walker*

This Comment considers the use of rap lyrics as evidence in criminal trials and the discriminatory implications of these practices. It specifically focuses on the ongoing prosecution of Atlanta rapper Young Thug (Jeffery Williams). The intersection of hip-hop and criminal justice has led courts across the nation to develop their own theories about how to treat this art form. Scholarship on this subject demonstrates that the use of rap lyrics as evidence against rapper defendants is highly discriminatory. This Comment considers how using rap lyrics as evidence can create implicit bias, impact jury outcomes, and put constitutional and statutory rights at risk. Finally, this Comment considers modern attempts to reform this practice, highlighting state and federal legislation that would provide enhanced protection for artists.

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*For Jeffery Williams,
We do, in fact, owe you.*

INTRODUCTION

Grammy-award-winning artist Jeffery Lamar Williams (Young Thug) is one of the nation's most influential modern rappers and has played a crucial role in sustaining and elevating Atlanta's status as an economic and cultural force in the entertainment industry. Williams's 2014 track *Stoner* was dubbed a song of the decade by Billboard magazine,¹ and his record label Young Stoner Life (YSL) Records,² based in Atlanta, was acquired by Warner Music Group.³ Williams was also one of three writers on Donald Glover's (Childish Gambino's) landmark 2018 track *This Is America*, which has been used widely in various forms of social commentary to represent racial injustice and discrimination in America.⁴ The track won four Grammy Awards for Record of the Year, Song of the Year, Best Rap/Sung Performance, and Best Music Video.⁵

¹ Dan Rys, *Songs that Defined the Decade: Young Thug's 'Stoner,'* BILLBOARD (Nov. 21, 2019), <https://www.billboard.com/music/music-news/young-thug-stoner-songs-that-defined-the-decade-8544256>; see also Deena Zaru, *Young Thug Indictment Spotlights Controversial Use of Rap Lyrics as Evidence in Court*, ABC NEWS (May 24, 2022, 3:13 AM), <https://abcnews.go.com/US/young-thug-indictment-spotlights-controversial-rap-lyrics-evidence/story?id=84860405>.

² *Young Thug*, YOUNG STONER LIFE RECS., <https://www.youngstonerliferecords.com/young-thug.php> (last visited May 6, 2024).

³ Jem Aswad, *Warner Music Group Acquires 300 Entertainment, Home of Megan Thee Stallion, Young Thug and More*, VARIETY (Dec. 16, 2021, 8:50 AM), <https://variety.com/2021/music/news/warner-music-group-acquires-300-entertainment-megan-thee-stallion-1235134996>.

⁴ *2018 Grammy Winners*, GRAMMY AWARDS, <https://www.grammy.com/awards/61st-annual-grammy-awards-2018> (last visited May 6, 2024).

⁵ *Id.*

Williams was arrested in May 2022 along with 28 others in a 56-count grand jury indictment in Fulton County, Georgia.⁶ Authorities stated they arrested these individuals for their alleged membership in the Young Slime Life (YSL) “gang,” notably not referencing Williams’s company YSL Records.⁷ The YSL acronym has been used widely and frequently by Williams and affiliated artists interchangeably, the ‘S’ sometimes standing in for ‘slime’ and sometimes for ‘stoner.’⁸ However, the Fulton County indictment did not indicate awareness of the two versions and defaulted to a purely gang-related interpretation of YSL. ABC News reported that his “lyrics and images that made him distinctive in the rap world and beyond” had thus become “part of a criminal case that has sent shockwaves through the hip-hop community and sparked a debate about artistic freedom in rap music.”⁹ The indictment charged Williams with one count of conspiracy to violate Georgia’s Racketeer Influenced and Corrupt Organizations (RICO) Act under O.C.G.A. section 16-14-4(c) and one count of Participation in Criminal Street Gang Activity under O.C.G.A. section 16-15-4(d).¹⁰

Count one of the indictment, the RICO charge, alleges that Jeffery Williams, also known as Young Thug, conspired to violate Georgia’s RICO statute with other accused and unindicted co-conspirators between January 24, 2013, and May 8, 2022.¹¹ The indictment deemed YSL “an enterprise consisting of a group of individuals associated in fact although not a legal entity,” and a “criminal street gang . . . claim[ing] affiliation with the national Bloods gang.”¹² The indictment detailed ways YSL “associates” allegedly used identifiers like clothing, colors, tattoos, and hand signs publicly.¹³ Fulton County included Young Thug’s lyrics throughout the indictment as “evidence” of his relation to the crimes as charged. For example:

Defendant JEFFERY WILLIAMS, an associate of YSL, appeared in a video released on social media titled “Eww,” where Defendant states “Red just like Elmo but I never fuckin giggle,” “YSL won’t fold, pick his ass off from the balcony,” “YSL, wipe a n[***]a nose,” “I ma fuck for the cash then she getting robbed by Tick,” “In a Bentley on West Lee getting trailed by sniper,” “All I

⁶ Zaru, *supra* note 1.

⁷ *Id.*

⁸ See YOUNG STONER LIFE RECORDS, <https://www.youngstonerliferecords.com> (last visited May 21, 2024); Matthew Loh, *Young Thug’s Defense Lawyer Said His Name Stands for ‘Truly Humble Under God,’* BUS. INSIDER (Nov. 28, 2023, 9:36 PM), <https://www.businessinsider.com/young-thugs-name-stands-truly-humble-under-god-defense-lawyer-2023-11>.

⁹ Zaru, *supra* note 1.

¹⁰ Indictment at 10–11, 86, State v. Adams, No. 22SC182273 (Ga. Super. Ct. May 9, 2022), <https://www.documentcloud.org/documents/21974867-indictment-22sc182273>.

¹¹ *Id.* at 11.

¹² *Id.* at 12.

¹³ *Id.*

ever wanted was the money, put your hands in the air if you dare, any motherfucker to step over here, F&N put em in a wheel chair,” an overt act in furtherance of the conspiracy.¹⁴

The indictment stated that these lyrics were “an overt act in furtherance of the conspiracy.”¹⁵ Other lyrics rapped by Young Thug used to support the prosecution’s claims that the lyrics were an overt act in furtherance of the conspiracy included:

“I never killed anybody but I got something to do with that body,” “I told them to shoot a hundred rounds,” “ready for war like I’m Russia,” “I get all type of cash, I’m a general.”¹⁶

“I escaped every one of the licks cause I was supposed to be rich, I don’t care nothing bout no cop, I’m tellin you just how it is.”¹⁷

“I fuck with slatts and we come to eat rats and I came with some fuckin’ piranhas” “I tote an FN on me, call Neechie-Neech, it’s a Glock he keep” “Duke Rollin’ 60’s, he locked in C’s.”¹⁸

This Comment considers the use of rap lyrics as evidence in criminal proceedings and the discriminatory implications of these practices. First, it explores rap music, the presence of criminal justice themes in hip-hop, and judicial responses to this phenomenon. Second, the Comment discusses how and why using rap lyrics as evidence against rapper defendants is discriminatory. Discrimination in the form of implicit bias significantly impacts juries, and if left unchecked, can create constitutional and statutory issues for one of the most historically marginalized groups of Americans. In addition, this discrimination negatively impacts Black communities and erodes trust in the justice system.

Third, the Comment explores how lawmakers are addressing discrimination in criminal procedure from the use of rap lyrics as evidence. At the federal level, the Restoring Artistic Protection Act of 2022 (RAP Act) proposes to amend the Federal Rules of Evidence to provide greater protections for creative expression. At the state level, California and New York provide two examples of early movers in legislative and policy-based solutions targeting discrimination in criminal procedure. Fourth, the Comment uses the case study of Jeffery Williams to contextualize the issues and presents a case for Georgia to follow California and New York’s lead.

¹⁴ *Id.* at 15.

¹⁵ *Id.*

¹⁶ *Id.* at 33 (quoting *Anybody* by Young Thug feat. Nicki Minaj). The indictment itself does not mention Nicki Minaj’s role on the song.

¹⁷ *Id.* at 39 (quoting *Just How It Is* by Young Thug).

¹⁸ *Id.* at 47 (quoting *Ski* by Young Stoner Life, Young Thug, and Gunna).

I. BACKGROUND

A. *Rap Music*

With rap music comes:

fundamental notions of identity and purpose; creativity; practice in voicing opinions, emotions, and feelings; the opportunity to gain money and a fan-base; the opportunity to escape from bad times into rap music; venting; and more. Rap is viewed as the “great unifier of diverse populations.” It can give youth a sense of style and identity. It educates people on many social issues and does so in a way to give the listener many various perspectives. . . . [I]t garners support for awareness of social issues because rap music brings light to otherwise unheard issues. . . . [I]t serves as entertainment that people can listen, dance, and sing along to with a confidence and a feeling of escape Rap has even been used as a form of therapy.¹⁹

Rap music and race are inextricably linked, the genre being “created by Black artists, riffing off of Black music, telling stories about Black lives for primarily Black audiences.”²⁰ The genre has evolved from a “longstanding oral tradition of Black poetry and art,” into a form of music that “require[s] rappers to formulate their lyrics primarily for entertainment value rather than deliberate poetic intention.”²¹ Since hip-hop began in the 1970s in the South Bronx, “artists have used their music to highlight, critique, and discuss the social, political, and cultural realities of contemporary Black issues while also . . . describ[ing] and challeng[ing] the American criminal justice system as racially biased and inequitable.”²²

Of particular importance for the evolution of rap music was the gangsta rap era where rappers began utilizing hip-hop “to discuss socio-political issues that affected their communities.”²³ The era saw the “East Coast–West Coast’ feud,” the rise of tension-inducing diss tracks, and the murders of Tupac Shakur and The Notorious B.I.G.²⁴ In 1992, the release of Body Count’s *Cop Killer* prompted the parent company of Body Count’s record label “to halt its sponsorship of the album, while then-President George H.W. Bush angrily denounced the record as ‘sick’ for glorifying

¹⁹ Ryan J. Bennett, *Rappers’ Rhymes Are Not Admissions to Crimes: Eliminating the Unlawful Use of Rap Lyrics Against Rappers in Criminal Proceedings*, 48 OHIO N.U. L. REV. 1, 13–14 (2021) (footnotes omitted).

²⁰ Reyna Araibi, Note, “Every Rhyme I Write”: *Rap Music as Evidence in Criminal Trials*, 62 ARIZ. L. REV. 805, 811 (2020).

²¹ Vidhaath Sripathi, Note, *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. GENDER, RACE & JUST. 207, 212 (2021).

²² Taifha Natalee Alexander, *Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement*, 12 HARV. J. SPORTS & ENT. L. 211, 213–14 (2021).

²³ Sripathi, *supra* note 21, at 210.

²⁴ *Id.* at 213–14.

the killing of law enforcement officers.”²⁵ Oliver North “vowed to seek criminal charges against Time-Warner for its distribution of the song,” and “sixty members of Congress sent a letter to Time-Warner urging the company to halt distribution of the record, while groups like the International Brotherhood of Police Officers aimed to file suit against Ice-T . . . for advocating for violence against law enforcement.”²⁶ Legal efforts to silence rap artists also included the successful campaign to add parental advisory labels to records and a surge of obscenity lawsuits, including “over 200 albums [that] faced . . . obscenity litigation in 1992.”²⁷ Immense controversy washed over hip-hop, and “the backlash against rap music was enough to create a cultural image of hip-hop as criminal and violent.”²⁸ Regardless of the rise and popularity of hip-hop or its current standing as the most consumed music genre in America, rap music “is still associated with the images of criminality and violence that were cultivated throughout its rise in popular culture.”²⁹

By 2021, hip-hop held a 33.9% share of music listening in America despite strong opposition and attempts at censorship.³⁰ Its popularity is matched by its economic contribution, estimated to provide billions of dollars to the national economy.³¹ The continued evolution of the genre has furthered its popularity and global demand. In Young Thug’s case, this evolution has meant “sound and atmosphere over lyrical intelligibility,” with lyrics that “feel ad hoc, adlibbed, absurdist, Dadaist, insular, [and] indulgent.”³² The lyrics are not meant “*to be read and unpacked as text*. . . . [the] music is meant to be *heard*, danced to, inspired by, meditated on, enjoyed, etc., but not necessarily *studied* using the traditional tools of legal interpretation.”³³ Andrew Kerr’s *Aesthetic Play and Bad Intent* describes the conflict between this lyrical rule of rap and courts, where “[t]he written word is the beginning and end of legal practice.”³⁴ Kerr’s critical point is that “rap becomes art *only when rapped by a rapper*. . . . [T]he potential art value of a rap song depends on hearing its audio recording and is informed by the identity of the rapper and . . . we cannot discern whether a rap lyric is art or bad art/non-art simply by reading it.”³⁵

²⁵ *Id.* at 215.

²⁶ *Id.*

²⁷ *Id.* at 216.

²⁸ *Id.* at 210.

²⁹ *Id.*

³⁰ *Id.* at 216–17.

³¹ PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 124–25 (2009).

³² Andrew J. Kerr, *Aesthetic Play and Bad Intent*, 103 MINN. L. REV. HEADNOTES 83, 91 (2018).

³³ *Id.* at 91–92.

³⁴ *Id.* at 92.

³⁵ *Id.* at 94.

Rap music, including Young Thug's, has generated rich scholarship and study. For example, Brie McLemore and Margaret Eby's piece *Abolition as Reparations: "This Is America" and the Anatomy of a Modern Protest Anthem* asserts that *This Is America* co-writers Donald Glover (Childish Gambino), Ludwig Göransson, and Jeffery Williams and "content creators who appropriate[d] the song as a protest anthem . . . utilized the power of social media to integrate this framing into the broader conversation of racial justice as a human rights issue, both specific to America and cognizant of the global demand for the dismantling of white supremacy."³⁶ McLemore and Eby focus in part on the song's references to reparations in Young Thug's final verse of the song: "America, I just checked my following list, and/You go tell somebody/You mothafuckas owe me."³⁷

For the authors, this line carries multiple meanings. It may beckon "to 'Forty Acres and a Mule (as established by the Special Field Orders, No. 15 in 1865),' which was promised to former slaves yet never delivered upon."³⁸ It alternatively may suggest "the debt owed for distracting Americans from unmasking the violence that serves to obfuscate the machinations of the white supremacist state," or it may be providing "an important social commentary on the contradictory role of Black artists and the cultural phenomena they have cultivated on social media."³⁹ They also suggest the lyrics may be inward facing, an acknowledgment by Williams of his fame and associated social media presence as "a distraction from state-sanctioned anti-Blackness or perhaps evidence of the false assumption of Black progress in America."⁴⁰ Young Thug is one example amidst dozens of rappers who have sparked similarly deep, meaningful discussion on what it means to be Black in America, in the criminal justice system, and in modern society. The study of rap and its lyrics is fluid and sparks a wide range of reactions based on the nature of the music and its constant process of evolution. One characteristic that does not fit into the practice and study of rap, however, is the literal interpretation of lyrics.

B. *Criminal Justice and Hip-Hop*

Rap is both admired and condemned for themes expressed in its lyrics. . . . It has proven a veritable soapbox, providing social commentary about the day-to-day struggle of those living on the fringes of society, while also being a source of great controversy for mainstream society with its provocative lyrics. While music is generally a metaphoric mixture of real-life experiences and

³⁶ Brie McLemore & Margaret Eby, *Abolition as Reparations: "This Is America" and the Anatomy of a Modern Protest Anthem*, in *FIGHT THE POWER: LAW AND POLICY THROUGH HIP-HOP SONGS* 251, 252 (Gregory S. Parks & Frank Rudy Cooper eds., 2022).

³⁷ *Id.* at 253.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 255.

creative storytelling, rap lyrics have been weaponized as damning evidence in trials against musicians—rappers in particular.⁴¹

The hip-hop world and criminal justice system intersect with almost seamless regularity. In the 1990s, an estimated “one in three young black men were under criminal justice supervision. An African American man born in 1991 ha[d] a 29 percent chance of being imprisoned, compared with . . . a 4 percent chance for a white man.”⁴² In 2004, the cover of *Source* magazine featured mug shots of ten rappers who were incarcerated or awaiting trial with the caption, “Hip-Hop Behind Bars: Are Rappers the New Target of America’s Criminal Justice System?”⁴³ Paul Butler’s *Let’s Get Free: A Hip-Hop Theory of Justice* asks the question, “[w]hat happens when many of the leaders of popular culture are arrested and incarcerated?” while pointing out that “[b]oth the New York and Miami Police Departments have acknowledged targeting hip-hop artists.”⁴⁴ In response to mass incarceration, rappers and hip-hop artists have explored the meaning of crime and punishment through their music, depicting prison as “a placement center for the undereducated, the unemployed, and, especially, aspiring capitalists who, if not locked up, would successfully challenge elites.”⁴⁵ Butler’s point regarding the perception in hip-hop that government and elites have sought ways to put Black men in prison, particularly those rising in financial success, has been a regular theme in the genre.⁴⁶

Butler also considers “[h]ip-hop’s indictment of criminal justice . . . identifi[ying] bias in the way that crime is defined as well as the way that the law is enforced,” the “lack of confidence in [the] criminal justice” system reflected in rap music, and the idea that “incarceration [is] being driven by profit rather than public safety.”⁴⁷ Butler compares the hip-hop perspective to Immanuel Kant and his “concern that it is immoral to punish people as a means of benefiting society.”⁴⁸ His discussion covers the vast and varied depths of hip-hop and its influence in educating listeners about the criminal justice system through its music.

⁴¹ 194 AM. JUR. PROOF OF FACTS 3D 169 § 1 (2023) [hereinafter AM. JUR. POF 3D] (quoting Dre’Kevius O. Huff, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 335 (2018)).

⁴² BUTLER, *supra* note 31, at 130.

⁴³ *Id.* (citing *Hip-Hop Behind Bars: Are Rappers the New Target of America’s Criminal Justice System?*, SOURCE MAG., Mar. 2004, cover).

⁴⁴ *Id.*

⁴⁵ *Id.* at 130–31.

⁴⁶ See, e.g., RUN THE JEWELS, *JU\$T*, on RTJ4 (Jewel Runners LLC 2020) (Atlanta-based rappers Killer Mike and Pharrell Williams rap, “[l]ook at all these slave masters (Ayy) posin’ on yo’ dollar,” “Every time on my grind, I’m just tryna shine (Stay sunny) / Make a dollar, government, they want a dozen dimes (No cap) / The petty kind / might kill ya ‘cause they see you shine . . .”).

⁴⁷ BUTLER, *supra* note 31, at 139–40, 143.

⁴⁸ *Id.* at 143.

Aside from Butler's pathbreaking work, criminal justice and rap have generated wide-ranging analysis. To name a few recent publications: *Hip Hop and the Law*, edited by Pamela Bridgewater (American University Washington College of Law), andré douglas pond cummings (Indiana Tech Law School), and Donald F. Tibbs (Thomas R. Kline School of Law, Drexel University);⁴⁹ and *Fight the Power: Law and Policy Through Hip-Hop Songs*, edited by Gregory S. Parks (Wake Forest University) and Frank Rudy Cooper (University of Nevada, Las Vegas William S. Boyd School of Law).⁵⁰ Articles in *Hip Hop and the Law* include, for example: *Hip Hop Prosecutors Heed the Call for Criminal Justice Reform*,⁵¹ *Thug Life: Hip Hop's Curious Relationship with Criminal Justice*,⁵² and *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*.⁵³ Rap's presence is well-established in mainstream society and increasingly so in the law.

C. Rap in Criminal Trials

Rap lyrics as evidence are often governed by separate and specific rules from other forms of art, and "[c]ourts across the country have found rap lyrics . . . to be relevant evidence in criminal trials Rap lyrics are properly admitted when they are relevant and their probative value is not substantially outweighed by the danger of unfair prejudice."⁵⁴ Rap lyrics have been used in over 500 criminal trials in the United States, the most common use being "during the guilt phase to show evidence of confession, knowledge, motive, or intent [and] when demonstrations of remorse and rehabilitation are crucial, prosecutors have used rap music to 'portray rappers as dangers to their communities.'"⁵⁵

One example of a state making special rules for rap lyrics is Arkansas's Criminal Trial Handbook for Lawyers section 92:36 on "Rap lyrics." The handbook states that "[r]ap lyrics which are relevant to the crime on trial can be admissible to show

⁴⁹ HIP HOP AND THE LAW (Pamela Bridgewater, andré douglas pond cummings & Donald F. Tibbs eds., 2015).

⁵⁰ FIGHT THE POWER: LAW AND POLICY THROUGH HIP-HOP SONGS (Gregory S. Parks & Frank Rudy Cooper eds., 2022).

⁵¹ Carla D. Pratt, *Hip Hop Prosecutors Heed the Call for Criminal Justice Reform*, in HIP HOP AND THE LAW, *supra* note 49, at 87.

⁵² andré douglas pond cummings, *Thug Life: Hip-Hop's Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515 (2010), *reprinted in* HIP HOP AND THE LAW, *supra* note 49, at 37.

⁵³ Andrea Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007), *reprinted in* HIP HOP AND THE LAW, *supra* note 49, at 61.

⁵⁴ Jason B. Binimow, Annotation, *Admissibility of Rap Lyrics or Videos in Criminal Prosecutions*, 43 A.L.R. 7th Art. 1 § 1 (2019).

⁵⁵ Araibi, *supra* note 20, at 808 (quoting Briana Younger, *The Controversial Use of Rap Lyrics as Evidence*, NEW YORKER (Sept. 20, 2019), <https://www.newyorker.com/culture/culture-desk/the-controversial-use-of-rap-lyrics-as-evidence>).

intent.”⁵⁶ Arkansas’s Trial Handbook does not mention any other genre of music lyrics. Maryland’s Evidence Code section 403:9 on “A party’s reading and listening material or composition; rap lyrics” states that the debate is still ongoing about whether lyrics someone composes should be admissible as evidence when inflammatory.⁵⁷ Yet the Code clarifies that Maryland’s Rule 5-404, which provides exceptions for allowing admissibility of character evidence to prove conduct, has been used to enable the admissibility of rap lyrics if the court finds that the evidence has “the special relevance needed to make it admissible . . . to prove identity, intent, or knowledge.”⁵⁸ The Code distinguishes “inadmissible works of fiction from possibly admissible autobiographical statements of historical fact.”⁵⁹ The Code, like Arkansas’s Trial Handbook, does not explicitly mention other genres of music lyrics aside from rap.

In “*Every Rhyme I Write*”: *Rap Music as Evidence in Criminal Trials*, Reyna Araibi notes that such regulatory and prosecutorial practices are “almost exclusive to rap music. There has only been one documented case where prosecutors used defendant-authored lyrics from another genre in a similar manner.”⁶⁰ While some higher courts have scolded trial judges for admitting rap lyrics as evidence with a weak connection to the defendant or issue, “[c]ourts across the country have found rap lyrics . . . to be relevant evidence in trials based on the content of the evidence and the issues.”⁶¹ Rappers, criminal justice reform advocates, social scientists, and critical race scholars have critiqued this approach.⁶² Yet, “[t]he prosecutorial tactic of admitting a defendant’s rap lyrics into the criminal adjudicatory process is not novel. Rap lyrics authored by criminal defendants have been admitted into evidence against their authors for roughly as long as gangsta rap has been in prominence.”⁶³

Criminal proceedings have included rap lyrics since the early days of gangsta rap, but recently courts have begun allowing “rap lyrics to be introduced into evidence against criminal defendants to prove that the[y] . . . committed or intended to commit the crime, and even to demonstrate the defendant’s ‘bad character.’”⁶⁴ In some cases, judges will likely fail to recognize if a rapper’s lyrics are actually true.⁶⁵ The widely quoted comparison from the New Jersey Supreme Court case *State v.*

⁵⁶ JOHN WESLEY HALL, JR., 3A TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 92:36 (4th ed. 2023).

⁵⁷ Lynn McLain, 5 MARYLAND EVIDENCE, STATE & FEDERAL ch. 4 § 403:9 (2023).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Araibi, *supra* note 20, at 808.

⁶¹ AM. JUR. POF 3D, *supra* note 41, § 1.

⁶² Araibi, *supra* note 20, at 808–09.

⁶³ Alexander, *supra* note 22, at 222.

⁶⁴ *Id.*

⁶⁵ *Id.*

Skinner is that “[f]ew would argue that Bob Marley actually ‘shot the sheriff,’ or that Johnny Cash really ‘shot a man in Reno just to watch him die.’”⁶⁶ Here, Taifha Natalee Alexander argues that when prosecutors fail to see these lyrics as a “reflection of fictional stories that the artist deems aesthetically pleasing or appealing to hip-hop consumers,” the treatment noticeably departs from the Bob Marley and Johnny Cash examples and fundamentally fails to understand what rap lyrics are.⁶⁷ The *Skinner* Court “acknowledged the artistic value of the lyrics and rejected the notion that they should be interpreted literally,” rejecting the trial court’s admission of the rap lyrics as evidence at trial.⁶⁸

D. Judicial Response

Various “[a]ppellate courts have admonished trial judges against admitting rap . . . lyrics with merely a tenuous connection to the defendant or issues in the case.”⁶⁹ Courts have addressed issues of evidentiary objections in this area, including relevance, prejudice, hearsay exceptions, character evidence, and authentication.⁷⁰ Yet, approaches vary widely regarding the rules governing the admissibility of rap lyrics. For example, “[s]ome federal circuits and state courts have adopted the inclusionary approach to Rule 404(b) and have admitted rap lyrics as character evidence. . . . if it can be used to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.’”⁷¹ Other courts “only require that the lyrics and the alleged crime are ‘sufficiently similar’ to admit the character evidence, which requires a lower burden of proof to invoke Rule 404(b).”⁷² In Michigan, for example, the precedent is to admit rap lyrics “as an opposing party’s statement made in an individual capacity,” and “rap lyrics were not even in the scope of Rule 404(b). . . . rap lyrics should be considered written statements and thus not ‘acts’ at all.”⁷³

However, courts in states like New Jersey, Illinois, and South Carolina use an approach that requires “a strong nexus between the rap lyrics and the alleged crime to avoid exclusion under Rule 403” because “if the connection between the specific crime and the lyrics is too attenuated, then it offers little probative value.”⁷⁴ Some of these courts “have found the danger of unfair prejudice substantial enough to

⁶⁶ *Id.* at 231–32.

⁶⁷ *Id.* at 232.

⁶⁸ Sripathi, *supra* note 21, at 225; *see also* State v. Skinner, 95 A.3d 236, 249–52 (N.J. 2014).

⁶⁹ Binimow, *supra* note 54, § 1.

⁷⁰ *Id.* § 2.

⁷¹ Sripathi, *supra* note 21, at 223 (quoting FED. R. EVID. 404(b)).

⁷² *Id.* at 223–24.

⁷³ *Id.* at 224–25.

⁷⁴ *Id.* at 224.

exclude rap lyrics as character evidence.”⁷⁵ *Skinner*, the New Jersey case mentioned in the previous Section where the court recognized the artistic value of rap lyrics and rejected their literal interpretation and their admission at trial, “followed the exclusionary interpretation of Rule 404(b) and articulated a heightened standard for character evidence: requiring a ‘direct connection’ between the lyrics and the crime in question.”⁷⁶ The *Skinner* approach has been popular because “[t]he ‘direct connection’ requirement effectively limits the admissibility of rap lyrics as character evidence, but allows for situations where the lyrics are clear proof of intent or motive for a specific crime.”⁷⁷

Although the Supreme Court denied certiorari to *Knox v. Pennsylvania*,⁷⁸ a case about the use of rap lyrics in criminal trials, rappers Chance the Rapper, Meek Mill, Killer Mike, Yo Gotti, Fat Joe, and 21 Savage filed an amicus brief in the Supreme Court⁷⁹ urging the justices “to hear their fellow rapper’s First Amendment challenge to his conviction.”⁸⁰ The rappers provided the justices with “intricate breakdowns of the lyrics that were condemned as ‘terrorist threats.’”⁸¹ They urged the justices to consider the unique characteristics of rap lyrics and hip-hop and warned that many have mistaken rap lyrics as truth at face value.⁸² The rappers were referring to, for example, the Pennsylvania Supreme Court, which wrote in the majority opinion in *Knox* that “the song’s lyrics express[ed] hatred toward the Pittsburgh police [and] contain[ed] descriptions of killing police informants and police officers . . . They do not include political, social or academic commentary, nor are they facially satirical or ironic.”⁸³ Mr. Knox’s lawyer commented on rap music’s propensity to be misunderstood, stating:

While famous rappers like Eminem win Grammy Awards and make millions off the violent imagery in their songs, judges and juries are routinely convinced that lesser-known rap artists are somehow living out their lyrics as rhymed autobiography. . . . It’s an alarming trend, often with devastating

⁷⁵ *Id.*

⁷⁶ *Id.* at 225 (quoting *State v. Skinner*, 95 A.3d 236, 253 (N.J. 2014)).

⁷⁷ *Id.* at 226.

⁷⁸ *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019) (mem), *denying cert. to* 190 A.3d 1146 (Pa. 2018).

⁷⁹ Motion for Leave to File Brief as Amici Curiae and Brief of Amici Curiae Michael Render (“Killer Mike”), Erik Nielson, and Other Artists and Scholars in Support of Petitioner at 1–2, *Knox v. Pennsylvania*, 139 S. Ct. 1547 (2019) (No. 18-949), 2019 WL 1115837, at 1–2.

⁸⁰ Adam Liptak, *Hip-Hop Artists Give the Supreme Court a Primer on Rap Music*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/supreme-court-rap-music.html>.

⁸¹ Noah Yoo, *Chance, Killer Mike, Meek Mill File Legal Brief in Supreme Court Case on Rap Lyrics*, PITCHFORK (Mar. 6, 2019), <https://pitchfork.com/news/chance-killer-mike-meek-mill-file-legal-brief-in-supreme-court-case-on-rap-lyrics>.

⁸² Liptak, *supra* note 80.

⁸³ *Commonwealth v. Knox*, 190 A.3d 1146, 1149, 1158 (Pa. 2018).

consequences for the young men of color who are almost always targeted in these cases.⁸⁴

II. DISCRIMINATION

A. Lyrics

Rap lyrics educate listeners about a variety of social issues and perspectives. Lyrics range from raw, vulgar, and violent to honest, searing, and unintelligible yet joy-inducing. Unfortunately, “[c]ourts have either forgotten or ignored that rap is a form of artistic expression . . . with a beneficial avenue for many people in the world.”⁸⁵ While lyrics have been admitted as evidence against rappers in criminal trials in at least 500 documented cases, scholars believe this number is low. It is likely fact-finders have considered lyrics in far more trials than that.⁸⁶ In about 95% of the cases using rap lyrics as evidence in criminal trials, “the defendant is a young black or Latino man with a local fan base, if any fan base at all.”⁸⁷ Statistically speaking, it’s fair to advise Black male rappers that their lyrics may at some point be used as evidence against them during criminal trials, “because [their] lyrics are not being admitted against [them] fairly and with the right factors in mind.”⁸⁸

One of the critical lessons from criminal justice and hip-hop studies is that “[v]iewing rap lyrics in their proper context is vital,” and while lyrics may be “provocative, violent, and profane, [they] do not actually communicate true threats,” a complicated truth that “the judiciary has repeatedly ignored.”⁸⁹ Rather than examining specific lyrics on a case-by-case basis to see whether the lyrics share a close nexus with the alleged crime, the judiciary largely assumes rap lyrics are true threats rather than a highly contextualized artistic expression.⁹⁰ Another key lesson is that this phenomenon uniquely targets rap. While other genres, like country music, “echo similar themes of violence . . . reactions have not included the prosecution of these artists.”⁹¹ This is a problem because many Americans are “unfamiliar with hip hop culture [and] may have difficulty being reasonable when it comes to rap music because it often primes enduring stereotypes about the criminality of young Black

⁸⁴ Liptak, *supra* note 80.

⁸⁵ Bennett, *supra* note 19, at 34.

⁸⁶ *Id.* at 33.

⁸⁷ *Id.* (quoting Marmstr3, *Arachnophobia: Rap on Trial*, LISTENING IN (Feb. 18, 2020), <https://blog.richmond.edu/parsons/2020/02/arachnophobia-rap-on-trial>).

⁸⁸ *Id.* at 33–34.

⁸⁹ Austin Vining, *Rap as a Proxy for Blackness: How the Prosecution of Rap Lyrics Continues to Unconstitutionally Restrict Free Speech Rights*, 31 U. FLA. J.L. & PUB. POL’Y 77, 90 (2020).

⁹⁰ Huff, *supra* note 41, at 337–38.

⁹¹ Vining, *supra* note 89, at 90.

men, its primary creators.”⁹² The issue is that courts are ill-equipped to accurately consider “the impact of implicit racial bias when allowing rap lyrics to be used in an effort to convict.”⁹³

B. *Implicit Bias*

“Rap music’s role as a Black artform, combined with deeply held racial stereotypes linking Black people to criminality, create a hard-to-shake perception that rap music (and the artists behind it) inherently condone or engage in criminal behavior.”⁹⁴

The *American Jurisprudence Proof of Facts* states that “[r]ap lyrics and videos may reflect a racial bias against a defendant to jurors or others, and therefore should be excluded from evidence.”⁹⁵ Further, they confirm that courts generally do not consider the relationship between rap music and racial bias, and by “routinely admitting rap lyrics in criminal trials, courts are likely reinforcing negative stereotypes by confirming the biased assumption that people who write rap music are probably criminals.”⁹⁶ The volume summarizes the issue by quoting Reyna Araibi’s work:

The deep connection between rap and race continues to inform how society perceives rap music and its artists. . . . [S]ocial psychologists have observed the distinct prejudicial impact that rap has on the way that people implicitly judge rap artists as violent criminals. . . . [R]ap is judged harshly because it is viewed through the lens of racial stereotypes. The relationship between rap and implicit racial bias is particularly concerning in the criminal context in which juries are asked to assess the guilt of a rap artist who is commonly a person of color.⁹⁷

Rap’s standing as the most consumed music genre in America is mirrored by studies that show, for example, that “more than 70% of Americans held a negative assessment of rap music and believed the music had a ‘bad’ impact on society,” or that “68% of Americans gave rap music an ‘unfavorable’ rating while every other genre . . . received largely ‘favorable’ ratings.”⁹⁸ Implicit bias gives us a better understanding when addressing the question of why rap music is singled out, both judicially and culturally, for being violent and “bad” when other forms of violent media

⁹² *Id.* at 91.

⁹³ Araibi, *supra* note 20, at 838.

⁹⁴ Sripathi, *supra* note 21, at 218.

⁹⁵ AM. JUR. POF 3D, *supra* note 41, § 2.

⁹⁶ *Id.* § 3 (quoting Araibi, *supra* note 20, at 835).

⁹⁷ *Id.* (quoting Araibi, *supra* note 20, at 805).

⁹⁸ Sripathi, *supra* note 21, at 218.

like “books, movies, and video games are free from this criticism because their content, the *same* content, is viewed as innocuous.”⁹⁹ While the New Jersey Supreme Court brought implicit bias into the conversation in *Skinner*,¹⁰⁰ for the most part, prosecutors and judges who allow rap lyrics as evidence in criminal trials “contribute to the disproportionate mass incarceration of Black men in the American criminal justice system.”¹⁰¹

Researchers have conducted studies on this topic for over three decades, seeking quantitative statistics on the impact of implicit bias when juries and judges are asked to judge rappers and their lyrics.¹⁰² While these studies are worth reading in their entirety, some of the key findings include the following:

- Generally, people “associate rap with criminality and violence more than any other genre. . . . [and] are significantly more likely to believe that rap artists are capable of committing murder.”¹⁰³
- Generally, people “tend to look at rap lyrics in a more negative light than they would if the lyrics were from a country, punk rock, or even heavy metal song. . . . because most jurors would believe that the rap lyrics were literal admissions of guilt, misleading them to believe that the case before them is less complicated than it is.”¹⁰⁴
- Rap lyrics “are significantly more likely to be perceived as dangerous and offensive.”¹⁰⁵
- Lyrics presented as rap lyrics are “judged significantly more negatively than when . . . White subjects thought the same lyrics were attributed to a predominately White genre, like folk or country music.”¹⁰⁶
- Generally, people believe rap lyrics are more literal than lyrics from other music genres.¹⁰⁷
- Rap lyrics may drastically alter people’s judgments, and people are “more likely to attribute negative character traits to [a] young man after reading his lyrics.”¹⁰⁸

⁹⁹ Huff, *supra* note 41, at 365.

¹⁰⁰ State v. Skinner, 95 A.3d. 236, 251–52 (N.J. 2014).

¹⁰¹ Alexander, *supra* note 22, at 214.

¹⁰² Araibi, *supra* note 20, at 809.

¹⁰³ *Id.*

¹⁰⁴ Bennett, *supra* note 19, at 23.

¹⁰⁵ Vining, *supra* note 89, at 91.

¹⁰⁶ Alexander, *supra* note 22, at 227.

¹⁰⁷ Araibi, *supra* note 20, at 820.

¹⁰⁸ *Id.* at 820–22.

- Generally, people are more positive about defendants accused of murder than defendants who are rappers and are not charged with murder, “suggesting that people view being a rap artist as worse than potentially committing murder.”¹⁰⁹

Discrimination and implicit bias in criminal justice against Black people are well-documented. Policing, traffic stops, and mass incarceration have garnered national attention for the impact of racial bias. Discrimination does not stop when formal criminal proceedings commence. Black people “are more likely to be detained pending trial due to high-set bails,” “are sentenced to longer sentences than similarly situated White defendants,” and studies have shown that prosecutorial implicit bias “can negatively influence prosecutorial discretion and lead to decisions that disproportionately impact Black people more than their White counterparts.”¹¹⁰ Given rap’s position in American culture, listeners of rap in America are:

inundated with lyrics that boast of Black men being savages, . . . ‘f—k[ing] b—ches’ and ‘getting money,’ but are not exposed to Black men at school or in their neighborhoods who are not dealing drugs or disrespecting women. . . . [T]he stereotype of the Black man as a deviant permeates . . . society and contributes to the negative perception that juries and criminal justice officials have of Black men, resulting in the group’s mass incarceration.¹¹¹

Thus, when asked to evaluate a rapper’s alleged crime or criminality, people are generally predisposed to carry negative stereotypes of their aptitude for crime and danger. This is untenable for a nation claiming to provide equal protection and justice under the law.

C. *Impact on Juries*

[T]he unconscious understanding of rap music remains underpinned by notions of race and racial stereotypes about who criminals are, what they look like, and where they come from. . . . Although jury trials in the United States have never been free of racial bias, courts continue to strive toward this goal. . . . A jury influenced by racial bias is so repugnant to our notions of justice that any practice that risks such an outcome requires further examination.¹¹²

¹⁰⁹ *Id.* at 822.

¹¹⁰ Alexander, *supra* note 22, at 226.

¹¹¹ *Id.* at 227–28 (alteration in original) (citations omitted).

¹¹² Araibi, *supra* note 20, at 810.

Utilizing rap lyrics to prove criminal intent or motive inherently leverages stereotypes “to curry disfavor among juries and lead them to strictly interpret rap lyrics—without regard for metaphorical or poetic intention.”¹¹³ Rap lyrics are not designed to be interpreted literally, and by presenting these lyrics as literal, factual statements made by rapper defendants, prosecutors disproportionately harm Black defendants.¹¹⁴ Ryan Bennett compares the art form to comedy, explaining that, like rappers, comedians “exaggerate or embellish stories,” blending truth and fiction to heighten their persona and the impact their art has on their audience.¹¹⁵ It is frankly incorrect to lead jurors to believe that “rap lyrics are literal admissions of guilt,” both because rap lyrics are not a form of literal art and because of the well-documented presence of implicit bias harming outcomes for Black criminal defendants.¹¹⁶

In *United States v. Mills*, a Michigan district court judge commented on the use of rap music in a rapper’s criminal racketeering case, stating that because rap music is now mainstream, “it [is] highly unlikely that any reasonable juror nowadays could conclude that [defendant] is guilty . . . merely because the rap songs contain potentially offensive themes.”¹¹⁷ This is an incorrect assumption. Because rap music is heavily stigmatized, context is critical in interpreting lyrics, yet “most courts and juries do not have the requisite familiarity with rap music” to accomplish this level of understanding.¹¹⁸ Trial courts must begin to seriously consider the risk of juror bias when determining whether or not to admit rap lyrics as evidence.

It is clear that rap lyrics as evidence cannot be confined to a generalized conversation about the rules of evidence. Because of the impact of implicit bias on jurors, admission of rap lyrics “can severely compromise a defendant’s constitutional right to a fair trial by an impartial jury, something the defendant may not be able to remedy on appeal.”¹¹⁹ The resulting scenario may mean that for Black male rap artists in criminal proceedings, jurors are influenced unconsciously by implicit racial bias and prejudice triggered by rap lyrics, negatively affecting the verdict.¹²⁰

D. First Amendment

“When courts admit unfairly prejudicial rap lyrics into evidence (which jurors examine for a literal admission of guilt), the courts also criminalize obviously

¹¹³ Sripathi, *supra* note 21, at 218–19.

¹¹⁴ *Id.* at 234–35.

¹¹⁵ Bennett, *supra* note 19, at 24.

¹¹⁶ *Id.* at 23–25.

¹¹⁷ *United States v. Mills*, 367 F. Supp. 3d 664, 672 (E.D. Mich. 2019) (citing *United States v. Stuckey*, 253 F. App’x 468, 484 (6th Cir. 2007)); *see also* Bennett, *supra* note 19, at 25.

¹¹⁸ Vining, *supra* note 89, at 86.

¹¹⁹ Araibi, *supra* note 20, at 836.

¹²⁰ *Id.* at 810.

false or exaggerated statements against rappers who never intended to communicate a *serious* threat because rap is often violent, explicit, and hyperbolic.”¹²¹

First Amendment concerns relating to the use of rap lyrics in criminal trials have inspired as much, if not more, scholarship as the evidentiary issues. However, First Amendment arguments do not appear to be the most strategic path ahead to protect rappers from the discriminatory use of their lyrics as evidence in criminal trials.

Music, as a form of artistic expression, is generally protected speech under the First Amendment of the United States Constitution.¹²² This affords the basic protection for artists to write lyrics and make songs public unless in a category of unprotected speech like a true threat, or now seemingly also as evidence of an admission of guilt. Art often conveys complex and abstract ideas that are prone to varying interpretations based on a particular audience. It is legally problematic to treat art as a definitive admission of guilt without considering the broader context and the artist’s intended message. Art should typically only be admissible as evidence of an admission of guilt under limited evidentiary conditions. The speech would have to be voluntary, and it would have to be interpreted based on its intent, context, and potential ambiguities. In the context of rap lyrics, the court should theoretically examine the speech, the intent of the rapper in writing the lyrics, the context in which the rapper wrote the lyrics, and potential ambiguities that could result from varying interpretations of the lyrics.

First Amendment principles are important here because they ask fundamentally different questions than do the rules of evidence. The rules of evidence generally look at the evidence itself and whether it is relevant to the case or is unfairly prejudicial to the defendant.¹²³ But First Amendment principles ask for an analysis of the speech’s intent, in its given context, and considered against potential ambiguities in interpretation.¹²⁴ This analysis actually seeks to understand the speech—what was a rapper’s intent when writing specific lyrics, what was the context in which they were written, and what ambiguities may result from an interpretation by a judge or jury who has little to no exposure to rap music. A court may interpret hyperbolic lyrics about violence not as artistic expression but as a threat or admission, or they may interpret disturbing or vivid storytelling in lyrics as accurate reflections of the rapper’s experience.

There are, of course, instances where rap lyrics may be justifiably admitted as evidence, for example, if the lyrics are suspiciously reflective of the alleged crime in question or if the speech is considered a true threat. A true threat is speech ““where

¹²¹ Bennett, *supra* note 19, at 30.

¹²² Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

¹²³ FED. R. EVID. 403.

¹²⁴ Commonwealth v. Knox, 190 A.3d 1146, 1158, 1166–67 (Pa. 2018).

the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group' . . . though the speaker 'need not actually intend to carry out the threat.'¹²⁵ Justice Thomas provided a definition of true threats in his dissenting opinion in *Elonis v. United States*, stating that to be a true threat, "a communication must be a serious expression of an intention to commit unlawful physical violence, not merely 'political hyperbole'; 'vehement, caustic, and sometimes unpleasantly sharp attacks'; or 'vituperative, abusive, and inexact' statements."¹²⁶ While this standard may seem high at first and unlikely to be met in most circumstances, Justice Alito's partial concurrence reflected an unfortunately common interpretation of rap music, implying that it would be unwise to allow real threats to be disguised as rap lyrics or parody.¹²⁷

Elonis has caused concern for speech advocates, the hip-hop community, and the entertainment industry in light of Justice Alito's perception of rap lyrics as true threats versus as protected expressive speech. Because there are cases where it is appropriate to admit rap lyrics as evidence, it is imperative that judges and justices have the knowledge and ability to interpret lyrics and differentiate art from an actual admission or a true threat. For example, if lyrics "parallel the details of the crime the rapper is charged with so closely that there is a reasonable likelihood that the author was involved in the crime, they should be admitted."¹²⁸ But admitting lyrics as evidence "that are not literal admissions of guilt" is a potential violation of "rappers' First Amendment right to free speech" and a failure to protect artistic expression.¹²⁹

Informative and entertaining speech are both protected by the First Amendment.¹³⁰ Rappers entertain and titillate audiences, but they also educate and inform the public about serious issues facing marginalized communities. Because the line between entertainment and education is elusive in rap music, "rap should be [constitutionally] protected . . . and not admitted for literal admissions of guilt in most cases."¹³¹ As Justice Thomas suggested in *Elonis*, speech that is merely politically hyperbolic, vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact cannot be considered a true threat unless it is a serious expression of an intention to or admission of the commission of unlawful physical violence. So what does it mean if rap lyrics are admitted as evidence based on the idea that they are an admission of guilt or are a true threat without conducting an actual true threat analysis? Is it

¹²⁵ *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 746 (9th Cir. 2021) (quoting *Virginia v. Black*, 538 U.S. 343, 359–60 (2003)).

¹²⁶ *Elonis v. United States*, 575 U.S. 723, 751 (2015) (Thomas, J., dissenting) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

¹²⁷ *Elonis*, 575 U.S. at 747 (Alito, J., concurring in part).

¹²⁸ Bennett, *supra* note 19, at 33.

¹²⁹ *Id.* at 2.

¹³⁰ *Id.* at 32.

¹³¹ *Id.*

possible that a rapper's lyrics about committing violence which might sound similar to a crime in question are merely politically hyperbolic, vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact? Certainly not all of the time, but probably sometimes and maybe even often. The distinction is murky particularly because many rappers make art about their experiences with extreme levels of violence. But most artists make art based on their experiences with whatever impacted *them* deeply. It is also important that rap music's profitability as a genre can be directly tracked to the glorification of gangsta rap and an appeal to white audiences.¹³²

Under the Constitution's First Amendment, individuals, not the government, make "aesthetic and moral judgments about art and literature."¹³³ Despite any negative perceptions, rap music is art and is subject to individual aesthetic and moral judgments. Yet there is a general fear that prosecutors will increasingly rely on rap lyrics as evidence and not as artistic expressive speech merely because a defendant is a rapper.¹³⁴ If lyrical art cannot be used as evidence for First Amendment reasons, presenting the same evidence as something other than artistic expression "to establish the elements of a crime or to prove motive or intent" can provide evidentiary grounds for admitting lyrics.¹³⁵ Some courts have considered First Amendment concerns when determining the use of rap lyrics "for permissible purposes or merely to show that [the defendant] was morally reprehensible due to his abstract beliefs."¹³⁶

The First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous . . . statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."¹³⁷ Ultimately, if lyrics are admissible under a rule of evidence, First Amendment concerns may be alleviated whether the speech is protected or not. The U.S. District Court for the Eastern District of Michigan considered such a case in *United States v. Mills*.¹³⁸ The Court unpacked *United States v. Garnes* and the issue of "whether the admission of rap lyrics . . . in a RICO conspiracy case would violate a defendant's First Amendment rights."¹³⁹ The *Garnes* court had held that First Amendment protections did

¹³² See, e.g., *id.* at 8 (discussing the rise of "hardcore gangster rap" group N.W.A.'s mainstream popularity); Araibi, *supra* note 20, at 811 (discussing Run-D.M.C.'s "debut, self-titled album, sending rap into the mainstream and attracting white audiences with its taboo appeal").

¹³³ Bennett, *supra* note 19, at 18.

¹³⁴ *Id.* at 36.

¹³⁵ *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993); accord *United States v. Mills*, 367 F. Supp. 3d 664, 668 (E.D. Mich. 2019).

¹³⁶ *Mills*, 367 F. Supp. 3d at 668 (quoting *United States v. Fell*, 531 F.3d 197, 229 (2d Cir. 2008)) (alteration in original).

¹³⁷ *Mitchell*, 508 U.S. at 489.

¹³⁸ *Mills*, 367 F. Supp. 3d at 664.

¹³⁹ *Id.* at 670.

not apply to the defendant's rap lyrics because they were "relevant to the issues being decided in the proceeding," like his gang membership.¹⁴⁰

The *Mills* court further explored an issue introduced in *United States v. Graham*, wherein alleged gang member defendants "argued that their rap lyrics and videos were a form of artistic expression subject to heightened protection under the First Amendment."¹⁴¹ In *Graham*, "[a]s in *Garnes*, the court rejected the defendants' First Amendment argument" because the state was "not seeking to punish defendants because of the content of the speech; rather the speech [was] being introduced as evidence of independent criminal behavior."¹⁴² Ultimately the *Mills* court ruled the lyrics were admissible evidence because "the probative value of the rap lyrics . . . [was] not substantially outweighed by a danger of unfair prejudice."¹⁴³ First Amendment concerns surrounding the admissibility of rap lyrics seem to dissolve when there is a separately articulated evidentiary justification for their use. In this context, introducing rap lyrics as evidence seems to provide a backdoor for the state to use Black speech and artistic expression against a defendant while avoiding constitutional First Amendment concerns.

Donald F. Tibbs and Shelly Chauncey's article, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, compares "White slave owners['] interpret[ation of] the emotional cries of slaves as intentions to revolt [with] today's judicial system . . . applying literal interpretations to Black expression (rap lyrics) and making inaccurate assumptions that they are depicting 'true-life, self-referential stories.'"¹⁴⁴ Tibbs and Chauncey state that rap lyrics are not "necessarily representative of an individual's mindset," and are not expressions of true, accurate, personalized depictions of events.¹⁴⁵ The authors then compare *Elonis* and *Skinner*, ultimately arguing that the government has failed to protect rap lyrics as Black speech and art under the Constitution.¹⁴⁶ This failure

resurrects the problem to a racial level beyond the legal one. Like all languages that exist inside a culture, rap lyrics, also, are a foreign language that deserves

¹⁴⁰ *Id.* (quoting *United States v. Garnes*, No. 14-20119, 2015 WL 3574845, at *2 (E.D. Mich. 2015)).

¹⁴¹ *Id.* (citing *United States v. Graham*, 293 F. Supp. 3d 732 (E.D. Mich. 2017)).

¹⁴² *Id.* at 670–71 (quoting *Graham*, 293 F. Supp. 3d at 737).

¹⁴³ *Id.* at 672 (citing *United States v. Stuckey*, 253 F. App'x 468, 482–83 (6th Cir. 2007)).

¹⁴⁴ Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 58 (2016) (quoting Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 4 (2007)).

¹⁴⁵ *Id.* at 58–59.

¹⁴⁶ *Id.* at 62.

to be evaluated and deconstructed by rap linguists who understand the cultural aspects of rap that include a racial sensitivity in its analysis. . . . Without an understanding of how rap lyrics are created and the purpose behind this genre of art, courts frequently mistake fictional and emotional accounts of violence and rage as an actual threat against persons depicted. Or simply, the courts are comfortable with using rap music as a proxy for criminalizing race.¹⁴⁷

Tibbs and Chauncey are correct in arguing that we need to engage rap linguists in legal proceedings that involve rap lyrics, videos, and other related artistic expressions. But they also highlight a more veiled issue—that the justice system and the players in it do not even treat Black art as art associated with First Amendment protections; instead, courts see Black lyrical art as a literal expression of fact or confession, evading First Amendment considerations in favor of evidentiary ones.

Prosecuting hip-hop through the process of determining what art is evidence “should cause us pause in the world of prosecutorial discretion.”¹⁴⁸ The seriousness of the implications of this comparison should not be ignored by the law—it is not being ignored by rappers and the hip-hop world. “Black speech, similar to the Slave era, still tends to be accepted as ‘real’ to the degree the threat it appears to pose is accepted as real: that Blackness is to be feared, ostracized, and treated as different rather than embraced and valued in America’s monolithic cultural society.”¹⁴⁹ Yet, “most find it difficult to peel back the many layers of rap music as . . . the slave overseers failed to peel back the many layers of plantation slave songs.”¹⁵⁰

E. *Black Communities*

Think how different the United States would be if *in every ethnic group* there were more young men in prison than in college. This is the reality for African Americans. Hip-hop is concerned with the consequences of having all these people locked up. It acknowledges that even when punishment is deserved, there may be severe collateral damage.¹⁵¹

The prosecutorial and judicial process of using rap lyrics to “target criminal behavior is more about criminalizing young Black men for *what they say*, under the premise that it exposes *what they do*.”¹⁵² Through different phases of American history, from slavery to today, “punishment has always been imposed differentially

¹⁴⁷ *Id.* at 62–63 (footnotes omitted).

¹⁴⁸ *Id.* at 64.

¹⁴⁹ *Id.* at 46.

¹⁵⁰ *Id.* at 51.

¹⁵¹ Butler, *supra* note 31, at 137. *But see* Jenée Desmond-Harris, *The Myth that There Are More Black Men in Prison than in College, Debunked in One Chart*, VOX (Feb. 12, 2015, 10:10 AM), <https://www.vox.com/2015/2/12/8020959/black-men-prison-college>.

¹⁵² Tibbs & Chauncey, *supra* note 144, at 38–39.

through overt legalized racial caste systems.”¹⁵³ Generations of families in Black communities have been subjected to “sensationalized fear, racialized drug law enforcement policies, and the lack of access to legitimate employment.”¹⁵⁴ Rappers today face these issues as defendants in the criminal justice system. Convicting Black men of crimes where skin color, implicit bias, rap identity, and art are at play has profoundly negative impacts on communities and families, as it does when the defendant is not a rapper.

Jeffery Williams, for example, has been held in jail since his arrest on May 9, 2022.¹⁵⁵ His trial was originally set for January 2023.¹⁵⁶ Fulton County Superior Court Judge Ural Glanville denied bond for Williams in June 2022, reasoning that the court had a significant concern of danger to the community and flight.¹⁵⁷ When the character of Young Thug comes off, Jeffery Williams is a fiancé and a father of six; he is a fixture of Atlanta hip-hop and is a record-label owner and music producer.¹⁵⁸ During a motion for bond that was ultimately denied, Williams’s attorney “proposed an unprecedented house arrest program that he said would involve 24 armed off-duty police officers, who would work around the clock and get paid \$60 an hour at one of Williams’[s] four metro Atlanta homes.”¹⁵⁹ Yet the prosecution “argued defendants should not be able to pay their way out of jail. . . . [claiming] Williams is a violent gang leader who poses a tremendous threat to the community.”¹⁶⁰

Families can be destroyed when anyone is imprisoned,

[h]owever, there is one main distinction here between rap and all the other types of cases: Rap lyrics are inherently prejudicial against the defendant, especially if he is a black male rapper, because rap and its negative aspects . . . are inextricably linked to black culture. This link results in black communities being damaged and unfairly treated in the American justice system.¹⁶¹

¹⁵³ *Id.* at 34.

¹⁵⁴ Alexander, *supra* note 22, at 220.

¹⁵⁵ See Zoe Guy, *Everything We Know About YSL’s RICO Case*, VULTURE, <https://www.vulture.com/article/ysl-young-thug-gunna-arrest-charges-explained.html> (Apr. 10, 2024).

¹⁵⁶ Tom Disalvo, *Judge in Young Thug and Gunna’s RICO Case Sets Trial Date for January 2023*, NME (Nov. 18, 2022), <https://www.nme.com/news/music/judge-in-young-thug-and-gunnas-rico-case-sets-trial-date-for-january-2023-3351470>. The trial began November 27, 2023. Guy, *supra* note 155.

¹⁵⁷ *Judge Denies Bond for YSL Rapper Young Thug over RICO Charge*, FOX 5 ATLANTA, <https://www.fox5atlanta.com/news/judge-denies-bond-for-ysl-rapper-young-thug-over-rico-charge> (June 2, 2022, 8:41 PM).

¹⁵⁸ Devin Friedman, *Young Thug Is an ATLieN*, GQ (Feb. 16, 2016), <https://www.gq.com/story/young-thug-best-rapper-alive-interview>.

¹⁵⁹ *Judge Denies Bond for YSL Rapper Young Thug over RICO Charge*, *supra* note 157.

¹⁶⁰ *Id.*

¹⁶¹ Bennett, *supra* note 19, at 24–25.

Ultimately the law must confront a hard truth that has been acknowledged by rappers and scholars alike: “rap is often used as a proxy for Blackness in the courts.”¹⁶² Explicit discrimination may no longer be legally sanctioned, but more discreet forms of legalized racial discrimination exist in the “layers of discretionary decision-making and complex socioeconomic and cultural dynamics, both inside and outside American law. The causality has either become less visible or more difficult to remedy and thus led to a subsequent increase in inequality.”¹⁶³ Robust legal scholarship, research, and advocacy have been dedicated to understanding implicit bias, race, and rap in criminal proceedings. Discrete decisions about criminal procedure and evidence codes at the state and federal levels, in combination with complex cultural dynamics surrounding rap music and its popularity and perception, have significantly impacted legal outcomes. The discriminatory impact on Black communities that comes in part from admitting rap lyrics as evidence in criminal trials must be addressed and remedied where it violates constitutional protections like the right to a fair trial, freedom of expression, and equal protection.

F. *Larger Implications*

The biggest threat to freedom in the United States comes not from some foreign or terrorist threat but rather from our dysfunctional criminal justice system. . . . We define too many acts as crimes, punish too many people far longer than their crimes warrant, and therefore have too much incarceration. Some people deserve to be in jail, but not two million. . . . [and] [t]he two million Americans in prison represent the most urgent challenge to democratic values since the civil rights era.¹⁶⁴

Discrimination in the law should be addressed when and where it is identified. The use of rap lyrics as evidence in criminal trials has been discussed widely by scholars, journalists, bloggers, radio hosts, and advocates.¹⁶⁵ These parties generally agree that “there is something fundamentally immoral, unethical, and tragic about manipulating the legal system to prosecute young Black men just because they happen to like, listen to, and write rap music.”¹⁶⁶ Allowing the status quo to continue will “result in bad public policy because of the continued stifling of the creativity, ability to vent, the financial gain of rappers, and the dissemination and social benefits of valuable rap content.”¹⁶⁷

¹⁶² Vining, *supra* note 89, at 80.

¹⁶³ Tibbs & Chauncey, *supra* note 144, at 34–35 (footnotes omitted).

¹⁶⁴ BUTLER, *supra* note 31, at 26.

¹⁶⁵ Tibbs & Chauncey, *supra* note 144, at 37.

¹⁶⁶ *Id.* at 37–38.

¹⁶⁷ Bennett, *supra* note 19, at 34.

III. REGULATION AND LEGISLATION

Lawmakers, legislators, and judges have made significant progress recently in addressing the discriminatory impacts of using rap lyrics as evidence in criminal trials. Due to the varied common law approaches from jurisdiction to jurisdiction, regulation and legislation can help pave a clearer road towards protecting artistic expression specifically concerning rap lyrics. This Section explores national and state-level laws directed at the issue of protecting rap lyrics as artistic expression. The Federal Rules of Evidence currently determine most admissibility issues for the use of rap lyrics in federal criminal trials, but the recent introduction of the Restoring Artistic Protection Act shows there could be expanded protections for rappers and their lyrics in the future. At the state level both California and New York have taken steps toward protecting artistic expression. As discussed below, California signed the Decriminalizing Artistic Expression Act into law in 2022, and New York's Senate Bill S7527 currently moving through the state assembly aims to limit admissibility of a defendant's artistic expression as evidence. Finally, this Section explores why Georgia should be the next frontier for legislation to amend rules of evidence and rules of criminal procedure.

A. Federal Landscape

1. Federal Rules of Evidence

Federal Rule of Evidence 401's "Test for Relevant Evidence" says that evidence is relevant if both "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."¹⁶⁸ An example of the application of this rule can be seen in the 2006 case, *United States v. Wilson*.¹⁶⁹ In *Wilson*, the Eastern District of New York held that defendant Ronell Wilson's rap lyrics were admissible, including lyrics found in his possession, on his associate's computer, and from his associate's home.¹⁷⁰ The court found that the lyrics discussed activities resembling the central crime alleged and seemed to have been written after the alleged crime occurred.¹⁷¹ They also argued that admitting the lyrics would not prejudice Wilson "any more than would the indictment or eyewitness testimony of the crime," stating the lyrics weren't "violent or depraved" enough to have that effect.¹⁷²

In the years since *Wilson*, there have been calls for reform to the rules of evidence, both federally and at the state level, to protect rap lyrics as protected artistic

¹⁶⁸ FED. R. EVID. 401 (the "Test for Relevant Evidence").

¹⁶⁹ *United States v. Wilson*, 493 F. Supp. 2d 460 (E.D.N.Y. 2006).

¹⁷⁰ *Id.* at 462–64.

¹⁷¹ *Id.* at 462.

¹⁷² *Id.* at 462.

speech in criminal proceedings. Federal Rule of Evidence 403 provides room to argue for stronger protections for rap lyrics as evidence in criminal trials, stating federal courts “may exclude relevant 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 presenting cumulative evidence.”¹⁷³ As discussed in previous Sections, the use of rap lyrics in trials is demonstrably received in a biased fashion, and it has been shown that prosecutors, judges, and juries regularly confuse issues like whether rap lyrics are admissions or art. Prosecutorial strategies that present rap lyrics as factual, autobiographical statements can severely mislead juries, a trend that has dangerous First Amendment, evidentiary, and equal protection ramifications for young Black men who rap.

Federal Rule of Evidence 403 provides a solid basis to argue for the exclusion of rap lyrics as evidence based on unfair prejudice, confusing the issues, misleading the jury, or even needlessly presenting cumulative evidence. Some have argued that Rule 403 has been misunderstood and misapplied by federal courts who have a practice of admitting rap lyrics as evidence likely due to the widespread belief that “rap is ‘more literal, offensive, and in greater need of regulation’ than country, punk rock, or heavy metal.”¹⁷⁴ “[J]udges have a wide range of discretion to sustain or overrule . . . a rule 403 objection,” and some courts, including the Fourth and Eleventh Circuit Courts of Appeals, have acknowledged that rap lyrics can be unfairly prejudicial to defendants.¹⁷⁵ While ultimately disagreeing with the Rule 403 unfair prejudice claim and concluding the lyrics in question were sufficiently related to the alleged crime, the Fourth Circuit recognized in *United States v. Recio* that rap lyrics, “like other forms of artistic expression, can describe a panoply of violent, criminal, or distasteful conduct, and so in some cases courts have excluded lyrics, finding they primarily served to paint the defendant in an unflattering light.”¹⁷⁶ But in *United States v. Gamory*, the Eleventh Circuit’s “independent review of [a] rap video and the totality of the record” led them to “conclude that it was error under [Federal Rule of Evidence] 403 to play this rap video to the jury.”¹⁷⁷ In addition to being unnecessarily cumulative,

the substance of the rap video was heavily prejudicial. The lyrics presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle. At the same time, the video was not clearly probative of Gamory’s guilt.¹⁷⁸

¹⁷³ FED. R. EVID. 403.

¹⁷⁴ Bennett, *supra* note 19, at 2.

¹⁷⁵ *Id.* at 22–23.

¹⁷⁶ *United States v. Recio*, 884 F.3d 230, 236 (4th Cir. 2018).

¹⁷⁷ *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

¹⁷⁸ *Id.*

Engaging a rap linguist in lyrical interpretation and conducting an independent review of lyrics rooted in the context of hip-hop are critical steps judges can take to address potential bias prior to presenting lyrics as evidence to the factfinder.

2. *The Restoring Artistic Protection Act of 2022*

In July 2022, U.S. Congressmen Hank Johnson (Georgia's 4th District) and Jamaal Bowman (New York's 16th District) "introduced the Restoring Artistic Protection Act (RAP Act H.R. 8531), to protect artists from the wrongful use of their lyrics against them in criminal and civil proceedings."¹⁷⁹ Congressman Johnson of Georgia, the sponsor of the bill, is the federal representative from Georgia's majority Black 4th District containing many of Atlanta's inner eastern suburbs, including Decatur, home of notable rap acts B.o.B., Ghetto Mafia, and Baby Tate.¹⁸⁰

The RAP Act "adds a presumption to the Federal Rules of Evidence that would limit the admissibility of evidence of an artist's creative or artistic expression against that artist in court."¹⁸¹ The stated purpose of the Act is "[t]o amend the Federal Rules of Evidence to limit the admissibility of evidence of a defendant's creative or artistic expression against [them] in a criminal proceeding, and for other purposes."¹⁸² Representative Johnson stated:

It is no longer enough that the Bill of Rights guarantees [the] freedom [of speech]: without further Congressional action, the freedom of speech and of artistic expression present in music will continue to be stifled, and that expression will be chilled, until the voices behind that protected speech are silenced.¹⁸³

Congressman Bowman added that because the criminal justice system "disparately criminalizes Black and brown lives, including Black and brown creativity," rap lyrics must be protected as a form of artistic expression.¹⁸⁴ He also referenced the statistical evidence showing that jurors tend to presume rap lyrics are literal or confessions, arguing the RAP Act would ensure evidentiary standards reflect meaningful

¹⁷⁹ Press Release, Rep. Hank Johnson (GA-04), Congressmen Johnson, Bowman Introduce Bill to Protect Artists' 1st Amendment Rights (July 27, 2022), <https://hankjohnson.house.gov/media-center/press-releases/congressmen-johnson-bowman-introduce-bill-protect-artists-1st-amendment>; Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

¹⁸⁰ *Congressional District 4, GA*, DATAUSA, <https://datausa.io/profile/geo/congressional-district-4-ga> (last visited May 6, 2024); *B.o.B.*, LAST.FM, <https://www.last.fm/music/B.o.B> (last visited May 6, 2024); *Ghetto Mafia*, LAST.FM, <https://www.last.fm/music/Ghetto+Mafia> (last visited May 6, 2024); Paul Meara, *Interview: Baby Tate Explains How Her Family Encouraged Her Love of Hip-Hop*, BET (Nov. 30, 2022, 6:00 AM), <https://www.bet.com/article/1hm6ql/baby-tate-hip-hop-family-interview>.

¹⁸¹ Press Release, *supra* note 179.

¹⁸² H.R. 8531.

¹⁸³ Press Release, *supra* note 179.

¹⁸⁴ *Id.*

protection of the First Amendment right to freedom of expression for artists and rappers.¹⁸⁵ Groups publicly supporting the legislation include the GRAMMYS, the Recording Industry Association of America (RIAA), SAG-AFTRA, the Black Music Action Coalition (BMAC), and Warner Music Group, among other influential music and entertainment organizations.¹⁸⁶

The RAP Act was announced just two months after the arrest and indictment of Young Thug and Gunna (Sergio Kitchens) in Atlanta. Given Young Thug's prominence in rap music and hip-hop culture generally, the announcement of the Act sparked a national conversation about the issue of admitting rap lyrics as evidence in criminal trials. Variety reported on the introduction of the Act in July 2022, discussing its implications in federal courts, Young Thug's arrest and indictment, and the prevalence of rap lyrics being misunderstood in courts.¹⁸⁷ Rolling Stone has featured stories including *New York Lawmakers Introducing Bill to Limit Rap Lyrics as Evidence in Criminal Trials* (2021) and *Democrats Propose 'RAP Act' to Ban Lyrics from Being Used as Evidence* (2022).¹⁸⁸

The RAP Act, if passed by Congress and signed into law by the president, would provide significant protection for rappers' and artists' rights in federal criminal proceedings. An amendment to the Federal Rules of Evidence protecting creative expression would play an important role in remedying discrimination in federal trials where rappers and young Black men in general are defendants. The proposed legislation would amend the Federal Rules of Evidence to insert a new section: "Rule 416. Limitation on admissibility of defendant's creative or artistic expression."¹⁸⁹ The bill specifically provides that "original or derivative" creative or artistic expression would be inadmissible against the artist-defendant in a criminal case. Such creative or artistic works may be admissible if the state can prove by clear and convincing evidence, in a hearing away from the jury, that:

- (1)(A) if the expression is original, that defendant intended a literal meaning, rather than figurative or fictional meaning; or

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Shirley Halperin & Ethan Shanfeld, *RAP Act Introduced in Congress Would Bar the Use of Lyrics as Evidence in Court Proceedings*, VARIETY (July 27, 2022, 4:09 PM), <https://variety.com/2022/music/news/rap-lyrics-criminal-evidence-congress-bill-legislation-1235327683>.

¹⁸⁸ Nancy Dillon, *New York Lawmakers Introducing Bill to Limit Rap Lyrics as Evidence in Criminal Trials*, ROLLING STONE (Nov. 16, 2021, 8:31 PM), <https://www.rollingstone.com/music/music-news/ny-state-senators-bill-legislation-rap-lyrics-evidence-criminal-trials-1258767>; Tomás Mier, *Democrats Propose 'RAP Act' to Ban Lyrics from Being Used as Evidence*, ROLLING STONE (July 27, 2022), <https://www.rollingstone.com/music/music-news/law-bans-lyrics-as-evidence-1389042>.

¹⁸⁹ Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. § 2(a) (2022).

- (B) 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) that the creative expression refers to the specific facts of the crime alleged;
- (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.¹⁹⁰

The proposed legislation creates a new baseline for defendants' art, deeming it inadmissible unless an exception has been met. The exceptions for original and derivative works seem to be consistent with the idea that true threats or actual admissions of guilt should generally be admissible. Defense attorneys and hip-hop focused court watchers should consider how the state intends to prove, with clear and convincing evidence, that a defendant's expression was intended to carry a literal meaning and was not figurative or fictional in the context of the song. This will require courts to engage rap linguists and judges to develop an increased contextual understanding of rap music. The proposed rule would also clear up confusion about whether or not lyrics need to share specific facts to the crime alleged or be relevant to an issue of disputed fact. If passed, lyrical evidence would not even be admitted until and unless the prosecution clearly and convincingly proves that the lyric is actually relevant to a factual dispute and that it specifically refers to facts of the alleged crime at issue. Finally, the legislation would require the state to run through any other admissible evidence first that could provide similar probative value.

B. *State Landscape*

1. *New York*

Recently, the New York State Senate introduced Senate Bill S7527 limiting the admissibility of "[e]vidence of a defendant's creative or artistic expression . . . against such defendant in a criminal proceeding."¹⁹¹ As of late 2022, the law has passed the New York Senate and is awaiting approval by the Assembly. The law would amend New York's rules of criminal procedure by adding two new sections: one to establish the admissibility of evidence of defendants' creative expression in the rules of evidence, and one to add a new definition section for creative expression.¹⁹² State Senator Brad Hoylman's Sponsor Memo for the bill states:

The purpose of [the] legislation is to protect freedom of speech and artistic expression in New York State. This bill effectuates the enhanced free speech

¹⁹⁰ *Id.* § 2(a).

¹⁹¹ S.B. S7527, 2021–2022 Reg. Sess. (N.Y. 2021).

¹⁹² *Senate Bill S7527: Sponsor Memo*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2021/S7527> (last visited May 6, 2024).

protections provided by the New York State Constitution, ensuring that criminal defendants are tried *based upon evidence of criminal conduct, not the provocative nature of their artistic works and tastes*.¹⁹³

The proposed New York rule would require that “in order to overcome the presumption of inadmissibility of [a] defendant’s creative expression, the proffering party must affirmatively prove by clear and convincing evidence” that the work has:

- (a) literal, rather than figurative or fictional, meaning . . .
- (b) a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged;
- (c) relevance to an issue of fact that is disputed; and
- (d) distinct probative value not provided by other admissible evidence.¹⁹⁴

Similar to the proposed federal RAP Act, the New York rule would require the state to prove by clear and convincing evidence that the art sought to be introduced has a literal meaning rather than figurative or fictional. The proposed legislation incorporates the “strong factual nexus” requirement that has been used in case law to determine lyric admissibility, going slightly further than the federal bill to incorporate existing common law approaches to lyric admissibility. Critically, New York’s bill includes the presumption of inadmissibility unless and until the state can affirmatively prove its necessity. The remainder of the proposed text in the New York bill appears to be very similar to the federal bill.

Passage of this bill into law would be a significant win for artists, First Amendment advocates, and criminal justice advocates in New York. As stated in the bill’s formal justification section, “[t]here is no New York without art, whether it is provoking or inspiring, beautiful or crude.”¹⁹⁵ Senator Hoylman and his co-sponsors reference the discriminatory impact the admission of rap lyrics as evidence has had in criminal proceedings, making it clear that Black people have had to deal with anti-rap attitudes and racially discriminatory behavior for decades.¹⁹⁶ The stated justifications and accompanying memo in the bill provide a full explanation for other states and lawmakers seeking a concise explanation as to why this problem must be addressed explicitly by and through the law.¹⁹⁷ It also helps provide an example of proposed legislation for other lawmakers to model and build upon, given concrete legislation and public policy related to rap lyrics and criminal procedure are still nascent.

¹⁹³ *Id.* (emphasis added).

¹⁹⁴ S.B. S7527 § 1.

¹⁹⁵ *Senate Bill S7527: Sponsor Memo, supra* note 192.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

2. *California*

California Governor Gavin Newsom signed the Decriminalizing Artistic Expression Act into state law after unanimous approval in the Senate and Assembly.¹⁹⁸ The law restricts the use of rap lyrics as evidence by prosecutors in criminal cases by requiring them to provide “the purpose behind including lyrics as evidence and interrogate whether doing so injects ‘racial bias into the proceedings.’”¹⁹⁹ Governor Newsom said in a statement that,

Artists of all kinds should be able to create without the fear of unfair and prejudicial prosecution . . . California’s culture and entertainment industry set trends around the world and it’s fitting that our state is taking a nation-leading role to protect creative expression and ensure that artists are not criminalized under biased policies.²⁰⁰

Again, major supporters and stakeholders of music and entertainment spoke out in favor of the law. Assemblymember Reggie Jones-Sawyer, author of the bill, said that because unfortunate racial biases play a role in perceptions and interpretations of rap music, it’s important that this law will “disallow prosecutors from triggering racial biases or reinforcing racial stereotypes and . . . give[] judges guidance on the use of creative expression in court.”²⁰¹

The new law added section 352.2 to the California Evidence Code, stating that for a form of creative expression to be admitted as evidence,

[T]he court, while balancing the probative value of that evidence against the substantial danger of undue prejudice . . . shall consider, in addition to [other] factors listed in [this section], that: (1) the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression [was] created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime . . . or includes factual detail not otherwise publicly available; and (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will . . . treat the expression as evidence of the defendant’s propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.²⁰²

¹⁹⁸ Larisha Paul, *California Bill Banning Use of Rap Lyrics as Evidence Signed into Law*, ROLLING STONE (Sept. 30, 2022), <https://www.rollingstone.com/music/music-news/california-bill-banning-rap-lyrics-as-evidence-heads-to-governor-1234579851>; A.B. 2799, 2022 Cal. Stat. ch. 973 (Cal. 2022) (codified as amended at CAL. EVID. CODE § 352.2).

¹⁹⁹ Paul, *supra* note 198 (quoting A.B. 2799).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² CAL. EVID. CODE § 352.2 (West 2023).

Section 352.2(a) clearly addresses limited truth in creative expression with specific exceptions and highlights how undue prejudice impacts triers of facts. It specifically addresses how the admission of artistic expression as evidence against a defendant to imply violent or criminal disposition can inject implicit or explicit racial bias into criminal proceedings. As the first law passed in the nation protecting this kind of artistic expression, it provides a clear example of how states may protect artists through their own state codes of evidence.

Section 352.2(b) instructs the court to consider a variety of things if relevant to the case, including “credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression,” or “experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.”²⁰³ When considering a case regarding the admission of rap lyrics as evidence against a rapper-defendant, California’s new Evidence Code invites the court to consider the social or cultural context, conventions, and artistic techniques of those rap lyrics in order to ensure evidence is not admitted that may unduly prejudice that defendant.²⁰⁴ The rule provides specific guidance for courts to ensure this amplified standard of artistic speech protection may be applied in reality.

California Bill No. 2799, which turned into the new section 352.2 protecting creative expression in criminal proceedings, provides an example of successful legislation that has been enacted by a state to protect the rights of rappers and artists. An important takeaway for state lawmakers seeking to explore similar legislation comes from the bill’s historical and statutory notes:

It is the intent of this Legislature to provide a framework by which courts can ensure that the use of an accused person’s creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence and to recognize that the use of rap lyrics and other creative expression 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.²⁰⁵

The California law is significantly different than the proposed New York bill and the federal RAP Act in a few key ways. First, although it does not articulate a presumption of inadmissibility, it does provide considerations for a judicial balancing test. This is important because without contextual guidance it’s unlikely judges would incorporate considerations like implicit bias into their decision regarding lyric

²⁰³ EVID. § 352.2(b)(1–2).

²⁰⁴ EVID. § 352.2(b)(1).

²⁰⁵ A.B. 2799, 2022 Cal. Stat. ch. 973 (Cal. 2022) (codified as amended at CAL. EVID. CODE § 352.2).

admissibility. The California law also explicitly articulates considerations surrounding undue prejudice, propensity for criminal disposition, and implicit and explicit bias that could influence proceedings if the evidence was admitted. In terms of enforcement and clarity, the California law creates much clearer guidelines for the courts.

Just a few weeks before the passage of California's amended Evidence Code, Judge Clare Maier of the Contra Costa County Superior Court "vacated the murder convictions of . . . Gary Bryant Jr., and Diallo Jackson, two aspiring rappers, who were charged with first degree murder and convicted of fatally shooting Kenneth Cooper."²⁰⁶ The judge ruled that prosecutors "'more likely than not' injected racial bias into the proceedings by presenting the men's rap lyrics as part of the alleged evidence . . . 'more likely than not trigger[ing] the jury's Implicit racial bias against African American men."²⁰⁷ Even more powerfully, the judge determined that admitting the lyrics was a violation by prosecutors of California's Racial Justice Act of 2020 that "seeks to 'eliminate racial bias from California's criminal justice system."²⁰⁸ Ultimately, the judge concluded that the prosecutorial use of lyrics in this case against Bryant and Jackson like had a discriminatory impact.²⁰⁹ While this may be just one case, it signifies that judges are waking up to the role they and others must play to prevent discriminatory applications of the law.

3. *Georgia*

a. *Why Georgia?*

All states concerned about complications arising from admitting rap lyrics as evidence should consider taking regulatory or statutory action to modify their evidence code and provide sufficient protection for creative expression. Georgia has a particular interest in ensuring rap lyrics are protected creative expression because of Atlanta's status as one of the main cultural and entertainment hubs in the United States. While New York City and Los Angeles have historically been seen as the core hip-hop cities, a new epicenter has emerged in Atlanta.²¹⁰ High-profile rappers from Atlanta include Lil Baby, Future, Killer Mike, Young Thug, 21 Savage, Offset,

²⁰⁶ Deena Zaru, *Judge Overturns Murder Convictions of Black Men, Ruling Rap Lyrics Used at Trial Likely Injected Racial Bias*, ABC NEWS (Oct. 7, 2022, 11:19 AM), <https://abcnews.go.com/US/judge-overturns-murder-convictions-black-men-ruling-rap/story?id=91097139>; *People v. Bryant Jr.*, No. 05-152003-0, at 72 (Cal. Super. Ct. Oct. 3, 2022).

²⁰⁷ Zaru, *supra* note 206 (quoting *Bryant Jr.*, No. 05-152003-0, at 68).

²⁰⁸ *Id.* (quoting *Bryant Jr.*, No. 05-152003-0, at 64).

²⁰⁹ *Bryant Jr.*, No. 05-152003-0, at 63.

²¹⁰ See August Brown, *The Year Outkast and Atlanta Took Over Hip-Hop*, L.A. TIMES (Aug. 7, 2023, 5:00 AM), <https://www.latimes.com/entertainment-arts/music/story/2023-08-07/outkast-atlanta-dj-drama-2003-50th-anniversary-hip-hop>.

Quavo, Gunna, Gucci Mane, Lil Yachty, Playboi Carti, and Latto.²¹¹ Before them, Atlanta was the birthplace of 2 Chainz, Akon, André 3000, Big Boi, Boyz n da Hood, Bubba Sparxxx, Cee Lo Green, Childish Gambino, Ghetto Mafia, Gorilla Zoe, India Arie, Jermaine Dupri, Kelly Rowland, Keri Hilson, Lil Jon, Lil Nas X, London on da Track, Ludacris, Migos, Outkast, Rich Homie Quan, Soulja Boy, T.I., TLC, Usher, Waka Flocka Flame, and the Ying Yang Twins.²¹²

For Georgia to remain a hospitable state for media and entertainment companies to operate in, it will have to eventually address the state's laws that harm entertainers, particularly those heralding from Atlanta. As California and New York acknowledged their special responsibility to artists in their states, Georgia is similarly responsible for ensuring its citizens are adequately protected from violations of their constitutional rights through state criminal proceedings. Additionally, as more rappers launch recording houses, production companies, and other enterprises, it is all but a matter of time until this issue triggers mainstream and economic concern.

Recent events surrounding the indictment and arrest of Young Thug exposed some of the potential challenges and opportunities for reform of the state evidence code as a targeted approach to preventing discrimination in Georgia's criminal procedure. Former President of Def Jam Recordings Kevin Liles (current CEO of 300 Entertainment) responded that this situation is not just about lyrics, "our culture is on trial."²¹³ Liles has widely expressed that he is committed to protecting Black art

²¹¹ *Top Atlanta Rappers*, KULTURE VULTURES, <https://www.kulturevulturez.com/top-atlanta-rappers> (last visited May 6, 2024).

²¹² Sebastian Wolf, *The 20 Best Rappers from Atlanta*, MUSIC GATEWAY: BLOG (Feb. 6, 2023), <https://www.musicgateway.com/blog/spotify/the-20-best-rappers-from-atlanta>; MC WordWeaver, *The Top 25 Best Atlanta Rappers of All Time*, BEATS, RHYMES & LISTS (Aug. 4, 2023), <https://beats-rhymes-lists.com/lists/top-25-best-atlanta-rappers-of-all-time>; *Boyz N Da Hood*, LAST.FM, <https://www.last.fm/music/Boyz+N+Da+Hood> (last visited May 6, 2024); *Bubba Sparxxx*, M&M GRP. ENT., <https://www.mm-group.org/talent/bubba-sparxxx> (last visited May 6, 2024); *Ghetto Mafia*, LAST.FM, <https://www.last.fm/music/Ghetto+Mafia> (last visited May 6, 2024); *India.Arie*, LAST.FM, <https://www.last.fm/music/India.Arie/+wiki> (last visited May 6, 2024); *Kelly Rowland*, IMDB, <https://www.imdb.com/name/nm0746714> (last visited May 6, 2024); Collin Kelley, *R&B Star, Decatur Native Keri Hilson Comes Home* (Aug. 5, 2011, 2:59 PM), <https://roughdraftatlanta.com/2011/08/05/rb-star-decatur-native-keri-hilson-comes-home>; Andrew R. Chow, *'It Feels Like I'm Chosen to Do This.'* *Inside the Record-Breaking Rise of Lil Nas X* (Aug. 15, 2019, 6:54AM), <https://time.com/5652803/lil-nas-x-2>; *London on Da Track*, GENIUS, <https://genius.com/artists/London-on-da-track> (last visited May 6, 2024); *Soulja Boy*, THE VOGUE, <https://thevogue.com/artists/soulja-boy/#bio> (last visited May 6, 2024); Michelle Zhong, *TLC (1991-)* (May 17, 2018), <https://www.blackpast.org/african-american-history/tlc-1991>; Colin McEvoy, *Usher*, BIOGRAPHY.COM, <https://www.biography.com/musicians/usher> (Sept. 25, 2023); *Akon*, BIOGRAPHY.COM, <https://www.biography.com/musicians/akon> (Apr. 6, 2021); *Ying Yang Twins*, LAST.FM, <https://www.last.fm/music/Ying+Yang+Twins> (last visited May 6, 2024).

²¹³ 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),

and is a supporter of the federal RAP Act.²¹⁴ While the scope of the response is yet to be entirely realized as Young Thug's trial only began at the end of November 2023, there is already movement within rock, pop, country, alternative, and jazz circles mobilizing to support the protection of Black art.²¹⁵

The Wall Street Journal published an article on November 1, 2022, titled *Rappers' Lyrics Are Used Against Them in Court. The Music Industry Wants It to Stop*, which used Young Thug's case as a case study for the issue that had been building long before the birth of Young Stoner Life Records.²¹⁶ The article discusses the coalition of supporters, including Warner Music (the third-biggest music conglomerate in the world²¹⁷), who have spoken out since Young Thug's arrest. It also highlights the recently passed law in California, the proposed New York bill, the introduction of the federal RAP Act, and even highlights critical New Jersey case law that set precedents for states like California to develop regulations that protect creative expression without sacrificing public safety.²¹⁸

Georgian lawmakers must act to maintain Atlanta's status as a powerful cultural and entertainment hub for the world's most popular musical genre. Yet the current political reality is challenging at best. At the time of this writing, Fulton County, Georgia's District Attorney Fani Willis is prosecuting Jeffery Williams and Donald Trump under similar charges.²¹⁹ In addition, the Georgia state legislature has been overwhelmed by partisanship related to elections and voting,²²⁰ and attention is hard to maintain. But the issue of protecting rap artists' creative expression is critical for individual rights and a long-term economic concern for Georgia, home to many rap-music-related businesses and artists. Policymakers should consider how Georgia's Rules of Evidence and Rules of Criminal Procedure can be adapted to provide

<https://abcnews.go.com/US/protect-black-art-indictment-young-thug-gunna-sparked/story?id=91395434>.

²¹⁴ Press Release, *supra* note 179.

²¹⁵ Zaru et al., *supra* note 213.

²¹⁶ Neil Shah, *Rappers' Lyrics Are Used Against Them in Court. The Music Industry Wants It to Stop*, WALL ST. J. (Nov. 1, 2022, 3:51 PM), <https://www.wsj.com/articles/young-thug-gunna-music-industry-law-11667332005>.

²¹⁷ Kristin Kizer, *The 10 Largest Record Labels in the United States*, ZIPPIA (Apr. 9, 2023), <https://www.zippia.com/advice/largest-record-labels>.

²¹⁸ Shah, *supra* note 216.

²¹⁹ *Compare* Indictment at 1, State v. Adams, No. 22SC182273 (Ga. Super. Ct. filed May 9, 2022), <https://www.documentcloud.org/documents/21974867-indictment-22sc182273>, *with* Indictment at 1, State v. Trump, No. 23SC188947 (Ga. Super. Ct. filed Aug. 14, 2023).

²²⁰ See Carlisa N. Johnson, *Georgia Republicans Race to Pass Laws to Restrict and Challenge Votes*, GUARDIAN (Mar. 6, 2023, 6:00 AM), <https://www.theguardian.com/us-news/2023/mar/06/georgia-republicans-statehouse-voting-legislation>; Richard Fausset, Reid J. Epstein & Rick Rojas, *'I Refuse Not to Be Heard': Georgia in Uproar over Voting Meltdown*, N.Y. TIMES, <https://www.nytimes.com/2020/06/09/us/politics/atlanta-voting-georgia-primary.html> (June 11, 2020).

stronger protections for artistic expression, or at the very least, greater clarity on the rules of admission for art as evidence in criminal trials.

b. Young Thug

“I never killed anybody but I got somethin’ to do with that body,” from the song *Anybody* is one lyric that Fulton County is using to prosecute Jeffery Williams, claiming the lyric, among others, is an overt act in furtherance of the alleged conspiracy.²²¹ *Anybody* features Nicki Minaj and is clearly a track designed for bars, clubs, and party environments. Pitchfork published a review of *Anybody* in 2018 because of Young Thug’s prominence in the hip-hop scene.²²² The review said that the track fell short of Young Thug’s usual standard and called it “lazily rapped.”²²³ Generally, the response to the song was that Young Thug and Nicki Minaj were going for a hit designed to appeal to listener preferences and aesthetic flow.²²⁴ The track reached certified gold standard by the RIAA.²²⁵

Most notably, the song was written by four people and was produced by two. Songwriters include Young Thug, Nicki Minaj, Rex Kudo, and Ryan Vojtesak. Producers include Rex Kudo and Charlie Handsome.²²⁶ The popular and widely used rap lyric database platform Genius (formerly known as Rap Genius) shows that the lyrics “I never killed anybody / but I got somethin’ to do with that body” were likely an acknowledgment of a desire to maintain street-cred while avoiding commission of crimes.²²⁷ Contributors also suggest that the line beckons to Tupac Shakur, one of Young Thug’s biggest inspirations, where Tupac rapped a similar verse with the implication that while he would never kill someone, the idea of revenge is particularly important to maintain credibility.²²⁸

Many questions emerge when comparing the origins of the song with the allegation that the lyrics indicate an admission or proof of Young Thug’s commission of a crime or furtherance of a conspiracy. The song was written by four people—it cannot be said at this point that Young Thug was responsible for the lyrics, “I never

²²¹ Indictment at 33, *Adams*, No. 22SC182273.

²²² Sheldon Pearce, “*Anybody*” [ft. Nicki Minaj]: *Young Thug*, PITCHFORK (Apr. 13, 2018), <https://pitchfork.com/reviews/tracks/young-thug-anybody-ft-nicki-minaj>.

²²³ *Id.*

²²⁴ See Sheldon Pearce, Review of *Anybody* by Young Thug, Featuring Nicki Minaj (Apr. 13, 2018), <https://pitchfork.com/reviews/tracks/young-thug-anybody-ft-nicki-minaj>.

²²⁵ *Gold & Platinum*, RIAA, <https://www.riaa.com/gold-platinum> (search in Advanced Search for artist “Young Thug,” song “Anybody,” and date range “01/01/2018” to “12/31/2018”) (last visited May 6, 2024).

²²⁶ *ANYBODY*, ASCAP REPERTORY, <https://www.ascap.com/repertory#> (choose “Work ID” from dropdown; then search for “895577512”) (last visited May 6, 2024).

²²⁷ *Anybody by Young Thug*, GENIUS, <https://genius.com/14322622> (last visited May 6, 2024).

²²⁸ *Id.*

killed anybody / but I got somethin' to do with that body.” The lyrics could have been written by someone else or in collaboration as a group. It could have been influenced by Young Thug’s commitment to not personally murdering anyone. Or, it could have been the catchiest line to bridge the verses on the track. That “body” may imply a dead body, or it may refer to the body of a woman Young Thug wants to engage with. The line may have been suggested as a way to create chemistry between Young Thug and Nicki Minaj on the track, a common practice in songwriting for mainstream male–female collaboration tracks.

Anybody was a collaboration between Young Thug and Nicki Minaj, an international mega-star. Tracks featuring Minaj are typically designed to top charts, and particular emphasis is placed on such tracks to ensure every line is catchy and singable. Music experts noticed this and called out the song for being lazily rapped—even if catchy and fitting for a dance floor.²²⁹ While the state’s case has not been displayed in full, to a listener of hip-hop and a fan of Young Thug’s music, these lyrics do not suggest a truthful statement or admission of guilt.

This is just one lyric being used in one charge of one indictment, against one defendant, in one county. But it is also a popular song, being used as evidence against a famous rapper in a county home to a substantial share of currently relevant rappers. Mainstream awareness of the discriminatory practice has increased significantly since its public application to a rapper as famous as Young Thug. But this is not a rare situation, and it is one that is disproportionately impacting Black rappers from the well-established to the up and coming to the neighborhood hobbyist.²³⁰

Fulton County denied multiple requests to release Williams on bond since he was arrested in May 2022.²³¹ Fulton County District Attorney Fani Willis has made multiple statements justifying the use of Williams’s lyrics against him, both in the charges as well as in the denial of bond. Prosecutors have argued that his lyrics “served as ‘overt acts’ to fulfill a key objective of the alleged RICO conspiracy: ‘Preserving, protecting, and enhancing the reputation, power and territory of the enterprise [YSL].”²³² Willis calls YSL “an acronym for ‘Young Slime Life,’” describing it as “a hybrid gang that operates . . . in Atlanta and [is] an affiliate of the Bloods gang.”²³³ Nowhere in the indictment or in any statements from the prosecution was

²²⁹ Nicki Minaj’s 20 Best Features: Staff Picks, BILLBOARD (May 15, 2020), <https://www.billboard.com/music/rb-hip-hop/nicki-minaj-best-features-top-20-9378020>.

²³⁰ Cady Lang, *What to Know About Young Thug’s Trial and the Controversial Use of Rap Lyrics in Criminal Cases*, TIME (June 29, 2022, 4:57 PM), <https://time.com/6192371/young-thug-rap-lyrics-evidence-court>.

²³¹ Deena Zaru, *Rapper Young Thug Files 4th Motion for Bond as he Awaits Trial in RICO Indictment*, ABC NEWS (Apr. 26, 2023, 6:51 PM), <https://abcnews.go.com/US/rapper-young-thug-files-4th-motion-bond-awaits/story?id=98889200>.

²³² Zaru, *supra* note 1 (quoting Indictment at 11, 13, State v. Adams, No. 22SC182273 (Ga. Super. Ct. filed May 9, 2022)) (alteration in original).

²³³ *Id.*

an acknowledgment that YSL is also the acronym of Williams's company: Young Stoner Life Records.²³⁴ This fact has been conveniently ignored by the state.

Williams' attorney filed a Motion to Suppress Young Thug lyrics as evidence against Williams at trial, arguing that "the prosecution's use of the hip-hop star's lyrics in this case is 'racist and discriminatory' because it could prejudice a jury trial against [Williams] and prevent him from having a fair trial—a right that is protected by the Sixth Amendment in the U.S. Constitution."²³⁵ The prosecution responded by urging the judge to allow admission of the lyrics, arguing that "the use of rap lyrics as evidence is 'clearly permitted by precedent from federal and state courts around the nation, and in line with well-established prosecutorial practice in similar cases.'"²³⁶ But this argument does not consider that the issue of rap lyric admissibility has sparked decades of scholarship and proposed and passed legislation. It also ignores the precedent from federal and state courts around the nation that do not allow this prosecutorial practice in similar cases.

In a May 2022 press conference, Willis stated, "The First Amendment does not protect people from prosecutors using [lyrics] as evidence We put it as overt within the RICO count because we believe that's exactly what it is."²³⁷ But prosecutorial *belief* should not be enough to justify admitting rap lyrics as evidence, given everything we know about the discriminatory underpinnings and outcomes associated with this practice. By August, Willis doubled down: "If you decide to admit your crimes over a beat, I'm going to use it I have some legal advice Don't confess to crimes on rap lyrics if you don't want them used, or at least get out of my county."²³⁸

CONCLUSION

Rap music is a beautiful, messy, exciting, world-changing form of artistic expression that reflects diverse experiences of America's most marginalized communities. Hip-hop allows for and invites expression openly and honestly. It calls to hold the government accountable for its promises to the people. Rap music is bonded

²³⁴ Deena Zaru, *Young Thug Indictment Spotlights Controversial Use of Rap Lyrics as Evidence in Court*, ABC NEWS (May 24, 2022, 3:13 AM), <https://abcnews.go.com/US/young-thug-indictment-spotlights-controversial-rap-lyrics-evidence/story?id=84860405>.

²³⁵ Deena Zaru, *Young Thug's Attorney Asks Judge to Stop Prosecutors from Using Rapper's Lyrics as Evidence*, ABC NEWS (Dec. 7, 2022, 6:59 PM), <https://abcnews.go.com/US/young-thugs-attorney-asks-judge-stop-prosecutors-rappers/story?id=94722996>.

²³⁶ *Id.*

²³⁷ Deena Zaru & Ashan Singh, *Killer Mike Calls for Protection of Black Art amid Young Thug and Gunna Indictment*, ABC NEWS (June 18, 2022, 10:18 AM), <https://abcnews.go.com/US/killer-mike-calls-protection-black-art-amid-young/story?id=85406280> (quoting D.A. Willis from a May 10 press conference) (alteration in original).

²³⁸ Shah, *supra* note 216 (quoting D.A. Willis at an August press conference).

with Black America in a way that is impossible to separate. It is also bonded with the criminal justice system, which has been a traditional mechanism for explicit and implicit racial discrimination for decades. It is abundantly clear that allowing rap lyrics as evidence in criminal trials puts defendants in danger of adverse outcomes because of implicit racial bias attached to rap music, rap lyrics, and hip-hop culture. Rap lyrics are connected to stereotypes of violent crime, drug dealing, and gang membership. Treating rap lyrics as literal speech violates artistic expression protected by the First Amendment and puts the right to a fair jury trial on shaky ground. The implications for Black families and communities are devastating.

Progress is slowly being made and will hopefully continue. In recent years, two states have introduced formal legislation to codify the protection of creative expression like rap lyrics in state evidence codes, and one state has already implemented this law. California and New York provide sample roadmaps and learning opportunities for other jurisdictions seeking to implement similar protections. States like New Jersey may be looked to for common law guidance as their courts have led the charge in this area. Federally, the Restoring Artistic Protection Act of 2022 opens the door for federal protections for creative expression in the form of rap lyrics. States like Georgia, where protecting creative expression and artistic freedoms are of particular importance to the economy, should follow.

APPENDIX: RECOMMENDED LISTENING

YOUNG STONER LIFE, YOUNG THUG, GUNNA, YAK GOTTI, *Take It to Trial*, on SLIME LANGUAGE 2 (Young Stoner Life Records/300 Entertainment 2021).

YOUNG THUG, *Anybody* (feat. Nicki Minaj), on HEAR NO EVIL (Young Stoner Life Records/300 Elektra Entertainment, Atlantic Records 2018).

CHILDISH GAMBINO, *This Is America*, on THIS IS AMERICA (RCA Records/Sony Music Entertainment 2018).

KILLER MIKE, *RUN* (feat. Young Thug), on RUN (Loma Vista Recordings 2022).

YOUNG THUG, *Hot* (feat. Gunna), on SO MUCH FUN (300 Entertainment / Atlantic Recording Company 2019).

GUNNA, *DOLLAZ ON MY HEAD*, on WUNNA (Young Stoner Life Records/300 Elektra Entertainment 2020).

GUNNA, *Oh Okay* (feat. Young Thug & Lil Baby), on DRIP SEASON 3 (DELUXE) (Young Stoner Life Records exclusively distributed by 300 Entertainment 2018).

YOUNG THUG, *Just How It Is*, on SO MUCH FUN (300 Entertainment/Atlantic Recording 2019).

YOUNG THUG, *Check*, on BARTER 6 (300 Entertainment/Atlantic Recording Corporation and WEA International Inc. A Warner Music Group Company 2015).

YOUNG THUG, *High* (feat. Elton John), on ON THE RUN (300 Entertainment/Atlantic Recording Corporation and WEA International Inc. A Warner Music Group Company 2018).

RUN THE JEWELS, *JU\$T* (feat. Pharrell Williams & Zach de la Rocha), on RTJ4 (Jewel Runners 2020).

YOUNG THUG, *Halftime*, on BARTER 6 (300 Entertainment/Atlantic Recording Corporation and WEA International Inc. A Warner Music Group Company 2015).

RICH GANG, YOUNG THUG, RICH HOMIE QUAN, *Lifestyle* (Cash Money Records 2014).

BEYONCÉ, *Amen, on* COWBOY CARTER (Parkwood Entertainment, LLC 2024).