

A CRITICAL ANALYSIS OF RAP SHIELD LAWS

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For years, scholars have been sounding the alarm on “rap on trial,” or the use of rap as evidence in criminal proceedings, pointing out that the fundamental characteristics of rap music make it uniquely susceptible to misinterpretation and prejudice. Scholars have also cautioned that rap on trial has the potential to chill artistic expression in violation of the First Amendment. The heavy reliance on rap lyrics in the recent RICO prosecution against rapper Young Thug has shed a renewed spotlight on the rap on trial concerns. In response to these growing concerns and a perceived gap in evidence law, state and federal legislators have proposed, and in some states enacted, statutes that seek to limit the use of rap lyrics as evidence—what this Article refers to as “rap shields.”

This Article provides the first critical analysis of rap shield proposals. More specifically, this Article demonstrates that rap shield laws are largely duplicative and, therefore, unnecessary from both an evidentiary and constitutional standpoint. Nevertheless, from a social justice standpoint, rap shields serve important functions that may justify their enactment, such as offering guidance that increases judicial scrutiny and decreases judicial discretion. Those benefits, however, come with unintended costs—costs that may outweigh the important functions rap shields serve—including impeding defendants’ rights to present a defense. This Article concludes that the administration of justice may be better served and the concerns with rap on trial better addressed when the firmly rooted canons of evidence law are stringently applied rather than amended.

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INTRODUCTION

In May 2022, Grammy Award-winning rapper Jeffery Lamar Williams II, known professionally as Young Thug, made headlines when his rap lyrics were prominently featured in a fifty-six-count indictment charging him and twenty-seven others with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), among other offenses.¹ The indictment alleged that Young Thug’s rap lyrics helped YSL, an alleged criminal street gang, preserve, protect, and enhance its reputation, power, and territory by “demonstrating allegiance to the enterprise and a willingness to engage in violence on its behalf.”² Lyrics featured throughout the indictment included, “I done for the crew, I done did the robbin, I done did the jackin, now I’m full rappin”;³ “gave the lawyer close to two mil, he handles all the killings”;⁴ and “for slimes you know I kill, trial, I done beat it twice, state, I’m undefeated”⁵ During Young Thug’s bond hearing in June 2022, the prosecution again relied on his rap lyrics, reading the following lyrics to persuade the judge that Young Thug was a threat to the public: “Fuck

¹ Indictment, *State v. Adams*, No. 22SC182273 (Ga. Super. Ct. May 9, 2022).

² *Id.* at 11.

³ *Id.* at 39.

⁴ *Id.*

⁵ *Id.* at 46.

the police. Fuck the judge. Mob life.”⁶ Then again, starting in November 2023, during what is now the longest criminal trial in Georgia’s history, the prosecution introduced several of Young Thug’s lyrics to prove the charged offenses.⁷

Young Thug is not alone—several other famous rappers have recently had their lyrics used as evidence against them in criminal proceedings. In 2019, after being indicted on charges related to racketeering, weapon possession, and conspiracy to commit murder, Daniel Hernandez, known professionally as Tekashi69 or 6ix9ine, pled guilty and agreed to testify against his codefendants as a government witness.⁸ During his testimony, prosecutors played excerpts of Tekashi69’s music videos and provided jurors with transcripts of the lyrics of his songs.⁹ In 2022, twenty individuals, many of whom are part of the Bronx drill¹⁰ music scene, were indicted on charges involving shootings and stabbings as part of what law enforcement called “Operation Drilly,” an investigation that relied, in part, on the monitoring and review of rap music videos.¹¹ In 2023, Michael Williams, known professionally as Sheff G, was among thirty-two defendants charged in a one-hundred-and-forty-count indictment that featured lyrics from his rap songs.¹² And the list goes on.¹³

⁶ 11Alive, *State’s Case Against Bond for Young Thug Continues (Very Explicit Language)*, YouTube, at 1:03 (June 2, 2022), <https://www.youtube.com/watch?v=xeyYrGkuaJI> [<https://perma.cc/BD2Q-JARU>].

⁷ *State v. Williams*, No. 22SC183572 (Ga. Super. Ct. Nov. 27, 2023).

⁸ Joe Coscarelli, *6ix9ine’s Testimony: The Rapper’s Rise, Beef’s and Crash, in His Own Words*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2019/09/20/arts/music/tekashi-case-testimony.html> [<https://perma.cc/76Z2-GR3H>]; Victoria Bekiempis, *Tekashi 6ix9ine’s Ex-Bodyguard Found Guilty of Kidnapping Him*, VULTURE (Oct. 3, 2019), <https://www.vulture.com/2019/10/tekashi69-trial-update-snitching-leads-to-guilty-verdict.html> [<https://perma.cc/6K9N-C3DD>].

⁹ See sources cited *supra* note 8.

¹⁰ Drill music is a subgenre of rap that originated in the 2010s in Chicago. See Andre Gee, *How Drill Music Took Over Chicago—and Was Almost Forced Out*, COMPLEX (June 10, 2021), <https://www.complex.com/music/a/andre-gee/chicago-drill-music-rap-forced-out> [<https://perma.cc/3ZGA-ZZHR>].

¹¹ Brenton Blanchet, *Drill Rap Videos Used by Cops to Arrest 20 Alleged Gang Members in ‘Operation Drilly,’* COMPLEX (Apr. 11, 2022), <https://www.complex.com/music/a/b-blanchet/bronx-da-drill-arrests-operation-drilly> [<https://perma.cc/9D2T-WPQF>].

¹² Indictment, *People v. Williams*, No. 98/2021 (N.Y. Sup. Ct. May 3, 2023).

¹³ See, e.g., Edward Helmore, *Rapper YNW Melly’s Lyrics Could Be Used Against Him in Double Murder Retrial*, THE GUARDIAN (Dec. 17, 2023), <https://www.theguardian.com/music/2023/dec/17/rapper-ynw-melly-lyrics-double-murder-retrial> [<https://perma.cc/7YPL-FWF2>]; Jennifer Henderson & Travis Nichols, *Rapper Arrested on a Murder Charge After Allegedly Writing a Song and*

But these are just a handful of examples against rappers with notoriety. Rap lyrics have also been used against amateur and novice rappers, or simply those who express themselves through rap.¹⁴ Since at least the early 1990s, rap lyrics have been introduced in several hundred federal and state criminal proceedings against both high-profile and amateur rappers.¹⁵ In recent years, the practice of relying on rap lyrics as evidence in criminal proceedings has become much more commonplace. Of the hundreds of criminal cases in which rap lyrics were admitted as evidence, more than seventy percent occurred in the last ten years.¹⁶ The use of online downloading or streaming platforms such as YouTube, Spotify, Snapchat, and Soundcloud, has expanded artists' (including the famous, the amateur, and the experimentalist) abilities to record and disseminate music, making rap music more widely available to not only fans but also law enforcement and prosecutors.¹⁷ Indeed, state and federal law enforcement agencies have organized "Hip-Hop Task Forces" to conduct surveillance on individuals "in and around the hiphop music scene."¹⁸

Making a Music Video About the Crime, CNN (Sept. 8, 2023), <https://www.cnn.com/2023/09/08/us/kenjuan-mcdaniel-nevada-rapper-arrested-murder/index.html> [https://perma.cc/22JM-7A2R].

¹⁴ See Jack Lerner, *Rap on Trial: A Brief History*, 27 CHAP. L. REV. 405, 428 (2024) (noting that the majority of rap on trial cases concern local or unknown artists).

¹⁵ ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 12 (2019) (identifying approximately five hundred cases of rap on trial).

¹⁶ A Westlaw search of cases admitting rap lyrics (search query: (rap /5 lyric! video!) /s admis! relev! prej!) resulted in 532 cases as of June 7, 2025. A Westlaw search of cases admitting rap lyrics after 2014 (search query: (rap /5 lyric! video!) /s admis! relev! prej! & daft(1/1/2014)) resulted in 400 cases as of June 7, 2025. See generally Lerner, *supra* note 14, at 421 (noting an increase in rap on trial opinions in California starting around 2009).

¹⁷ See Lerner, *supra* note 14, at 421 (noting the rise of YouTube as a possible reason for increase in the number of rap on trial cases since 2009); NIELSON & DENNIS, *supra* note 15, at 23 (noting that digital streaming platforms serve as a source for police and prosecutors to find rap evidence); see also Joseph Goldstein & J. David Goodman, *Seeking Clues to Gangs and Crime, Detectives Monitor Internet Rap Videos*, N.Y. TIMES (Jan. 7, 2014), <https://www.nytimes.com/2014/01/08/nyregion/seeking-clues-to-gangs-and-crime-detectives-monitor-internet-rap-videos.html> [https://perma.cc/DQ8D-LDFY].

¹⁸ Dasun Allah, *NYPD Admits to Rap Intelligence Unit*, VILLAGE VOICE (Mar. 16, 2004), <https://www.villagevoice.com/nypd-admits-to-rap-intelligence-unit> [https://perma.cc/7QHB-3USM]; see also Shawn Setaro, *Why Are the NYPD 'Hip-Hop Police' Spying on Rappers?*, COMPLEX (June 11, 2020), <https://www.complex.com/music/2020/06/nypd-hip-hop-police> [https://perma.cc/P445-LYDV]; 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, 37 (2016).

For years, scholars have been sounding the alarm on the use of rap as evidence and coined the term “rap on trial” to describe the practice.¹⁹ As scholars point out, determining the admissibility of rap as evidence requires unique considerations.²⁰ In particular, rap music, as a form of artistic expression often replete with figurative language and braggadocio, makes determining its probative value challenging.²¹ The introduction of rap music as evidence also has the potential to be highly prejudicial to defendants, given common references to violence, drugs, and guns.²² Additionally, despite its mainstream popularity, several studies have shown that individuals hold negative views toward rap music and those who create it, which also increases the risk of prejudice in criminal proceedings.²³ Aside from these evidentiary concerns, admitting rap lyrics as evidence has the potential to chill artists’ creative expression.²⁴

While scholars have been critical of rap on trial for some time now, the recent use of rap lyrics in criminal proceedings against high-profile artists, like Young Thug, has brought national attention and widespread criticism to the practice.²⁵ Since 2019, a book has been written,²⁶ podcasts have been produced,²⁷ documentaries have been filmed,²⁸ and a substantial

¹⁹ See generally NIELSON & DENNIS, *supra* note 15. The practice of “rap on trial” involves the use of both rap lyrics *and* rap music videos in criminal proceedings. Throughout this Article the term “rap lyrics” is used to refer to both lyrics and videos, the most common forms of evidence introduced.

²⁰ See *infra* Part II.

²¹ See *infra* subpart II.A.

²² See *infra* subpart II.B.

²³ See *infra* subpart II.B.

²⁴ See *infra* subpart II.C.

²⁵ See, e.g., Tim Darnell, *Rap Lyrics Become Key Focus in Young Thug’s Trial*, ATLANTA NEWS FIRST (Nov. 1, 2023), <https://www.atlantaneewsfirst.com/2023/11/01/rap-lyrics-become-key-focus-young-thugs-trial/> [<https://perma.cc/2SNG-PXYJ>]; Sam Cabral, *Young Thug Rico Trial: How Rap Lyrics Put a Rapper Behind Bars*, BBC NEWS (Aug. 30, 2022), <https://www.bbc.com/news/world-us-canada-62087286> [<https://perma.cc/8DHY-58NY>]; Sidney Madden, Rodney Carmichael, Ayesha Rascoe & Isabella Gomez Sarmiento, *The Charges Against Young Thug Build on a Growing Trend of Criminalizing Rap Crews*, NPR (May 15, 2022), <https://www.npr.org/2022/05/15/1099004661/young-thug-is-the-latest-rapper-to-be-charged-under-historically-problematic-ric> [<https://perma.cc/9FAQ-NV69>].

²⁶ See NIELSON & DENNIS, *supra* note 15.

²⁷ See, e.g., Louder Than a Riot, *21 Years and 1 Day: Mac Phipps (Exclusive)*, NPR (Mar. 12, 2021), <https://www.npr.org/2021/03/11/976072964/21-years-and-1-day-mac-hipps-exclusive> [<https://perma.cc/JY9E-KT5V>].

²⁸ See, e.g., RAP TRAP: HIP HOP ON TRIAL (ABC News Studios 2023); AS WE SPEAK: RAP MUSIC ON TRIAL (Paramount+ 2024).

body of legal scholarship has been published²⁹ criticizing the use of rap as evidence. And just after Young Thug's indictment, industry leaders, legal experts, and over 100 artists (including, just to name a few, Alicia Keys, Camila Cabello, Coldplay, Drake, Future, J. Cole, Jack Harlow, John Legend, Lil Baby, Mary J. Blige, Meek Mill, Megan Thee Stallion, Post Malone, and Travis Scott) signed an open letter criticizing the evidentiary use of rap music.³⁰

In response to this growing concern and a perceived gap in evidence law, several state and federal legislators have proposed amending the rules of evidence (and, in some cases, the rules of criminal procedure) to create a special relevancy rule that limits the use of rap lyrics in criminal proceedings,³¹ what this Article refers to as "rap shields." State legislators in California, Georgia, Illinois, Louisiana, Maryland, Missouri, New Jersey, and New York have proposed such rap shields, and a similar rule has been proposed in Congress to amend the Federal Rules of Evidence.³² So far, two states, California and Louisiana, have enacted rap shield laws, with California being the first to do so.³³ Many of the rap shield laws being urged demonstrate the temptation to adopt "quick-fix" solutions to high-profile issues. Despite the laudable goals of these reforms, those temptations should be resisted.

This Article provides the first critical analysis of recent rap shield legislation. In particular, this Article argues that, as currently drafted, rap shields are duplicative and, therefore, unnecessary from both an evidentiary and constitutional standpoint. As demonstrated by recent court decisions, in practice these legislative efforts do little more than duplicate existing precedents under the current evidentiary framework. While

²⁹ See, e.g., Lucy J. Litt, *From Rhyming Bars to Behind Bars: The Problematic Use of Rap Lyrics in Criminal Proceedings*, 92 *UMKC L. REV.* 121 (2023); Taifha Natalee Alexander, *Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement*, 12 *HARV. J. SPORTS & ENT. L.* 211 (2021); 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 (2021); Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 *AM. J. CRIM. L.* 77 (2019); Paige M. Walker, *Restricting The Use of Rap Lyrics as Evidence in Courts: A Targeted Approach to Tackling Discrimination in Criminal Procedure*, 28 *LEWIS & CLARK L. REV.* 431 (2024).

³⁰ See *Art on Trial: Protect Black Art*, PROTECT BLACK ART (Nov. 1, 2022), <https://www.protectblackart.co/> [<https://perma.cc/J9KS-DEVM>].

³¹ See *infra* Part III.

³² See *infra* Part III.

³³ See *infra* Part III.

rap shield statutes may be duplicative from an evidentiary and constitutional standpoint, they nevertheless serve important social justice functions, including limiting judicial discretion by providing judges with specific guidance on when to properly admit and exclude rap music as evidence. Those important functions, however, come with unintended costs—costs that may outweigh the benefits the rap shields are intended to serve—including impeding on defendants' rights to present a defense, encouraging the use of problematic gang expert testimony, and limiting the use of highly probative evidence far beyond merely rap music, like sex dolls and gang tattoos.

This Article examines these ideas in six Parts. Part I provides a brief overview of the rules of evidence most applicable to determining the admissibility of rap.³⁴ Part II discusses the concerns with relying on rap lyrics as evidence: (A) the difficulties with determining the probative value of rap lyrics by virtue of rap music's artistic conventions; (B) the risk of introducing unfair prejudice into criminal proceedings; and (C) the potential chilling effects of the practice. Part III provides an overview of the different approaches legislators are taking to address these concerns through rap shield legislation. Part IV examines the admissibility of rap lyrics as evidence under the current evidentiary framework (and without the benefit of rap shields). Part V argues that rap shield laws are duplicative and, therefore, largely unnecessary from an evidentiary and constitutional standpoint. Part V further argues that rap shields nevertheless may serve important functions from a social justice standpoint by limiting judges' otherwise broad discretion to admit evidence and increasing judicial scrutiny through modified admissibility standards and procedural requirements. Part VI argues that the benefit of that guidance, however, may not outweigh unintended consequences. This Article concludes that the administration of justice may be better served and the concerns with rap on trial better addressed when the current evidentiary framework is stringently applied rather than amended.³⁵

³⁴ Because the rules of evidence are inapplicable at the charging and sentencing stages of criminal proceedings, this Article will focus on the admissibility of rap lyrics in criminal trials. See FED. R. EVID. 1101(d).

³⁵ This Article does not address prosecutions of rap lyrics as true threats or obscenity. The use of rap in those contexts is outside of the scope of this Article. Instead, this Article addresses cases about the use of rap lyrics as evidence to prove *elements* of a crime, not as the crime itself. For a discussion of rap lyrics as true threats, see generally Clay Calvert, Emma Morehart & Sarah Papadelia, *Rap Music and True Threats Quagmire*, 38 Colum. J.L. & Arts 1 (2014).

I

THE CURRENT EVIDENTIARY FRAMEWORK

Because rap shield laws supplant existing relevancy rules of evidence, a brief overview of the rules that apply to the admissibility of rap lyrics in criminal proceedings and the purpose they serve is necessary.³⁶

Rule 401 defines “relevant evidence” broadly.³⁷ Under the Rule, evidence is relevant if “(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.”³⁸ Rule 402 declares that relevant evidence is admissible unless the Rules or governing law specify otherwise.³⁹ These two Rules together create a presumption of admissibility of relevant evidence.⁴⁰

Rule 403 serves as a safety valve for the breadth conferred by Rules 401 and 402.⁴¹ It grants trial courts broad discretion to exclude otherwise relevant evidence if its probative value is

³⁶ Though other rules are relevant to the question of admissibility of rap lyrics, including rules on hearsay (FED. R. EVID. 801–803) and authentication (FED. R. EVID. 901), admissibility disputes and the existing scholarship on the subject center primarily on the application of FED. R. EVID. 401–404 (or their state equivalents). In discussing the admissibility of rap lyrics under the current evidentiary framework, *see infra* Part IV, this Article thus focuses on these four rules. Rap lyrics typically overcome hearsay challenges under the hearsay exceptions of admissions of a party opponent (FED. R. EVID. 801(d)(2)(A)) and coconspirator statements (FED. R. EVID. 801(d)(2)(E)). *See, e.g.*, United States v. Graham, 293 F. Supp. 3d 732, 738–39 (E.D. Mich. 2017) (citing cases).

³⁷ *See* PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE r. 401 (2025 ed.), Westlaw FEDRLSEV (“The Rule 401 definition of relevancy is quite expansive. Any tiny increase or decrease in the probability of a fact of consequence ‘does the trick,’ no matter how slightly incremental.”); *see also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587 (1993) (“[Rule 401’s] basic standard of relevance [] is a liberal one.”); Bielunas v. F/V Misty Dawn, Inc., 621 F.3d 72, 76 (1st Cir. 2010) (“[Rule 401’s] definition of relevance is quite expansive . . .”).

³⁸ FED. R. EVID. 401.

³⁹ FED. R. EVID. 402.

⁴⁰ *See* FED. R. EVID. 402 advisory committee’s notes on proposed rules; ROTHSTEIN, *supra* note 37, at r. 402 (“Rule 402 embodies an informal ‘presumption’ of admissibility for evidence that is relevant under Rule 401.”).

⁴¹ *See* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (“Rule 403 is intended to provide protection against the danger that the enlarged scope of admissibility under the Federal Rules will place before the trier of fact evidence which may lead to an improper decision.”); D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 291 (1989) (“In recognition that the admission of relevant evidence may threaten the reliability of the factfinding process, Rule 403 provides a balancing test by which probative, otherwise admissible evidence may be excluded.”).

substantially outweighed by the danger of the evidence.⁴² Probative value under Rule 403 goes beyond mere relevance.⁴³ “Whereas ‘relevancy’ is the tendency to make a consequential fact more or less probable, ‘probative value’ gauges the strength and force of that tendency.”⁴⁴ Under Rule 403, “unfair prejudice” means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”⁴⁵ Exclusion under Rule 403 was designed to be used sparingly, as an exceptional remedy for uniquely dangerous or problematic evidence.⁴⁶

Although the relevancy rules grant trial judges wide discretion to admit and exclude evidence, the bounds of the rules are not limitless. Indeed, the remaining relevancy rules, often called special relevance rules, categorically exclude certain types of evidence because of their inherently prejudicial nature.⁴⁷ Rule 404, one of the specialized relevancy rules, prohibits the admission of evidence of “any other crime, wrong, or act . . . to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”⁴⁸ Other act evidence⁴⁹ is not completely barred in all situations, however. Rule 404(b)(2) allows the use of other act evidence for limited purposes, such as, to prove “motive,

⁴² See FED. R. EVID. 403; Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 442 (1989) (“[B]y making most other admissibility rules subordinate to Rule 403, the drafters gave tremendous discretion to the trial court to exclude relevant evidence.”). But see 22A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5214, at 172 (2014) (criticizing the rule for the “unbridled discretion” it affords to trial judges).

⁴³ See *Old Chief v. United States*, 519 U.S. 172, 184 (1997) (“[W]hat counts as the Rule 403 ‘probative value’ of an item of evidence, as distinct from its Rule 401 ‘relevance,’ may be calculated by comparing evidentiary alternatives.”); see also Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 233 (1976).

⁴⁴ *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988); see also Dolan, *supra* note 43, at 233.

⁴⁵ FED. R. EVID. 403 advisory committee’s notes on proposed rules.

⁴⁶ See e.g., *United States v. Stone*, 702 F.2d 1333, 1340 (11th Cir. 1983); *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 906 (1988).

⁴⁷ See FED. R. EVID. 404–415.

⁴⁸ FED. R. EVID. 404(b)(1).

⁴⁹ Throughout this Article, “other act evidence” is used as a shorthand for other crimes, wrongs, and acts under Rule 404(b).

opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”⁵⁰

Whether rap lyrics should be analyzed under a Rule 404(b) framework remains an open question.⁵¹ Of course, writing about a crime or bad act is not itself a crime or bad act. Courts generally agree, however, that rap lyrics can be analyzed under Rule 404(b) when proffered as extrinsic evidence for the limited purposes laid out in the Rule.⁵² Such an application advances the purpose of the Rule, which serves as a safeguard against propensity evidence that may prejudice the jury against a defendant.⁵³ And rap lyrics, by the nature of the artistic conventions of the genre, have the capacity to accomplish just that.⁵⁴ When proffered as intrinsic evidence or evidence that provides direct proof against a defendant, however, courts generally apply the Rule 401 standard of relevance.⁵⁵

II

THE CONCERNS WITH RAP AS EVIDENCE

Under the current evidentiary framework, rap lyrics may be admitted on any issue to which they may be relevant, unless their probative value is substantially outweighed by the risk of unfair prejudice, or if their only relevance is to show a propensity on the part of the accused.⁵⁶ Striking the right balance between the probative value and potential prejudicial effect of evidence under Rule 403 is challenging and extremely

⁵⁰ FED. R. EVID. 404(b)(2).

⁵¹ *State v. Skinner*, 95 A.3d 236, 248 (N.J. 2014) (acknowledging “debatable question” of analyzing rap under New Jersey’s equivalent of Rule 404(b)).

⁵² *See, e.g.*, *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) (analyzing rap lyrics under Rule 404(b)); *Skinner*, 95 A.3d at 248 (same); *Hannah v. State*, 23 A.3d 192, 196–201 (Md. 2011) (same); *Greene v. Commonwealth*, 197 S.W.3d 76, 86–87 (Ky. 2006) (same); *State v. Cheeseboro*, 552 S.E.2d 300, 312–13 (S.C. 2001) (same); *Montague v. State*, 243 A.3d 546, 560 (Md. 2020) (recognizing rap lyrics can be analyzed under Rule 404(b)); *cf. State v. Hanson*, 731 P.2d 1140, 1144 n.7 (Wash. Ct. App. 1987) (recognizing fictional writings can be analyzed under Rule 404(b)). *But see Joynes v. State*, 797 A.2d 673, 677 (Del. 2002) (concluding that writing rap lyrics is not a “bad act” under Rule 404 and therefore should be governed by relevance standard).

⁵³ *See* FED. R. EVID. 404 advisory committee’s notes on proposed rules.

⁵⁴ *See supra* subparts II.A–B.

⁵⁵ *See Foster*, 939 F.2d at 456 (recognizing that when offered as direct evidence, rap lyrics should not be evaluated under Rule 404(b)); *Skinner*, 95 A.3d at 249 n.5 (same); *Montague*, 243 A.3d at 564 (recognizing rap lyrics proffered as direct evidence should be analyzed under the Maryland equivalents of Rules 401 and 403).

⁵⁶ *See infra* Part IV.

fact-intensive in any case.⁵⁷ It can be particularly challenging when the evidence sought to be introduced is rap music.⁵⁸ As several scholars have pointed out, when rap lyrics are offered as evidence, unique challenges and considerations arise in the evidentiary quest for truth and justice.⁵⁹

A. Low Probative Value

First, rap music generally features artistic conventions, such as metaphors, double entendres, and exaggerated storylines, that make it difficult to determine its probative value.⁶⁰ The use of these artistic conventions means that rap lyrics, unlike other first-person defendant statements, are not necessarily factual accounts of the truth, and so, unlike when considering the probative value of other defendant statements, it cannot be presumed that the author of rap lyrics has acted in accordance with the lyrics he authored.⁶¹ While it can generally

⁵⁷ See *United States v. Mehanna*, 735 F.3d 32, 61 (1st Cir. 2013) (describing Rule 403 determinations as “case-specific” because “[i]t is hen’s-teeth rare that two cases . . . will be of much assistance through a comparative analysis of Rule 403 determinations”); *United States v. Pulido*, 69 F.3d 192, 204 (7th Cir. 1995) (describing Rule 403 determinations as “a ‘comparison of intangibles’” (quoting *United States v. Glecier*, 923 F.2d 496, 503 (7th Cir. 1991))); *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985) (describing Rule 403 as “susceptible only to case-by-case determinations”); see also 2 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 403:1 (9th ed.), Westlaw FEDEVID (database updated Nov. 2024) (noting that in exercising its discretion under Rule 403, courts consider the following: “the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, . . . the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction” (footnotes omitted)).

⁵⁸ See *infra* subparts II.A–C.

⁵⁹ See *infra* subparts II.A–C.

⁶⁰ See Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 22 (2007); Michael Gregory, Note, *Murder Was the Case That They Gave Me: Defendant’s Rap Lyrics as Evidence in A Criminal Trial*, 25 B.U. PUB. INT. L.J. 329, 354 (2016); Kelly McGlynn, Jacob Schriener-Briggs & Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutions*, COMM’NS LAW., Winter 2023, at 10, 12; Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 RACE & JUST. 330, 333 (2017).

⁶¹ See, e.g., Alexander, *supra* note 29, at 231 (“[P]rosecutorial reliance on rap lyrics operates under the false assumption that the lyrics are actually true”); Gregory, *supra* note 60, at 354–55 (“[I]t is still important to recognize that in many cases, the introduced lyrics are most likely fiction.”); Lutes, Purdon & Fradella, *supra* note 29, at 85 (“[S]cholars have noted that the legal system has increasingly used rap lyrics as evidence as if the words were ‘truthful and autobiographical.’”); Stoia, Adams & Drakulich, *supra* note 60, at 330–34 (“In legal contexts, rap lyrics

be assumed that one would not make a statement against penal interest in most contexts, rap lyrics, by the nature of the artistic conventions the genre employs, can, in fact, be against one's own penal interest, though not necessarily based in truth.⁶²

Rap music often employs violent imagery in the form of metaphors and double entendres.⁶³ One common metaphor present in rap, for example, is homicide or murder.⁶⁴ Homicide in rap music often serves as a symbol of "skill, courage, or power" and a "lyricist's ability to defeat or destroy another lyricist through a superior display of verbal dexterity."⁶⁵ For example, in rap battles—face-to-face verse competitions—it is common for artists to use the term "body bag" to describe victory over an opponent, rather than a bag designed to contain a human cadaver.⁶⁶

Deciphering the meaning of rap lyrics and their probative value is further complicated by the conflict between authenticity and commercialization.⁶⁷ Rappers "frequently adopt mythical or real-life characters as alter egos or fictional personas" in their music.⁶⁸ These fictional personas are often driven by a heavily commercialized rap industry focused on maximizing profits, rather than the authenticity of the artist.⁶⁹ Thus, rap artists sometimes face pressure to convince listeners that "their lyrics are truthful and accurate representations of their lives, beliefs, and conduct," even when the content of the music is fictional.⁷⁰

are frequently interpreted literally. There are a variety of problems with this practice.").

⁶² See *supra* note 61 and accompanying text.

⁶³ See Dennis, *supra* note 60, at 22; Michael Eric Dyson, *Foreword* to THAT'S THE JOINT!: THE HIP-HOP STUDIES READER, at xi, xii (Murry Forman & Mark Anthony Neal eds. 2004); Gregory, *supra* note 60, at 354; McGlynn, Schriener-Briggs & Schell, *supra* note 60, at 10, 12; Stoia, Adams & Drakulich, *supra* note 60, at 333.

⁶⁴ Dennis, *supra* note 60, at 22.

⁶⁵ *Id.* (quoting IMANI PERRY, *PROPHETS OF THE HOOD* 60 (2004)).

⁶⁶ Brian Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. 685, 743 & n.381 (2021).

⁶⁷ Dennis, *supra* note 60, at 16–20; see also Lutes, Purdon & Fradella, *supra* note 29, at 84 (discussing how rap "involves fictionalized bragging about the performer's . . . 'badness' vis-à-vis criminal behavior"); Stoia, Adams & Drakulich, *supra* note 60, at 333–34 (discussing commercialization of rap).

⁶⁸ Dennis, *supra* note 60, at 23.

⁶⁹ *Id.* at 17–18.

⁷⁰ *Id.* at 19.

Indeed, a number of rap artists have admitted that their lyrics are not necessarily based in truth.⁷¹ Nayvadius DeMun Cash, known professionally as Future, for example, continues to portray himself as a drug abuser in his lyrics, even after proclaiming sobriety because, according to him, it is what his fans want to hear.⁷² Similarly, William Leonard Roberts II, known professionally as Rick Ross, based his rap persona and many of his songs after a famous drug kingpin, despite having been a correctional officer before he became famous (a fact he denied and tried to hide from fans).⁷³ And despite having rapped about committing armed robbery, extortion, and grand larceny, Joseph Antonio Cartagena, known professionally as Fat Joe, has stated that he has lied “in almost 95 percent of my songs. . . . I write like I feel that day. I’m just being creative.”⁷⁴ As McKinley Phipps, known professionally as Mac put it, “We’re in this to make money, and we’re feeding a market that demands this type of content. At the end of the day, I wasn’t walking around shooting people in real life, and I wasn’t walking around selling drugs to people in real life.”⁷⁵ Given these conventions, scholars have pointed out that “[r]ap music lyrics are neither inherently truthful, accurate, self-referential depictions of events, nor necessarily representative of an individual’s mindset.”⁷⁶

But the inverse is also generally true: rap lyrics are neither inherently untruthful, inaccurate, non-self-referential depictions of events, nor necessarily unrepresentative of an individual’s mindset. Even critics of the use of rap lyrics as evidence agree that rap lyrics can often contain truthful information about criminal activity.⁷⁷ Indeed, one of rap’s common

⁷¹ See *infra* notes 72–75 and accompanying text.

⁷² See Jessica McKinney, *Future Keeping His Sobriety a Secret Says More About You Than Him*, VIBE (Jan. 17, 2019), <https://www.vibe.com/features/opinion/future-sobriety-secret-toxic-fan-culture-630778/> [<https://perma.cc/DSB9-M6A9>].

⁷³ Oliver Herzfeld, *Rick Ross’ First Amendment Rap*, FORBES (Mar. 20, 2015), <https://www.forbes.com/sites/oliverherzfeld/2014/01/17/rick-ross-first-amendment-rap/> [<https://perma.cc/S4CF-M6JQ>].

⁷⁴ King Charles, *Transcript of Interview with Fat Joe*, CNN (Nov. 29, 2023), <https://transcripts.cnn.com/show/kc/date/2023-11-29/segment/01> [<https://perma.cc/R2K5-2YCY>].

⁷⁵ See NIELSON & DENNIS, *supra* note 15, at 2.

⁷⁶ Dennis, *supra* note 60, at 4.

⁷⁷ *Id.* at 20 (“[M]ass-produced hip hop maintains its “authenticity” in part by encouraging artists to live out the artistic narratives they portray.’ Thus, to support claims of authenticity, artists become enmeshed in criminal activities” (footnotes omitted) (quoting PERRY, *supra* note 65, at 90)); *People v. Bryant*, No. 05-152003-0, slip op. at 21, 29, 31 (Cal. Super. Ct. Oct. 3, 2022) (noting expert

conventions, authenticity, prescribes that the artist and product should “keep it real,” which means that rappers “claim that their lyrics are truthful and accurate representations of their lives, beliefs, and conduct,” regardless of whether or not the lyrics are actually truthful and accurate.⁷⁸ And sometimes (though not always), lyrics that “keep it real” provide truthful and accurate information regarding a defendant’s involvement in criminal activity.⁷⁹ Indeed, even by Fat Joe’s account, he told the truth in at least some parts of his songs.⁸⁰ And just last year, rapper Tekashi69, for example, testified under oath about his involvement in criminal activity and how portraying the gang image he rapped about often meant actually being involved in gang activity.⁸¹ Likewise, one of Young Thug’s co-defendants and fellow rapper, Gunna, affirmed during a plea deal that “YSL is a music label and a gang” and that “members or associates of YSL have committed crimes in furtherance of the gang”—precisely what the indictment alleged certain lyrics meant.⁸² And to complicate matters more, sometimes rap lyrics are based on half-truths, or as rapper Ice-T once put it, “factions”—a blend between fact and fiction.⁸³

All that is to say, “although rap music often contains first-person accounts of the speaker’s lifestyle and activities—including criminal activities—the lyrics are not always autobiographical statements.”⁸⁴ Criminality, therefore, cannot be necessarily inferred simply from a rap lyric’s reference to criminal activity. As a result, it can be difficult to ascertain the probative value of rap lyrics.⁸⁵

witnesses “conceded that some rap lyrics can be treated as true,” that “in some cases rappers are portraying what actually has happened in the past,” and that words “can be used literally in rap music”).

⁷⁸ Dennis, *supra* note 60, at 19.

⁷⁹ See *infra* notes 80–83 and accompanying text.

⁸⁰ See *supra* note 74 and accompanying text.

⁸¹ See *supra* note 8 and accompanying text.

⁸² Jewel Wicker, *Gunna’s Plea Deal Sparks Complex Conversations About “Snitching” in Hip-Hop*, OKAYPLAYER (Feb. 17, 2023), <https://www.okayplayer.com/originals/gunna-snitch-young-thug-case.html> [<https://perma.cc/KE48-H23P>].

⁸³ Reyna Araibi, Note, “Every Rhyme I Write”: Rap Music as Evidence in Criminal Trials, 62 ARIZ. L. REV. 805, 815 (2020).

⁸⁴ *United States v. Wiley*, 610 F. Supp. 3d 440, 446 (D. Conn. 2022).

⁸⁵ See Dennis, *supra* note 60, at 18 (noting that “distinguishing truth [in rap lyrics] is not a straightforward proposition”); McGlynn, Schriener-Briggs & Schell, *supra* note 60, at 11 (“The probative value of rap lyrics is highly questionable. As in many genres, artists often write under fictional personas, reference events in the news (including crimes), and employ lyrical hyperbole.”).

B. Risk of Unfair Prejudice

Second, the introduction of rap music, by the nature of its content, presents a risk of inflaming jurors and influencing them to convict a defendant on impermissible grounds.⁸⁶ Rap music, as a genre, often discusses themes of violence, drugs, guns, and other criminal behavior, which makes its introduction into evidence potentially highly prejudicial.⁸⁷ The danger associated with introducing rap lyrics that discuss these themes is the potential that a jury could ascribe character assessments to a defendant based on the content of the lyrics that he wrote.⁸⁸ In other words, a jury might regard the rap lyrics as proof that a defendant engaged in criminal behavior, instead of regarding them as simply artistic expression.⁸⁹

Beyond the content of rap music, stereotypes about the genre and those that create it—typically young men of color— influence how listeners (and potentially judges and juries) interpret rap lyrics.⁹⁰ Despite a growth in popularity of the genre,⁹¹ studies suggest that individuals react negatively to rap music and those that create it, particularly when compared to other genres.⁹² In a 1999 study, for example, psychologist Stuart Fischhoff explored the effect of rap lyrics authored by a hypothetical defendant on perceptions of the hypothetical defendant's personality.⁹³ To conduct the study, Fischhoff divided participants into four groups and presented each group with biographical information about a hypothetical eighteen-year-old African American man.⁹⁴ Each group was then assigned one of four conditions varying as to whether the hypothetical man was on trial for murder or the author of rap lyrics.⁹⁵ The

⁸⁶ See NIELSON & DENNIS, *supra* note 15, at 17; Dennis, *supra* note 60, at 29; Lutes, Purdon & Fradella, *supra* note 29, at 108; McGlynn, Schriener-Briggs & Schell, *supra* note 60, at 10, 15.

⁸⁷ See sources cited *supra* note 86.

⁸⁸ See sources cited *supra* note 86.

⁸⁹ See sourced cited *supra* note 86.

⁹⁰ See *infra* notes 93, 103, 107.

⁹¹ Jill Serjeant, *Hip Hop and R&B Surpass Rock as Biggest U.S. Music Genre*, REUTERS (Jan. 4, 2018), <https://www.reuters.com/article/lifestyle/hip-hop-and-rb-surpass-rock-as-biggest-us-music-genre-idUSKBN1ET2A6/> [<https://perma.cc/ZM53-FX2M>]; NIELSON & DENNIS, *supra* note 15, at 45.

⁹² See *infra* notes 93, 103, 107.

⁹³ Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795 (1999).

⁹⁴ *Id.* at 798–99.

⁹⁵ *Id.*

lyrics included the following: “[C]ome in my face again/ I’m gonta grab it/ So watch your/ chains and Nugget/ cause with the Steel/ in my hand I’m ruggit.”⁹⁶ The four conditions were (1) no murder and no lyrics, (2) murder and no lyrics, (3) no murder and lyrics, and (4) murder and lyrics.⁹⁷ Participants were then asked about their perceptions regarding the hypothetical man’s personality (e.g., caring/uncaring, truthful/untruthful, capable of murder/not capable of murder).⁹⁸

Fischhoff found that the participants presented with the lyrics “judged the target male far more negatively than when he was not associated with such lyrics.”⁹⁹ Furthermore, participants viewed the male rap lyricist accused of murder “significantly more negatively” than the male non-lyricist accused of the same murder.¹⁰⁰ Fischhoff also found that participants were “significantly inclined to more negatively evaluate” a rap lyricist not accused of murder than a non-lyricist accused of murder.¹⁰¹ In other words, being accused of writing rap music, according to this study, was more damning to a person’s character than being accused of committing murder.¹⁰²

That same year, psychologist Carrie Fried conducted another study in which participants deemed rap lyrics to be more offensive, in greater need of regulation, and more literal than country music.¹⁰³ In that study, Fried provided participants lyrics from a folk song.¹⁰⁴ Fried then told each set of participants that the lyrics came from either a country or rap song and asked them to evaluate the lyrics based on a series of statements about the lyrics, including the following: “I object to these lyrics,” “I find these lyrics offensive,” “[t]his song may be dangerous or harmful to society.”¹⁰⁵

The results showed that when participants were told that the lyrics were from a rap song, responses were more negative.¹⁰⁶ Two decades later, Adam Dunbar and other researchers

⁹⁶ *Id.* at 800.

⁹⁷ *Id.* at 798–99.

⁹⁸ *Id.* at 799.

⁹⁹ *Id.* at 800.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 800–02.

¹⁰² *Id.*

¹⁰³ Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705 (1999).

¹⁰⁴ *Id.* at 710.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 715–16.

replicated Fried's experiment.¹⁰⁷ They found that, yet again, participants evaluated rap lyrics more negatively than country lyrics.¹⁰⁸

C. First Amendment Concerns

Beyond these evidentiary concerns, rap shield proponents raise a constitutional concern: the First Amendment implications of the evidentiary use of rap.¹⁰⁹ More specifically, the concern is that the evidentiary use of rap music will have a chilling effect on artists, and stifle creative expression in violation of the First Amendment.¹¹⁰ New York legislators, for example, stated that “[t]he purpose of this legislation is to protect freedom of speech and artistic expression in New York State.”¹¹¹ Congressman Jamaal Bowman, cosponsor of the federal rap shield statute, likewise stated that the legislation “would ensure that our evidentiary standards protect the First Amendment right to freedom of expression.”¹¹² California Assemblymember Reginald Jones-Sawyer said that the California statute “ultimately boiled down to a question of First Amendment rights.”¹¹³

This chilling effect is not imaginary. Rap artists are indeed becoming aware that their listeners include not just fans but also law enforcement and prosecutors and are becoming

¹⁰⁷ Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 PSYCH. PUB. POL’Y & L. 280, 286–89 (2016). While Fried did not manipulate the race of the lyricist in her study, Dunbar did and included a control condition to isolate potential racial bias by assessing the impact of the songwriter’s race on character judgments, thereby exploring the connections between negative rap stereotypes and anti-Black stereotypes. The results of this study showed that the more negative evaluations of rap occurred regardless of the lyricist’s race. *Id.* In other words, the race of the lyricist had no effect on how the lyrics were evaluated. *Id.*

¹⁰⁸ *Id.* at 287–89.

¹⁰⁹ See, e.g., *infra* notes 111–13 and accompanying text; see also NIELSON & DENNIS, *supra* note 15, at 112–20; Dre’Kevius O. Huff, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 359 (2018).

¹¹⁰ See sources cited *supra* note 109.

¹¹¹ SPONSOR MEMO, S. S7527, 2021–2022 Leg., Reg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/S7527> [<https://perma.cc/J8FC-GF3E>].

¹¹² Press Release, Hank Johnson, Congressman for Georgia’s Fourth District, 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> [<https://perma.cc/8JBY-8R3A>].

¹¹³ Livia Albeck-Ripka, *California Bill Could Restrict the Use of Rap Lyrics in Court*, N.Y. TIMES (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/arts/music/california-rap-lyrics-bill-young-thug.html> [<https://perma.cc/H2E7-MZZZ>].

increasingly cautious about the content of their lyrics.¹¹⁴ Michael Render, also known as “Killer Mike” from the Atlanta rap duo Run The Jewels, for example, recently warned aspiring rap artists that they are being “targeted by the authorities, and they need to balance their right to free speech—and their desire to push the envelope of free speech—with the reality that police are watching.”¹¹⁵ Similarly, in 2020, rapper 50 Cent cautioned rappers that law enforcement may use their lyrics as evidence against them.¹¹⁶ In response, some artists have started to include disclaimers in their music indicating that their lyrics are fictional.¹¹⁷ Rapper Lil Durk, for example, included the following disclaimer on the opening song of his album *7220*, released in 2020: “This deluxe is all cap,¹¹⁸ this shit is not real.”¹¹⁹

* * *

Finally, and perhaps most importantly, the use of rap as evidence contributes to the racial disparities in America’s ongoing mass incarceration problem—a problem that disproportionately affects Black and Latino men.¹²⁰ Indeed, in ninety-five percent of cases in which rap lyrics are used as evidence in criminal proceedings, the defendants are either Black or Latino, reinforcing racial biases about the inherent criminality of these groups.¹²¹ Likewise, the use of art as evidence in criminal proceedings is reserved almost exclusively to rap music.¹²²

¹¹⁴ See *infra* notes 115–19 and accompanying text.

¹¹⁵ Killer Mike, *Foreword* to NIELSON & DENNIS, *supra* note 15, at xi.

¹¹⁶ 50 Cent (@50cent), X (Mar. 23, 2020, 10:07 AM), <https://x.com/50cent/status/1242090695072133128> [<https://perma.cc/KL9M-RWWS>] (“[I]f you say crazy shit on these records they are gonna use it. [I]f you in a gang on the song then you in the gang when the indictment come fool.”).

¹¹⁷ See *infra* note 119 and accompanying text.

¹¹⁸ The phrase “no cap” conveys authenticity and truth and is often used to emphasize that someone is not exaggerating about something hard to believe. By contrast, “cap” refers to a lie. Olivia Munson, *What Does ‘No Cap’ Mean? Here’s the Definition of the Slang Term and How to Use It.*, USA TODAY (Mar. 18, 2023), <https://www.usatoday.com/story/tech/2023/06/17/no-cap-meaning-slang/70292816007/> [<https://perma.cc/9MEL-WLMY>].

¹¹⁹ Andre Gee, *Rappers Are Saying They’re ‘Cappin’ in Songs. Here’s Why.*, COMPLEX (Aug. 10, 2022), <https://www.complex.com/music/a/andre-gee/rap-disclaimers-lyrics-cappin-monster-corleone> [<https://perma.cc/7RFA-ZJ7U>].

¹²⁰ NIELSON & DENNIS, *supra* note 15, at 10; Alexander, *supra* note 29, at 226.

¹²¹ NIELSON & DENNIS, *supra* note 15, at 18–19; see also Litt, *supra* note 29, at 138; Stoa, Adams & Drakulich, *supra* note 60, at 333.

¹²² NIELSON & DENNIS, *supra* note 15, at 20–21; Dennis, *supra* note 60, at 2; Stoa, Adams & Drakulich, *supra* note 60, at 333.

This is perhaps unsurprising given the deep historical and cultural connection between rap and communities of color (albeit now adopted by many other communities¹²³), and the racial disparities in our criminal justice system.¹²⁴ Black and Latino men are vastly overrepresented in the prison population, and this disparity widens for those serving lengthy sentences.¹²⁵ For example, Black and Latino Americans are incarcerated in state prisons at nearly 5 times and 1.3 times the rate of white Americans, respectively.¹²⁶ In California, for example, sixty-nine percent of individuals who have served over fifteen years in prison are Black or Latino.¹²⁷ Given these disparities and the connection between rap and communities of color, it is unsurprising, though still deeply concerning, that when music, or other forms of art, are introduced as evidence in criminal proceedings, it is almost exclusively rap music against Black and Latino defendants.¹²⁸

III

THE PROPOSED SOLUTION: RAP SHIELD LAWS

In response to the growing concerns over the use of rap as evidence and a perceived gap in evidence law, state and federal

¹²³ Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 985–86 (2004) (“Hip-hop foreshadows the future of the United States—one in which no racial group will constitute a majority. It is the most diverse form of American popular culture.” (footnote omitted)).

¹²⁴ NIELSON & DENNIS, *supra* note 15, at 27–58.

¹²⁵ See generally ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/5X92-CMSD>]; NAZGOL GHANDNOOSH & ASHLEY NELLIS, THE SENT’G PROJECT, HOW MANY PEOPLE ARE SPENDING OVER A DECADE IN PRISON? (2022), <https://www.sentencingproject.org/app/uploads/2022/10/How-Many-People-Are-Spending-Over-a-Decade-in-Prison.pdf> [<https://perma.cc/Z8ZS-HVXG>].

¹²⁶ NELLIS, *supra* note 125, at 5–6.

¹²⁷ GHANDNOOSH & NELLIS, *supra* note 125, at 7.

¹²⁸ See NIELSON & DENNIS, *supra* note 15, at 7 (noting that no other music genre is used nearly to the extent that rap lyrics are in criminal proceedings). Other forms of defendant-authored music have also been admitted into evidence, including against defendants who committed racially motivated acts of violence against Black victims. See, e.g., *Chaddock v. State*, 203 S.W.3d 916, 928 (Tex. App. 2006) (affirming admission of lyrics to a song by a “white power” musical group that described a group excitedly preparing to assault African-Americans in aggravated assault prosecution); *Brosky v. State*, 915 S.W.2d 120, 135 (Tex. App. 1996) (affirming admission of cassette tape titled “N—— at the End of a Rope,” by the Midtown Boot Boys, a band popular among skinheads, and a poster-sized transcript of the lyrics to the same song in prosecution of organized criminal activity and conspiracy, involving drive-by killing of Black man).

legislators have proposed rap shield laws or special relevancy rules that restrict the evidentiary use of “creative expression,” including rap music, in criminal proceedings.¹²⁹ Legislation has been proposed in several states, including California,¹³⁰ Georgia,¹³¹ Illinois,¹³² Louisiana,¹³³ Maryland,¹³⁴ Missouri,¹³⁵ New Jersey,¹³⁶ and New York.¹³⁷ In Congress, Representatives Hank Johnson and Jamaal Bowman introduced the Restoring Artistic Protection (“RAP”) Act.¹³⁸ These bills have garnered support from lawyers, rap and hip-hop artists, record labels, scholars, and activists.¹³⁹ So far, only the California and Louisiana proposals have been enacted into law.¹⁴⁰

These rap shield statutes are intended to combat the concerns with the use of rap lyrics as evidence in criminal proceedings,¹⁴¹ and were introduced following the attention brought to the practice after the use of rap lyrics as evidence in several high-profile prosecutions against famous rappers, like Young Thug and Tekashi69.¹⁴² Some of the rap shield

¹²⁹ See sources cited *infra* notes 130–38.

¹³⁰ Assemb. 2799, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (codified at CAL. EVID. CODE § 352.2 (West 2024)).

¹³¹ H.R. 990, 2023–2024 Leg., Reg. Sess. (Ga. 2024).

¹³² H.R. 3420, 103d Gen. Assemb., Reg. Sess. (Ill. 2023).

¹³³ H.R. 475, 2023 Leg., Reg. Sess. (La. 2023) (codified at LA. CODE EVID. ANN. art. 404(B) (2024)).

¹³⁴ H.D. 1429, 2024 Gen. Assemb., Reg. Sess. (Md. 2024).

¹³⁵ H.R. 353, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023).

¹³⁶ Assemb. J. Res. 107, 221st Leg., Reg. Sess. (N.J. 2024).

¹³⁷ S. 1738, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

¹³⁸ Restoring Artistic Protection (RAP) Act of 2023, H.R. 2952, 118th Cong. (2023).

¹³⁹ See, e.g., Bill Donahue, *Jay-Z, Meek Mill & More Urge New York to Limit the Use of Rap Lyrics in Criminal Cases*, BILLBOARD (Jan. 19, 2022), <https://www.billboard.com/business/legal/jay-z-new-york-limit-rap-lyrics-criminal-cases-1235020544/> [<https://perma.cc/4WSG-YZ9T>]; Press Release, Hank Johnson, *supra* note 112; Memorandum from Alex Spiro & Erik Nielson in Support of Rap Music on Trial Senate Bill, <https://www.scribd.com/document/553846265/Memorandum-of-Support-Rap-Music-on-Trial> [<https://perma.cc/2699-M8XZ>].

¹⁴⁰ CAL. EVID. CODE § 352.2 (West 2024); LA. CODE EVID. ANN. art. 404(B) (2024).

¹⁴¹ See, e.g., *People v. Venable*, 304 Cal. Rptr. 3d 731, 737 (Ct. App. 2023) (recognizing that the California legislature passed the rap shield law to address the problems of allowing rap lyrics into evidence).

¹⁴² See, e.g., Press Release, Brad Hoylman-Sigal, New York State Sen., Senators Brad Hoylman & Jamaal Bailey Introduce “Rap Music on Trial” Legislation to Prevent Song Lyrics from Being Used as Evidence in Criminal Cases (Nov. 17, 2021), <https://www.nysenate.gov/newsroom/press-releases/2021/brad-hoylman-sigal/senators-brad-hoylman-jamaal-bailey-introduce-rap> [<https://perma.cc/4WPF8-BZKS>] (referencing the evidentiary use of Tekashi69’s rap lyrics); Rob DiRienzo, *Bipartisan Group of GA Lawmakers Want to Ban ‘Artistic Expression’ Used*

legislation explicitly references the protection of rap music as the intended purpose of the legislation.¹⁴³ The California bill, for example, makes clear that there is “a significant risk of unfair prejudice when rap lyrics are introduced into evidence,” citing to the body of research discussed above in subpart II.B.¹⁴⁴ And when introducing rap shield legislation in New York, sponsors of the bill likewise referenced the concerns with the evidentiary use of rap music. For example, State Senator Brad Hoylman-Sigal, said:

Art is creative expression, not a blueprint of criminal plans. Yet we’ve seen prosecutors in New York and across the country try to use rap music lyrics as evidence in criminal cases It’s time to end the egregious bias against certain genres of music, like rap, and protect the First Amendment rights of all artists.¹⁴⁵

Senator Jamaal Bailey, who cosponsored the New York rap shield legislation, similarly noted the protection of rap music as a motivation for introducing the bill, saying:

The admission of art as criminal evidence only serves to erode [the right to free speech], and the use of rap and hip-hop lyrics in particular is emblematic of the systemic racism that permeates our criminal justice system. In many cases, even the mere association with certain genres, like hip-hop and rap, leads to heightened scrutiny in the courtroom and is used to presume guilt, immorality, and propensity for criminal activity.¹⁴⁶

Though the motivation behind these legislative efforts is the protection of rap music and those who express themselves

as Evidence, FOX 5 ATLANTA, (Feb. 6, 2024), <https://www.fox5atlanta.com/news/bipartisan-group-of-ga-lawmakers-want-to-ban-artistic-expression-used-as-evidence> [<https://perma.cc/2SUS-X585>] (noting that Georgia state representative referenced the Young Thug prosecution when introducing rap shield legislation).

¹⁴³ See *infra* notes 144–45 and accompanying text; see also Assemb. J. Res. 107, 221st Leg., Reg. Sess. (N.J. 2024) (noting “lyrics of rap music, as expressed in audio and music videos, have been used as a basis for indictment and prosecution of rap artists, specifically hip-hop and rap artists”); Assemb. 2799, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (“[A] substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence.”); S. RULES COMM., SENATE FLOOR ANALYSIS: THIRD READING, Assemb. 2799, 2021–2022 Leg., Reg. Sess., at 3 (Cal. 2022) (“[R]ap lyrics and other creative expressions get used as racialized character evidence.”).

¹⁴⁴ Cal. Assemb. 2799 § 1(a) (first citing Fischhoff, *supra* note 93, at 803; and then citing Fried, *supra* note 103).

¹⁴⁵ Press Release, Brad Hoylman-Sigal, *supra* note 142.

¹⁴⁶ *Id.*

through rap, none of the statutes are so narrow in scope.¹⁴⁷ Instead, the statutes go beyond limiting the use of rap and extend their application to all forms of “artistic expression,” defined broadly as “the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.”¹⁴⁸

Legislators have taken varying approaches in drafting rap shield statutes to limit the use of “artistic expression.” These approaches fall into several categories: (1) absolute exclusion (one jurisdiction), (2) exclusion of some formats (one jurisdiction), (3) exclusion as character evidence (one jurisdiction), and (4) exclusion with exceptions (six jurisdictions). Most states that have taken action, including California, have taken the last approach, which generally excludes artistic expression, subject to exceptions.

Absolute Exclusion. Rap shields that fall into this category are the most restrictive approach and call for a total ban on the use of artistic expression as evidence, with no exceptions. Just two months after the Young Thug RICO trial began in Georgia, legislators from that state introduced a rap shield bill that takes this approach.¹⁴⁹ In particular, the bill states, “[e]vidence deemed to be creative or artistic expression shall not be admissible.”¹⁵⁰ As of the writing of this Article, the Georgia proposal has yet to advance out of committee.¹⁵¹

Exclusion of Some Formats. Legislators in New Jersey have also proposed the exclusion of artistic expression without exceptions.¹⁵² Under the New Jersey rap shield proposal, however, only artistic expression in audio or video format would be

¹⁴⁷ Despite the application to *all* forms of artistic expression, this Article refers to statutes that seek to limit the evidentiary use of artistic expression as “rap shields,” given that the protection of rap music, in particular, is the motivation behind these legislative efforts.

¹⁴⁸ Cal. Assemb. 2799 sec. 2, § 352.2(c); H.R. 3420, 103d Gen. Assemb., Reg. Sess., sec. 5, § 115–7.5(a) (Ill. 2023); *see also* H.R. 990, 2023–2024 Leg., Reg. Sess. (Ga. 2024); H.R. 475, 2023 Leg., Reg. Sess. (La. 2023); H.R. 353, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); N.J. Assemb. J. Res. 107; S. 1738, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

¹⁴⁹ Ga. H.R. 990.

¹⁵⁰ *Id.*

¹⁵¹ *HB 990*, GA. GEN. ASSEMBLY (Feb. 20, 2024), <https://www.legis.ga.gov/legislation/66188> [<https://perma.cc/2769-F99S>].

¹⁵² N.J. Assemb. J. Res. 107.

inadmissible in a criminal proceeding.¹⁵³ Artistic expression in other formats would continue to be admissible subject to applicable rules under the current evidentiary framework.¹⁵⁴ While rap music videos and songs in audio format would be excluded under the proposal, rap lyrics in written format would still be admissible. As of the writing of this Article, the New Jersey proposal has also not yet advanced out of committee.¹⁵⁵

Exclusion as Character Evidence. Rap shields in this category amend state equivalents of Rule 404(b) to include artistic expression. Louisiana's Restoring Artistic Protection Act, which took effect in August 2023, is the only rap shield statute so far to take this approach.¹⁵⁶ In particular, the Act amends Louisiana's Rule 404(b) to prohibit artistic expression, in addition to other act evidence, from being used as propensity evidence, but allows such evidence for other limited purposes, such as to show motive, intent, and knowledge.¹⁵⁷ In practice, Louisiana's approach codifies what courts are already doing: analyzing rap lyrics under Rule 404(b) when offered as extrinsic evidence of motive, intent, and knowledge.¹⁵⁸ The statute does not, however, require that rap lyrics be interpreted as other act evidence.¹⁵⁹ Neither does this statute exclude artistic expression (except as character evidence), impose any additional burdens on the proffering party, nor does it impose any additional limits on the use of rap lyrics as evidence.¹⁶⁰ In other words, under this approach, artistic expression is otherwise admissible, subject to applicable rules under the current evidentiary framework.

Exclusion with Exceptions. The majority of rap shield statutes fall somewhere in the middle of the Georgia and Louisiana approaches and provide for exclusion with some exceptions. This category of rap shield provides that artistic expression is

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ *Bill AJR107*, N.J. LEGISLATURE (Feb. 1, 2024), <https://www.njleg.state.nj.us/bill-search/2024/AJR107> [<https://perma.cc/G56Y-NG39>].

¹⁵⁶ When originally introduced, Louisiana's Restoring Artistic Protection Act took the majority approach of imposing a presumption of inadmissibility subject to various exceptions. *See* H.R. 475, 2023 Leg., Reg. Sess. (La. 2023) (as prefiled by Representative Magee, Mar. 31, 2023), <https://legis.la.gov/legis/ViewDocument.aspx?d=1309162> [<https://perma.cc/S6FT-4YND>].

¹⁵⁷ Restoring Artistic Protection Act of 2023, 2023 La. Sess. Law Serv. Act 354 (West) (codified at LA. CODE EVID. ANN. art. 404(B) (2024)).

¹⁵⁸ *See supra* note 52 and accompanying text.

¹⁵⁹ *See* Restoring Artistic Protection Act of 2023 § 1.

¹⁶⁰ *See id.*

presumptively inadmissible subject to certain exceptions that tend to increase the probative value of the evidence.¹⁶¹ Most of these statutes require the trial court to closely scrutinize the evidence through the use of special standards and procedural requirements.¹⁶²

In effect, rap shield statutes that fall into this category increase judicial scrutiny of the admissibility of rap music in two ways: substantively and procedurally. Substantively, the statute modifies the default standard for assessing whether the probative value of proffered evidence is substantially outweighed by the danger of unfair prejudice set forth in Rule 403. Unlike most other evidentiary rules of exclusion, which define an impermissible use of otherwise relevant evidence but do not purport to enumerate an exhaustive list of permissible uses, rap shield statutes in this category reverse the ordinary approach of such rules and prohibit the use of any and all artistic expression unless it is explicitly permitted by the rule.¹⁶³ Rap shield statutes are then a markedly different approach from that of other rules of exclusion which state with specificity only that which is excluded but maintain the general approach of broad admissibility (subject to the ordinary considerations of Rules 401 and 403).

Without the rap shield statutes, as discussed *infra* Part IV, rap lyrics (and other artistic expression) are typically excluded under Rule 403 when the risk of unfair prejudice *substantially* outweighs its probative value. Rap shield legislation in this category imposes a more restrictive admissibility standard than Rule 403.¹⁶⁴ More specifically, the statutes invert the Rule 403 standard, and presume that the prejudicial effect of artistic expression *always* outweighs its probative value.¹⁶⁵ Under these statutes, artistic expression is therefore presumptively

¹⁶¹ See CAL. EVID. CODE § 352.2 (West 2024); H.R. 3420, 103d Gen. Assemb., Reg. Sess. (Ill. 2023); H.R. 353, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); S. 1738, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); Restoring Artistic Protection (RAP) Act of 2023, H.R. 2952, 118th Cong. (2023).

¹⁶² Maryland's proposal is the only legislation that falls into this category that does not also mandate the use of procedural requirements. See H.D. 1429, 2024 Gen. Assemb., Reg. Sess. (Md. 2024).

¹⁶³ Compare EVID. § 352.2, with FED. R. EVID. 407, and FED. R. EVID. 408 (narrowly defining evidence to be excluded for enumerated purposes and thereby affirming that any relevant evidence not barred is admissible, subject to Rule 403).

¹⁶⁴ Special tests for prejudice are occasionally used elsewhere in rules of evidence. For example, Federal Rule of Evidence 609(a) admits evidence of a felony conviction if the probative value outweighs the prejudicial effect, and Rule 609(b) admits evidence of convictions over 10 years old if probative value substantially outweighs prejudicial effect. See FED. R. EVID. 609(a)–(b).

¹⁶⁵ See EVID. § 352.2; Ill. H.R. 3420; Mo. H.R. 353; N.Y. S. 1738; H.R. 2952.

inadmissible (rather than presumptively admissible) unless certain factors that tend to increase the probative value of the evidence are present such that the probative value outweighs the prejudicial effect.¹⁶⁶

California, the first state to enact a rap shield law, has taken this approach.¹⁶⁷ The California Decriminalizing Artistic Expression Act,¹⁶⁸ which took effect in January 2023, requires courts to tip the scale in favor of excluding rap lyrics when employing the probative versus prejudicial value balancing test.¹⁶⁹ In particular, this statute requires courts employing the probative versus prejudicial value test to presume that the artistic expression has low probative value, and is, therefore, inadmissible, with several caveats.¹⁷⁰ To overcome this presumption, the proffering party can show that the artistic expression (1) “is created near in time to the charged crime,” (2) “bears a sufficient level of similarity to the charged crime or crimes,” or (3) “includes factual details not otherwise publicly available.”¹⁷¹ These conditions serve courts’ need for reliable evidence by tending to increase the evidence’s probative value. California’s rap shield statute also requires courts, in applying the probative versus unfair prejudice balancing test, to consider that unfair prejudice includes (1) the possibility that the trier of fact will “treat the expression as evidence of the

¹⁶⁶ See sources cited *supra* note 165.

¹⁶⁷ EVID. § 352.2.

¹⁶⁸ The exclusion with exceptions approach seems to be the preferred and most viable approach to rap shield legislation. While, so far, California is the only state to enact legislation in this category, the majority of states who are taking action seem to be coalescing around California’s approach. The analysis of rap shield legislation in subsequent sections of this Article, thus, focuses on this category of rap shield laws, and in particular, California’s version. Unless otherwise noted, references to rap shield laws in subsequent sections of this Article are references to rap shields in this category.

A quick note on the other proposals: As evidenced by the fact that most states taking action are coalescing around California’s approach, the remaining approaches are likely not as viable. Absolute exclusion, Georgia’s approach, is likely much too restrictive to achieve any legislative success. The exclusion of some formats, New Jersey’s approach, does little to actually exclude rap lyrics as evidence and, in practice, may actually restrict defendants’ defense. See Andrew Jensen Kerr, *When to Admit Art as Evidence*, 101 WASH. U. L. REV. ONLINE 29, 30 (2023) (suggesting rap music should be played in its entirety if admitted as evidence). Exclusion as character evidence, Louisiana’s approach, as discussed above, also does little to exclude the use of rap as evidence and merely codifies that rap can be analyzed under a Rule 404(b) framework.

¹⁶⁹ EVID. § 352.2(a).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

defendant's propensity for violence or general criminal disposition," and (2) "the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings."¹⁷² Legislators in Illinois, Maryland, Missouri, New York, and Congress have likewise considered this approach.¹⁷³

Except for legislation in Maryland,¹⁷⁴ rap shield legislation in this category also requires trial courts to impose additional procedural safeguards to minimize the risk of prejudicial effect if the artistic expression in dispute is admitted. In particular, the statutes require the following procedural protections before artistic expression is admitted into evidence: (1) an evidentiary hearing outside the presence of the jury; (2) an appropriate limiting instruction to the jury; and (3) redactions in a manner to limit the evidence presented to the jury to that which is specifically excepted under the statute.¹⁷⁵ In addition to these safeguards, the California law requires the trial court to weigh three more considerations, if raised by either party, before allowing a creative expression into evidence: (1) credible testimony regarding "the social or cultural context, rules, conventions, and artistic techniques of the expression"; (2) experimental or social science research demonstrating that a particular type of expression could explicitly or implicitly inject racial bias into the proceedings; and (3) evidence to rebut such research or testimony.¹⁷⁶

IV

THE ADMISSIBILITY OF RAP UNDER THE CURRENT FRAMEWORK

Without the protection of rap shields, when conducting Rule 403 determinations for rap evidence, courts have

¹⁷² *Id.*

¹⁷³ H.R. 3420, 103d Gen. Assemb., Reg. Sess. (Ill. 2023); H.D. 1429, 2024 Gen. Assemb., Reg. Sess. (Md. 2024); H.R. 353, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); S. 1738, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); Restoring Artistic Protection (RAP) Act of 2023, H.R. 2952, 118th Cong. (2023). These proposals take a similar approach to the California law, though the factors to overcome the presumption of inadmissibility vary slightly: the proffering party must prove by clear and convincing evidence (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." Ill. H.R.3420; N.Y. S. 1738; *see also* Mo. H.R. 353; H.R. 2952.

¹⁷⁴ Maryland's proposal does not require trial courts to impose additional procedural safeguards if artistic expression is admitted. *See* Md. H.D. 1429.

¹⁷⁵ *See* Ill. H.R. 3420; Mo. H.R. 353; N.Y. S. 1738; H.R. 2952. California's rap shield statute does not require redactions. *See* EVID. § 352.2.

¹⁷⁶ EVID. § 352.2.

recognized that balancing the probative value against the danger of unfair prejudice can be particularly challenging, given the unique characteristics of the genre.¹⁷⁷ Courts have generally acknowledged that rap music is a form of artistic expression¹⁷⁸ and that rap lyric evidence introduces a risk of prejudice.¹⁷⁹ In particular, courts have found the content of

¹⁷⁷ See *infra* notes 178–79 and accompanying text.

¹⁷⁸ See, e.g., *United States v. Jordan*, 714 F. Supp. 3d 158, 163 (E.D.N.Y. 2024) (recognizing “hip hop is fundamentally an *art form* that traffics in hyperbole, parody, kitsch, dramatic license, double entendres, signification, and other literary and artistic conventions to get it[s] point across” (quoting Dyson, *supra* note 63, at xii)); *United States v. Williams*, 663 F. Supp. 3d 1085, 1133 (D. Ariz. 2023) (recognizing that “rap music features fictional imagery, metaphors, and exaggerated storylines,” and it is “difficult to identify the probative value in fictional or other forms of self-expressive endeavors”); *United States v. Wiley*, 610 F. Supp. 3d 440, 446 (D. Conn. 2022) (recognizing that, although “rap music often contains first-person accounts of the speaker’s lifestyle and activities—including criminal activities,” “lyrics are not always autobiographical statements,” and “not every lyric in a rap video is probative of the charged conduct”); *United States v. Williams (Williams II)*, No. 13-cr-00764-WHO-1, 2017 WL 4310712, at *7 (N.D. Cal. Sept. 28, 2017) (recognizing that rap songs “are a form of artistic expression, and as with any artistic expression, it is difficult to distinguish between reality and fantasy”), *aff’d sub nom.* *United States v. Heard*, No. 18-10218, 2022 WL 2662882 (9th Cir. July 11, 2022); *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *6 (E.D. Pa. Apr. 28, 2017) (recognizing that “rap lyrics are not necessarily autobiographical statements; rather, rap music is a well-recognized musical genre that often utilizes exaggeration, metaphor, and braggadocio for the purpose of artistic expression”).

¹⁷⁹ See, e.g., *United States v. Recio*, 884 F.3d 230, 236 (4th Cir. 2018) (“[Rap] lyrics, like other forms of artistic expression, can describe a panoply of violent, criminal, or distasteful conduct”); *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) (finding admission of “heavily prejudicial” rap video containing explicit lyrics dealing with drugs, sex, profanity, degradation of women, firearms, and violence erroneous); *Williams*, 663 F. Supp. 3d at 1133 (“[C]ourts recognize that a significant concern with the admission of gangsta rap music at trial is that the lyrics present a serious risk of inflaming the jurors and influencing them to convict a defendant on impermissible grounds.”); *United States v. Stephenson*, 550 F. Supp. 3d 1246, 1255 (M.D. Fla. 2021) (excluding videos that included racially insensitive words and violent sexual imagery); *United States v. Johnson*, 469 F. Supp. 3d 193, 222 (S.D.N.Y. 2019) (excluding as irrelevant and unduly prejudicial rap lyrics that included references to violence, allusions to police misconduct, and profanity); *Williams II*, 2017 WL 4310712, at *7 (noting that rap evidence “may arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish”); *Bey*, 2017 WL 1547006 at *7 (noting that lyrics in rap songs often contain inflammatory material that risks inflaming the jurors); *Baker v. State*, 899 S.E.2d 139, 150–51 (Ga. 2024) (finding admission of rap video erroneous because it created a substantial danger of unfair prejudice by improperly portraying defendant as having a propensity for violence); *State v. Skinner*, 95 A.3d 236, 238 (N.J. 2014) (“The admission of [a] defendant’s inflammatory rap verses . . . risk[s] poisoning the jury against [the] defendant.”); *Montague v. State*, 243 A.3d 546, 566 (Md. 2020) (“[R]ap lyric evidence carries inherent prejudicial effect”); *Holmes v. State*, 306 P.3d 415, 418 (Nev. 2013) (recognizing that rap lyrics carry the risk of “being misunderstood or misused as criminal propensity

rap music to be cause for concern: “rap music as a genre often glorifies violence, misogyny, crime, and other offensive messaging which makes its introduction into evidence potentially highly prejudicial.”¹⁸⁰ Courts have also recognized that there is a danger that some members of the jury will consider rap music “more offensive, in greater need of regulation, and more literal and autobiographical” than other genres.¹⁸¹ In *United States v. Williams*, for example, the court found that the danger of unfair prejudice was substantial because “the videos depict ‘images of young African-American men, guns, and drugs atop musical lyrics that denigrate other African-Americans, women, and cooperating witnesses.’”¹⁸² The court concluded that it is “undeniable that certain scenes [in the rap video] may arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish.”¹⁸³ Likewise, in *United States v. Stephenson*, the court found that the rap lyrics in dispute “create[d] a significant risk that the jury will view [defendant] as a violent drug dealer and gang member and find [defendant] guilty of the charged offenses for improper reasons.”¹⁸⁴

As with all evidence, the probative value of a defendant’s rap lyrics shares an inverse relationship with unfair prejudice. Courts have reconciled the unique considerations raised by rap evidence by holding that the probative value of a defendant’s rap lyrics spikes—and consequently, the danger of unfair prejudice decreases—when a nexus exists between specific details of the rap lyrics and the circumstances of the offense for which the evidence is being adduced.¹⁸⁵ The more closely the rap

or ‘bad act’ evidence” (citing *Dennis*, *supra* note 60, at 18, 22, 25–26)); *Commonwealth v. Gray*, 978 N.E.2d 543, 562 (Mass. 2012) (explaining that the rap video had a prejudicial impact on the jury); *Hannah v. State*, 23 A.3d 192, 202 (Md. 2011) (reversing admission of rap lyrics because they “had no tendency to prove any issue other than . . . [defendant] was a violent thug with a propensity to commit the crimes for which he was on trial”).

¹⁸⁰ *Wiley*, 610 F. Supp. 3d at 446.

¹⁸¹ *Id.* at 445 (quoting *Dunbar*, *Kubrin & Scurich*, *supra* note 107, at 288); *see also Bey*, 2017 WL 1547006, at *6 n.3 (citing *Fischhoff*, *supra* note 93, at 797).

¹⁸² *Williams II*, 2017 WL 4310712, at *7.

¹⁸³ *Id.*

¹⁸⁴ *Stephenson*, 550 F. Supp. 3d at 1253.

¹⁸⁵ *See United States v. Sims*, 11 F.4th 315, 323 (5th Cir. 2021) (“The general conclusion from courts that have considered this type of evidence is that explicit rap videos are probative and outweigh substantial prejudice when the defendant performs the song, describes events closely related to the crime charged, and the evidence is not cumulative.”); *Montague v. State*, 243 A.3d 546, 569–70 (Md. 2020) (“While rap lyric evidence often has a prejudicial effect as improper propensity evidence of a defendant’s bad character, those concerns are diminished

lyrics recount key details of the events in a case, or, in other words, the more direct the nexus between the rap lyrics and the facts of the case, the more the probative value weighs in favor of admission, and the lower the danger of unfair prejudice.¹⁸⁶ Under this standard, courts have been reticent to admit rap lyrics when the lyrics bear only a tenuous connection to the charged crime.¹⁸⁷ For example, courts have found that the probative value of rap lyrics diminishes when they contain

when the lyrics are so akin to the alleged crime that they serve as 'direct proof of the defendant's involvement.');" State v. Skinner, 95 A.3d 236, 251–52 (N.J. 2014) ("[W]e reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced."); People v. Mendoza, No. A157489, 2021 WL 302739, at *7 (Cal. Ct. App. Jan. 29, 2021) ("[T]here is a clear nexus between the rap lyrics written by Mendoza prior to DeToro's murder and the circumstances of the charged offenses, and thus a persuasive basis exists for considering them at face value as a reflection of Mendoza's true motive and intent.").

Courts have applied this same standard in cases involving other forms of art. See, e.g., United States v. Orr, No. 92–10681, 1994 WL 384631 (9th Cir. July 21, 1994) (finding manuscript of unpublished book admissible against defendant accused of setting arson fires because similarities between arsonist in the book and defendant and between the fires in the book and the charged ones); United States v. Fraser, 448 F.3d 833, 839–41 (6th Cir. 2006) (admitting book written by defendant which described exact check counterfeiting scheme with which defendant was charged as evidence of intent).

¹⁸⁶ Compare United States v. Stuckey, 253 F. App'x 468, 482–83 (6th Cir. 2007) (finding rap lyrics describing criminal behavior similar to how the victim was killed admissible), and United States v. Hankton, 51 F.4th 578, 600 (5th Cir. 2022) (same), and United States v. Wilson (Wilson I), 493 F. Supp. 2d 460, 462 (E.D.N.Y. 2006) (same), and People v. Singh, 221 Cal. Rptr. 3d 308, 314–15 (Ct. App. 2017) (same), and Greene v. Commonwealth, 197 S.W.3d 76, 86–87 (Ky. 2006) (same), and Bryant v. State, 802 N.E.2d 486, 498–99 (Ind. Ct. App. 2004) (same), with Hannah v. State, 23 A.3d 192, 202 (Md. 2011) (reversing admission of rap lyrics because they bore no resemblance to the facts of the case), and State v. Cheeseboro, 552 S.E.2d 300, 313 (S.C. 2001) (same).

¹⁸⁷ See, e.g., United States v. Wiley, 610 F. Supp. 3d 440, 446 (D. Conn. 2022) (excluding rap lyrics containing statements with only tenuous connection to charged conduct, while admitting rap lyrics offense-specific content tending to corroborate the Government's other evidence in drug case); United States v. Jordan, 714 F. Supp. 3d 158, 165–66 (E.D.N.Y. 2024) (excluding rap lyrics merely containing "generic references to violence that can be found in many rap songs"); United States v. Donald, No. 21-cr-8, 2023 WL 6958797, at *27 (D. Conn. Oct. 20, 2023) (excluding rap videos that "generically reference[d] the drug trade, the gang war . . . , generalized acts of retaliation or violence, or possession of firearms"); United States v. Sneed, No. 14 CR 00159, 2016 WL 4191683, at *5–6 (M.D. Tenn. Aug. 9, 2016) (excluding rap video which appeared to depict the defendant and other individuals performing a rap song containing lyrics about drug sales and gang activity to show the defendant's alleged participation in the charged conspiracy); see also Montague, 243 A.3d at 563–64 ("[R]ap lyrics that include 'only general references glorifying violence[.]' even if they pass the low relevance threshold, should be excluded because their 'minimal probative value . . . is far outweighed

merely vague and generic references to common themes in rap music.¹⁸⁸

The degree of similarity required for a sufficient nexus, however, depends on the proffered purpose of the lyrics. When proffered as intrinsic evidence that directly proves the crime charged, close similarity is necessary.¹⁸⁹ But similarity is not *always* necessary; instead, logical relevance is sometimes enough.¹⁹⁰ When introduced as extrinsic other act evidence, such as to show criminal intent and motive, for example, the rap lyrics need not be similar in kind to the facts of the crime.¹⁹¹ In *United States v. Jordan*, for example, the trial court excluded defendant's rap lyrics as *direct* evidence of the murder charges because the lyrics did not "include any specific facts that might relate to [defendant's] participation in the murder alleged in this case."¹⁹² The lyrics did not mention, for example, "[the victim], the recording studio in which [the victim] was killed, the other shooting victim, or any alleged accomplices."¹⁹³ Instead, the lyrics "merely contain[ed] generic references to violence that can be found in many rap songs."¹⁹⁴

Meanwhile, in *People v. Sanchez*, the appellate court upheld the admission of rap lyrics proffered to show motive and

by [their] unfair prejudicial impact'" (second and third alterations in original) (quoting *Cheeseboro*, 552 S.E.2d at 313)).

¹⁸⁸ See *supra* note 187 and accompanying text.

¹⁸⁹ See *Montague*, 243 A.3d at 560 ("When 'rap lyric evidence . . . provides direct proof against a defendant[,] such as an admission or details that are not generally known and dovetail with the facts of the case[,] the court found that those lyrics may be admissible if they are relevant and their probative value is not substantially outweighed by unfair prejudice." (alterations in original) (quoting *Skinner*, 95 A.3d at 249 n.5)).

¹⁹⁰ See *Skinner*, 95 A.3d at 250 n.6 (recognizing that rap lyrics admitted as other-crime evidence need not always be similar in kind or reasonably close in time to the alleged crime); see also 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:13, Westlaw (database updated Dec. 2024) ("[T]he prevailing view in the United States is that even dissimilar acts can be logically relevant and admissible [under Rule 404(b)] on an uncharged misconduct theory."); 3 CLIFFORD S. FISHMAN & ANNE TOOMEY MCKENNA, JONES ON EVIDENCE § 17:15 (7th ed.), Westlaw (database updated Dec. 2024) ("Similarity is sometimes relevant in assessing admissibility [under Rule 404(b)]. Sometimes mere 'fungible' similarity between the charged and extrinsic acts suffices."); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:30, at 757 (4th ed. 2013) ("One might think that the important thing is a close resemblance between the prior and the charged offense. Often resemblance does count, but not always. When offered to prove motive, for instance, a prior crime need not resemble the charged offense at all.").

¹⁹¹ See *supra* note 190.

¹⁹² *Jordan*, 714 F. Supp. 3d at 165.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 165–66.

intent even though the lyrics did not closely resemble the facts of the murder.¹⁹⁵ In *Sanchez*, a member of the “Two-Five” gang was charged with murder after shooting a member of the “Varrío Encanto Locos” gang, a rival gang under the Sureño gang umbrella.¹⁹⁶ Over defendant’s objection, the prosecution introduced defendant’s handwritten rap lyrics at trial, in part to show defendant’s gang membership and motive: defendant shot the victim because he was a member of a rival gang.¹⁹⁷ The lyrics referred to defendant’s Two-Five gang and talked about his involvement in gang-related killings, saying, for example, “I hunt sur rats around the clock. I’m on a murder spree. . . . I’m a Two-Five factor. Fuck a sureño and an EME. . . . I smoke South Side fools at no cost to me.”¹⁹⁸ Evidence at trial demonstrated that the lyrics referred to killing Sureño gang members.¹⁹⁹ On appeal, defendant argued the trial court erred in admitting the lyrics because they were minimally relevant and more prejudicial than probative.²⁰⁰ The appellate court upheld the admission of the lyrics even though they did not closely resemble the facts of the murder (i.e., they did not mention the victim by name or shooting at the victim) because the lyrics were relevant to show that defendant was an active Two-Five member, that he intended to and had motive to kill rival gang members, and that he committed the shooting for the benefit of the gang.²⁰¹

In addition to a factual nexus, in determining the probative value of rap, courts have also considered the temporal proximity between when the lyrics were written and when the charged crime occurred.²⁰² The closer in time to the charged crime the

¹⁹⁵ *People v. Sanchez*, No. D064673, 2014 WL 5861369, at *8 (Cal. Ct. App. Nov. 13, 2014).

¹⁹⁶ *Id.* at *1.

¹⁹⁷ *Id.* at *8.

¹⁹⁸ *Id.* at *4.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at *7.

²⁰¹ *Id.* at *8.

²⁰² *Compare United States v. Stephenson*, 550 F. Supp. 3d 1246, 1252–53 (M.D. Fla. 2021) (excluding rap videos published eighteen months prior to the date of the offense), and *State v. Skinner*, 95 A.3d 236, 254 (N.J. 2014) (affirming reversal of admission of rap lyrics where “many of the lyrics found in defendant’s car and read to the jury were composed long before the circumstances underlying the instant offense took place”), and *United States v. Jordan*, 714 F. Supp. 3d 158, 165 (E.D.N.Y. 2024) (excluding rap lyrics where there was no evidence that “[defendant] wrote or performed these lyrics around the time of the alleged murder”), and *United States v. Rivera*, No. 13–CR–149(KAM), 2015 WL 1757777, at *7 (E.D.N.Y. Apr. 17, 2015) (excluding rap videos “dating back to the 1990s,

lyrics were written or produced, the more probative the lyrics. In *Greene v. Commonwealth*, for example, the defendant was charged with murdering his wife by cutting her throat with a knife after finding out that she had an affair.²⁰³ The court admitted a rap video defendant recorded just days after his wife was found dead that contained the following lyrics: “B— made me mad, and I had to take her life. My name is Dennis Greene and I ain’t got no f—ing wife”; “I knew I was gonna be givin’ it to her . . . when I got home”; “I cut her motherf—in’ neck with a sword”²⁰⁴ Likewise, in *United States v. Wilson*, the trial court admitted rap lyrics that the defendant “wr[ote] in the two days following the murders of the victims and at a time when [defendant] knew he was wanted by police for these crimes.”²⁰⁵ In contrast, in *State v. Skinner*, the New Jersey Supreme Court affirmed the exclusion of rap lyrics where “many of the lyrics found in defendant’s car and read to the jury were composed long before the circumstances underlying the instant offense took place.”²⁰⁶ Similarly, the trial court in *United States v. Stephenson* excluded rap videos, in part, because it was “unknown when the videos were produced,” and there was no evidence “as to when the lyrics were actually written, the songs recorded, or the videos filmed and edited.”²⁰⁷

Courts have also considered whether the defendant authored the lyrics in determining the probative value of the lyrics.²⁰⁸ Courts have found, for example, that rap lyrics are not sufficiently probative where the defendant did not write the lyrics, or in the case of rap video evidence, did not appear in the

which predates the indictment period, and is less probative than footage from the indictment period.”), *with United States v. Wilson (Wilson II)*, 493 F. Supp. 2d 484, 490 (E.D.N.Y. 2006) (admitting rap lyrics written by defendant “in the two days following the murders of the victims and at a time when [the defendant] knew he was wanted by the police for the[] crimes”), *and United States v. Norwood*, No. 12-CR-20287, 2015 WL 2343970, at *11 (E.D. Mich. 2015) (admitting rap videos uploaded to the internet a few months before trial), *and Greene v. Commonwealth*, 197 S.W.3d 76, 86–87 (Ky. 2006) (affirming admission of rap video where video was “shot days after the murder”), *and Montague v. State*, 243 A.3d 546, 570 (Md. 2020) (affirming admission of rap lyrics recorded less than a year after the murder occurred and three weeks before trial).

²⁰³ *Greene*, 197 S.W.3d at 79–80.

²⁰⁴ *Id.* at 86–87.

²⁰⁵ *Wilson II*, 493 F. Supp. 2d at 490.

²⁰⁶ *Skinner*, 95 A.3d at 240.

²⁰⁷ *Stephenson*, 550 F. Supp. 3d at 1252–53.

²⁰⁸ *See infra* note 209.

video.²⁰⁹ For example, in *United States v. Sneed*, the court excluded a rap video depicting individuals performing a rap song that contained lyrics about drug sales and gang activity in a drug conspiracy prosecution.²¹⁰ The court noted that the video did not help prove the existence of a conspiracy because only one of the defendants was in the video and none of the other individuals in the video were identified as coconspirators.²¹¹

Even if relevant and probative, courts have nevertheless excluded rap lyrics where they were needlessly cumulative of other evidence.²¹² The court in *United States v. Williams*, for example, excluded rap videos and lyrics in a RICO/VICAR prosecution because the rap evidence was “cumulative of the substantial amount of other far more probative evidence that will be admitted at trial.”²¹³ Similarly, in *United States v. Gamory*, the Eleventh Circuit held that the district court erred in admitting a rap video, in part because that evidence was cumulative of other evidence to establish facts that “were not seriously contested.”²¹⁴ Finally, in *People v. Coneal*, the court held that the trial court erred in admitting rap videos because “the probative value of the videos was completely or largely captured

²⁰⁹ Compare *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) (excluding rap video where the defendant was not in the video and did not author the lyrics), and *United States v. Williams*, 663 F. Supp. 3d 1085, 1140 (D. Ariz. 2023) (excluding rap lyrics where author unknown), and *Commonwealth v. Gray*, 978 N.E.2d 543, 560–61 (Mass. 2012) (finding admission of rap video erroneous where the defendant did not write or perform the lyrics or produce the video, and it was not found in his possession), and *People v. Taylor*, No. D074197, 2019 WL 926601, at *6–7 (Cal. Ct. App. Feb. 26, 2019) (finding admission of rap evidence erroneous where defendant appeared in the background but did not rap in the video), with *Commonwealth v. Talbert*, A.3d 536, 541 (2015) (affirming admission of defendant-authored rap lyrics that described scenario matching the facts and circumstances of the murders), and *People v. Singleton*, No. D037129, 2002 WL 31022398, at *15 (Cal. Ct. App. Sept. 11, 2002) (affirming admission of defendant-authored rap lyrics that included numerous references to using a nine-millimeter gun in the gun-related prosecution). See also *Daniels v. Lewis*, No. C 10–04032, 2013 WL 183968, at *11 (N.D. Cal. Jan. 17, 2013) (“Courts across the nation have allowed rap lyrics to be used against the defendants who penned them.”).

²¹⁰ *United States v. Sneed*, No. 14 CR 00159, 2016 WL 4191683, at *5–6 (M.D. Tenn. Aug. 9, 2016).

²¹¹ *Id.*

²¹² *People v. Coneal*, 254 Cal. Rptr. 3d 653, 664 (Ct. App. 2019) (finding rap evidence cumulative); *Williams*, 663 F. Supp. 3d at 1137–38 (same); *Gray*, 978 N.E.2d at 560–61 (same); *United States v. Bey*, No. 16-290, 2017 WL 1547006, at *7 (E.D. Pa. Apr. 28, 2017) (same); *Graham*, 293 F. Supp. 3d at 740 (same).

²¹³ *Williams*, 663 F. Supp. 3d at 1138.

²¹⁴ *Gamory*, 635 F.3d at 493.

by the screenshots” and “substantial other evidence was presented in the People’s case-in-chief.”²¹⁵

Applying these general principles, courts have primarily admitted rap lyrics under Rules 401, 404(b), and 403 as proof of the following: (1) commission of actus reus, where the rap videos resembled aspects of the charged crime, typically violent crimes; (2) defendant’s knowledge of and involvement in drug trafficking; and (3) defendant’s association with a gang and motive and criminal intent to engage in gang-related activities on behalf of that gang.²¹⁶

Actus Reus in Violent Crimes. In cases in which the rap lyrics have been proffered as direct evidence of the commission of actus reus, courts have required a close factual nexus between the rap lyrics and the charged crime, admitting those rap lyrics that described or substantially paralleled specific details of the crime alleged.²¹⁷ In *United States v. Stuckey*, for example, the defendant was charged with murdering the victim to prevent them from providing information to federal authorities.²¹⁸ In

²¹⁵ *Coneal*, 254 Cal. Rptr. 3d at 664.

²¹⁶ See *infra* notes 217–35 and accompanying text; see also Lutes, Purdon & Fradella, *supra* note 29, at 91 (discussing ways rap evidence was proffered in criminal cases); Gregory S. Parks & Rashawn Ray, *Poetry As Evidence*, 3 UC IRVINE L. REV. 217, 234 (2013).

²¹⁷ Compare *Greene v. Commonwealth*, 197 S.W.3d 76, 86–87 (Ky. 2006) (admitting rap lyrics about killing wife, the very crime for which defendant was on trial), and *Bryant v. State*, 802 N.E.2d 486, 498–99 (Ind. Ct. App. 2004) (admitting rap lyrics about killing and keeping a body in the trunk of a car because those facts mirrored the evidence in murder trial), and *United States v. Stuckey*, 253 F. App’x 468, 482–83 (6th Cir. 2007) (admitting rap lyrics about “killing government witnesses and specifically referr[ing] to shooting snitches, wrapping them in blankets, and dumping their bodies in the street—precisely what the Government accused [Defendant] of doing to [the victim] in this case”), and *People v. Singh*, 221 Cal. Rptr. 3d 308, 314–15 (Ct. App. 2017) (affirming admission of rap lyrics that “eerily describe[d] what [defendant] did to [the victim]”), with *Hannah v. State*, 23 A.3d 192, 202 (Md. 2011) (finding admission of rap lyrics erroneous because they bore no resemblance to the facts of the case), and *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001) (same), and *People v. Foster*, No. 320136, 2015 WL 2412383, at *6 (Mich. Ct. App. May 19, 2015) (same). See also *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013) (“It is one thing to exclude defendant-authored fictional accounts . . . when offered to show a propensity for violence It is quite another when the defendant-authored writing incorporates details of the crime charged.”); *Daniels v. Lewis*, No. C 10–04032, 2013 WL 183968, at *10–12 (N.D. Cal. Jan. 17, 2013) (“The details set forth in the lyrics were sufficiently close to the evidence of the crimes that [they] could be viewed as autobiographical.” (alteration in original) (quoting *People v. Daniels*, No. A113184, 2009 WL 568918, at *11 (Cal. Ct. App. Mar. 6, 2009))); *Montague v. State*, 243 A.3d 546, 566 (Md. 2020) (“The closer the nexus between a defendant’s rap lyrics and the details of an alleged crime, the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence of the defendant’s bad character.”).

²¹⁸ *Stuckey*, 253 F. App’x at 473.

affirming the district court's admission of the lyrics, the Sixth Circuit stated "[Defendant's] lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street—precisely what the government accused [Defendant] of doing to [the victim] in this case."²¹⁹ Similarly, in *Commonwealth v. Seagraves*, the court admitted rap lyrics describing violent acts that bore an uncanny resemblance to the charged crimes.²²⁰ There, the defendants allegedly lured a victim under a bridge and then committed a series of violent acts that included robbing the victim, stabbing him forty-five times, and then burying his body in the woods.²²¹ The court admitted a notebook and DVD containing the following rap lyrics:

It was cold, but I wasn't alone trippin, waiting for the kid to commence with throat rippin. My heart skipping as I'm waiting under the dark bridge, my friend luring him down here, we gonna kill this kid. When they come under, I was sitting in the dark cover. He sat next to me, and I went and stabbed this mothafucka. Right into his neck, and I stabbed him in the head. . . . We stabbed him again, and we watched the blood squirt. Through his shirt, and I stabbed him in the face. He was still alive but dying at good pace. He was begging and begging. Please, man, let me go. I'll never say nothing, and nobody will ever know.²²²

By contrast, in *People v. Foster*, the Michigan Court of Appeals reversed the trial court's admission of rap lyrics in an armed robbery trial, where "the rap video did not reveal any details about the charged offenses," nor "share any characteristics about the charged offenses, aside from the fact that defendant's rap spoke generally about violent crimes and carrying a weapon."²²³

Drug Trafficking Offenses. Courts have also admitted rap lyrics in drug trafficking cases to act as proof of a conspiracy and explain the defendant's preferred process for preparing and delivering drugs, his motivations for engaging in it, his access to tools and proceeds, and his knowledge of and participation

²¹⁹ *Id.* at 482.

²²⁰ *Commonwealth v. Seagraves*, 103 A.3d 839, 840–41 (Pa. Super. Ct. 2014).

²²¹ *Id.* at 840.

²²² *Id.* at 840 n.2.

²²³ *People v. Foster*, No. 320136, 2015 WL 2412383, at *6 (Mich. Ct. App. May 19, 2015).

in the drug trade.²²⁴ In *United States v. Wiley*, for example, the court admitted rap lyrics with offense-specific content in a conspiracy to distribute controlled substances case, such as lyrics about defendant's use of a "press machine" to facilitate his drug trade, as proof that defendant conspired with others to sell drugs and his intent to do so.²²⁵ At the same time, however, the court recognized that "not every lyric in a rap video is probative of the charged conduct" and therefore excluded "[l]yrics containing statements with only a tenuous connection to the charged conduct."²²⁶

Gang-Related Offenses. In cases involving racketeering or gang-related offenses, rap lyrics have been admitted to prove the existence of an enterprise or conspiracy, the relationship between its members, the methods and means by which the enterprise or conspiracy operated, and the motive and intent to commit criminal acts in furtherance of the gang.²²⁷ In *United*

²²⁴ See, e.g., *United States v. Moore*, 639 F.3d 443, 447–48 (8th Cir. 2011) (affirming admission of rap video to prove that defendant "knew cocaine prices, used drug code words, and sold drugs to supplement his income" in prosecution for conspiracy to distribute crack cocaine); *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) (affirming admission of rap lyrics containing "drug code words" to show knowledge of drug trade, not to show that defendant "was the character portrayed in the lyrics"); *United States v. Haight*, 892 F.3d 1271, 1278 (D.C. Cir. 2018) (affirming admission of rap lyrics as probative that defendant "(i) owned the backpack and the marijuana found in the backpack; (ii) knew about guns and drug dealing; (iii) possessed the guns and drugs found in Ferguson's apartment; and (iv) intended to distribute drugs in Lincoln Heights"), *abrogated on other grounds by*, *Borden v. United States*, 593 U.S. 420 (2021); *United States v. Carpenter*, 372 F. Supp. 3d 74, 77 (E.D.N.Y. 2019) (admitting rap lyrics that "explain[ed] the Defendant's preferred process for preparing and delivering drugs," and "show[ed] knowledge of the vocabulary and environment of the drug trade"); *United States v. Wiley*, 610 F. Supp. 3d 440, 446 (D. Conn. 2022) (admitting rap lyrics that tended to corroborate the government's other evidence, such as defendant's "use of a 'press machine' to facilitate his drug trade"); *Brown v. State*, No. 1302, 2016 WL 5720590, at *8 (Md. Ct. Spec. App. Sept. 30, 2016) (admitting rap lyrics to show defendant's knowledge of narcotics trafficking, and in particular drug code words).

²²⁵ *Wiley*, 610 F. Supp. 3d at 446.

²²⁶ *Id.*

²²⁷ See e.g., *United States v. Herron (Herron II)*, 762 F. App'x 25, 30 (2d Cir. 2019) (finding rap videos probative of defendant's participation in the charged conspiracies and crimes, his position as a leader of the gang, his familiarity with firearms and the drug trade, and his relationship to certain cooperating witnesses); *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (finding rap lyrics probative of the defendant's association with members of a violent street gang and his motive to participate in the charged conduct); *United States v. Belfast*, 611 F.3d 783, 820 (11th Cir. 2010) (finding rap lyrics probative of defendant's association with his anti-terrorism unit); *United States v. Norwood*, No. 12–CR–20287, 2015 WL 2343970, at *11 (E.D. Mich. 2015) (finding rap lyrics probative of "existence of the enterprise, its members, and . . . its alleged purposes and/or means and

States v. Mills, for example, the court admitted defendant's rap lyrics in a RICO conspiracy prosecution.²²⁸ In one of the rap songs, the defendant rapped about codefendant "Edwin Mills" assisting with narcotics distribution: "Got my sack in the back, in the yard by the bushes, my n* * *a Ed Boy sittin' in the car with the bullets."²²⁹ Throughout the song, defendant also rapped about "running with the killers," "selling hella dope," and "been on Chedda Grove," all of which tended to prove the existence of the "6 Mile Chedda Grove" enterprise and that its members engaged in racketeering activities together.²³⁰ In *United States v. Norwood*, the trial court held rap videos posted online were admissible in a RICO conspiracy case because they "helped establish the existence of the enterprise, its members and at least one of its alleged purposes and/or means and methods: evading law enforcement by using threats and violence to dissuade witnesses from 'snitching.'"²³¹ Similarly, in *Tann v. United States*, the D.C. Circuit affirmed the admission of rap lyrics in a trial for conspiracy and a string of violent crimes, including homicides that were committed in connection with gang membership.²³² The rap lyrics there made reference to "The Deuce," "Deuce Mob," and the "Young Gunz," all names affiliated with the 22nd Street Crew, a criminal street gang operating in the area of 22nd Street, Southeast, Washington, D.C.²³³ The lyrics also referred to the gang nicknames of several of the coconspirators.²³⁴ Furthermore, the lyrics discussed

methods"); *Wilson I*, 493 F. Supp 2d 460, 463 (E.D.N.Y. 2006) (finding rap lyrics found in a coconspirator's possession probative of existence of enterprise and whether it engaged in racketeering activity); *People v. Zepeda*, 83 Cal. Rptr. 3d 793, 801 (Ct. App. 2008) (finding rap lyrics written by defendant probative of his membership in a gang, his loyalty to it, his familiarity with gang culture and, inferentially, his motive and intent on the day of the killing); *People v. Serrano*, No. H047310, 2023 WL 6281039, at *11 (Cal. Ct. App. Sept. 26, 2023) (finding rap evidence probative of defendant's gang affiliation and motive, i.e., using a gun to kill rival gang members); *People v. Minnifield*, 2014 IL App (1st) 113778-U, ¶ 35 (finding rap lyrics probative of defendant's membership in the Black P Stones).

Though outside the scope of this Article, scholars have criticized the wide latitude of the use of gang evidence in racketeering prosecutions as depriving defendants of the protections afforded by the Federal Rules of Evidence. See, e.g., Lucy Litt, *RICO: Rethinking Interpretations of Criminal Organizations*, 26 BERKELEY J. CRIM. L. 71, 127 (2021).

²²⁸ 367 F. Supp. 3d 664, 672 (E.D. Mich. 2019).

²²⁹ *Id.* at 669.

²³⁰ *Id.*

²³¹ *Norwood*, 2015 WL 2343970, at *11.

²³² 127 A.3d 400, 469 (D.C. 2015).

²³³ *Id.* at 465.

²³⁴ *Id.*

“living by the code required by the gang, selling drugs, killing snitches, and killing rivals.”²³⁵

If admission is warranted after applying these standards, some courts have relied on procedural safeguards to further mitigate the concerns with rap on trial. In particular, courts have limited, often through the use of redactions, the lyrics exposed to the jury;²³⁶ allowed expert testimony to contextualize rap as artistic expression;²³⁷ and given the jury limiting instructions on the limited use of the lyrics and the dangers of implicit bias.²³⁸

²³⁵ *Id.*

²³⁶ See, e.g., *State v. Skinner*, 95 A.3d 236, 239 (N.J. 2014) (noting rap evidence “should be carefully redacted to ensure that irrelevant and inflammatory content is not needlessly presented to the jury”); *Ward v. State*, 794 S.E.2d 246, 249 (Ga. Ct. App. 2016) (finding admission of redacted rap lyrics was not an abuse of discretion); *People v. Mancera*, No. B206328, 2009 WL 2170967, at *12 (Cal. Ct. App. July 22, 2009) (same); *Taylor v. State*, 772 S.E.2d 630, 634 (Ga. 2015) (same); see also *State v. Scurry*, No. A-0377-18T1, 2020 WL 6074133, at *5 (N.J. Super. Ct. App. Div. Oct. 15, 2020) (noting trial court’s willingness to mitigate prejudicial nature of rap video through redactions); *People v. Allen*, 2022 IL App (4th) 200554-U, ¶ 88 (noting trial court gave defendant opportunity to redact rap videos before played for the jury).

²³⁷ See, e.g., *United States v. Herron (Herron I)*, No. 10-CR-0615, 2014 WL 1871909, at *7–9 (E.D.N.Y. May 8, 2014) (recognizing that expert testimony may assist the jury in weighing the import of rap lyrics), *aff’d*, 762 F. App’x 25 (2d Cir. 2019); *United States v. Harris*, No. 12-cr-205-T-17MAP, 2016 WL 4204633, at *4 (M.D. Fla. July 28, 2016) (same). But see *United States v. Williams (Williams I)*, No. 13-cr-00764-WHO-1, 2016 WL 9130978, at *1 (N.D. Cal. Mar. 3, 2016) (finding expert testimony on potential prejudice of rap lyrics unnecessary); *Wilson II*, 493 F. Supp. 2d 484, 488–90 (E.D.N.Y. 2006) (same).

²³⁸ See, e.g., *People v. Medina*, No. D038541, 2003 WL 1849316, at *6 (Cal. Ct. App. Apr. 10, 2003) (instructing jury that rap evidence “may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crime”); *Holmes v. State*, 306 P.3d 415, 418–19 (Nev. 2013) (same); *Williams I*, 2016 WL 9130978, at *1 (noting that if rap videos are admitted, the court would instruct the jury that the rap lyrics are to not “be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit a crime” (quoting *id.* at 418)); *Herron I*, 2014 WL 1871909, at *5 (citing FED. R. EVID. 105) (noting the court would provide a limiting instruction if rap evidence was admitted); *United States v. Carpenter*, 372 F. Supp. 3d 74, 80 (E.D.N.Y. 2019) (noting that the court would consider a limiting instruction if rap evidence admitted); *Hart v. State*, 688 S.W.3d 883, 898 (Tex. Crim. App. 2024) (admonishing trial court for not providing the jury with limiting instruction); *State v. Tomlinson*, 264 A.3d 950, 971 (Conn. 2021) (noting that the trial court offered to provide a limiting instruction); *People v. Wallace*, 873 N.Y.S.2d 403, 404 (App. Div. 2009) (affirming conviction based in part on admission of rap lyrics because the trial court gave a limiting instruction to alleviate the potential for unfair prejudice).

V

THE INTENDED BENEFITS OF RAP SHIELD LAWS

Highly publicized cases such as the Young Thug RICO prosecution create temptations for legislators to adopt a “quick fix” solution to the problem of rap on trial.²³⁹ Many of the rap shield laws being urged demonstrate this temptation. Rap shield laws are “designed to increase the likelihood of acquittals and reduce punishment for an identified class of persons.”²⁴⁰ The idea is that these laws will lead to the exclusion of rap lyrics as evidence, thereby leading to results that are less biased against defendants of color. The temptations to enact rap shield statutes are understandable, particularly given the increased use of rap lyrics as evidence against Black and Latino defendants, and the racial disparities in America’s ongoing mass incarceration problem.²⁴¹ But whether rap shields will actually achieve the intended results—fewer admissions of rap lyrics as evidence, and more acquittals—is not obvious. Rap shield statutes certainly increase judicial scrutiny by imposing a test for prejudicial effect that is more restrictive than the test normally employed under Rule 403.²⁴² While evidence is typically excluded only when the prejudicial effect *substantially* outweighs probative value, rap shield statutes *require* exclusion unless certain factors that increase the probative value are shown. In addition, the statutes prescribe the use of procedural measures to address the concerns with rap on trial. In theory, “[t]hese changes make it more likely that rap lyric evidence will be excluded, which creates a potential benefit to defendants in that the results of some criminal proceedings will be more favorable to the accused.”²⁴³

But, as demonstrated by recent case law, the changes proposed by rap shield legislation are simply a codification of that precedent. In other words, rap shield legislation is duplicative and, therefore, likely unnecessary from an

²³⁹ Cf., e.g., Lenora Ledwon, *Diaries and Hearsay: Gender, Selfhood, and the Trustworthiness of Narrative Structure*, 73 TEMP. L. REV. 1185, 1186 (2000) (discussing hearsay exception legislation passed in the wake of the O.J. Simpson trials); Recent Legislation, *Act of Sept. 3, 1996, ch. 416 (to be codified at Cal. Evid. Code § 1370)*, 110 HARV. L. REV. 805 (1997) (same).

²⁴⁰ *People v. Venable*, 304 Cal. Rptr. 3d 731, 738 (Ct. App. 2023).

²⁴¹ See NIELSON & DENNIS, *supra* note 15, at 27–58.

²⁴² Special tests for prejudice are occasionally used elsewhere in the rules of evidence. For example, in the Federal Rules of Evidence, Rule 609(a) admits evidence of a felony conviction if probative value “outweighs” prejudicial effect, and Rule 609(b) admits evidence of convictions over 10 years old if probative value “substantially outweighs” prejudicial effect. See FED. R. EVID. 609(a)–(b).

²⁴³ *Venable*, 304 Cal. Rptr. 3d at 738.

evidentiary standpoint. While rap shield laws may serve important functions—namely, judicial guidance—in practice, these legislative efforts may not actually achieve their social justice goals of excluding more rap lyrics as evidence and acquitting more defendants.

A. The Modified Admissibility Standard

The factors that overcome the presumption of inadmissibility under rap shield statutes are, in essence, the same factors courts already rely on to determine the probative value of rap lyrics.²⁴⁴ Indeed, under the statutes, rap lyrics would be admissible if the proffering party shows the same factors analyzed under a Rule 403 analysis: a factual nexus and temporal proximity.²⁴⁵ It is difficult to imagine rap evidence that would be admissible when the current evidentiary framework is correctly applied but inadmissible under a rap shield. In effect, the rap shield statutes simply codify existing precedent.

Legislators may have intended to do more than simply codify precedent. Under a narrow reading of the statutes, the factual nexus requirement might be read to *always* necessitate “similarity,” or close resemblance, between the rap lyrics and the charged crime. Under such an interpretation, at least *some* rap lyrics could be excluded under the statutes that would otherwise be admissible under the current evidentiary framework. As discussed in Part IV, similarity is not always necessary, particularly when the rap lyrics are introduced as other act evidence to show criminal intent and motive.²⁴⁶ So if exclusion of other act evidence was the intent of some legislators,²⁴⁷ such a reading would be unduly restrictive, leading to the exclusion of rap lyric evidence that is highly probative of a defendant’s criminal intent and motive, particularly in gang-motivated crimes like in *Sanchez*.²⁴⁸ While the rap lyric evidence in *Sanchez* was admissible under the current evidentiary framework, under a narrow interpretation of rap shield laws, a court could potentially exclude such evidence because it did not closely resemble

²⁴⁴ See *supra* Part IV.

²⁴⁵ See CAL. EVID. CODE § 352.2 (West 2024).

²⁴⁶ See *supra* Part IV.

²⁴⁷ See Assemb. 2799, 2021–2022 Leg., Reg. Sess. § 1(b) (Cal. 2022) (“It is the intent of this Legislature . . . 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.”).

²⁴⁸ See *supra* Part IV.

the facts of the murder.²⁴⁹ What is more, even if legislators intended to exclude the use of rap as other act evidence, courts are likely to respond by interpreting the new rap shield statutes consistent with precedent under the existing framework.²⁵⁰ In other words, courts are likely to continue to admit highly probative rap lyrics, like the lyrics in *Sanchez*, where the probative value of such evidence does not substantially outweigh a risk of prejudice, effectively achieving the same results.

True, rap shields do more than just codify courts' application of the Rule 403 standard; they invert it by placing a thumb on the scale of the danger of unfair prejudice. Only rap evidence fitting within the exceptions is admissible, and all other evidence is presumptively too prejudicial and, therefore, inadmissible. This presumption of inadmissibility, therefore, demands more judicial scrutiny, which, in theory, may lead to more exclusion of rap evidence.

Legislators have pointed to the Fischhoff and Fried²⁵¹ studies to support the need for such a presumption.²⁵² Those studies, however, may not necessarily support a presumption of inadmissibility in *every* case. They were not juror-decision-making studies, and therefore, they say little about how jurors might evaluate rap lyrics during trial deliberations.²⁵³ Participants in those studies were not instructed to think of themselves as jurors or to engage in group deliberations; they were not

²⁴⁹ While outside the scope of this Article, studies have shown that gang evidence has a biasing effect on jury verdicts. See Mitchell Eisen, Brenna Dotson & Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2, 11–14 (2014); see also Fareed Nassor Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 165 (2019) (arguing that gang charges should be litigated separately from the specific crime charged due to the inflammatory, confusing, and prejudicial use of gang evidence during prosecutions for substantive crimes).

²⁵⁰ See Edward J. Imwinkelried, *The Need for Truly Systemic Analysis of Proposals for the Reform of Both Pretrial Practice and Evidentiary Rules: The Role of the Law of Unintended Consequences in "Litigation" Reform*, 32 REV. LITIG. 201, 228 (2013) (noting that when unanticipated problems materialize, courts are likely to respond by reinterpreting new evidentiary rules to preserve old practices); see also Rosanna Cavallaro, *Federal Rules of Evidence 413–415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 33 (2007) (noting that it would be surprising if trial courts implementing new evidentiary rules "did not resist, to some degree, congressional imposition of a categorical approach to admissibility in a context in which individualized determinations of probativeness and prejudice by a trial judge have been the norm").

²⁵¹ See *supra* subpart II.B.

²⁵² See, e.g., Cal. Assemb. 2799 § 1(a) (first citing Fischhoff, *supra* note 93, at 803; and then citing Fried, *supra* note 103).

²⁵³ See *supra* subpart II.B.

presented with rap lyrics as part of a narrative in conjunction with other evidence, nor were they presented with requisite jury instructions on the law and permissible inferences that may be drawn from the rap lyrics.²⁵⁴ So, while the Fischhoff and Fried studies may suggest that participants have negative perceptions of rap lyrics in isolated contexts, they say little about how jurors might evaluate lyrics during deliberations after a trial, where the rap lyrics are presented as part of a narrative in conjunction with other inculpatory and exculpatory evidence, and where jurors are presented with jury instructions, including limiting instructions on the use of rap lyrics.

And in fact, at least one juror-decision-making study suggests that such a presumption may not be necessary. To overcome the limitations of Fischhoff and Fried's studies, Adam Dunbar, who replicated Fried's study in 2016, conducted a juror-decision-making study on the effect of rap lyrics on jury decision making in 2020.²⁵⁵ Based on that study, he concluded that jurors view rap lyrics as interdependent with other evidence presented at trial, and that evaluations of lyrics did *not* predict verdict outcomes.²⁵⁶ In other words, rap lyrics as evidence did not "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."²⁵⁷ These findings suggest that whatever emotions rap music may invoke in jurors, those emotions may not necessarily affect the *process* of deliberation. Overall, this study suggests that introducing rap lyrics as evidence does *not* necessarily "allow the government to obtain a stranglehold on the case,"²⁵⁸ or create "an almost insurmountable barrier for the defense to overcome."²⁵⁹ In other words, in some instances, rap lyrics may not be so inherently inflammatory that they would create an undue tendency for the jury to decide the case based on an improper basis in every case. A presumption of inadmissibility is therefore unnecessary from an evidentiary standpoint.

That is not to say that rap lyrics are never unfairly prejudicial and should never be excluded under a Rule 403 analysis. As discussed, rap lyrics often *are* unfairly prejudicial and should be excluded, depending on their content and the issues in the

²⁵⁴ See *supra* subpart II.B.

²⁵⁵ Adam Dunbar, *Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases*, 10 RACE & JUST. 320, 322–24 (2020).

²⁵⁶ *Id.* at 333.

²⁵⁷ *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

²⁵⁸ Dennis, *supra* note 60, at 2.

²⁵⁹ *Id.* at 26.

case. Dunbar's decision-making study, however, reinforces the current evidentiary framework's presumption of admissibility, which rests on trust that the jury is capable of overcoming certain degrees of prejudice, so long as that prejudice is not unfair. Ultimately, the modified admissibility standard that rap shield statutes impose is at worst unduly restrictive, and at best a codification of existing precedent under the current evidentiary framework.

B. Procedural Safeguards

In addition to modifying the admissibility standard, rap shield legislation also prescribes several procedural requirements intended to mitigate the concerns with rap on trial, including requiring courts to redact irrelevant portions of rap lyrics, provide limiting instructions to the jury, and consider expert testimony.²⁶⁰ The current evidentiary framework, however, already allows courts to consider and implement these safeguards when appropriate. In an effort to minimize any undue prejudice under Rule 403, courts have redacted or excluded rap lyrics with low probative value that present a danger of unfair prejudice.²⁶¹ Under Rule 702,²⁶² courts have also allowed expert testimony from rap scholars²⁶³ to educate the jury on the social or cultural context, rules, conventions, artistic techniques, and meaning of rap lyrics.²⁶⁴ In *United States v. Harris*, for example, the court allowed expert testimony to aid

²⁶⁰ See *supra* Part III.

²⁶¹ See *supra* note 236 and accompanying text.

²⁶² Rule 702 governs the admissibility of expert testimony, and allows such testimony if,

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

FED. R. EVID. 702. On the question of what qualifies as a reliable principle and method, most jurisdictions follow the criteria outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94 (1993).

²⁶³ As discussed *infra* Part VI, however, "expert testimony" in this context more often than not includes testimony from police officers who rely on their own experience to define and ascribe meaning to rap lyrics.

²⁶⁴ See, e.g., *Herron I*, No. 10-CR-0615, 2014 WL 1871909, at *7–9 (E.D.N.Y. May 8, 2014) (finding expert testimony may assist the jury in weighing the import of rap lyrics); *United States v. Harris*, No. 12-cr-205-T-17MAP, 2016 WL 4204633, at *4 (M.D. Fla. July 28, 2016) (same). But see *Williams I*, No. 13-cr-00764-WHO-1, 2016 WL 9130978, at *1 (N.D. Cal. Mar. 3, 2016) (finding expert

jurors in distinguishing common, metaphorical meanings from literal interpretations of the defendant's authored rap lyrics in one of his music videos.²⁶⁵ The expert was expected to, among other things, analyze the rap lyrics at issue and "to make parallels between those lyrics and trends in rap music; to show common phrases between [the defendant]'s lyrics and other rap lyrics; to show that rap music videos often share common elements such as flashing money, acting out fictional drug deals, etc."²⁶⁶ Likewise, in *United States v. Herron*, the court allowed an expert to "testify as to the history, culture, artistic conventions, and commercial practices of hip-hop or rap music, focusing on gangsta rap."²⁶⁷

Finally, pursuant to Rule 105,²⁶⁸ courts have instructed juries that rap lyrics are not to be considered to prove that the defendant is a person of bad character or has a disposition to commit a crime.²⁶⁹ One court, for example, instructed the jury as follows:

You will now listen to evidence of a rap tape made by the defendant This evidence, if believed by you, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crime.

It may be used by you for the limited purpose of determining if it [tends to show [defendant's] membership or affiliation in a gang and/or his intent to commit the crimes charged in this indictment.

It may not be considered as an admission of any of the charged crimes or for any other purpose.²⁷⁰

testimony on potential prejudice of rap lyrics unnecessary); *Wilson II*, 493 F. Supp. 2d 484, 488–90 (E.D.N.Y. 2006) (same).

²⁶⁵ 2016 WL 4204633, at *4–5.

²⁶⁶ *Id.* at *3.

²⁶⁷ 2014 WL 1871909, at *8.

²⁶⁸ Federal Rule of Evidence 105 provides that when evidence is admitted for a limited purpose, the court, when requested, must provide a limiting instruction. FED. R. EVID. 105.

²⁶⁹ See *supra* note 238 and accompanying text.

²⁷⁰ *People v. Medina*, No. D038541, 2003 WL 1849316, at *6 (Cal. Ct. App. Apr. 10, 2003) (first alteration in original).

Some courts have also instructed juries to guard against implicit biases, including racial bias, affecting jury decision making.²⁷¹

C. First Amendment Protections

Legislators and supporters of rap shield laws contend that rap shield legislation is also necessary to protect the First Amendment rights of those who author rap music.²⁷² While the concerns over a potential chilling effect are valid, rap shield legislation is also duplicative from a constitutional perspective, particularly in light of Federal Rule of Evidence 402 and state equivalents. The question of evidentiary admissibility is independent from the question of constitutionality.²⁷³ The admissibility question is one resolved by applying the rules of evidence, and the constitutionality question by applying First Amendment jurisprudence. Doctrinally, these are separate issues. To

²⁷¹ See, e.g., *Hubbard v. Miller*, No. CV 13-1955-RGK, 2014 WL 1248013, at *34 (C.D. Cal. Jan. 6, 2014) (noting trial court instructed jury not be influenced by “bias, sympathy, or prejudice,” and “that it had to decide the case based only upon the evidence presented at trial”), *report and recommendation adopted*, No. CV 13-1955-RGK, 2014 WL 1224753 (C.D. Cal. Mar. 21, 2014); *People v. Jamerson*, No. A153218, 2019 WL 459012, at *6 (Cal. Ct. App. Feb. 6, 2019) (same). Studies have shown, however, that many lower courts are reluctant to provide instructions mentioning racial bias. See Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1286–89.

²⁷² See *supra* subpart II.C.

²⁷³ While outside the scope of this Article, the question of whether the evidentiary use of rap lyrics in criminal proceedings violates the First Amendment is unresolved. There are two different contexts in which rap lyrics are introduced in criminal proceedings: (1) where rap lyrics are introduced as evidence of the elements of a charged offense, and (2) where rap lyrics are themselves the proscribed conduct (e.g., where the rap lyrics allegedly constitute a violent threat). Arguably, only in the latter, but not the former, is the First Amendment relevant. See Andrew Jensen Kerr, *Art Threats and First Amendment Disruption*, 16 DUKE J. CONST. L. & PUB. POL’Y 173, 183 (2021) (“[T]here is an essential distinction between a published rap lyric being used as evidence of motive or confession and a rap song being criminalized as a threat *in itself*. The First Amendment is only relevant to the latter issue of art threats.”); see also *Herron II*, 762 F. App’x 25, 30 (2d Cir. 2019) (rejecting First Amendment challenges to admissibility of rap lyrics as evidence of elements of a charged offense as meritless); *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (same); *United States v. Wiley*, 610 F. Supp. 3d 440, 444 (D. Conn. 2022) (same); *United States v. Carpenter*, 372 F. Supp. 3d 74, 78 (E.D.N.Y. 2019) (same); *United States v. Mills*, 367 F. Supp. 3d 664, 668–71 (E.D. Mich. 2019) (same); *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (“The First Amendment, moreover, 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 declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.”).

the extent the admission of evidence is unconstitutional, the inquiry stops there—whether evidence is admissible under the rules of evidence is of no consequence.²⁷⁴ In other words, even if the use of rap as evidence is unconstitutional under the First Amendment, amending the rules of evidence to restrict artistic expression would be an inconsequential and superfluous solution. Indeed, Federal Rule of Evidence 402 makes clear that the rules do not speak to constitutional limitations on admitting evidence.²⁷⁵ The Rule clearly states that relevant evidence is inadmissible if the Constitution provides otherwise.²⁷⁶ The Advisory Committee Notes further indicate that “[t]he rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence.”²⁷⁷ The reference to the constitutional protections in Rule 402 itself is “in a sense superfluous since nobody would argue that the Rules could displace constitutional standards.”²⁷⁸

* * *

As demonstrated by a review of the current evidentiary framework and the recent application of that framework, rap shield laws are at best a codification of precedent (and at worst unduly restrictive of probative evidence) and are therefore likely unnecessary from both an evidentiary and constitutional standpoint. When properly applied, the standard rules of evidence function in virtually the same way that rap shield statutes are intended to function. In other words, these new rules, in practice, may do little to further protect or exclude rap music from evidentiary use.

²⁷⁴ Kerr, *supra* note 273, at 192 (“The use of rap as evidence is an important socio-legal problem, but it is not a *First Amendment* problem. In short, the First Amendment does not cover evidence law—as legal doctrines, they exist in separate spheres. The First Amendment does not insulate either non-literal or artful speech from courtroom use, . . . First Amendment values are mostly irrelevant to evidence law.” (footnote omitted)).

²⁷⁵ FED. R. EVID. 402.

²⁷⁶ *Id.*

²⁷⁷ FED. R. EVID. 402 advisory committee’s notes on proposed rules.

²⁷⁸ 1 MUELLER & KIRKPATRICK, *supra* note 190, § 4:9, at 605 (“The reference in Rule 402 to the Constitution is in a sense superfluous, since nobody would argue that the Rules could displace constitutional standards. The reference is also a sign of the philosophy of the framers of the Rules not to deal explicitly with constitutional doctrines by rule.”).

Although rap shield statutes may be duplicative from an evidentiary and constitutional standpoint, they may nonetheless serve important functions. At a minimum, rap shield statutes communicate society's concern over the protection of artistic expression, particularly the artistic expression of people of color, and legitimize the values underlying the statutes. The statutes also serve to educate the judiciary and provide judges with guidance on how to properly consider the admissibility of rap as evidence. In particular, rap shield statutes subject evidence of "artistic expression," including rap music, to closer judicial scrutiny through the use of special standards and procedural requirements. The modified admissibility standard provides judges with a framework outlining what factors they should consider when determining the probative value against the risk of prejudice that may arise from introducing rap lyrics to prove guilt. Indeed, under the current evidentiary framework, several courts have erred in admitting rap lyrics.²⁷⁹ Rap shield laws may aid in preventing some of those errors and ensure that courts will not discount the importance of protecting rap in their quest to admit relevant evidence. Rap shield laws may, in other words, lead to more accurate decision making.

Given their recent enactment, few courts have analyzed the admissibility of rap lyrics under the enacted rap shield statutes, so the effect of rap shield legislation is still unknown.²⁸⁰ But at least one California court considering the retroactivity of the rap shield statute in that state determined that, if the statute had been in effect at the time of the defendant's trial, "[t]here is substantial doubt whether the trial judge would have admitted the video evidence under the new standard."²⁸¹ After holding that California Evidence Code section 352.2 applied

²⁷⁹ See, e.g., *Hannah v. State*, 23 A.3d 192, 202 (Md. 2011) (finding trial court abused its discretion in admitting rap lyrics); *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) (same); *Boyd v. City of San Francisco*, 576 F.3d 938, 949 (9th Cir. 2009) (same).

²⁸⁰ A Westlaw search revealed that courts in California and Louisiana have yet to analyze the admissibility of rap lyrics under the newly enacted rap shield statutes in those states. As of June 24, 2024, thirty-one cases that reference the new California statute have been decided in California; all of those cases discuss the retroactive application of the new law, and all but two cases declined to answer the question of admissibility under the new law.

²⁸¹ *People v. Venable*, 304 Cal. Rptr. 3d 731, 740 (Cal. Ct. App. 2023). *But see People v. Love*, No. B326635, 2024 WL 2286362, at *6 (Cal. Ct. App. May 21, 2024) (finding the trial court would not have abused its discretion in admitting rap lyrics, even if it had done so under CAL. EVID. CODE § 352.2)

retroactively,²⁸² the appellate court in *People v. Venable* held that in light of the new rule, the trial judge erred by admitting a rap video in which the defendant appeared.²⁸³ In that case, defendant, a member of the criminal street gang California Gardens, was charged with first-degree murder and attempted murder arising out of a gang-related drive-by shooting—the victims were members of defendant’s rival gang.²⁸⁴ At trial, the court admitted a rap video featuring defendant’s brother rapping.²⁸⁵ Although defendant also appeared in the video along with other California Gardens members, he did not say anything in the video.²⁸⁶ Most of the lyrics had nothing to do with the shooting, though one line could have been interpreted as referring to the shooting: “Got word from a bird . . . that they did that [racial slur] dead wrong/Slid up Medical and left that [racial slur] head gone.”²⁸⁷ According to the gang expert that testified in the case, this line in the rap song meant defendant’s brother had heard a California Gardens member shot someone else in the head on Medical Center—what occurred in the case.²⁸⁸ In the expert’s opinion, the video was a way of “claiming ownership” of the shooting and bragging about it.²⁸⁹ At the same time, the expert conceded it was the gang as a whole taking credit, and not any particular member of the gang.²⁹⁰ The song lyrics also “contain[ed] offensive language, including frequent uses of the n-word, depictions of guns and drugs, and references to violent gang activities.”²⁹¹

The appellate court determined that “[t]here’s no question the trial judge’s admission of the rap evidence in this case did not comply with the new requirements for admission of creative expression.”²⁹² But the trial judge’s admission of the rap evidence arguably also did not comply with a stringent application of Rule 403 under existing precedent. Indeed, defendant

282 California Evidence Code section 352.2 was enacted after defendant’s trial, and while defendant’s case was pending on appeal. See *Venable*, 304 Cal. Rptr. 3d at 733.

283 *Id.* at 740.

284 *Id.* at 732.

285 *Id.* at 736.

286 *Id.* at 738.

287 *Id.* at 736 (alterations in original).

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.* at 738.

292 *Id.*

did not author the lyrics, and nothing in the song indicated that defendant had personal knowledge or involvement in the shooting—factors that courts have considered in applying Rule 403 to the admissibility of rap as evidence.²⁹³ Had California's rap shield statute been in effect at the time of defendant's trial, the modified admissibility standard may have served as a reminder to the court to carefully scrutinize the factors that increase the probative value of rap. Even so, a robust application of Rule 403 would have likely achieved the same result.

Rap shields' procedural measures also serve as a reminder to both the judiciary and the parties of their availability. Without those reminders, the use of these procedural measures is currently inconsistent across cases that have admitted rap lyrics. At times, parties do not request them; other times, courts deny the requests or fail to provide them. In *United States v. Stuckey*, for example, the trial court admitted rap lyrics and held that it would give a limiting instruction to the jury so "the jury will understand that we don't convict people for murder simply because they have written lyrics about murder."²⁹⁴ During trial, however, the court failed to provide the jury with the limiting instruction.²⁹⁵

Likewise, the use of expert testimony is also inconsistent in cases in which rap lyrics have been admitted. While some courts have allowed rap scholars to testify as defense experts, the admission of such testimony is rare. Courts have held, for example, that rap expert testimony on the meaning and artistic conventions of rap is unnecessary in criminal proceedings.²⁹⁶ In *United States v. Wilson*, for example, the defendant proffered a rap expert to "testify that [r]ap music lyrics often describe violent and sexual acts, and other antisocial behavior, that are not necessarily rooted in actual events."²⁹⁷ The court excluded the testimony because the defendant failed to abide by the notice requirements under the Federal Rules of Criminal Procedure and the court's orders.²⁹⁸ The court noted, however, that even if the defendant had met those notice requirements, the testimony would have been inadmissible because the

²⁹³ See *id.*

²⁹⁴ *United States v. Stuckey*, 253 F. App'x 468, 483 (6th Cir. 2007).

²⁹⁵ *Id.* at 484 (holding failure to give a limiting instruction was not plain error).

²⁹⁶ See *Williams I*, No. 13-cr-00764-WHO-1, 2016 WL 9130978, at *1 (N.D. Cal. Mar. 3, 2016) (finding expert testimony on rap unnecessary); *Wilson II*, 493 F. Supp. 2d 484, 489–90 (E.D.N.Y. 2006) (same).

²⁹⁷ *Wilson II*, 493 F. Supp. 2d at 486.

²⁹⁸ *Id.* at 489.

defendant could simply argue—without the benefit of evidentiary support—that the lyrics have little evidentiary weight.²⁹⁹ The court acknowledged that expert testimony (i.e., specialized knowledge) regarding rap music can be helpful in some cases, including copyright and trademark cases, but concluded that it would not be helpful in the present case and implicitly in any criminal case.³⁰⁰

A mandate to consider expert testimony, however, serves as a reminder to courts that such testimony may indeed be helpful to the trier of fact in criminal cases, and can be used for a range of purposes, including providing important historical background, identifying genre conventions that can help contextualize lyrics, performing an analysis of the admitted lyrics to determine their correspondence to lyrics of commercially successful rappers, and reviewing the experimental research on rap and bias.³⁰¹ Defense expert testimony can also be helpful in rebutting the prosecution's interpretations of rap lyrics. In 2017, for example, the rapper Boots Riley served as an expert witness in a California case to explain that phrase "Where da licks?" has varied meanings, including "What's happening?" or "What's up?," and may not necessarily be a reference to robbery, as the prosecution had argued.³⁰² Ultimately, rap shields, while duplicative and, therefore, perhaps unnecessary from an evidentiary standpoint, serve important functions that may lead to more accurate and just decision making.

VI

THE UNINTENDED COSTS OF RAP SHIELD LAWS

Rap shield statutes may well serve as a helpful framework and encourage closer judicial review, but not without potentially creating a series of new problems. The benefit of the additional guidance to the judiciary that rap shields provide

²⁹⁹ *Id.*

³⁰⁰ *See id.* at 489–90.

³⁰¹ *See* Dennis, *supra* note 60, at 36 (discussing benefits of expert testimony); JACK I. LERNER & CHARIS E. KUBRIN, *RAP ON TRIAL: A LEGAL GUIDE* 113 (2d ed. 2024), <https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/d/2220/files/2024/06/Rap-on-Trial-Legal-Guide-2nd-Ed.-2.1-2024-06-10.pdf> [https://perma.cc/WW66-KKQ9] (same).

³⁰² Tracey Kaplan, *Man Acquitted of Murder After Oakland Hip-Hop Artist Boots Riley Testifies About Meaning of "Where da Licks,"* MERCURY NEWS (Jan. 28, 2017), <https://www.mercurynews.com/2017/01/27/rare-end-to-murder-trial-man-acquitted-after-oakland-hiphop-artist-boots-riley-testifies/> [https://perma.cc/X2NC-DUDC].

comes with unintended costs that likely outweigh that benefit. In some instances, these unintended consequences may frustrate the very purpose of the laws.³⁰³

The law of unintended consequences teaches that any rule can have unanticipated effects.³⁰⁴ Indeed, the unintended consequences of several well-intentioned evidentiary reforms have been discussed extensively and criticized harshly.³⁰⁵ Rap shield legislation is not immune from the law of unintended consequences and legislators should be mindful of that possibility. While a modified admissibility standard and procedural safeguards may in some instances lead to more accurate and just evidentiary decisions as intended (and in turn, less rap as evidence and more acquittals), in others, it may have the opposite effect. Below are just a few of the unintended consequences that may arise from the measures required under new rap shield legislation.

Rap shields may in some instances impede a defendant's right to present a defense. Notably, the rap shield laws are neutral rules, limiting a defendant's ability to present creative expression just as much as the prosecution's. To be sure, the statute will tend to affect the prosecution's ability to present evidence more than a defendant's. And in some cases, defendants will benefit from having rap evidence excluded under the new rules. But in other cases, the prosecution may instead be the beneficiary. For example, the prosecution could invoke a rap shield statute in a case where a *defendant* offers the creative

³⁰³ See Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851, 862 (1996) (discussing how the law of unintended consequences suggests that well-intentioned efforts to attain a specific goal may actually produce results antithetical to the hoped for effect); Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199, 2228 (2014) (same).

³⁰⁴ See Margaret Howard, *The Law of Unintended Consequences*, 31 S. ILL. U. L.J. 451, 451 (2007); Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOCIO. REV. 894, 897 (1936).

³⁰⁵ Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295, 304–14 (2019) (noting possible constitutional issues with Rape Shield Laws); David S. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 14–46 (1976) (same); Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER 183, 205–15 (2017) (detailing numerous complaints with Rape Shield Laws, including from the perspective of victims, defendants, feminists, and minorities); Imwinkelried, *supra* note 250, at 227 (noting that the broad interpretation of Rule 612 has made it harder to prepare deponents for deposition hearings); Karleen F. Murphy, Note, *A Hearsay Exception for Physical Abuse*, 27 GOLDEN GATE U. L. REV. 497, 513–25 (1997) (discussing potential effects of California's section 1370 hearsay exception).

expression as evidence of a lack of motive or knowledge.³⁰⁶ The prosecution could also invoke a rap shield where *defendant* offers rap lyrics as third-party culpability evidence, offering the creative expression of a codefendant or a third party in an attempt to implicate that other person for the crime(s) at issue. And where the prosecution admits some rap lyrics under the rule, they may also invoke the rule where a defendant wants to admit the entirety of a rap song or video in its original audio form to help contextualize for the jury that allegedly probative rap lyrics are merely art and part of a song.³⁰⁷ The prosecution could invoke a rap shield, for example, where defendant offers rap lyrics in their entirety to explain or rebut Rule 404(b) evidence—such as in instances in which social media post captions referencing violence are actually just rap lyrics rather than actual threats of violence. For example, Young Thug’s legal team played one of Young Thug’s songs in its entirety during trial in an attempt to convince the jury that the lyrics did not mean that Young Thug was engaged in the racketeering activities alleged by the prosecution, but rather that the song was merely art meant to be listened to and enjoyed.³⁰⁸ Likewise in *People v. Davis*, defense counsel urged the court to play the entirety of defendant’s music video:

You want to bring the whole thing for context to show it is [sic] music video. That’s what we want to do anyway to show this is part of a music video and a lot of these are props. It’s something that’s made to be on YouTube. . . . I want to show it’s a music video.³⁰⁹

Likewise, the defendant in *Bryant v. State* maintained that the rap evidence had to be admitted in its entirety if the trial court

³⁰⁶ See, e.g., *People v. Rhine*, No. D080806, 2023 WL 4835150, at *3 (Cal. Ct. App. July 28, 2023) (noting it was “[*defendant’s*] counsel who introduced the issue of rap lyrics at trial”).

³⁰⁷ See Kerr, *supra* note 168, at 42 (arguing rap lyrics should be admitted only in their original audio form in full, not as parsed snippets).

³⁰⁸ Michael Saponara, *A Timeline of Young Thug’s YSL RICO Trial*, BILLBOARD (Nov. 1, 2024), <https://www.billboard.com/lists/young-thug-ysl-rico-trial-timeline/jan-3-2024-ysl-co-founder-identifies-young-thug-as-founding-member/> [<https://perma.cc/G38B-ZPLR>].

³⁰⁹ *People v. Davis*, No. F084930, 2024 WL 1132171, at *3 (Cal. Ct. App. Mar. 15, 2024); see also *id.* at *6 (declining to address whether CAL. EVID. CODE § 352.2 applied retroactively because “trial counsel invited the admission of the rap video lyrics” and “induced the error, if any”).

was going to allow it.³¹⁰ Under most rap shield laws,³¹¹ however, courts would be *required* to exclude or redact any evidence that is not “specifically excepted under” the statute.³¹² If the prosecution successfully excluded creative expression evidence offered by a defendant in these instances, “the impact of the statute would be the opposite of ameliorative.”³¹³

Furthermore, the California statute encourages the use of expert testimony to assist triers of fact. But, again, this safeguard may also lead to a perverse result. While requiring courts to consider “credible testimony regarding the social or cultural context, rules, conventions, and artistic techniques of the expression” may, in some instances, lead to more rap scholars testifying on behalf of defendants, it will also likely encourage the use of more law enforcement officer testimony on behalf of the prosecution.³¹⁴ As discussed in subpart V.C, courts have, in some instances, allowed rap scholars to testify as experts on behalf of defendants, but more often than not, “expert testimony” in cases in which rap is admitted as evidence includes testimony from police officers on behalf of the prosecution.³¹⁵ In cases where the defendant’s membership in a gang is at issue, such as in racketeering cases, for instance,

³¹⁰ Bryant v. State, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004).

³¹¹ While most rap shield proposals require redactions, CAL. EVID. CODE § 352.2 (West 2024) does not.

³¹² H.R. 353, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); Restoring Artistic Protection (RAP) Act of 2023, H.R. 2952, 118th Cong. (2023); see also H.R. 3420, 103d Gen. Assemb., Reg. Sess. (Ill. 2023); S. 1738, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

³¹³ People v. Serrano, No. H047310, 2023 WL 6281039, at *14 (Cal. Ct. App. Sept. 26, 2023); see also People v. Ramos, 307 Cal. Rptr. 3d 258, 271 n.24 (Ct. App. 2023) (“If a prosecution-requested exclusion occurs, the new rule will harm some criminal defendants just as much as it helps many others.”); People v. Slaton, 313 Cal. Rptr. 3d 412, 422 (Ct. App. 2023) (“[S]ection 352.2 . . . is instead a neutral evidentiary rule providing its benefits to all comers, potentially to the detriment of defendants.”).

³¹⁴ Nabil Yousfi, *Verses Turned to Verdicts: YSL RICO Case Sets a High-Watermark for the Legal Pseudo-Censorship of Rap Music*, 47 SEATTLE U. L. REV. 1507, 1541–42 (2024).

³¹⁵ See, e.g., Ramos, 307 Cal. Rptr. 3d at 265 (noting a gang expert was allowed to opine on the meaning of rap lyrics); People v. Bowie, No. H045010, 2021 WL 4841308, at *8 (Cal. Ct. App. Oct. 18, 2021) (same); People v. Mendoza, No. A157489, 2021 WL 302739, at *6–7 (Cal. Ct. App. Jan. 29, 2021) (same); People v. Shelman, No. D075365, 2019 WL 3448540, at *12 (Cal. Ct. App. July 31, 2019) (same); People v. Renteria, No. B262367, 2016 WL 4440406, at *6 (Cal. Ct. App. Aug. 23, 2016) (same); People v. Green, 939 N.Y.S.2d 520, 523 (App. Div. 2012) (same).

the prosecution will commonly present “gang expert”³¹⁶ police officer testimony.³¹⁷ But the use of “gang experts” is extremely problematic, particularly when introduced to interpret rap music.³¹⁸ As a preliminary matter, studies have shown that when gang expert testimony is introduced, a significant minority of jurors will vote to convict even when reasonable doubt has been clearly established.³¹⁹ And when it comes to interpreting rap evidence, gang experts are typically given wide latitude to rely on their own experience to define and ascribe meaning to rap lyrics even when they have no training or experience in these fields and may not necessarily be qualified to testify as to the meaning of rap lyrics.³²⁰ These witnesses almost never have specialized knowledge about rap lyrics and can misinterpret or misconstrue the meaning of the lyrics in question.³²¹ While some courts have recognized that a “police officer who has been qualified as a ‘gang expert’ cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics,”³²² most courts routinely allow the testimony.³²³ And rap shield laws will likely only further encourage the use

³¹⁶ While outside the scope of this Article, the use of “gang expert” testimony in criminal proceedings has also been criticized. See, e.g., Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 202–03 (2021).

³¹⁷ NIELSON & DENNIS, *supra* note 15, at 130–39; Annabelle Wilmott, *Protecting the Right to a Meaningful Defense: Criminal Trial Storytelling*, 111 CALIF. L. REV. 927, 948–49 (2023).

³¹⁸ See NIELSON & DENNIS, *supra* note 15, at 130–39 (criticizing the use of law enforcement prosecution witnesses to explain the meanings of rap lyrics); Dennis, *supra* note 60, at 14 (same); Yousfi, *supra* note 314, at 1542 (same); see also Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2081 (2017) (arguing that judicial deference to police decision making may be based on a flawed assumption of police expertise); Christopher McGinnis & Sarah Eisenhart, *Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111, 128–51 (2010) (arguing that police officers are unqualified to serve as gang experts); H. Mitchell Caldwell, *Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution*, 18 U. PA. J.L. & SOC. CHANGE 341, 366–67 (2015) (noting that despite lack of direct proof that an individual is in a gang, an expert can testify at trial that a defendant is in a gang).

³¹⁹ Eisen, Dotson & Dohi, *supra* note 249, at 11–14.

³²⁰ See *Commonwealth v. Gray*, 978 N.E.2d 543, 561 (Mass. 2012) (finding admission of police detective witness qualified as gang expert to opine on meaning of rap video was error); NIELSON & DENNIS, *supra* note 15, at 121–39; Litt, *supra* note 29, at 137.

³²¹ NIELSON & DENNIS, *supra* note 15, at 121–39 (discussing how experts for the prosecution have expressed their dislike for rap music and offered incorrection information about rap music and lyrics); Litt, *supra* note 29, at 137 (same).

³²² See *Gray*, 978 N.E.2d at 561.

³²³ See *supra* note 315.

of such testimony. What is more, while prosecutors have state-funded police experts at the ready, defendants often face economic barriers in presenting expert testimony,³²⁴ which means rap shield laws may ultimately increase the number of rap “experts” testifying on behalf of the prosecution, rather than defendants.

Moreover, under rap shield laws, the presumption of inadmissibility imposed by the modified admissibility standard applies to all forms of “artistic expression,” not just rap, which means rap shield laws will likely be used to exclude highly relevant evidence that extends well beyond rap music and that does not raise the same concerns that rap does. While legislators in enacting and proposing rap shields were concerned about bias against rap music and those who express themselves through rap, the enacted and proposed legislation is not so narrow in scope.³²⁵ Instead, it extends well beyond rap and applies to *all* forms of “artistic expression.”³²⁶ Under such a broad definition, the statutes can be invoked to exclude almost anything of evidentiary value. Part of the problem is that art defies simple definition. Indeed, what constitutes art is a matter of controversy in contemporary philosophy.³²⁷ “[A]rt is not just a category but also an honorific,” which “makes the definitional boundaries harder to maintain.”³²⁸ Some, for example, might characterize the 9/11 attack on the World Trade Center to be “the greatest work of art that is possible in the whole cosmos,”³²⁹ while most others would condemn it as one of the deadliest terrorist attacks in human history. It is not difficult to imagine then that parties will invoke rap shields to exclude evidence far beyond rap music that they consider “art.” Rap

³²⁴ Wilmott, *supra* note 317, at 948–50.

³²⁵ See *supra* Part III.

³²⁶ See *supra* Part III.

³²⁷ See, e.g., STEPHEN DAVIES, DEFINITIONS OF ART 1 (1991) (outlining the debate in Anglo-American philosophy about the definition of art); Robert Stecker, *Definition of Art*, in THE OXFORD HANDBOOK OF AESTHETICS 136, 138–53 (Jerrold Levinson ed., 2003) (surveying the history of defining art in the twentieth century); Thomas Adajian, *The Definition of Art*, STAN. ENCYC. OF PHIL. (July 30, 2024), <https://plato.stanford.edu/entries/art-definition/> [<https://perma.cc/2R75-QMKY>] (“The definition of art is controversial in contemporary philosophy. Whether art can be defined has also been a matter of controversy.”).

³²⁸ Soucek, *supra* note 66, at 693.

³²⁹ See Anthony Tommasini, *Music; The Devil Made Him Do It*, N.Y. TIMES (Sept. 30, 2001), <https://www.nytimes.com/2001/09/30/arts/music-the-devil-made-him-do-it.html> [<https://perma.cc/7WPC-UDQ9>] (describing German composer Karlheinz Stockhausen’s comments characterizing the 9/11 attacks as “the greatest work of art that is possible in the whole cosmos”).

shield legislation could be invoked to exclude, for example, a mass shooter's recording of himself in the act of committing murder³³⁰ and a YouTube vlogger and mom-fluencer's post depicting child abuse.³³¹ Both are arguably "expression[s] . . . of creativity . . . in the production or arrangement of forms, sounds, words, movements, or symbols."³³²

This slippery slope application of rap shields is not imaginative. In the less than two years since California Evidence Code section 352.2 took effect, defendants in California have already invoked the law in an attempt to exclude things like gang tattoos and sex dolls, neither of which present the same kind of concerns that propelled the new legislation. In *People v. Aiello*, for example, defendant appealed his convictions of aggravated kidnapping and multiple sex offenses against six minors.³³³ On appeal, defendant invoked section 352.2, arguing that the trial court abused its discretion in admitting photographs of sex dolls found in his bedroom.³³⁴ The sex dolls found in defendant's bedroom were clothed from the waist up in childlike clothing, including a Minnie Mouse shirt, and bore a striking resemblance to the minor victims, including having similar hair color and facial features to the victims.³³⁵ Hundreds of photographs on defendant's computer depicted the sex dolls posing in sexually explicit positions similar to those defendant made the minor victims pose in during the abuse.³³⁶

In *People v. Sanchez*, defendant likewise invoked section 352.2 on appeal, arguing that the trial court erred in admitting photographs of and testimony about his tattoos.³³⁷ In *Sanchez*,

³³⁰ Aarti Shahani, *Why Shooters Record Themselves in the Act*, NPR (Aug. 27, 2015), <https://www.npr.org/sections/alltechconsidered/2015/08/27/435076699/why-shooters-record-themselves-in-the-act> [<https://perma.cc/5XCT-P8MG>] (noting that mass shooter video looked like a first-person-shooter video game).

³³¹ Sean Neumann, *A Timeline of Ruby Franke's Rise and Fall: From Family Vlogger to Convicted Child Abuser*, PEOPLE MAG. (Feb. 20, 2024), <https://people.com/ruby-franke-rise-fall-youtube-vlogger-charged-child-abuse-7969073> [<https://perma.cc/D4E6-6FC7>] (describing online mom influencer with millions of followers sentenced to prison for child abuse after posting videos depicting abuse).

³³² Assemb. 2799, 2021–2022 Leg., Reg. Sess., sec. 2, § 352.2(c) (Cal. 2022) (codified at CAL. EVID. CODE § 352.2 (West 2024)).

³³³ *People v. Aiello*, No. C096502, 2024 WL 1226683, at *1–6 (Cal. Ct. App. Mar. 22, 2024).

³³⁴ *Id.* at *9.

³³⁵ *Id.* at *8, *10.

³³⁶ *Id.* at *10.

³³⁷ *People v. Sanchez*, No. H050599, 2024 WL 1007925, at *6 (Cal. Ct. App. Mar. 8, 2024).

defendant, an active Norteño gang member, was charged with shooting at three people, killing one and wounding another.³³⁸ According to the prosecution's theory of the case, defendant intended to kill F.F., a former Norteño gang member, because he was a gang dropout.³³⁹ At trial, the prosecution moved to introduce photographs and testimony regarding several of defendant's tattoos as evidence of defendant's gang membership and his motive and intent in committing the crime, or, in other words, to prove that defendant intended to shoot F.F. because he was a Norteño dropout.³⁴⁰ For example, the prosecution introduced testimony that the tattoo of the letter "N" on defendant's forehead represented "Norteño" and signaled defendant's gang affiliation.³⁴¹ The prosecution also introduced evidence of a tattoo on defendant's right forearm that read "D.O. killa," which was, according to the prosecution, a reference to killing gang dropouts.³⁴²

The courts in both *Aiello* and *Sanchez* ultimately concluded that section 352.2 did not retroactively apply in these cases and, therefore, declined to answer the question of whether the evidence was "artistic expression" under the statute.³⁴³ Both gang tattoos and sex dolls, however, arguably fall within rap shields' definition of artistic expression and could, in future cases, be excluded, despite neither raising the same unique concerns as rap.

Lastly, tipping the scale against the admission of rap lyrics may, at times, inadvertently open the door to evidence that may have otherwise been excluded under the Rule 403 balancing test. Under Rule 403, the probative value of evidence is not determined in isolation; instead, probative value means the "'marginal probative value' of the evidence relative to the other evidence in the case."³⁴⁴ In other words, the probative value of

338 *Id.* at *1.

339 *Id.* at *5–6.

340 *Id.*

341 *Id.* at *5.

342 *Id.* at *6.

343 In both *Aiello* and *Sanchez*, California Evidence Code section 352.2 became effective *after* defendants' trials ended. On appeal, both defendants contended the statute applied retroactively. The courts held section 352.2 was not retroactive and declined to answer the question of whether the evidence was "artistic expression" under the statute. *People v. Aiello*, No. C096502, 2024 WL 1226683, at *12 (Cal. Ct. App. Mar. 22, 2024); *Sanchez*, 2024 WL 1007925, at *8–9.

344 *Old Chief v. United States*, 519 U.S. 172, 185 (1997) (citing 1 J. STRONG, MCCORMICK ON EVIDENCE 782 & n.41 (4th ed. 1992)); *see also* *Robinson v. State*, 701 S.W.2d 895, 898 (Tex. Crim. App. 1985) ("A third factor used to measure

evidence depends, in part, on “the availability of other means of proof.”³⁴⁵ One of the factors in the probative value assessment is the availability of “evidentiary alternatives” to the offered evidence.³⁴⁶ By requiring courts to presumptively exclude rap lyrics that under the current evidentiary framework may have been excluded anyway, rap shield laws inadvertently open the door to prosecutorial arguments that the court needs to admit other evidence that might not otherwise have come in under Rule 403. Presumptively excluding rap lyrics under the rap shield law empowers prosecutors to argue that the probative value of other evidence is heightened by the exclusion of the rap lyrics.

* * *

After weighing these unintended consequences against the marginal benefit of guidance to the judiciary, the administration of justice is likely better served and the concerns with rap on trial better addressed when the current evidentiary framework is stringently applied rather than amended. Proponents of rap shield legislation may insist that revisions to current rap shield proposals could minimize these unintended consequences. Such revisions could include, for example, narrowing the legislation to apply to just rap music rather than all forms of artistic expression and not requiring procedural safeguards. But such revisions would make rap shield proposals rather toothless, leaving merely a modified admissibility standard that is awfully close to the current evidentiary framework. What is more, limiting the rule to just rap music rather than all artistic expression may shift the debate to whether particular lyrics or songs could be evaluated as rap at all. Furthermore, as the law of unintended consequences suggests, additional changes may lead to another host of unforeseen consequences. Ultimately, the best available solution to rap on trial appears to be the strict application of the firmly rooted canons of evidence law rather than amendments to those laws. Courts, therefore, should take care to stringently apply the rules of evidence to ensure that resolution of guilt and innocence emerge from evidence with a relationship to the charged crime and not be

probative value is the availability of alternative sources of proof.”); *United States v. Long*, 92 F.4th 481, 486 (3d Cir. 2024) (“We assess the probative value of evidence in relation to evidentiary alternatives.”).

³⁴⁵ *Old Chief*, 519 U.S. at 184.

³⁴⁶ *Id.* at 185; see also 2 GRAHAM, *supra* note 57, § 403:1 (collecting cases).

based on perceptions born from the commercial and artistic conventions of rap.

CONCLUSION

Rap shield laws enjoy broad support for a host of well-intentioned and thoroughly examined reasons. Undoubtedly, rap music, by nature of the artistic conventions of the genre, often conveys a less-than-truthful account of the violent or criminal character of the artist. The themes of violence, drugs, guns, and other criminal behavior, often present in rap music, can also make its introduction into evidence potentially highly prejudicial. And artists should be free to create without fear that their lyrics could be unfairly used against them at a trial. But as other evidentiary reforms have shown us, even when passed in good faith, the law of unintended consequences can sometimes lead to perverse results that are counterproductive to the goals they were intended to serve.

However well-intentioned rap shield legislative efforts may be, on balance the system may suffer. In their quest to find lasting solutions to combat the concerns with rap on trial, legislators should be mindful of unintended consequences. Although it is often said that as California goes, so goes the nation, this time other states should think twice before following California's lead. Ultimately, the administration of justice may be better served and the social justice concerns with rap on trial better addressed by a robust application of the current rules of evidence rather than amendments to those rules.