

Rap on Trial: A Brief History

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ABSTRACT

In recent years, the prosecutorial tactic, often called “Rap on Trial”—in which rap lyrics and videos associated with a defendant are used as evidence of criminal activity—has exploded into national prominence. The widely-followed prosecution of Young Thug and his labelmates, along with other high-profile rappers, has generated intense interest in the issue, but even before the Young Thug indictment, legislators in California, Washington D.C., and other states had introduced legislation to curb the practice. The Rap on Trial tactic has been around since at least 1991; hundreds of courts have issued judicial opinions permitting the use of rap evidence, despite a steady stream of peer-reviewed empirical studies demonstrating that the tactic introduces a substantial risk of unfair prejudice. In this Article, the author reflects on his work on this issue, identifies important moments in the history of the tactic, explores why it has become more well-known in recent years, and what this new prominence suggests about the state of the Rap on Trial tactic. The author concludes by offering suggestions for policymakers and courts.

| | |
|---|-----|
| INTRODUCTION | 406 |
| I. THE EARLY CASES..... | 411 |
| A. <i>United States v. Foster</i> | 411 |
| B. <i>People v. Olguin</i> and <i>People v. Zepeda</i> | 415 |
| II. EMPIRICAL RESEARCH | 422 |
| III. PROSECUTORS SAY THE QUIET PART OUT LOUD: RAP EVIDENCE IS CHARACTER EVIDENCE | 425 |

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|---|-----|
| IV. <i>STATE V. SKINNER</i> RAISES AWARENESS..... | 426 |
| V. PROMINENT RAP PROSECUTIONS..... | 428 |
| VI. SIGNS OF HOPE: ACTIVISM, LEGISLATION, AND PROMISING JUDICIAL DECISIONS | 434 |
| A. Recent Case Law: Signs of Progress? | 434 |
| B. A Growing Movement Against Rap on Trial | 437 |
| C. Legislative Action | 438 |
| VII. CONCLUSION | 441 |

INTRODUCTION

In 2014, I came across an article in the *San Diego Union-Tribune* about a man who was being prosecuted under California’s controversial street gang conspiracy law. No criminal acts were alleged against Brandon Duncan, who raps as “Tiny Doo,” but prosecutors were using his rap lyrics—and only his lyrics—to tie him to a long list of alleged felonies.¹ The California Street Terrorism Enforcement and Prevention Act (“STEP Act”) applies if the defendant “promotes, furthers, assists, or benefits” from criminal conduct.² The prosecution argued that, because Mr. Duncan gained a reputational benefit in the form of street credibility, he could be prosecuted for a slew of crimes that other people had committed.³

I was outraged. This prosecution was a clear violation of Mr. Duncan’s right to free speech; its use rested on the dismissive assumption that rap music is not art but instead a literal confession; it threatened to introduce inflammatory language about violence and criminality that could prejudice the jury; it sought to leverage decades of negative media treatment and

¹ See Kristina Davis, *Dozens Protest Gang Conspiracy Cases*, SAN DIEGO UNION-TRIB. (Dec. 4, 2014, 3:32 PM), <https://www.sandiegouniontribune.com/sdut-protest-gang-conspiracy-case-duncan-tiny-doo-2014dec04-story.html> [https://perma.cc/C9XK-LMMX]; see also Memorandum of Points and Authorities of Amicus Curiae in Support of Defendant Brandon Duncan’s Motion to Set Aside Information Pursuant to Penal Code § 995, *People v. Duncan* (No. SCD256609) (Cal. Sup. Ct. Feb. 27, 2015), at 1 (“The charges boil down to prosecuting Mr. Duncan because of the content of his speech. That is a clear violation of the First Amendment and the California Constitution, both of which protect speech about crime and violence, even if the speaker is recounting or lionizing criminal acts.”).

² CAL. PENAL CODE § 182.5 (West 2024).

³ See Memorandum of Points and Authorities of Amicus Curiae in Support of Defendant Brandon Duncan’s Motion to Set Aside Information Pursuant to Penal Code § 995, *supra* note 1, at 22. Duncan spent several months in detention and was later awarded half of a \$1.475 million settlement with the City of San Diego. *Tiny Doo, Aaron Harvey React to Their \$1.5M Settlement After Wrongful Arrest*, KPBS (Feb. 11, 2020, 10:55 AM), <https://www.kpbs.org/news/2020/feb/11/tiny-doo-another-man-wrongfully-jailed-will-split/> [https://www.perma.cc/E7X6-3FYG].

preconceptions about rap music as a genre; it was an attempt to use creative expression to prop up a case that otherwise would have been dead on arrival—and, ultimately, I felt, this was an attempt to punish Mr. Duncan just for being a rapper.

I was well aware that police have been targeting rappers via surveillance, harassment, and selective prosecution since the 1980s.⁴ I vividly remembered following, as a young fan, the prosecution of 2 Live Crew for obscenity,⁵ Snoop Dogg’s trial and acquittal for murder,⁶ the backlash against Ice-T’s song “Cop Killer,”⁷ and of course, the legendary controversy around N.W.A.’s hit “F**K Tha Police.”⁸ The targeting of rap by police is just the latest chapter of a long history in which law enforcement have harassed, intimidated, and suppressed Black musicians, a story that dates back well over a century.⁹ And because Black and Latino communities are notoriously over-policed,¹⁰ rappers are more frequently caught up in the criminal justice system. Though I knew of this history, I was not aware at the time that prosecutors were bringing rap lyrics and videos into the courtroom and using them as evidence of criminal activity.

This prosecutorial tactic, often called “Rap on Trial,”¹¹ dates back at least to 1991, is widely known throughout the criminal defense bar, and can even be found in prosecutors’ training materials.¹² Rap music is sometimes the basis for true threats¹³ or even obscenity prosecutions, and is used in sentencing and parole determinations, but its most common use by far is as evidence

⁴ For a useful overview of the “long tradition of antagonism between the legal establishment and hip-hop culture,” see Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185 (2014).

⁵ *Skywalker Recs., Inc. v. Navarro*, 739 F. Supp 578, 596 (S.D. Fla. 1990), *rev’d sub nom.* *Luke Recs., Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). In 1991, at a small 2 Live Crew performance in suburban New Orleans, I counted 35 policemen outside the venue—including several mounted police.

⁶ See Kim Bellware, *California Makes It Harder to Use Lyrics as Evidence Against Rappers*, WASHINGTON POST (Oct. 2, 2022, 9:00 AM), <https://www.washingtonpost.com/lifestyle/2022/10/02/california-rap-lyrics-law/> [<https://www.perma.cc/2K88-SWPZ>].

⁷ BODY COUNT, COP KILLER (Sire Records 1992).

⁸ N.W.A., FUCK THA POLICE (Ruthless Records 1988).

⁹ See Harmony Holiday, *A Brief History of the Policing of Black Music*, LITERARY HUB (June 19, 2020), <https://lithub.com/a-brief-history-of-the-policing-of-black-music/> [<https://www.perma.cc/G6BD-K53A>] (“For as long as Black music has been popular . . . it has also been criminalized by white police at all levels of law enforcement.”).

¹⁰ See generally Aaron Chalfin et al., *Police Force Size and Civilian Race*, 4 AMERICAN ECON. REV.: INSIGHTS 139, 140 (June 2022) (reporting race-specific effects of larger police forces in the United States).

¹¹ See Kubrin & Nielson, *supra* note 4.

¹² See *infra* Part III.

¹³ See *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018).

supporting criminal charges. Prosecutors justify the use of rap lyrics by arguing that they serve as literal confessions of illegal actions, are indications of motive, intent, or knowledge related to the alleged crime, or demonstrate membership in a criminal gang. In truth, they are used primarily to circumvent rules against character or propensity evidence and to leverage racial bias and preconceived notions about rap music in order to strengthen the prosecutor's case. It is noteworthy that this practice is virtually exclusive to the rap genre, despite the fact that American culture is filled with themes of violence or criminality, from country music to mob films.

As I read more, I learned that a growing body of experimental studies show that people often hold negative stereotypes about rap music and its performers, who are predominantly young men of color. These studies strongly suggest that as soon as a lyric is identified as rap, juries will judge the lyric as more literal, autobiographical, offensive, and violent as compared to when they are labeled with other genres like "country" or "heavy metal."¹⁴ Yet as I discuss in this Article, these studies are not sufficiently considered by courts assessing whether to admit rap lyrics.

As it happened, my University of California Irvine colleague, Dr. Charis Kubrin, is one of the nation's leading researchers on this issue. When we met in 2017, she had been studying rap music from a sociological perspective for over a decade,¹⁵ had just co-authored an important experimental study on rap lyrics,¹⁶ and been an outspoken critic of Rap on Trial for several years.¹⁷ Dr. Kubrin began hearing regularly from defense attorneys seeking help fighting the introduction of rap lyrics as evidence. Often, they

¹⁴ See Adam Dunbar et al., *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280, 281, 288 (2016).

¹⁵ See Charis E. Kubrin, "I See Death Around the Corner": Nihilism in Rap Music, 48 SOCIO. PERSP. 433, 433–59 (2005); Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 360–78 (2005).

¹⁶ See Dunbar et al., *supra* note 14, at 280–92.

¹⁷ A 2014 TEDx Talk by Dr. Kubrin entitled "The Threatening Nature of...Rap Music?" has been viewed over 300,000 times on YouTube. See Charis E. Kubrin, *The Threatening Nature of...Rap Music?*, YOUTUBE (Oct. 23, 2014), <https://www.youtube.com/watch?v=cjTihRtFJbU>. See also Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, THE N.Y. TIMES (Jan. 13, 2014), <https://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html> [<https://perma.cc/U7AF-VEC2>]; Charis E. Kubrin & Erik Nielson, *Op-Ed: A New California Trend-Prosecuting Rap*, L.A. TIMES (Apr. 7, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-kubrin-and-nielson-rap-prosecution-20140408-story.html#axzz2yL6IsZgC> [<https://perma.cc/7ERT-2RN9>]; Charis E. Kubrin, *Op-Ed: A Potential Censorship or Criminalization of Rap Music*, THE N.Y. TIMES (Dec. 4, 2014), <https://www.nytimes.com/roomfordebate/2014/12/03/should-facebook-do-more-to-monitor-violent-expressions/a-potential-censorship-or-criminalization-of-rap-music> [<https://perma.cc/3XSC-WVTW>].

had been blindsided just before trial, or they simply did not know much about rap music with its localized variations, unique lingo, and artistic conventions. Nor were they always familiar with the case law, First Amendment arguments, voir dire tactics, or practical strategies that had been used before. So, we decided to team up and together with a group of dedicated law students in the UCI Intellectual Property, Arts, and Technology Clinic at the UC Irvine School of Law, we set out to create a legal guide that would help level the field in the battle over the use of rap lyrics in the courtroom.

Over the next three years, we read and catalogued hundreds of cases involving rap lyrics, pored over social science studies analyzing the impact of rap music, and educated ourselves about artistic practices within rap—such as braggadocio, hypermasculinity, and the convention of “keepin’ it real.” Most importantly, we spoke with many defense attorneys who had dealt with rap evidence in the courtroom, and learned that even in places like rural Missouri, prosecutors seek to use rap lyrics and videos whenever they can.

In June 2021, we launched *Rap on Trial: A Legal Guide* (hereinafter referred to as the “Guide”), a comprehensive resource designed to help attorneys at every stage of a criminal case—from initial discovery to pre-trial motions, jury selection, and trial.¹⁸ We knew from the outset it was necessary to do more than walk through the legal arguments for objecting to the admissibility of lyrics. Lawyers often need to educate judges and juries about rap music, and judges also need to know about the experimental research on rap and bias, so we included a substantial discussion of both the research and the themes and conventions in rap music. And based on our conversations with practitioners, we included strategic advice, including a stage-by-stage “Roadmap to Challenging Rap on Trial.”¹⁹ We also created a Brief Bank and Case Compendium as companions to the Guide.²⁰

¹⁸ See JACK I. LERNER & CHARIS KUBRIN, *RAP ON TRIAL: A LEGAL GUIDE 1* (1st ed. 2021); see also *UC Irvine Law, Criminology Experts Release Second Edition of Rap on Trial: A Legal Guide*, UCI NEWS, (Jan 23, 2024), <https://news.uci.edu/2024/01/23/uc-irvine-law-criminology-experts-release-second-edition-of-rap-on-trial-a-legal-guide/> [https://perma.cc/GQU2-FEKZ].

¹⁹ See sources cited *supra* note 18.

²⁰ See *Rap on Trial Brief Bank*, UCI IP, Arts & Tech Clinic, <https://ipat.law.uci.edu/rap-on-trial-brief-bank/> [https://perma.cc/J2SK-ZALX] (last visited Apr. 11, 2024).

Following the publication of our Guide, Dr. Kubrin, my students, and I presented educational workshops to hundreds of attorneys across the country, talked with dozens of reporters about the issue, and provided guidance to policymakers on legislation that would place important guardrails on the practice. Given the changing landscape of this issue, we published the Guide's Second Edition not too long ago.²¹ This new edition includes discussions of the California Racial Justice Act, implicit bias, negative polling and hostile media treatment of rap, the surprisingly common practice of ghostwriting, the declining usefulness of the term "gangsta rap," and, of course, new legislation. Throughout it all, the most gratifying moments came when we were contacted by defense attorneys who found our Guide particularly useful in cases they were involved in. In fact, attorneys even used a rough pre-publication draft of the Guide to successfully limit the use of rap lyrics in a federal case involving firearms and other charges.²²

Since we began working on the Guide, the issue of Rap on Trial has become even more prominent. By the time the second edition of the Guide was published in January 2024, California and Louisiana had passed new legislation placing guardrails on the use of rap lyrics in criminal trials,²³ and three states had considered legislation as well. Between the inception of the project and the second edition, fellow scholars wrote a book and numerous academic articles about Rap on Trial; two documentaries and a podcast were produced about the practice; and a nationwide movement began to advocate for change. In April 2022, the issue exploded into national prominence like never before when prosecutors in Atlanta, Georgia, arrested two of the most famous rappers in the world, Young Thug and Gunna, using the state's Racketeer Influenced and Corrupt Organizations ("RICO") Act. The indictment, just like Brandon Duncan's in San Diego, uses Young Thug's rap lyrics to tie him to a range of crimes other people committed.

In this Article, I discuss some of the most important moments in the history of this prosecutorial tactic, beginning with the first known judicial opinion addressing the admissibility of rap

²¹ *UC Irvine Law, Criminology Experts Release Second Edition of Rap on Trial: A Legal Guide*, UCI NEWS, (Jan 23, 2024), <https://news.uci.edu/2024/01/23/uc-irvine-law-criminology-experts-release-second-edition-of-rap-on-trial-a-legal-guide/> [<https://perma.cc/GQU2-FEKZ>].

²² See *United States v. Stephenson*, 550 F. Supp. 3d 1246, 1255 (M.D. Fla. 2021) (relying on the Guide to exclude three YouTube music videos from evidence).

²³ See CAL. EVID. CODE § 352.2 (West 2022).

evidence and concluding with the recent movement. This account will shed light on today's debates about the role of racial bias in the criminal justice system; show the continuing impact of harmful judicial decisions from decades ago; and inform ongoing conversations about what legal reforms are needed.²⁴

I. THE EARLY CASES

A. *United States v. Foster*

The first written judicial opinion on the use of rap lyrics in criminal trials is widely understood to be *United States v. Foster*.²⁵ In that case, the United States Court of Appeals for the Seventh Circuit held that it was not an error for the prosecution to introduce lines of verse found in a notebook by the defendant. Derek Foster was questioned, searched, and arrested at Chicago's Union Station when he was observed with two heavy, unwieldy suitcases, which turned out to contain cocaine and PCP. At trial, the only disputed issue had been whether Foster knew he was transporting controlled substances.²⁶ The prosecution successfully introduced a two-line "verse" found in a notebook in Foster's possession, which Foster challenged on appeal:

Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve
all over town.

Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars
than your average bussiness [sic] man.²⁷

These lines did not relate to the actual charges in the case. Foster was accused of transporting drugs, while the verse discussed selling or dealing drugs. Foster argued that his verse was art, and fictional, written for eventual incorporation into a rap song. The court compared Foster's argument to *State v. Hanson*, a 1987 decision by the Washington Court of Appeals in which a man was accused of shooting a 7-11 clerk in the stomach. In *Hanson*,

²⁴ This account does not address the history of rap music's conflict with the legal system, which is notoriously long, fraught with injustice, and very well covered in other works. Nor do I provide a full discussion of the broader cultural context involving decades' worth of negative media coverage and public opinion polling showing broad hostility to rap. For such a discussion, see JACK I. LERNER & CHARIS KUBRIN, *RAP ON TRIAL LEGAL GUIDE* 14–16, 30–43 (2d ed. 2024). I also do not discuss prosecutions of rap lyrics as true threat or for obscenity; this Article concerns cases about the use of rap lyrics or videos as evidence to prove a crime or support aggravating circumstances such as gang enhancements. For a brief discussion of true threats, see *id.* at 96–99.

²⁵ See *United States v. Foster*, 939 F.2d 445, 455–56 (7th Cir. 1991); see also ERIK NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* 14–15 (The New Press ed., 2019) (discussing *Foster* and its importance).

²⁶ See *Foster*, 939 F.2d at 449.

²⁷ *Id.*

the prosecutor questioned the defendant about “fiction he had written which contained some incidents of violence.”²⁸ The Washington court rejected the use of these fictional writings out of hand: “any value” of the writings “would be overwhelmed by the danger of unfair prejudice.”²⁹ Besides, held the court, “[w]ithout some further foundation, the defendant’s writings were simply not probative. A writer of crime fiction, for example, can hardly be said to have displayed criminal propensities through works he or she has authored.”³⁰

The panel in *Foster* took a different tack, holding that Federal Rule of Evidence 404(b) permitted the verse. Rule 404(b) prohibits evidence to be used “to prove a person’s bad character or his propensity to commit crimes” (similar to Washington’s Evidence Rule 404, at issue in *Hanson*³¹), but also *permits* such evidence for certain purposes, including knowledge. The court held that the verse was relevant because it showed that Foster “was familiar with drug code word and, to a certain extent, narcotics trafficking, a familiarity that made it more probable that he knew that he was carrying illegal drugs.”³² Furthermore, held the court, the verse “rebutted Foster’s protestations of naiveté.”³³ The court rejected Foster’s argument with an analogy to *The Godfather*:

[T]he rap verse was not the equivalent of admitting The Godfather as evidence that Mario Puzo was a mafia don It was, instead, the equivalent of admitting The Godfather to illustrate Puzo’s knowledge of the inner workings of an organized crime family Rap music, under Foster’s definition, “constitutes a popular musical style that describes urban life”; it describes the reality around its author. And it is Foster’s knowledge of this reality, as evidenced by the verse that he has admittedly authored, that was relevant to the crimes for which he was charged.³⁴

In a vacuum, this reasoning might make sense. But this opinion was not written in a vacuum: it was written just as the “gangsta rap” movement burst into chart-topping popularity,³⁵ and controversy over rap music had been national news for at several years.³⁶ By that point, millions of records that mention drug dealing had been sold by artists such as Ice-T, Eazy-E, Ice

²⁸ State v. Hanson, 731 P.2d 1140, 1143 (Wash. Ct. App. 1987).

²⁹ *Id.* at 1144.

³⁰ *Id.*

³¹ WASH. EVID. R. 404.

³² *Foster*, 939 F.2d at 455.

³³ *Id.* at 455–56.

³⁴ *Id.* at 456.

³⁵ JEFF CHANG, CAN’T STOP WON’T STOP 416 (St. Martin’s Press 2005).

³⁶ See LERNER & KUBRIN, *supra* note 24, at 35–43.

Cube, the Geto Boys, KRS-One, Too \$hort, and of course, N.W.A. The court noted that, “[a]t trial, the government offered testimony that the words ‘key’ and ‘rock’ were standard code words used in cocaine trafficking.”³⁷ It failed to mention, however, that anyone who listened to rap at the time would have been familiar with those words.³⁸ The court easily could have held that a rap lyric mentioning “keys” and “rocks” had no probative value on the question of whether someone actually had firsthand knowledge of drug trafficking.³⁹ By ignoring this context, the court allowed Derek Foster’s affinity for rap to be used against him. Being an aspiring rapper—or simply a fan of rap music—was enough for the court to demonstrate Foster’s “knowledge of this reality.”⁴⁰

How could the court have ignored what was obvious by this time even to white suburban kids who listened to rap? It is possible that the judges simply were not familiar with rap music. Rap is a product of Black culture. It is heavily associated with the Black community,⁴¹ much more so in 1991 than today. In contrast, all the judges on the *Foster* panel were white men, averaging sixty-three years of age, when the case was decided. The trial judge was of the same demographic, age fifty-four at the time.⁴²

The court’s discussion of *The Godfather* is also problematic, and telling. The court declared that *The Godfather* could be admitted to show Mario Puzo’s knowledge of the inner workings of the mafia. But it is well established that Puzo had no first-hand knowledge of the mafia world other than a few neighborhood characters. “I’m ashamed to admit that I wrote the *The Godfather* entirely from research,” he wrote. “I never met a real honest-to-god gangster. I knew the gambling world pretty good, but that’s

³⁷ *Id.* at 449 n.1.

³⁸ See, e.g., ICE-T, I’M YOUR PUSHER (Syndicate Studios West 1988) (“You know where I can get a key? I know where you can get a LP.”); TOO \$HORT, CITY OF DOPE (RCA Records 1988) (“It’s like midnight, slangin’ rock. Task force just hit the block.”).

³⁹ Cf. *United States v. Sneed*, No. 3:14 CR 00159, 2016 WL 4191683, at *6 (M.D. Tenn. Aug. 9, 2016) (“[R]apping about selling drugs does not make it more likely that [the] Defendant did, in fact, sell drugs.”).

⁴⁰ *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

⁴¹ See IMANI PERRY, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP 12 (2004). See also Christine Reyna et al., *Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12 GRP. PROCESSES & INTERGROUP RELS., 361 (2009).

⁴² See generally AMERICAN BAR ASS’N, PROFILE OF THE LEGAL PROFESSION (2023), <https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf> [<https://perma.cc/6MJW-LGG3>].

all.”⁴³ The book and film have also received criticism for perpetuating a one-sided, stereotypical view of Italian-Americans—in other words, the book is not accurate to real life.⁴⁴ And the book’s depiction of the mafia was a broad, mythic saga that did not capture how organized crime actually worked at the time, and certainly not by 1991;⁴⁵ in fact, *The Godfather* itself famously changed how real-life mobsters spoke and dressed.⁴⁶

It would have been wrong to use Puzo’s ability to research and tell a story as evidence of his criminal activity, just as it was wrong to use Derek Foster’s rap lyrics to do so. Neither work demonstrates any real connection to a criminal enterprise, but the use of either would be highly prejudicial. Furthermore, Puzo was a lifelong gambler who was in debt to bookies and loan sharks when he wrote *The Godfather*⁴⁷—yet, as far as we know, he was never arrested and his book was never used as evidence against him. The court’s use of this comparison is problematic both because it takes an unacceptably broad view of the admissibility of creative expression, and because it inadvertently highlights the fact that only rap evidence has ever been used in court.⁴⁸

The legacy of *Foster* is significant. The opinion has been cited by other courts dozens of times, including in the Second, Third, Fourth, Fifth, Sixth, and Tenth Circuits; the Maryland Supreme Court; the Massachusetts Supreme Judicial Court; the Nevada

⁴³ MARIO PUZO, *THE MAKING OF THE GODFATHER AND OTHER CONFESSIONS* 35 (G.P. Putnam’s Sons, 1972); see also Eric Hoberger, *Obituary: Mario Puzo*, *THE GUARDIAN* (July 4, 1999, 9:14 PM), <https://www.theguardian.com/news/1999/jul/05/guardianobituaries> [<https://perma.cc/Q86F-HRLK>].

⁴⁴ Pop Culture Happy Hour, *‘The Godfather’ and the Limitations of Representation*, NPR (Nov. 6, 2022, 12:10 AM), <https://www.npr.org/transcripts/1133013484> [<https://perma.cc/4KUW-M6JG>].

⁴⁵ See, e.g., Sean M. McWeeney, *The Sicilian Mafia and Its Impact on the United States*, 56 *FBI L. ENF’T BULL.* 1, 6-7, 10 (1987) (highlighting the complexity of organized crime operation, such as an assignment of a person whose only task is to receive a phone call at nighttime).

⁴⁶ Justin Metz, *With ‘The Godfather,’ Art Imitated Mafia Life. And Vice Versa.*, *THE NEW YORK TIMES* (Mar. 13, 2022), <https://www.nytimes.com/2022/03/09/movies/godfather-mafia.html> [<https://perma.cc/4TFJ-TLCJ>].

⁴⁷ PUZO, *supra* note 43, at 34.

⁴⁸ See discussion *infra* pp. 419–21.

Supreme Court; and numerous trial courts.⁴⁹ It was still being cited approvingly as recently as 2023.⁵⁰

B. *People v. Olguin* and *People v. Zepeda*

California has seen far more Rap on Trial cases than any other state. A few years after *Foster*, a pair of appellate decisions in California set the stage for hundreds of opinions over the next three decades permitting rap evidence to show gang affiliation or related facts.⁵¹

People v. Olguin is the first written judicial opinion in California to consider rap lyrics.⁵² There, the California Court of Appeal considered the admissibility of rap lyrics to show allegiance to a gang and associated motive, knowledge, and intent.⁵³

Cesar Javier Olguin and Francisco Calderon Mora were prosecuted for a murder in Santa Ana, California, related to a territorial dispute between two gangs.⁵⁴ At trial, prosecutors introduced handwritten lyrics found in a search of Mora's home that associated him with one of the gangs in question.⁵⁵ The lyrics were read aloud by the lead investigator on the case, "who also interpreted them."⁵⁶ A substantial amount of lyrics were read to the jury: around fifteen couplets, comprising nearly 400 words, and taking up over twenty lines of small text in the *California Appellate Reports*.⁵⁷ The lyrics do make reference to gangs, but also many references to criminality and violence, with lines such as "Ima shootin in the head make him jump like a rana," "smoking Marijuana," "Well make you bleed," and "When I walk out my door I have to pack my forty four."⁵⁸ The lyrics did not mention the crime at issue in that case.

⁴⁹ See, eg., *United States v. Garcia*, 291 F.3d 127 (2d Cir. 2002); *United States v. Gibbs*, 190 F.3d 188 (3d Cir. 1999); *United States v. Gastiaburo*, 16 F.3d 582 (4th Cir. 1994); *United States v. Williams*, 957 F.2d 1238 (5th Cir. 1992); *United States v. Stuckey*, 253 Fed. Appx. 468 (6th Cir. 2007); *United States v. Long*, 774 F.3d 663 (10th Cir. 2014); *Hannah v. State*, 23 A.3d 192 (Md. 2011); *Commonwealth v. Correa*, 210 N.E.3d 407 (Mass. 2023); *Holmes v. State*, 306 P.3d 415 (Nev. 2013).

⁵⁰ *Correia*, 210 N.E.3d at 407.

⁵¹ *People v. Olguin*, 31 Cal. App. 4th 1355, 1372 (1994); *People v. Zepeda*, 167 Cal. App. 4th 25 (2008).

⁵² *Olguin*, 31 Cal. App. 4th at 1372. See NIELSON & DENNIS, *supra* note 25, at 62–65, for a further analysis of this case as well as the harmful prosecutorial practice of combining gang and rap evidence.

⁵³ *Olguin*, 31 Cal. App. 4th at 1383.

⁵⁴ *Id.* at 1366–67.

⁵⁵ *Id.* at 1372–73.

⁵⁶ *Id.* at 1372 n.3.

⁵⁷ *Id.* at 1372.

⁵⁸ *Id.* at 1372 n.3–4.

Both defendants were convicted.⁵⁹ On appeal, Mora argued that the lyrics had not been adequately authenticated, but the court held that “[b]oth the content and location of these papers identified them as the work of Mora.”⁶⁰ Mora also objected that the lyrics created a substantial risk of unfair prejudice, but the Court of Appeal refused to overrule the trial court:

Regardless of whether these lyrics were written before or after the killing . . . they demonstrated his membership in [the] Southside [gang], his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the killing. The trial court properly admitted them, carefully limiting them to those purposes.⁶¹

As discussed above, however, these lyrics also contained numerous references to violence and criminality. Given that the prosecution featured extensive expert testimony from the lead investigating detective regarding street gangs and the defendants’ membership in a gang, which the court called “highly probative on the issues of intent and motive,” and “highly relevant to the prosecution’s theory of how and why [the victim] was killed,” the court easily could have held that the rap evidence should have been excluded as both unfairly prejudicial and cumulative.

Olguin, Mora’s co-defendant, objected that the lyrics were inadmissible character evidence and had effectively been used against *him*, violating his right to confrontation.⁶² The court rejected this argument as well, casually dismissing the risk of prejudice.⁶³ “The mere fact the lyrics might be interpreted as reflective of a generally violent attitude could not be said ‘substantially’ to outweigh their considerable probative value.”⁶⁴

As to the risk that Olguin would be confused with Mora, the court held, “Nothing makes these rap lyrics inherently unreliable—at least no more unreliable than rap lyrics in general—and there is little risk the jury would find them so authoritative as to overwhelm their ability to follow the instruction to consider them only against Mora.”⁶⁵ By downplaying the lyrics’ “unreliab[ility],” the court was clearly indicating that a jury could consider the lyrics as literal fact, and use them to make

⁵⁹ *Id.* at 1366.

⁶⁰ *Id.* at 1373. At least one evidence treatise has criticized the court’s holding on authentication. 1 Jefferson, CAL. EVIDENCE BENCHBOOK (3d ed.) § 30.25, p. 667.

⁶¹ *Olguin*, 31 Cal. App. 4th at 1373.

⁶² *Id.* at 1373–74.

⁶³ *Id.* at 1374.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1375.

conclusions about Mora’s gang allegiance (and, “inferentially,”⁶⁶ his motive and intent). In light of this conclusion on literality, the second part of the passage—“at least no more unreliable than rap lyrics in general”—appears to indicate a default assumption that rap lyrics can be taken literally.

Olguin is one of the most cited cases in Rap on Trial history, if not the most cited. Courts have cited this holding over 200 times.⁶⁷ Together with *People v. Zepeda*, *Olguin* stands for a broad rule in California that rap lyrics can be admitted whenever they show gang affiliation.

The California Court of Appeal decided *People v. Zepeda*⁶⁸ fourteen years after *Olguin*, reaching the same conclusion using similar reasoning. Santos Nieto Zepeda was convicted at trial of murder, attempted murder, and two assaults with semi-automatic firearm, gang, and other enhancements added.⁶⁹ The appeal primarily concerned Zepeda’s challenge to the jury instruction on what constitutes “reasonable doubt,” but it also dealt with rap lyrics.⁷⁰ At trial, the prosecution played two rap songs that the court characterized as “gangster rap,”⁷¹ which it attributed to Zepeda. A large amount of lyrics were played for the jury (who were given written transcripts so they could follow along):⁷² over forty-eight lines of verse, taking up nearly two pages of the opinion.⁷³ Again, the lyrics contained more than gang references—they were also filled with expletives and violent imagery that did not mention gang allegiance or rivalries. An example:

I’m a straight-up hustlin’ pimp, mother fucker can’t you see,
 what you got one fine-ass bitch trick, I’ve got like two or three,
 so you mother fuckers want to kill (inaudible)
 guard your house and load the gate mother fucker I’m about to retaliate,
 creepin’ up in your window, puttin’ a slug into your face, slippin’ and
 sliding outta the scene so bad I don’t catch a case,
 (inaudible) from almighty Chico, oh you know we don’t have a play,

⁶⁶ *Id.* at 1373.

⁶⁷ *See, eg.*, *People v. Coneal*, 254 Cal. Rptr. 3d 653 (2019); *State v. Williams*, 820 N.W.2d 156 (Wis. 2012); *People v. Mendoza*, 132 Cal. Rptr.3d 803 (2011); *People v. Medina*, 95 Cal. Rptr. 3d 202 (2009).

⁶⁸ *See People v. Zepeda*, 167 Cal. App. 4th 25 (2008).

⁶⁹ *See id.* at 28.

⁷⁰ *See id.* at 29–32.

⁷¹ *Id.* at 32.

⁷² *See Terry Vau, Prosecution Rests in Zepeda Trial*, ENTERPRISE-REC. (Oct. 4, 2006), <https://www.chicoer.com/2006/10/04/prosecution-rests-in-zepeda-trial/> [<https://perma.cc/AT7R-LA4P>].

⁷³ *Zepeda*, 167 Cal. App. 4th at 33–34.

when I realize hangin' ain't gonna happen just doing our gangster thing,
 I'm a hoggin' doggin' player bitch and I been that way so long,
 just take a hit of the dojo weed as you're listenin' to this song,
 take a 40 (inaudible) hit that shit until it's gone . . .
 (Inaudible) blunts and broken jugs (inaudible) lift it on my homie's back
 and (inaudible)⁷⁴

During trial, one of the police experts admitted that the lyrics did not refer specifically to the murder in question, and that the references to violence and criminality were not much different than the content on commercially successful records of the “gangsta rap” genre.⁷⁵ As it happened, substantial gang evidence had already been admitted, including writings found at the home where Zepeda was living, a photograph of Zepeda making gang signs, and a tattoo on Zepeda’s hand.⁷⁶ He was convicted.

On appeal, Zepeda’s counsel argued that the rap evidence was cumulative and unduly prejudicial, but the Court of Appeal held that the lyrics were relevant and admissible.⁷⁷ As in *Olguin*, the court relied on the testimony of a police “gang expert”⁷⁸ who “testified that gangs communicate through music.”⁷⁹ Therefore, the court found:

[Zepeda’s] communications here were not ambiguous or equivocal. These lyrics . . . go beyond mere fiction to disclosing defendant’s state of mind, his motives and intentions, and his fealty to furthering his criminal gang’s activities . . . The evidence was not unduly prejudicial . . . The language and substance of the lyrics, although graphic, did not rise to the level of evoking an emotional bias against the defendant as an individual apart from what the facts proved.⁸⁰

Again, the court treated the lyrics literally. In the court’s eyes, this was not art but “communications” that “go beyond mere fiction.” And again, the court made no mention of the enormous controversy around this type of rap, nor of the body of empirical research that had been published by this time.

⁷⁴ *See id.*

⁷⁵ *See Vau, supra* note 72.

⁷⁶ *Zepeda*, 167 Cal. App. 4th at 32.

⁷⁷ *Id.*

⁷⁸ As we discuss in the *Rap on Trial Legal Guide*, the frequent use of “gang experts” to interpret rap music is problematic. LERNER & KUBRIN, *supra* note 24, at 112–17 (“Prosecutors often present rap lyrics through a law enforcement perspective, commonly a ‘gang expert’ charged with explaining the supposed relevance of the lyrics to the jury. But these individuals are not ‘rap experts’ and can incorrectly define rap terms.”).

⁷⁹ *Zepeda*, 167 Cal. App. 4th at 35.

⁸⁰ *Id.*

Olguin and *Zepeda* set an extremely permissive standard for the admission of gang evidence in the form of rap. In the years since, many Court of Appeal panels have relied on these cases to permit gang-related rap evidence. Rap evidence and gang evidence are regularly commingled—even though countless studies have shown that gang evidence, like rap evidence, threatens the right to a fair trial.⁸¹ California Governor Gavin Newsom’s Committee on Revision of the Penal Code warned in 2020 that “[gang] evidence considered in court can be unreliable and prejudicial to a jury Empirical research corroborates this assessment. Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them.”⁸² The Committee also pointed out that gang enhancements are almost exclusively applied to people of color, “[y]et research shows that white people make up the largest group of youth gang members. It is difficult to imagine a statute, especially one that imposes criminal punishments, with a more disparate racial impact.”⁸³ The Committee recommended that direct evidence of gang involvement be bifurcated from the guilt determination at trial and suggested several other reforms be made to gang enhancement proceedings.⁸⁴ In 2021, the California Legislature did just that with the STEP Forward Act, requiring, along with other reforms, that gang enhancement be tried separately from underlying offenses.⁸⁵

Despite this important reform, it remains unclear how much the STEP Forward Act will ameliorate the compounding prejudice that occurs when gang evidence and rap evidence are commingled. In the Act, the Legislature warned against this type of commingling, declaring that “[g]ang enhancement evidence can be unreliable and prejudicial to a jury *because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people.*”⁸⁶ Despite this danger, the Act’s bifurcation requirement only explicitly applies to gang enhancements and the crime of

⁸¹ See COMM. ON REVISION OF THE PENAL CODE, 2020 ANN. REP. AND RECOMMENDATIONS 46 (2021) (first citing Mitchell L. Eisen et al., *Examining the Prejudicial Effects of Gang Evidence*, 13 J. FORENSIC PSYCH. PRAC. 1 (2013); and then Mitchell L. Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2 (2014)); see also *People v. Burgos*, 77 Cal. App. 5th 550 (2022) (gang evidence is “inherently prejudicial”).

⁸² See COMM. ON REVISION OF THE PENAL CODE, *supra* note 81.

⁸³ *Id.* at 44.

⁸⁴ *Id.*

⁸⁵ Assemb. B. 333, 2021 Leg., Reg. Sess. (Cal. 2021).

⁸⁶ *Id.* § 2(d)(6) (emphasis added).

participation in a criminal street gang.⁸⁷ The danger remains that substantial gang evidence could still be permitted, including via rap lyrics, using the justification that it is relevant to the underlying offense, such as to show motive or intent.⁸⁸ Courts should heed the California legislature's warning and work to keep gang evidence out of the courtroom whenever possible—particularly when it comes in the form of rap lyrics or videos. When prosecutors offer rap evidence to prove gang-related elements of a charge, courts should be *more* reluctant, not less, to admit such evidence.

Between *Olguin* in 1994 and *Zepeda* in 2008, the California Court of Appeal issued forty-three judicial opinions assessing rap evidence; nearly all of these, though not designated for publication, allowed the rap evidence to be admitted.⁸⁹ In total, since 1994, at least 330 opinions have been issued in California dealing with rap evidence, nearly always admitting rap lyrics or videos.⁹⁰

Olguin and *Zepeda* have left quite a legacy—one that can still be felt today. In 2023, a California Court of Appeal panel relied on those cases to affirm the extensive use of violent rap lyrics to show gang affiliation, premeditation, and intent to murder.⁹¹ In *People v. Ramos*, a police “gang expert” testified at trial that “[o]nly a gang member would make reference to such things in a rap video. He also testified that the gang rapper uses rap as a diary of gang events.”⁹² The court accepted this blanket statement at face value, and found no abuse of discretion in admitting rap lyrics.⁹³ The court also distinguished artists like Neil Young and Johnny Cash from “street gang rap artists”⁹⁴:

Of course, in many other contests, song lyrics do not reflect their author's true state of mind. Neil Young did not shoot his girlfriend, although he sang that he did in “*Down by the River*.” And Johnny Cash

⁸⁷ CAL. PENAL CODE § 1109 (West 2022).

⁸⁸ See *People v. Session*, 311 Cal. Rptr. 3d 363, 371–72 (2023) (holding that failure to bifurcate was harmless because gang evidence could have properly been admitted for motive, intent, and so on); see also *People v. Boukes*, 300 Cal. Rptr. 3d 1, 9–10 (2022) (finding “any error in the lack of bifurcation was harmless” because the evidence at issue could have been admissible to demonstrate motive).

⁸⁹ For additional large-scale analysis of rap opinions, see 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); see also Mapping Rap on Trial, RAP ON TRIAL, <https://www.rapontrial.org/> [<https://perma.cc/T79Z-6KC6>] (last visited Apr. 8, 2024).

⁹⁰ See sources cited *supra* note 89.

⁹¹ *People v. Ramos*, No. D074429, 2022 WL 11515789, at *1–*2 (Cal. Ct. App. Oct. 20, 2022).

⁹² *Id.* at *21–*27.

⁹³ *Id.* at *21.

⁹⁴ “Street gang rap” is not a term that is known or regularly used in the rap industry, not does it refer to a musical rap sub-genre like “trap,” “drill,” “crunk,” or even “gangsta rap.”

did not kill a man in Reno just to watch him die, even though he sang that he did in “*Folsom Prison Blues*.” However, the significant distinction between lyrics such as these and [the defendant’s] rap is that the “street gang rap artist” creates rap as a “diary of themselves.”⁹⁵

The passage also makes the wrong comparison. The question is not whether Neil Young was ever accused of shooting his girlfriend. A better comparison would be whether Neil Young was ever accused of domestic violence or of assaulting a woman. Would his lyrics have been treated as literal then? Along similar lines, what if Johnny Cash were accused of murder? Would his lyrics have been used then? If history is a guide, probably not. Johnny Cash was arrested at least seven times during his career and there is no record that his lyrics were ever used against him.⁹⁶

Though *People v. Ramos* is an unpublished opinion and may not be cited in California, and has been certified for review by the California Supreme Court,⁹⁷ the prevalence of opinions like it make clear that legislative intervention is necessary.

Right around the time of *Zepeda*, the number of Rap on Trial opinions in California spiked. Prior to 2008, an average of 4.6 opinions per year were issued; from 2009-2023, an average of 19.2 opinions were issued.⁹⁸ What explains the increase? It may have to do with the digitization of judicial opinions and their inclusion in legal databases, or changes in the way the California Court of Appeal included opinions in the *California Appellate Reports*. It may also be a result of lower music production costs combined with free internet distribution, as YouTube gained massive popularity beginning around 2006.⁹⁹ This, in turn, led to more publicly accessible rap than ever before¹⁰⁰—and also made it much easier than ever before for police to find, surveil, and target rappers.¹⁰¹

⁹⁵ *People v. Ramos*, 90 Cal. App. 5th 578, 597 (2023) (quoting the law enforcement “gang expert”).

⁹⁶ See Jackie Manno, *Inside Johnny Cash’s Arrest Record*, THE LIST (June 13, 2022, 9:42 AM), <https://www.thelist.com/613328/inside-johnny-cashs-arrest-record/> [https://perma.cc/V2B2-UF8L].

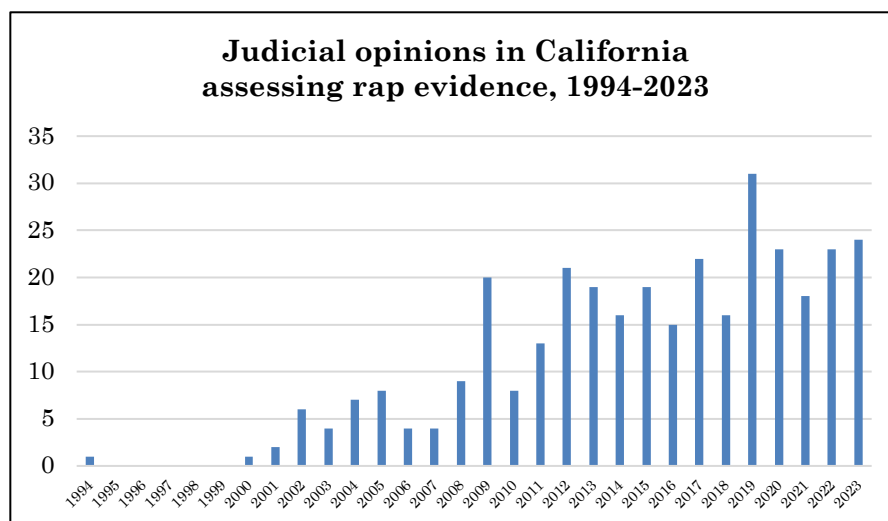
⁹⁷ *People v. Ramos*, 531 P.3d 968 (Cal. 2023).

⁹⁸ On file with author.

⁹⁹ See *Youtube Serves Up 100 Million Videos a Day*, NBC NEWS (July 16, 2006, 12:18 PM), <https://www.nbcnews.com/id/wbna13890520> [https://perma.cc/YPR3-72GS].

¹⁰⁰ See *id.*

¹⁰¹ See Joseph Goldstein & J. David Goodman, *Seeking Clues to Gangs and Crime; Detectives Monitor Internet Rap Videos*, THE 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/39QB-MZ4L] (discussing New York Police Department’s program to monitor the New York rap scene, including via YouTube).



II. EMPIRICAL RESEARCH

Just two years after *Olguin*, Dr. Carrie Fried published a landmark study on the risk of bias when it comes to rap music.¹⁰² Fried set out to test the hypothesis that “rap lyrics receive more negative criticism than other types of lyrics, perhaps because of their association with Black culture.”¹⁰³ The study asked participants to report their emotions based solely on lyrics, then again when participants were told the genre of music. To do so, she used the first verse of a folk song recorded in the 1960s by the all-white folk group, The Kingston Trio, called “Bad Man’s Blunder.” The lyrics read:

Well, early one evening I was rollin’ around
I was feelin’ kind of mean
I shot a deputy down
Strollin’ on home and I went to bed
Well, I laid me pistol up under my head

Some participants were told the song was rap, while others were told it was country music. The results were stark. Fried found that “[t]he exact same lyrical passage, which is acceptable as a country song or when associated with a White artist, becomes a dangerous, offensive song in need of government regulation

¹⁰² See Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135, 2135 (1996).

¹⁰³ *Id.*

when it is a rap song or associated with a Black artist.”¹⁰⁴ Fried observed that while participants would not report negative emotions based on learning the singer’s race, they did based on the genre of music—rap as compared to country. This study was the first to suggest that subjects are biased against rap music simply by virtue of its identification as rap music, and it informed numerous studies over the next twenty-five years.¹⁰⁵

Two decades later, Adam Dunbar, Charis Kubrin, and Nicholas Scurich replicated Dr. Fried’s findings in their own experimental study. Using the same song, and conducting two additional studies, these researchers again found that when violent lyrics were described as “rap,” subjects judged the lyrics to be more literal and autobiographical than when they were labeled as “country.”¹⁰⁶ In light of these findings, they concluded, “rap lyrics might influence jurors’ decisions independent of their actual content. That is, the mere label of rap is sufficient to induce negative evaluations, even when holding constant the actual lyrics.”¹⁰⁷ As a result, “a key concern is that any value rap lyrics may have as evidence is likely to be artificially inflated by stereotypes associated with the genre.”¹⁰⁸

In a 1999 study, Stuart Fischhoff sought to examine how jurors would perceive “gangsta rap” lyrics used as evidence in a murder trial.¹⁰⁹ Dr. Fischhoff served as an expert witness for the defense in a 1992 murder trial in which the court permitted violent and misogynistic rap lyrics to be admitted.¹¹⁰ A mistrial was declared, and three years later the case was retried.¹¹¹ Dr. Fischhoff was again retained as an expert witness.¹¹² In preparation for his testimony, he explored the effect of inflammatory rap lyrics by asking test subjects for their impression of an individual using the defendant’s real background and actual rap lyrics.¹¹³ Dr. Fischhoff

¹⁰⁴ *Id.* at 2141.

¹⁰⁵ Dr. Fried conducted two additional studies that built on her findings in *Bad Rap for Rap* and yielded similar results. See, e.g., Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705 (1999); Carrie B. Fried, *Stereotypes of Music Fans: Are Rap and Heavy Metal Fans a Danger to Themselves or Others?*, 8 J. MEDIA PSYCH. ONLINE 1, 7–9 (2003).

¹⁰⁶ Dunbar et al., *supra* note 14, at 286.

¹⁰⁷ *Id.* at 289.

¹⁰⁸ *Id.*

¹⁰⁹ Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 795 (1999).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 795–96.

¹¹² *Id.* at 796.

¹¹³ *Id.*

shared the defendant's background with all the subjects.¹¹⁴ Some were shown the lyrics and some were also told the defendant was on trial for murder.¹¹⁵ The findings were again conclusive—they “clearly indicate that showing participants the rap lyrics exerted a significant prejudicial impact on the evaluation of a person and particularly so when the person is accused of murder.”¹¹⁶ These results, he concluded, were:

chilling in their implications . . . Based on the present research results, the outcome of the first trial, and the desire by the Prosecution to get the gangsta' rap lyrics into evidence in the retrial, it seems that people may indeed be inclined to identify an artist with his/her artistic product.¹¹⁷

These studies are some of the most prominent and influential in a substantial body of empirical research on attitudes toward rap and on jurors' reaction to it.¹¹⁸ Yet, they have rarely been considered by courts. Dr. Fried's landmark 1996 study, for example, has only been cited in a judicial opinion once—a dissent.¹¹⁹ In total, empirical studies by these authors have been referenced just seven times in nearly 700 judicial opinions.¹²⁰

Courts should begin to consider the empirical research more regularly. The California Legislature recently required that, if offered, courts must consider “[c]redible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression” and “[e]xperimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.”¹²¹ In enacting the law, the Legislature cited several of the studies discussed above.¹²² Courts throughout the nation should follow California's lead and carefully consider this research whenever rap evidence is at issue.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 803.

¹¹⁷ *Id.* at 803, 804.

¹¹⁸ See LERNER & KUBRIN, *supra* note 24, at 118–23.

¹¹⁹ Hart v. State, No. 05-19-01394-CR, 2022 WL 3754537, at *16 (Tex. App. Aug. 30, 2022) (Reichek, J., dissenting).

¹²⁰ *Id.*; United States v. Donald, No. 3:21-CR-9 (VAB), 2023 WL 6958797, at *21 n.7 (D. Conn. Oct. 20, 2023); United States v. Wiley, 610 F.Supp.3d 440, 445 (D. Conn. 2022); Montague v. State, 243 A.3d 546, 551 n.2 (Md. 2020); Jordan v. State, 212 So. 3d 836, 858 (Miss. Ct. App. 2015) (Fair, J., dissenting), *aff'd*, Jordan v. State, 212 So. 3d 817 (Miss. 2016); United States v. Bey, No. CR 16-290, 2017 WL 1547006, at *6 n.2 (E.D. Pa. Apr. 28, 2017); Holmes v. State, 306 P.3d 415, 418 (Nev. 2013).

¹²¹ CAL. EVID. CODE § 352.2(b)(1)–(2) (West 2024) (effective Jan. 1, 2023).

¹²² See A.B. 2799, 2021-2022 Leg., Reg. Sess. (Cal. 2022).

III. PROSECUTORS SAY THE QUIET PART OUT LOUD: RAP EVIDENCE IS CHARACTER EVIDENCE

By 2004, the use of rap lyrics was a go-to tactic for prosecutors around the country—so much so that their training manuals openly discussed the tactic. Tellingly, these materials make clear that the primary purpose of rap evidence is not simply to prove elements like motive or intent. The real motivation is to leverage years of hostile media coverage,¹²³ negative stereotypes, and misinterpretation of lyrics to create a negative image of the defendant’s character or shore up a case.

In a manual published by the American Prosecutors Research Institute, a then-Deputy District Attorney for the County of Los Angeles revealed this true purpose in so many words:

Perhaps the most crucial element of a successful prosecution is introducing the jury to the real defendant . . . Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant’s true personality. Gang investigators should focus on these items of evidence during search warrants and arrests.¹²⁴

Around the same time, a United States Department of Justice bulletin gave similar guidance.¹²⁵ The bulletin claimed that with rap lyrics, gang members “put their true-life experiences into lyrical form,” and that such lyrics “reflect true-life experiences” and “the author’s gang mentality.”¹²⁶ The bulletin instructed the reader to “remain mindful of . . . the opportunities to obtain inculpatory evidence” in the form of rap lyrics and recordings.¹²⁷

The 2004 American Prosecutors’ Research Institute manual shows that the real value of rap evidence is as character or propensity evidence—a shortcut to make a conviction easier, or a way to turn a weak case into a strong one.¹²⁸ The publication of these manuals represents a shameful moment in the history of this prosecutorial tactic. It is telling that prosecutors have been this explicit about the true purpose for which they use rap evidence,

¹²³ For a discussion of hostile media coverage throughout the history of rap, see LERNER & KUBRIN, *supra* note 24, at 35–43.

¹²⁴ AMERICAN PROSECUTORS RESEARCH INSTITUTE, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 15–16 (2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf [<https://perma.cc/6YFA-ZQ7F>].

¹²⁵ See Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, 54 U.S. ATT’YS’ BULL. 1, 1 (May 2006), <https://www.justice.gov/archive/olp/pdf/gangs.pdf> [<https://perma.cc/682A-LGPA>].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J. L. & ARTS 1, 1–2 (2007) (discussing the training materials); see also Kubrin & Nielson, *supra* note 4.

and courts should have these comments in mind when they consider whether to admit it.¹²⁹

IV. *STATE V. SKINNER* RAISES AWARENESS

In 2014, the New Jersey Supreme Court decided *State v. Skinner*.¹³⁰ The case raised considerable attention and garnered numerous amicus briefs.¹³¹ At trial, a witness for the prosecution read thirteen pages of rap lyrics to the jury, which had been found in Skinner's car.¹³² The lyrics did not mention the victim and were written well before the crime at issue—but they were quite violent.¹³³ In addition, even though the charges bore no relation to violence against women, the prosecution read to the jury lyrics that included depictions of rape and “violent and demeaning treatment of women.”¹³⁴ The case has been cited numerous times for its clear holding that:

Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged¹³⁵

At issue was New Jersey's Rule of Evidence 404(b), which prohibits “evidence of other crimes, wrongs, or act” except in certain circumstances including to show “motive or intent.”¹³⁶ The trial court had ruled that the lyrics were admissible under Rule 404(b)(2) to demonstrate the defendant's motive and intent “because the rap lyrics addressed a street culture of violence and retribution that fit with the State's view of defendant's role in the attempted murder.”¹³⁷

In evaluating this application of Rule 404(b), the court applied a four-part test specific to New Jersey designed “to avoid the over-use of extrinsic evidence of other crimes or wrongs.”¹³⁸ The test

¹²⁹ For a more detailed discussion of the training materials, see Dennis, *supra* note 128. See also Kubrin & Nielson, *supra* note 4.

¹³⁰ *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

¹³¹ See, e.g., Brief of Amicus Curiae American Civil Liberties Union of New Jersey In Support Of Defendant-Respondent, *State v. Skinner*, 95 A.3d 236 (N.J. 2014) (No. A-57/58-12 (071764)).

¹³² See Nielson & Kubrin, *supra* note 17.

¹³³ See *id.*

¹³⁴ *Id.* at 504.

¹³⁵ *Skinner*, 95 A.3d at 238–39.

¹³⁶ N.J.R.E. § 404(b).

¹³⁷ *Skinner*, 95 A.3d at 238.

¹³⁸ *Id.* at 247.

includes the following elements. First, “the evidence of the other crime must be admissible as relevant to a material issue [that is genuinely disputed].”¹³⁹ Second, it must be “similar in kind and reasonably close in time to the offense charged.”¹⁴⁰ Third, “the evidence of the other crime must be clear and convincing.”¹⁴¹ Fourth, “[t]he probative value of the evidence must not be outweighed by its apparent prejudice.”¹⁴² Applying these factors, the court rejected the use of rap evidence below, finding that there was but a tenuous connection between the lyrics and the charged offense.¹⁴³ The court emphasized the requirement for a “strong connection to the attempted murder offense with which defendant was charged.”¹⁴⁴ Without such a connection, the court found an overwhelming risk of undue prejudice “without much, if any, probative value.”¹⁴⁵

The court also admonished the prosecution not to make statements that “employ language designed to stoke a jury’s fear for the future of its community or make an inflammatory argument akin to a ‘call to arms.’”¹⁴⁶ At trial, the prosecutor had talked about a “subculture of violence” related to snitching and likened testimony favorable to Skinner to “a call for anarchy.”¹⁴⁷

Several courts have examined *Skinner*’s “strong nexus” test, and many more have cited the case. The Court of Appeals of Washington applied *Skinner* to hold that the admission of rap lyrics violated Washington’s Evidence Rule 403, and suggesting that the trial court should have “engaged in a weighing process similar to the one outlined in *Skinner*.”¹⁴⁸

The Maryland Supreme Court, formerly known as the Maryland Court of Appeal, purported to adopt the test but ignored New Jersey’s four-part “other crimes or wrongs” analysis, interpreted the rap lyrics in question very broadly, virtually ignored the question of character or propensity evidence, and heavily discounted the danger of undue prejudice.¹⁴⁹ Justice Shirley M. Watts, in dissent, pointed out that the lyrics actually

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 252.

¹⁴⁴ *Id.* at 253.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 254.

¹⁴⁷ *Id.* at 242.

¹⁴⁸ *Matter of Quintero*, 541 P.3d 1007, 1034 (Wash. Ct. App. 2024).

¹⁴⁹ *Montague v. State*, 243 A.3d 546, 563–70 (Md. Ct. App. 2020).

did not bear a close nexus to the facts of the case and warned that the court had departed from other courts in creating an overly permissive rule.¹⁵⁰ The *Montague* ruling has been sharply criticized; prominent music industry attorney Dina LaPolt called it “blatantly racist.”¹⁵¹

In California, the Court of Appeal flatly refused to adopt the *Skinner* test.¹⁵² The prosecution in that case had sought to use a rap video to show a shooting was gang-related and to demonstrate familiarity with “the gang’s culture of violence.”¹⁵³ Relying again on *Olguin* and *Zepeda*, the panel upheld the admission of rap lyrics with little analysis.¹⁵⁴

Skinner was decided at a moment when attention to the Rap on Trial issue appeared to be picking up. Its “strong nexus” test, combined with the factors for determining when to admit “other crimes or wrongs” evidence, bears some similarity to legislation that has been introduced in Congress and several states.¹⁵⁵ Importantly, the Court also recognized that rap is artistic expression, and it is wrong to treat rap lyrics literally:

The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song “I Shot the Sheriff,” actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story “The Tell-Tale Heart,” simply because of their respective artistic endeavors on those subjects. Defendant’s lyrics should receive no different treatment.¹⁵⁶

V. PROMINENT RAP PROSECUTIONS

The vast majority of Rap on Trial cases concern artists with only local notoriety or no following at all. Many concern handwritten writings that are poorly authenticated. Yet, over the decades, many prominent, commercially successful rappers have had their rap music used against them in criminal prosecutions. A brief, non-exhaustive examination of these notable examples will

¹⁵⁰ *Id.* at 570 (Watts, J., dissenting).

¹⁵¹ See Dina LaPolt, *Rap Lyrics Now Admissible as Court Evidence: A Dangerous Precedent* (Guest Column), VARIETY (Jan. 5, 2021, 9:30 AM), <https://variety.com/2021/music/opinion/rap-lyrics-admissible-evidence-dangerous-precedent-1234878315/> [<https://perma.cc/SR5V-KSUV>].

¹⁵² See *People v. Heartsman*, No. A135202, 2015 WL 2400735, at *6, *14 (Cal. Ct. App. May 20, 2015).

¹⁵³ *Id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *infra* Part VI.C.

¹⁵⁶ *State v. Skinner*, 95 A.3d 496, 522 (N.J. 2014).

shed light on the methods prosecutors use to make the content of rap songs or videos the focus of their cases, including in press releases or statements made to the news media. These prosecutions have raised awareness about the Rap on Trial practice—none more so than the ongoing trial of Jeffrey Williams, professionally known as “Young Thug.”¹⁵⁷ Of course, these prosecutions, and media coverage of them, have also served to send a message that successful rappers will be targeted and punished.¹⁵⁸

Mac Dre is an early example. The Vallejo, California, rapper, whose real name is Andre Hicks, released “Punk Police” in part because he felt that police were harassing him.¹⁵⁹ He was convicted in 1993 for conspiring to rob a bank and at trial, a recording was played of Hicks snapping his fingers to the rap lyrics “I’m going to get my gat (gun) and go pull a heist.”¹⁶⁰ Mac Dre and his friends and family felt strongly that the arrest and prosecution was in retaliation for “Punk Police.”¹⁶¹

Superstar rapper Snoop Dogg was tried in 1996 and acquitted in California for murder.¹⁶² At trial, Snoop’s lyric “Cause it’s 1-8-7 on a undercover cop” from the song “Deep Cover” was used, even though the song was written for the crime film *Deep Cover*, which featured an undercover policeman as a protagonist.¹⁶³

In 2001, New Orleans rapper and No Limit Records recording artist Mac Phipps was convicted of manslaughter after a shooting took place at a concert where he was scheduled to perform.¹⁶⁴ At trial, the prosecution spliced together two songs—one about “battle rapping” and another about his father, a military veteran—

¹⁵⁷ See discussion *infra* pp. 433–34.

¹⁵⁸ See Deena Zaru, *Judge Rules Rap Lyrics Can ‘Conditionally’ Be Used As Evidence in Young Thug Trial*, ABC NEWS (Nov. 9, 2023, 10:19 AM), <https://abcnews.go.com/US/judge-rules-rap-lyrics-conditionally-evidence-young-thug/story?id=104760646> [<https://perma.cc/LL3F-2Y2H>].

¹⁵⁹ Jessica Kariisa, *Did Mac Dre Really Go to Prison Because of His Lyrics?* KQED (June 29, 2023), <https://www.kqed.org/news/11954252/did-mac-dre-really-go-to-prison-because-of-his-lyrics> [<https://perma.cc/W6DA-EJ5H>].

¹⁶⁰ The Associated Press, *Sentencing Stalls Rapper’s Career*, Oakland Trib. (Jan. 12, 2023), available at <https://perma.cc/W5WM-RB6F>.

¹⁶¹ See Kariisa, *supra* note 159.

¹⁶² Kim Bellware, *California Makes It Harder to Use Lyrics as Evidence Against Rappers*, WASHINGTON POST (Oct. 2, 2022, 9:00 AM), <https://www.washingtonpost.com/life-style/2022/10/02/california-rap-lyrics-law/> [<https://perma.cc/ZP3S-38AB>].

¹⁶³ *Id.*

¹⁶⁴ See Ramon A. Vargas, *Former No Limit Rapper Mac Released From Prison, Back Home After Being Granted Parole: ‘Blessed,’* NOLA (Jun. 24, 2021), https://www.nola.com/news/courts/former-no-limit-rapper-mac-released-from-prison-back-home-after-being-granted-parole-blessed/article_612244fa-d43a-11eb-83d1-1fc4e097c3f4.html [<https://perma.cc/MDT3-NGU2>].

to paint Mac as a violent person.¹⁶⁵ The district attorney continued with the prosecution, and ultimately achieved a conviction, even after a man working security that night came forward and declared that he had shot the victim in self-defense. Mac was released from prison in 2021 after serving twenty years of a thirty-year sentence.¹⁶⁶

Project Pat, an affiliated member of the platinum-selling rap group Three 6 Mafia, was prosecuted in 2002 for being a felon in possession of a firearm.¹⁶⁷ At trial, the court took judicial notice of the term “gangsta rap” and, over defense counsel’s objections, asked potential jurors about “gangsta rap.”¹⁶⁸ During trial, the court allowed the prosecutor to question a witness about a range of rap recordings, repeatedly using the loaded term “gangsta rap.”¹⁶⁹ The court allowed this line of questioning on the grounds that it tended to show the defendant “like[d] guns.”¹⁷⁰ The Sixth Circuit upheld the conviction, over a meticulous dissent that was nearly twice as long as the majority opinion.¹⁷¹

In December 2014, Ackquille Pollard, better known as the rapper “Bobby Shmurda,” and fourteen others were arrested in New York on charges including conspiracy, reckless endangerment, and gun possession.¹⁷² Police allegedly found twenty-one guns and a small amount of crack cocaine during the arrest.¹⁷³ While the charges against Shmurda were not the gravest, the prosecutor described Shmurda as the “driving force behind the GS9 gang” and the “organizing figure within this

¹⁶⁵ Medhill Justice Project, *Years After Rapper Was Convicted for Killing, Questions Raised About His Case*, THE LENS (Dec. 23, 2014), <https://thelensnola.org/2014/12/23/years-after-rapper-was-convicted-for-killing-questions-raised-about-his-case/> [https://perma.cc/CL36-WC2K].

¹⁶⁶ Ramon Antonio Vargas, *Former No Limit Rapper Mac Released from Prison, Back Home After Being Granted Parole: 'Blessed'*, NOLA.COM (June 23, 2021), https://www.nola.com/news/courts/former-no-limit-rapper-mac-released-from-prison-back-home-after-being-granted-parole-blessed/article_612244fa-d43a-11eb-83d1-1fc4e097c3f4.html [https://perma.cc/MT7X-SQ8X]. The podcast *Louder Than A Riot* covers Mac Phipps’s story in detail. See *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].

¹⁶⁷ *United States v. Houston*, 205 F. Supp.2d 856, 859–60 (W.D. Tenn. 2002).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 864–66.

¹⁷⁰ *Id.* at 866.

¹⁷¹ *United States v. Houston*, 2004 WL 2030302, at *1 (6th Cir. Sept. 7, 2004).

¹⁷² Heran Mamo, *A Timeline of Bobby Shmurda’s Case*, BILLBOARD (Jan. 6, 2021), <https://www.billboard.com/music/rb-hip-hop/bobby-shmurda-case-timeline-9507234/> [https://perma.cc/SQ4P-LJ4K].

¹⁷³ *Id.*

conspiracy” during the arraignment.¹⁷⁴ Shmurda’s bail was set at \$2 million—about ten times what others have received for comparable charges.¹⁷⁵ James Essig, head of the Brooklyn South Violence Reduction Task Force that made the arrests, explained during a press conference that Shmurda’s songs and videos were “almost like a real-life document of what they were doing on the street.”¹⁷⁶ In September 2016, Shmurda accepted a plea deal agreeing to serve seven years in prison.¹⁷⁷

In a murder case against Los Angeles rapper Darrel Caldwell, known professionally as “Drakeo the Ruler,” prosecutors could not connect him directly to the crime.¹⁷⁸ Though Caldwell attended the party where the killing occurred, he had left before the incident.¹⁷⁹ Prosecutors attempted to build a case by portraying Caldwell’s rap group as a gang and using his lyrics to suggest his involvement.¹⁸⁰ A jury trial lasting twelve weeks resulted in an acquittal on most charges, including murder and attempted murder, but the jury hung on gang conspiracy charges.¹⁸¹ The prosecution then re-filed the gang charges.¹⁸² After over two and a half years behind bars, in November 2020, Caldwell was offered a plea deal the day after reformist George Gascón defeated Jackie Lacey for Los Angeles District Attorney.¹⁸³ He was released the same night.¹⁸⁴

In February 2019, Daniel Hernandez, known as the rapper “Tekashi 6ix9ine,” pleaded guilty to nine counts of racketeering,¹⁸⁵

¹⁷⁴ See Robert Kolker, *Hot Shmurda*, VULTURE (May 4, 2015), <https://www.vulture.com/2015/05/bobby-shmurda-court-case.html?> [<https://perma.cc/3PTP-H3ET>].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Mamo, *supra* note 172.

¹⁷⁸ See Kyle Eustice, *Drakeo the Ruler Finally Released from Prison Following ‘Sudden’ Plea Deal Offer*, HIPHOPDX (Nov. 4, 2020, 3:17 PM), <https://hiphopdx.com/news/id.58840/title.drakeo-the-ruler-finally-released-from-prison-following-sudden-plea-deal-offer> [<https://perma.cc/25QS-JBVW>]; see also Jeff Weiss, *Stabbing, Lies, and a Twisted Detective: Inside the Murder Trial of Drakeo the Ruler*, FADER (July 11, 2019), <https://www.thefader.com/2019/07/11/drakeo-the-ruler-murder-trial-los-angeles-report> [<https://perma.cc/VFB3-5844>].

¹⁷⁹ See Weiss, *supra* note 178.

¹⁸⁰ *Id.*

¹⁸¹ See Jeff Weiss, *The Ruler’s Back: Drakeo the Ruler Is Finally Free—and Ready to Talk*, THE RINGER (Nov. 13, 2020, 5:55 PM), <https://www.theringer.com/music/2020/11/13/21563566/drakeo-the-ruler-trial-release-prison-interview-we-know-the-truth> [<https://perma.cc/GV74-7ZQV>].

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Eric Levenson & Lauren del Valle, *Rapper Tekashi 6ix9ine Sentences to 2 Years in Prison for Racketeering After Flipping on Gang Associates*, CNN (Dec. 18, 2019, 3:37 PM), <https://www.cnn.com/2019/12/18/us/tekashi-6ix9ine-guilty-sentencing/index.html> [<https://perma.cc/EBM4-N236>].

firearms offenses, and drug trafficking, and agreed to testify and cooperate with prosecutors against alleged gang members.¹⁸⁶ Federal authorities built a case against the rapper in part by using lyrics from his songs as proof that he was a member of a gang and a criminal.¹⁸⁷ During the hearing, prosecutors played excerpts from Hernandez's "Kooda" and "Gummo" music videos, and jurors were given transcripts of Gummo's lyrics.¹⁸⁸

Kentrell Gauden, known as the rapper "NBA Youngboy," was charged with possession of a firearm after police pulled him over in March 2021 in Tarzana, California, and found a gun in his vehicle.¹⁸⁹ During his federal trial in Los Angeles, prosecutors sought to introduce lyrics from three Youngboy songs—"Lonely Child," "Life Support," and "Gunsmoke"—to help convict him.¹⁹⁰ Among other verses, prosecutors argued that the lyric "FN, Glock, MAC-10s" from "Gunsmoke" demonstrates the rapper's "familiarity and knowledge of FN," the manufacturer of the gun found in his car.¹⁹¹ The judge ruled to exclude the use of Youngboy's lyrics as evidence and he was acquitted of the felony gun-possession charge in July 2022.¹⁹²

Jamell Demons, known to rap fans as "YNW Melly," currently faces a double murder retrial in Fort Lauderdale, Florida.¹⁹³ He is accused of shooting to death two fellow rappers and childhood friends in October 2018 after a late-night recording session, in an alleged staged drive-by.¹⁹⁴ The first trial started in June 2023, but ended with a hung jury in July 2023.¹⁹⁵ Now, under a new

¹⁸⁶ See 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>].

¹⁸⁷ See Fox 5 NY Staff, *Citing Tekashi 6ix9ine, Lawmakers Seek Limits to Using Rap Lyrics as Criminal Evidence*, FOX 5 N.Y. (Nov. 20, 2021, 8:19 AM), <https://www.fox5ny.com/news/ny-rap-lyrics-criminal-evidence-bill> [<https://perma.cc/9LJM-AZEH>].

¹⁸⁸ Bekiempis, *supra* note 186.

¹⁸⁹ See Joe Coscarelli, *YoungBoy Never Broke Again Found Not Guilty in Federal Gun Case*, THE N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2022/07/15/arts/music/nba-youngboy-gun-charges-verdict.html> [<https://perma.cc/3BMU-397D>].

¹⁹⁰ *Id.*

¹⁹¹ Kristin Robinson, *Judge Says NBA Youngboy Lyrics Can't Be Used as Evidence as L.A. Gun Possession Trial Begins*, BILLBOARD (July 12, 2022), <https://www.billboard.com/pro/nba-youngboy-lyrics-firearm-possession-trial/> [<https://perma.cc/7EKV-6LYC>].

¹⁹² Coscarelli, *supra* note 189.

¹⁹³ See Edward Helmore, *Rapper YNW Melly's Lyrics Could Be Used Against Him in Double Murder Retrial*, THE GUARDIAN (Dec. 17, 2023, 4:42 PM), <https://www.theguardian.com/music/2023/dec/17/rapper-ynw-melly-lyrics-double-murder-retrial> [<https://perma.cc/7YPL-FWF2>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

prosecutor, the State of Florida seeks to admit a staggering fifty-five songs, four album covers and eighteen audio files into evidence, including Melly’s 2018 breakout hit, “Murder on My Mind”—even though the song was recorded at least two years before the crime took place.¹⁹⁶ Melly faces the death penalty if convicted.¹⁹⁷

The most sensational Rap on Trial prosecution in hip hop history is the trial of Jeffrey Williams, professionally known as “Young Thug.”¹⁹⁸ In 2022, Atlanta prosecutors filed an indictment using Georgia’s RICO Act. The indictment against Young Thug, labelmate Gunna (real name Sergio Kitchens), and twenty-five others included seventeen excerpts from their rap lyrics.¹⁹⁹ Notably, some lyrics cited were from songs recorded over seven years prior.²⁰⁰ Young Thug’s music, particularly his “Slime Season” mixtapes, is credited with popularizing terms like “slime” and “slatt” that are now commonplace in hip hop.²⁰¹ However, the indictment labelled these very terms as identifiers of a criminal gang, specifically Young Slime Life (“YSL”).

Before trial, the court held that the First Amendment did not provide free speech protections against the use of creative expression as evidence.²⁰² The prosecution immediately acted on that ruling, reading lyric after lyric to the jury—and making Young Thug’s music the focus of the case.²⁰³ As this Article was going to print, the trial was ongoing and expected to last several more months.²⁰⁴

This case represents a particularly aggressive example of the Rap on Trial tactic. It has also created an observable chilling effect: since the YSL indictment, rappers have begun including disclaimers on their recordings, explicitly noting that the recordings are fiction,

¹⁹⁶ *See id.*

¹⁹⁷ *Id.*

¹⁹⁸ *See* Jennifer Zhan, *Here Are the Rap Lyrics Being Used in the YSL Trial*, VULTURE (Nov. 27, 2023), <https://www.vulture.com/article/young-thug-lyrics-ysl-indictment.html> [<https://perma.cc/8WSC-3YSB>].

¹⁹⁹ *Id.*

²⁰⁰ *See* Jeff Weiss, *Why Young Thug Is the 21st Century’s Most Influential Rapper*, BBC (Oct. 21, 2019), <https://www.bbc.com/culture/article/20191021-why-young-thug-is-the-21st-century-s-most-influential-rapper> [<https://perma.cc/W979-JVBR>].

²⁰¹ *Id.*

²⁰² *See* Michael Saponara, *A Timeline of Young Thug’s YSL RICO Trial*, BILLBOARD (Apr. 8, 2024), <https://www.billboard.com/lists/young-thug-ysl-rico-trial-timeline/may-9-2022-young-thug-arrested-on-array-of-rico-charges/> [<https://perma.cc/G9MM-M5NK>].

²⁰³ *Id.*

²⁰⁴ *See id.*

and they know police are watching.²⁰⁵ The case has also sparked enormous media interest, outraged thousands of fans, and introduced the problems with Rap on Trial to millions who had not previously been aware of them. As I discuss below in Part VI.B., it also accelerated and intensified an activist movement against the use of rap evidence in criminal trials.

VI. SIGNS OF HOPE: ACTIVISM, LEGISLATION, AND PROMISING JUDICIAL DECISIONS

A. Recent Case Law: Signs of Progress?

Since we began drafting the Guide, well over 125 Rap on Trial opinions have been issued in California alone, the overwhelming majority of them permitting rap evidence. That is a dispiriting figure. But we also began to observe some encouraging signs in the case law.

In 2019, the California Court of Appeal decided *People v. Coneal*, another gang case involving rap evidence.²⁰⁶ In that case, the court sharply limited rap evidence on the basis of unfair prejudice and cumulativeness.²⁰⁷ The court the carefully analyzed *Olguin* and *Zepeda*,²⁰⁸ and determined that unlike in those cases, the gang evidence in *Coneal* was cumulative.²⁰⁹ It is one of the only California opinions to restrict rap evidence on the basis of cumulativeness.²¹⁰

Then, in 2021, the United States District Court for the Eastern District of Pennsylvania held that the First Amendment requires “a presumption that artistic expression is not a factual admission.”²¹¹ *Bey-Cousin v. Powell* was a Section 1983 action against police officers in which the plaintiff alleged that two officers had planted a gun on him, leading to arrest, conviction, and imprisonment on firearm possession charges.²¹² The officers

²⁰⁵ See 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/5PF2-ZSWM>]; see, e.g., Lil Durk, *Ahh Ha* (Sony Music 2022) (“Everything I’m saying . . . is all props . . . this shit is not real . . . in case the police is listening.”); see also Jack Lerner, *Opinion: It’s Scary to Use Art as Trial Evidence*, The Atlanta J.-Const. (Dec. 6, 2023), <https://www.ajc.com/opinion/opinion-its-scary-to-use-art-as-trial-evidence/FDOZZV2PMJEYNG7IUQVPIDHFAI/> [<https://perma.cc/5ZSD-25VD>].

²⁰⁶ *People v. Coneal*, 41 Cal. App. 5th 951, 964–65 (2019).

²⁰⁷ *Id.* at 664, 668.

²⁰⁸ See *id.* at 663–64 (first citing *People v. Olguin*, 37 Cal. Rptr. 2d 596 (1994); and then citing *People v. Zepeda*, 83 Cal. Rptr. 3d 793 (2008)).

²⁰⁹ *Id.*

²¹⁰ See LERNER & KUBRIN, *supra* note 24, at 76.

²¹¹ See *Bey-Cousin v. Powell*, 570 F. Supp. 2d 251, 255 (2021).

²¹² *Id.* at 254.

sought to admit rap lyrics the plaintiff had released while the prosecution was pending, including the songs “Busted by Da Fedz,” “Gun Talk,” and “Court Apparance” [sic]; the plaintiff moved to preclude that evidence.²¹³ The court granted the motion, and began its opinion as follows:

Vincent Van Gogh summarized an artist's inspiration: “You must start by experiencing what you want to express.” But while many artists base their art on experience, they also embellish, change, or distort their experience for purposes of their craft. The question before the Court is whether a party to a lawsuit can use an artist's expressions against him as evidence of the truth. And the Court's answer is, “Not always.” In a society that treasures First Amendment expression, courts should start with a presumption that art is art, not a statement of fact. To rebut that presumption, the party offering the evidence must demonstrate that the art is the artist's attempt to tell a factual story. The mere fact that an artistic expression resembles reality is not enough because holding otherwise would risk chilling the free expression that our society holds dear.²¹⁴

This is the only case we have found that establishes a presumption, based on the First Amendment, against the use of an artist's rap lyrics against them.²¹⁵

In 2024, the United States District Court for the Eastern District of New York issued a powerful, thorough opinion in *United States v. Jordan* in which it examined rap music as a genre. The court situated rap within the context of Black history, but also explained why rap has value and why it is important.²¹⁶ “[R]ap artists have played the part of storytellers,” the court observed, “providing a lens into their lives and those in their communities.”²¹⁷

In considering whether to admit rap lyrics, the court noted that it “must remain cognizant that ‘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.’”²¹⁸ Furthermore, “rap artists have become increasingly incentivized to create music about drugs and violence to gain commercial success, and will exaggerate or fabricate the contents of their music in pursuit of that success.”²¹⁹ This is a point rarely made in the courts. The court rejected the prosecution's motion to admit rap videos and

²¹³ *Id.*

²¹⁴ *Id.* at 253–54.

²¹⁵ LERNER & KUBRIN, *supra* note 24, at 90–95 (discussing First Amendment jurisprudence).

²¹⁶ *United States v. Jordan*, 2024 WL 343970, at *1 (E.D.N.Y. Jan. 30, 2024).

²¹⁷ *Id.* at *2.

²¹⁸ *Id.* at *6–*7 (quoting MICHAEL ERIC DYSON, *THAT'S THE JOINT!: THE HIPHOP STUDIES READER* xii (Forman & Neal eds., 2004))

²¹⁹ *Id.* at *7.

lyrics because the lyrics had no specific connection to the crime at hand, and were not materially different than many other songs. Finally, the court cautioned other courts against “overly permissive rules allowing the use of rap lyrics and videos against criminal defendants.”²²⁰

At trial, a jury convicted the defendants of murder, without the rap lyrics. This was only fitting, as the murder victim was legendary DJ Jam Master Jay.²²¹

One final example: in 2022, the Decriminalizing Creative Expression Act was passed in California, the nation’s first-ever law addressing the use of creative expression as evidence. Less than two months after the law went into effect, the California Court of Appeal held in *People v. Venable* that the new law is retroactive to all non-final cases, including cases on appeal.²²² More importantly, however, it recognized the high risk of racialized bias in rap lyrics, quoting from Assembly Floor testimony:

[R]ap lyrics and other creative expressions get used as racialized character evidence: details or personal traits prosecutors use in insidious ways playing up racial stereotypes to imply guilt. The resulting message is that the defendant is that type of Black (or Brown) person . . . There's always this bias that this young Black man, if they're rapping, they must only be saying what's autobiographical and true, because they can't possibly be creative.²²³

Courts often talk about the inflammatory nature of rap lyrics and assess the risk they create of unfair prejudice, but they almost never acknowledge the racialized nature of that prejudice. In California, they are now required to do so. *People v. Venable* is the first court ever to apply the new statute, and still one of the only courts ever to acknowledge that with respect to rap evidence, the risk of unfair prejudice arises out of, and is amplified by, racial bias.²²⁴ In that sense, it is a historic holding.

²²⁰ *Id.* at *13.

²²¹ See Press Release, U.S. Attorney’s Office, Eastern District of New York, Two Queens Men Convicted of Drug-Related Murder of Run-DMC D.J. Jason Mizell, Also Known as “Jam Master Jay” (Feb. 27, 2024), <https://www.justice.gov/usao-edny/pr/two-queens-men-convicted-drug-related-murder-run-dmc-dj-jason-mizell-also-known-jam> [<https://perma.cc/NE2E-7AB5>].

²²² *People v. Venable*, 88 Cal. App. 5th 445, 454–55 (2023).

²²³ *Id.* at 454–55 (quoting AB 2799, Assem. Floor Analysis at p. 3, (internal citations omitted)).

²²⁴ *People v. Bryant*, No. 05-152003-0, at 66 (Cal. Sup. Ct. Oct. 3, 2022).

B. A Growing Movement Against Rap on Trial

In 2007, Andrea Dennis published a comprehensive examination of the Rap on Trial tactic.²²⁵ “When courts permit the prosecutor to admit rap music lyrics as criminal evidence,” she wrote, “they allow the government to obtain a stranglehold on the case,” both by using the lyrics as evidence and by constructing a narrative framework for the case. Dennis’s comprehensive article was followed by more legal and empirical research, including a 2014 sociological analysis by Charis Kubrin and Erik Nielson that further placed the Rap on Trial tactic in historical context, showing that it “resides within a long tradition of antagonism between the legal establishment and hip-hop culture, one that can be traced back to hip-hop’s earliest roots.”²²⁶

Around that time, interest in this issue began to increase at a rapid pace. Since 2018, when Dr. Kubrin, my students, and I began work on the Guide, leading scholars Dennis and Nielson wrote a book,²²⁷ NPR produced a two-season podcast,²²⁸ two documentaries were created,²²⁹ and a substantial body of legal scholarship has been published.²³⁰

The YSL prosecution has generated national interest in the Rap on Trial issue, and fueled a movement in response. Music executive Kevin Liles, founder and CEO of the company that distributes Young Thug’s YSL label, created a Change Petition entitled “Art on Trial: Protect Black Art,” which has been signed by over 90,000 people.²³¹ “With increasing and troubling frequency,” Liles wrote, “prosecutors are attempting to use rap lyrics as confessions. This practice isn’t just a violation of First Amendment protections for speech and creative expression. It punishes already marginalized communities and silences their stories of family, struggle, survival, and triumph.”²³² The petition calls for legislation to restrict the use of creative expression court.

The music industry has also begun to advocate for change.²³³ On November 1, 2022, an open letter was published by over 100

²²⁵ Dennis, *supra* note 128.

²²⁶ Kubrin & Nielson, *supra* note 4.

²²⁷ NIELSON & DENNIS, *supra* note 25.

²²⁸ *Louder Than a Riot*, *supra* note 166.

²²⁹ RAP TRAP: HIP HOP ON TRIAL (ABC News Studios 2023); AS WE SPEAK: RAP MUSIC ON TRIAL (Paramount+ 2024).

²³⁰ See LERNER & KUBRIN, *supra* note 24, at 118–23.

²³¹ See Kevin Liles, *Art on Trial: Protect Black Art*, Change.org (June 8, 2022), <https://www.change.org/p/art-on-trial-protect-black-art> [<https://perma.cc/9SE3-Y8EH>].

²³² *Id.*

²³³ See *Art on Trial: Protect Black Art*, ART ON TRIAL: PROTECT BLACK ART, <https://www.protectblackart.co/> [<https://perma.cc/E72A-SB57>] (last visited Apr. 12, 2024).

artists, music industry figures, legal experts, and organizations such as the Black Music Action Coalition, the Recording Academy, BMG, Spotify, and even TikTok.²³⁴ Like Liles's petition, the letter decried the Rap on Trial tactic and called for legislative reform.²³⁵ "Rappers are storytellers," it argued, "creating entire worlds populated with complex characters who can play both hero and villain. But more than any other art form, rap lyrics are essentially being used as confessions in an attempt to criminalize Black creativity and artistry."²³⁶ Warner Music Group published the letter as full-page advertisements in both *The New York Times* and *The Atlanta Journal-Constitution*.²³⁷ The industry has continued to support legislative efforts to protect creative expression in court.²³⁸

In the United Kingdom, human rights groups have launched a similar initiative entitled "Art Not Evidence" in response to increasing attempts by Crown prosecutors to use of drill music in criminal proceedings.²³⁹ In support of this movement, Members of Parliament Kim Johnson and Nadia Whittome have announced plans to introduce legislation entitled the Criminal Evidence (Creative and Artistic Expression) Act.²⁴⁰

C. Legislative Action

In 2020, California passed the Racial Justice Act of 2020, which sought to eliminate racial bias in the justice system by providing procedural means by which to challenge convictions and sentences where racial bias or animus is present.²⁴¹ The legislature passed the Act in response to the 1986 Supreme Court

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Artists, Industry Leaders, Legal Experts Join Together to Protect Black Art*, WARNER MUSIC GRP. (Nov. 1, 2022), <https://www.wmg.com/news/artists-industry-leaders-legal-experts-join-together-to-protect-black-art> [<https://perma.cc/6BUJ-YLDK>].

²³⁸ *Id.*

²³⁹ See *Art Not Evidence*, ART NOT EVIDENCE, <https://artnotevidence.org/> [<https://perma.cc/3KDB-KBUC>] (last visited Apr. 17, 2024).

²⁴⁰ See Aneesa Ahmed, *It risks miscarriages of justice: MPs oppose rap lyrics being used as evidence in UK trials*, THE GUARDIAN (Nov. 22, 2023, 5:56 AM), <https://www.theguardian.com/music/2023/nov/22/mps-call-for-change-in-rap-lyrics-being-used-as-evidence-in-uk-trials-nadia-whittome-kim-johnson-shami-chakrabarti-annie-mac> [<https://perma.cc/9XHF-ZDBM>]; see also *Criminal Evidence (Creative and Artistic Expression) Bill*, ART NOT EVIDENCE, <https://drifttime.notion.site/Criminal-Evidence-Creative-and-Artistic-Expression-Bill-2554634113ef463bb8b42534d262b34d> [<https://perma.cc/G4MD-D836>] (last visited Apr. 17, 2024).

²⁴¹ California Racial Justice Act of 2020, Assemb. B. 2542 (Ca. 2020). See also California Racial Justice Act for All, Assemb. B. 256 (Ca. 2022) (amending the Racial Justice Act to make it retroactive, among other changes); *California Racial Justice Act for All Signed Into Law*, ASSEMBLYMEMBER ASH KALRA (Sept. 30, 2022), <https://a25.asmdc.org/press-releases/20220930-california-racial-justice-act-all-signed-law> [<https://perma.cc/2DGH-6VTB>].

decision *McCleskey v. Kemp*, which requires defendants to prove the existence of purposeful discrimination in order to prove a Constitutional violation.²⁴² An early application of the Racial Justice Act came in a rap evidence case when, in 2022, a trial court in Contra Costa County, California, vacated a conviction and sentence for murder and other crimes pursuant to the Act.²⁴³ In *People v. Bryant*, the court found that implicit racial bias played a role: “whether purposefully or not, the prosecution’s use of rap lyrics as evidence of [defendants’] commission of the charged offense and gang membership premised their convictions on racially discriminatory evidence.”²⁴⁴

While that case was pending, Governor Newsom signed the nation’s first legislation restricting the use of creative expression. The Decriminalizing Creative Expression Act, Assembly Bill 2799, added a new section to the Evidence Code addressing creative expression, defined 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.”²⁴⁵ The law passed unanimously in both chambers.²⁴⁶ The new Section 352.2 of the Evidence Code establishes a baseline presumption that the probative value of creative expression is minimal, unless one of three conditions is met: “the expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available.”²⁴⁷ The legislative findings to the Act make clear that it is meant to complement the Racial Justice Act. The findings mention key empirical studies (including those discussed above), requires that courts “consider . . . testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression,” as well as “[e]xperimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.”²⁴⁸ Finally, the new provision supplements the definition of “undue prejudice” in a critically

²⁴² *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²⁴³ *People v. Bryant*, No. 05-152003-0, at 66 (Cal. Sup. Ct. Oct. 3, 2022).

²⁴⁴ *Id.*

²⁴⁵ A.B. 2799, 2022 Leg., 2021-2022 Sess. (Cal. 2022); *see also* CAL. EVID. CODE § 352.2.

²⁴⁶ A.B. 2799, 2022 Leg., 2021-2022 Sess. (Cal. 2022).

²⁴⁷ *Id.* § 352.2(a)(1).

²⁴⁸ *Id.* § 352.2(b)(1).

important way. Now, whenever creative expression is at issue, the court *must* investigate “the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.”²⁴⁹

Thirty cases have been decided since AB 2799 went into effect; in each, the question of retroactivity is paramount because the trials took place before the Act was passed. That question is now before the California Supreme Court.²⁵⁰ *People v. Venable*, discussed above, held that AB 2799 is retroactive,²⁵¹ but it appears to be an outlier; most other Court of Appeal panels have held that the Act is not retroactive, and most have held that, in any event, the question of retroactivity is moot because any error in admitting rap evidence was harmless error.²⁵² In *People v. Ramos*, discussed above, the California Supreme Court ordered the panel “to vacate its decision and reconsider the cause” in light of the new law.²⁵³ One might consider this a signal to change course; instead, the panel quickly held that AB 2799 is not retroactive, and simply repeated verbatim its holding affirming the admission of rap evidence, including its broad language characterizing “street gang rap” as a “diary.”²⁵⁴

While there are signs that the judiciary is becoming more aware of the dangers inherent in using rap evidence, cases like *Ramos* show that many judges still do not appreciate the danger—or are digging in their heels. These cases make clear that legislators need to give courts more guidance, and place strict guardrails, on the use of rap evidence. And legislators are listening. Lawmakers from both parties, in several states—including Maryland,²⁵⁵ New York,²⁵⁶ Georgia,²⁵⁷ Missouri,²⁵⁸ and Illinois²⁵⁹—have introduced bills intended to curb the misuse of creative expression in court.

In Congress, Representatives Hank Johnson and Jamaal Bowman have introduced the Restoring Artistic Protection

²⁴⁹ *Id.* § 352.2(a)(2).

²⁵⁰ *People v. Venable*, 523 P.3d 871, 871 (2023) (granting defendant’s petition for review along with the related issues in *People v. Bankston* and *People v. Hin*).

²⁵¹ *Id.*

²⁵² *See, e.g.*, *People v. Sanchez*, No. H050599, 2024 WL 1007925 (Cal. Ct. App. Mar. 8, 2024); *People v. Olguin*, 31 Cal. App. 4th 1355, 1377 (1994); *see also* *People v. Frahs*, 9 Cal. 5th 618, 628-29 (2020).

²⁵³ *People v. Ramos*, 2022 WL 11615789, at *1 (Oct. 20, 2022).

²⁵⁴ *Id.* at *24.

²⁵⁵ H.B. 1429, 2023 Reg. Sess. (Md. 2023).

²⁵⁶ S.B. 1738, 2023 Leg. Sess. (N.Y. 2023).

²⁵⁷ H.B. 990, 2023 Gen. Assemb. (Ga. 2023).

²⁵⁸ H.B. 353, 102d Gen. Assemb., Reg. Sess. (Mo. 2023).

²⁵⁹ H.B. 3420, 103d Gen. Assemb. (Ill. 2023).

(“RAP”) Act.²⁶⁰ The RAP Act would create a new Federal Rule of Evidence 416 entitled “Limitation on admissibility of defendant’s creative or artistic expression.” Like AB 2799, the RAP Act sets forth several conditions, each of which must be met before evidence of a defendant’s creative expression can be admitted. The proponent must first prove by clear and convincing evidence that the defendant intended the expression to be literal.²⁶¹ The creative expression also must “refer to the specific facts of the crime alleged;” be “relevant to an issue of fact that is disputed;” and have “distinct probative value not provided by other admissible evidence.”²⁶² Also like AB 2799, the Act includes procedural protections: the court must conduct a hearing outside the jury, make its ruling and findings of fact on the record, and must limit the issue and deliver a limiting instruction to the jury if it does admit creative expression.²⁶³

VII. CONCLUSION

The Rap on Trial issue is at a critical moment. As this Article was going to press, the trial of Young Thug was ongoing, and expected to last for months more. That case represents an ambitious escalation of the use of rap evidence. Meanwhile, Rap on Trial decisions continue to issue almost weekly, and most courts *still* permit rap evidence to be admitted, or wave away serious problems as “harmless error.” And, as we show in the Guide, over thirty years’ worth of opinions are having a noticeable chilling effect.

Yet there are encouraging signs. More people than ever before are aware of, and outraged by, the use of rap lyrics in criminal proceedings. There is real momentum toward further legislative change, and courts are now more likely to see rap as an art form with its own unique conventions and history.

In California, the justice system is in flux; new laws on racial bias, gang enhancements, and rap evidence are being interpreted by the courts as matters of first impression. The California Supreme Court will soon decide whether AB 2799 is retroactive,²⁶⁴

²⁶⁰ Restoring Artistic Protection Act of 2023 (“RAP ACT”), H.R. 2592, 118th Cong. (2023).

²⁶¹ *Id.* at §2(a).

²⁶² *Id.* Unlike the RAP Act, which requires *each* of these condition to be met, AB 2799 allows the evidence if any *any* of the predicate conditions are met. CAL. EVID. CODE §352.2. AB 2799 also differs from the RAP Act in that it contains substantial legislative findings drawing a connection between rap evidence and racial bias, and explicitly requires judges to consider empirical research and genre evidence—as well as the risk of racial bias.

²⁶³ H.R. 2592, §2(a).

²⁶⁴ *People v. Venable*, 528 P.3d 871, 871 (2023).

and eventually it will interpret the new Section 352.2. When it does, it should declare *Olguin* and *Zepeda* invalid in light of the STEP Forward Act, and reaffirm what the legislature has plainly instructed: when rap evidence is introduced, courts must consider the risk of explicit and implicit racial bias, and must do so with the Racial Justice Act in mind.

The California Supreme Court, and other courts across the land, should follow the lead of recent decisions like *Bey-Cousin v. Powell*, *United States v. Jordan*, and *People v. Venable* and recognize the free speech principles at stake, as well as the historical context, social milieu, and artistic contributions of rap music. They should instruct courts not to commingle gang and rap evidence except in truly extraordinary circumstances. They should sharply restrict the use of the harmless error doctrine in rap cases. And all courts must recognize that rap evidence is a key entry point for racial bias in America's justice system.

It's safe to assume that prosecutors will continue trying to use rap evidence for the foreseeable future—and, unfortunately, many courts will support these efforts. We can expect some courts to downplay the artistic value of rap and the risk of unfair prejudice, ignore context, and turn a blind eye to the racial bias inherent in the Rap on Trial tactic. It will ultimately be up to policymakers, and the citizens who elect them, to prevent this. Legislators must continue to work on new laws that provide guidance and guardrails against this abusive practice. They must also remain vigilant. Some courts will misinterpret, minimize, or simply ignore rules that restrict their ability to admit rap evidence. Legislators must be prepared for that to happen and be ready to go back to the legislative chamber to refine and strengthen the law. And citizens must be engaged—talking with legislators, county officials, and even their local district attorney, and advocating for change in other ways.

The history of Rap on Trial contains many important lessons. It exposes the racism and unfairness that still plagues the American criminal justice system. It demonstrates the enduring importance of rap music in American culture. And, it teaches us that through organizing, legal advocacy, research, legislative action, and education, we can make progress toward a more just legal system. The next chapter in this story is still being written, but it is sure to reflect that change is afoot.

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