Your Inside Track Newsletter

Description

Can Your Lyrics Send You to Jail?

The tension between free speech and criminal prosecution.

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“Sticks and stones can break your bones, but words can never hurt you,” or so the old maxim goes. Yet, in recent years, rap artists have found that their words can hurt them; indeed, rap lyrics help speed their artist’s way to criminal conviction and jail time. A growing national dialogue developed concerning this issue, on both state and federal levels, posing difficult questions about whether rap lyrics, and creative expression generally, should be used against a criminal defendant in order to prove the commission of a crime.

Analysis of the issue requires a balancing of free speech and criminal justice interests. Classic First Amendment jurisprudence struggles with the speech/conduct dichotomy, because no bright line exists between protecting only words versus words combined with conduct. For example, in *Texas v. Johnson* , the Supreme Court held flag-burning as political protest is protected,[i] but, in *United States v. O’Brien* , the Court held burning a draft card was not.[ii] In *Brandenburg v. Ohio*, the Supreme Court established that speech advocating illegal conduct is protected under the First Amendment unless the speech is likely to incite “imminent lawless action.”[iii]

At one time, the Supreme Court took the view that libel was not protected by the First Amendment at all. As stated by Justice Murphy in *Chaplinsky v. New Hampshire*, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.’”[iv]

Recent First Amendment jurisprudence limits civil exposure to defamation suits. Notably, in *New York Times v. Sullivan*, and cases to follow,[v] the court set a standard of “actual malice” by the defendant when the plaintiff is a public figure.[vi] *Gertz v. Robert Welch, Inc.* extended this reasoning to non-

public figures, requiring a showing of at least negligence by the defendant.[vii] In these and other cases, courts attempted to strike a balance between the interests of free speech and redress of social or personal harms.[viii]

Persecution of Artists for Political Beliefs

The same First Amendment conflict played out in the field of artistic expression. The McCarthy Era investigations into supposed Communist sympathizers in the film industry represent a notorious example of prosecuting and ostracizing artists for their political beliefs. The now-infamous House Unamerican Activities Committee, or HUAC, subpoenaed film industry directors, producers and screenwriters to testify as to their political beliefs and to name others who might be Communist sympathizers.[ix] Some complied with the Committee's summons, but many refused to testify, citing the Constitutional privilege against self-incrimination.[x] Congress cited many of those who refused to cooperate for contempt and even criminally prosecuted some.[xi] Uncooperative witnesses were placed on a film industry blacklist and effectively prevented from working in motion pictures and television. A few, like screenwriter Dalton Trumbo, continued to work furtively under pseudonyms. This led to the absurdity of no one accepting an Oscar for the 1956 drama *The Brave One*, which Trumbo had secretly written under the invented name "Robert Rich."[xii]

HUAC's inquisition extended beyond the film industry to music. For example, when the Committee summoned musician Pete Seeger, the iconic folk singer, songwriter and political activist in 1955, he refused to testify on what amounted to First Amendment grounds. "I am not going to answer any questions as to my association, my philosophical or religious beliefs or my political beliefs, or how I voted in any election, or any of these private affairs. I think these are very improper questions for any American to be asked, especially under such compulsion as this," Seeger told the Committee.[xiii] Seeger's invocation of free speech did not shield him from prosecution. He was indicted for contempt of Congress and convicted in a jury trial in 1961. Seeger was sentenced to ten one-year terms in jail (to be served simultaneously), but in May 1962 an appeals court overturned his conviction on the technical basis that the indictment lacked the specificity required by the Sixth Amendment.[xiv] Because the court found the indictment flawed, it did not rule on Seeger's Fifth and First Amendment arguments.[xv]

The Use of Rap Lyrics Against Criminal Defendants

Thus, the current persecution of artists for their beliefs, and by extension the suppression of their creative works which may reflect their beliefs, both have precedents in US history. However, a new variation on this problematic issue recently arose: prosecutors' efforts to use creative expression itself as probative of guilt when an accused artist stands charged of a crime.

A recent Wisconsin case squarely addressed the issue of whether lyrics written by a rap artist can be admitted to prove guilt in a criminal trial. In the case against 17-year-old Tommy Canady for the murder of Semar McClain, age 19, no witness or evidence actually placed Canady at the crime scene. Yet, along with evidence that the two were seen arguing before McClain's death, and that Canady possessed weapons similar to the ones the prosecution claimed were used to murder McClain, the judge allowed prosecutors to play to the jury excerpts from Canady's rap song "I'm Out There," with lyrics arguably depicting a murder similar to the one at trial. The lead investigator on the case testified

that he understood the words of the song were:

Catch [Semar] slipping, walking through the alley. Something similar to, n*gga tried to run, tried to run like an athlete, but bullets, when bullets were on track meets, bullet hit a n*gga's head, watch him fall to his toes, n*gga think he's the shit, now he's getting exposed. [xvi]

The jury asked to hear the song twice, suggesting the song's lyrics influenced the jury's decision to convict. The court sentenced Canady to a minimum of 50 years in prison.[xvii]

On appeal, in an unpublished *per curiam* decision from October 2022, the Wisconsin Supreme Court affirmed the conviction with this holding: "Canady argues the court erred by admitting the written rap lyrics into evidence. . . . We reject his arguments and affirm."[xviii] The court reasoned:

Certain aspects of the written rap lyrics can be reasonably interpreted as a reference to McClain's shooting, including specific references to the location, date, and manner of the homicide. Interpreted in such a fashion, the lyrics make it more probable that Canady was the shooter. The trial court did not erroneously exercise its discretion when it concluded the lyrics were relevant evidence.[xix]

In response to the argument that the lyrics unduly prejudiced the jury, the court found no abuse of discretion:

[T]he trial court could reasonably conclude certain lyrics were specific factual references to McClain's murder. Having made that finding, it was within the court's province to conclude that the jury should be tasked with considering the context of the lyrics and decid[e] whether to draw the inference that Canady was involved in the homicide. . . .[xx] [T]he court concluded the lyrics were not *unfairly* prejudicial, and they did not rise to the level of impermissible character evidence. Our review of the record confirms the court's decision was one that a reasonable judge could reach by consideration of the relevant law and facts and by a process of logical reasoning.[xxi]

The outcome in *Canady* caused disquiet, with op-eds scrutinizing the case even before the appellate decision. For example, columnist Jaeah Lee wrote in *The New York Times*, "[r]ap songs are sometimes used to argue that defendants are guilty even when there's little other evidence linking them to the crime. What these cases reveal is a serious if lesser-known problem in the courts: how the rules of evidence contribute to racial disparities in the criminal justice system."[xxii] Ms. Lee concludes, "The use of rap lyrics in Mr. Canady's case was an example of what legal scholars sometimes call racialized character evidence: details or personal traits prosecutors can use in an insidious way, playing up racial stereotypes to imply guilt. The resulting message, as a Boston University law professor, Jasmine Gonzales Rose, told me, is that the defendant is 'that type of Black person.'"[xxiii] According to Lee, reliance on lyrics to support criminal prosecutions is largely in cases involving rap artists.[xxiv] Would

there be more reluctance to use lyrics to convict a country western or a political activist songwriter?

Canady's case is not alone. High profile rap artists have faced indictments based in part on the very words they use in their songs. Examples include rappers Young Thug and Gunna, whose criminal indictments quoted heavily from their lyrics.[xxv] Prosecutors use rap lyrics against both less-established rappers and high-profile artists, such as the late Drakeo the Ruler and Bobby Shmurda.[xxvi] The outcome on appeal in Canady's case is not an outlier, either. As reported in a recent *Billboard* article, "[i]n late 2020, the Maryland Supreme Court upheld a conviction secured using rap lyrics. And over just the last six months, upper courts in both Connecticut and Tennessee have both issued new rulings doing the same. They joined scores of other states that have said rap lyrics are generally fair game despite the risk of jury bias."[xxvii]

Some commentators forcefully assert that the use of rap lyrics in criminal trials represents racial bias on the part of the prosecutors. Attorney Desiree Talley is among the most vocal opponents of the use of rap or hip-hop lyrics against criminal defendants. In an interview with this author published in the music industry newsletter *Your Inside Track*, Ms. Talley contends "it's uniquely a rap thing, rap lyrics, and hip-hop are being criminalized,"[xxviii] and argues further "if we're going to criminalize hip hop artists and rap lyrics we need to criminalize everything [depicting violence] which again impacts our laws and freedom of speech and creative expression."[xxix]

The use of Canady's rap lyrics in the circumstances of his case are concerning, but at the same time it must be conceded that, in other cases, lyrics may be probative of a crime and not unduly prejudicial. As a case in point, in July 2022 Los Angeles rapper Nuke Bizzle pleaded guilty to unemployment insurance fraud.[xxx] In a YouTube music video entitled "EDD," a reference to the California Employment Development Department, Bizzle rapped about doing "my swagger for EDD" and held up a stack of envelopes, intoning he is getting rich by "go[ing] to the bank with a stack of these.[xxxi]" Rather uselessly, the video contained this disclaimer: "[t]his video was created with props and was made for entertainment purposes."[xxxii]

Prosecutors charged Bizzle, whose real name is Fontrell Antonio Baines, with stealing more than $1.2 million in Pandemic Unemployment Assistance. He pleaded guilty to one count of mail fraud and one count of unlawful possession of a firearm and ammunition by a convicted felon.[xxxiii] With Bizzle's lyrics so closely related to the specific crimes for which he was charged, their introduction at trial—had he not pleaded guilty—would have been less problematic than the introduction of Canady's more generalized references to a street murder.

Legislators have noticed the issues that these and like cases pose. On both the state and federal level, lawmakers proposed legislation to adjust the rules of evidence to create a balancing test weighing free speech concerns, prejudice and probative value. 2022 saw three such legislative efforts. California passed, and its governor signed, Assembly Bill 2799, which became law on September 30, 2022.[xxxiv] It keeps artistic content out of court unless the introducing party can show a nexus between the content and the crime in question. Efforts at passing a similar bill in New York failed, where Assembly Bill A8681 passed the state Senate but failed to pass in its Assembly before the legislature recessed.[xxxv] On the Federal level, Representatives Hank Johnson of Georgia and Jamaal Bowman of New York introduced a bill in July 2022 titled Restoring Artistic Protection Act of 2022, or RAP. Congressmember Bowman stated, "Our judicial system disparately criminalizes Black and brown lives, including Black and brown creativity . . . We cannot imprison our talented artists for expressing their

experiences nor will we let their creativity be suppressed."[xxxvi]That bill remains in committee.[xxxvii]

The California Statute

As the first successful legislative effort at setting the necessary standards before artistic expression can be used against a party, California's law warrants close attention. Indeed, the bills introduced in New York and Congress closely resemble California's law, which may become a template for other jurisdictions as well.

California Assembly Bill 2799 begins with a declaration of findings by the Legislature: "Existing precedent allows artists' creative expression to be admitted as evidence in criminal proceedings without a sufficiently robust inquiry into whether such evidence introduces bias or prejudice into the proceedings. In particular, a substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence."[xxxviii] The Bill cites published studies to support this finding.[xxxix] The bill goes on to declare:

It is the intent of this Legislature to provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence, and to recognize that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.[xl]

Notably, although the impetus for this legislation is the Legislature's concern about "unfair prejudice when rap lyrics are introduced into evidence" and the injection of racial bias in prosecutions, the law does not limit its application to lyrics alone, much less rap lyrics. Rather, the statute covers any creative expression, which is broadly 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." For example, it would seem filmmakers or novelists prone to depicting violence, should they be charged with murder or mayhem, may therefore also take advantage of the statute's limitation on admissibility. The statute might also avail novelists, such as Delia Owens, who was recently called in for questioning in connection with a mid-1990s murder in Zambia based on the similarities between that crime and events depicted in her best-selling novel *Where the Crawdads Sing*. [xli]

Another notable feature of the California statute is that it does not by its terms limit its applicability solely to prosecutors. The opening sentence of the bill states, "[i]n any criminal proceeding where *a party* seeks to admit as evidence a form of creative expression . . . " [Italics Added]. While less likely, it is possible that a criminal defendants might want to admit their lyrics as exculpatory evidence—for example, to show they deplore violence, or to show that any crimes depicted in their lyrics are vastly different factually than the crime for which they're being prosecuted. The legislature's deliberate choice of the word "party," rather than "prosecution," indicates an intent to subject both sides in a criminal

case to the strictures of the statute.

AB 2799 is enacted against the backdrop of California's evidentiary rule, set forth in Evidence Code 352, generally prohibiting introduction of evidence, even though relevant, if the prejudicial impact of the evidence outweighs its probative value.[xlii] The new statute also calls into play Evidence Code 1101, which prohibits, with certain exceptions, introduction of evidence of a person's character or a trait of character to show he or she acted as accused.[xliii] The principal exceptions allowed are evidence offered in criminal actions "in the form of an opinion or evidence of his reputation"[xliv] to prove action in conformity with a trait of character, subject to certain limitations.[xlv]

California's new law adjusts the calculus the court must undertake in its Section 352 analysis. AB 2799 requires "while balancing the probative value of that evidence against the substantial danger of undue prejudice . . . , [the court] shall consider, in addition to the factors listed in Section 352, . . ." the following two factors:

(1) [that] the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that 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; and (2) [that] undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of Section 1101, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

The directive to the court is therefore that probative value as literal truth is minimal unless the specified conditions are present. Those are whether the "expression is created near in time to the charged crime," "bears a sufficient level of similarity to charged crime," or "includes factual detail not otherwise publicly available." Textualists will note that these criteria are stated in the alternative, separated by comas and the disjunctive, "or." Does this mean that it is enough if any one of the three criteria is present to satisfy the first factor? Or did the Legislature intend that all three criteria must be present to permit admission of the evidence? Vigorous advocacy on both sides of this issues may be expected, with an eventual resolution either in the courts or by an amendment to the law. This may be a case in which the intent of the legislature is not precisely as expressed in the statute, and counsel and courts will have to grapple with a dichotomy between legislative intent and the text of the law.

As to the second factor, the court must accept that undue prejudice includes "the possibility that the trier of fact will . . . treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings." The statute falls short of an unconditional demand that such evidence be excluded, instead, it requires that the court conduct a hearing on the "question of the admissibility of a form of creative expression . . . *in limine* . . . outside the presence and hearing of the jury, pursuant to Section 402."[xlvi]

The statute gives the trial court direction as to the types of evidence it may consider in conducting its AB2799 analysis:

(b) If proffered and relevant to the issues in the case, the court shall consider the following as well as any additional relevant evidence offered by either party: (1) Credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression. (2) Experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings. (3) Evidence to rebut such research or testimony.

Taking all these requirements together, it must be asked, when, if ever, will the prosecution be able to offer creative expression evidence in a criminal case? Do these requirements, in the aggregate, amount to a *de facto* suppression of such evidence for all practical purposes? If so, First Amendment advocates will be vindicated, but prosecutors will protest the exclusion of what they consider otherwise relevant and admissible evidence. The application of AB2799 in the courts will, in time, give us a better understanding of the real-life consequences of these new evidentiary rules. From the perspective of this author, with four decades of trial experience, trial courts find it difficult to admit evidence of any creative expression except in the most compelling circumstances.

On the appellate level, what standard of review will apply? Evidence Code section 352 provides that the court's decision on admissibility is "in its discretion," which would imply an "abuse of discretion" standard for appellate review—a standard seldom met by appellants.[xlvii] Can it be argued that, in view of the compelling interests articulated by the legislature, a higher standard of review should apply, for example, a *de novo* consideration of the trial court's decision on admissibility?[xlviii] Here again, time will tell as the courts of appeal are called upon to reverse convictions based in part on creative expression evidence. In the event of a conviction following admission of this evidence, will an appellate court be able to affirm on the basis of "harmless error" in the face of this strong legislative policy? Again, only time and experience will elucidate the real world impact of this new legislation.

The Proposed New York Statute

New York's failed Assembly Bill 8681 resembles, but also departs from, the California law. The New York Statute would have created a presumption of inadmissibility for creative expression evidence and require the party offering it to overcome that presumption. Under the California statute such evidence is admissible only if the court makes certain findings; under proposed New York legislation, the evidence is presumed inadmissible, and it falls upon the party offering it to prove it meets the criteria for admission. As stated in the New York bill:

(1) Evidence of a defendant's creative or artistic expression, whether original or derivative, may not be received into evidence against such defendant in a criminal proceeding unless such evidence is determined by the court to be relevant and admissible, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require . . .

The bill would have required the proffering party must "affirmatively prove" by "clear and convincing" evidence the following four factors: (a) literal, rather than figurative or fictional, meaning and, where the work is derivative, that the defendant intended to adopt the literal meaning of the work as the defendant's own thought or statement; (b) a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged; (c) relevance to an issue of fact that is disputed; and (d) distinct probative value not provided by other admissible evidence.

As drafted, this bill clearly requires the court to find in favor of the proffering party on all four criteria, a significant hurdle for any prosecutor. To make it even more difficult, the bill would have set the evidentiary standard at clear and convincing, a standard higher than California's preponderance of the evidence, but short of beyond a reasonable doubt. The California statute is silent on burden of proof, which would imply the default preponderance standard would govern. Like the California statute, this bill would have extended to all forms of creative expression, not lyrics alone.[xlix] Unlike the California statute, Assembly Bill 8681 would have restricted only evidence offered against a criminal defendant. The more aggressive pro-defendant aspects of the New York bill may have contributed to its stalling in the legislature.

The Proposed Federal Legislation

The proposed Federal legislation, H. R. 8531, would resemble the New York bill in creating a presumption against admissibility: "[e]xcept as provided in subsection (b), evidence of a defendant's creative or artistic expression, whether original or derivative, is not admissible against such defendant in a criminal case."[l] The exceptions mirror the criteria referenced in the New York bill: the Government must prove by clear and convincing evidence in a hearing outside the presence of the jury the following:

(1)(A) if the expression is original, that defendant intended a literal meaning, rather than figurative or fictional meaning; or (B) if the expression is derivative, that the defendant intended to adopt the literal meaning of the expression as the defendant's own thought or statement; (2) that the creative expression refers to the specific facts of the crime alleged; (3) that the expression is relevant to an issue of fact that is disputed; and (4) that the expression has distinct probative value not provided by other admissible evidence.[li]

Following both the California statute and the New York bill, the proposed Federal law would require a hearing outside the presence of the jury, and, like the New York bill, require redaction of an evidence presented "to limit the evidence presented to the jury to that which is specifically excepted . . . ."[lii] Currently, the proposed Federal statute has not come to a vote in the House. Given the current Republican majority in the House, prospects for passage must be evaluated as "dim."

The policy issues underlying these legislative efforts challenge some of our most deeply cherished rights of due process and fairness in criminal proceedings. Public interest in the apprehension of criminals argues for receipt of evidence relevant to the commission of the alleged crime, but the

interests of free speech argue against using creative expression against an accused. Due process at trial argues for limitation of evidence against the defendant to facts pertaining to the *res gestae* of the offense, and not, except in limited circumstances, to speech or conduct extraneous to it, whereas fact finders may be convinced by conduct or statements unrelated to the offense charged. As stated to me by the late Justice Otto Kaus, "Evidence is a set of rules designed to keep from jurors the sort of things people like to know in making up their minds."

These are issues that will be confronted not only by the United States but also in jurisdictions whose traditions and policies seek to avoid unduly prejudicial evidence contaminating criminal trials. For example, in Canada, the Ontario Supreme Court adopted the rule that rap lyric evidence is admissible where relevant, material and not excluded by a specific rule of evidence.[liii] This decision generated scholarly criticism contending that the ruling "jeopardizes trial fairness by allowing the Crown to adduce highly prejudicial rap lyric evidence at trial'"[liv]

Conclusion

Criminal defense lawyers often tell their clients, "You can't talk your way out of jail, but you can talk your way into jail." Today, this maxim might be updated to caution "you can sing (or rap) your way into, but not out of, jail." Whether by legislative action, or courts reinterpreting existing evidentiary rules, a welcome move is underway to prevent lyrics from sending artists to prison. The new legislation in California, and proposed reforms in New York and on the Federal level, seek to accommodate the very real risks of chilling artistic expression and contaminating jury deliberations with racial bias. Thoughtful reform is called for, and at the risk of a bad pun, it might be said that current rules of evidence can result in some artists suffering a "bad rap."

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[i] *Texas v. Johnson*, 491 U.S. 397 (1989).

[ii] *United States v. O'Brien*, 391 U.S. 367 (1968).

[iii] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[iv] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

[v] David L. Hudson Jr., *Libel and Slander,* First Amend. Encyclopedia (May 14, 2020), https://mtsu.edu/first-amendment/article/997/libel-and-slander; Gabe Teninbaum & David L. Hudson Jr., *Art Censorship,* First Amend. Encyclopedia (Sept. 2017), https://mtsu.edu/first-amendment/article/978/art-censorship.

[vi] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[vii] *Gertz v. Welch*,418 U.S. 323 (1974).

[viii] Katrina Hoch, *Expressive Conduct*, First Amend. Encyc. (2009), https://www.mtsu.edu/first-amendment/article/952/expressive-conduct.

[ix] Jennifer Latson, *Walt Disney, Ronald Reagan and the Fear of Hollywood Communism*, TIME (Oct. 20, 2014), https://time.com/3513597/huac-hollywood-hearings/.

[x] *Id.*

[xi] *Id.*

[xii] Simon Brew, *Dalton Trumbo: The Oscar Winner Who Couldn't Get His Award,* Den of Geek (June 22, 2016), https://www.denofgeek.com/movies/dalton-trumbo-the-oscar-winner-who-couldnt-get-his-award/.

[xiii] Evan McMurry, *The Amazing Transcript of Pete Seeger Testifying at the House Un-American Activities Committee*, WBAI (Jan. 28, 2014), https://www.wbai.org/articles.php?article=1711.

[xiv] *United States v. Seeger*, 303 F.2d 478 (2d Cir. 1962) ("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." (citing U.S. Const. amend. VI) The appellate ruling reversing Seeger's conviction is on very technical grounds, and one may speculate that the court was stretching to find a way to undue HUAC overreach.).

[xv] *Id*.

[xvi] Alyssa Mauk, *Racine Man's Appeal Argues Rap Lyrics Shouldn't Have Convicted Him of Murder*, Racine J. Times (Nov. 22, 2019), https://madison.com/news/local/crime-and-courts/racine-mans-appeal-argues-rap-lyrics-shouldnt-have-convicted-him-of-murder.html. (The defense disputed whether the word was "Selmar" or "mawg" slang for "an opposition to us, like somebody from the other side.").

[xvii] *Id*. at 3.

[xviii] *Id*. at 1.

[xix] *Id*. at 9.

[xx] *Id*. at 10.

[xxi] *Id*. at 11-12.

[xxii] Jaeah Lee, *This Rap Song Helped Sentence a 17-Year-Old to Prison for Life,* N.Y. Times (Mar. 30, 2022), https://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html.

[xxiii] *Id.*

[xxiv] *Id.*

[xxv] Bill Donahue, *Rap on Capitol Hill: Proposed Federal Law Would Ban Lyrics From Criminal Cases,* Billboard (July 27, 2022), https://www.billboard.com/pro/rap-lyrics-banned-criminal-trial-congress-bill/?curator=MediaREDEF.

[xxvi] *Id.*

[xxvii] *Id.*

[xxviii] Don Franzen & Judith Finell, *An Interview with Desiree Talley*, Your Inside Track https://yourinsidetrack.net/your-inside-track-newsletter/.

[xxix] *Id.*

[xxx] Richard Winton, *L.A. Rapper Who Sang About Scamming COVID Jobless Benefits to Plead Guilty* , L.A. Times (July 6, 2022, 1:22 P.M.), https://www.latimes.com/california/story/2022-07-06/rapper-accused-of-fraud-agrees-to-plead-guilty-but-will-nuke-bizzles-career-fizzle.

[xxxi] *Id.*

[xxxii] *Id.*

[xxxiii] *Id.*

[xxxiv] Cal. Assemb. B. 2799, Reg. Sess. (Cal. 2022) (enacted); Cal. Evid. Code § 352.2 (Deering 2022).

[xxxv] N.Y. Assemb. B. 8681, (NY 2022), N.Y. Penal Law § 60.77 (2022).

[xxxvi] Donahue, *supra*.

[xxxvii] Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

[xxxviii] Cal. Assemb. B. 2799, Reg. Sess. (Cal. 2022) (enacted); Cal. Evid. Code § 352.2 (Deering 2022).

[xxxix] *See* Stuart P. Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. Applied Soc. Psych. 795-805 (1999); Carrie B. Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics*., 29 J. Applied Soc. Psych. 705–721 (1999); Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. Experimental Criminology 507-528 (2018).

[xl] Cal. Assemb. B. 2799, *supra* note xxxiv; Cal. Evid. Code § 352.2 (Deering 2022).

[xli] *See* Johnny Oleksinski, *'Where the Crawdads Sing' Author Wanted for Questioning in African Murder*, The N.Y. Post (July 12, 2022 3:53 PM)https://nypost.com/2022/07/12/where-the-crawdads-sing-author-wanted-for-questioning-in-murder/.

[xlii] Cal. Evid. Code § 352 (Deering 2022) ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.").

[xliii] Cal. Evid. Code § 1101 (Deering 2022) ("Except as provided in this section and in Sections 1102,

1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.").

[xliv] Cal. Evid. Code § 1102 (Deering 2022).

[xlv] *See* Cal. Evid. Code § 1103 (Deering 2022); Cal. Evid. Code § 1108 (Deering 2022); Cal. Evid. Code § 1109 (Deering 2022).

[xlvi] Cal. Evid. Code § 402 (Deering 2022) ("(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . .").

[xlvii] *Blank v. Kirwan*, 39 Cal. 3d 311, 331 (Cal. 1985) (noting that under the "abuse of discretion" standard of review, appellate courts will disturb discretionary trial court rulings only upon a showing of "a clear case of abuse" and "a miscarriage of justice."); *see also Sargon Enters., Inc. v. Univ. of S. Cal*., 55 Cal. 4th 747, 773 (Cal. 2012) ("[A] ruling that constitutes an abuse of discretion has been described as one that is so irrational or arbitrary that no reasonable person could agree with it." (internal quotes omitted)) .

[xlviii] Jeremy Price, *Don't Give Up: Overcoming Standard of Review and Prejudice Obstacles*, First Dist. Appellate Project Training Seminar (Jan. 31, 2020), https://www.fdap.org/wp-content/uploads/2020/06/Standards_of_Review_and_Prejudice.pdf.

[xlix] N.Y. Assemb. B. 8681, *supra* ("Creative expression" means "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.").

[l] H.R. 8531, *supra* note xxxvii.

[li] *Id.*

[lii] *Id.*

[liii] *R v. Skeete*, 2017 CanLII C55872 (Can. Ont. C.A.).

[liv] Ngozi Okidegbe, *A 'Bad Rap': R. v. Skeete and the Admissibility of Rap Lyric Evidence*, 66 Crim. L.Q. 294 (2018).


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Don Franzen's legal practice covers the spectrum of the entertainment industry, including recording, television, film, live entertainment, copyright, trademarks, endorsements, corporate, tax and visa issues, and non-profit organizations. His clients include composers, producers, vocal and instrumental artists, as well as performing arts organizations. In addition to providing business and legal advice, he has acted an as a producer on recording, video, and theatrical projects. He also has established an expertise in commercial civil litigation, including appellate practice (State and Federal). He has lectured on entertainment law for Eastman School of Music, the Santa Monica College Academy of Entertainment, the Colburn School of Music, the California Institute of the Arts, and is a visiting professor at the Berklee School of Music (Valencia, Spain). Since 2009 he has taught courses on music and the law at the Herb Albert School of Music, University of California Los Angeles, and effective 2016 has been appointed as an adjunct professor as part of its Music Industry Program. Since 1997 he has been chosen as a Fellow of the Institute for the Humanities at the University of Southern California. He serves as the Legal Affairs Editor for the Los Angeles Review of Books, and has authored various essays and book reviews on legal topics. He is a founding director of the Los Angeles Opera, and a director of Heyday Books, and the Denyce Graves Foundation. In addition to his native English, he speaks Spanish, Italian and conversational German. He is married to Dale Franzen and proud father of three children. He may be reached by e-mail at donfranzen@yourinsidetrack.net.

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