



NEW YORK  
CITY BAR

**REPORT ON LEGISLATION  
BY THE CRIMINAL COURTS COMMITTEE  
CRIMINAL JUSTICE OPERATIONS COMMITTEE AND  
ENTERTAINMENT LAW COMMITTEE**

**A.127  
S.1738**

**M. of A. Cruz  
Sen. Hoylman-Sigal**

AN ACT to amend the criminal procedure law, in relation to rules of evidence concerning the admissibility of evidence of a defendant’s creative expression.

**THIS BILL IS APPROVED**

The New York City Bar Association (“City Bar”) supports passage of the above-referenced “Rap Music on Trial” bill, which would ensure that defendants in criminal trials are free from having their creative artistic expression used against them as evidence.

**I. BACKGROUND**

As a world center of art and media, New York City has a special interest in freedom of speech and expression.<sup>1</sup> It is also the birthplace of hip-hop.<sup>2</sup>

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<sup>1</sup> Letter from the New York City Bar Association’s Communications and Media Law Committee and Council on Intellectual Property to President Joseph R. Biden (Feb. 5, 2021), 1, <https://s3.amazonaws.com/documents.nycbar.org/files/2020842-FreedomSpeechPressBiden.pdf>; see also *People ex re. Arcara v. Cloud Books*, 68 N.Y.2d 553, 557-58 (1986) (describing New York’s “long history and tradition of fostering freedom of expression”); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (recognizing that New York is “a cultural center for the Nation” and has “long provided a hospitable climate for the free exchange of ideas”) (all websites last visited Feb. 27, 2023).

<sup>2</sup> Alexandra S. Levine, *New York Today: The Home of Hip-Hop*, New York Times (Aug. 18, 2016), <https://www.nytimes.com/2016/08/18/nyregion/new-york-today-hip-hop-in-new-york.html>; S. Res. 331 - 117th Congress (2021-2022): A resolution designating August 11, 2021, as “Hip Hop Celebration Day”, designating August 2021 as “Hip Hop Recognition Month”, and designating November 2021 as “Hip Hop History Month”, S.Res.331, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-resolution/331> (recognizing that Hip Hop was born in the Bronx).

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

But in courtrooms across the nation, and here in New York, rap music has been increasingly used as evidence in criminal prosecutions.<sup>3</sup> Rap music has been used to “prove” a wide variety of factual issues, including identity, knowledge, motive, or intent, and consciousness of guilt. Rap lyrics have even been used as purported confessions.<sup>4</sup> These practices have not been limited to cases where the accused himself created the lyrics at issue—courts have gone so far as to admit evidence that a defendant merely listened to a song.<sup>5</sup> These tactics threaten to chill the creative expression of ordinary New Yorkers.<sup>6</sup>

Troublingly, other genres of music are not being scrutinized or used as evidence in the same way.<sup>7</sup> The singling out of rap music, a historically Black form of musical expression, threatens to invite racial discrimination and stereotyping into criminal prosecutions, and it continues a shameful legacy of demonizing and criminalizing Black art.<sup>8</sup>

Additionally, this kind of evidence is rarely probative. Merely because a person has created art relating to or describing certain behavior does not provide good reason to believe that the artist has actually engaged in that behavior. As the New Jersey Supreme Court has observed, “[o]ne would not presume that Bob Marley, who wrote the well-known song, ‘I Shot the Sheriff,’ actually shot a sheriff, or that Edgar Allen Poe buried a man beneath his floorboards, as depicted in his short story ‘The Tell-Tale Heart,’ simply because of their respective artistic endeavors in those subjects.” *State v. Skinner*, 218 N.J. 496, 517, 521 (2014). This is particularly true for rap music,

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<sup>3</sup> Brittany Francis, *et al.*, *Putting Rap Music on Trial*, N.Y.L.J. (June 30, 2021), <https://www.law.com/newyorklawjournal/2021/06/30/putting-rap-music-on-trial/>; see also Reyna Araibi, “Every Time I Write”: *Rap Music as Evidence in Criminal Trials*, Note, 62 *Ariz. L. Rev.* 805, 808 (2020) (observing that “the use of rap music in criminal trials is widespread and has been identified in over 500 cases across the United States”); Bethany J. Paek, *Catching a Bad Rap: The Use of Rap Lyrics as Evidence in Criminal Trials*, *NBA National Bar Association Magazine* (Dec. 2014) (“The use of rap lyrics as evidence in criminal trials is not a novel idea; however, recently, the practice has become increasingly popular.”). For a running list of media coverage discussing the use of rap music as evidence in criminal prosecutions, visit: <https://docs.google.com/document/d/1pjBYeOlued4VXAVds8jg2udSchJ98wQ7Slu8itN49vw/edit?usp=sharing>.

<sup>4</sup> Paek, *supra*; Ariabi, *supra*; *People v. Goldman*, 35 N.Y.3d 582, 595 (2020) (motive); *People v. Green*, 92 A.D.3d 953, 956 (2d Dep’t 2012) (consciousness of guilt); *People v. Hayes*, 168 A.D.3d 489 (1st Dep’t 2019) (identity).

<sup>5</sup> *Green*, 92 A.D.3d at 954 (admitting lyrics that defendant “or members of the gang with which the defendant was affiliated” had written); *People v. Wallace*, 59 A.D.3d 1069 (4th Dep’t 2009) (approving of admission into evidence rap song that the defendant merely listened to).

<sup>6</sup> Law enforcement in New York City has, in the past, specifically targeted rappers, causing a decline in the City’s rap music scene. See Craig Jenkins, *New York Rap Never ‘Fell Off—It Was Snuffed Out*, *Vulture* (Sept. 17, 2020), <https://www.vulture.com/article/giuliani-bloomberg-new-york-rap-essay.html>.

<sup>7</sup> Erik Nielson, ‘*Rap on Trial*’: *Why Lyrics Should Be Off-Limits*, *Rolling Stone* (May 3, 2017), <https://www.rollingstone.com/culture/culture-news/rap-on-trial-why-lyrics-should-be-off-limits-116368/> (explaining that “[n]o other fictional genre is treated” like rap music, “a troubling fact that raises important questions about the way racial double standards operate to put rap music, and the people behind it, on trial”); Ariabi, *supra*, at 808 (explaining that “the practice” of introducing lyrics as evidence in criminal cases “is almost exclusive to rap music”).

<sup>8</sup> Nielson, *supra* (“Almost all defendants in . . . cases” where rap lyrics are introduced as evidence “are young men of color”); see also Francis, *supra* (discussing the use of rap lyrics as evidence in the context of historical criminalization of Black music).

which frequently relies on tropes of hyperbole, exaggeration, and braggadocio.<sup>9</sup> To make matters worse, the introduction of rap lyrics is likely to trigger anti-Black biases in jurors.<sup>10</sup>

## II. THE PROPOSED LEGISLATION

The proposed legislation would protect free expression by imposing sensible limitations on the Government's use of creative expression as evidence in criminal trials. The legislation would make the introduction of a defendant's "creative artistic expression" presumptively inadmissible. The legislation does not, however, completely bar the introduction of such evidence. Rather, it requires the proffering party to establish that: the content of the expression represents the artist's "literal, rather than figural or fictional meaning"; there is a "strong . . . nexus" between the facts of the case and the content of the expression; the evidence is relevant; and the facts which the evidence tends to support cannot be "provided by other admissible evidence." Additionally, the legislation would require the Court to take precautions designed to reduce the potential of prejudice, including providing a limiting instruction to the jury when creative expression is admitted into evidence.

These protections, modeled after those limiting the admissibility of evidence of a victim's manner of dress in sex offenses codified at Criminal Procedure Law section 60.48, are necessary to supplement the traditional evidentiary principles requiring that the probative value of proffered evidence outweigh its potential for prejudice,<sup>11</sup> and that evidence of a defendant's uncharged crimes or prior bad acts do not "tend[] only to demonstrate the defendant's propensity to commit the crime charged."<sup>12</sup> They do so by ensuring that particular concerns – that the introduction of rap lyrics will chill free expression, will not be probative, and will encourage juror bias – are adequately considered before such evidence is admitted.

The Legislature should enact this proposed legislation to support free expression, and to ensure that criminal trials are fair and bias-free.

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<sup>9</sup> Brief of *Amici Curiae* Michael Render ("Killer Mike"), Erik Nielson, & Other Artists and Scholars in Support of Petitioner, *Knox v. Pennsylvania*, [https://www.supremecourt.gov/DocketPDF/18/18-949/90947/20190306152355894\\_11%20AM%20Final%20Knox%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/18/18-949/90947/20190306152355894_11%20AM%20Final%20Knox%20Amicus%20Brief.pdf) (citing Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 25 (2007)) ("Rappers famously rely on exaggeration and hyperbole as they craft the larger-than-life characters that have entertained fans (and offended critics) for decades); Clay Calvert, et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 Colum. J.L. & Arts 1, 19 () (quoting Ralph M. Rosen & Donald R. Marks, *Comedies of Transgression in Gangsta Rap and Ancient Classical Poetry*, 30 New Literary Hist. 897, 897 (1999) ("Rap . . . is a form of art, poetry and fantasy. In fact 'gangsta rap operates within a well-documented poetic tradition within African American Culture that ritualizes invective, satire, obscenity and other verbal phenomena with transgressive aims.'").

<sup>10</sup> Nielson, *supra* ("Multiple studies have demonstrated that when people are presented with *identical* lyrics containing violent content, they are significantly more likely to regard the lyrics as harmful and threatening if they are labeled as rap rather than country music, a traditionally white genre").

<sup>11</sup> *People v. Frumusa*, 29 N.Y.3d 364, 372 (2017).

<sup>12</sup> *People v. Cass*, 18 N.Y.3d 553, 559 (2012) (citing *People v. Molineux*, 168 N.Y.264 (1901)).

#### IV. CONCLUSION

For the aforementioned reasons, we respectfully urge our elected officials to support A.127/S.1738.

Criminal Courts Committee  
Carola Beeney, Co-Chair  
Anna G. Cominsky, Co-Chair

Criminal Justice Operations Committee  
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Entertainment Law Committee  
Terrence Lee Dugan, Chair

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\* *This report was first issued in April 2022 during the terms of the following committee chairs: Tess Cohen, Chair, Criminal Justice Operations Committee; and Randy M. Friedberg, Chair, Entertainment Law Committee.*