



Memorandum in Support

TASK FORCE ON RACISM, SOCIAL EQUITY, AND THE LAW

Racism, Social Equity, and the Law #1

April 17, 2023

S. 1738

By: Senator Hoylman-Sigal

A. 127

By: M of A Cruz

Senate Committee: Codes

Assembly Committee: Codes

Effective Date: Immediately

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.

LAW AND SECTION REFERRED TO: Amends the criminal procedure law by adding a new section 60.77, Rules of evidence; admissibility of evidence of defendants' creative expression. Amends the criminal procedure law by adding a new section 1.20(46), Definition of "creative expression".

THE TASK FORCE ON RACISM, SOCIAL EQUITY, AND THE LAW **SUPPORTS THIS LEGISLATION**

The Task Force on Racism, Social Equity, and the Law strongly urges the New York State Legislature to pass S.1738/A.127, which would protect the creative expression of New Yorkers and ensure that convictions are based on evidence of criminal conduct, not artistic works. By enacting this law, the legislature will ensure that New York remains a haven for all artists.

The Task Force on Racism, Social Equity and the Law (“Task Force”) is tasked with identifying and recommending concrete steps to build a legal system rooted in true equity and justice for all New Yorkers. This mission is particularly pronounced in the criminal justice system, where racial minorities are significantly over-represented. The system itself is steeped in racial bias and animus on a structural level and requires fundamental changes to reverse the decades of harm caused. Accordingly, the Task Force will issue legal and policy recommendations designed to dismantle a two-tiered system of justice and eliminate the driving forces of inequity in our system.

Given our mission, the Task Force supports S.1738/A.127 because it is an important step in the fight for racial justice in New York.

In a concerning national trend prosecutors are increasingly relying on creative works as evidence of criminality.¹ Indeed, people of color are disproportionately targeted for their creative expression through the introduction of Rap music and lyrics. Rap music is used in criminal proceedings far more than any other genre, and social scientists have shown that anti-rap attitudes go hand-in-hand with anti-Black bias.² The probative value of this evidence is weak, yet this practice has become a back door for irrelevant and prejudicial propensity evidence against people of color. Indeed, researchers have found that exposure to rap music, “increase[s] the ease of associating Black people with negative traits like hostility, being violent, and being sexist as well as making less empathetic judgments toward Black victims.”³

Using rap music as criminal evidence is the latest iteration of our nation’s long history of criminalizing Black music. In the 1700s, state slave codes barred enslaved Africans from using music to communicate “their wicked designs and purposes,” namely, escape and rebellion. During the Harlem Renaissance, Black jazz musicians were targeted for harassment and prosecution by the Federal Bureau of Narcotics, whose commissioner believed the genre to be “evidence of a recurrence of the primitive impulses that lurk in black people.” Decades later, in 1994, Congress began pathologizing rap music in a campaign that continued for over a decade. Indeed, at a 2007 hearing, one congressperson referred to the music as “filth.” In the United States, the legitimacy and freedom granted to a musical genre have always been intertwined with the race of the musicians involved. This legacy lives on in our criminal legal system. Passing S.1738/A.127 will make New York a leader in ending this racially discriminatory practice.

The effect of weaponizing creative expression is incredibly pointed against people of color. Simply copying, reposting, performing, or even listening to others’ music can be used as “evidence” that someone literally committed the figurative conduct described in the music. This practice of weaponizing music chills creative expression and contributes to unjust convictions. By passing S.1738/A.127, New York will ensure that prosecutors cannot rely on creative expression as racially charged criminal evidence unless they provide clear and convincing proof that there is a strong, literal, and factual nexus between the creative expression and the facts of the case.

The Task Force calls on the legislature to pass S.1738/A.127. Doing so will advance racial equity, promote creative expression from all communities, and prevent unjust convictions in New York.

Based on the foregoing, the Task Force on Racism, Social Equity, and the Law **SUPPORTS** this legislation.

¹ Brittany Francis, et Al., *Putting Rap Music on Trial*, New York Law Journal, June 30, 2021
file:///C:/Users/afelise/Downloads/Putting%20Rap%20Music%20on%20Trial%20(1).pdf

² Christine Reyna, et. Al., *Blame it on Hip-Hop; Anti-Rap attitudes as a proxy for Prejudice*, 12 G.P.I.R. 361 (2009).

³ Adam Dunbar, et al., *The Threatening Nature of “Rap” Music*, 22 Psychology Public Policy and Law 280 (2016)