

The Irrelevance of Rap

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Introduction

Rap is a form of Black expressive youth culture. It originated in the Bronx, New York, in the 1970s, as the musical component of hip-hop culture. It evolved from party music to include social and political commentary, and spread across the globe to become one of the most popular (and profitable) genres of music.¹ In the UK, there are a number of distinct subgenres of rap influenced not only by American rap and UK dance music, but also by music and culture direct from the Caribbean and West Africa.² The most recent rap subgenre to gain significant attention is 'drill'.³ Drill originated in Chicago and became popular in the UK during the mid 2010s, taking on its own distinct 'UK drill' sound and style.⁴ In recent years, drill has entered the mainstream and has become a regular feature in the UK Official Charts. While there are now many commercially successful drill rappers, there continue to be many amateur drill rappers, some of whom upload their music onto social media, YouTube, and other music hosting websites and apps.

Drill draws on the conventions established within the earlier gangsta rap genre. Gangsta rap is hypermasculine, with artists typically rapping in the first person, often about criminal exploits involving violence, drug dealing and gangs.⁵ In fact, the subject matter of violence and criminality is a defining feature of drill, and one of the conventions of the genre involves the construction of an authentic persona who is willing to engage in violence. It is intentionally shocking and provocative. Some drill songs are accompanied by videos which typically feature groups of young men and boys in tracksuits and, sometimes, face coverings. They use their hands to mimic weapons (and occasionally use real or fake weapons as props), as well as to

*The author would like to thank Andrea Dennis, Lambros Fatsis, Erik Nielson, Federico Picinali, Eithne Quinn, Tony Ward and the reviewers for their helpful feedback on previous versions of this article.

¹ See, for example, J. Chang, *Can't Stop, Won't Stop: A History of the Hip-Hop Generation* (Edbury Press, 2005); E. Quinn, *Nuthin' but a "G" Thang: The Culture and Commerce of Gangsta Rap* (New York: Columbia University Press, 2005); E. Nielson and A.L. Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (New York: The New Press, 2019); BBC, 'Fifth of all Songs Streamed in UK in 2020 were Rap and Hip Hop' (*BBC News*, 15 April 2020) <https://www.bbc.co.uk/news/newsbeat-56749586> [Accessed 20 September 2021].

² See generally, R. Bramwell, *UK Hip-Hop, Grime and the City: The Aesthetics and Ethics of London's Rap Scenes* (Abingdon: Routledge, 2015); D. Hancox, *Inner City Pressure: The Story of Grime* (London: William Collins, 2018).

³ See J. Keith, 'The Evolving Sound of UK Drill' (*DJ Mag*, 21 October 2020) <https://djmag.com/longreads/evolving-sound-uk-drill> [Accessed 20 September 2021].

⁴ C. Thapar, 'From Chicago to Brixton: The Surprising Rise of UK drill' (*Fact Magazine*, 2017) www.factmag.com/2017/04/27/uk-drill-chicago-brixton/ [Accessed 20 September 2021].

⁵ Quinn, *Nuthin' but a "G" Thang* (2005).

make letters and symbols. Drill videos are often filmed at night in urban areas, including in and around council estates.⁶

While the appearance of authenticity is important within some rap subgenres, particularly drill, many rappers have no connection to criminal activity or grossly exaggerate their involvement. References to criminal acts are often fictional and entertaining, or used as a means of cultivating an image of street authenticity. Drill fans, for example, respond positively to violent content, with online audiences rating rappers by authenticity.⁷ More broadly, rap relies heavily on symbolism, figurative language, hyperbole and braggadocio. The use of humour, rhetoric and innuendo also ‘thickens the obscure’,⁸ making it all the more difficult to decipher fact from fiction.

Despite the violent content, and persistent efforts by the media, politicians and criminal justice agencies to associate rap with crime,⁹ there is no empirical evidence to support claims that rap as a genre, or drill in particular, causes crime.¹⁰ This is not to suggest that no rapper ever commits the kind of crime they rap about, or that there has never been any link between violent lyrics and particular incidents of violence.¹¹ However, the nature and implications of such links are incredibly difficult to identify and unpack, and participation in rap can be hugely beneficial, including by providing an alternative to crime.

Many are drawn to rap because of the potential financial rewards. This prospect influences much of the content of mainstream rap music, including criminal themes.¹² Those who are successful might also have their impact recognised through highly coveted awards and prizes. In 2018, for example, American rapper, Kendrick Lamar, was awarded the Pulitzer Prize for music.¹³ In the UK, several rappers, including Dave and Skepta, have won the Mercury Prize, which ‘promotes the best of UK music and the artists who produce it.’¹⁴ While, for many, rap

⁶ J. Ilan, ‘Digital Street Culture Decoded: Why Criminalizing Drill Music is Street Illiterate and Counterproductive’ (2020) 60(4) *British Journal of Criminology* 994, 1001.

⁷ Ilan, ‘Digital Street Culture Decoded’ (2020) 60(4) *British Journal of Criminology* 994, 1003; F. Stuart, *Ballad of the Bullet: Gangs, Drill Music and the Power of Online Infamy* (Princeton: Princeton University Press, 2020).

⁸ Ilan, ‘Digital Street Culture Decoded’ (2020) 60(4) *British Journal of Criminology* 994, 1006.

⁹ See, for example, C.E. Kubrin and E. Nielson, ‘Rap on Trial’ (2014) 4(3) *Race and Justice* 185, 187-191; Hancox, *Inner City Pressure* (2018), ch.6; Nielson and Dennis, *Rap on Trial* (2019), ch 1; L. Fatsis, ‘Grime: Criminal Subculture or Public Counterculture? A Critical Investigation into the Criminalization of Black Musical Subculture in the UK’ (2019) 15(3) *Crime, Media, Culture* 447; L. Fatsis, ‘Policing the Beats: The Criminalisation of UK Drill and Grime Music by the London Metropolitan Police’ (2019) 67(6) *The Sociological Review* 1300; Ilan, ‘Digital Street Culture Decoded’ (2020) 60(4) *British Journal of Criminology* 994.

¹⁰ See generally, A. Lynes, C. Kelly and E. Kelly, ‘Thug Life: Drill Music as a Periscope into Urban Violence in the Consumer Age’ (2020) 60(5) *British Journal of Criminology* 1201.

¹¹ D. Hancox, ‘The Drill and Knife Crime Story is a Classic Chicken-and-Egg Dilemma’ (*Noisey*, 31 May 2018) <https://www.vice.com/en/article/nek3qm/drill-knife-crime-violence-london-long-read> [Accessed 20 September 2021].

¹² See A. Dennis, ‘Poetic (In)Justice? Rap Music as Art, Life and Criminal Evidence’ (2007) 31 *Columbia Journal of Law & the Arts* 1; N. Stoia, K. Adams and K. Drakulich, ‘Rap Lyrics as Evidence: What Can Music Theory Tell Us?’ (2018) 8(4) *Race and Justice* 330; Nielson and Dennis, *Rap on Trial* (2019).

¹³ <https://www.pulitzer.org/winners/kendrick-lamar> [Accessed 20 September 2021].

¹⁴ <https://www.mercuryprize.com/about-the-prize> [Accessed 20 September 2021].

music is a route to financial security, artists may also find it cathartic. American rapper and activist, Michael Render (aka Killer Mike), describes rap as a 'safe space' for Black people, offering 'a kind of therapy ... a place to express even our rawest feelings.'¹⁵ Rap can be used as a creative outlet, to express a variety of thoughts and emotions, to express dissatisfaction with societal and living conditions, and to create a sense of belonging and a sense of oneself.¹⁶

Against this backdrop, it is imperative to question how and why the creation and performance of rap is used as evidence against defendants in criminal trials, and with increased frequency in recent years, correlating with the rise of drill. In particular, can rap lyrics and videos help to prove that someone committed a crime? How do courts assess the relevance of rap? Do courts appreciate (and take account of) the conventions of rap music and rap culture? Is the potential for undue prejudice recognised? Are prosecutors being permitted to present stereotypes as if they are evidence? How does the use of rap as evidence fit into a wider pattern of marginalising and criminalising Black youth and Black cultures?

This article is one of a series of planned articles exploring the admissibility and use of rap as evidence in criminal trials, as well as its implications.¹⁷ It focuses on the first three questions, pertaining to the relevance of rap in respect of a criminal charge and, in doing so, sheds some light on the latter questions. The article evaluates the way in which relevance has been determined by engaging in a qualitative analysis of appellate cases from England and Wales, reported between January 2005 and January 2021. These cases were sourced through legal databases, namely Westlaw and LexisNexis, by using various search terms, such as 'lyric' and 'music video'. While case searches do not uncover every appeal case, 38 relevant cases were identified, 34 of which concern rap music, with the other four seemingly involving the use of other genres of music in criminal proceedings. In 31 of the cases, lyrics or participation in music videos had been admitted as evidence against a defendant at a criminal trial or treated as an aggravating factor at sentencing. The other seven cases link rap music to crime or character in some way. For example, rap music has been used or attempted to be used as evidence against a witness, has led to a police investigation into possession of firearms, and has formed part of a gang injunction. Reported appeal cases cannot tell us everything that is happening in first instance trials, including how often prosecutors seek to rely on rap, or whether trial judges tend to admit or exclude the evidence.¹⁸ However, the main findings from the case law are broadly consistent with anecdotal insight gained from engagement with legal professionals and expert witnesses, as well as engagement in first instance trials.¹⁹

¹⁵ M. Render, 'Foreword' in Nielson and Dennis, *Rap on Trial* (2019), p.i.

¹⁶ See Bramwell, *UK Hip-Hop, Grime and the City* (2015).

¹⁷ See also, A. Owusu-Bempah, 'Prosecuting Rap: What Does the Case Law Tell Us?' *Popular Music* (forthcoming).

¹⁸ Some cases allude to frequent admission of rap music as evidence. In *Martin* [2017] EWCA Crim 488 at [23], the defence submitted that 'this type of rap evidence is frequently admitted at the behest of the Crown'.

¹⁹ This includes engagement at seminars and events, including Garden Court Chambers' webinar series, 'Drill Music, Gangs and Prosecutions – Challenging Racist Stereotypes in the Criminal Justice System' (2020) <https://www.gardencourtchambers.co.uk/events/drill-music-gangs-and-prosecutions-challenging-racist-stereotypes-in-the-criminal-justice-system> [Accessed 20 September 2021].

Accordingly, an analysis of over 30 appeal judgments can tell us much about the treatment of rap as evidence.

It is important to note that not all of the cases involve a challenge to the admissibility of rap as evidence. In fact, the admission, interpretation or use of lyrics or videos against a defendant was a subject of appeal in a minority of cases, and was usually not the sole ground of appeal. Still, the cases provide insight into the way in which rap is used in court. It is also notable that, where admission of 'rap evidence' was challenged, there was other (often stronger) evidence against defendants. In *Soloman*, for example, rap was said to be of 'marginal significance' in the case.²⁰ This helps to explain why appeals were usually dismissed, as convictions were deemed to be safe. But it does not explain why initial decisions to admit rap evidence against defendants were almost always approved and upheld, with there being only one successful challenge in the analysed cases.²¹ The law of evidence is concerned not only with the safety of convictions, but also the appropriateness and fairness of relying on various types of evidence. Rap, as we will see, is a unique and controversial form of evidence that, even where it may be relevant, is often of low probative value and creates a risk of undue prejudice. Thus, while rap evidence does not exist in a vacuum, scrutinising its admissibility is valuable regardless of whether it is central or peripheral to the prosecution case, particularly given the lack of academic attention this form of evidence has so far received in England and Wales.

Before delving into the question of relevance, and to provide further important context, this article begins by briefly outlining the profile of rap cases and introduces some of the broader issues emanating from the case law. Attention is then turned to the question of whether (and when) rap is relevant, and how this has been assessed by the courts. Particular consideration is given to the assessment of factors which can affect the relevance (and probative value) of rap, and the way in which one's views and experiences may inform determinations of relevance. The case law reveals a relaxed and uninformed approach to the assessment of the relevance of rap. It is argued that, if rap is to be admissible evidence, a more rigorous approach is required. The article concludes with some suggestions for how such an approach might be developed.

Beyond relevance: Issues of concern from the case law

Within the case law, rap lyrics and videos were usually adduced in the form of bad character evidence²² in trials for serious offences. The vast majority of cases concerned offences involving weapons (mostly firearms offences) and/or violence, including nine murders. Often these were cases of joint enterprise or secondary liability, where rap was used to link

²⁰ *Soloman* [2019] EWCA Crim 1356 at [15].

²¹ *Alimi* [2014] EWCA Crim 2412.

²² Or as misconduct to do with the alleged facts of the offence, under s.98 of the Criminal Justice Act 2003 (CJA).

defendants to each other and to the crime, and often, or at the same time, as evidence of gang involvement, to place the offence in a gang context. The case law also indicates that rap is used almost exclusively as evidence against young Black men and boys (usually teenagers)²³ in London and other urban areas, and in ways that other genres of music or forms of art are not used.²⁴

The profile of the case law raises a number of important issues. A detailed analysis of these issues is beyond the scope of this article and will be taken up in separate papers. However, it is useful to introduce them here, as they should be borne in mind when addressing the question of relevance.

These issues include the categorisation of rap as bad character evidence. Bad character evidence is defined in section 98 of the Criminal Justice Act 2003 (CJA) as ‘evidence of, or of a disposition towards, misconduct’. Section 112 defines ‘misconduct’ as ‘the commission of an offence or other reprehensible behaviour’. ‘Reprehensible behaviour’ has been given its ordinary meaning, carrying with it ‘some element of culpability or blameworthiness’.²⁵ The appeal judgments do not usually specify which aspect of the definition applies to rap. However, since writing or performing rap does not usually amount to the commission of an offence, it seems that rapping about criminal behaviour is treated as reprehensible or, alternatively, as showing a ‘disposition towards’ committing crime or reprehensible behaviour. This begs a question: If writing or performing violent or graphic rap amounts to ‘misconduct’, or is otherwise evidence of bad character, is it not also misconduct to write or perform violent plays, write violent novels, play violent video games, or perform violent lyrics from other genres, such as pop or opera, a genre ‘almost wholly devoted to violence’?²⁶ What sets rap apart from these other fictionalised forms of art and violent pastimes which are not commonly thought of as being ‘reprehensible’ or as showing a ‘disposition towards’ committing crime? Most obviously, rap is a form of Black expressive culture, performed primarily by young people who fit a pre-existing image of what a criminal looks or behaves like. At play may be a ‘racist assumption that [Black arts] cannot reach the same levels of

²³ This is consistent with Nielson and Dennis’ finding from the US that, based on approximately 500 cases involving ‘rap on trial’, an estimated 95% of defendants are Black or Latino. Nielson and Dennis, *Rap on Trial* (2019), p.18. Note that while rap is a form of Black expressive culture, it is not exclusionary and there are many rappers of other races.

²⁴ For example, at the time of research, in 16 of the 29 crime cases from England and Wales on Westlaw with the word “lyric” in the judgment, rap lyrics had been admitted as evidence of a defendant’s participation in a crime or treated as an aggravating factor at sentencing. Conversely, in just one of these cases is it clear that lyrics from a genre other than rap had been admitted as evidence against a defendant. Moreover, Crown Prosecution Guidance (CPS) on gang related offences explicitly links drill music to gangs, and guidance on offensive weapons advises that consideration be given to the use of drill music videos as bad character evidence. See CPS, *Decision Making in Gang Related Offences*, <https://www.cps.gov.uk/legal-guidance/gang-related-offences-decision-making> [Accessed 20 September 2021]; CPS, *Offensive Weapons, Knife Crime*, <https://www.cps.gov.uk/legal-guidance/offensive-weapons-knife-crime-practical-guidance> [Accessed 20 September 2021].

²⁵ *Renda* [2005] EWCA Crim 2826, [2006] 1 W.L.R. 2948 at [24].

²⁶ Stoia, Adams and Drakulich, ‘Rap Lyrics as Evidence’ (2018) 8(4) *Race and Justice* 330, 331.

sophistication as their white counterparts',²⁷ and, as such, can be taken literally and attributed to one's character in a way which other genres are not.

One could argue that the 'bad character' label protects defendants in so far as, to be admissible, evidence of a defendant's bad character must not only be relevant, but must also satisfy one of the seven gateways in section 101(1) of the CJA 2003. This could potentially safeguard the defendant against admission of some evidence. However, the 'gateways' seem to do little, if anything, to prevent admission of rap evidence. As we will see, in the case law, rap was commonly admitted through section 101(1)(d), as being relevant to an important matter in issue between the defendant and the prosecution. If rap is deemed to be relevant, it is likely to go to an 'important matter' in issue, thus satisfying gateway d. Also, whatever little protection section 101 may offer would be less necessary if the courts were to take a more rigorous and informed approach to assessing the relevance of rap. For these reasons, as well as space constraints, this article focuses on the prerequisite question of relevance, leaving a detailed exploration of the bad character provisions for elsewhere.

Related to the issue of categorising rap as bad character evidence, the relationship between rap, race and gangs also deserves serious scrutiny, including the potential for rap to be used to ignite longstanding stereotypes of Black men and boys as criminals.²⁸ Prosecutors may benefit from themes and aesthetics within rap music, by taking rap literally and using it to help build a case in which Black boys and men represent, or fit into, what Angela Davis referred to as the 'racialized figure of the criminal',²⁹ without expressly stating as much. In other words, as Quinn puts it, 'Police and prosecutors who don't want to appear overtly discriminatory can ... let the rap music do the racist signalling for them.'³⁰ Stereotypes about Black male criminality are reproduced and reinforced through a gang narrative. The term 'gang' is vague and has been disproportionately applied to Black young people, including many who are not involved in crime, and in a way that does not correlate to the commission of serious youth violence.³¹ Such disproportionate application equips the term 'gang' with the ability to evoke images of Black criminality. Rap music can thus be used as a 'racialised

²⁷ Ilan, 'Digital Street Culture Decoded' (2020) 60(4) *British Journal of Criminology* 994, 1003.

²⁸ Nielson and Dennis, *Rap on Trial* (2019), pp.81 and 93. See also, P. Gilroy, 'The Myth of Black Criminality' (1982) 19 *The Socialist Register* 47; P. Gilroy, *There Ain't no Black in the Union Jack* (London: Routledge, 1987), ch.3; P. Gilroy, (2003) 'A New Crime, But the Same Old Culprits' (*The Guardian*, 8 January 2003) <https://www.theguardian.com/uk/2003/jan/08/ukguns.comment> [Accessed 20 September 2021]; K.M. Drakulich, 'Explicit and Hidden Racial Bias in the Framing of Social Problems' (2015) 62(3) *Social Problems* 391; Fatsis, 'Grime: Criminal Subculture or Public Counterculture?' (2019) 15(3) *Crime, Media, Culture* 447, 451.

²⁹ A. Davis, 'Race and Criminalization: Black Americans and the Punishment Industry' in W. Lubiano (ed) *The House That Race Built* (New York: Vintage Books, 1997) p.270.

³⁰ E. Quinn, 'Lost in Translation? Rap music and racial bias in the courtroom' (Policy@Manchester Blogs, 4 October 2018) <http://blog.policy.manchester.ac.uk/posts/2018/10/lost-in-translation-rap-music-and-racial-bias-in-the-courtroom/> [Accessed 20 September 2021].

³¹ Amnesty International, *Trapped in the Matrix* (London: Amnesty International, 2018); P. Williams, *Being Matrixed: The (Over)Policing of Gang Suspects in London* (London: StopWatch, 2018). See also P. Williams and B. Clarke, *Dangerous Associations: Joint Enterprise, Gangs and Racism* (London: Centre for Crime and Justice Studies, 2016).

signifier',³² to amplify pre-existing notions of Black men and boys as criminals, to help build a gang narrative (especially where lyrics or videos exploit a gang aesthetic, as is common in drill), and further link Black men and boys to crime.

Where rap is used by prosecutors to help put an offence into a gang context, this is often done with the aid of a police officer acting as a gang expert.³³ In this capacity, the officer may be invited to interpret and contextualise rap lyrics and videos. This is a further issue of concern, and raises a number of important questions about whether police officers are sufficiently qualified to act as experts on rap, whether they are (or can be) impartial, and whether their evidence is sufficiently reliable. Being an expert on gangs does not, without more, make one an expert on rap. Unless the officer has studied the history, culture and conventions of the genre, has kept up to date with ever-changing slang, and/or is actively involved or immersed in rap culture, it would be more appropriate for the court to hear from musicians, industry insiders and social scientists, particularly scholars of hip-hop, rap and popular culture. Moreover, 'intense crime-fighting motivations and institutional racism might discourage more circumspect readings' of rap by the police.³⁴ In a recent report on tackling racial injustice in the youth justice system, JUSTICE took the view that, in the context of drill, 'the use of police officers as experts amounts to no more than the prosecution calling itself to give evidence. They have little understanding of the culture within which Drill is created, and how it is made.'³⁵ Although Ward and Fouladvand do not take such a strong line, they note that, 'there is nothing in recently reported cases to indicate that police gang expertise is being subjected to any kind of rigorous scrutiny'.³⁶ They suggest that the courts should take more seriously the factors relevant to determining whether expert opinion evidence is sufficiently reliable to be admitted, as set out in the Criminal Practice Direction 19A (Expert Evidence). Given widespread concern about the consequences of admitting unreliable expert evidence,³⁷ the 'laissez-faire' approach in respect of police opinions on rap is somewhat surprising.

The final issue of concern to be outlined here relates to prejudicial effect. Even if relevant, evidence should not be adduced if its probative value is outweighed by its prejudicial effect. With few exceptions, the case law shows little concern for how rap music might unduly prejudice a jury against the defendant. By and large, jurors seem to be trusted to put emotion aside and decide for themselves whether rap music is 'part of art or part of life'.³⁸ While the

³² B. Clarke and P. Williams, '(Re)producing Guilt in Suspect Communities: The Centrality of Racialisation in Joint Enterprise Prosecutions' (2020) 9(3) *International Journal for Crime, Justice and Social Democracy* 116.

³³ On police as gang experts, see *Myers* [2015] UKPC 40, [2016] A.C. 314.

³⁴ Ilan, 'Digital Street Culture Decoded' (2020) 60(4) *British Journal of Criminology* 994, 1003.

³⁵ JUSTICE, 'Tackling Racial Injustice: Children and the Youth Justice System' (London: JUSTICE, 2021), para. 2.51.

³⁶ T. Ward and S. Fouladvand, 'Bodies of Knowledge and Robes of Expertise: Expert Evidence About Drugs, Gangs and Human Trafficking' [2021] *Crim. L.R.* 442, 449.

³⁷ Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (TSO, 2011), Law Com. No.325, para.1.8.

³⁸ *O* [2010] EWCA Crim 2985.

judge must provide directions on the legal issues in the case,³⁹ there is no requirement that the judge (or anyone else) explain to the jury the culture, artistic conventions or social influences of rap music. This is of concern because of the huge potential for undue prejudice. Jurors may believe that violent or inflammatory lyrics are far stronger evidence of guilt than they actually are, or they may act in an emotional or irrational way by, for example, believing that the defendant is worthy of conviction and punishment, regardless of the strength of the evidence against them. The risk of both reasoning and moral prejudice can arise not only from a lack of understanding of conventions in rap music, but also because the evidence plays into preconceived notions about rappers and, more broadly, Black people as criminals. Its use risks evoking racial prejudice. Several American studies have found bias against rap music, rooted in racial stereotypes.⁴⁰ In Dunbar and Kubrin's 2018 study, for example, participants were 'more likely to assume that a rapper is in a gang, has a criminal record, and is involved in criminal activity than are artists from other music genres, and this is based merely on the genre of the lyrics.'⁴¹ The significance of prejudicial effect for the admission of rap music as evidence is returned to briefly in the conclusion.⁴²

Having outlined the profile of rap cases and some of the issues raised by the way in which rap is used in court, we can turn to the first condition for admission of evidence: its relevance.

Relevance

In *Myers*, a case concerning the admission of gang evidence, the Privy Council explained two basic principles of the law of evidence:

The starting point is that evidence is not admissible unless it is relevant. It is relevant if, but only if, it contributes something to the resolution of one or more of the issues in the case. It may do so either directly or indirectly. The second important proposition is that not all relevant evidence is admissible.⁴³

To contribute something to the resolution of an issue in the case and, therefore, be relevant, evidence must make 'the matter which requires proof more or less probable'.⁴⁴ Thomason warns of the need to distinguish between 'probable' and 'likely'. To be relevant, he argues,

³⁹ See *Rashid* [2019] EWCA Crim 2018.

⁴⁰ See, for example, S. Fischhoff, 'Gansta' Rap and a Murder in Bakersfield' (1999) 29(4) *Journal of Applied Social Psychology* 795; C.B. Fried, 'Who's Afraid of Rap? Differential Reactions to Music Lyrics' (1999) 29(4) *Journal of Applied Social Psychology* 705; A. Dunbar, C.E. Kubrin and N. Scurich, 'The Threatening Nature of "Rap" Music' (2016) 22(3) *Psychology, Public Policy, and Law* 280.

⁴¹ A. Dunbar and C.E. Kubrin, 'Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments' (2018) 14(4) *Journal of Experimental Criminology* 507, 521.

⁴² See also, Owusu-Bempah, 'Prosecuting Rap' *Popular Music* (forthcoming).

⁴³ *Myers* [2015] UKPC 40, [2016] A.C. 314 at [37]-[38].

⁴⁴ *DPP v Kilbourne* [1973] AC 729 at 756.

evidence need not make the existence of a fact more or less 'likely'. Rather, it need only increase (or decrease) the probability of the existence of a fact by *any* amount.⁴⁵

Within the case law, lyrics and videos were most commonly said to be relevant to one or more of the following five matters or issues, often by using rap to link defendants to a gang.

The first issue is state of mind, including intention. In *O*,⁴⁶ the appellant was convicted of possession of a firearm and ammunition with intent to endanger life. He had been arrested in a taxi with a loaded handgun in the footwell of his seat. The prosecution sought to frame the offence within a gang context, asserting that the appellant was a member of a violent gang, despite the particulars of the offence not involving gang violence. 'Various pieces of evidence'⁴⁷ were relied on to help prove gang membership and, in turn, possession of the gun with intent to endanger life. This included a six-month old 'YouTube video' in which the appellant appeared 'rapping with many others and using words which were said to relate to guns and gangs'.⁴⁸ The lyrics included the lines, 'fuck a leg shot aim for his weak top' and 'I told these dumb pricks I ain't playing around, violate my Blue State then their ribs split'. The lyrics did not include any 'specific threat to anyone in particular on any particular occasion'.⁴⁹ The video was held to be admissible under section 101(1)(d) of the CJA 2003 as 'going to a disposition or propensity of the appellant as a gang member to use gun violence for the purposes of endangering life',⁵⁰ and as 'relevant to the important matter in issue of whether the gun ... was in his possession with the intent to endanger life.'⁵¹

The second issue is motive. In *Sode*, the three appellants had been convicted of murder by way of joint enterprise. The prosecution case was that the shooting was a revenge attack committed by members of the Anti-Shower gang against a member of the Shower gang, despite the only direct evidence of the attack involving the Anti-Shower gang being a hearsay statement of questionable reliability.⁵² The appellants denied involvement in the shooting or in any gang. To help establish that the attack was motivated by a gang dispute, the prosecution relied on several items of evidence, including evidence from a police officer of 'tit-for-tat' violence between the two gangs and text messages between two of the appellants in which a video made by the Shower gang was described as 'trash'.⁵³ The prosecution also sought to link one of the appellants to the Anti-Shower gang by way of a two-year-old 'rap video' in which he made 'a gesture supportive of the Anti-Shower Gang and remarks

⁴⁵ M. Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) *E&P* 342, 345. Original emphasis.

⁴⁶ [2010] EWCA Crim 2985.

⁴⁷ *O* [2010] EWCA Crim 2985 at [15].

⁴⁸ *O* [2010] EWCA Crim 2985 at [6].

⁴⁹ *O* [2010] EWCA Crim 2985 at [25].

⁵⁰ *O* [2010] EWCA Crim 2985 at [17].

⁵¹ *O* [2010] EWCA Crim 2985 at [26].

⁵² *Sode* [2017] at [60].

⁵³ *Sode* [2017] EWCA Crim 705 at [18].

consistent with support of the Anti-Shower Gang'.⁵⁴ Notwithstanding the fact that the appellant was just 14-years-old at the time of making the video, the Court of Appeal found that it provided a 'clear and direct link'⁵⁵ between the child and the gang. As such, it was held to be relevant evidence of motive for the killing.

The third and fourth issues are presence and association, including whether presence at the scene of a crime and association with co-defendants was innocent. In *Lewis*,⁵⁶ the seven appellants were convicted of a number of offences, including riot and possession of a firearm with intent to endanger life. The charges arose out of an incident of public disorder during the 2011 riots in Birmingham. The prosecution case was that the appellants had been part of a group of 42 individuals who broke into a pub, set it on fire with petrol bombs, and fired shots at police officers and a police helicopter. In addition to other evidence, including CCTV footage, cell site evidence and DNA linking one of the appellants to a firearm, the prosecution relied on the appearance of five of the appellants in music videos found on YouTube. Some of the videos featured two or more of the appellants together. The videos, which were said by police officers to include references to guns, gangs and/or gang signage, were admitted under section 101(1)(d) of the CJA 2003 as evidence of association with 'a gang or gangs, exhibiting violence or hostility to the police or links with firearms'.⁵⁷ The videos were the 'principal' evidence of gang association,⁵⁸ and were used to help prove the important matters of the appellants' presence in the area of the pub at the time of the violence, that their presence was not innocent, and that they had a common purpose to commit unlawful acts.⁵⁹

Fifth, rap was admitted under section 101(1)(d) as relevant to propensity; to show, for example, a propensity towards violence or using firearms. In some cases, propensity was then used to help prove one or more of the above issues, such as intention in *O*, and presence in *Lewis*.

Whether or not a particular form or item of evidence is relevant to an issue in a case is not always easy to determine and can be open to debate. As explained below, relevance is a relative concept, and decisions can be informed by cultural norms and subjective views. The position taken here is that rap music is rarely relevant evidence of criminal behaviour. This is because it cannot usually be taken at face value: 'Rap music lyrics are neither inherently truthful, accurate, self-referential depictions of events, nor necessarily representative of an individual's mindset.'⁶⁰ Rather, 'Rap music is an art form, told in rhymed verse, that privileges

⁵⁴ *Sode* [2017] EWCA Crim 705 at [18].

⁵⁵ *Sode* [2017] EWCA Crim 705 at [53].

⁵⁶ [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27.

⁵⁷ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [100].

⁵⁸ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [97].

⁵⁹ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [84]-[87].

⁶⁰ Dennis, 'Poetic (In)Justice?' (2007) 31 *Columbia Journal of Law & the Arts* 1, 4.

figurative language and resides in a long tradition of hyperbolic rhetoric.⁶¹ The dark, provocative and exaggerated nature of some rap songs is mirrored in the images of accompanying videos. Consequently, we cannot ordinarily infer that an individual thinks or behaves in a particular way based on their rap lyrics or videos. Moreover, rap is unlike many forms of documentation, such as diary entries or text messages, not only because it is a highly complex genre of music with a rich history in which realistic depictions of crime, criminality and gang involvement are normalised and expected, but also because rap is often created for public consumption. In fact, once it is recorded and shared on social media or YouTube, there can be little doubt that it is intended to entertain and attract attention.

Further, rap cannot be used to establish a 'comparative propensity' to commit crime, either generally or a specific kind of crime.⁶² There is no evidence, empirical or otherwise, to suggest that those who rap about, for example, stabbing or shooting people, are more likely to engage in this conduct than those who do not. Thus, at a basic level, in the absence of any meaningful support for a generalisation that writing or performing rap lyrics about crime (or participating in a video with criminal themes) increases the probability of having committed crime, we cannot, with any degree of confidence, claim that such lyrics (or videos) are relevant evidence of criminal behaviour. In a case like *O*, then, arguably, the 'YouTube video', which included hyperbolic rhetoric about guns, should not have been used to show a propensity as a gang member to use or possess guns with intent to endanger life.

While the position taken here is that rap is rarely probative of criminal tendencies or activity, it is not suggested that rap is never relevant evidence of a crime. However, because some subgenres of rap call for authentic portrayals of criminality, and because there is no evidence that rappers have a comparative propensity to commit crime, something more than commonplace lyrics about gangs, weapons or the kind of offence charged is required. For rap to be probative evidence of guilt, arguably, there needs to be a strong and direct connection between the lyrics or contents of a video and the offence charged. This might occur where the defendant wrote lyrics which refer accurately to the events which make up the subject matter of the charge (with, for example, reference to names, dates and locations), and include information that was not in the public domain, shared in the local community or otherwise easily accessible to the defendant. Here, the lyrics are not relevant because rapping about, for example, guns, gangs or violence shows a propensity for violence. Nor are they necessarily indicative of mindset or motive, depending on the content. Rather, relevance might be founded on the fact that such lyrics demonstrate intimate knowledge of the offence, and someone with such knowledge might be more likely to have been involved in the offence than someone without such knowledge. However, even in this situation, one must remain alert to the risk of misinterpretation, and exclusion of relevant lyrics may be warranted on the basis

⁶¹ Nielson and Dennis, *Rap on Trial* (2019), p.17.

⁶² On previous convictions as evidence of comparative propensity, see M. Redmayne, *Character in the Criminal Trial* (Oxford: Oxford University Press, 2015) ch.2.

of undue prejudice. Also, such lyrics may amount to a confession in so far as they are adverse to the maker of the statement.⁶³ As such, the prosecution could be required to prove that the lyrics were not written or performed as a result of anything said or done which might render them unreliable.⁶⁴ As noted by Ward and Fouladvand, ‘This raises the question of whether drill performers may be egged on, for example by producers or online comments, to provide authentic-sounding accounts of a violent way of life which cannot be relied on as statements of fact.’⁶⁵

Unfortunately, the lyrics are not cited in full in most of the judgments, making it impossible to determine the extent to which the courts scrutinised the lyrics and their connection to the case. Still, it is unlikely that the above-mentioned cases included lyrics which referenced the particulars of the offence charged. In fact, if there was a direct connection between lyrics and offence, one would expect it to be mentioned, as it was in *Ntim*.⁶⁶ In this sentencing case concerning a serious assault, the lyrics are not provided in the judgment, but the Court stated that ‘the drill music lyrics on [the appellant’s] mobile phone contained a chilling description of the events of this offence’.⁶⁷ Their use at sentencing was not challenged.

It could be argued that in cases such as *Sode*, where the offence is said to be gang-related and proof of a contested fact (e.g. motive) is inferred through evidence of gang membership, lyrics and videos which reference a particular gang are relevant because they make membership of that gang more probable. However, even assuming lyrics or videos are interpreted correctly, this is too simplistic a view. As noted above, references to gangs are common in rap, especially drill, and non-gang affiliated young people participate in gang-themed music for a variety of reasons, including for fun, to appear more authentic, boost publicity, or as a ‘nod to’ their local audience.⁶⁸ Further, since identifying with a gang is ‘porous, fluid and often “for show”’,⁶⁹ it is difficult to draw an inference of current affiliation from past indicators of support for a gang. Even if one is not convinced that these considerations defeat relevance, they surely have a substantial impact on probative value, such that a ‘clear and direct link’ between a defendant and a gang is not as easy to establish as the case law suggests. As explained below, factors which affect the probative value of rap were often not scrutinised with rigour.

In cases such as *Lewis*, it could be argued that the videos were relevant in so far as they show an association between people accused of participating in a joint enterprise. However, where

⁶³ Police and Criminal Evidence Act 1984 (PACE) s.82(1).

⁶⁴ PACE 1984 s.76(2).

⁶⁵ Ward and Fouladvand, ‘Bodies of Knowledge and Robes of Expertise’ [2021] *Crim. L.R.* 442, 455.

⁶⁶ [2019] EWCA Crim 311. See also *N* [2019] EWCA Crim 2280, [2020] 4 W.L.R. 64.

⁶⁷ *Ntim* [2019] EWCA Crim 311 at [11].

⁶⁸ J.I. Lerner and C.E. Kubrin, *Rap on Trial: A Legal Guide for Attorneys* (University of California, Irvine, 2021), p.73. See also, Stuart, *Ballad of the Bullet* (2020).

⁶⁹ Amnesty International, *Trapped in the Matrix* (2018) p.9.

association is in issue, it is the appearance of the individuals together in a video (and potentially references made to each other), not the broader contents of the video, that help to prove this fact. In any event, the videos in *Lewis* were admitted for purposes that went beyond establishing association. They were used to suggest that association was by way of a gang that had pro-firearm and anti-police tendencies and, as such, the appellants had been correctly identified as being present at the scene of the offences and were acting with a common purpose.

Overall, in few of the analysed cases could it plausibly be argued that the lyrics or videos were directly connected to or written about the offence charged. In fact, this seemed to be insinuated in only eight cases.⁷⁰ One of the clearest examples of the prosecution seeking to make a direct link between lyrics and the crime at issue is *Saleem*.⁷¹ In *Saleem*, the appellant claimed that his presence at the scene of a serious assault was innocent. The prosecution contended that he was present to photograph the attack. The prosecution relied on images of assault victims found on the appellant's computer (there was no clear evidence they were taken by the appellant), as well as the following lyrics which were downloaded from the internet three months before the attack and modified: 'Im gon make history, 1stly dey gon call me mister an dey gon say I dissed ya, I hav 2 b carfull hu I talk 2 becos ur bird wil be da listner, 2ndly February 24th my birth day im gon make it ur worst day, 3rdly do I have 2 have u layin in emergency 2 have dem stitch ya?'⁷²

The lyrics, which were part of a long document last accessed 10 days before the attack, referred to the date of the attack, which was also the appellant's birthday. The Court held that they were not relevant evidence of a propensity for violence, as they showed an interest in something violent happening on the appellant's birthday, but not a propensity to commit violence. However, the lyrics were held to be admissible under section 101(1)(d) as going to the important matter of whether the defendant's presence at the scene of the attack was innocent. If relevance is to be found here, it is because of the birthday reference. Redmayne notes that: 'While still written in the register of fantasy, it was more open to a sinister interpretation than a self-penned violent lyric might otherwise be.'⁷³ However, unlike the Court, Redmayne argues that the lyrics went to propensity, as 'D was more likely to use violence on his birthday than someone who had not written those words. But without the mention of the birthday—or without the attack taking place on D's birthday—the case for admissibility would have been weak.'⁷⁴

⁷⁰ In three further cases, the content of videos, including use of weapons as props, resulted in prosecution for firearms offences. See *Agostini* [2011] EWCA Crim 301; *M* [2011] EWCA Crim 1371; *Esty* [2020] EWCA Crim 830.

⁷¹ [2007] EWCA Crim 1923.

⁷² *Saleem* [2007] EWCA Crim 1923 at [9].

⁷³ Redmayne, *Character in the Criminal Trial* (2015), p.161.

⁷⁴ Redmayne, *Character in the Criminal Trial* (2015), p.161

Relevance or weight?

Unfortunately, the cases include very limited consideration of the way in which the complexities, artistic conventions and commercial drivers of rap music affect relevance. This is consistent with the approach of American courts which ‘continuously fail to acknowledge that rap music lyrics, like other forms of fictional writing, make use of the same traditional artistic devices such as exaggerated storylines, figurative language, metaphors, and fictional personas or alter egos.’⁷⁵ In cases where the broader context was acknowledged by the Court of Appeal, it was not found to defeat relevance.

Soloman,⁷⁶ for example, concerned convictions for possession of a firearm and ammunition with intent to endanger life. The prosecution case was that the appellant had supplied another man with a gun and ammunition, knowing it would be used for criminal purposes and an intent to endanger life. The evidence against the appellant included, *inter alia*, police surveillance of the incident, the appellant’s fingerprints on the bag which contained the gun, and the title line of a rap song, created in his phone two days before the incident. The lyric, ‘sold guns to str8 killers’, was admitted under section 98 of the CJA 2003 as being ‘to do with’ the alleged facts of the case on the basis that it was ‘capable of showing what was on the appellant’s mind at the relevant time and as referring to the activity in which he was allegedly engaged’.⁷⁷ It is worth noting that the lyric was written in the past-tense and before the incident such that, even if it could be taken literally, it referenced past, not present or future events or mindset. Regardless, as argued above, this kind of non-specific and common-place boast in a rap song should not be treated as a statement of fact. The Court recognised that ‘the lyrics of songs that people choose to record on their phones will often or perhaps typically have no connection to the factual reality of their own lives.’⁷⁸ The Court also criticised the trial judge for not directing the jury as to ‘the limitations of the relevance of the lyric’.⁷⁹ Yet, the Court did not take issue with its admission, finding that it would be ‘reasonably apparent to the jury that lyrics of a song do not necessarily or perhaps commonly bear a connection with actual real life events.’⁸⁰ Empirical research indicates that the fictional nature of rap lyrics may not be as ‘reasonably apparent’ to jurors as the Court suggests, with study participants associating rap with criminality.⁸¹ In any event, it is difficult to reconcile the acknowledgment that, typically, lyrics are not statements of fact with the decision that the lyric was relevant to the appellant’s actions and state of mind.

⁷⁵ E. Shumejda, ‘The Use of Rap Music Lyrics as Criminal Evidence’ (2014) 25(3) *Entertainment, Arts and Sports Law Journal* 29, 34.

⁷⁶ [2019] EWCA Crim 1356.

⁷⁷ *Soloman* [2019] EWCA Crim 1356 at [12].

⁷⁸ *Soloman* [2019] EWCA Crim 1356 at [12].

⁷⁹ *Soloman* [2019] EWCA Crim 1356 at [14].

⁸⁰ *Soloman* [2019] EWCA Crim 1356 at [15].

⁸¹ See, for example, Fischhoff, ‘Gansta’ Rap and a Murder in Bakersfield’ (1999) 29(4) *Journal of Applied Social Psychology* 795; Fried, ‘Who’s Afraid of Rap?’ (1999) 29(4) *Journal of Applied Social Psychology* 705; Dunbar, Kubrin and Scurich, ‘The Threatening Nature of “Rap” Music’ (2016) 22(3) *Psychology, Public Policy, and Law* 280; Dunbar and Kubrin, ‘Imagining Violent Criminals’ (2018) 14(4) *Journal of Experimental Criminology* 507.

The Court seems to have taken the perspective that the conventions of rap affect how much probative value it has as evidence, rather than its relevance.⁸² Thus, relevance is found by taking lyrics at face value and jurors are left to determine weight. This is a dangerous approach. Not only do the conventions of the genre go to relevance, they can also make it impossible to distinguish fact from fiction. This means that, even where lyrics may have probative value, their reliability as statements of fact (and as statements of fact which can be attributed to the behaviour or character of the defendant) often cannot be properly tested or assessed.

It is also concerning that the case law demonstrates little scrutiny of various factors surrounding the creation of lyrics and videos that may defeat relevance or, if not, substantially reduce probative value. As the above quote from *Myers* explains, not all relevant evidence is admissible. Relevant evidence may be excluded where it is not sufficiently probative, is unduly prejudicial, or is not worth the time that would be devoted to hearing it.⁸³ The CJA 2003, for example, requires that bad character evidence not be admitted through gateway d if admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.⁸⁴ In making this determination, particular attention should be given to the age of the evidence; the older the evidence of previous misconduct, the more likely admission will adversely affect the fairness of the proceedings. Also, the less likely it will indicate a propensity towards certain behaviour or be indicative of mindset.⁸⁵ Yet, many of the cases lack basic information about when lyrics or videos were created or performed (whether, and how long, before or after the offence). When mentioned, the age of the material appeared to be of little concern. In *Sode*, for example, the fact that the 'rap video' was created two years before the offence, when the appellant was 14-years-old, was said not to 'reduce its impact or diminish its relevance',⁸⁶ with no explanation as to why. Likewise, in *O*, the rap video having been created six months before the appellant's arrest was said not make it too remote to be relevant in respect of the firearms offences,⁸⁷ again, with no explanation as to why.

As well as taking a relaxed approach to the age of the material, the cases tend to lack information about whether lyrics were written or performed by the appellant(s), and the extent of the appellants' role in music videos. While the cases do indicate that the role of the accused in music videos affects the relevance and probative value of the evidence, the level of participation required before lyrics or conduct in videos can be attributed to the lived

⁸² See also, *O* [2010] EWCA Crim 2985; *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27.

⁸³ Thomason, 'Previous Sexual History Evidence' (2018) *International Journal of Evidence and Proof* 342, 345.

⁸⁴ CJA 2003 s.101(3).

⁸⁵ CJA 2003 s.101(4) and s.103(3); *Hanson* [2005] EWCA Crim 824, [2005] 1 W.L.R. 3169 at [11]. See also Redmayne, *Character in the Criminal Trial* (2015), ch.2.

⁸⁶ *Sode* [2017] EWCA Crim 705 at [53].

⁸⁷ *O* [2010] EWCA Crim 2985 at [25].

experience or mindset of an accused person is far from clear. In *Alimi*,⁸⁸ the one successful challenge to use of rap against a defendant, it was held that the lyrics contained in two videos should not have been admitted as evidence of the appellant's involvement in gangs because he had been an 'extra', appearing in the background of the videos. Here, mere presence in a video was not enough. In the earlier case of *Lewis*, the trial judge took the view that:

For the video material to be relevant evidence as to gang membership, there must be something more than an appearance on a video. That may be what the person does or says on the video. It may be appearances on more than one video. It may be an appearance on a video coupled with other evidence linking the defendant to a gang or gangs.⁸⁹

Without criticising the trial judge's approach, the Court of Appeal in *Lewis* clarified that appearance on one video could, 'in appropriate circumstances, show gang membership or association.'⁹⁰ The precise nature of each of the appellant's participation in each of the videos at issue in *Lewis* is not clear from the judgment.⁹¹ It ranged from 'active'⁹² participation (including rapping) in videos said to contain gang-specific lyrics, to displaying a sign said to be associated with a gang in a video that did not include gang-specific lyrics,⁹³ to appearance in videos said to feature or promote a gang.⁹⁴ In respect of one of the appellants, Lewis, there was evidence of him:

participating in a video called "*Gangbusters R Us*" together with Francis [a co-accused]. Although his role was less prominent, Lewis did spend much of the video in close proximity to Francis. At one point in the lyric there was a reference to a ".44" and to "*Phantom*" (*i.e.* Lewis by his street name). Lewis is seen at this point on the video mimicking a shooting action.⁹⁵

While the case law suggests that presence without more is not enough to link a defendant to the contents of a video (or to a gang), it seems that the defendant need only play a minor or supporting role for the evidence to be deemed relevant. Thus, the position in the case law is that a defendant, despite not having written or even performed violent lyrics, can be taken to have endorsed violence through participation in a video, and that endorsement becomes evidence of guilt.⁹⁶ This is consistent with the fact that, even when dealing with offences

⁸⁸ [2014] EWCA Crim 2412. Note, the Court had 'no doubt that the evidence of the rap lyrics was properly admitted as against' Alimi's two co-defendants who were rapping in the videos (at [22]).

⁸⁹ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [98].

⁹⁰ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [99].

⁹¹ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [103]-[125].

⁹² *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [124].

⁹³ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [32].

⁹⁴ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [32]-[35].

⁹⁵ *Lewis* [2014] EWCA Crim 48, [2014] 2 Cr. App. R. (S.) 27 at [34].

⁹⁶ See also Nielson and Dennis, *Rap on Trial* (2019), p.80.

against the person, lyrics need not mention the victim, the mode of offending, or animosity towards anyone in particular in order to be deemed probative of guilt.⁹⁷ Overall then, not only is an inappropriate approach taken to determining the relevance of rap in many cases, but there is also a troubling lack of consideration for how factors surrounding the creation of rap affect its probative value.

Awoyemi

One of the cases which best illustrates the ease with which relevance has been found in respect of rap is *Awoyemi*.⁹⁸ In this case, three appellants, Thomas, Toto and Awoyemi, appealed against their convictions for various offences, including possession of a firearm with intent to endanger life and attempted murder. The prosecution presented its case on the basis that the appellants were members of the 'DAG gang' and had participated in a gang-related shooting. More specifically, it was contended that they had driven to the territory of a rival gang, the 'Beckton Boys', where they attempted to kill one of its members by shooting a gun through the front door of a house, injuring, but not killing, the wrong person. The prosecution further contended that, having shot through the wrong door, Toto, Awoyemi and another man returned two weeks later to 'finish the job', but were intercepted by the police.

The appellants, who denied being in a gang, challenged the admissibility of evidence of gang affiliation, including 'Handwritten RAP Lyrics found in Thomas' bedroom relating to violence, drugs, guns, using guns to get drugs and the DAG gang.'⁹⁹ Also at issue was 'Part of a "You Tube" video said to feature Thomas and Toto and other DAG members.'¹⁰⁰ In the video, Thomas and Toto were said to have made 'threatening gestures with their fingers to indicate guns' and rapped about shooting and using violence, including the line, 'don't fuck with my family. Why? Cos I'll be eager to let slug fly'.¹⁰¹ The video also contained references to someone getting 'yacked' or 'bodied', as well as references to the DAG gang.¹⁰²

It is worth noting that, while Thomas accepted that the lyrics were found in his bedroom, there was no evidence that he authored them. Both Thomas and Toto denied that they were in the YouTube video and Thomas relied on a facial mapping expert who questioned the identification of Thomas. The jury was, therefore, not only invited to infer from the evidence membership of a gang, familiarity with firearms, and willingness to engage in violence, but also that the material was created or performed by the appellants. However, the main issue with this case is not whether we can (or should) use the lyrics and videos to link the appellants to a gang or violence. Rather, the issue is whether (and how) the lyrics and video could be

⁹⁷ The same is true of American case law. Nielson and Dennis, *Rap on Trial* (2019).

⁹⁸ [2016] EWCA Crim 668, [2016] 4 W.L.R. 114.

⁹⁹ *Awoyemi* [2016] EWCA Crim 668, [2016] 4 W.L.R. 114 at [9].

¹⁰⁰ *Awoyemi* [2016] EWCA Crim 668, [2016] 4 W.L.R. 114 at [9].

¹⁰¹ *Awoyemi* [2016] EWCA Crim 668, [2016] 4 W.L.R. 114 at [9].

¹⁰² *Awoyemi* [2016] EWCA Crim 668, [2016] 4 W.L.R. 114 at [9].

relevant to the offences at issue in the absence of evidence to substantiate the prosecution's gang crime narrative.

The prosecution had been unable to establish with any certainty the identity of the intended victim, and there was no evidence of a feud or hostility between the DAG gang and the Beckton Boys gang. Without clear evidence that the crime was gang related, or involved these particular gangs, it is difficult to see how the evidence operated to link the accused to the crime that was presented by the prosecution.¹⁰³ Thus, it was argued on appeal that there was 'no proven gang related background to the shooting so as to make the evidence relevant and probative.'¹⁰⁴

Seemingly unconcerned about the lack of evidence to support the gang narrative, the Court of Appeal was 'entirely satisfied the evidence of gang affiliation was relevant and admissible on the facts of this case.'¹⁰⁵ According to the Court:

The shooting, and the return visit to finish the job, bore all the hallmarks of gang-related violence. On the first occasion two cars travelled in convoy to an address considered home territory by another gang. Someone fired through a door, reckless as to who might be the other side, no doubt in an attempt both to kill and to terrify. On the second occasion, one of the same cars with three occupants equipped with balaclavas, a bandana and a loaded shotgun (the same gun available for use by members of a gang) headed towards the same scene. ...

... [T]he gang affiliation evidence provided a link between them and a gang that gloried in violence and the use of firearms, mourned murdered friends and threatened violent retribution for those who crossed them. The Crown could thereby establish a possible motive for the shooting, an association with firearms and lethal violence and could negative innocent presence and association. The evidence was prejudicial but inevitably so and not unduly so. It went far beyond simple membership of a gang, the love of RAP music, hyperbole or appearance on a video. It indicated the extent to which the individuals concerned had signed up to gang and gun culture.¹⁰⁶

This amounts to little more than the Court saying 'the offence was a gang crime because we say so', and that was sufficient to justify the admission of rap to link the appellants to a gang, helping the prosecution to advance a gang narrative. As McKeown noted in his commentary on the case:

¹⁰³ P. McKeown, 'Evidence: R v Awoyemi' [2017] *Crim LR* 131, 135.

¹⁰⁴ *Awoyemi* [2016] EWCA Crim 668, [2016] 4 W.L.R. 114 at [31].

¹⁰⁵ *Awoyemi* [2016] EWCA Crim 668, [2016] 4 W.L.R. 114 at [32].

¹⁰⁶ *Awoyemi* [2016] EWCA Crim 668, [2016] 4 W.L.R. 114 at [32]-[33]

[W]hile the totality of the evidence may well have pointed in the direction of a gang crime, two cars travelling together (described as "a convoy") into the territory of another gang, where there is no evidence of hostility between the gangs, is not itself distinctive of gang crime, nor is discharging a shotgun through a door and being reckless as to who might be on the other side.¹⁰⁷

There are numerous situations in which a gun could be recklessly discharged through a closed door, including during an aggravated burglary or by a violent ex-partner.¹⁰⁸

The Court did not mention concerns raised in an earlier judgment granting the application for leave to appeal, where Lord Justice Lloyd Jones recognised that:

[T]here may have been a failure here to identify the precise purpose for which such evidence was to be admitted ... In our view, it is arguable that such evidence could only become relevant for the purpose for which it seems to have been admitted if hostility between the two gangs was demonstrated.¹⁰⁹

The *Awoyemi* judgment not only demonstrates a lack of scrutiny as to the connection between rap, gangs and the offence at issue, but it is also problematic in so far as the Court appeared to adopt a literal interpretation of the lyrics, suggesting that rap lyrics can in themselves be indicative of the extent to which someone has signed up to 'gang and gun culture', whatever that may mean. Notwithstanding the fact that the lyrics are not set out in full in the judgment, this statement, and the suggestion that rap music can go 'far beyond' hyperbole, reveals a lack of understanding of rap. Some rap subgenres, such as drill and horrorcore, include lyrics which are extremely and intentionally provocative and graphic. The extent to which someone has signed up to gang or gun culture is precisely the kind of thing that we cannot easily deduce from rap lyrics.

Relevance is relative

The discussion so far prompts a question: Why do (at least some) judges believe that generic or common-place rap lyrics which lack specificity as to the offence charged and, sometimes, were created months or even years before the offence, help to prove guilt? One explanation is that relevance is not a neutral evidential rule or principle. Determinations of relevance are informed by one's own world view, beliefs and experiences,¹¹⁰ as well as stereotypes. This has been recognised in the context of sexual history evidence. For example, in the Canadian case of *Seaboyer*, Justice L'Heureux-Dubé opined that relevance:

¹⁰⁷ McKeown, 'Evidence: R v Awoyemi' [2017] *Crim LR* 131, 136.

¹⁰⁸ McKeown, 'Evidence: R v Awoyemi' [2017] *Crim LR* 131, 136.

¹⁰⁹ *Awoyemi* [2015] EWCA Crim 590 at [51].

¹¹⁰ See generally, J. Simon-Kerr, 'Relevance Through a Feminist Lens' in C. Dahlman, A. Stein and G. Tuzet (eds.), *Philosophical Foundations of Evidence Law* (forthcoming).

[l]s a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilization of stereotype in determinations of relevance and again, as was demonstrated earlier, this appears to be the unfortunate concomitant of a society which, to a large measure, holds these beliefs.¹¹¹

It is possible that a belief that rap can be taken literally and/or that jurors can readily distinguish between fact and fiction in rap music is informed by stereotypes pertaining to Black urban youth culture. Despite the fictional or exaggerated nature of much of rap, the genre has long been associated with criminality.¹¹² This may be partly attributable to the appearance of authenticity which many rappers strive to achieve, with success often being contingent on fitting a mold that is marketable to the buying audience.¹¹³ Above and beyond this, however, the notion that rappers are criminals reflects long standing stereotypes about Black people (particularly Black boys and men) as criminals, as noted above. These stereotypes are reinforced and reproduced through the persistent over-policing of Black people and the over-representation of Black people, especially Black children, as suspects, defendants and prisoners,¹¹⁴ alongside negative representations of Black people in the media,¹¹⁵ and the way in which rap has been linked to crime by the establishment, including the mainstream press.¹¹⁶

¹¹¹ *Seaboyer* [1991] 2 S.C.R. 577 at p.679. See also *CH v HMA* [2020] H CJAC 43 at [112].

¹¹² See, for example, Fischhoff, 'Gansta' Rap and a Murder in Bakersfield' (1999) 29(4) *Journal of Applied Social Psychology* 795; Fried, 'Who's Afraid of Rap?' (1999) 29(4) *Journal of Applied Social Psychology* 705; Dunbar, Kubrin and Scurich, 'The Threatening Nature of "Rap" Music' (2016) 22(3) *Psychology, Public Policy, and Law* 280; Dunbar and Kubrin, 'Imagining Violent Criminals' (2018) 14(4) *Journal of Experimental Criminology* 507. See also, Fatsis, 'Policing the Beats' (2019) 67(6) *The Sociological Review* 1300.

¹¹³ Dennis, 'Poetic (In)Justice?' (2007) 31 *Columbia Journal of Law & the Arts* 1, 15-19.

¹¹⁴ Institute of Race Relations, *Policing Against Black People* (London: Institute of Race Relations, 1987); D. Lammy, *The Lammy Review* (Ministry of Justice, 2017); House of Commons and House of Lords Joint Committee on Human Rights, *Black People, Racism and Human Rights* (Eleventh Report of Session 2019-21) (HC 559) 11 November 2020; JUSTICE, 'Tackling Racial Injustice' (2021).

¹¹⁵ S. Cushion, K. Moore and J. Jewell, *Media Representations of Black Young Men and Boys* (London: Crown, 2011); S. Turnnidge, 'The Met Police Are More Likely To Publish Your Mugshot If You're Black' (*HuffPost*, 11 March 2021) https://www.huffingtonpost.co.uk/entry/metropolitan-police_uk_603fa18ec5b617a7e411ffc5 [Accessed 20 September 2021].

¹¹⁶ See generally, Hancox, *Inner City Pressure* (2018), ch.6. The first drill song to reach number one in the UK Official Charts was described in a Daily Mail headline as the 'soundtrack to murder'. See S. Boyle, 'Soundtrack to Murder: For the First Time, a Gangland 'Drill' Track is at Number One - Spreading a Message of Hatred and Violent Revenge Being Echoed in Playgrounds Across the Country. So Why IS the BBC Promoting it?' (*Daily Mail*, 16 May 2021) <https://www.dailymail.co.uk/news/article-9585461/Soundtrack-murder-time-gangland-drill-track-Number-One.html> [Accessed 20 September 2021].

Even if determinations of the relevance of rap are not (consciously) based on stereotypes, it is significant that the judiciary is comprised predominantly of middle and upper-class white men and (to a lesser extent) women over the age of 50.¹¹⁷ Thus, the world view, beliefs and experiences informing determinations of the relevance of rap are those of middle aged and elderly privileged white people. It comes as no surprise that a perspective so far removed from the origins, environment and culture of rap would ascribe to it more probative value than it warrants or be over-confident in a jury's ability to assess the evidence.

Viewing the relevance of rap music through the lens of the judiciary, aided by the lens of predominantly white police officers and prosecutors,¹¹⁸ arguably amounts to a form of what Gonzales Rose terms, 'racialized epistemic injustice'.¹¹⁹ A lack of knowledge of, or immersion in, rap culture, coupled with a readiness to ignore, deny or diminish the significance of rap culture and conventions, means that, in many cases, an appropriate conceptual framework is not being used to assess relevance or make sense of rap. The rightful knowers (in this case, the young Black people who are immersed in rap culture) are effectively silenced and disbelieved while the less knowledgeable (in this case, police officers and prosecutors, as well as judges themselves) are given more credibility and credence in their belief (including that rap can be taken literally) than they are legitimately entitled to. To mount a successful challenge against the use of rap evidence and provide the court with an explanation of the rap genre and culture, some defence lawyer have turned to expert witnesses. While anecdotal evidence suggests that this can be effective, it is not a guarantee that the judge will be persuaded to exclude the evidence and, in any event, it appears to be relatively rare for the defence to offer expert opinion on the irrelevance of rap.

Towards a more rigorous approach

While this article has been critical of the ease with which the Court of Appeal has found rap to be relevant, there are cases in which the irrelevance of rap lyrics has been acknowledged. As noted above, in *Alimi*, the Court held that the appellant's presence as an extra in two music videos did not show association with a gang. In *Ali*,¹²⁰ a sentencing case following a guilty plea to possession of a shotgun without a certificate, the sentencing judge attached 'little weight' to the appellant's 'activities as a rapper, singing songs in which reference is made to using firearms'.¹²¹ The Court of Appeal took the view that 'The appellant's activities as a rapper

¹¹⁷ Judicial Office, *Judicial Diversity Statistics 2020* (Judicial Office, 2020).

¹¹⁸ At the end of March 2020, 92.7% of police officers in England and Wales were white and just 1.3% were Black. See Home Office, *Police Workforce, England and Wales* (March 2020). Approximately 78% of barristers, and 86% of QCs, are white. See Bar Standards Board, *Diversity at the Bar* (London: BSB, 2021).

¹¹⁹ J.B. Gonzales Rose, 'Race, Evidence, and Epistemic Injustice' in C. Dahlman, A. Stein and G. Tuzet (eds.), *Philosophical Foundations of Evidence Law* (forthcoming). See also M. Fricker, *Epistemic Injustice: Power and Ethics of Knowing* (Oxford: Oxford University Press, 2007).

¹²⁰ [2019] EWCA Crim 968.

¹²¹ *Ali* [2019] EWCA Crim 968 at [9].

were not relevant in this context.¹²² Nonetheless, the case law demonstrates a relaxed approach to assessing the relevance of rap. In the analysed judgments, the Court of Appeal tended to agree that rap was relevant for the purposes advanced by the prosecution or articulated by the trial judge, with little scrutiny of counterarguments, and with insufficient consideration given to the broader context in which rap is created. Also, where rap is deemed to be relevant, the bad character provisions in the CJA 2003 do not appear to be a sufficient or suitable means of regulating its admission. The case law indicates that the provisions do little, if anything, to ensure proper scrutiny and, as argued above, the categorisation of rap as ‘bad character evidence’ is often inappropriate. If rap music is to be admissible as evidence in court, it is imperative that a more rigorous and informed approach is taken.

This article falls short of proposing a specific test of relevance or admissibility for rap, and acknowledges the difficulty of formulating a meaningful test that sets fair and appropriate boundaries. Rather, the more modest aim of the article is to provide information, context and critical analysis of the current approach. Still, it is useful to consider what a more rigorous approach to rap might consist of. At a minimum, decisions on relevance should take account of, *inter alia*: the extent to which lyrics and videos conform to the conventions of rap; who wrote the lyrics or what role the defendant played in music videos; the age of the material and whether it was created before or after the offence; the specificity of the lyrics, including accurate and reliable reference to the facts of the offence at issue; whether they contain information about the offence which is not readily accessible; and, also, if the prosecution seek to rely on only certain lyrics from a song or parts of a video, how this fits into the broader context of the song or video (as well as the defendant’s wider body of work) and whether it has been cherry-picked to fit a certain narrative.¹²³

All of this will likely need to be considered with the assistance of an expert on rap music and culture, and it should be informed by an ‘insiders’ perspective’. Or, as Dennis argued in her 2007 article, admissibility of defendant-authored lyrics should be evaluated from the perspective of the lyricist. Dennis suggested that judges should apply one or all of the below viewpoints:

- (1) begin analysis from the point-of-view that rap music lyrics are metaphorical rather than literal;
- (2) begin analysis from the point-of-view that rap music lyrics are fictional, abstract, and entertaining representations of life rather than truthful or accurate;
- (3) begin analysis from the point-of-view that the information revealed or events depicted in rap music lyrics are not self-referential.¹²⁴

¹²² *Ali* [2019] EWCA Crim 968 at [15].

¹²³ See further, Dennis, ‘Poetic (In)Justice?’ (2007) 31 *Columbia Journal of Law & the Arts* 1, 33; Lerner and Kubrin, *Rap on Trial: A Legal Guide for Attorneys* (2021), p.39.

¹²⁴ Dennis, ‘Poetic (In)Justice?’ (2007) 31 *Columbia Journal of Law & the Arts* 1, 33.

Further, prosecutors should be ‘obliged to expressly articulate a theory of relevance and proffer supporting information to overcome one of these analytical perspectives.’¹²⁵ Adopting this suggestion, and taking into account the factors outlined above, might not only assist in achieving fairer and more thorough assessments of the relevance of rap, but could also help to address the epistemic injustice that arises from too readily accepting literal interpretations of lyrics from police and prosecutors.

Even if one disagrees that rap is rarely relevant evidence of a crime, it is instructive to again recall that not all relevant evidence is admissible. In particular, prosecution evidence should be excluded where admission would have such an adverse effect on the fairness of the proceedings that it ought not be admitted.¹²⁶ The potential for undue prejudice was noted at the beginning of this article. It arises from a lack of understanding or appreciation of the conventions of rap. But the potential for undue prejudice must also be considered in the light of the over-criminalisation of Black people, racist stereotypes that continue to exist in society disproportionately linking Black people to crime, and research that shows a tendency to associate rappers with criminality. Prosecutors should not be permitted to use rap music as a means of amplifying or utilising stereotypes, even where those stereotypes are themselves exploited in the music for entertainment value or commercial gain. The potential chilling effect of ‘prosecuting rap’ should also be taken into account when considering the admissibility of rap in criminal proceedings. Using rap as evidence of criminal behaviour, alongside gang injunctions and Criminal Behaviour Orders which have been used to regulate the activities, performances and/or lyrics of (particularly drill) rappers,¹²⁷ combine to stifle the creativity and opportunities of young, often socially marginalised, individuals. It arguably amounts to ‘demonising a predominately Black-led genre of music’,¹²⁸ sending ‘a message to Black boys and young men that their cultural activities will be policed and prosecuted’.¹²⁹

These broader considerations may warrant implementing an exclusionary rule. This could be akin to exclusionary rules regulating the admission of other types of controversial evidence where decision-making may be informed by stereotypes, and where significant interests are at stake, namely sexual history evidence.¹³⁰ Consideration would need to be given to the practicality of such a rule, including the need for exceptions, the potential for disagreement

¹²⁵ Dennis, ‘Poetic (In)Justice?’ (2007) 31 *Columbia Journal of Law & the Arts* 1, 33.

¹²⁶ PACE 1984 s.78.

¹²⁷ See, for example, E. Papamichael, ‘Criminal Behaviour Order (CBO) Preventing People Making “Drill” Music’ 11 June 2018 <https://www.hja.net/criminal-behaviour-order-cbo-preventing-people-making-drill-music/> [Accessed 20 September 2021]; I. Cobain, ‘London Drill Rap Group Banned from Making Music due to Threat of Violence’ (*The Guardian*, 15 June 2018) <https://www.theguardian.com/uk-news/2018/jun/15/london-drill-rap-gang-banned-from-making-music-due-to-threat-of-violence> [Accessed 20 September 2021]; E. Clowes, ‘For British Drill Stars, the Police and Listening Closely’ (*The New York Times*, 11 January 2021) <https://www.nytimes.com/2021/01/11/arts/music/digga-d-drill-music.html> [Accessed 20 September 2021].

¹²⁸ JUSTICE, ‘Tackling Racial Injustice’ (2021), para. 2.50.

¹²⁹ JUSTICE, ‘Tackling Racial Injustice’ (2021), para. 2.52.

¹³⁰ Youth Justice and Criminal Evidence Act 1999 s.41.

as to whether something should be classified as ‘rap’,¹³¹ and whether there is a need for such a rule to extend beyond rap, to other genres of music or artistic performances.

In the US, where there is a longer and larger history of putting ‘rap on trial’, Nielson and Dennis have proposed ‘rap shield rules’,¹³² completely banning the use of rap lyrics, videos, or promotional material as evidence in criminal proceedings. Interestingly, the authors do not agree on whether there are sufficient legal justifications for broadly curtailing rap as evidence in criminal cases (and doubt the political viability of the proposal), but offer the proposal because they do not believe that the criminal justice system has the tools or willingness to set reasonable boundaries:

As a group, judges haven’t shown themselves capable of applying the rules of evidence thoughtfully when it comes to rap music. They’ve been unwilling to educate themselves on the nuance and sophistication in hip hop, even as it has become the most influential musical genre of the last half century. And they’ve deferred to the “expertise” of law enforcement professionals with absolutely no expertise. We don’t trust the gatekeeping they provide, and we certainly don’t expect prosecutors to limit themselves. So until our justice system is better equipped to handle evidence that is biased and stereotypical, one option is to keep it out altogether.¹³³

In England and Wales, the criminal justice response to rap is a developing field of study,¹³⁴ and it remains to be seen how responsive judges and prosecutors will be to research on the matter. In the meantime, where rap is presented as evidence, it seems imperative that, at the very least, the factfinder is informed about the conventions of rap music and what drives or influences its contents. This information should come from a suitably qualified expert, namely rappers, industry insiders, and scholars of rap music and culture.

¹³¹ Dennis, ‘Poetic (In)Justice?’ (2007) 31 *Columbia Journal of Law & the Arts* 1, 31.

¹³² Nielson and Dennis, *Rap on Trial* (2019), p.157.

¹³³ Nielson and Dennis, *Rap on Trial* (2019), p.157.

¹³⁴ See, for example, Quinn, ‘Lost in Translation? Rap Music and Racial Bias in the Courtroom’ (*Policy@Manchester Blogs*, 4 October 2018); Fatsis, ‘Policing the Beats’ (2019) 67(6) *Sociological Review* 1300; Ilan, ‘Digital Street Culture Decoded’ (2020) 60(4) *British Journal of Criminology* 994; A. Owusu-Bempah, ‘Part of Art or Part of Life: Rap Lyrics in Criminal Trials’ (*LSE British Politics and Policy Blog*, 27 August 2020) <https://blogs.lse.ac.uk/politicsandpolicy/rap-lyrics-in-criminal-trials/> [Accessed 20 September 2021]; JUSTICE, ‘Tackling Racial Injustice’ (2021), paras 2.50-2.54; Ward and Fouladvand, ‘Bodies of Knowledge and Robes of Expertise’ [2021] *Crim. L.R.* 442. There has also been growing media interest in the use of rap in court. See, for example, K. Rymajdo, ‘Prosecuting Rap: How a UK Legal Project is Fighting the Use of Rap Lyrics in Court’ (*DJ Mag*, 8 December 2020) <https://dimag.com/longreads/prosecuting-rap-how-uk-legal-project-fighting-use-rap-lyrics-court> [Accessed 20 September 2021]; S. Swann, ‘Drill and Rap Music on Trial’ (*BBC News*, 13 January 2021) <https://www.bbc.co.uk/news/uk-55617706> [Accessed 20 September 2021]; C. Baksi, ‘Coming to the Defence of Drill Music’ (*The Times*, 11 March 2021) <https://www.thetimes.co.uk/article/coming-to-the-defence-of-drill-music-9jg06qgccc> [Accessed 20 September 2021].