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What's Said in the Booth Never Stays in the Booth: A Comparative Analysis of the Use of Rap Lyrics in American and English Criminal Trials

Yekaterina Shrayber
LMU Loyola Law School

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What’s Said in the Booth Never Stays in the Booth: A Comparative Analysis of the Use of Rap Lyrics in American and English Criminal Trials

YEKATERINA SHRAYBER*

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* Спасибо моей маме! (“Thank you to my mom!”)

I. INTRODUCTION

*"I never killed anybody But I got somethin' to do with that body."*¹

*"Hey, this that slime sh-t, hey YSL sh-t, hey Killin' 12 sh-t, hey F-ck a jail sh-t, hey."*²

When Atlanta prosecutors indicted Jeffrey Lamar Williams (also known as the famed Atlanta rapper Young Thug) on gang activity charges and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, they heavily cited his music.³ Prosecutors claimed Young Thug founded Young Slime Life and conspired with his alleged fellow associates to engage in a pattern of racketeering activity. Further charges include that he rented a car used in the commission of a murder, possession of a machine gun, and possession of a firearm during the commission of a felony, in addition to various drug charges. To prove this large-scale criminal operation, prosecutors turned to Thug's music.⁴

*"Don't f-ck with my family. Why? Cos I'll be eager to let slugs fly."*⁵

In the United Kingdom, when prosecutors for the Crown needed to bolster their case for an attempted murder case, they too turned to rap lyrics. In *Regina v. Awoyemina*, the prosecution introduced evidence of gang association to establish motive and a connection to firearms to convict defendants of attempted murder.⁶ However, there was limited support for the assumption that the offenses were gang-related.⁷ The intended victim's identity was unknown, and there was no indication of a rivalry between the gangs the prosecution alleged to be involved.⁸ Without a clear connection between the crimes and the gangs, the prosecution turned to handwritten rap lyrics in one of the defendant's rooms to bolster their thin narrative.⁹

Since the birth of the genre, hip-hop has transformed into a means of expression to discuss, expose, and assess what it means to be Black

1. Young Thug, *Anybody* (Young Slime Life, 300 Entertainment & Atlantic Recording 2018).

2. Young Thug, *Slime Shit* (300 Entertainment & Atlantic Recording 2016).

3. Bill Donahue, *Young Thug's Indictment Quotes His Own Lyrics. Here's Why That's Controversial*, *Billboard* (May 10, 2022), <https://www.billboard.com/business/legal/young-thug-indictment-quotes-lyrics-controversial-1235069258/>.

4. Indictment, *Georgia v. Jeffrey Williams AKA "Young Thug," AKA "Slime,"* No. 22SC182273 (2022).

5. *Awoyemi & Ors v. Regina* (2016) 4 WLR 114 (E.W. Ct. App.).

6. *Regina*, 4 WLR at 10.

7. *Id.* at 9.

8. *Id.*

9. *Id.* at 4.

and specifically to bring to light the inequalities of the criminal justice system. Hip-hop and rap allow people to tell their stories, but what happens when those stories are used against them, as in Young Thug's and Awoyemi's cases? Using rap lyrics as evidence raises various issues, including questionable practices under the relevant rules of evidence, and poses chilling consequences on stifling expression and speech, which shall be discussed herein.

Additionally, the use of rap lyrics as evidence in court cannot be separated from the issue of discrimination. Rap is a genre created and predominantly written by Black people to bring awareness to the Black experience. When rap lyrics are used to impose criminal consequences, it disproportionately affects Black people and perpetuates a discriminatory outcome. Rap lyrics have been increasingly used to continue overpolicing and overpunishing Black communities without working safeguards. In 2018, the American Civil Liberties Union in New Jersey found that in the 18 cases that considered the admissibility of rap lyrics as evidence, the lyrics were allowed nearly 80% of the time.¹⁰

Research shows that there is a significant risk of unfair prejudice when rap lyrics are introduced as evidence in a criminal case.¹¹ In a criminal trial, prosecutors tend to use rap lyrics in multiple ways: (1) using lyrics as confessions, (2) using the lyrics to show intent to commit the alleged crime, and (3) portraying that the lyrics themselves are a criminal threat.¹² While some assert rap is “the most widely disseminated poetry in the history of the world,”¹³ it is in danger of being muffled. It is worrisome that the use of rap lyrics as evidence in court can have a chilling effect on the creativity of rap artists. The legal system risks suppressing artistic expression and narrowing the boundaries of what is acceptable in this creative expression by imposing criminal consequences for the stories told through rap.

This issue is not unique to the United States, as exemplified earlier. In recent years, UK drill music, a subgenre of rap music, has been used in an increasing number of cases to show a defendant's bad character.¹⁴

10. Brief of *Amicus Curiae* American Civil Liberties Union of New Jersey in Support of Defendant-Respondent, *State v. Skinner*, 218 N.J. 496 (2014) (No. A-57/58-12 (071764)).

11. Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795 (2006).

12. Briana Lavon Carter, Comment, *Lyrics for Lockups: Using Rap Lyrics to Prosecute in America*, 69 MERCER L. REV. 917, 926 (2018).

13. Nick Romeo, *The Professor of Hip-Hop: Adam Bradley's Poetic Mission*, Daily Beast (JULY 14, 2017, 12:30 AM), <https://www.thedailybeast.com/the-professor-of-hip-hop-adam-bradleys-poetic-mission>.

14. Abenaa Owusu-Bempah, *The irrelevance of rap*, 2 CRIM. L. REV. 130, 133 (2022).

Part II of this Note will explore the background and history of rap and drill music. Part III describes how and why rap music is being criminalized. Part IV of this Note will describe the intersection of rap music and the criminal justice system in both the United Kingdom and the US. Part V will analyze the defenses used in the American and British systems. Parts VI and VII will discuss why the existing law is inadequate and why protecting rap lyrics is important. Lastly, Part VIII will provide solutions for what the UK can do.

II. BACKGROUND

*“The following content is for entertainment purposes.”*¹⁵

A. History of Rap

Rap originated in the Bronx, New York, during the early 1970s.¹⁶ Rapping involves speaking rhyming lyrics, often set to a beat, and is recognized as one of the most immersive styles of poetry.¹⁷ Since its inception in the 1970s, rap has risen to commercial success, particularly in the 1980s and 1990s, often referred to as the “Golden Age” of rap.¹⁸ Today, rap is one of the most dominant music genres. The rap genre has won 335 Grammys¹⁹, three Oscars²⁰, one Pulitzer Prize²¹, and has become a multi-billion-dollar industry.²²

Rap music offers numerous benefits for those who engage in it. While pursuing commercial success and financial gain, including potentially violent themes, may drive mainstream rap, it also provides a

15. PR SAD, F.M.W. (Pressplay Media 2022).

16. CHERYL LYNETTE KEYES, RAP MUSIC AND STREET CONSCIOUSNESS (Univ. of Ill. 2004).

17. Ali Irfan, *The Evolution of Rap Music*, HOLR MAG. (Apr. 3, 2022), <https://www.holrmagazine.com/the-evolution-of-rap-music/>.

18. MICKEY HESS, ICONS OF HIP HOP: AN ENCYCLOPEDIA OF THE MOVEMENT, MUSIC, AND CULTURE 163 (Greenwood 2007).

19. *Genre: Rap*, RECORDING ACADEMY GRAMMY AWARDS, <https://www.grammy.com/music-genre/rap> (last visited Sept. 18, 2023).

20. Hugh McIntyre, *Common, Eminem, and Three 6 Mafia: A Look At Hip-Hop At the Oscars*, FORBES (Feb. 22, 2015, 8:45 AM), <https://www.forbes.com/sites/hughmcintyre/2015/02/22/common-eminem-and-three-6-mafia-a-look-at-hip-hop-at-the-oscars/?sh=7d58db5262fe>.

21. DAMN., by Kendrick Lamar, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/kendrick-lamar> (last visited Sept. 14, 2023, 3:22 pm).

22. Bernadette Giacomazzo, *How An NYC Street Sound Became the Multi-Billion Dollar Industry Known As ‘Hip-Hop’*, AFROTECH (Aug. 11, 2011), <https://www.afrotech.com/hip-hop-birthday-rap-hip-hop-net-worth?item=1>.

platform for creativity and self-expression. Moreover, rap can facilitate personal growth and development, aiding in identity formation, emotional intelligence, and self-esteem.²³ Studies have indicated that rap can be beneficial in helping young people understand their place in the world and how their experiences shape their relationships with others.²⁴

B. History of Drill

Drill music, originating in Chicago's South Side in the 2010s and popularized by artists like Chief Keef, is a more aggressive form of trap rap.²⁵ A few years after its inception, Group 67 from South London emerged as leaders in the genre, and drill gained significant popularity in the UK.²⁶ Although UK drill and American drill share similar melodies, beats, slang, and themes of violence, UK drill has evolved into a distinct genre.²⁷ It is characterized by its rough, rugged style, focusing on the violence and challenges of growing up Black in the UK.²⁸ Beyond its surface, drill represents the voice of the marginalized and disenfranchised, expressing their mental anguish and lack of support from the nation.²⁹

Drill music, often characterized by violent and provocative lyrics, has been controversially linked to a rise in violent crime, especially murders.³⁰ Amid this increase in UK crime and intense debate about its causes, the UK media has erroneously blamed drill music and its creators for perpetuating violence.³¹ There is a lack of empirical evidence to

23. Abenaa Owusu-Bempah, *Prosecuting Rap: What Does the Case Law Tell Us?* 2-3 (LSE Legal Studies Working Paper No. 07, 2022).

24. RICHARD BRAMWELL, *UK HIP-HOP, GRIME AND THE CITY THE AESTHETICS AND ETHICS OF LONDON'S RAP SCENES* 20 (Routledge 2015).

25. Ciaran Thapar, *From Chicago to Brixton: The surprising rise of UK Drill*, FACT MAG., <https://www.factmag.com/2017/04/27/uk-drill-chicago-brixton/>.

26. Kyann-Sian Williams, *Move over, Chicago: how the UK made drill its own – and then sold it back to the world*, NME (Feb. 25, 2020), <https://www.nme.com/blogs/nme-blogs/uk-drill-chicago-chief-keef-am-skengdo-67-pitbulls-terms-and-conditions-2611268>.

27. Matt Broomfield, *Inside UK Drill, London's Hyper-Local DIY Sound*, DAZED DIGITAL (Apr. 25, 2017), <https://www.dazeddigital.com/music/article/35706/1/uk-drill-artists-and-crews>.

28. Yemi Abiade, *Inside UK drill, the demonised rap genre representing a marginalized generation*, INDEPENDENT (May 29, 2018, 08:43), <https://www.independent.co.uk/arts-entertainment/music/features/drill-music-london-stabbings-shootings-rap-67-abra-cadabra-comment-government-a8305516.html>.

29. *Id.* at 4.

30. Shingi Marariki, Tom Harper & Andrew Gilligan, *Drill, the 'demonic' music linked to rise in youth murders; The lyrics of drill, a violent form of rap sweeping Britain, have been branded a 'rehearsal' for killings by one grieving father*, THE SUNDAY TIMES (Apr. 8, 2018, 12:01), <https://www.thetimes.co.uk/article/drill-the-demonic-music-linked-to-rise-in-youth-murders-0kbh3csk>.

31. Abiade, *supra* note 28.

establish a direct link between drill music and violent crime, leading to divided public opinions.³² Despite this, authorities have taken a stringent stance against the genre. The Metropolitan Police (“The Met”) in London have successfully requested the removal of drill music videos from YouTube.³³ In some instances, gang injunctions and Criminal Behavior Orders have been issued, imposing restrictions on music releases, lyrics, and music video participation, specific to the drill genre.³⁴

III. HOW AND WHY IS IT BEING CRIMINALIZED?

*“If you decide to admit your crimes over a beat, I’m going to use it.”*³⁵

*“Man, don’t worry ‘bout this story ‘cause it’s fictional.”*³⁶

A. How in America?

In the United States, prosecutors have a long history of citing rap lyrics against defendants. They use rap lyrics in trials in several ways: (1) lyrics written after a crime are used as confessions or to aid in identifying the perpetrator; (2) lyrics written before a crime show intention; (3) lyrics illustrate threats; and (4) lyrics establish gang membership.

For lyrics to be admitted as evidence, they must be both relevant and in admissible form. Evidence is relevant if (a) it tends to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action.³⁷ Relevant evidence is admissible unless the United States Constitution, a federal statute, a federal rule of evidence, or any other rules prescribed by the Supreme Court provide otherwise.³⁸ Irrelevant evidence is not admissible.³⁹ The

32. Owusu-Bempah, *supra* note 23, at 2-3.

33. Will Pritchard, *YouTube is Working With Met Police to Take Down Rap and Drill Videos*, VICE (Feb. 24, 2022, 1:00 AM), <https://www.vice.com/en/article/bvnp8v/met-police-youtube-drill-music-removal>.

34. Colette Allen, *The Criminalisation of Drill Music and Article 10 of the European Convention on Human Rights*, INFORM (Mar. 5, 2021), <https://www.inform.org/2021/03/05/the-criminalisation-of-drill-music-and-article-10-of-the-european-convention-on-human-rights-colette-allen/>.

35. Itoro N. Umontuen, *Fani Willis: If you decide to admit your crimes over a beat, I’m going to use it*, THE ATLANTA VOICE (Aug. 30, 2022), <https://www.theatlantavoices.com/fani-willis-if-you-decide-to-admit-your-crimes-over-a-beat-im-going-use-it/>.

36. DRAKEO THE RULER, *Fictional*, on THANK YOU FOR USING GTL, (Stinc Team 2020).

37. FED. R. EVID. 401.

38. FED. R. EVID. 402.

39. *Id.*

court may exclude evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.⁴⁰

In *Montague v. State*, the court held a defendant's rap lyrics relevant under Maryland's rule of evidence because the lyrics detailed the victim's murder, and the defendant's use of the word 'snitch' increased the probability of his role as the shooter.⁴¹ Three weeks before his trial, the defendant called an unidentified male, made several statements in the form of an amateur rap over the phone, and recorded the lyrics.⁴² When the person on the other end warned the defendant about recording and posting the lyrics on social media, the defendant replied, "I'm gucci. It's a rap. F—k they can do for – about a rap?"⁴³ The Maryland Court of Appeals held that the circuit court did not err in admitting the lyrics, as they met the relevance threshold.⁴⁴

The court applied a framework stating that (1) even when probative, rap lyric evidence inherently carries a prejudicial effect, and (2) the probative value of rap lyric evidence may outweigh the prejudicial effect when the lyrics closely relate to the details of the alleged crime.⁴⁵ "The closer the nexus between a defendant's rap lyrics and the details of an alleged crime, the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence of the defendant's bad character."⁴⁶

Here, including "stop snitching" references in his rap lyrics to potentially intimidate witnesses made the lyrics more probative of Montague's involvement in the crime.⁴⁷ Rather than weakening the probative value of Montague's rap lyrics, his attempt to have the "stop snitching" lyrics recorded and uploaded on social media as a witness intimidation tactic made it more probable that he shot and killed the victim.⁴⁸ Additionally, the lyrics mirrored the alleged crime in a specific and chronological order. The first verse referenced the victim's attempt to cheat Montague by purchasing drugs using counterfeit money.⁴⁹ The following two verses acknowledged that Montague shot at the victim for

40. FED. R. EVID. 403.

41. *Montague v. Maryland*, 471 Md. 657, 692 (2020).

42. *Id.* at 667.

43. *Id.* at 694.

44. *Id.* at 692.

45. *Id.* at 687.

46. *Id.* at 692.

47. *Montague*, 471 Md. at 692.

48. *Id.*

49. *Id.* at 692.

trying to “play” him during the transaction. Shortly after the victim “played” Montague, he was shot to death in the actual crime—just as the lyrics recount.⁵⁰ The lyrics go on to state, “It’s a .40 when that b—h goin’ hit up.” Identically, officers had located .40-caliber shell casings at the scene of the murder.⁵¹ Furthermore, the victim was found unconscious at the scene and was transported in an ambulance.⁵² Montague’s rap lyrics included “You getting picked up by the ambulance / You going to be dead on the spot.”⁵³ The court held that the rap lyrics had heightened probative value as substantive evidence of his guilt because a close factual nexus existed between the lyrics and the details of the victim’s murder, which added to the identification of Montague as the alleged killer.⁵⁴

In *Ojito v. Clark*, the district court stated that using Ojito’s violent lyrics in his jury trial for two counts of second-degree murder did not deprive him of his right to a fair trial.⁵⁵ The prosecution asserted that the lyrics showed Ojito harbored animosity toward KN, a rival gang member, and manifested a willingness to act violently toward other KN members.⁵⁶ They further argued that this was relevant to his intent when confronting the members during the two shootings.⁵⁷ The district court agreed that the evidence was offered for two legitimate purposes: to show that Ojito approved of group violence toward KN members, and to show *why* Ojito inflicted violence on the KN members.⁵⁸ The lyrics included the phrase, “all you f—ts is jealous, pull your gun out and blast. I dare you f—ts to open fire, I’ll murder that ass & disappear before the cops come running. My Glocks spittin rounds f—s dropping down clutchin they stomach. Its southwest TNS.” The term “f—ts” was a derogatory name for KN members, and the lyrics also contained the crossed-out word “vicious,” the gang nickname for Alegria, one of the victims of the shooting.⁵⁹ The court reasoned that the jury could draw a permissible inference about Ojito’s hostility toward other gangs, specifically the gang of which the shooting victims were affiliated. This inference directly related to Ojito’s intent as it related to his claim of self-defense; if Ojito could be shown to have hostility toward KN gang members, it would

50. *Id.* at 692-93.

51. *Id.* at 693.

52. *Id.*

53. *Montague*, 471 Md. at 693.

54. *Id.*

55. *Ojito v. Clark*, No. 09-CV-2127-LAB (JMA), 2011 U.S. Dist. LEXIS 116839, at 14 (S.D. Cal. Mar. 02, 2011).

56. *Id.* at 23.

57. *Id.*

58. *Id.* at 24.

59. *Id.* at 26.

make his self-defense claim less credible. Therefore, the lyrics were admitted.⁶⁰

No other fictional art form has been censored and used against its creators like this. For example, one of the most popular modern songs, *Bohemian Rhapsody*, has lyrics that sing, “Mama, just killed a man, Put a gun against his head, pulled my trigger, now he’s dead.”⁶¹ Here, Freddy Mercury alludes to taking a life, but these lyrics have never been seen as anything but a song or metaphor. Unlike rap songs, Mercury’s lyrics have never been taken literally. In the early days of rap, the distribution and performance of rap music were often censored as rap music was seen as obscene. For example, in 1990, a federal district court held that 2 Live Crew’s album *As Nasty As They Wanna Be* was legally obscene.⁶² Using rap lyrics as criminal evidence is a natural outgrowth of rap’s combative relationship with the legal system.

B. How in the UK?

Just like in the United States, drill music has long been subjected to heavy policing, prosecution, and censorship. Conservative leader David Cameron claimed that BBC Radio 1 encourages “people to carry guns and knives,” and promotes crime by playing music that glorifies violence.⁶³ The former Commissioner of the Met, Cressida Dick, called upon YouTube to take down drill music videos to help reduce gang crime.⁶⁴ The Court of Appeal (“COA”), the second-most senior court in England and Wales, affirms almost every question of admissibility in cases where an issue is raised about the admissibility of music.⁶⁵

Similarly, in the United Kingdom, the prosecution’s approach to lyrics is to treat them literally, to show a propensity for crime, and to prove gang association. UK drill lyrics and music videos have been used as evidence in court to establish links between inciting violence and actual crimes. Research from the University of Manchester identified more than 60 cases in the last two decades where rap music was used by prosecutors “as autobiographical confessions to crimes, threats of

60. *Id.* at 27.

61. QUEEN, *Bohemian Rhapsody*, on A NIGHT AT THE OPERA (EMI 1975).

62. *Skywalker Rec., Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990).

63. Julia Day, *Radio 1 glorifies knife crime, says Tory leader*, THE GUARDIAN (Jun. 7, 2006), <https://www.theguardian.com/media/2006/jun/07/radio.conservativeparty>.

64. Nick Ferrari, *Met Police Chief Calls On YouTube To Take Down Drill Music To Curb Gang Crime*, LEADING BRITAIN’S CONVERSATION (May 18, 2018), <https://www.lbc.co.uk/radio/presenters/nick-ferrari/met-police-chief-calls-on-youtube-drill-music/>.

65. Keir Monteith KC, *Ban rap and drill lyrics in the courtroom*, 41/4 POPULAR MUSIC 546, 553-554 (2023).

violence or proof of gang affiliation.”⁶⁶ An analysis done by Doctor Owusu-Bempah at the London School of Economics shows that prosecutors in UK courtrooms have deliberately used rap lyrics and music videos to draw on stereotypes to construct their theories of the case.⁶⁷ Dr. Owusu-Bempah analyzed 30 appeal judgments between 2005 and 2020. In 26 of these cases, the defendants had been convicted of violent offenses, and the vast majority were young and exclusively male.⁶⁸ 21 cases were said to be gang-related, as the lyrics and videos were most often used as evidence of gang association and to link the defendant to a joint enterprise and evidence to prove other issues in the case.⁶⁹

In most cases, the lyrics are not presented as evidence about the crime charged but as evidence of a defendant’s bad character.⁷⁰ Although other art forms that contain violent content, such as films, novels, or video games, are typically not considered in this manner, courts may see the creation or performance of lyrics that refer to violence or other criminal activities as reprehensible and indicative of a tendency towards violence.

For example, in *R. v. Lewis*, the COA upheld a judge’s admission of a rap video to help prove gang affiliation.⁷¹ The defendants stated that they appeared in the music videos not because they were gang members, but because they were part of drill and rap culture.⁷² The defense argued that the rap videos were nothing more than a demonstration of involvement in a music genre and that the words and gestures should not be taken literally.⁷³ The prosecution argued that no one would be allowed to be present in making these videos unless they were trusted by and affiliated with the relevant gang culture.⁷⁴ The judge stated that in order for the video to be relevant, there must be something more than an appearance on video; that could be what the person does or says, or it could be multiple appearances in more than one video.⁷⁵ Here, the defendant was in multiple videos, and the video had explicit references

66. Kamila Rymajdo, *Prosecuting Rap: how a UK legal project is fighting the use of rap lyrics in court*, DJ MAG (Dec. 8, 2020), <https://www.djmag.com/longreads/prosecuting-rap-how-uk-legal-project-fighting-use-rap-lyrics-court>.

67. Abenaa Owusu-Bempah, *Part of art or part of life? Rap lyrics in criminal trials*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Aug. 27, 2020), <https://blogs.lse.ac.uk/politicsandpolicy/rap-lyrics-in-criminal-trials/>.

68. Owusu-Bempah, *supra* note 23.

69. *Id.* at 4.

70. Rymajdo, *supra* note 66.

71. *The Queen v. Lewis & Ors* [2014] EWCA (Crim) 48 [100] (Eng.).

72. *Id.* ¶69,100.

73. *Id.* ¶100.

74. *Id.* ¶97.

75. *Id.* ¶98.

to gangs.⁷⁶ The COA held that there was no inherent prejudice because some of the defendants were found guilty, and some were acquitted, thus showing the judge's direction of placing limited weight on the music video evidence was good enough to deal with any perceived prejudice.⁷⁷ The COA explained that the judge was entitled to conclude that the videos were clear examples of showing membership or association with a gang and exhibiting violence or hostility towards the police and connections to firearms.⁷⁸

Rap lyrics have more severe consequences in the UK than they do in the US. After a series of stabbings and shootings that were linked to drill music, the government launched a series of criminal justice responses.⁷⁹ These measures include Operation Domain – a team within The Met responsible for monitoring YouTube for “videos that incite violence” and treating drill rappers as terror suspects.⁸⁰ As a result of this, 30 YouTube videos were removed after their lyrics allegedly incited real-world violence.⁸¹ Another example, Form 696, a risk assessment tool used by The Met, required club promoters to detail the ethnicity of their clientele, which in turn allowed the police to shut down rap performances and slap drill artists with injunctions, banning them from making and performing drill music.⁸² Form 696 drew heavy criticism for its racist undertones and was seen as discriminatory against drill, rap, and other underground black genres.⁸³ It was removed by London Mayor Sadiq Khan in 2017.⁸⁴

Introduced in 2014, criminal behavior orders (“CBOs”) are available following a conviction for any criminal offense and are often used in cases involving rap.⁸⁵ These orders are designed “to tackle the

76. *Id.* ¶103.

77. Lewis & Ors [2014] EWCA (Crim) 48, [¶107] (Eng.).

78. *Id.* ¶99.

79. Lambros Fatsis, *Policing the beats: The criminalisation of UK drill and grime music by the London Metropolitan Police*, 67(6) UNIV. OF SOUTHAMPTON SOCIO. REV. 1, 4 (2019).

80. Vivian Yeung, *Drill artists in violent music videos to be treated like terror suspects*, CRACK MAG. (May 05, 2018), <https://www.crackmagazine.net/2018/05/drill-artists-in-violent-music-videos-to-be-treated-like-terror-suspects/>.

81. Jim Waterson, *YouTube deletes 30 music videos after Met link with gang violence*, THE GUARDIAN (May 28, 2018, 7:01 PM), <https://www.theguardian.com/uk-news/2018/may/29/youtube-deletes-30-music-videos-after-met-link-with-gang-violence>.

82. Rymajdo, *supra* note 66.

83. Jesse Bernard, *Form 696 is gone – so why is clubland still hostile to black Londoners?*, THE GUARDIAN (Jan. 31, 2018, 7:15 AM), <https://www.theguardian.com/music/2018/jan/31/form-696-is-gone-so-why-is-clubland-still-hostile-to-black-londoners>.

84. *Id.*

85. *Criminal Behaviour Orders*, SENT’G COUNS., <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/ancillary-orders/5-criminal-behaviour-orders>.

most serious and persistent anti-social individuals whose behavior has brought them before a criminal court.”⁸⁶ A CBO may prohibit the offender from doing anything described in the order or require the offender to do anything described in the order.⁸⁷ CBOs give the prosecution and judges broad powers to regulate a convicted criminal’s life, such as by banning them from certain areas or preventing them from meeting certain people. Some judges have used CBOs to control lyrics, arguing that when a rapper brags about attacks on a rival, it could stoke tensions and lead to more violence.⁸⁸ The undesirable “anti-social behavior that is being addressed does not need to be connected to the criminal behavior or activity that led to the conviction.”⁸⁹ CBOs are an order rather than a sentence, but breaching a CBO is itself a criminal offense,⁹⁰ thus leading to more severe penalties than what a defendant may have originally been sentenced to. These measures have resulted in the use of drill-related YouTube videos as a source of intelligence collection to bring convictions against the individuals identified in those videos “without any proof that the target music videos were linked to specific acts of violence.”⁹¹ Yet, isolated incidents aside, there is no basis to infer anything but coincidence between crime and drill music.

Eithne Quinn, head of the research project “Prosecuting Rap: Criminal Justice and UK Black Youth Expressive Culture,” opined that the rise of rap evidence has coincided with the popularity of drill music, which some have accused of furthering the knife crime epidemic in the UK.⁹² While she concedes that there are sometimes loose links between drill music and youth violence, Quinn explains that most drill rappers adopt a violent or criminal persona that is proactive, complex, and coded – which prosecutors often misconstrue.⁹³

In addition to how the policing of drill has shaped the context within which drill music is controlled, cultural hostility and racial stereotypes also underlie the reasoning. Society tends to find rap lyrics offensive and depict a world filled with influence. When a rap song possesses a violent lyrical passage or a Black singer is associated with such a passage, people find the lyrics objectionable and worry about their consequences. If the same lyrical passage is presented as country or folk music or is associated

86. *Id.*

87. *Id.*

88. Bernard, *supra* note 83; Rymajdo, *supra* note 66.

89. *Criminal Behaviour Orders*, *supra* note 85.

90. *Id.*

91. Fatsis, *supra* note 79.

92. Owusu-Bempah, *supra* note 23.

93. *Id.*

with a White artist, reactions to the lyrics are significantly less critical in all dimensions.⁹⁴ The tendency to interpret rap lyrics as an individual lifestyle rather than as an ugly fact of social life is an expression of racial neoliberalism. It misplaces the responsibility for inadequate public resources on private individuals rather than the state and serves as a useful political tool in which to criminalize people for the social conditions within which they exist as victims.⁹⁵

IV. HOW ARE RAP LYRICS CURRENTLY BEING PROTECTED?

*"I done got indicted selling all white."*⁹⁶

A. Current State of American Law

1. First Amendment Protection

Using rap lyrics against a criminal defendant has significant freedom of speech implications. The First Amendment provides constitutional protection for speech, which applies to artistic and creative expressions, including inflammatory and offensive language.⁹⁷ The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech." Freedom of expression requires "breathing space to survive" to prevent a "chilling effect" on free expression.⁹⁸ Music falls within the scope of this protection.⁹⁹ Defendants on trial for rap lyrics tend to argue that rap lyrics are a matter of public concern and, therefore, protected by the First Amendment. To be considered a matter of public concern, speech must be "fairly considered as relating to any matter of political, social, or other concern to the community" or as "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."¹⁰⁰

The First Amendment does not protect every form of communication. The unprotected categories include "advocacy intended

94. Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED. SOC. PSYCH. 2135, 2141 (1996).

95. Fatsis, *supra* note 79.

96. CHIEF KEEF, *I Don't Like, on FINALLY RICH* (Interscope 2012).

97. ERIC NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL 24* (The New Press 2019).

98. Brief of Amici Curiae Am. Civ. Liberties Union and Am. Civ. Liberties Union of Tenn. to File at 4, *State v. Bassett*, (No. 110855), 2022 WL 152516.

99. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

100. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

and likely to incite imminent lawless action,” “obscenity,” “defamation,” “speech integral to criminal conduct,” “child pornography,” “fraud,” “true threats,” and “speech presenting some grave and imminent threat the government has the power to prevent.”¹⁰¹ While defendants have attempted to argue that the First Amendment protects rap songs and their lyrics, courts have generally held that rap lyrics are not entitled to constitutional protection. This issue is explained in further detail later in Part V.

2. Evidentiary Protection

Defendants have had the most success responding to the use of defendant-created rap lyrics by using Rule 403 of the Federal Rules of Evidence. Rule 403 states, “The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁰² There are two ways to use this balancing test in favor of a defendant: by arguing that the lyrics are not probative because they are fictional works that should not be taken literally and by arguing that the use of lyrics would be unfairly prejudicial because they invoke implicit bias and stereotypes, and could be misleading or otherwise problematic.¹⁰³

In 2014, the New Jersey Supreme Court held that the appellate court in *State v. Skinner* correctly reversed a defendant’s attempted murder conviction because the lyrics authored by the defendant were highly prejudicial and had little to no probative value as to any motive or intent behind the offense with which he was charged.¹⁰⁴ The victim was shot multiple times, and on the way to the hospital, he told police that Skinner was the person responsible.¹⁰⁵ Skinner’s first trial resulted in a hung jury.¹⁰⁶ During that trial, the judge allowed into evidence rap lyrics written by Skinner as evidence of his motive and intent to commit the shooting. The lyrics were found in notebooks obtained from Skinner’s car.¹⁰⁷

During his second trial, Skinner once again objected to the admission of lyrics, but “a detective testifying for the state read to the jury extensive passages from the defendant’s lyrics depicting violence,

101. *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

102. FED. R. EVID. 402.

103. JACK I. LERNER ET AL., *RAP ON TRIAL* 39, 49, 50 (June 2021).

104. *State v. Skinner*, 218 N.J. 496, 500 (2014).

105. *Id.* at 501.

106. *Id.* at 503.

107. *Id.* at 502.

bloodshed, death, and dismemberment *unconnected* to the specific facts of the attempted murder charge against [the] defendant.”¹⁰⁸ This trial ultimately led to his conviction. The New Jersey Appellate Division overturned the conviction as “the admission of defendant’s inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risked *poisoning* the jury against [the] defendant.”¹⁰⁹ In sum, according to the New Jersey Appellate Court, rap lyrics or fictional material may not be used as evidence of motive and intent, except when such material has a direct connection to the specifics of the offense for which it is offered in evidence, and the evidence’s probative value is not outweighed by its apparent prejudice.¹¹⁰ In the weighing process, courts should consider the existence of other evidence that can be used to make the same point. When admissible, such evidence should be carefully redacted to ensure that irrelevant, inflammatory content is not needlessly presented to the jury.¹¹¹

Several other courts have found that rap lyrics are not very probative.¹¹² For example, in *People v. Coneal*, the California Court of Appeal overturned a trial court’s admission of five rap videos featuring the defendant and/or members of the defendant’s gang as it was an abuse of their discretion.¹¹³ The court explained that the videos had “minimal probative value, either because they were cumulative of other, less prejudicial evidence or because their probative value depended on interpreting the lyrics as literal statements of fact or intent without a . . . basis to do so” and that the “minimal probative value was substantially outweighed by the highly prejudicial nature of the violent and inflammatory lyrics.”¹¹⁴

B. Current State of British Law

In the UK, protection for rap lyrics comes from the rules of evidence. British law already provides safeguards against the automatic admission of such material; evidence must pass the relevance test and, if appropriate, the bad character considerations within the Criminal Justice Act 2003.¹¹⁵

108. *Id.* at 504.

109. *Id.* at 500.

110. *Skinner*, 218 N.J. at 500.

111. *Id.*

112. *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

113. *People v. Coneal*, 4 Cal. App. 5th 951, 953, 954 (2019).

114. *Id.*

115. Criminal Justice Act 2003, c. 44, § 98 (UK).

“Evidence is relevant if it logically proves or disproves some fact at issue in the prosecution.”¹¹⁶ “Bad character” evidence is “evidence of, or a disposition towards, misconduct on their part, other than evidence which has to do with the alleged facts of the offence” or “is evidence of misconduct in connection with the investigation or prosecution.”¹¹⁷ Lyrics and videos are often offered as “bad character evidence” under Section 101(1) of the Criminal Justice Act of 2003 or as evidence “to do with” the alleged facts of the offense under Section 98.¹¹⁸ In order for evidence of the defendant’s bad character to be admissible, one of the following must occur:

- (a) all parties to the proceedings agree to the evidence being admissible; (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it; (c) it is important explanatory evidence; (d) it is relevant to an important matter in issue between the defendant and the prosecution; (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant; (f) it is evidence to correct a false impression given by the defendant; or (g) the defendant has made an attack on another person’s character.¹¹⁹

Lyrics are often brought through Gateway D of the Criminal Justice Act 2003 as relevant to an important matter in issue between the defendant and the prosecution.¹²⁰ Most commonly, they are used to show intention, motive, or to rebut the defense of being an innocent presence.¹²¹

One of the most recent trials in the UK that involved prosecutors attempting to use lyrics as evidence of a defendant’s bad character is that of London drill artist Unknown T.¹²² Despite the lack of substantial evidence against him, Unknown T was accused of murder following a fight and a fatal stabbing at a New Year’s Eve party he attended.¹²³ After

116. HEALTH AND SAFETY EXEC., *Key Rules of Evidence*, <https://www.hse.gov.uk/enforce/enforcementguide/court/rules-key.htm>.

117. Criminal Justice Act 2003, c. 44, § 98.

118. Owusu-Bempah, *supra* note 23, at 13.

119. Criminal Justice Act 2003, c. 44, § 101 (1) (UK).

120. *Id.*; see Sasha Wass, *Drill music as bad character evidence*, 6KBW COLLEGE HILL (June 13, 2021), <https://blog.6kbw.com/posts/drill-music-as-bad-character-evidence>.

121. Criminal Justice Act 2003, c. 44, § 101 (1).

122. See Kamila Rymajdo, *Drill Lyrics Are Being Used Against Young Black Men in Court*, VICE (Aug. 24, 2020, 3:22 AM), <https://www.vice.com/en/article/4ayp5d/drill-lyrics-used-against-young-black-men-court-uk>.

123. *Unknown T: rapper is cleared over New Year stabbing*, BBC NEWS (Feb. 18, 2020), <https://www.bbc.com/news/newsbeat-51552241>.

a legal dispute about the admissibility of the lyrics, the trial judge took an uncommon stance and dismissed the prosecution's attempt, stating that the use of rap lyrics "is in any event highly prejudicial and in effect, the Crown are seeking to bolster an otherwise weak or flawed case by the introduction of such evidence."¹²⁴ The court found Unknown T not guilty of all charges.¹²⁵

Another successful case that challenged the admission of rap music is *R v. Alimi*. Here, the defendant had been convicted of firearms offenses.¹²⁶ The COA overturned the conviction, acknowledging that the defendant's presence in the background of two music videos, as an extra, did not show gang membership.¹²⁷

V. WHY IS EXISTING LAW NOT ADEQUATE?

*"You know the feds listening, ——— what money?"*¹²⁸

A. America

In light of the exceptions to the First Amendment, lyrics have been admissible in court even when defendants argue that their lyrics are creative expressions. Generally, rap lyrics and videos are still introduced into evidence as they are seen as "true threats." In *Elonis v. United States*, the defendant was charged with five counts of violating a federal anti-threat statute.¹²⁹ *Elonis* threatened his ex-wife, coworkers, law enforcement officers, an FBI agent, and a kindergarten class through rap lyrics on his Facebook page.¹³⁰ During his trial, *Elonis* argued that his comments were not true threats and that they were a form of artistic expression that helped him manage what was happening in his life.¹³¹ *Elonis* pointed to Eminem's lyrics and videos that used similar language to try to get the court not to take his lyrics literally and seriously.¹³² *Elonis* was convicted as his lyrics were seen as "true threats" and therefore fell outside the scope of First Amendment speech protection.¹³³

124. Rymajdo, *supra* note 66.

125. *Id.*

126. *Regina v. Alimi* [2014] EWCA (Crim) 2412.

127. *Id.*

128. DJ Khaled, *I'm On One*, WE THE BEST FOREVER (We the Best 2011).

129. *Elonis v. United States*, 575 U.S. 723, 732 (2015).

130. *Id.* at 731.

131. *See id.* at 727.

132. *Id.* at 731.

133. *See id.* at 732.

In *United States v. Garnes*, the court held that the First Amendment argument for excluding rap lyrics in a RICO conspiracy case was without merit.¹³⁴ The court reasoned that the lyrics were relevant to determine membership in the gang and that the speech was not the basis for prosecution; it was used to establish the existence of and participation in the alleged RICO conspiracy.¹³⁵ Although rap lyrics are being utilized as evidence in criminal cases, the lyrics per se are not facing direct punishment. Rather, courts are permitting the prosecution to use rap lyrics to substantiate an alleged criminal act that occurred in the past. In essence, the courts maintain that they are not penalizing speech; they merely admit it as proof of an individual's culpability, directly bypassing any constitutional issues.

While numerous decisions have held that lyrics are not admissible under Rule 403, many courts have decided otherwise and have stated that the danger of unfair prejudice is not outweighed by probative value.

The judicial decision to conclude that rap lyrics are not prejudicial arises from a lack of comprehension of the nature of rap. Despite rap music's widespread popularity, the methods governing the composition of lyrics are not part of everyday life.¹³⁶ While many believe that rap lyrics are simple rhymes, they are actually a complex form of creative verbal expression.¹³⁷ Nevertheless, courts adjudicating criminal cases treat the comprehension and analysis of rap music lyrics as within the judges' and jurors' public knowledge.¹³⁸ Most courts do not consider whether specialized information is necessary.¹³⁹ For example, in *United States v. Wilson*, the court rejected the testimony of the defendant's expert rap witness and implied that the interpretation of rap lyrics is not a subject worth expert testimony.¹⁴⁰ The court went on to say further that this type of specialized knowledge can be helpful in trademark and copyright cases but concluded implicitly that it has no place in criminal cases.¹⁴¹ Courts tend to assume that defendants usually do not use poetic devices.¹⁴² Additionally, courts generally do not consider that social factors may influence the defendant's creation of lyrics, nor do they consider the

134. *United States v. Garnes*, 2015 U.S. Dist. LEXIS 72742, 2-9 (E.D. Mich. June 5, 2015).

135. *Id.* at 9.

136. Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007).

137. *Id.*

138. *Id.*

139. *Id.*

140. *United States v. Wilson*, 493 F. Supp. 2d 484, (2006).

141. *Id.*

142. Dennis, *supra* note 136, at 14.

inherent biases that stem from rap.¹⁴³ One study concluded that “those who write violent ‘rap’ lyrics are more easily associated with crime and violence than those who write similar, violent lyrics in different genres.”¹⁴⁴ “In particular, participants are 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.”¹⁴⁵

In general, expert witnesses are retained to offer their opinions on matters pertinent to the case, unlike lay witnesses, who can only testify based on what they have directly observed. This gives expert witnesses more room to opine, as they are basing their opinions on training, education, and experience. Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony: If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) “the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”¹⁴⁶ The main problem is that the word “expert” implies substantial education and carries enormous authority.

When defendants use slang or crime-related terms in their lyrics, courts generally rely on law enforcement as their experts to interpret the terms or provide synonymous meanings in “plain English.”¹⁴⁷ The problem with utilizing police officers as expert witnesses in cases involving rap music is their lack of formal education in this field. They are not basing their testimony on reliable principles and methods but rather on their on-the-job observations, which often result in questionable testimony that contains misleading representations of rap music and the defendant aimed at strengthening the prosecution’s case. Further, in most cases, defense attorneys do not have an expert on rap music to rebut this testimony.

One court has already held that “[a] police officer who has been qualified as a ‘gang expert’ cannot, without more, be deemed an expert

143. *Id.* at 14, 30.

144. Adam Dunbar & Charis E. Kubin, *Imagining violent criminals: an experimental investigation of music stereotypes and character judgments*, JOURNAL OF EXPERIMENTAL CRIMINOLOGY, 1, 15 (2018).

145. *Id.*

146. FED. R. EVID. 702.

147. Dennis, *supra* note 136, at 13.

qualified to interpret the meaning of rap music lyrics.”¹⁴⁸ By permitting police officers to provide testimony on the interpretation of a highly intricate art form they are unfamiliar with, the courts fail to recognize rap as an art form and the creators as artists expressing themselves. This provides the criminal justice system with another means of punishing primarily young men of color. Two consequences of this are the perpetuation of societal biases and a failure to appreciate the cultural value of rap.

Currently, only one law protects the use of rap lyrics. As of January 1, 2023, Assembly Bill 2799, also known as the Decriminalizing Artistic Expression Act, became law in California, preventing the use of rap lyrics in prosecutions.¹⁴⁹ Advocates are also pushing for federal protection with the Restoring Artistic Protection (RAP) Act, which would add a presumption to the Federal Rules of Evidence that would limit the admissibility of evidence of an artist’s creative expression.¹⁵⁰

B. UK

Unlike American law, English law provides fewer protections against using lyrics as evidence based on freedom of speech. A right to free speech is not generally recognized by common law, and there is no equivalent to the First Amendment in the UK.¹⁵¹ As the right to free speech is not outlined directly anywhere, it is difficult to predict when courts would use it for the outcome of a case, such as whether rap lyrics can be used in a proceeding, leading to uncertainty, which could further lead to the dilution of the art form and have devastating legal consequences.

Dr. Owusu-Bempah’s study found that most cases challenging the admissibility of lyrics and videos, except for one, were unsuccessful.¹⁵² In the case analysis, there was little consideration for the relevance of the rap lyric material, and discussion of the fairness and prejudice of using this evidence was minimal.¹⁵³ Jurors were trusted to judge how much weight to give to the evidence without considering the broader context,

148. *Costa v. Brait Builders Corp.*, 463 Mass. 65, 73 (2012).

149. Cal. Legis., 2799, 2021-2022 Sess. (Cal. 2022).

150. Ashley King, *Restoring Artistic Protection (RAP) Act Introduced In the US House of Representatives — Bob Marley Did Not Confess to Having Shot a Sheriff*, DIGITAL MUSIC NEWS (July 27, 2022), <https://www.digitalmusicnews.com/2022/07/27/restoring-artist-protection-act-us-house/>.

151. Eric Barendt, *Freedom of Expression in the U.K. Under the Hum. Rs Act 1998*, 84 IND. L. REV. 851, 851 (2009).

152. Owusu-Bempah, *supra* note 23, at 5.

153. *See id.* at 1.

such as cultural and musical genre conventions.¹⁵⁴ For example, in *R. v. Awoyemi*, the COA ruled that the evidence of the written lyrics and YouTube rap video, which included the defendants allegedly making “threatening gestures with their fingers to indicate guns,” was prejudicial but not excessively so.¹⁵⁵ The court reasoned that “it went far beyond simple members of a gang, the love of rap music, hyperbole, or appearance on a video.”¹⁵⁶

Additionally, in *R v Rashid* [2019], the judge instructed the jury on how the “gang” music videos could be used.¹⁵⁷ First, the jury had to be sure that the defendant they were considering was a gang member.¹⁵⁸ Second, even if they were gang members, that did not mean they were violent or that they committed the offenses with which they were charged.¹⁵⁹ Third, the jury should not be prejudiced against the defendants because they were gang members, but they “might give it weight.”¹⁶⁰ Even with these limiting instructions, the jury still determined the defendants were gang members by watching rap videos and listening to the opinion of a police officer who had watched the very same videos.¹⁶¹ The judge also had directed the jury that the police expert believed all the defendants were in a gang.¹⁶² The officer spoke of the clothing they wore, how they acted, and that the lyrics and gestures depicted in the music videos were designed to incite violence.¹⁶³

Additionally, as is the case in America, there is a questionable use of rap lyric “expertise.” In England, expert evidence in criminal proceedings is controlled by section 30 of the Criminal Justice Act, which states:

- (1) an expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings and that (2) if it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.¹⁶⁴

There are no qualifications necessary to be an expert in the language of the statute. Common law is the only source of criteria for assessing the

154. *See id.* at 11.

155. *S v. Regina*, 4 WLR at 118.

156. *Id.* at 124.

157. *R v. Rashid* [2019] EWCA (Crim) 2018 [59] (Eng.).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* ¶28.

163. *Rashid* [2019] EWCA (Crim) 2018 [28] (Eng.).

164. Criminal Justice Act, 1988, § 30 (Act No. 33) (UK).

admissibility of expert testimony.¹⁶⁵ Common law holds that expert testimony is admissible if it is “(1) relevant to a matter in issue in the proceedings, (2) it is needed to provide the court with information likely to be outside the court’s own knowledge and experience, and (3) the witness is competent to give that opinion.”¹⁶⁶ Expert evidence in this jurisdiction has been described as being admitted too easily and with “insufficient scrutiny.”¹⁶⁷

Expert evidence is an exception to the rule that witnesses’ testimony must be evidence only of fact and not of opinion.¹⁶⁸ An expert witness may draw on the body of expertise relevant to his field.¹⁶⁹ Some courts interpret ‘body of expertise’ broadly. They acknowledge that the best and most informed expert witnesses are often people who have gained expertise through contact with the criminal activity at issue rather than academic or professional training.¹⁷⁰ This broad interpretation is especially problematic in the context of expert testimony regarding lyrics. For example, in *R. v. Lewis*, one crucial factor in deciding a guilty conviction was that commentary by officers accompanied the rap music videos.¹⁷¹ The officers explained where the videos were filmed, the significance of the signs used, and the significance of particular bandanas and names used.¹⁷² The COA found that was a perfectly valid approach.¹⁷³ Police officers take courses to become “experts” to inform juries what the rapper really means and what can be inferred from hand gestures and colors that might be displayed.¹⁷⁴ Local police officers had transcribed, translated, and interpreted songs and YouTube music videos, many of which had been recorded and released more than five years before the alleged crime, to make their case.¹⁷⁵ These guidelines are under review; the use of police officers as experts has been described as ‘no more than the prosecution calling itself to give evidence,’ and there have been many

165. Nicci MacLeod, *Art vs Craft Expert: Evidence in the England and Wales Criminal Justice System*, 8(1), *Language and Law/Linguagem E Direito* 44 (2021).

166. *Id.* at 45.

167. *Id.* at 44.

168. *Id.* at 46.

169. Criminal Justice Act, 2003, § 118 (1), (8) (Act. No. 44) (UK).

170. MacLeod, *supra* note 165, at 46.

171. *The Queen v. Lewis & Ors* [2014] EWCA (Crim) 48 [99] (Eng.).

172. *Id.*

173. *Id.*

174. Monteith KC, *supra* note 65, at 549.

175. Ciaran Thapar, *What kind of society sends young men to jail and ruins lives because of the lyrics in a song*, *THE GUARDIAN* (Jan. 31, 2023), <https://www.theguardian.com/commentisfree/2023/jan/31/rap-music-young-men-fail-lyrics-conviction>.

calls for greater scrutiny of this so-called expert testimony, but the practice continues unrestricted.¹⁷⁶

VI. WHY SHOULD WE PROTECT RAP LYRICS?

*“I stopped rapping and reoffended”*¹⁷⁷

Rap music is a valuable form of creativity, expression, and political agency that continues to resist, criticize, and expose by “speaking truth to power.”¹⁷⁸ Drill music opens a window into the inequality and social exclusion that disproportionately affect young Black people, uncovering the unfair and discriminatory policing practices that criminalize Black youth and their form of expression.¹⁷⁹ Drill lyrics serve as chronicles of the violence that Black rappers *suffer from* rather than *cause*.¹⁸⁰ Even if some find this form of artistic expression repugnant, rap artists are still entitled to protection, especially when lyrics contain political and social commentary.¹⁸¹

When courts do not oppose, scrutinize, call out, or exclude gang evidence, including music videos, and when defense attorneys fail to instruct defense experts, the adversarial system fails defendants. Moreover, when jury instructions omit the caution that should be employed when considering the prosecution’s assertions on rap music, miscarriages of justice occur. Despite their innocence, Black youths end up serving hundreds of years in prison because the government locks up youths based on the actions of a single individual on the basis of a song or video.¹⁸²

One problematic consequence of admitting lyrics is that it can preclude a fair trial. A study by Stuart Fischhoff suggests that if a defendant is associated with writing violent or misogynistic rap lyrics, a jury will look at them as if they had scarlet red letters across their garments (“R-A-P”), which they must wear in shame until the jury gets a chance to turn

176. Monteith KC, *supra* note 65, at 549.

177. K-Trap, *Warm* (2021).

178. Lambros Fatsis, *Grime: Criminal subculture or public counterculture? A critical investigation into the criminalization of Black musical subcultures in the UK*, 15 CRIME, MEDIA, CULTURE: AN INT’L J. 447, 452 (2018).

179. Fatsis, *supra* note 79, at 1309.

180. *Id.* at 1309.

181. Brief of Amici Curiae Am. Civ. Liberties Union and Am. Civ. Liberties Union of Tenn. to File, *supra* note 98.

182. Monteith KC, *supra* note 65, at 553.

in a guilty verdict.¹⁸³ This survey, consisting of four sample groups and four different fact patterns, was designed to examine differences in jury perceptions of a defendant on a criminal trial who, in two scenarios, was associated with rap lyrics and, in two other scenarios, was not.¹⁸⁴ Fischhoff concluded that writing these lyrics was more damning regarding adjudged personality characteristics than the actual murder charge.¹⁸⁵

Despite the creative license many rappers take when crafting their songs, scholars have noted that the legal system has increasingly used rap lyrics as evidence, as if the words were “truthful and autobiographical.” This is particularly concerning in the context of criminal trials because it allows prosecutors to prove elements of the crime by circumstantial evidence that was crafted to glamorize either fictionalized or grossly exaggerated descriptions of badness—often of the same type of criminal behaviors for which a particular defendant may be on trial.¹⁸⁶

In the current digital landscape, the content shared on YouTube and other social media platforms can be interpreted as a sign of potential gang affiliation and could lead to individuals being included in the matrix.¹⁸⁷ The gang violence matrix is an intelligence tool the Met uses to identify and risk-assess gang members across London who are involved in gang violence.¹⁸⁸ This leads to youth, just by participating in music and its culture, being subjected to being profiled and monitored by the police.

Further, using rap lyrics as evidence can lead to a chilling effect on the rap genre. There has been an unprecedented level of censorship regarding UK drill. Earlier in 2023, *VICE* reported that YouTube had been working with the Met Police to remove drill videos from the site, complying with around 97% of the force’s removal requests.¹⁸⁹ In 2018, rapper Digga D was sentenced to a year in prison for conspiracy to commit violent disorder after a court case in which music videos by the masked rapper were used as evidence.¹⁹⁰ During his sentencing, the judge issued an order banning him from releasing tracks that describe gang-

183. See Fischhoff, *supra* note 11.

184. *Id.* at 798-99.

185. *Id.* at 803.

186. Erin Lutes et al., *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 2019 at 77, 85.

187. Fatsis, *supra* note 79.

188. *Gangs Violence Matrix*, METRO. POLICE, <https://www.met.police.uk/police-forces/metropolitan-police/areas/about-us/about-the-met/gangs-violence-matrix/> (last visited Sept. 03, 2023).

189. Pritchard, *supra* note 33.

190. Ed Clowes, *For British Drill Stars, the Police Are Listening Closely*, N.Y. TIMES (Jan. 11, 2021), <https://www.rollingstone.co.uk/politics/features/prosecuting-uk-drill-rap-lyrics-court-20131/>.

related violence.¹⁹¹ To release new music, he must notify the police within 24 hours and provide lyrics.¹⁹² If a court finds that his words incite violence, he can be sent back to prison, and his parole conditions limit what he can say publicly about his past.¹⁹³ In 2019, a London judge sentenced drill musicians Skengdo and AM to nine months in prison for breaking a criminal behavior order by performing a song with lyrics including a list of gang members who had been stabbed.¹⁹⁴ “According to the Index on Censorship, this is the first time in British legal history that a prison sentence was issued for performing a song.”¹⁹⁵ This type of legal interference has impacted the music scene. “A lot of rappers are censoring their music now,” says Skengdo.¹⁹⁶

Even down to what they name their video or what hashtag they use to promote it. They want to go under the radar. You put all that hard work into it, you gas everyone up... and it gets taken down in 10 minutes. This is our livelihood, and it's a serious financial loss to have a tune banned. It's changed the way we have to write, the way we express ourselves, the things we say – and that in itself is a problem. We have to change the way we do things to accommodate the police.” . . . [a]nd that's literally just the music side of things – there are food shops 10 minutes away in Oval that we can't use, because it's in SE11.¹⁹⁷

The next step may be the censorship of artists who have not been charged, let alone convicted, of any crime. Artists should be free to reflect lyrically on the violence that exists in their communities and be free from the threats of censorship and criminal consequences.

191. *Id.*

192. *Id.*

193. *Id.*

194. Dan Hancox, *Skengdo and AM: the drill rappers sentenced for playing their song*, THE GUARDIAN (Jan. 31, 2019), <https://www.theguardian.com/music/2019/jan/31/skengdo-and-am-the-drill-rappers-sentenced-for-playing-their-song>.

195. *Id.*

196. *Id.*

197. *Id.*

VII. WHAT CAN THE UK DO?

*“In and out these courtrooms, my lawyer like, ‘Objection’”*¹⁹⁸

A. *Ban the Admission*

One potential solution is to enact legislation calling for an all-out ban on using lyrics as evidence. Potential rap shield rules would completely prohibit the use of rap lyrics and videos as evidence in criminal proceedings.¹⁹⁹ This solution aims to relieve the criminal justice system from setting and enforcing strict boundaries. Changing the law would signal progress and prevent a chilling effect.

B. *If the Lyrics are Admitted, Regulate Strictly and Educate Broadly*

While an absolute ban might be the most comprehensive solution, it might lack a sufficient legal basis, and its implementation could face numerous obstacles. Additionally, there may be instances where prosecutors have valid reasons to use lyrics against a defendant if the lyrics closely mimic a crime. While lyrics should not be completely off-limits, prosecutors should not have broad discretion to use them, and the jury should be properly educated about the context of the lyrics.

One solution could involve making it more difficult for lyrics to be admitted as evidence. There should be a presumption that evidence of a defendant’s creative or artistic expression is inadmissible, requiring the prosecutor to prove, by clear and convincing evidence, the necessity of presenting such artistic material to the jury.

For example, the UK could follow the analysis set out in *Skinner* and *Montague*. The *Skinner* court required a strong nexus between the artistic expression’s specific details and the alleged underlying offense’s circumstances.²⁰⁰ Additionally, “courts should consider the existence of other evidence that can be used to make the same point.”²⁰¹ The *Montague* court stated that “(1) even when probative, rap lyric evidence has an inherent prejudicial effect, and (2) the probative value of rap lyrics evidence may outweigh that prejudicial effect when the lyrics bear a close nexus to the details of the alleged crime.”²⁰² The closer the nexus between

198. Drake and 21 Savage, *On BS* (OVO Sound 2022).

199. NIELSON & DENNIS, *supra* note 97, at 157.

200. *Skinner*, 218 N.J. at 238-39.

201. *Id.* at 239.

202. *Montague*, 471 Md. at 687.

a defendant's rap lyrics and the details of an alleged crime, the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence of the defendant's bad character. This assessment recognizes the innate bias arising from the use of rap lyrics. This is an effective way to initiate the analysis, as it establishes a more rigorous standard to meet. Furthermore, it proposes an accordion-style approach that links the lyrics to the purported offense, therefore enlarging and shrinking the nexus based on the lyrics' similarity to the alleged crime. If the lyrics were written years before the crime, they should not be admitted as evidence in the present case as they are irrelevant. This approach acknowledges this fact.

Furthermore, the UK could adhere to guidelines outlined in the recently enacted California legislation. The court must "first consider that the probative value of the creative expression for its literal truth is minimal unless that expression meets special conditions."²⁰³ The court is also required to "consider that undue prejudice includes the possibility that the trier of fact will treat the creative expression as evidence of the defendant's propensity for violence or criminal disposition, as well as the possibility that the evidence will inject racial bias into the proceedings."²⁰⁴ The court must also consider "credible testimony on the genre of creative expression as to the context of the expression, research demonstrating that the introduction of a particular type of expression introduces racial bias into the proceedings, and evidence to rebut such research or testimony."²⁰⁵ Other factors to consider include:

the extent of the defendant's involvement (did they write the lyrics, perform them, or merely show support in a music video?); the age of the lyrics or videos (was the material created days, weeks, months or years before or after the crime?); and perhaps most importantly, whether the lyrics reference the specific crime at issue.²⁰⁶

If lyrics are presented as evidence, the entire song should be admitted to prevent prosecutors from selectively using parts to suit their agenda. For example, Eithne "Quinn recounts a murder case that she was in, involving a drive-by shooting on a moped with a number of defendants."²⁰⁷

203. Cal. Legis., *supra* note 149, at 94.

204. *Id.*

205. *Id.*

206. Owusu-Bempah, *supra* note 67.

207. Rymajdo, *supra* note 66.

Plucked from over 100 pages of handwritten verses, police presented *two* references to drive-bys that the prosecution wanted to rely on: ‘Grab the strap, load the mac now we riding to it, Drive by get stupid, live nines we shoot it.’ However, they omitted the opening line to this verse — ‘This is rider music, get you hyper music’ — and its closing line, ‘this is a club banger.’²⁰⁸

If the court presented all of the verses, the jury would see that this song was purely created to be an energetic club song.

This type of law would benefit the UK. It requires the prosecutors’ purpose of bringing lyrics into the court to be analyzed and critiqued. The prosecutors must closely examine the evidence to prevent the introduction of bias and the reinforcement of racial stereotypes in legal proceedings. It also provides judges with proper guidance and context for using creative expression in court. In sum, there needs to be a higher barrier for these expressive actions, which are not inherently criminal, as they can be perceived as negative, bad, or violent and can persuade a jury of a defendant’s guilt, regardless of other evidence. Taking all these proposed analyses, prosecutors should have to show that (1) the defendant intended his lyrics to be the truth, (2) the lyrics were created around the time of the alleged crime, (3) there is a strong detailed nexus between the lyrics and the alleged act, and (4) there is no other evidence.

Jurors may often be unfamiliar with rap’s genre markers, such as bragging about violence and creating fictional personas. They might easily confuse the “rough and rugged” creative persona with the person they see standing accused of a crime before them. Two potential solutions to address this issue include offering clearer instructions to jurors and ensuring more credible and closely monitored expert testimony.

The first solution involves providing jurors with limiting jury instructions. These instructions could direct the jury not to take the lyrics literally and recognize that inherent biases might influence their perception of the lyrics.

The second solution focuses on making expert testimony more accessible and ensuring the expert has the necessary knowledge. In the UK, resistance against imposing a standard admissibility test for expert witnesses is prevalent.²⁰⁹ A common issue is that prosecutors often bring in police officers to “explain” rap lyrics, comment on their relevance to the crime at issue, and pose as experts. Defense attorneys are disadvantaged as the two groups who typically testify about rap lyrics are

208. *Id.*

209. MacLeod, *supra* note 165 at 44.

police and rap experts. This practice is problematic as there are presumably a limited number of rap experts, and the defense cannot rely on the police.

Knowledgeable experts should be more accessible for defense use. Experts such as academics, linguists, musical artists, or industry experts can explain the meaning behind the lyrics. Defendants can bring in these rap experts to draw parallels between the particular lyrics in the case and other rap lyrics, showing that music videos often share common elements.²¹⁰ Additionally, experts can describe the conventions and context of rap music, explaining that the lyrics are generally fictional, the rapper's persona is separate from the real person, and the more violent the lyrics, the greater the chance of success in the music industry.²¹¹

By hearing this testimony, jurors might consider the lyric's context, whether the personal circumstances surrounding the artist or the rap lyrical conventions drive the choice of words in the song; the jury has a chance to see the perspective coming from the actual individual behind the art, not follow the perspective set out by other experts informing us what the songwriter had in mind when writing the lyrics. Courts should allow, or at least consider, the opportunity for an expert witness to acknowledge that the defendants authoring the lyrics are engaging in an artistic process, so jurors can apply the evidence discretely. Suppose the UK adopts a broad interpretation of the body of expertise and allows law enforcement officers to testify because they have interacted with the relevant criminal activity. In that case, the courts should permit and encourage defendants to present witnesses with first-hand experience with gang life or lyric composition.

VIII. CONCLUSION

*"F--- it, got a budget for the lawyer though"*²¹²

At the core of rap is a creative expression that challenges the established political, social, and economic systems. Despite this undeniable truth, prosecutors in the US and the UK have utilized rap lyrics as evidence to police, censor, and imprison artists, predominantly those from minority groups. This disproportionate treatment of a genre created by minority artists represents yet another instance of racial

210. *United States v. Harris*, No. 8:12-cr-205-T-17MAP, 2016 U.S. Dist. LEXIS 102730, at 9 (M.D. Fla. Jul. 28, 2016).

211. *Id.*

212. RICK ROSS, *Stay Schemin'*, on *STAY SCHEMIN'* (2012).

injustice in a criminal justice system already plagued with such issues. The use of rap lyrics should be carefully regulated, as there are risks of misinterpretation, chilling effects on creative expression, and the perpetuation of racial stereotyping and bias.