

ORIGINAL ARTICLE

Prejudicial but not unduly so? Addressing the epistemic and non-epistemic dangers of rap evidence

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Abstract

Recent years have seen mounting concern about the use of rap music as evidence in criminal proceedings, alongside an ever-increasing number of cases involving ‘rap evidence’. Yet, while rap music is widely recognized to be highly prejudicial as evidence in court, little is known about how ‘prejudicial effect’ is, or should be, conceptualized and addressed in these cases. This article unpacks the meaning of prejudicial effect in criminal trials, offering a broad interpretation that encapsulates epistemic (accuracy) and non-epistemic (fairness) concerns, interrogates how the social and cultural context of rap music can make it ‘unduly prejudicial’ as evidence, and explores how the appellate courts approach the prejudicial effect of rap evidence. The article proposes more informative directions to jurors and advocates for legislation to restrict the admissibility of rap evidence, emphasizing the importance of assessing evidence in its proper social and cultural context.

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1 | INTRODUCTION

Concern is mounting among lawyers, civil liberties organizations, politicians, and the public about the use of rap music lyrics and videos as evidence in English criminal courts.¹ Since emerging more than 50 years ago, rap music has become a global phenomenon.² It has provided a creative, therapeutic, empowering, and lucrative outlet, particularly for Black young people from marginalized communities.³ Yet, several styles and subgenres of rap that reference crime have attracted unwelcome attention from police and prosecutors, with ‘drill’ being the subject of most recent cases and debate.⁴ An emerging body of literature interrogates the contemporary criminalization of rap music in the United Kingdom (UK), often focusing on drill. Beyond rap as evidence, this literature scrutinizes the policing and censoring of rap artists, including the removal of music from digital platforms and the prevention of live performances. It criticizes the heavy-handed response to rap as inappropriate, disproportionate, and counterproductive, risking miscarriages of justice, stifling creative expression, and perpetuating harmful stereotypes about Black people.⁵

Yet, in criminal trials, the use of ‘rap evidence’⁶ by police and prosecutors, which started at least 20 years ago, shows no sign of abating,⁷ with lawyers reporting that such evidence is more

¹ See for example JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), at <https://cdn.prod.website-files.com/67becde70dae19a9e5ea2bc3/689f556627ddaea14c80512a_JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>; A. Ahmed, “‘It Risks Miscarriages of Justice’: MPs Oppose Rap Lyrics Being Used as Evidence in UK Trials” *Guardian*, 22 November 2023, at <<https://www.theguardian.com/music/2023/nov/22/mps-call-for-change-in-rap-lyrics-being-used-as-evidence-in-uk-trials-nadia-whittome-kim-johnson-shami-chakrabarti-annie-mac>>; Youth Justice Legal Centre, *Fighting Racial Injustice: Rap & Drill* (2024), at <https://yjlc.uk/sites/default/files/attachments/2024-06/YJLC_Racial-injustice_Toolkit-3-JUNE24-D.pdf>.

² R. Bramwell and A. de Lacey (eds), *The Cambridge Companion to Global Rap* (2025).

³ See for example R. Bramwell, *UK Hip-Hop, Grime and the City: The Aesthetics and Ethics of London’s Rap Scenes* (2015); J. White, *Terraformed: Young Black Lives in the Inner City* (2020); A. Ekpoudom, *Where We Come From: Rap, Home and Hope in Modern Britain* (2024).

⁴ This article discusses ‘rap evidence’, not only drill, because not all cases involve drill. Some basic conventions of rap and drill are described below.

⁵ See for example L. Fatsis, ‘Policing the Beats: The Criminalisation of UK Drill and Grime Music by the London Metropolitan Police’ (2019) 67 *Sociological Rev.* 1300; J. Ilan, ‘Digital Street Culture Decoded: Why Criminalizing Drill Music Is Street Illiterate and Counterproductive’ (2020) 60 *Brit. J. of Criminology* 994; E. Quinn et al., ‘Introduction to Special Issue: Prosecuting and Policing Rap’ (2022) 41 *Popular Music* 419; A. Oliver, *Deeping It: Colonialism, Culture & Criminalisation of UK Drill* (2023); A. Sanghavi, ‘Giving Rap a Chance: The Cultural Policing and Consequences of the Suppression of Rap Music in England in the Twenty-First Century’ (2025) 52 *J. of Law and Society* 181; T. Young and S. Hulley, “‘It’s Tantalising Evidence ... but You’ve Got to Look at the Wider Picture’: Rap Music as Evidence in Joint Enterprise Cases’ (2024) 21 *Crime, Media, Culture* 338; I. Ingram and S. Blackman, ‘Policing Popular Music – “Therapy in the Trap”: An Online Ethnography of UK Drill and Grime Artists, Producers and Listeners’ in *Popular Music Ethnographies: Practices, Places and Identities*, eds S. Raine et al. (2025) 277; H. Carvalho, ‘Love, Hate, Beauty and Justice: Affective and Aesthetic Economies of UK Drill and Its Criminalisation’ (2025) 19 *Law and Humanities* 199; T. Jalloh, ‘Speech Acts and Unspeakable Raps’ (2025) 42 *J. of Applied Philosophy* 1378.

⁶ The term ‘rap evidence’ describes: lyrics purportedly written or performed by a defendant; participation in music videos, including dancing, making gestures, or being present; possessing and sharing lyrics or music videos; and status as a rapper or as being involved in rap culture.

⁷ While it is impossible to know the number of cases involving rap evidence, research collated from media reports, case law databases, scholarship, and professional networks identified 68 cases between 2020 and 2023 involving 252 defendants. Anecdotal evidence suggests that the true figure is much higher. See E. Quinn et al., *Compound Injustice: A Review of Cases Involving Rap Music Evidence in England and Wales* (2024), at <<https://documents.manchester.ac.uk/display.aspx?DocID=72455>>.

likely to be admitted than excluded.⁸ In previous work, I have interrogated how courts assess the relevance of rap, showing that lyrics and videos are often not relevant evidence in the cases in which they are used, and raised the question of whether courts adequately recognize the potential ‘undue prejudice’ of rap evidence.⁹ Despite widespread concern, little is known about how courts conceptualize and address the ‘prejudicial effect’ of rap. Addressing this gap is important because, with relevance being a low threshold, decisions as to the admissibility of evidence can easily hinge on its prejudicial nature.

This article examines the concept of prejudicial effect in the context of rap evidence, demonstrating that the social and cultural context of rap, including the racialized nature of rap evidence, has largely been disregarded in assessments of prejudice. Consideration of this context supports a broad understanding of prejudicial effect, encapsulating epistemic (accuracy) and non-epistemic (fairness) concerns. Section 2 unpacks the meaning of prejudicial effect in criminal trials and what makes evidence ‘unduly prejudicial’, requiring exclusion from the trial. Section 3 interrogates factors that can make rap evidence unduly prejudicial, including the racialized vilification of rap and its decontextualization in court. Section 4 turns to the case law, examining how the appellate courts have approached the prejudicial effect of rap. One possible explanation for a lack of judicial scrutiny is that directions to jurors are thought to prevent undue prejudice. However, Section 5 demonstrates that, unless properly informed and formulated, directions to jurors may do more harm than good, and proposes points for inclusion in such directions. Section 6 briefly explores developments in other jurisdictions where there has been greater recognition of the prejudicial and racialized nature of rap evidence, before supporting calls for law reform.

By concentrating on prejudicial effect, the article provides a richer understanding of what has been termed ‘prosecuting rap’,¹⁰ which is necessary to improve approaches to rap music as evidence. It also contributes to a growing body of socio-legal scholarship that questions the neutrality of evidence law. It urges courts to engage more deeply and carefully with epistemic and non-epistemic forms of undue prejudice that account for the social and cultural context of evidence.

2 | PREJUDICIAL EFFECT

To be admissible in a criminal trial, evidence must be relevant, meaning that it must be logically probative or disprobative of some matter that requires proof.¹¹ As explored elsewhere, the judicial approach to the relevance of rap music has left much to be desired, with insufficient consideration of the music’s conventions or how particular lyrics or videos relate to the crime charged, allowing music unconnected to an offence to be used to prove issues such as intention, motive, and criminal propensity.¹² However, relevance is not the only criterion for the admission of evidence.

⁸ T. Ejimofe, *Rap Reflections: A Scoping Survey of Lawyers’ Experience of Rap Music in Criminal Proceedings* (2024) 15, at <https://endrapontrial.org/wp-content/uploads/2025/08/2025_Ejimofe_RapReflections.pdf>.

⁹ A. Owusu-Bempah, ‘The Irrelevance of Rap’ (2022) *Criminal Law Rev.* 130.

¹⁰ This is the title of a project at the University of Manchester: <<https://sites.manchester.ac.uk/prosecuting-rap/>>.

¹¹ *DPP v. Kilbourne* [1973] AC 729 (HL).

¹² Owusu-Bempah, *op. cit.*, n. 9.

In addition to exclusionary rules for certain types of evidence,¹³ judges may exclude otherwise admissible evidence on grounds of prejudice or unfairness.

At common law, prosecution evidence can be excluded where its probative value is outweighed by its prejudicial effect (PV versus PE).¹⁴ The common law has been largely superseded by Section 78(1) of the Police and Criminal Evidence Act 1984 (PACE 1984),¹⁵ which provides for the exclusion of prosecution evidence

if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Though Section 78 does not mention ‘probative value’ or ‘prejudicial effect’, evidence may be excluded under this provision where its prejudicial effect outweighs its probative value, rendering the admission of the evidence unfair. In considering the application of Section 78 to rap evidence, courts and counsel have referred to ‘prejudice’ and ‘unfairness’ interchangeably.¹⁶ Thus, while the Section 78 ‘fairness test’ has become the primary means of excluding prejudicial prosecution evidence, prejudicial effect remains an important evidential concept.

Rap music is often treated as ‘bad character evidence’ under the Criminal Justice Act 2003 (CJA 2003) and admitted through Section 101(1)(d) as relevant to an important matter in issue between the defendant and the prosecution. Section 101(1)(d) is subject to Section 101(3), which requires courts to exclude evidence, on an application by the defendant, where its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

There are, then, various routes to exclude prejudicial prosecution evidence. However, what makes evidence ‘prejudicial’? Paul Roberts notes that common lawyers invoke ‘prejudice’ in a ‘loose and imprecise way, uninhibited by definitional rigour’.¹⁷ English and Welsh appellate courts have not scrutinized specific forms of prejudice, but they distinguish between ‘prejudice’ and ‘undue prejudice’. In *R v. Awoyemi*, for example, Lady Justice Hallett, upholding the admission of rap music, spoke of the evidence as being ‘prejudicial but inevitably so and not unduly so’.¹⁸ This distinction matters; evidence can be prejudicial and yet admissible, with the Court of Appeal using the term ‘prejudicial’ to describe evidence that is merely ‘adverse to the defendants’.¹⁹ Exclusion is only warranted where the evidence is (or may be) ‘unduly prejudicial’ – that is, where its value in proving an issue is outweighed by its prejudicial effect, thereby causing unfairness. The real question, then, is how, or when, probative value is outweighed by prejudicial effect so that evidence becomes ‘unduly prejudicial’ and should be excluded.

¹³ See for example the rules on sexual behaviour evidence in the Youth Justice and Criminal Evidence Act 1999.

¹⁴ *R v. Sang* [1980] AC 402 (HL). As below, probative value outweighs prejudicial effect where the value of evidence in proving an issue is outweighed by the damage that it may cause by, for example, leading to an improper conclusion.

¹⁵ I. Dennis, *The Law of Evidence* (2024, 8th edn) 87.

¹⁶ See for example *R v. Lewis* [2014] EWCA Crim 48, [101]; *R v. Alimi* [2014] EWCA Crim 2412, [36]; *R v. Dixon-Kenton* [2021] EWCA Crim 673, [59].

¹⁷ P. Roberts, *Roberts & Zuckerman's Criminal Evidence* (2022, 3rd edn) 665.

¹⁸ *R v. Awoyemi* [2016] EWCA Crim 668, [33].

¹⁹ *R v. Rashid* [2019] EWCA Crim 2018, [38]. Note that this does not require hostility or unreasonableness, as may be understood in some definitions of prejudice, outside of evidence law.

Within evidence law scholarship, there are two commonly recognized forms of undue prejudice: reasoning prejudice and moral prejudice.²⁰ Both concern epistemic considerations: the accuracy of verdicts and the potential for evidence to lead the factfinder to convict the defendant for reasons other than the proper probative value of the evidence. Reasoning prejudice occurs where evidence is afforded excessive weight in determining guilt. A jury might, for example, reason that a five-year-old conviction for shoplifting is much stronger evidence of a disposition to steal cars than it is. Moral prejudice, by contrast, occurs where the nature of the evidence causes the factfinder to convict regardless of its probative value. For example, a previous conviction for assaulting a child might lead the jury to conclude that the defendant is a bad person who deserves to be convicted and punished for an unrelated offence, regardless of whether guilt is proven beyond reasonable doubt.²¹

Section 20D of the Juries Act 1974 prohibits disclosure of jury deliberations, making it impossible to know when reasoning prejudice and moral prejudice occur in a particular case. However, as shown in Section 3, there are specific and powerful reasons to be concerned about reasoning prejudice and moral prejudice in assessing rap evidence, which support the calls for informed jury directions in Section 5 and restrictions on the admissibility of rap evidence in Section 6.

Many commentators confine their discussion of undue prejudice to these forms.²² They appear to make a distinction between (1) exclusion of evidence on grounds of undue prejudice, which focuses on epistemic considerations that affect the accuracy of the weight attributed to evidence or trial outcomes, and (2) exclusion on broader grounds of unfairness. Applying this distinction, the common law PV versus PE formula is captured by the Section 78 fairness test. However, Section 78 also allows for exclusion on non-epistemic fairness grounds distinct from prejudicial effect, such as where reliable but improperly obtained evidence is excluded to remedy a rights breach or protect the integrity of the courts.²³ This article makes no such distinction; it employs a wide view of prejudice that encompasses non-epistemic fairness concerns independent of the promotion of accurate outcomes. It also goes further than case law on improperly obtained evidence, in which the mistreatment of defendants in the gathering of evidence may render its admission at trial unfair.²⁴ Here, it is argued that, even when obtained appropriately, the court's admission of and reasoning with evidence can constitute the unfair treatment of defendants, and this can amount to undue prejudice on non-epistemic grounds.²⁵

It is thus contended that faulty factfinding is not the only way in which evidence can be unduly prejudicial to defendants. As Roberts explains, “prejudice” is capable of straddling the divide

²⁰ Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996) para 7.2.

²¹ See S. Lloyd-Bostock, ‘The Effects on Juries of Hearing about the Defendant’s Previous Criminal Record: A Simulation Study’ (2000) *Criminal Law Rev.* 734.

²² See for example H. L. Ho, ‘Justice in the Pursuit of Truth: A Moral Defence of the Similar Facts Rule’ (2006) 35 *Common Law World Rev.* 51; C. Tapper, ‘The Law of Evidence and the Rule of Law’ (2009) 68 *Cambridge Law J.* 67, at 72.

²³ Note that much of the case law on exclusionary discretion pertains to improperly obtained evidence. On the rationales for excluding improperly obtained evidence and their application in case law, see A. Ashworth and M. Redmayne, *The Criminal Process* (2010, 4th edn) ch. 11.

²⁴ See for example *R v. Mason* [1988] 1 WLR 139; *A v. Secretary of State for the Home Department* [2005] UKHL 71.

²⁵ This argument builds on the work of scholars who argue that non-epistemic unfairness can occur in the admission of and reasoning with evidence but have not framed these arguments in terms of prejudicial effect or undue prejudice. See for example Ho, *op. cit.*, n. 22; F. Picinali, ‘Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial’ (2024) 6 *Quaestio Facti: International J. on Evidential Legal Reasoning* 201.

between epistemic and broader normative rationales underpinning evidentiary doctrines.²⁶ He posits that '[p]robative value and prejudicial effect are to be assessed in terms of their relative contribution to the objectives and values of criminal proceedings'.²⁷ These objectives and values include accurate verdicts, but also fair procedures and the fair and respectful treatment of defendants.²⁸ If defendants are not treated fairly, the moral authority and legitimacy of both verdict and process can be questioned.²⁹

There are several ways in which the admission of and reasoning with evidence can be unduly prejudicial on non-epistemic grounds. For example, as explored below, when a defendant's perspectives on the evidence is dismissed or devalued due to an identity prejudice against a social group to which they belong, they suffer testimonial injustice.³⁰ Not only does this weaken their case, there is also a distinct moral harm in denying the defendant's capacity to contribute to an epistemic exchange and provide knowledge.³¹

More broadly, defendants suffer unfair treatment when evidence is adduced or reasoned with in defiance of their dignity, moral agency, and autonomy. While not an uncontentious position, the point has been articulated forcefully in the context of bad character evidence,³² particularly using previous convictions as propensity evidence, where past conduct may be treated as determinative of present conduct. According to Hock Lai Ho, we fail to respect the defendant fully as a person when we are dismissive of the possibility of moral redemption or moral fortitude to resist temptation to which they have previously succumbed: 'Reliance on evidential reasoning that expresses such disrespect is objectionable in itself, apart from whatever bad consequences to which it might lead.'³³

With rap music, as opposed to previous convictions, as propensity evidence, there is a distinct issue: the defendant's previous misconduct or 'bad character' (from which they are said to have failed to deviate) is unproven and derived from an often unjustified assumption that lyrics or music videos reflect the defendant's reality. Conflating a rap persona with real-life character itself undermines dignity and agency, often being based on racialized assumptions of threat and danger, and that Black young people lack the intellect or capacity to engage in (or with) a complex form of cultural expression.³⁴ As explored below, rap evidence is unduly prejudicial when it becomes a means of dehumanizing and objectifying defendants.

²⁶ Roberts, op. cit., n. 17, p. 665.

²⁷ Id.

²⁸ See Rule 1.1 of the Criminal Procedure Rules 2025, which sets out the overriding objective of dealing with cases justly. This includes treating participants with respect, dealing with the prosecution and the defence fairly, and recognizing the rights of the defendant, as well as acquitting the innocent and convicting the guilty.

²⁹ H. L. Ho, 'Liberalism and the Criminal Trial' (2010) *Singapore J. of Legal Studies* 87, at 102; A. Owusu-Bempah, *Defendant Participation in the Criminal Process* (2017) ch. 2; Dennis, op. cit., n. 15, pp. 47–53.

³⁰ See M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (2007).

³¹ Picinali, op. cit., n. 25, p. 224.

³² For a critique of this position, see M. Redmayne, *Character in the Criminal Trial* (2015) ch. 4.3; Roberts, op. cit., n. 17, p. 675.

³³ Ho, op. cit., n. 22, p. 72. See also H. L. Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (2008) ch. 6.

³⁴ On constructions of Blackness and crime, see for example J. Belle, 'Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited' (2018) 34 *Georgia State University Law Rev.* 513; P. Williams and B. Clarke, 'The Black Criminal Other as an Object of Social Control' (2018) 7 *Social Sciences* 234; C. Phillips et al., 'Ethnicities, Racism, Crime, and Criminal Justice' in *The Oxford Handbook of Criminology*, eds A. Liebling et al. (2023, 7th edn) 329.

To summarize, prejudicial evidence is damaging to defendants' interests. Evidence is unduly prejudicial, and should be excluded, when its value in proving an issue is outweighed by the prejudice that it may cause, resulting in unfairness. Such undue prejudice may arise where the evidence is likely to result in faulty factfinding, but also, irrespective of the epistemic value of the evidence, when the admission of or reasoning with evidence conflicts with basic principles of fair trial and legitimate adjudication, which include the respectful treatment of defendants.

As we will see in Section 4, the case law on rap evidence does not engage with a conception of prejudice (or 'fairness') that accounts for the respectful treatment of defendants. Rather, the courts have focused on epistemic considerations, consistent with the dominant 'reliability-centred' approach to Section 78.³⁵ In other words, if the court finds rap evidence sufficiently reliable, it is unlikely to be excluded as unfair. Unfortunately, the social and cultural context of rap, which affects reliability, has been ill considered and poorly understood by the courts, meaning that even an epistemic reliability-centred approach to prejudice is sorely lacking.

3 | THE PREJUDICIAL EFFECT OF RAP

This section explores why rap evidence can be unduly prejudicial, recognizing that rap has been used inappropriately to infer bad character and guilt. However, a caveat is necessary. Rap is not always unduly prejudicial, and the prejudicial effect of an item of evidence depends on the issues and other evidence in the case. Sometimes rap can be put before a court fairly, such as where lyrics written by the defendant make reliably incriminating references to the offence charged, including information not readily accessible.³⁶ However, lawyers and judges should be alert to the factors explored here. Prosecutors should consider how they present their cases,³⁷ defence lawyers should be prepared to counter prosecution narratives, and judges should exclude unduly prejudicial rap evidence, as well as explain evidence that is admitted.

3.1 | Why is rap prejudicial?

Perhaps the most obvious consideration is the content and aesthetics of rap music.³⁸ While rap has many styles and subgenres, from political to party rap, some are known for violent and criminal themes. Drill, in particular, is provocative and inflammatory. Drawing on the earlier 'gangsta rap' subgenre, drill artists leverage popular perceptions of criminal street culture for financial and social gain.³⁹ Against distinct 'drum patterns, ... sliding basslines and eery melodies',⁴⁰ drill artists

³⁵ D. Ormerod and D. Birch, 'The Evolution of the Discretionary Exclusion of Evidence' (2004) *Criminal Law Rev.* 767, at 779. See also A. Choo and S. Nash, 'What's the Matter with Section 78?' (1999) *Criminal Law Rev.* 929.

³⁶ Owusu-Bempah, *op. cit.*, n. 9.

³⁷ The Code for Crown Prosecutors is clear that '[p]rosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction', and that '[p]rosecutors must be even-handed in their approach to every case, and have a duty to protect the rights of suspects and defendants'. CPS, *Code for Crown Prosecutors* (2018) paras 2.7–2.8, at <<https://www.cps.gov.uk/publication/code-crown-prosecutors>>.

³⁸ See further N. Stoia et al., 'Rap Lyrics as Evidence: What Can Music Theory Tell Us?' (2018) 8 *Race and Justice* 330.

³⁹ Ilan, *op. cit.*, n. 5, p. 1003; F. Stuart, *Ballad of the Bullet: Gangs, Drill Music and the Power of Online Infamy* (2020).

⁴⁰ Oliver, *op. cit.*, n. 5, p. 23.

typically rap in the first person, depicting shocking tales of ‘road life’,⁴¹ emphasizing violence, drug dealing, and gangs. Though drill, and rap more broadly, calls for the appearance of authenticity, it relies heavily on storytelling, bravado, and hyperbole, meaning that we cannot simply infer involvement in crime from an artist’s lyrics or rap persona.⁴² Likewise, participation in music videos with street crime or gang imagery tells us little about a person’s disposition or criminal associations. Participation may be for fun, to support someone, to boost social capital, or a moment of spontaneity.⁴³ Even references to real-world events, including taunts of victims of violence, may be a form of street reportage rather than an indication of involvement.⁴⁴

The conventions of rap affect its relevance as evidence. However, where it may have some probative value (such as where it explicitly connects a defendant to a particular place, person, or event) or is admitted despite its irrelevance, failure to appreciate these conventions can result in undue prejudice. While many rap fans appreciate the symbolism, hyperbole, and dark humour that can make it impossible to distinguish fact from fiction, to judges and jurors, lyrics and videos may appear to be far stronger evidence of character and criminality than they are. However, why does the risk of reasoning prejudice and moral prejudice arise with rap, when we can usually appreciate the entertaining nature and nuances of other forms of creative expression that include violent content?

Part of the answer lies in the history of the suspicion, suppression, and vilification of rap. In the UK, this has included persistent efforts by law enforcement, politicians, and the media to associate rap with crime.⁴⁵ As the latest subject of moral panic, drill has received intense attention from the police and media,⁴⁶ including the online monitoring of rappers and the removal of videos from YouTube and social media.⁴⁷ This sits alongside newspaper headlines describing drill as the ‘soundtrack to murder’,⁴⁸ and statements from senior police officers and politicians accusing drill of ‘glamorising serious violence’,⁴⁹ suggesting that drill rappers should be treated like terror

⁴¹ Y. Bakkali, ‘Road Capitals: Reconceptualising Street Capital, Value Production and Exchange in the Context of Road Life in the UK’ (2022) 70 *Current Sociology* 419.

⁴² See E. Nielson and A. Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019).

⁴³ F. Addo, ‘Resisting the Criminalisation of Rap’ (2022) 41 *Popular Music* 558, at 560.

⁴⁴ Id., p. 561; W. Pritchard, ‘Behind Bars: How Rap Lyrics Are Being Used to Convict Black British Men’ *Guardian*, 21 June 2023, at <<https://www.theguardian.com/music/2023/jun/21/behind-bars-how-rap-lyrics-are-being-used-to-convict-black-british-men>>.

⁴⁵ See for example D. Hancox, *Inner City Pressure: The Story of Grime* (2018) ch. 6; L. Fatsis, ‘Grime: Criminal Subculture or Public Counterculture? A Critical Investigation into the Criminalization of Black Musical Subculture in the UK’ (2019) 15 *Crime, Media, Culture* 447; Oliver, op. cit., n. 5; W. Pritchard, ‘“They’re Doing This by Stealth”: How the Met Police Continues to Target Black Music’ *Guardian*, 21 April 2023, at <<https://www.theguardian.com/music/2023/apr/21/theyre-doing-this-by-stealth-how-the-met-police-continues-to-target-black-music>>; Sanghavi, op. cit., n. 5.

⁴⁶ See for example C. Thapar, ‘The Moral Panic against UK Drill Is Deeply Misguided’ *Pitchfork*, 12 September 2018, at <<https://pitchfork.com/thepitch/the-moral-panic-against-uk-drill-is-deeply-misguided/>>.

⁴⁷ W. Pritchard, ‘Police Are Taking Down More UK Drill and Rap Videos than Ever – For Artists, What Is the Cost?’ *DJ Mag*, 12 July 2023, at <<https://djmag.com/features/police-are-taking-down-more-uk-drill-and-rap-videos-ever-artists-what-cost>>.

⁴⁸ 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, at <<https://www.dailymail.co.uk/news/article-9585461/Soundtrack-murder-time-gangland-drill-track-Number-One.html>>.

⁴⁹ LBC, ‘Met Police Chief Calls On YouTube to Take Down Drill Music to Curb Gang Crime’ *LBC*, 18 May 2018, at <<https://www.lbc.co.uk/radio/presenters/nick-ferrari/met-police-chief-calls-on-youtube-drill-music/>>.

suspects,⁵⁰ and claiming a direct link between drill and carrying knives.⁵¹ Despite the lack of empirical evidence to substantiate claims that drill, as opposed to material and social conditions, causes crime,⁵² anyone unfamiliar with the genre could easily infer (or accept) from this rhetoric that drill (and rap more broadly) is a dangerous autobiographical account of the rapper's exploits, glorifying and inciting crime. Beyond the content of the music, the figure of the drill artist has become an 'embodiment of disorder, disruption, and dissent'.⁵³

3.2 | Racialized undue prejudice

The above rhetoric can be persuasive because, despite having a diverse fanbase, rap is performed predominantly by (and used against⁵⁴) Black young people who are positioned within entrenched racialized stereotypes of criminality.⁵⁵ In this context, Blackness functions as a symbolic marker of suspicion and danger,⁵⁶ shaping how the authorities treat Black people and how Black cultural expression is interpreted. The vilification of rap continues a long colonial history of policing Black bodies and cultural practices, including musical forms cast as dangerous and threatening to the establishment.⁵⁷ Rap is also devalued in ways that are '[c]onsistent with supremacist rhetoric suggesting the intellectual inferiority of Black people', with Black culture not perceived as 'sophisticated enough to transcend literalism'.⁵⁸ Lambros Fatsis explains that, with rap seen as 'a source of dissonance and incivility', it becomes excluded 'from the pantheon of art'.⁵⁹ As such, it gets attributed to character in a way in which other music genres do not.

Thus, rap evidence can invite what we may term *racialized* reasoning prejudice and moral prejudice. The factfinder may overestimate its probative value because, alongside a lack of understanding or appreciation of the genre, rap plays into preconceived notions of Black criminality. They may also view the defendant negatively, as worthy of conviction and punishment, because of an association with rap culture. The danger of racialized undue prejudice is evidenced by

⁵⁰ BBC News, 'Gangs to Be Prosecuted like "Terror Suspects" over Violent Videos' *BBC News*, 30 May 2018, at <<https://www.bbc.co.uk/news/uk-england-london-44300724>>.

⁵¹ *Independent*, 'Tory MP Claims There Is "Direct Link" between Drill Music and Young People Carrying Knives' *Independent*, 6 February 2024, at <<https://www.independent.co.uk/tv/news/tory-mp-knife-crime-drill-music-b2491519.html>>.

⁵² See generally A. Lynes et al., 'Thug Life: Drill Music as a Periscope into Urban Violence in the Consumer Age' (2020) 60 *Brit. J. of Criminology* 1201; M. Lee et al., 'No, Music Doesn't Cause Crime – Not Even "Drill Rap"' *The Conversation*, 9 May 2023, at <<https://theconversation.com/no-music-doesnt-cause-crime-not-even-drill-rap-203912>>.

⁵³ Oliver, op. cit., n. 5, p. 23.

⁵⁴ In a dataset of 68 cases involving 252 defendants, 84 per cent were from an ethnic minority and 78 per cent were Black or Black/mixed race. Quinn et al., op. cit., n. 7.

⁵⁵ Nielson and Dennis, op. cit., n. 42, p. 81. See also P. Gilroy, *There Ain't No Black in the Union Jack* (1987) ch. 3; P. Gilroy, 'A New Crime, but the Same Old Culprits' *Guardian*, 8 January 2003, at <<https://www.theguardian.com/uk/2003/jan/08/ukguns.comment>>; Williams and Clarke, op. cit., n. 34.

⁵⁶ Belle, op. cit., n. 34.

⁵⁷ Oliver, op. cit., n. 5; L. Fatsis, 'From Overseer to Officer: A Brief History of British Policing through Afro-Diasporic Music Culture' in *Southern and Postcolonial Perspectives on Policing, Security and Social Order*, eds R. Cavalcanti et al. (2023) 45.

⁵⁸ Addo, op. cit., n. 43, p. 559. See also Ilan, op. cit., n. 5, p. 1003.

⁵⁹ L. Fatsis, 'Sounds Dangerous: Black Music Subcultures as Victims of State Regulation and Social Control' in *Harm and Disorder in the Urban Space: Social Control, Sense and Sensibility*, eds N. Peršak and A. Di Ronco (2021) 30, at 39.

empirical studies from the United States (US) that have consistently found racial bias against rap music.⁶⁰ In these studies, participants were more likely to associate rap music and (Black) rappers with crime, danger, and gangs than artists of other music genres.

The risk of racialized undue prejudice is particularly acute in group prosecutions, including cases of secondary liability and conspiracy, and where prosecutors situate offences within a gang context. The Compound Injustice project found that, of a dataset of 68 cases involving rap evidence between 2020 and 2023, 80 per cent had more than one defendant, and 53 per cent were joint enterprise murder or attempted murder cases involving an average of 4.7 defendants.⁶¹ Rap music seems to have become a routine means of sweeping young people into criminal charges, including those who are, at best, on the periphery of offending or involved in lesser offences than that charged.⁶² The music is used to infer criminal associations, shared motives, and intentions,⁶³ with rap operating as a ‘racialised signifier’⁶⁴ to help to build the gang narrative.⁶⁵ The term ‘gang’ is vague and disproportionately applied to Black young people,⁶⁶ rendering the participation of Black young defendants in rap culture consistent with stereotypical images of gangsters.

3.3 | Decontextualizing rap

We must also consider how rap is decontextualized in court. Judges and jurors are not the intended audience, and the courtroom is not the intended venue for rap to be experienced. The music loses entertainment value, appearing increasingly sinister in the solemn court environment – an alienating environment far removed from most defendants’ lives or social experiences. When lyrics are read aloud by police and prosecutors, it is difficult to appreciate their artistic merit, let alone assess probative value. Lyrics that are violent and provocative in content can sound creative, emotive, and fun when performed to a beat, with the artist displaying their lyrical prowess and ability to

⁶⁰ S. Fischhoff, ‘“Gangsta” Rap and a Murder in Bakersfield’ (1999) 29 *J. of Applied Social Psychology* 795; C. Fried, ‘Who’s Afraid of Rap? Differential Reactions to Music Lyrics’ (1999) 29 *J. of Applied Social Psychology* 705; A. Dunbar et al., ‘The Threatening Nature of “Rap” Music’ (2016) 22 *Psychology, Public Policy, and Law* 280; A. Dunbar and C. Kubrin, ‘Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments’ (2018) 14 *J. of Experimental Criminology* 507.

⁶¹ Quinn et al., op. cit., n. 7, p. 7.

⁶² See P. Williams and B. Clarke, *Dangerous Associations: Joint Enterprise, Gangs and Racism* (2016) 19; E. Quinn, ‘Racist Inferences and Flawed Data: Drill Rap Lyrics as Criminal Evidence in Group Prosecutions’ (2024) 65 *Race & Class* 3; N. Waller, *The Legal Dragnet: Joint Enterprise Law and Its Implications* (2024) 14. For two concerning examples, see D. Conn, ‘One Death, 11 Jailed Teenagers: Was a Moss Side Murder Trial Racist?’ *Guardian*, 5 June 2021, at <<https://www.theguardian.com/world/2021/jun/05/one-death-11-jailed-teenagers-was-a-moss-side-trial-racist>>; F. Robertson, ‘Jailed over a Group Chat’ (2024) 6 *Proof Magazine* 55.

⁶³ See for example Lewis, op. cit., n. 16; Awoyemi, op. cit., n. 18; Rashid, op. cit., n. 19.

⁶⁴ B. Clarke and P. Williams, ‘(Re)Producing Guilt in Suspect Communities: The Centrality of Racialisation in Joint Enterprise Prosecutions’ (2020) 9 *International J. for Crime, Justice and Social Democracy* 116.

⁶⁵ A. Owusu-Bempah, ‘Prosecuting Rap: What Does the Case Law Tell Us?’ (2022) 41 *Popular Music* 427; Quinn et al., op. cit., n. 7.

⁶⁶ Amnesty International, *Trapped in the Matrix: Secrecy, Stigma, and Bias in the Met’s Gangs Database* (2018), at <<https://media.amnesty.org.uk/documents/Trapped20in20the20Matrix20Amnesty20report.pdf>>.

rhyme to different flows.⁶⁷ Likewise, the bravado displayed in music videos to garner excitement and support the artist, and as a means of self-expression through movement is made to appear menacing in court. ‘Gun fingers’, for example, have been used to infer association with gangs and weapons,⁶⁸ with no regard for the status of this now ‘universal sign of appreciation and enjoyment’, as a ‘generational salute to various expressions of artistic excellence [originating] in 1950s Jamaican sound clash culture’.⁶⁹

Furthermore, by treating rap music as autobiographical, the positive aspects of engagement with rap culture are denied, including how it can enable disfranchised young people to resist oppression, build camaraderie, and develop a sense of themselves and their place in the world.⁷⁰

Police officers acting as rap ‘experts’ enable the music to be stripped of context.⁷¹ In the experiences of independent expert witnesses, police reports are often devoid of information about the musical conventions and culture, are laden with misinterpretations of ever-changing terminology, and make tenuous suggestions of links between music and crime.⁷² The endemic institutional racism within police forces adds weight to concerns about the partiality of police opinions on Black youth culture.⁷³ Unfortunately, however, the weaknesses in police evidence can be masked by the credibility excess that they are afforded. Research on lawyers’ experiences of judicial bias indicates that judges privilege police accounts, even in the face of evidence that contradicts officers’ versions of events.⁷⁴ This credibility excess furthers the risk of reasoning prejudice, with the police perspective being overvalued to the detriment of defendants.⁷⁵

There is also the problem of cherry picking lyrics to fit a narrative. Eithne Quinn provides a clear example, revealing a deliberate attempt to mislead judge and jury.⁷⁶ The defendant (D) in the case, in which Quinn acted as an expert witness, was a popular drill artist accused of assisting or encouraging a fatal stabbing that occurred when a fight broke out unexpectedly at a party. Prosecutors sought to rely on excerpts from lyrics found on D’s phone, including the lines ‘I had devilish thoughts when I witnessed a body get chopped ... He got splashed & he got cheffed. We didn’t say shit.’ The lyrics were said to show a propensity to participate in acts of armed violence,

⁶⁷ C. Thapar, ‘What Kind of Society Sends Young Men to Jail and Ruins Lives because of the Lyrics in a Song?’ *Guardian*, 31 January 2023, at <<https://www.theguardian.com/commentisfree/2023/jan/31/rap-music-young-men-fail-lyrics-conviction>>.

⁶⁸ Lewis, op. cit., n. 16, [34]; Awoyemi, op. cit., n. 18, [9].

⁶⁹ Oliver, op. cit., n. 5, p. 73.

⁷⁰ Bramwell, op. cit., n. 3; White, op. cit., n. 3.

⁷¹ See JUSTICE, op. cit., n. 1, para 2.51; T. Ward and S. Fouladvand, ‘Bodies of Knowledge and Robes of Expertise: Expert Evidence about Drugs, Gangs and Human Trafficking’ (2021) *Criminal Law Rev.* 442.

⁷² Addo, op. cit., n. 43, p. 562; Thapar, op. cit., n. 67.

⁷³ Ilan, op. cit., n. 5, p. 1003; Baroness Casey, *The Baroness Casey Review Final Report: An Independent Review into the Standards of Behaviour and Internal Culture of the Metropolitan Police Service* (2023), at <<https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf>>; V. Dodd, ‘Head of Britain’s Police Chiefs Says Force “Institutionally Racist”’ *Guardian*, 5 January 2024, at <<https://www.theguardian.com/uk-news/2024/jan/05/head-of-britains-police-chiefs-says-force-is-institutionally-racist-gavin-stephens>>.

⁷⁴ K. Monteith KC et al., *Racial Bias and the Bench: A Response to the Judicial Diversity and Inclusion Strategy (2020–2025)* (2022) 16, at <<https://documents.manchester.ac.uk/display.aspx?DocID=64125>>.

⁷⁵ J. Gonzales Rose, ‘A Critical Perspective on Testimonial Injustice: Interrogating Witnesses’ Credibility Excess in Criminal Trials’ (2024) 7 *Quaestio Facti: International J. on Evidential Legal Reasoning* 173.

⁷⁶ Quinn, op. cit., n. 62.

and that the defendant participated in the attack. However, in the excerpt above, the prosecution omitted playful references to guns and shooting, replacing them with an ellipsis to create the impression that the lyrics fit the incident at issue, which did not involve firearms.⁷⁷ Quinn's analysis also revealed that, contrary to the prosecution's assertions, the lyrics were not an account of the incident. The excerpt above had originally been composed (with some inconsequential differences) before the stabbing and became part of a hit song. Ultimately, the judge excluded the lyrics, acknowledging both their irrelevance and their unduly prejudicial effect.⁷⁸ With the case otherwise weak, D was acquitted. However, many are not so fortunate. Quinn's analysis reveals both the ease with which rap can be used as a deliberate tactic, drawing on stereotypical narratives about Black youth culture to create prejudice, and the benefit of independent experts to expose this tactic.

3.4 | Non-epistemic undue prejudice

The potential for faulty factfinding, principally in the form of racialized reasoning prejudice and moral prejudice, should now be clear. The danger of such epistemic undue prejudice justifies new interventions to regulate rap evidence, proposed in Sections 5 and 6. However, we should also be concerned about non-epistemic undue prejudice, which provides further grounds for restricting rap evidence. The admission of rap can undermine the defendant's position as the autonomous subject of proceedings who should be treated with respect and dignity, and, in turn, undermine the legitimacy of proceedings. This is because an uncritical assumption that rap can be taken literally, informed by stereotypes and the devaluing of Black artistic expression, is dehumanizing, as is the dicing and splicing of lyrics to mislead the court and create the impression of a deviant or depraved defendant. Rap can become a means of 'othering' – of casting the defendant as an outsider and a threat to order,⁷⁹ of denying them 'the dignity of their own expressivity'.⁸⁰

As well as dehumanizing defendants through implicit racialized narratives of threat and danger, rap can be used to deny Black children the status of vulnerability or victimhood – a status that can warrant special adjustments, defences, and sentence mitigation. In *R v. NHF*, at a trial for the supply of drugs in a 'county lines' operation, dancing in a drill video became evidence that the defendant 'was a willing associate of this gang' and not a victim of modern slavery as he claimed.⁸¹ The defendant was 17, autistic, and had a history of abuse. He thought that being in the video would be fun. He testified that he was unaware of the lyrical content at the time of filming.⁸² Yet, similar to how Black music is often reduced to 'noise',⁸³ his 'physical responses to music are read as gang activity'.⁸⁴ Had his explanation been taken seriously, and considered in the light of the conventions of drill, it would have been easier to appreciate that dancing in a music video does

⁷⁷ *Id.*, p. 14.

⁷⁸ *Id.*, p. 16.

⁷⁹ Fatsis, *op. cit.*, n. 59, p. 40.

⁸⁰ Ilan, *op. cit.*, n. 5, p. 1008.

⁸¹ *R v. NHF* [2022] EWCA Crim 859, [6].

⁸² *Id.*, [10].

⁸³ T. Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* (1994).

⁸⁴ Oliver, *op. cit.*, n. 5, p. 72.

not equate to gang membership. In any event, it is unsurprising that a vulnerable person under a gang's control might be in the gang's video.

Beyond vulnerable defendants, as indicated above, treating participation in rap culture as evidence of bad character can be unduly prejudicial. It not only implies a lack of capacity to express oneself creatively or engage in a sophisticated cultural form, but also, when used as propensity evidence, suggests an inability to act against the persona portrayed in rap music, thus denying moral agency. This is contrary to how we treat the creators of other forms of expression with violent content deemed more culturally and politically acceptable.⁸⁵ Film directors such as Quentin Tarantino are praised for creating stylized and exaggerated narratives, evoking strong emotional reactions while engaging audiences in conversations about complex social and moral issues.⁸⁶

In many cases, defendants have explained that provocative lyrics are a convention of the music and that their participation in rap culture is for fun, a creative outlet, for financial gain, or spontaneous.⁸⁷ These explanations are given scant regard in the case law, indicating a significant danger of epistemic injustice,⁸⁸ which, it is argued here, can amount to non-epistemic undue prejudice.⁸⁹ Drawing on the work of Miranda Fricker, Federico Picinali explains that testimonial injustice occurs 'when a speaker suffers a credibility deficit due to the hearer holding an identity prejudice against a social group to which the speaker belongs'.⁹⁰ Thus, if a Black defendant's perspective on the probative value and prejudicial effect of rap evidence is dismissed or afforded a credibility deficit due to an identity prejudice that associates Black youth culture with crime, they suffer testimonial injustice.⁹¹ This credibility deficit sits alongside the credibility excess afforded to police officers, with the defendant's already lessened credibility judged against the police's augmented credibility, resulting in even less weight being placed on the defendant's perspective.⁹²

We may also, or instead, view the epistemic injustice as contributory. Contributory injustice occurs when a problematic set of hermeneutical resources (the shared meanings used to understand and communicate experiences) are applied with wilful ignorance, frustrating an agent's ability to contribute to shared knowledge.⁹³ In the context of criminal proceedings, Tareeq Jalloh argues that 'a contributory injustice occurs when adjudicators rely on generalisations that do not reflect the experience and stock of knowledge of a party and therefore contributes to the epistemic exclusion of said party'.⁹⁴ For example, if the adjudicator relies on a generalization that people who perform drill are likely to be gang members or have a propensity for violence, they commit a contributory injustice; they wilfully ignore the other stock of knowledge that reflects

⁸⁵ JUSTICE, op. cit., n. 1, para 2.52.

⁸⁶ This comparison is provided by the Art Not Evidence campaign: <<https://driftime.notion.site/FAQ-1c26e890cded428ea8f9bb9f3f2f9d0f>>.

⁸⁷ See for example *R v. O* [2010] EWCA Crim 2985; Lewis, op. cit., n. 16; Dixon-Kenton, op. cit., n. 16; NHF, op. cit., n. 81.

⁸⁸ On epistemic injustice, see Fricker, op. cit., n. 30; J. Gonzales Rose, 'Race, Evidence, and Epistemic Injustice' in *Philosophical Foundations of Evidence Law*, eds C. Dahlman et al. (2021) 380.

⁸⁹ Epistemic injustice in the assessment of evidence can be harmful to defendants and affect the fairness of trials, regardless of the accuracy of evidential reasoning. See Picinali, op. cit., n. 25.

⁹⁰ Id., p. 210.

⁹¹ Id.

⁹² Gonzales Rose, op. cit., n. 75, p. 178.

⁹³ K. Dotson, 'A Cautionary Tale: On Limiting Epistemic Oppression' (2012) 33 *Frontiers: A J. of Women Studies* 24.

⁹⁴ T. Jalloh, 'Understanding Epistemic Injustice as Contributory Injustice: A Comment on Picinali's Argument' (2024) 7 *Quaestio Facti: International J. on Evidential Legal Reasoning* 189, at 193. See also T. Jalloh, 'Does the Critical Scrutiny of Drill Constitute an Epistemic Injustice?' (2022) 62 *Brit. J. of Aesthetics* 633.

the experiences of rap artists.⁹⁵ Epistemic injustice can be unduly prejudicial because it is damaging to defendants personally, denying their full capacity to contribute to the epistemic exchange at the trial and to shared knowledge more broadly,⁹⁶ and because it undermines the right to effective participation guaranteed by Article 6 of the European Convention on Human Rights.⁹⁷ Though the exact scope of this right is uncertain, arguably it means that defendants have a right to contribute and that their contributions must be taken seriously, with appropriate consideration given to their perspective.⁹⁸

This section has demonstrated the significant risk of rap evidence causing undue prejudice. This undue prejudice can take the form of reasoning prejudice or moral prejudice, informed by racist logic and stereotypes, resulting in erroneous factfinding. It may also be non-epistemic; rap evidence may be unduly prejudicial because it is admitted or reasoned with unfairly, in defiance of defendants' dignity and autonomy, and can act to dehumanize and impede participation. As explained above, it is not suggested that rap evidence is always unduly prejudicial. Nonetheless, the complex and interconnected factors that can result in undue prejudice should be considered. Searches of legal databases have uncovered at least 20 appeal cases involving a challenge to the admission or use of rap at trial or sentencing, and many more in which rap was admitted but not challenged. Yet, as we turn to the case law, we find little concern for what prejudicial effect entails, how rap evidence can create undue prejudice, or how to manage this risk.

4 | THE CASE LAW

The Court of Appeal will only interfere with a decision as to the admissibility of bad character evidence, or the application of Section 78 of PACE 1984, based on *Wednesbury* unreasonableness,⁹⁹ where the decision 'is so unreasonable that no reasonable authority could ever have come to it'.¹⁰⁰ This helps to explain why there has been only one successful appeal against the use of rap evidence.¹⁰¹ However, a reluctance to interfere with trial judges' decisions does not explain or justify the striking lack of engagement with the concept of prejudicial effect in rap cases.¹⁰²

In *R v. Seed & Others*, for example, part of a music video made by someone neither present at the shooting nor involved in the case was admitted 'to show the deceased's reputation as an important and violent gang member'.¹⁰³ The video included the lyrics 'I ain't surprised you died with your

⁹⁵ *Id.*

⁹⁶ It is also damaging because it perpetuates systemic inequalities and undermines the pursuit of knowledge and understanding. Gonzales Rose, *op. cit.*, n. 75, p. 183.

⁹⁷ *SC v. UK* (2005) 40 EHRR 10. See Picinali, *op. cit.*, n. 25.

⁹⁸ This applies whether the contributions come from the defendant or through their representatives. See A. Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22 *International J. of Evidence and Proof* 321.

⁹⁹ *R v. O'Leary* (1988) 87 Cr App R 387 (CA), 391; *R v. Hanson* [2005] EWCA Crim 824, [15]; *R v. W* [2022] EWCA Crim 1438, [42].

¹⁰⁰ *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 (CA), 230.

¹⁰¹ *Alimi*, *op. cit.*, n. 16.

¹⁰² In addition to cases discussed below, see for example *R v. Sode* [2017] EWCA Crim 705; *R v. Abdi* [2022] EWCA Crim 315; *R v. Khan* [2022] EWCA Crim 1478; *R v. Egan* [2022] EWCA Crim 392; *R v. Dibba* [2023] EWCA Crim 576.

¹⁰³ *R v. Seed & Others* [2024] EWCA Crim 650, [60].

gun, over there shooting guys you liked riding for fun'. In this unusual case, the applicants were convicted of murdering their friend despite him having been shot by someone from another group. The applicants were convicted on the basis that they took part in a violent altercation with the other group, sharing a common purpose to shoot at each other, or intentionally assist or encourage others to shoot at each other. The submission that the lyrics were a hearsay commentary on the incident, had no evidential value, and were highly prejudicial was rejected without considering their prejudicial nature. The Court merely found the video to be relevant to the deceased's gang involvement, and that, '[i]n any event, it is impossible to say that this evidence – even if it had been incorrectly admitted – could render the convictions of either applicant unsafe'.¹⁰⁴

Though the video formed 'a very small part of the prosecution evidence',¹⁰⁵ its prejudicial effect warranted evaluation. The artistic expression of someone unconnected to the case reinforced the prosecution narrative that the applicants were in a gang with the victim, despite the applicants disputing gang membership and one denying being at the scene of the offence. Given the questionable reliability of a third party's musings, along with the potential for rap to reinforce stereotypes of the violent Black gangster in group prosecutions, the potential for undue prejudice should have been obvious.

Even in the one successful appeal against rap evidence, the Court did not engage with the issue of prejudice. In *R v. Alimi*, appearance as an extra in two music videos should not have been used as evidence of gang membership at the appellant's trial for weapons offences. Having found the videos to be irrelevant, the Court simply noted that 'we consider that the admission of the rap lyrics as against the appellant would be prejudicial and would have an adverse effect on the fairness of the proceedings'.¹⁰⁶ While the acknowledgement of unfairness is welcomed, more could have been said. Did undue prejudice stem solely from the appellant's minor role in the videos, making them irrelevant to the issue of gang association and thus inviting reasoning prejudice, or was the Court cognisant of additional concerns about the prejudicial nature of rap evidence? It is likely the former since the Court was content with the music being used against two co-defendants who performed lyrics containing 'references to and glorification of violence and guns and of gang activities generally'.¹⁰⁷

In *R v. R*, the Court went slightly further, finding that, though the 'YouTube evidence' at issue 'undoubtedly had prejudicial content', the trial judge was within his discretion to conclude 'that he was satisfied that safeguards existed which would prevent undue weight being given to the prejudicial aspects of the evidence'.¹⁰⁸ While the reference to 'undue weight' indicates an epistemic understanding of prejudice, the judgment does not explain the 'safeguards' and is therefore of limited use in determining when prejudicial effect outweighs probative value.

There are few cases where the Court provided a more specific explanation of its view on prejudice. In *R v. Lewis*, the acquittal of one defendant who participated in a rap video helped to establish a view that the admission of music videos as 'gang evidence' against other defendants was not unduly prejudicial, despite the videos being unrelated to the incident at issue.¹⁰⁹ However, without knowing what transpired in the deliberation room, it is optimistic to assume that the

¹⁰⁴ Id., [79].

¹⁰⁵ Id.

¹⁰⁶ *Alimi*, op. cit., n. 16, [36].

¹⁰⁷ Id., [22].

¹⁰⁸ *R v. R* [2011] EWCA Crim 1067, [20]–[22].

¹⁰⁹ *Lewis*, op. cit., n. 16.

acquitted defendant's participation in the video did not unduly cloud the jury's opinion of him, or that his acquittal meant that the jury was not unduly prejudiced against the appellants.

In *R v. Dixon-Kenton*, the Court explained why the admission of gang evidence at a murder trial was fair, but without directly addressing the prejudicial effect of a drill music video in which the appellant participated.¹¹⁰ The prosecution case was that the appellant, a member of the RP gang, stabbed a rival as retribution for an earlier killing. The appellant denied being in a gang and claimed to have acted in self-defence. The Court found the admission of gang evidence to be fair because the gang context of the case was apparent from the defence statement, the appellant contending that he was the victim of a gang attack.¹¹¹ Furthermore, the Court agreed with the trial judge, who reasoned that

the prosecution ... do not seek to put before the jury the whole background of serious violence between the two factions, which includes at least nine murders over the last ten years. The evidence ... is measured and evidence which the defence can answer and which the jury can consider without the danger of the adverse effect of prejudice.¹¹²

The prosecution also refrained from seeking to adduce a video featuring the appellant's brother (a member of RP), which purportedly mocked the victim's death and would have prejudiced the appellant. However, contrary to the Court's suggestion, the prosecution not seeking to adduce some highly prejudicial evidence of questionable probative value does not make it fair to rely on other highly prejudicial evidence of questionable probative value – namely, participation in a music video that was consistent with the conduct and aesthetics of drill videos. The prosecution should not be commended for refraining from situating an offence within a much broader gang narrative, including prior offences that date back to when the appellant and the victim were young children and that they had nothing to do with. Such tactics rely on 'gang folklore' to position defendants within the continuum of gang stories,¹¹³ undermining their autonomy and moral agency. Furthermore, the Court's description of the music video as 'a collective gang activity'¹¹⁴ reveals a lack of understanding of or appreciation for not only the conventions of drill and the reasons for participation in music videos, but also the racially prejudicial way in which the gang narrative is formulated.

Overall, the Court of Appeal has expressed approval of the way in which rap (and gang-related evidence) is handled by trial judges. In *R v. Awoyemi*, the Court rejected the suggestion that judges are too indulgent of applications to adduce gang-related evidence, stating that '[i]t is our experience that, as a general rule, trial judges are acutely conscious of the dangers of admitting gang affiliation evidence'.¹¹⁵ Though the Court recognized the prejudicial nature of the rap lyrics and video at issue, it did not elaborate on why the evidence was prejudicial, or why prejudicial effect did not outweigh probative value. Based on the opinion (seemingly formed by taking lyrics at face value) that the evidence 'indicated the extent to which the individuals concerned had signed up

¹¹⁰ *Dixon-Kenton*, op. cit., n. 16.

¹¹¹ *Id.*, [60].

¹¹² *Id.*, [59].

¹¹³ *Clarke and Williams*, op. cit., n. 64.

¹¹⁴ *Dixon-Kenton*, op. cit., n. 16, [60].

¹¹⁵ *Awoyemi*, op. cit., n. 18, [36].

to gang and gun culture’,¹¹⁶ the Court merely declared that the evidence was prejudicial ‘but not unduly so’.¹¹⁷

Conversely, Paul McKeown has argued that the prosecution presenting its case in *R v. Awoyemi* as a botched gang rivalry shooting, with little evidence to substantiate it, ‘does appear to be unduly prejudicial’.¹¹⁸ The music was used to help to prove that firearms offences and an attempted murder were a gang crime gone wrong, despite the identity of the intended victim being unproven and there being no evidence of hostility between the gangs allegedly involved. McKeown’s argument reflects concerns expressed in the earlier judgment granting leave to appeal, where the Court found it ‘arguable that at least some of the evidence admitted was capable of being highly prejudicial and was of questionable probative value’.¹¹⁹ While this finding invited a fuller assessment of both relevance and prejudice by the Court hearing the appeal, regrettably, the opportunity was not taken.

The concerns about *R v. Awoyemi* highlight a particular prejudicial use of rap evidence noted above – namely, to support a gang narrative, with rap compensating for a lack of direct evidence linking a crime to a gang.¹²⁰ We also see this in *R v. Heslop*, where the prosecution presented a fatal shooting as being part of a gang rivalry, despite the identity of the shooters being at issue, the victims not being associated with gangs (the prosecution saying that it was a case of misidentification), and there being no evidence of ‘tit-for-tat’ violence between the two gangs said to be involved.¹²¹ Yet, alongside other circumstantial evidence, rap lyrics were admitted against two of the three appellants to show gang association and help to prove intention, motive, common purpose, and, in the case of one appellant, propensity to handle firearms and ammunition.¹²² Despite the appellants arguing that the rap evidence would unfairly prejudice the jury against them, prejudicial effect was barely considered. According to the Court, ‘[h]aving been properly admitted and having been the subject of entirely appropriate judicial directions, it was for the jury to decide whether the contentions based on the gang-related evidence were established’.¹²³ The directions included an instruction to approach the evidence ‘fairly’ and ‘that gang association alone could not make an individual guilty of the crime alleged’,¹²⁴ but did not appear to include context about rap music, or caution against being influenced by bias or stereotypes. The adequacy of judicial directions is considered in Section 5.

While the appellate case law lacks engagement with the prejudicial effect of rap, it is difficult to draw firm conclusions on how trial judges assess prejudice. There are some ‘good news’ stories, such as that detailed by Quinn, where the judge excluded evidence on grounds of irrelevance and undue prejudice.¹²⁵ However, there is much to indicate that, contrary to the perception of the Court in *R v. Awoyemi*, a rigorous approach is not often taken. This can be garnered from the

¹¹⁶ *Id.*, [33].

¹¹⁷ *Id.*

¹¹⁸ P. McKeown, ‘Case Comment: Evidence: *R v. Awoyemi*’ (2017) *Criminal Law Rev.* 131, at 133.

¹¹⁹ *R v. Awoyemi* [2015] EWCA Crim 590, [53].

¹²⁰ On the use of speculative inferences, including a racialized gang narrative, to fill evidential deficits, see Waller, *op. cit.*, n. 62.

¹²¹ *R v. Heslop* [2022] EWCA Crim 897.

¹²² *Id.*, [23], [26].

¹²³ *Id.*, [51].

¹²⁴ *Id.*, [28].

¹²⁵ Quinn, *op. cit.*, n. 62.

experiences of lawyers and expert witnesses,¹²⁶ from the fact that most appeal cases uphold the admission of seemingly irrelevant or unreliable rap evidence,¹²⁷ and from information in some judgments, including *R v. O*, where the admission of a generic rap video was upheld despite the trial judge failing to ‘give specific attention to’ Section 101(3) of the CJA 2003.¹²⁸

The lack of analysis in the case law presents a challenge to determining how the courts conceptualize ‘undue prejudice’. However, the focus appears to be an epistemic PV versus PE formula, with no regard for how rap evidence can dehumanize, undermine moral agency and autonomy, and cause epistemic injustice. In short, if the music is deemed relevant to an issue, it is unlikely to be considered unduly prejudicial. Unfortunately, the courts’ epistemic focus does not sufficiently account for the culture or conventions of rap, or the racialized moral panic around the genre that may influence factfinding. Of the 50 appellate judgments consulted for this article, not one addressed the racialized nature of rap evidence. The closest we get is the recent case of *R v. Oni*, where the Court acknowledged that ‘[i]t is vital in any case to avoid the unfair stereotyping of individuals, based on their race, as members of gangs’.¹²⁹ Yet, the Court failed to engage with counsel’s submissions on institutional racism and discriminatory prosecution strategies,¹³⁰ upholding the admission of images of two appellants holding ‘money phones’ (popular among rappers and other celebrities) as evidence of gang membership. While one of the appellants had his conviction for conspiracy to cause grievous bodily harm quashed because a police officer misidentified him in a video said to show him wearing the gang’s colour, his six co-appellants, whose convictions were attained partly through racist narratives about drill music,¹³¹ were not so fortunate.

5 | JUDICIAL DIRECTIONS

Perhaps we need not worry about undue prejudice because judges explain to jurors the use to which rap evidence can be put and warn against prejudice to the defendant. In *R v. Abdi*, a case concerning the appellant’s appearance in three music videos, the Court explained that ‘[s]o long as appropriate caution is advised by the judge (which is what occurred in this case) a jury is entitled to consider such material’.¹³²

By and large, the Court of Appeal has been content with judicial directions.¹³³ Any criticism has tended to focus on the lack of clarity as to the purported relevance of the evidence or the

¹²⁶ This is based on discussions with legal professionals and expert witnesses at events on rap evidence. See Monteith et al., op. cit., n. 74, p. 16; Ejimofo, op. cit., n. 8.

¹²⁷ Owusu-Bempah, op. cit., n. 9.

¹²⁸ *O*, op. cit., n. 87, [24].

¹²⁹ *R v. Oni* [2025] EWCA Crim 12, [102].

¹³⁰ Garden Court Chambers, ‘Court of Appeal Quashes Conspiracy to Cause Grievous Bodily Harm Conviction of Aspiring Law Student Who Spoke in Parliament’ *Garden Court Chambers*, 15 January 2025, at <<https://gardencourtchambers.co.uk/court-of-appeal-quashes-conspiracy-to-cause-grievous-bodily-harm-conviction-of-aspiring-law-student-who-spoke-in-parliament/>>.

¹³¹ M. Lipson, ‘Damned by Drill’ *Shado Mag*, 26 November 2024, at <<https://shado-mag.com/act/damned-by-drill/>>.

¹³² *Abdi*, op. cit., n. 102, [26]. See also *Rashid*, op. cit., n. 19. Where rap is adduced as bad character evidence, directions should be given in accordance with Judicial College, *The Crown Court Compendium: Part I: Jury and Trial Management and Summing Up* (2025) ch. 12, at <<https://www.judiciary.uk/wp-content/uploads/2022/06/Crown-Court-Compendium-Part-I-July-2024-April-2025-update.pdf>>.

¹³³ See for example *Awoyemi*, op. cit., n. 18, [39]; *Heslop*, op. cit., n. 121, [28].

use to which it could be put, rather than a failure to explain rap music or caution against bias or stereotypes.¹³⁴ This is concerning because the latter direction is necessary to counter, or balance, the prosecution's negative portrayal of rap music and mitigate undue prejudice.

In *R v. Saleem*, for example, the trial judge 'should have given the jury much more help than he did' as to the purported relevance of lyrics to the case.¹³⁵ Yet, the Court of Appeal believed that the jury was 'quite capable of considering [the evidence] in the proper context of this case and putting aside its emotive connotations'.¹³⁶ In *R v. Soloman*, the Court went further, finding not only insufficient direction on relevance, but also that the judge should have reminded the jury 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'.¹³⁷ Yet, the Court concluded that, even without such a direction,

it would have been apparent to the jury that the title of a lyric found on the appellant's phone could not be given much weight or significance and ... that lyrics of a song do not necessarily or perhaps commonly bear a connection with actual real-life events.¹³⁸

Given societal bias against rap, and empirical research indicating that rap is perceived as more dangerous and indicative of criminality than other music genres, the Court may have been too confident in the jury's ability to fairly assess rap evidence. Nonetheless, *R v. Soloman* represents a step forward in articulating an expectation that jurors be reminded of the fictional nature of much music. However, it does not appear to have set a precedent. The Court's view that the lyric was of little weight was put in the context of the case,¹³⁹ and it was significant that the trial judge had said that '[t]he jury will certainly be told ... that rap lyrics commonly contain references to criminality, shootings and so on', but that this did not occur.¹⁴⁰

Even where the potential use of the evidence is articulated clearly, if not done carefully, directions may elicit the kind of emotive response that jurors are assumed to guard against. In *R v. O*, a case concerning the possession of a firearm and ammunition with intent to endanger life, the judge summed up the issue as follows:

Members of the jury, the question is does that video demonstrate that he is a member of a *street gang bent on violence*, and if it does not, then however *repulsive* you find it, it takes you nowhere and you must ignore it. If it does demonstrate that he is a member of a violent street gang, it does not necessarily follow that that gun must have been taken into the cab by him, does it, but it may help you to make up your minds about that. It may also help you to decide whether he had an intention to endanger life, either himself or by someone else sooner or later in the course of the *feuds to which these gangs are devoted*.¹⁴¹

¹³⁴ See for example *Rashid*, op. cit., n. 19, [40].

¹³⁵ *R v. Saleem* [2007] EWCA Crim 1923, [47].

¹³⁶ *Id.*, [43].

¹³⁷ *R v. Soloman* [2019] EWCA Crim 1356, [12].

¹³⁸ *Id.*, [15].

¹³⁹ *Id.*, [12].

¹⁴⁰ *Id.*, [14].

¹⁴¹ *O*, op. cit., n. 87, [16], emphasis added.

References to ‘a street gang bent on violence’ and ‘devoted’ to feuds are inflammatory, particularly in a case that did not involve gang violence, but, rather, a teenager being arrested in a taxi with a gun and ammunition under his seat. The prosecution case was that the appellant’s performance in a six-month-old YouTube video showed a propensity as a gang member to use gun violence for the purposes of endangering life, making it more likely that he was guilty of possessing the weapon with intent to endanger life. The relevance and reliability of the video is doubtful, given the generic content of the music and its lack of connection to the incident at issue. However, once admitted, the judge should have articulated the prosecution theory without such provocative framing. Moreover, telling the jurors that they may find the video (which included violent ‘lyrics about guns and gun culture’¹⁴²) ‘repulsive’, without acknowledging the widespread appeal of such music, validates an othering response to Black youth culture, opening the door to both epistemic and non-epistemic racialized undue prejudice.

Fortunately, some recent first-instance trials demonstrate better practice. At a trial for robbery and murder in 2024, the judge repeatedly reminded the jury to treat drill lyrics with caution.¹⁴³ Jurors were told that they had to be sure that the words related to the incident at issue and were reliable before taking them into account as some support for the prosecution case against the defendant who wrote the lyrics, but not his co-defendants. Importantly, the jury was directed not to hold the shocking nature of the lyrics against the defendant, that the lyrics were interspersed throughout a notebook and among other lengthy sections of lyrics, and that violence is a constant theme in the genre and violent and offensive lyrics may have no real-life basis. The judge provided some explanation of the basic conventions of drill and set out the prosecution and defence perspectives on the relationship between the lyrics and the offence. For the defence, this included why the lyrics (some of which had been written after attending a course in prison on building rap lyrics) could not be taken at face value, that they were intended to be shocking, and that the defendant had sought to boost his ‘bad kid’ persona or social reputation. It is no doubt significant that the defence was assisted by an expert, Yusef Bakkali, who, unlike many police officers, provided a balanced evidence-based account of the history, conventions, and social significance of drill.

An informed account of rap is necessary to mitigate racialized reasoning prejudice and moral prejudice, as well as epistemic injustice and other forms of unfair treatment. As such, the Crown Court Compendium should be updated to instruct judges that, where rap is adduced, in addition to having the prosecution and defence cases (including the defendant’s perspective) clearly set out for them, jurors should be:

- informed of common conventions within rap, and of its popularity and widespread appeal;
- warned against being influenced by stereotypes, including stereotypes of Black criminality and negative stereotypes about rap music and rap artists;
- cautioned against assuming that rap can be taken literally – jurors should be instructed that the link between the music and the alleged crime must be scrutinized and assessed carefully, and that, where dealing with lyrics, they must be sure that the words are reliable;
- directed to consider factors that can affect the weight to be given to the music, including the extent to which it conforms to the conventions of the genre, its age, its specificity, its broader

¹⁴² *Id.*, [28].

¹⁴³ A copy of the directions was obtained from counsel for the defendant. The case received media coverage, including J. Britton, ‘Man Guilty of Teenage Knife-Dealer’s Murder’ *BBC News*, 17 June 2024, at <<https://www.bbc.co.uk/news/articles/cleeyxvvv0eo>>.

context, how it was intended to be heard, and the extent of the defendant's role in its creation or performance.

Independent expert evidence is often necessary to provide context and inform directions, and jurors should have the benefit of this expert opinion. However, an informative direction is not a magic bullet to prevent undue prejudice. Rap evidence should only be admitted if, having carefully scrutinized its relevance, and taking account of the factors discussed in Section 3, it would not have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. Unfortunately, however, the case law indicates that something more than guidance for and by judges is needed. Law reform is warranted to restrict the admissibility of this category of evidence.

6 | ART NOT EVIDENCE

In some jurisdictions where the issue of criminalizing rap has arisen, there has been increasing engagement with the unduly prejudicial nature of rap evidence. In Australia, at a pre-trial hearing in July 2024 in the New South Wales Supreme Court, several items of evidence, including drill lyrics, were excluded from a trial for joint enterprise murder and wounding as unfairly prejudicial.¹⁴⁴ In excluding extracts of lyrics found in the applicants' phones as confessional evidence and evidence of state of mind, Hamill J stated that he was

unable to formulate a direction that would allow the jury to use this evidence in a rational way and not be overwhelmed by the prejudice or distaste which some people may have if they are unfamiliar with, or just don't like, the artform and its reliance on violent language.¹⁴⁵

Earlier in the judgment, he noted that '[t]here are real issues in allowing an artist's or musician's words or works to be used in this way. It would set a dangerous precedent to do so.'¹⁴⁶ He was conscious of the danger of leaving or encouraging jurors to 'cherry pick particular lyrics while ignoring others'.¹⁴⁷

In Canada, in September 2024, a murder case against a popular rapper was stayed following a ruling that gang evidence, including music videos, was inadmissible because its prejudicial effect 'significantly outweighed' its probative value.¹⁴⁸ In assessing the prejudicial effect of rap videos that were proffered as evidence of motive, Schreck J in the Ontario Superior Court of Justice explicitly acknowledged anti-Black racism as a significant issue in the criminal justice system, and stated that 'the possibility that reliance on rap lyrics may give rise to unconscious bias based on stereotypes about young Black men and violent crime must form part of the assessment of the prejudicial effect of this type of evidence'.¹⁴⁹

¹⁴⁴ *Diallo & Ors (No 4)* [2024] NSWSC 882.

¹⁴⁵ *Id.*, [87].

¹⁴⁶ *Id.*, [62].

¹⁴⁷ *Id.*, [81].

¹⁴⁸ *R v. Ali* [2024] ONSC 5208, [11]. For an examination of earlier Canadian jurisprudence, see D. Tanovich, 'R v. Campbell: Rethinking the Admissibility of Rap Lyrics in Criminal Cases' (2016) 24 *Criminal Reports* 27.

¹⁴⁹ *Ali*, *id.*, [157].

In the US, despite a longstanding problem of rap being inappropriately used as evidence,¹⁵⁰ appellate courts across jurisdictions are increasingly recognizing its highly prejudicial nature.¹⁵¹ In March 2024, the Supreme Court of Georgia overturned a murder conviction because the admission of a portion of a music video showing the appellant waving a gun created a substantial danger of unfair prejudice by improperly portraying the appellant as having a propensity for violence.¹⁵² Two months later, the Texas Court of Criminal Appeals overturned a murder conviction, finding that ‘any probative value of the rap videos and lyrics was outweighed by the overwhelming potential for prejudice and confusing the issues’.¹⁵³ The music, which referenced criminal activity, had been introduced to undermine the appellant’s claim that, being of low intelligence, he naïvely drove acquaintances to the victim’s home, not understanding that he was taking them to commit robbery and murder, and that he was a friendly person. The Court, unpersuaded by the use of rap to undermine vulnerability (and given the lack of proof that the appellant authored the lyrics), concluded: ‘Appellant stated our view on the issue at hand best when he said “[I]t’s just rap, m’am.”’¹⁵⁴

While assessments of probative value and prejudicial effect are context specific, these brief examples demonstrate a greater willingness to engage with the issue of prejudice, including racialized prejudice, than is apparent in the case law of England and Wales. Going further, some US jurisdictions have tabled or introduced legislation to restrict the use of rap evidence.¹⁵⁵ Notably, Section 352.2(a) of the California Evidence Code, in force since 2023, requires a court determining the admissibility of creative expression to balance ‘the probative value of that evidence against the substantial danger of undue prejudice’. In so doing, the court must take account of specific factors, such as the fact that undue prejudice includes the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

Law reform efforts in the US have inspired similar in England. The Art Not Evidence campaign launched in 2023,¹⁵⁶ proposing a Criminal Evidence (Creative and Artistic Expression) Bill.¹⁵⁷ The bill would create a presumption that creative expression is inadmissible evidence in criminal trials. This presumption could be rebutted if proven that the evidence is literal, refers to the facts of the crime alleged, is relevant to an issue of fact in dispute, and is necessary insofar as the issue cannot be proven by other evidence. In deciding whether these conditions are met, judges would be required to consider specific factors relating to the linguistic and artistic conventions of the expression, the social and cultural context of the expression, and the context in which it was created, published, and performed. Thus, regard must be had for the perspective of those engaged in the culture or creation of the expression. The bill would also require a suitably qualified independent expert to be instructed. For rap, this might be a scholar, a musician, or a youth worker, but not a police officer.

¹⁵⁰ See generally Nielson and Dennis, *op. cit.*, n. 42; E. Lutes et al., ‘When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases’ (2019) 46 *Am. J. of Criminal Law* 77.

¹⁵¹ See for example *State v. Skinner* 95 A.3d 236 (NJ 2014). A list of key opinions on rap evidence is available at <<https://www.rapontrial.org/legal-resources>>.

¹⁵² *Baker v. State of Georgia* (2024) S23A0860.

¹⁵³ *Hart v. State of Texas* (2024) No. PD-0677-22, 2.

¹⁵⁴ *Id.*, p. 24.

¹⁵⁵ For a list of passed and introduced legislation, see <<https://www.rapontrial.org>>.

¹⁵⁶ See Art Not Evidence, at <<https://www.artnotevidence.org>>; Ahmed, *op. cit.*, n. 1.

¹⁵⁷ The bill is modelled on Senate Bill S7527 introduced in New York, and the proposed federal Restoring Artistic Protection Act.

The bill would also require that where creative expression is admitted, the court redact any part in respect of which prejudicial effect outweighs probative value. In some cases, presenting a full song or video would be unnecessarily damaging. For example, where a still from a video can prove that defendants are acquainted, jurors need not see or hear its inflammatory content. At the same time, judges must be cautious of cherry picking. As explained, lyrics and imagery that, at face value, may appear connected to an offence can lose probative force when considered in their proper context.

The bill does not seek a complete ban on rap evidence. However, where exclusionary discretions have failed, the bill would help to ensure that rap is only adduced where it is relevant, reliable, and not unduly prejudicial. In so doing, it would further the epistemic aims of the trial while promoting fairness by protecting the dignity and autonomy of defendants and, ultimately, contributing to the legitimacy of the proceedings.¹⁵⁸ Together with judicial directions proposed above, clear, structured, statutory guidance, with a requirement to consider independent expert evidence, could greatly improve the treatment of rap as evidence.

7 | CONCLUSION

Even with legislation addressing rap evidence, there is a need for a more comprehensive understanding of when evidence should be excluded as unduly prejudicial. This article has advanced such an account by arguing that evidence can be unduly prejudicial on epistemic grounds, where it distorts the accuracy of factfinding, and on non-epistemic grounds, where its admission or use is contrary to basic precepts of fairness, including the fair treatment of defendants. The argument goes further than evidence law scholarship that has explored non-epistemic unfairness in evidential reasoning separately from prejudicial effect.¹⁵⁹ It also goes beyond case law that recognizes that the mistreatment of the accused in the gathering of evidence may render its admission at trial unfair, but that has not considered that the admission of and reasoning with properly obtained evidence can itself amount to the mistreatment of the accused, warranting exclusion on non-epistemic grounds.¹⁶⁰

In addition to furthering understanding of undue prejudice and what should constitute grounds for exclusion, the article has shown that racial and cultural ignorance and bias can generate both epistemic and non-epistemic undue prejudice. The admission and use of rap evidence risks inaccurate factfinding through racialized reasoning prejudice and moral prejudice, and can also amount to an assault on the dignity and personhood of the participants. Such dangers are likely to arise with other culturally specific or socially situated evidence.¹⁶¹

As evidence law scholarship increasingly questions certain assumptions that ground the rationalist tradition – namely, that there is a singular or privileged ‘stock of knowledge’ about the

¹⁵⁸ The goal is similar to that of ‘rape shield’ laws, excluding complainants’ sexual behaviour evidence from sex offence trials where relevance is questionable, there is an inherent risk of unreliability, and/or it is liable to generate unfairness.

¹⁵⁹ See for example Ho, op. cit., n. 22; Picinali, op. cit., n. 25.

¹⁶⁰ For a critique of the courts’ focus on epistemic considerations in the reasoning with evidence, see Picinali, id.

¹⁶¹ See for example the work of critical evidence law scholars in the context of gendered evidence on sexual offences and violence, including R. Hunter, ‘Gender in Evidence: Masculine Norms vs Feminist Reforms’ (1996) 19 *Harvard Women’s Law J.* 127.

common course of events from which to assess the issues in a case¹⁶² – we become more attentive to the social and cultural context of evidence and to the diverse experiences and perspectives that shape its meaning.¹⁶³ To assess and address undue prejudice and ensure fair trials, judges, lawyers, and jurors must be willing and able to recognize and engage with this context. Conversely, when we take for granted that there are commonplace generalizations that facilitate the neutral application of rules and the determination of facts, discriminatory and oppressive practices are masked. In the case of rap music, this allows racial prejudice and institutional racism, widely acknowledged to exist in the criminal legal system,¹⁶⁴ to manifest in the production, presentation, and assessment of evidence.

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¹⁶² See for example W. L. Twining, 'The Rationalist Tradition of Evidence Scholarship' in *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston*, eds E. Campbell and L. Waller (1982) 244. For a critique of this assumption, see Picinali, op. cit., n. 25, pp. 205–209.

¹⁶³ See for example K. L. Scheppele, 'Manners of Imagining the Real' (1994) 19 *Law and Social Inquiry* 995; Hunter, op. cit., n. 161; J. Gonzales Rose, 'Toward a Critical Race Theory of Evidence' (2017) 101 *Minnesota Law Rev.* 2243; Gonzales Rose, op. cit., n. 88; J. Simon-Kerr, 'Relevance through a Feminist Lens' in *Philosophical Foundations of Evidence Law*, eds C. Dahlman et al. (2021) 364.

¹⁶⁴ See for example D. Lammy, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (2017), at <<https://assets.publishing.service.gov.uk/media/5a82009040f0b62305b91f49/lammy-review-final-report.pdf>>; Monteith et al., op. cit., n. 74; Casey, op. cit., n. 73.