Popular Music (2022) Volume 41/4. © The Author(s), 2022. Published by Cambridge University Press, pp. 446–462
10.1017/S0261143022000587

Expert or advocate? The role(s) of the expert witness when rap is on trial

ERIK NIELSON

Department of Liberal Arts, University of Richmond

E-mail: enielson@richmond.edu

Abstract

This paper considers the role of the rap music expert in criminal cases involving the use of rap as evidence. In addition to describing ways that an expert can help the defence challenge the use of rap, both before and during trial, it also offers strategies for intervening beyond the criminal justice system. These strategies may require an expert to balance the roles of objective observer on the one hand and criminal justice advocate on the other, but whatever the risks or challenges associated with this balancing act, this paper argues that doing so opens up important avenues for intervention and impact that can more effectively end the racially motivated and unjust practice of 'rap on trial'.

For rap artist Darrell Caldwell, better known to his fans as Drakeo the Ruler, 2018 appeared to mark a turning point in his career. After several years of hard work in the studio, he was finally beginning to make a name for himself: he was headlining shows, had amassed hundreds of thousands of followers on Instagram, and had garnered millions of views on YouTube. That success led to national attention in the media, culminating in a front-page story in the *Los Angeles Times* entertainment section titled 'L.A. rapper Drakeo the Ruler is a man in demand' (Weiss 2018). There was no question; his career was about to take off.

Just two days after the *Los Angeles Times* piece was published, Caldwell suffered a jarring reversal of fortune. Authorities in Los Angeles County arrested and charged him with multiple crimes, including first degree murder, in connection with the December 2016 shooting death of a 24-year-old man named Davion Gregory (Levin 2019). According to police and prosecutors, although Caldwell didn't carry out the shooting himself, he orchestrated it, and the intended victim wasn't Davion Gregory but was instead a rival rap artist who performed under the name RJ. Gregory, the state claimed, was the collateral damage in a deadly feud between competing rappers. Prosecutors initially filed the case as a murder with special circumstances, which under California Penal Code 190.2 meant that if found guilty, Caldwell was eligible for the death penalty. Among the special circumstances was the allegation that Caldwell's hip hop collective, called The Stinc Team, was actually a criminal street gang and that Gregory's murder was gang related.

Early on, prosecutors signalled that Caldwell's music would be a significant part of the state's case against him – in particular, a line from his song 'Flex

Freestyle', in which he raps, 'I'm ridin' round town with a Tommy gun and a Jag/ And you can disregard the yelling, RJ tied up in the back'. The line was fictional; nobody claimed that RJ was ever tied up in the back of Caldwell's car. Nevertheless, prosecutors planned to argue at trial that the lyrics reflected Caldwell's desire to harm an industry rival.

This is why I became involved. As somebody who has served as an expert witness or consultant in close to 100 cases involving rap lyrics as evidence over the last decade – providing in-court testimony in a dozen of them – I am frequently called upon by defence attorneys to provide advice on the best way to challenge, or at least mitigate, the state's attempt to introduce rap music as evidence. So Caldwell's case was something I had seen many times before. What was unique, however, was the scope of my work throughout the case, which was more extensive than what a traditional expert would normally be called upon to do. This not only included preparation for eventual in-court testimony, but leading up to that I assisted Caldwell's attorney, John Hamasaki, by providing sample briefs from other cases I had worked on. At one point I also connected him with attorneys from the American Civil Liberties Union, an organisation I work with regularly, so that they could provide additional guidance and assistance. And when it came time for trial, I worked for hours with Hamasaki to discuss my testimony. Although Hamasaki naturally made all final decisions about how he wanted to use my testimony, our discussions were highly collaborative, with each of us suggesting approaches that would be the most effective.

My testimony came near the end of the trial, so it was not long after that verdicts were announced. In a stinging rebuke of the prosecution's case, the jurors found Caldwell not guilty of all murder and attempted murder charges. They did convict him of a single firearms possession charge and were hung (meaning that they could not reach a unanimous decision) on two lesser counts, including criminal gang conspiracy, but it was clear that jurors had roundly rejected the State's case. In a trial that lasted more than two months, with hours of witness testimony each day, it is difficult to determine what role, if any, my testimony played in the jury's decision. However, according to Hamasaki, I 'provided the jurors an important counternarrative to the prosecution, which played a significant role in their verdict' (J. Hamasaki, text message, 18 October 2021).[1]

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In one of the first scholarly articles to consider the use of rap lyrics as evidence, Andrea L. Dennis (2007) not only exposed the kind of practice we see in the Caldwell case, but also advocated for an important tool to combat it: the expert witness. According to Dennis, allowing an expert on rap music to testify is 'the ideal means by which to challenge the admissibility and credibility of lyrical evidence offered by the prosecution. More particularly, an expert may offer testimony as to the modern-day social backdrop and poetics governing the authoring of rap music lyrics' (pp. 35–6). As Dennis noted at the time, however, defence attorneys facing rap lyrics as evidence were not routinely presenting experts on rap music, and even when they tried, courts would often disallow their testimony.

[1] On 18 December 2021, just over a year after he was released from custody, Caldwell was murdered backstage at the Once Upon a Time in L.A. music festival, where he was scheduled to perform. RIP.

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

Since (and perhaps in part because of) the publication of Dennis's article, times have changed. While there are no quantitative analyses regarding the extent to which experts in rap music have been permitted to testify over time, it is clear that expert testimony has become more mainstream over the last 15 years, particularly in the US, Canada and the UK, where numbers of cases involving rap as evidence appear to have increased precipitously (Tanovich, 2016; Quinn, 2018; Nielson and Dennis, 2019).[2]

Less clear, however, is what it means to be an expert if the goal is not simply to provide counsel to attorneys or testimony to courts, but ultimately to limit the use of rap as evidence in the first place. And that is my goal, as well as the goal of many other scholar-experts working in this space. This paper assumes that perspective; it does not tackle the broader theoretical questions about whether this type of intervention in the legal system is ultimately disruptive to the systemic forces that it seeks to combat – or whether, through engagement, it actually upholds and reproduces those forces.[3] These are certainly important questions to ask, but here the goal is not to justify or theorise the role of the scholar-expert, but instead to consider the ways in which that role can, even should, be combined with the role of advocate. These roles may appear to be in conflict at times, particularly because an expert must maintain the appearance of neutrality and objectivity at all times. However, I hope to demonstrate that they can also be mutually constitutive – and, working in tandem, can undermine a profoundly unfair legal practice that can have devastating consequences for young rap artists.[4]

Although it is far from typical, the Caldwell case is nevertheless instructive because it offers a far more expansive view of what it can mean to be an expert, particularly one whose goal is to effect systemic change within the legal system. So, using Caldwell as a starting point, this paper will consider the various roles that an expert might assume and strategies that he or she might employ to help achieve a fair(er) trial for the defendant and, at the same time, challenge a legal practice that is undeniably racist and unjust.

Framing rap pre-trial

Arguably the most important intervention an expert can make in a rap-on-trial case occurs before trial, and even before the formal discovery process begins (*discovery* refers to the formal process in which attorneys on each side furnish the other with

[2] Throughout I will be using the term *rap*, even as UK scholars and media sources often focus on the drill subgenre in the context of policing and criminalisation. It is also worth noting that although I do not make reference to grime, a distinct genre of urban music native to the UK, grime artists have also found themselves in the crosshairs of British law enforcement (Bramwell, 2015; Fatsis 2019; see also Fatsis 2021).

[3] Lipsitz and Tomlinson (2013), for example, remind us that as scholars and members of the academy, we 'inhabit' the very systems we seek to challenge; without remaining aware of that, we risk validating and reinforcing them unwittingly (p. 7).

[4] For more on the tensions between the traditional view of the scholar as neutral and detached, and the partisan role of the activist, see Remi Joseph-Salisbury and Laura Connelly (2021). Drawing in particular on radical feminist and anti-racist traditions, the authors argue that 'rather than undermining academic rigor, the explicitly political and partisan nature of anti-racist scholar-activism offers a higher level of integrity and honesty than scholarship that purports to be objective'. They also correctly assert that a neutral-objective posture risks ignoring the stark inequalities that demand more proactive interventions.

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

evidence, potential witnesses, etc.). If an attorney takes on or is assigned a criminal case involving a defendant who performs or produces rap music, best practice is to assume that prosecutors will try to leverage that music however they can. If they are successful, they gain a significant advantage (as Dennis puts it, 'a stranglehold') at trial, so an expert can provide vital research that defence counsel can use to argue for the exclusion, or at least limitation, of rap-related evidence.

Here the Caldwell case was very unusual. The trial process actually began before I became involved, and I was contacted by music journalist Jeff Weiss – the author of *The Los Angeles Times* article about Drakeo – because he was deeply concerned about Caldwell's defence, noting that he had attended a pre-trial hearing and it was clear that Caldwell's 91-year-old attorney was 'woefully outgunned' and appeared unprepared to navigate the challenges that a case so centred on black popular culture would present (J. Weiss, email communication, 28 January 2019). Caldwell's friend and sound engineer, Navin Upamaka, also contacted me with similar concerns. Both asked me if I could find a new attorney.

I reached out to a colleague with whom I had collaborated in the past, a San Francisco-based attorney named John Hamasaki. Having worked on cases involving rap as evidence in the past, he was eager to take on another, even if it meant relocating to Los Angeles for months. As it turned out, getting Hamasaki to take the case was easy compared with convincing Caldwell and his family to change attorneys right before trial – by any estimation a risky decision. So I set up a call with Caldwell, who was in prison awaiting trial; I later learned that his aunt had been listening in as well. I explained my experience with cases like his, my knowledge of Hamasaki's work, and promised that I would remain engaged throughout the trial, providing in-court testimony if needed. I didn't want the family to suspect that my recommendations were motivated by personal gain, so I offered to work on the case *pro bono*. Hamasaki was hired shortly thereafter.

Since Caldwell's previous attorney made no attempt to exclude his lyrics before trial, we knew they were going to be admitted and focused on preparing for my testimony. Normally, however, attorneys have an opportunity to exclude lyrics beforehand, and to that end they will often call upon an expert to put rap in the appropriate context, focusing on its evolution as an art form and its often-complex conventions. After all, it is safe to assume that most actors within the criminal justice system – police, lawyers, and judges foremost among them – will be largely unfamiliar with, or even openly hostile to, rap. What's more, they may have preconceived notions about the young men who produce it – namely, that they are neither educated nor sophisticated enough to produce complex works of art. For instance, when the head of the Newport News, Virginia, gang unit was asked if he considered the fictional or artistic elements of the rap videos he and his officers watch as part of their community surveillance, he replied, 'We are not dealing with the brightest guys', adding, 'It's much easier to write about something [that happened] than to think of something' (Ross 2014). In many ways, this (mis)perception lies at the heart of rap-on-trial and, therefore, represents one of the primary challenges of an expert – namely, overcoming the assumption, generally perpetuated by the state, that rap artists aren't really artists at all, which opens the door to interpreting their lyrics as, in the words of one prosecutor, 'autobiographical journals' (Hernandez 2013).

To counter this narrative, an expert may be called upon to provide a written report before trial that explains the history and conventions of the genre. For such a report it is often wise to emphasise the artistic, rhetorical and commercial traditions

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

underpinning rap music so that, armed with this information, a judge might think twice before allowing rap into evidence.

For starters, in order to dispel the notion that rap artists are simply snitching on themselves in rhymed form, it is useful to explain the long and complex traditions out of which rap music emerged. While 1970s New York City is widely considered ground zero for hip hop, the movement evolved from a wide range of musical antecedents, including West African music, slave spirituals and work songs, as well as blues and jazz. Equally important are non-musical sources, including the urban fiction of authors like Iceberg Slim and Donald Goines (among the best selling African American authors of their times), the so-called 'blaxploitation' films of the 1970s, and the confrontational poetry of the Black Arts Movement (Quinn 2005).

Highlighting the connections between hip hop and its artistic predecessors is useful for two reasons. For one, it emphasises the creative traditions that underpin hip hop, complicating efforts to delegitimise it as art. In addition, it offers an opportunity to demonstrate that hip hop music has received the kind of recognition generally reserved for more traditional (read: white, Western) art forms. Kendrick Lamar's 2018 Pulitzer Prize for his album *DAMN* is an obvious and recent example, but rap music has been taught in colleges and universities across the world for decades, representing what Henry Louis Gates, Jr calls 'the new vanguard of American poetry' (Bradley and DuBois 2010, p. xxvi). This new poetry has expanded far beyond the borders of the United States to become one of the world's most popular and influential musical forms. Judges need to know that.

They also need to know that interpreting the lyrics requires specialised knowledge. Recognising this, in 2003 a British judge presiding over a copyright case involving rap lyrics remarked that the case 'led to the faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases as "mish mish man" and "shizzle my nizzle"'. Noting the interpretive difficulties he had with many of the lyrics, the judge observed that although they were in a form of English, they were 'for practical purposes a foreign language' (CNN 2003).

Given its popularity and ubiquity, rap can hardly be considered 'foreign' anymore, but the judge's basic point is an important one for an expert to emphasise: rap lyrics do not lend themselves to easy interpretation, particularly for those unfamiliar with its conventions. These are rooted in a long tradition of African American storytelling and language games, which are themselves rooted in the process of signifying, or 'the obscuring of apparent meaning' (Gates 1988, p. 53). In the signifying tradition, ambiguity is prized, meaning is destabilised, and gaps between the literal and the figurative are intentionally exploited. As Gates, Jr notes, therefore, rap 'complicates or even rejects literal interpretation' (Gates 2010, p. xxv).

Recognising this type of rhetorical flexibility is essential to interpreting rap music. And it is useful to remind courts that most, if not all, art forms require some level of expertise to understand fully. Yet rap's complexities make it particularly challenging. Rappers employ all the same devices as other poets, including extensive use of symbolism and metaphor; they are also highly focused on form, choosing words not only for their meanings and connotations, but also for their place in the metre and rhyme scheme of the song. Further complicating matters, rap is characterised by dense slang, coded references, intentional mispronunciations, and sometimes blazing-fast delivery, which defies interpretation at every turn.

This is often the point in rap, as well as in the black vernacular generally, which has long employed semantic inversion, neologism and other devices to maintain what linguist Geneva Smitherman refers to as a 'black linguistic code' (1977, p. 70). Speaking to this kind of code in rap, Jay Z writes, 'The art of rap is deceptive', noting that lyrics are imbued with multiple, unresolved layers of meaning so that 'great rap retains mystery' (2010, pp. 54–5). An expert should, whenever possible, emphasise the fluid, often multi-valent nature of rap lyrics in order to illustrate the problem with trying to ascribe fixed meanings to them.

Yet another way to contextualise rap music, particularly the violent rap that ends up as evidence, is to explain the commercial pressures on aspiring artists. For decades, music industry executives – particularly those running major record labels – have pressured young artists to present themselves as a gangster in their lyrics, even when that persona has nothing to do with the artist in real life. As Damon Tillard, the so-called 'Hip Hop Minister', puts it in Byron Hurt's (2006) documentary *Hip-Hop: Beyond Beats and Rhymes*, 'Every black man that goes in the studio, he's always got two people in his head: him, in terms of who he really is, and the thug that he feels he has to project. It's a prison for us'. To be fair, some artists undoubtedly relish the chance to adopt a violent persona – after all, violent themes are ubiquitous across popular culture. But there is no denying that thanks to industry pressure, incorporating violence is often more a requirement than a choice. This pressure comes in a variety of forms. For an up-and-coming artist, it can mean the difference between landing a recording deal and being turned away. For more established artists, many of whom are in highly restrictive contracts (Brown 2020), it can mean having a recording project held up or cancelled unless the lyrics are revised to conform with gangsta rap conventions. And even once an album is released, it can mean the difference between getting airplay on the radio or on television – or being relegated to relative obscurity. As Mark Anthony Neal notes, the result is only certain types of rap make it to the mainstream: 'We want to see the hardcore thug performing hip-hop. We want to see booty shaking in the background. And when hip-hop videos don't fit into those conventions, they don't get played' (Hurt 2006).

For many artists, record deals with major labels and distribution via radio and television are still the goal, but for the last decade in particular, social media has allowed for alternative business models. Gone are the industry gatekeepers who control access to the market; thanks to sites like YouTube, Facebook and SoundCloud, amateur artists have new ways to create and distribute their music directly to their fans. For some, this has opened up new creative spaces. No longer confined to gangsta-type themes, some artists have built successful careers while rapping about more socially or politically conscious themes – something that a decade ago would probably have relegated them to rap's 'underground'.

But for many aspiring rappers, certainly those I've seen caught up in rap-on-trial, gangsta-inspired rap is still seen as the easiest path to success. Whether or not the amplification provided by social media results in commercial success for individual artists, it certainly increases exposure to law enforcement. It is no coincidence, then, that the rise of rap-on-trial cases in the US – and probably the UK as well, where drill has emerged in large part because of sites like YouTube (Ilan, 2020, p. 2) – tracks neatly to the increasing prevalence of social media in the production and distribution of rap music (Nielson and Dennis 2019).

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

In the majority of cases I've been involved in, attorneys have asked me to highlight the imitative nature of the artist's lyrics, that is, that they are modelled after those of more prominent and commercially successful artists. So in most reports I've written, as well as in all three *amicus* briefs I've written for the US Supreme Court, I focus on the extent to which the lyrics being proffered as evidence by the State have been used, often verbatim, by many mainstream artists. This approach is intended to demonstrate to a judge or jury that lyrics that on their face may seem shocking or disturbing can, in fact, create a pathway to a lucrative career.

At the same time, it is intended to effect a kind of artistic distance between the defendant and his lyrics; because he is imitating other artists, it is more difficult to connect his lyrics with his own thoughts, feelings and experiences. These are borrowed words, belonging to someone else. This line of argument works as a fallback position – if judges and juries don't buy rap lyrics as fiction, then this is the next best approach. The result is that an expert may sometimes feel as if he or she is denigrating the artist on trial by emphasising his lack of originality.

In 2017, I was confronted with a disturbing example of this in the case of Ronnie Fuston, who had been convicted of murder by an Oklahoma City jury (*Fuston v. State*, 470 P.3d 306 (2020)). The State was seeking the death penalty, and the jury that found him guilty was being asked to weigh whether he was deserving of execution. Fuston's attorneys argued that he had taken multiple IQ tests that classified him as 'mentally retarded' (that is the legal term in Oklahoma). Although the US Supreme Court outlawed the death penalty for someone whose IQ designates him or her as mentally retarded (*Atkins v. Virginia*, 536 US 304 (2002)), the Oklahoma legislature passed a law stating that anyone who had ever received a score above 75 – the threshold score for mental retardation according the US Supreme Court – could not be considered retarded, even if multiple other scores fell below 75. (Fuston's scores went as low as 59.)

So at sentencing, prosecutors were intent on *emphasising* Fuston's intelligence in order to argue that he was fit to be executed. One way they did that was by introducing a recording of Fuston rapping (which had not been admitted at trial) to demonstrate that he had the mental acuity to write and then memorise long lyrical passages. My role, then, was not only to emphasise that the lyrics were highly imitative of more successful artists, but also, through audio manipulation of the recording, to argue that because there were a number of audible stops and starts – as opposed to one single recording – that Fuston could have memorised just a line or two at a time and recorded each memorised portion in succession. In an uncomfortable turn of roles, the State was cynically elevating the sophistication of a rap artist and I felt as if I were doing the opposite.

This is obviously an extreme example, but it does shed some light on the conflicting roles that an expert may be required to assume. Here, personal or professional convictions can collide with the realities of the criminal justice system and the most effective ways to navigate it.

Demonstrating prejudice

In order to exclude, or at least limit, the introduction of rap lyrics as evidence at trial, attorneys will generally try to demonstrate that rap has the potential to be highly prejudicial to a jury. That's because in the US, the federal rules of evidence permit

a judge to exclude evidence, whether it is relevant or not, if its probative value is significantly outweighed by its prejudicial impact (Rule 403). In the UK, section 78 of The Police and Criminal Evidence Act of 1984 gives judges similar discretion. Although there are other grounds upon which to limit or exclude rap music as evidence – namely, by arguing that it is not relevant in the first place (Owusu-Bempah 2022) or, in the US, that introducing it infringes on First Amendment protections – the most successful strategies have centred on its potentially inflammatory impact on a jury. And for good reason. As a growing body of empirical research has demonstrated, rap music can be highly prejudicial, which is why keeping it out of the courtroom altogether is often in a defendant's best interest. When arguing for exclusion, either in a pre-trial motion filed by an attorney or in a report solicited from an expert, there are a few studies in particular worth citing.

Among the most important is Carrie B. Fried's 1999 study, titled 'Who's Afraid of Rap: Differential Reactions to Music Lyrics'. For this study, Fried devised an experiment in which she compared people's reactions to rap *vs.* country music. To do this, she presented two groups of people with an identical set of violent lyrics, taken from a song called 'Bad Man's Blunder' by the Kingston Trio, a folk/pop band that began recording in the 1950s. The lyrics included passages like this:

> Well, early one evening I was roamin' around,
> I was feelin' kind of mean, I shot a deputy down.
> Strolled along home and I went to bed.
> Well, I laid my pistol up under my head.

Fried removed all information related to the song's title or genre, so participants in the study had only the lyrics to consider. One group was told the lyrics came from a country song, while the other was told those exact same lyrics came from a rap song. Fried then measured their reactions and, as she hypothesised, found that responses were significantly more negative when the lyrics were represented as rap, revealing, to quote Fried herself, that '[t]he same lyrical passage that is acceptable as a country song is dangerous and offensive when identified as a rap song' (pp. 715–16). She emphasises an important racial dimension, too. Whereas country music is traditionally associated with white performers, rap 'primes the negative culturally held stereotype of urban Blacks' (p. 716).

Notably, this study was replicated in 2016 by researchers at UC Irvine, and almost 20 years later, their results matched Fried's. As the researchers noted, 'participants deemed the exact same lyrics to be more offensive, in greater need of regulation, and *more literal* when characterised as rap compared with country' (p. 88, emphasis added).

Fried's study is just one example of research examining people's differential responses to rap music when compared with other genres or artists. Other studies have examined the way rap music is portrayed in the media compared with heavy metal (Binder 1993), the way fans of rap *vs.* heavy metal are perceived (Fried, 2003), the way lyrics are judged when participants believe they come from a rap, country or heavy metal song (Dunbar and Kubrin 2018), and the way violent lyrics are perceived if the artist is presented as black *vs.* white (Fried 1996). All of these studies tell a similar story: rap artists and fans are seen as more threatening than those from other, traditionally white, genres.

Fischoff (1999) reveals that these perceptions and the stereotypes underlying them can have a profound impact in a courtroom. To demonstrate this, he designed

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

a study in which participants were separated into four different groups and presented with biographical information about a hypothetical African American male. The amount of information each group was given varied. For example, only some groups were told that this hypothetical man was on trial, accused of murder and/or that he was the author of violent rap lyrics. Participants who were told about the lyrics were also shown samples.

Fischoff then asked all participants about their perceptions regarding the young man's personality. For starters, he found that rap lyrics significantly prejudiced participants, which meant, among other things, that participants who read the lyrics were significantly more likely to think the man was capable of committing murder. What's more – and here's the most surprising part – Fischoff found that exposure to the lyrics evoked a negative reaction that was *more intense than the reaction to being told the young man was on trial for murder*.

Taken together, the studies examining people's response to rap reveal that rap music and the people who create it are viewed as more dangerous and threatening than traditionally white genres. This is probably the most important argument for excluding rap lyrics altogether, and even if it is unsuccessful at the trial level, it preserves the issue on appeal. In the US, most appellate courts have been unwilling to reverse a decision based on the improper use of rap music as evidence. However, there have been some high-profile exceptions, including in Massachusetts (*Com. v. Gray*, 463 Mass. 731 (2012)), New Jersey (*State v. Skinner*, 95 A.3d 236 (2014)), Maryland (*Hannah v. State*, 23 A.3d 192 (2011)) and Mississippi (*Brooks v. State*, 903 So. 2d 691 (Miss. 2005)), where those states' highest courts reversed lower court decisions, ruling that the use of rap lyrics or videos as evidence was improper. Notably, all of those decisions focused on the prejudicial nature of the evidence relative to its probative value.

These decisions notwithstanding, the reality is that if the state introduces rap music as evidence, it is likely to be admitted over the objections of defence counsel, so the next stage of preparation from an expert perspective is to prepare for trial. This may include assisting the defence attorney(s) with jury selection, offering sample materials that other attorneys have used in similar cases, suggesting questions that a defence attorney might ask of the State expert (usually a police officer) on cross examination, and of course working through the best line of questioning on direct examination and the most effective ways to respond to cross examination.

Jury selection and composition

The way juries are empanelled is very different in the UK than it is in many other countries whose legal systems are based on English Common law. In the US – as well as countries such as Australia, Canada, Ireland and New Zealand – prosecutors and defence attorneys select jurors from a pool of people, interviewing potential jurors in a process known in the US as *voir dire*. During *voir dire*, which is intended to ensure the impartiality of a jury (although studies tell us that it leads to the disproportionate exclusion of black jurors), attorneys can ask would-be jurors any number of questions to determine their suitability (Eisenberg 2017; DeCamp and DeCamp 2020).[5] What's more, prosecuting and defence attorneys are both permitted a

[5] Studies from the US and the UK tell very different stories about the role of race and jury verdicts. A 2012 study from the US reveals that race plays a significant role. For example, the authors found that all white

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

certain number of peremptory challenges, which allow them to exclude someone from the jury without explanation. (There are some exceptions to this.) In the UK, however, the right of peremptory challenge was abolished altogether by Criminal Justice Act of 1988 (section 118), meaning that only in very rare cases, such as an obvious and direct conflict of interest, can a juror be removed.

In countries that do allow each side to select jurors, however, the role of the expert can be significant. In high profile civil or criminal cases involving a defendant with significant resources, defence teams may call in an expert, or a team of experts, to assist in jury selection. Often drawing on social science research, these experts engage in what is known as scientific jury selection in an attempt to choose favourable juries. The OJ Simpson murder trial is a notable example of a case in which scientific jury selection was employed for the defence (Seltzer 2006). In the vast majority of cases, however, defence attorneys handle jury selection without this kind of help.

In several such cases, I have been asked to assist, and while I have been careful not to skew too far from my actual area of expertise, I have offered advice in two ways. The first involves race. Invariably, defence attorneys assume that in a case involving rap music, the more black or Hispanic jurors there are, the friendlier the jury will be. However, research suggests that age may in fact be a better predictor of a jury's amenability to rap music. Take, for instance, Carrie Fried's 1999 study. While she found that violent lyrics represented as rap were significantly more inflammatory than the same lyrics when represented as country, she notes that this disparity only occurred in participants over the age of 40. Younger participants did not demonstrate the same bias. What's more, when Dunbar *et al*., (2016) replicated Fried's experiment in 2016, they found something similar: participants aged 33 and under were 'insensitive to the genre label' (p. 285). And yet again, in a 2018 study evaluating participants' responses to lyrics characterised as rap, heavy metal and country, Dunbar and Kubrin found that younger participants showed no bias against rap, while older participants did.

In that same 2018 study, Dunbar and Kubrin made some surprising discoveries. Although they did find that (older) participants held more negative views about lyrics represented as rap, those views did not extend to the race of the songwriter. In other words, participants' views about rap music were consistent, regardless of whether the artist was presented as black or white. The authors write, '[c]ontrary to expectations, the Black songwriter was not evaluated more negatively than the White songwriter and the race of the songwriter did not interact with the effect from negative stereotypes about rap music' (p. 519). In addition, the authors found that neither the race nor gender of the participants in the study had a significant impact on their perception of rap music.

The authors did, however, find that whether study participants listened to rap had a significant influence on their perceptions of the genre. Specifically, participants who reported that they never listened to rap, compared with those who did, evaluated the songwriter more negatively when his lyrics were presented as rap music. This is potentially important when it comes to jury selection because it suggests

juries are 16% more likely to convict black defendants compared with white defendants – and that this disparity was erased completely if there were just one black juror on the jury (Anwar *et al*., 2012). Surprisingly, a 2010 study in the UK found no evidence of bias towards black defendants among all-white juries – a finding that may well need revisiting (Thomas 2010).

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

that musical preferences are an important factor to consider during *voir dire*. Even without the benefit of empirical evidence, many attorneys I've worked with have assumed this to be the case and have asked me to provide them with questions that will help reveal the extent of a potential juror's knowledge of hip hop.

Of course, all of this is informed guesswork at best, but in many cases – particularly those where resources are limited – it speaks to the various hats that an expert might be asked to wear by attorneys who are looking for any advantage they can gain going into trial.

Trial

Based on conversations I've had with scholars in the US and the UK, it seems that the role of the expert is often different when it comes to trials. Several UK-based experts I've spoken with have never been asked to provide in-court testimony after submitting an initial written report, and in her analysis of 38 cases involving rap as evidence in the UK, Owusu-Bempah identifies just one that mentions an expert's testifying on behalf of the defence (forthcoming, p. 16). In the US, providing trial testimony is typically the primary role of the expert. In fact, of the 12 cases in which I have testified, only half even required an initial written report. In the other half, I provided no written materials (except my CV) prior to testifying. This is not to say that most cases actually reach trial – the vast majority of criminal cases are settled beforehand with a plea bargain – but an expert's preparation is nevertheless focused on taking the stand and involves significant pre-trial communication with defence attorneys.[6]

Although testifying in court may seem daunting, university faculty in particular are uniquely suited to it because they are accustomed to making complex or abstract ideas understandable to a general audience, whether students in a classroom or jurors in a courtroom. In addition, they are comfortable with the performative aspect of teaching, which not only requires a certain level of comfort with public speaking but also an ability to engage in extemporaneous discussions, even debates. And the very nature of scholarship demands that scholars be willing to have their ideas challenged. All of these attributes make teachers good expert witnesses.

Nevertheless, the courtroom presents some unique challenges. For one, while the production of scholarship is (or should be) collaborative in nature, in-court testimony is adversarial; a prosecutor's cross examination, for example, is often intended to undermine or impugn the expert's credibility in front of the jury rather than work together to arrive at some kind of objective truth. In addition, whereas a college professor generally dictates what will happen in the classroom or lecture hall, the opposite is true in court. This alone can make the prospect of in-court testimony intimidating. Add to that the likelihood that an expert will, probably for the first time, come face to face with a defendant whose fate rests in part on the success of his or her testimony and all of a sudden the similarities between teaching and testifying begin to offer less comfort than one might hope.

[6] In the US, fewer than 3% of criminal cases go to trial, with the vast majority settled by plea bargain (National Association of Criminal Defense Lawyers 2018). The numbers tell a similar, although somewhat more balanced, story in the UK, where just 12% of charges are decided by jury deliberation (Thomas 2010).

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

There is also the issue of variability. In my experience, testifying differs significantly by court, something that experts in countries with more centralised justice systems may not experience to the same degree. In some cases, I have been permitted to give an extended lecture to the jury, complete with PowerPoint slides, on the history and conventions of rap music. In other cases, the judge limited my answers to just one or two sentences. In two cases, I was permitted to talk about rap and hip hop in general terms but I was not permitted to engage the defendant's specific lyrics or videos. And in one case – where the state was seeking the death penalty – I was given wide latitude to talk about rap music generally, as well as the defendant's specific lyrics. However, on instructions from the defence attorney, I was not allowed to utter the word *gang* at any point in my testimony, even when talking about the early roots of hip hop, for fear that doing so would open the door for prosecutors to introduce gang-related evidence that would otherwise be excluded.

Knowing that one mistake could jeopardise the defence creates a high-stress environment, one that can only be ameliorated by meticulous preparation. Here, too, there is variability. In some cases, I have brought extensive notes with me to the stand. In others, I have been asked to limit my notes for fear that prosecutors would demand that I turn them over as discoverable work products; this required me to commit more of my testimony to memory than I normally would. In all cases, however, constant communication with the defence attorney is key. Before trial, there should be extensive discussion about the scope and sequence of the questions that will be asked on direct examination and clear communication about what boundaries there are. Direct examination should be reviewed, more than once if possible, so that there are no surprises.

Just as important is preparing for cross examination, where there certainly could be surprises. Prosecuting attorneys have taken a variety of approaches to my testimony, but I have observed some similarities across cases. Some lines of questioning are more or less *pro forma*. Most prosecutors, for example, have either opened or closed their cross examination by asking how much I was being paid to testify. Generally, these kinds of questions are intended to cast doubt on the objectivity of an expert because he or she is being paid by the defence. Normally, prosecutors ask just a few questions related to fees, and there's little to do but answer them in a straightforward way. In one particularly satisfying exchange, however, I was asked this question by a prosecutor who didn't know that I was working *pro bono*. When I revealed that I wasn't being paid at all, he paused and then proceeded to cross out a number of items on the paper in front of him. Clearly he had intended to make this a key part of his questioning.

In cases involving allegations of a defendant's involvement in a gang, prosecutors will frequently ask a series of questions intended to reinforce the idea that a rap music expert is not a gang expert. They will also ask a series of questions intended to ascertain how much local knowledge an expert has, which is often minimal. Prosecutors find this useful, as it positions the expert as an out-of-towner with no real connection to the local environment – as opposed to the police gang expert, who will be presented as deeply connected to the local area.

These questions often require little more than a 'yes' or 'no' response. More challenging are the questions intended to undermine the notion of rap as fiction. In two different trials more than four years apart, prosecutors presented me with a printed version of the lyrics to Jay-Z's song 'December 4th' during cross examination.

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

The song, which Jay-Z (2010) describes as a 'capsule autobiography' in his book *Decoded* (p. 296), contains a number of factual details about his early life, including his birthday (4 December), his parents' names and his time dealing drugs. Prosecutors then questioned me about whether those details were, in fact, autobiographical in nature, with the clear goal of undermining my earlier argument on direct examination that rap music is fictional and not to be taken literally.

This line of questioning is one that any expert should expect and be prepared for. How do you reconcile the idea of rap as fiction with the fact that it may contain autobiographical elements? One approach is to cite analogues from a different genre. There are plenty of options, but one that is interestingly applicable to rap music, particularly the gangsta subgenre and its offshoots, is historical fiction. In historical fiction, the settings, events and even some characters are based on the historical record and are represented accurately, more or less. At the same time, however, many characters and other details are completely fictional; fiction is layered upon fact. We would never substitute a work of historical fiction for a history textbook in schools, though, because the factual elements don't alter the fictional nature of the text.

Gangsta rap works the same way – as Murray Forman (2002) demonstrates in *The 'Hood Comes First: Race, Space, and Place in Rap and Hip-Hop*, gangsta rappers in the US emphasise their local topographies, often highlighting actual streets, intersections, neighbourhoods or businesses in their lyrics and videos. The same is true in the UK, where 'spatial practices play a key role in rap music and street culture' and where 'locality tends to be "repped" (celebrated) and reified' (Ilan, 2020, p. 9). While this focus on spatiality and accurately representing locality characterises much of rap music, rappers' fidelity to their environments does not necessarily extend to the actions they depict within these environments.

I have found these analogues to be effective in front of juries, something I have learned from jurors themselves. Unlike in the UK, Canada and New Zealand, for example, where jurors are permanently barred from discussing their deliberations – or the many other countries in which jury trials don't exist at all – in the US, the First Amendment generally protects the right of jurors to discuss a case after the trial is over (although some localities may have more restrictive rules in certain scenarios; *Butterworth v. Smith*, 494 US 624 (1990)). That opens up a very valuable tool for attorneys and experts alike: jury surveys (Peyton and Escobar 2018). These surveys are not necessarily scientific in nature, but they do allow attorneys to ask jurors about what they did or did not find persuasive and why. While jurors are not required to participate, many do, and an expert would do well to request that the trial attorney ask specific questions related to his or her testimony.

In one case in which a young man was charged with using a rap song to threaten two teenage girls (so-called 'true threats' are not protected speech under the First Amendment), the trial attorney took the initiative to poll the jury on his own after his client was found not guilty. His assistant asked the jurors open-ended questions about what led them to their verdict, and since I was the only expert who testified on either side, several jurors keyed in on my testimony. One said, 'Dr. Nielson's testimony was huge – very interesting and helpful', while another made a comment that sums up the need for expert testimony in the first place, saying, 'Dr. Nielson helped a lot because we don't like that kind of music'. This type of feedback can be extremely useful, particularly if the questions are more specific in nature, so an expert should urge the attorney to conduct post-trial jury surveys, perhaps even suggesting possible questions to ask.

Expert *vs.* advocate

My role as an expert witness came about somewhat accidentally. Since 2011, I have been writing publicly about the (mis)use of rap lyrics as evidence, in both popular and scholarly venues (see, for example, Nielson 2014; Kubrin and Nielson 2014). This work increasingly put me in contact with practising attorneys, some of whom I contacted directly for my research, and some of whom reached out to me after reading my public writing on the subject. In the course of these conversations, attorneys began to ask if I would serve as an expert witness, and once I began doing so, word spread within the legal community. I was not the only person in the US serving as an expert, but I was the one doing it in the most public way, writing about my experiences and discussing them in interviews with national media outlets.

As a result, some attorneys were eager for me to use my media platform to draw attention to their clients' cases to put pressure on prosecutors (and also, I suspect, to raise their own profiles as defence attorneys). Some experts may be reticent to do this for fear that talking in critical terms about an ongoing case may compromise the appearance of objectivity – or at least open the door for prosecutors to do so. And it is certainly true that the sheer volume of public work I've done on the issue, much of it knowingly provocative, has led prosecutors to attempt to portray me as something of a zealot. Yet the question is whether the benefits of exposure and public advocacy outweigh the risks associated with it. And there's no clear answer.

In one case, the 2014 trial of Newport New, Virginia, rapper Antwain Steward, it clearly helped. Steward, who rapped under the name Twain Gotti, was arrested and charged for his alleged role in an unsolved double murder. Police and prosecutors indicated that one of his rap videos led them to pursue him as a suspect, and they later signalled that the video would play a significant role at trial (Speed 2013). In response, and in coordination with his attorney, I waged a media campaign with the goal of raising public pressure on the prosecution. By the time the trial was set to begin, reporters from major media outlets, including in the US and abroad, were covering the case and peppering the prosecutor's office with requests for comment. *PBS NewsHour*, a major American news show, arrived with cameras (PBS 2014).

I was in a hotel room near the courthouse preparing to testify, when I got a call from Steward's attorney – the prosecutors had blinked and, at the last moment, decided not to introduce the video at trial. According to his attorney, they had succumbed to the public pressure. Then a few days later, I learned that without the video to bolster their case, prosecutors were handed a defeat. Although he was found guilty of a lesser gun-related charge, Steward was acquitted of both murders.

For the flip side of the coin, consider the case that opens this paper, that of Darrell Caldwell, also known as Drakeo the Ruler. Before and during his trial, I worked with his attorney on a similar media campaign intended to put pressure on prosecutors. As part of that campaign, journalist Jeff Weiss, who was covering the trial, released a scathing story, titled 'Stabbing, lies, and a twisted detective: inside the murder trial of Drakeo the Ruler', that took aim at the prosecutors and lead detective on the case (Weiss 2019). After a near-total acquittal, prosecutors in general are unlikely to re-file charges on any lesser counts that are hung, especially if they are hung in the defendant's favour (meaning that most jurors voted in favour of acquittal) as in Caldwell's case. But Los Angeles County prosecutors, who were

https://doi.org/10.1017/S0261143022000587 Published online by Cambridge University Press

furious about the story, did re-file, and only because the sitting District Attorney lost her re-election bid to a far more progressive opponent was Caldwell ultimately spared a second trial. When asked what motivated prosecutors to re-file initially, Drakeo's attorney, John Hamasaki, said, 'Part of what I see underlying this re-prosecution is actually an article written by Jeff Weiss in *Fader* … I get the sense that [police and prosecutors] were really badly embarrassed by that article. They lost in a very public way at trial' (*No Jumper* 2019).

The Steward and Caldwell cases reveal the potential benefits, but also the potential perils, of using the media to raise public awareness about ongoing cases. It should go without saying that the final decision about whether to engage the media or not should rest with the attorneys. Yet an expert has a decision to make as well about his or her public presence in the first place. Engaging in public scholarship or advocacy around an issue – in this case, arguing against the use of rap lyrics as evidence – may feel uncomfortably subjective. But, as an analogy, would we view an expert witness in forensics who found eyewitness testimony to be unreliable – and who shared that view publicly – as biased and therefore unreliable? I'd hope not.

That's because as scholars intervening in a criminal justice system that is undeniably racist and unjust, our work should be motivated by the desire to change that system. That is nearly impossible to achieve if we attempt to maintain a posture of neutrality at the expense of meaningful action. As W.E.B. DuBois (2007) recollected in his autobiography, he eventually came to the realisation that the stakes were too high, the injustices too great, to remain objective: 'one could not be a calm, cool, and detached scientist while Negroes were lynched, murdered and starved' (p. 34). The imperative to take action, to measure our work in terms of demonstrable outcomes, demands that we acknowledge the importance of advocacy in our scholarship, even though, as I have described here, doing so presents its own risks and challenges. While each expert-advocate will be be forced to navigate these, I hope I have shown that the potential for this work to have real impact, to change lives, necessitates that we do so.

Acknowledgements

I would like to thank Eithne Quinn and Abenaa Owusu-Bempah for their guidance and advice as I prepared this paper. I'd also like to thank the anonymous reviewers for their thoughtful comments and suggestions.

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