

Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence

Andrea Dennis*

In today's society, many gang members compose and put their true-life experiences into lyrical form. . . . Law enforcement officials must remain mindful of . . . the opportunities to obtain inculpatory evidence in gang-related investigations and cases.¹

— From *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy* (2006)

Will the Real Defendant Please Stand Up?

Perhaps the most crucial element of a successful prosecution is introducing the jury to the real defendant. Invariably, by the time the jury sees the defendant at trial, his hair has grown out to a normal length, his clothes are nicely tailored, and he will have taken on the aura of an altar boy. But the real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing that jury to that person. Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant's true personality. Gang investigators should focus on these items of evidence during search warrants and arrests.²

— From *Prosecuting Gang Cases: What Local Prosecutors Need to Know* (2004)

The above are excerpted from gang prosecution training materials produced for state and federal prosecutors. The first excerpt is from a training newsletter issued by the United States Department of Justice for its Assistant United States

* Assistant Professor of Law, University of Kentucky College of Law. I am grateful for the assistance of my colleagues Sarah Welling and Lori Ringhand as well as the MACLRC. Valuable research support was provided by the trio of John Landon, Clark Baird, and Kelly Roseberry. Thanks for everything Plum.

1. Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. ATTY'S BULL. (U.S. Dep't of Just., Wash., D.C.), May 2006, at 1, 8. At the time of publication, the author was an Intelligence Analyst for the Federal Bureau of Investigation.

2. ALAN JACKSON, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, AM. PROSECUTORS RES. INST., PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW, 15-16 (Apr. 2004) (emphasis in original). At the time of publication, the author was Deputy District Attorney, Los Angeles County District Attorney's Office.

Attorneys. The second excerpt is from a manual produced for the National District Attorneys Association pursuant to a grant from the Bureau of Justice Assistance, United States Department of Justice. The training materials endorse an approach to prosecution that finds itself in perilous evidentiary waters and raises a host of provocative normative issues:³ the admission of hip hop or rap music lyrics written by defendants as evidence in the criminal adjudicatory process.⁴

When courts permit the prosecutor to admit rap music lyrics as criminal evidence, they allow the government to obtain a stranglehold on the case.⁵ This stranglehold is achieved in two manners. First, the prosecutor may offer the music lyrics as substantive evidence. For example, the prosecutor may cast defendant-authored music lyrics as an autobiographical depiction of actual events, hence permitting the lyrics to be treated as inculpatory statements or a confession. Relatedly, the music lyrics may be offered as evidence of the defendant's intent, knowledge, motive, or identity respecting the crime charged. The second avenue consists of the prosecutor using the lyrics to construct a narrative framework or theory of the case. For example, a prosecutor may use the music lyrics to "paint a picture" of the defendant at the time of the crime that is consistent with the prosecution's evidence and that resonates with jurors. Such narrative frameworks are used to satisfy juror expectations – both conscious and unconscious.

At the request of prosecutors, courts chiefly admit defendant-authored rap music lyrics rather than other genres of music lyrics.⁶ Neither of the training documents

3. Such issues might include: (1) the impact of unconscious racism on the rules of evidence and the criminal adjudicatory process, *see generally* Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); (2) whether group to individual evidentiary character inferences are appropriate, *see* TILLERS ON EVIDENCE AND INFERENCE, <http://tillerstillers.blogspot.com> (Dec. 12, 2006, 10:28 EST) (questioning "whether group-to-individual inferences are less odious as well as inferentially less fragile when those inferences are mediated by, or based upon, a person's participation in the social mores of a sector of society such as 'rappers' or 'composers of rap music lyrics'"); (3) the ethical use of stereotypical narratives and imagery in constructing a case theory, *see generally* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993); and (4) whether principles of free expression should prevent the admissibility of criminal evidence, *see* MICHAEL DORF, DORF ON LAW, <http://michaeldorf.org> (Dec. 21, 2006, 00:21 EST).

4. "Rap music" may be defined simply as "a form of rhymed storytelling accompanied by highly rhythmic, electronically based music." TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 2 (2004). The term "hip hop" is often used interchangeably with "rap music." The Recording Industry Association of America (RIAA) collapses hip hop and rap music into one statistical category: "Rap/Hip-hop." THE RECORDING INDUS. ASS'N OF AM., 2006 CONSUMER PROFILE (2006), <http://76.74.24.142/E795D602-FA50-3F5A-3730-9C8A40B98C46.pdf> [hereinafter *RIAA 2006 Consumer Profile*]. For clarity and ease, this Article will use the term "rap" as shorthand for "hip hop/rap."

5. Defendant-authored lyrics may also impact criminal cases in the pre-trial and post-conviction stages. In the pre-trial stage, prosecutors may use the potential admission of such evidence at trial to discourage a defendant from pursuing trial and hasten the defendant's decision to enter into a plea bargain. In the post-sentencing context, lyrics have been used against inmates as a basis to find a violation of disciplinary regulations, *e.g.*, *Evans v. Illinois Dept. of Corr.*, No. Civ. 06-055-WDS, 2006 WL 306757 (S.D.Ill. Feb. 8, 2006), and against parolees on supervision, *see* The Associated Press & Freedomforum.org Staff, *Paroled Rapper Jailed for Album's Lyrics*, THE FREEDOM FORUM, Mar. 4, 1998, <http://www.freedomforum.org/templates/document.asp?documentID=9460>.

6. To date, research has identified only one case involving defendant-authored music lyrics

quoted above explicitly limits its discussion to rap music lyrics, but in context it becomes quite apparent that the materials are referring primarily – if not solely – to rap music. More particularly, the materials likely refer to what are commonly labeled as “gangster rap” music lyrics.⁷ The Department of Justice newsletter contains numerous examples of lyrics presumably representative of the types of lyrics recovered in investigations and used in trials.⁸ All of these examples may be characterized as rap music lyrics. Moreover, both documents relate to the prosecution of gangs and gang members, and it is gangster rap music that is typically associated with gangs.

It is not difficult to imagine courts applying this approach to other defendant-artists who use verbal expression as the medium through which to convey their artistic sensibilities. Such artists might include lyricists of other musical genres, poets, fictional novelists, screenwriters, cartoonists and graphic novelists. Rap music lyricists, however, presently bear the brunt of this approach. Their treatment thus affords an opportunity to critically examine the criminal evidentiary admissibility analysis and utility of music lyrics and other forms of artistic verbal expression.

When courts consider the admission of rap music lyrics as criminal evidence, they must confront issues including how to properly interpret, understand and give meaning to the lyrics and how to define permissible evidentiary purposes. Jurors charged with evaluating the weight and credibility of lyrics confront equally difficult issues. To understand the implications of speech and language, people ordinarily apply—often sub-consciously—common-sense linguistic principles.⁹ Thus, we tend to believe that an individual’s statements are trustworthy, reliable, and based on personal knowledge. ‘If he said it, then it must be true.’ ‘If he did not mean it or it was not true, then he would credibly retract, recant, or rebut the statement and point to other information supporting his position.’ In the criminal adjudication setting, statements by defendants often are viewed no differently.

What happens, however, when the court admits as criminal evidence statements the defendant made in an artistic context rather than as a result of everyday conversation or speech? Can we continue to believe what the defendant said in the course of that artistic expression, or should we proceed with caution? Do a defendant’s words mean anything about his conduct, his beliefs, his intentions, and his motivations? In some instances but not others? Do we distinguish rap music lyricists from other lyricists? Other artists?

This Article tackles these concerns in the context of defendant-authored rap music lyrics and takes an initial step toward answering these questions.¹⁰ First, this

admitted into evidence that did not appear to be rap music. *See State v. Koskovich*, 776 A.2d 144 (N.J. 2001).

7. *See infra* Part II.A for a discussion of “gangster rap.”

8. Lyddane, *supra* note 1, at 9-11.

9. *See* GEORGIA GREEN, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING 5 (1989).

10. Scholars have discussed the admission of defendant’s preference for rap music as evidence. *See* Helen A. Anderson, *The Freedom to Speak and the Freedom to Listen: The Admissibility of the Criminal Defendant’s Taste in Entertainment*, 83 OR. L. REV. 899 (2004) (contrasting use of defendant’s viewing or listening habits to show motive, intent, state of mind, or sentencing aggravation with legal

Article reveals a problem underlying courts' allowance of rap music lyrics authored by criminal defendants as evidence. In essence, courts treat rap music lyrics not as art but as ordinary speech and allow jurors to do the same. Courts analyze the admission of lyrical evidence, and jurors assess the weight and credibility of such lyrical evidence based on uninformed assumptions about the composition of rap music lyrics. Courts presume that the interpretation and understanding of rap lyrics is within the common knowledge of judges and jurors. They apply a basic method of interpreting language: literal interpretation. Finally, they presume that criminal defendant-lyricists are depicting true-life, self-referential stories in their lyrics.

Contrary to the dominant judicial analysis, the assessment of the admissibility and evidentiary utility of rap music lyrics requires awareness and understanding of the complexities of the art form, particularly the existing social constraints and artistic norms governing the composition of rap music lyrics. These include a highly commercialized rap music industry and a tenet of authenticity alongside traditional artistic conventions such as boasting, metaphor, collective knowledge, narrative and role play. Analyzing the complexities of rap music lyrics reveals that rap lyrics are of questionable evidentiary value. Rap music lyrics are neither inherently truthful, accurate, self-referential depictions of events, nor necessarily representative of an individual's mindset. Nevertheless, they are offered for and admitted into evidence without contextual information vital to a complete understanding of the evidence.

Second, in response to the identified problem, this Article proposes two solutions. Courts should interpret the meaning and import of defendant-authored rap music lyrics from the perspective of the defendant and in light of factors derived from the social constraints and artistic conventions governing the composition of rap music lyrics. This analytical point-of-view and these factors would help to reveal the evidentiary reliability and propriety, or lack thereof, of the lyrics. Additionally, courts should permit defendants to offer expert testimony providing a complete base of knowledge within which judges and jurors may evaluate the admissibility, credibility, and weight of rap music lyrics as criminal evidence.

This Article examines these ideas in four parts. Part I documents the admission of rap music lyrics composed by defendants as substantive evidence in criminal cases. In particular, this Part recounts the nature of criminal cases in which rap music lyrics are used, provides examples of lyrics, and describes the rationale for admitting lyrics. Part I also presents an analysis of the assumptions regarding rap music lyrics that maintain courts' decisions to admit such lyrical evidence. Part II seeks to debunk the judicial assumptions revealed in Part I by discussing the commercialization of the rap music industry, notions of authenticity in rap music, and the poetics (*i.e.*, artistic conventions) of rap music lyrics. Part III applies the information from Parts I and II to demonstrate that defendant-authored rap music lyrics are of questionable evidentiary quality. Finally, Part IV suggests a framework that may be employed when evaluating the admissibility and credibility

of lyrical evidence. It then proposes that expert testimony be the means for presenting to judges and jurors the information set forth in Parts I and III.

In conclusion, I suggest that society must be mindful and wary of the negative impact this effort will have on the production and quality of art when individuals must worry that their artistic sensibilities and creative expressions might later be used against them in a criminal prosecution.

I. JUDICIAL APPROACH TO DEFENDANT-AUTHORED RAP MUSIC LYRICS AS CRIMINAL EVIDENCE

This Part opens by generally describing the nature of cases in which courts have admitted rap music lyrics authored by a defendant as substantive criminal evidence and presenting examples of lyrics from cases.¹¹ It is followed by an overview of the current judicial rationale for the admission of defendant-authored rap music lyrics as criminal evidence. This Part closes by analyzing the assumptions underlying the courts' rationale.

A. EXAMPLES OF CASES AND LYRICS

Court decisions sanctioning defendant-authored rap music lyrics as criminal evidence are found nationwide on both the state and federal levels.¹² Despite the recency of the training manuals quoted in the Introduction, cases exist as far back as the early 1990s. As early as 1991, a federal court admitted defendant-authored

11. Judicial admission of rap music lyrics in the adjudication of criminal cases arises in ways not addressed by this Article. For example, courts have admitted as evidence a defendant's preference for, consumption of, or business involvement with rap music. *E.g.*, *United States v. Hull*, 419 F.3d 762 (8th Cir. 2005); *State v. Tisius*, 92 S.W.3d 751 (Mo. 2002); *Britt v. State*, 974 S.W.2d 436 (Ark. 1998). Courts have admitted against one defendant rap music lyrics written by a co-defendant. *E.g.*, *Davis v. Taylor*, 116 F. App'x 807 (9th Cir. 2004); *People v. Lee*, 2005 WL 2093033 (Cal. Ct. App. Aug. 31, 2005), *overruled on other grounds*. A defendant's recitation of rap music lyrics written by another defendant has been admitted as evidence. *E.g.*, *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995). Courts have permitted rap music lyrics composed by a defendant to impeach a defendant's testimony. *E.g.*, *State v. Warren*, 138 P.3d 1081, 1092 (Wash. Ct. App. 2006) (impeaching the defendant's claim that he is a good child caretaker); *State v. Hawkins*, 58 S.W.3d 12 (Mo. 2001) (impeaching the defendant's claim that he is peaceful); *Commonwealth v. Ragan*, 645 A.2d 811 (Pa. 1994) (impeaching the defendant's claim that he is peaceful). Finally, a court admitted defendant's rap music lyrics as evidence supporting a law enforcement expert's opinion. *See People v. Singleton*, No. B171718, 2005 WL 699307 (Cal. Ct. App. Mar. 28, 2005).

12. *E.g.*, *United States v. Williams*, No. 05-13927, 2006 WL 3083968 (11th Cir. Oct. 31, 2006); *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991); *United States v. Price*, 418 F.3d 771 (7th Cir. 1995); *United States v. Wilson*, 493 F.Supp.2d 484 (E.D.N.Y. 2006); *People v. Williams*, No. 263892, 2006 WL 3682750 (Mich. App. Dec. 14, 2006); *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006); *State v. Allen*, 634 S.E.2d 272 (N.C. App. 2006); *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004); *Holmes v. State*, 608 S.E.2d 726 (Ga. Ct. App. 2004); *People v. Wright*, No. B162219, 2004 WL 516250 (Cal. Ct. App. Mar. 17, 2004); *State v. Tisius*, 92 S.W.3d 751 (Mo. 2002); *Joynes v. State*, 797 A.2d 673 (Del. 2002); *Bradshaw v. State*, 773 A.2d 1087 (Md. Ct. Spec. App. 2001); *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001); *Cook v. State*, 45 S.W.3d 820 (Ark. 2001); *People v. Spraggins*, 723 N.E.2d 359, 360 (Ill. App. Ct. 1999); *People v. Olguin*, 37 Cal.Rptr.2d 596 (Cal. Ct. App. 1994); *State v. Deases*, 476 N.W. 2d 91 (Iowa App. 1991).

rap music lyrics as substantive criminal evidence.¹³ Numerous decisions addressing this issue can be found in California, where the seminal case arose in 1994.¹⁴

Prosecutors have most often offered the lyrics in drug or violent crime cases. Naturally, the topics of the lyrics admitted mirror the type of case in which the lyrics will be used. For example, in *United States v. Price*, the defendants were charged with conspiracy to distribute crack cocaine.¹⁵ They were also “involved” with a rap group.¹⁶ The trial court admitted songs and a music video recorded by the group.¹⁷ In *United States v. Foster*, the defendant was charged with drug distribution after he was apprehended at a train station carrying two suitcases containing drugs.¹⁸ In the defendant’s duffel bag was a handwritten rap music verse he had ostensibly penned. The court admitted the following lyrics as evidence of the defendant’s knowledge and intent regarding drug distribution:

Key for Key, Pound for pound I’m the biggest Dope Dealer and I serve all over town.

Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average bussiness [sic] man.¹⁹

Defendant-authored rap music lyrics admitted in violent crime cases are exemplified by those in *Bryant v. State* and *Greene v. Commonwealth*. In *Bryant*, the juvenile defendant was charged with murder.²⁰ The victim, his stepmother, had been strangled to death and her body placed in the trunk of her car.²¹ Reasoning that lyrics written by the defendant were evidence of his intent, the court admitted the following lyrics:

Cuz the 5-0 won’t even know who you are when they pull yo ugly ass out the trunk of my car.²²

In *Greene*, the defendant was charged with killing his wife by slitting her throat.²³ Days after the killing but prior to arrest, the defendant recorded a video in which he was observed rapping the following lyrics ostensibly composed by him:

B—— made me mad, and I had to take her life.
My name is Dennis Greene and I ain’t got no f——ing wife.
I knew I was gonna be givin’ it to her . . . when I got home. . .

13. *Foster*, 939 F.2d 445.

14. *Olguin*, 37 Cal.Rptr.2d 596.

15. 418 F.3d at 775.

16. *Id.* at 775. The appellate court did not identify the substance of the lyrics in its decision.

17. *Id.* at 782-83.

18. 939 F.2d at 448-49.

19. *Id.* at 449.

20. *Bryant v. State*, 802 N.E.2d 486, 491 (Ind. Ct. App. 2004).

21. *Id.* at 492.

22. *Id.* at 498.

23. *Greene v. Commonwealth*, 197 S.W.3d 76, 79 (Ky. 2006).

I cut her motherf—in' neck with a sword. . .
I'm sittin' in the cell starin' at four walls . . .²⁴

The court held that these lyrics were admissible evidence of the defendant's premeditation and motive for the killing as well as his emotional state after the killing.²⁵

Finally, lyrics have played a prominent role in cases with the highest stakes—capital punishment cases. *United States v. Wilson* and *Commonwealth v. Neblett* are representative of the judicial treatment of lyrics written by defendants. In *Wilson*, the defendant was charged with capital crimes for shooting in the back of the head and killing two law enforcement officers.²⁶ When the defendant was arrested, law enforcement recovered the following rap music lyrics written by the defendant:

Come teast Rated U Better have that vast and dat Golock/Leavea 45 slogs in da back
of ya head cause I'm getting dat bread I ain't goin stop to I'm dead²⁷

The prosecution claimed that the lyrics constituted the defendant's confession to the shootings. The court agreed and admitted the lyrics as substantive evidence during the prosecution's case in chief during the guilt phase of the trial.²⁸ In *Neblett*, the defendant was alleged to have shot and killed a music store employee during the defendant's robbery of the store.²⁹ In his case-in-chief, the prosecutor sought to admit the following lyric as evidence:

So any nigga in the path to the flow of my cash
Will find that breathing is a privilege when taking your last³⁰

The lyrics were purportedly written by Neblett after the shooting on the day of his arrest.³¹ The prosecutor claimed that the lyrics were relevant to his case-in-chief during the guilt phase on the theory that the graphic and violent nature of the lyrics was a "reflection" of the defendant's "soul."³² In his sentencing phase

24. *Id.* at 86.

25. *Id.* at 87.

26. *United States v. Wilson*, 493 F. Supp. 2d 484 (E.D.N.Y. 2006). *See also* Michael Brick, *Rap Takes Center Stage at Trial in Killing of Two Detectives*, N.Y. TIMES, Dec. 12, 2006, at B1.

27. *Wilson*, 493 F. Supp. 2d at 488-89.

28. *Id.* at 484 (precluding defendant from introducing expert testimony to rebut the use of lyrics as evidence).

29. *See* Cassandra Kirby, *Neblett Goes on Trial in Music Store Killing*, LEXINGTON HERALD-LEADER, Aug. 3, 2006, at B1.

30. Videotape: *Commonwealth v. Neblett*, Case No. 04-CR-01046, Tape 22/2/06 VCR#50 B-11, Aug. 10, 2006 (on file with the Circuit Court for Fayette County, Lexington, Kentucky).

31. Videotape: *Commonwealth v. Neblett*, Case No. 04-CR-01046, Tape 22/2/06 VCR#50 B-7, August 7, 2006 (on file with the Circuit Court for Fayette County, Lexington, Kentucky).

32. *Id.* The court ultimately ruled the lyrics were irrelevant and inadmissible during the guilt phase. Videotape: *Commonwealth v. Neblett*, Case No. 04-CR-01046, Tape 22/2/06 VCR#50 B-11, Aug. 10, 2006 (on file with the Circuit Court for Fayette County, Lexington, Kentucky). Defendant was convicted, and the lyrics were later admitted in the sentencing phase. Videotape: *Commonwealth v. Neblett*, Case No. 04-CR-01046, Tape 22/2/06 VCR#50 B-11, Aug. 10, 2006 (on file with the Circuit Court for Fayette County, Lexington, Kentucky).

summation, the prosecutor argued: “Just because you write lyrics doesn’t mean they have true meaning. Johnny Cash was never really in Folsom Prison and didn’t shoot his old lady down. But defendant is living his lyrics.”³³

B. THE CURRENT EVIDENTIARY ADMISSIBILITY ANALYSIS

Overwhelmingly, courts admit defendant-composed rap music lyrical evidence. Courts ordinarily deem lyrics relevant on one of several grounds: as inculpatory statements or a confession to the crime charged, direct evidence of an element (such as intent or knowledge), or “other acts” evidence that circumstantially establishes intent, identity, knowledge, or motive respecting the crime. Lyrics may be admitted under any one or a combination of these theories of relevance.

Rarely do courts preclude the use of lyrics written by defendants. Frequently, defense attorneys object to the admission of lyrics on grounds of relevance, improper character evidence, and unfair prejudice. More often than not, defense objections fail and the trial court admits the evidence. Reviewing appellate courts rarely find error in admission of the evidence. Even in the event of a finding of error, it is unlikely to constitute reversible error in a defendant’s favor. What follows is an overview of the admissibility analysis for rap music lyrics written by defendants.³⁴

1. Non-Hearsay

When offering defendant-authored lyrics in the case-in-chief, the prosecution usually presents the lyrics during the testimony of a law enforcement witness.³⁵ Courts do not prohibit the admission of the evidence in this manner despite the hearsay form of the evidence.³⁶ Instead, courts deem lyrics authored by defendants to be admissions by party opponents.³⁷ Despite bearing the label of “admission,” this category of evidence merely requires that the evidence constitute a statement

33. Videotape: Closing Argument, *Commonwealth v. Neblett*, Case No. 04-CR-01046, Tape 22/2/06 VCR#50 B-11, August 10, 2006 (on file with Circuit Court for Fayette County, Lexington, Kentucky).

34. This Article will base its discussion on the Federal Rules of Evidence. As of 2002, forty-two states have modeled their rules of evidence on the Federal Rules of Evidence. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 1.2 n.2 (3d ed. 2003).

35. *E.g.*, *United States v. Price*, 418 F.3d 771, 783 (7th Cir. 2005); *People v. Olguin*, 37 Cal.Rptr.2d 596, 603 (Cal. Ct. App. 1994); *People v. Wright*, No. B162219, 2004 WL 516250 at *5 (Cal. Ct. App. Mar. 17, 2004); *People v. Pearson*, No. B177046, 2005 WL 2822411 at *7 (Cal. Ct. App. Oct. 28, 2005).

36. *See* FED. R. EVID. 801(c) (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”).

37. *See* FED. R. EVID. 801(d)(2)(A) (“A statement is not hearsay if The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity”); *People v. Williams*, No. 263892, 2006 WL 3682750 (Mich. App. Dec. 14, 2006); *People v. Singleton*, No. B171718, 2005 WL 699307 at *19 (Cal. Ct. App. Mar. 28, 2005). *See also* *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991) (noting that, while the prosecution could alternatively have categorized rap lyrics as an admission by a party opponent, the court did not need to explore that theory, since others were sufficient).

uttered by the party against whom the statement is sought to be admitted.³⁸ The statement does not have to be against the defendant's penal interest but simply inconsistent with his position at trial.³⁹ Hearsay evidence is admissible in limited circumstances and must be carefully scrutinized for admissibility.⁴⁰ Though technically hearsay, however, admissions by party opponents are excepted wholesale from hearsay rules and prohibitions.⁴¹ Thus, unlike hearsay, admissions by party opponents do not require indicia of trustworthiness, and since they are admissions by party opponents, defendant-authored rap music lyrics may be admitted into evidence as substantive evidence of the matters stated therein.⁴²

2. Relevant

Evidence that is not relevant may not be admitted.⁴³ "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁴⁴

Courts usually deem defendant-written lyrics relevant in one of two manners. The first manner is when lyrics are characterized as inculpatory statements regarding or a confession depicting the crime charged.⁴⁵ This was the case in *United States v. Wilson*⁴⁶ and *Greene v. Commonwealth*,⁴⁷ both earlier described. A similar conclusion was reached in *State v. Allen*, where the defendant was charged with murder.⁴⁸ The defendant had penned rap music lyrics while he was in pre-trial custody. "The trial court found the lyrics sufficiently similar to the facts and circumstances surrounding the murder" and therefore relevant.⁴⁹ The reviewing court affirmed the trial court's ruling.⁵⁰

In the second scenario, courts conclude defendant-authored lyrics are direct evidence of defendant's intent or motive. Such was the case in *Cook v. State*,

38. See KENNETH S. BROWN, ET AL., MCCORMICK ON EVIDENCE § 254 (6th ed. 2006).

39. *Id.*

40. See FED. R. EVID. 802, 803.

41. See FED. R. EVID. 801(d)(2)(A).

42. See BROWN ET AL., *supra* note 38, at § 254 (noting that admissions of a party are received as evidence of the facts admitted). Of course, the fact that admissions by a party opponent are excepted from the hearsay category does not mean that the same concerns regarding hearsay evidence (e.g., misperception, faulty memory, risk of insincerity, and narrative ambiguity) completely evaporate. See MUELLER & KIRKPATRICK, *supra* note 34, at § 8.2 (listing risks of hearsay).

43. FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.").

44. FED. R. EVID. 401.

45. Such "confessional" lyrics are distinguishable from law enforcement obtained confessions governed by special rules of admissibility because of constitutional considerations. See FED. R. EVID. 104(c) ("Hearings on the admissibility of confessions shall in all cases be conducted out of the presence of the jury").

46. *United States v. Wilson*, 493 F. Supp. 2d 484 (E.D.N.Y. 2006).

47. *Commonwealth v. Greene*, 197 S.W.3d 76, 86 (Ky. 2006).

48. See *State v. Allen*, No. COA05-1480, 2006 WL 2529580 (N.C. App. Sept. 5, 2006).

49. *Id.* at *5.

50. *Id.*

where the defendant was charged with felony murder, aggravated robbery, and theft.⁵¹ The rap penned by the defendant, entitled “Give up the Strilla,” included the following lyrics:

Look out 4 this muthaf* *n killa
on the for realla n* *a, you bets to give up the strilla
or getta, muthaf* *n slugg assigned to yo a* * or you can do the s* * t the easy way,
give up the cash
as bad as my muthaf* *n a* * is doin,
you refuse, you loose, you snooze, you made the news.⁵²

The appellate court characterized the lyrics as depicting aggravated robbery, and thus concluded that the lyrics were relevant to establish the defendant’s intent to commit the aggravated robbery.⁵³

Defendants frequently object to admission of lyrics proffered by the prosecution arguing that the lyrics are irrelevant and should be excluded.⁵⁴ However, the threshold for relevance is quite low and not difficult for a court to find satisfied.⁵⁵ As the examples demonstrate, whether the lyrics describe unique events similar to the crime charged or only abstractly describe an event of the same nature as the crime charged, courts will likely find lyrics have a “tendency” to make a fact “more probable or less probable than it would be without the evidence.”⁵⁶ Thus, trial courts usually overrule defense objections to the admission of rap music lyrics on grounds of irrelevance.⁵⁷

3. Permissible Character Evidence

Evidence rules permit the admission of evidence of other acts that circumstantially bear on a defendant’s criminal intent, motive, knowledge, or identity.⁵⁸ As the Rules Advisory Committee for the Federal Rules of Evidence recognized, “in many criminal cases evidence of an accused’s extrinsic acts is

51. 45 S.W.3d 820, 821 (Ark. 2001).

52. *Id.* at 822.

53. *Id.* at 823. See also Bryant v. State, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004).

54. See FED. R. EVID. 402 (“Evidence which is not relevant is not admissible.”).

55. See MUELLER & KIRKPATRICK, *supra* note 34, at § 4.1 (“[Federal Rule of Evidence] 401 establishes a low threshold of relevance”); see also *id.* at § 4.2 (“Courts have characterized [Rule] 401 as embodying a ‘liberal standard’ favoring a policy of ‘broad admissibility.’”) (internal citations omitted).

56. FED. R. EVID. 401.

57. Courts may be more reluctant to credit rap music lyrics in cases of well-known artists. At the sentencing of the 2004 federal gun charge case of Beanie Sigel, the prosecutor quoted Sigel lyrics about pouring acid on children and raping pregnant women. The judge was dismissive, saying that Sigel was simply “playing a character for his fans.” David Caruso, *More Rap Lyrics Showing Up in Court*, THE ASSOCIATED PRESS (New York), Dec. 21, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/20/AR2006122001203.html>. The criminal defense attorney who represented well-known rapper Beanie Sigel remarked that “he has had a tougher time downplaying the significance of rap lyrics written by other, less-famous clients.” *Id.*

58. FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts . . . [may] be admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .”).

viewed as an important asset in the prosecution's case against an accused."⁵⁹ Demonstration of an individual's state of mind usually cannot be proved except by reference to circumstantial evidence.⁶⁰

Courts admit defendant-authored lyrics as "other acts" evidence, reasoning that authored lyrics are indicative of the defendant's intent, knowledge, or motive respecting the crime charged.⁶¹ For example, in *United States v. Foster*, the defendant was charged with drug distribution.⁶² The court admitted lyrics written by the defendant as evidence of his knowledge and intent regarding drug distribution. More particularly, the court reasoned that the act of defendant authoring the lyrics, which included drug terminology, evidenced the defendant's knowledge of drug code words and narcotics trafficking.⁶³

Once courts admit the defendant's lyrics, the defendant often counters that the evidence is functionally equivalent to character or propensity evidence and therefore should be excluded.⁶⁴ Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."⁶⁵ As the Federal Rules Advisory Committee comments:

[C]haracter evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.⁶⁶

Nevertheless, if the "other acts" evidence is admissible for a permissible purpose, it is not excluded as impermissible character evidence.⁶⁷ Further, courts concerned about jurors drawing improper inferences routinely assure defendants that the admission of the rap music lyrics is not being permitted to establish the defendant's bad character or propensity to commit crimes and so instruct the jury.⁶⁸

59. FED. R. EVID. 404(b) (amended 1991), Advisory Committee notes.

60. MUELLER & KIRKPATRICK, *supra* note 34, at § 4.17 ("Intent is the broadest category for evidence of prior crimes, mostly because intent in some form is almost always an element in the charged offense, and almost always the prosecutor must prove it by circumstantial evidence. Prior conduct by the defendant often sheds light on his state of mind at the time of the event in question.")

61. *E.g.*, *Greene v. Commonwealth*, 197 S.W.3d 76, 86 (Ky. 2006) ("[T]he [rap] video establishes premeditation and motive in Appellant's own words"); *Cook v. State*, 45 S.W.3d 820, 823 (Ark. 2001) ("[Appellant's rap lyrics] make the existence of his intent to commit aggravated robbery more probable....").

62. 939 F.2d 445 (7th Cir. 1991).

63. *Id.* at 455.

64. *E.g.*, *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004); *Joynes v. State*, 797 A.2d 673, 676-77 (Del. 2002); *State v. Cheeseboro*, 552 S.E.2d 300, 312 (S.C. 2001).

65. FED. R. EVID. 404(a).

66. FED. R. EVID. 404(a) advisory committee's note (citing CALIFORNIA LAW REVISION COMM'N, REP., REC. & STUDIES 615 (1964)).

67. *See* FED. R. EVID. 404(b).

68. *See, e.g.*, *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

4. Not Prejudicial

Defendants commonly attempt to exclude defendant-composed rap music lyrics on grounds that the evidence is unfairly prejudicial.⁶⁹ Relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”⁷⁰ Risk of unfair prejudice is an important factor for exclusion.⁷¹ Unfair prejudice has been described as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”⁷² With respect to “other acts” evidence more specifically, when calculating unfair prejudice, concerns include: the extent to which the point to be proved is disputed; adequacy of proof of the prior misconduct; probative force of the evidence; proponent’s need for the evidence; availability of less prejudicial proof; inflammatory or prejudicial effect; similarity to the charged crime; effectiveness of limiting instructions; and the extent to which prior acts evidence prolongs proceedings.⁷³

Courts admitting defendant-composed rap music lyrics rarely find the lyrics *unfairly* prejudicial, even those courts that acknowledge the lyrics may be prejudicial.⁷⁴ Regardless, as a prophylactic measure, courts willingly provide juries with limiting instructions and admit the lyrics.⁷⁵

C. ASSUMPTIONS REGARDING RAP MUSIC LYRICS

Judicial decisions granting admission of rap music lyrics as evidence are founded on several implicit, and occasionally explicit, assumptions: (1) interpreting and understanding rap music lyrics is not a subject requiring specialized knowledge, (2) rap music lyrics should be literally understood; and (3) rap music lyricists depict accurate, truthful, and self-referential narratives. Essentially, courts fail to treat rap music lyrics as an art form.⁷⁶ Courts treat rap music lyrics as

69. *E.g.*, *Foster*, 939 F.2d at 455-56; *Greene v. Commonwealth*, 197 S.W.3d 76, 86-87 (Ky. 2006); *Bryant*, 802 N.E.2d at 498; *People v. Wright*, No. B162219, 2004 WL 516250 at *5 (Cal. Ct. App. Mar. 17, 2004); *Joyes*, 797 A.2d at 676-77 (Del. 2002); *Cheeseboro*, 552 S.E.2d at 313 (S.C. 2001); *State v. Evans*, No. 01AP-594, 2001 WL 1653864 (Ohio Ct. App. Dec. 21, 2001).

70. FED. R. EVID. 403.

71. *See* MUELLER & KIRKPATRICK, *supra* note 34, at § 4.15 (evidence erroneously admitted under Rule 404(b) is more likely to be prejudicial than other types of evidentiary error).

72. FED. R. EVID. 403 advisory committee’s note.

73. *See* MUELLER & KIRKPATRICK, *supra* note 34, at § 4.16.

74. *See Foster*, 939 F.2d at 456; *People v. Wright*, No. B162219, 2004 WL 516250 (Cal. Ct. App. Mar. 17, 2004); *Cook v. State*, 45 S.W.3d 820, 823 (Ark. 2001); *People v. Olguin*, 37 Cal.Rptr.2d 596, 603-04 (Cal. Ct. App. 1994). *But see* *Brooks v. State*, 903 So.2d 691, 699-700 (Miss. 2005); *Cheeseboro*, 552 S.E.2d at 313 (S.C. 2001).

75. *See Foster*, 939 F.2d at 455-56 (quoting the district court instruction that “[t]he limited purpose for which the document is received is only as to evidence of knowledge and intent.”). *See also* FED. R. EVID. 403 advisory committee note (“In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”).

76. *But see Foster*, 939 F.2d at 456 (explaining that admitting the rap lyrics was “the equivalent

everyday, conversational-type speech and analyze the admissibility of rap music lyrics without information pertaining to the creation and utility of rap music lyrics. Courts then permit jurors to evaluate the utility of the evidence without such information.

1. A Subject of Common Knowledge

Despite the present-day ubiquity and popularity of rap music, the existence and use of methods governing the composition of lyrics are not part of the public's everyday learning and experience. Rap music lyrics are not simply rhyming poems or declarative sentences, as many individuals believe. Rather, rap lyrics contribute to a complex form of creative verbal expression deserving of careful analysis.⁷⁷ Moreover, unlike poetry or fictional writing, it has not been until recently that rap music as an art form has been studied and taught in schools, colleges and universities.⁷⁸

Nevertheless, courts adjudicating criminal cases treat the comprehension and analysis of rap music lyrics as within the public's, hence judges' and jurors', common knowledge. As a corollary, courts do not view the interpretation and understanding of rap music lyrics as requiring specialized knowledge. Most courts apparently do not even consider whether specialized information is necessary. In *United States v. Wilson*, the court rejected the testimony of the defendant's expert witness and implied that the interpretation of rap music lyrics would not be a subject worthy of expert testimony.⁷⁹ The court acknowledged that expert testimony (i.e., specialized knowledge) regarding rap music can be helpful in some cases but concluded that it would not be helpful in the *Wilson* case and implicitly in any criminal case.⁸⁰

2. Subject to Literal Interpretation without Reference to Artistic Constraints

Courts do not acknowledge that defendants authoring rap music lyrics are engaging in an artistic process that challenges everyday expectations regarding

to admitting *The Godfather* to illustrate Puzo's knowledge of the inner workings of an organized crime family and admitting *The Pit and the Pendulum* to illustrate Poe's knowledge of medieval torture devices," in that the music "describes the reality around its author.").

77. See IMANI PERRY, *PROPHETS OF THE HOOD* 112 (Duke University Press 2004) ("[B]ecause hip hop is an art form complex to analyze, the real difficulty comes with what I would term the court of public opinion and the ethical evaluation of the art by said court."); Michael Eric Dyson, *Foreword to THAT'S THE JOINT! THE HIP-HOP STUDIES READER* xi, xii-xiv (Murray Forman & Mark Anthony Neal eds., Routledge 2004); Ralph M. Rosen and Donald R. Marks, *Comedies of Transgression in Gangsta Rap and Ancient Classical Poetry*, 30 *NEW LITERARY HISTORY* 897, 897 (1999) ("[Gangsta rap's] origins as a complex poetic form with deep roots in a variety of literary and ritual traditions have, for the most part, been neglected or obscured.").

78. See Murray Forman, *Introduction to THAT'S THE JOINT! THE HIP-HOP STUDIES READER*, *supra* note 77, at 1-7; Paul Butler, *Much Respect: Toward a Hip Hop Theory of Punishment*, 56 *STAN. L. REV.* 983, 993 (2004).

79. *United States v. Wilson*, 493 F. Supp. 2d 484 (E.D.N.Y. 2006).

80. *Id.*

language.⁸¹ Rather, courts interpret the meaning of defendant-authored rap music lyrics literally and in accord with ordinary conversational linguistic principles. At a first level of lyrical analysis, terms in the lyrics – whether proper English, slang, or crime-related terminology – are defined in the most commonly understood and direct sense.⁸² Proper English terms are given their ordinary, plain meaning. When the defendant uses slang or crime-related terms, courts generally rely on law enforcement prosecution witnesses to explain the meanings of terms or offer synonymous meanings in plain English.⁸³

At a second level of analysis, courts assume that defendant-lyricists for the most part do not use poetic devices or the devices play a minimal role in understanding the lyrics. In only a few instances do judicial decisions explicitly acknowledge that defendant-authored lyrics may employ metaphor, exaggeration, and other artistic devices.⁸⁴ In addition, courts generally do not consider that social factors may influence the defendant's crafting of the lyrics. Even when a court, either on its own or at the suggestion of the defendant, acknowledges the possibility that external influences may impact the defendant's crafting of lyrics and thus the interpretation and evidentiary utility of the lyrics, it often gives little weight to such influences.⁸⁵

The plain meaning interpretive approach is inconsistent with apparent instances (i.e., cross-outs and writing in the margins) in which the defendant's writings have been edited and redrafted. In those instances, the court is made aware that the defendant is consciously crafting the lyrics. Consequently, we would expect that the court factor into admissibility determinations, in particular the relevance analysis, the notion that the crafting and construction of the lyrics may make them unlikely to bear reliably on the truth of any fact in issue.

81. Philosopher Paul Grice set forth the "Cooperative Principle": "Make your conversational contribution such as is required at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged." See GEORGIA GREEN, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING 88 (1989). He also proposed maxims stemming from the "Cooperative Principle," including but not limited to: "Try to make your contribution one that is true"; "Do not say what you believe to be false"; "Do not say that for which you lack evidence"; "Avoid obscurity of expression"; and "Avoid ambiguity". *Id.* at 88-89. *But see* Greene v. Commonwealth, 197 S.W.3d 76, 86-87 (Ky. 2006) (interpreting "sword" in the defendant's lyrics to refer to the knife defendant used to kill his wife).

82. See Paul Kirgis, *Meaning, Intention, and the Hearsay Rule*, 43 WM. & MARY L. REV. 275, 294 (2001) ("Rather than seeking the specific intention of the actual speaker, however, plain meaning supplies an intention based on the interpreter's personal, often subconscious, judgments about the likely intention motivating the utterance. Interpreters who believe they are being objective are merely applying what to them appears to be the most obvious conventional meaning.").

83. See, e.g., *People v. Olguin*, 37 Cal. Rptr. 2d 596, 603 n.3 (Cal. Ct. App. 1994); see also Joelle Ann Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 6, 18-21 (2004).

84. See, e.g., *Greene*, 197 S.W.3d at 86-87 (interpreting "sword" in the defendant's lyrics to refer to the knife defendant used to kill his wife); Caruso, *supra* note 57.

85. See, e.g., *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

3. Autobiographical in Nature

Courts presume that rap music lyricists accurately convey truthful and self-referential narratives. To courts, lyrics often depict real-life events, based on personal knowledge.⁸⁶ In a sense, then, courts are likening rap music lyricists to journalists, autobiographers, or diary-keepers. Several lines of thinking underlie this assumption. First, this assumption likely is rooted in the notion that, with rare exception, individuals neither lie about nor falsely claim responsibility for criminal or wrongful conduct. Additionally, it relies on the general expectation that individuals do not speak of that for which they have no evidence or personal knowledge. Finally, this assumption harkens back to the linkage drawn between gangs and rap music by prosecutors: gang members write lyrics depicting their true-to-life experiences.⁸⁷ The assumption revealed – both implicitly and explicitly – is that lyrics written by a defendant must be true because what is spoken “fits” with what we “know” about gang-members and criminals. That is, the conception of rap music lyrics as truth rather than art is consistent with the stock image of gang-members and rappers as criminals.⁸⁸

On the other hand, courts do not treat lyricists of other mainstream musical genres similarly, even those who live an outlaw lifestyle or promote an outlaw image. They are not presumed to be making statements about their beliefs, intent or their conduct.⁸⁹ They are not automatically linked to the negative aspects of their music. For example, with respect to country music, we do not likely believe that Johnny Cash shot a man simply to watch him die.⁹⁰ With respect to reggae, we do not generally take to heart Bob Marley’s proclamation: “I shot the sheriff, but I

86. See, e.g., *id.*

87. Lyddane, *supra* note 1, at 1.

88. “[I]t proves comparatively difficult for listeners and critics to understand the realism in hip hop as something crafted, ideological, and resulting from artistic choices. Why? One frequent answer claims that the music’s audience is too young and unsophisticated to distinguish between entertainment and reality; another finds that critics scapegoat hip hop as opposed to other music styles due to racism or a generation gap. And both hold some truth. Yet the difficulty results from a far more convoluted dynamic than these answers can account for.” PERRY, *supra* note 77, at 90.

89. However, courts have treated lyrics in outsider musical genres, such as white power music, as reflective of the author’s beliefs. For example, in *Chaddock v. State*, the defendant was charged with aggravated assault while a member of a gang. The victim was Black and the gang was an alleged skinhead group. The court admitted racist song lyrics by a band member as evidence of the band member’s racist beliefs and, since the defendant was a follower of the band member, the lyrics in turn, constituted evidence of the defendant’s mindset. 203 S.W.3d 916 (Tex. 2006). See also *United States v. Magleby*, 241 F.3d 1306, 1319 (10th Cir. 2001) (holding that the probative value of racist song lyrics listened to by the defendant before the crime outweighed their prejudicial effect and were admissible in prosecution for civil rights violations).

90. JOHNNY CASH, *Folsom Prison Blues* (Sun Records 1956) (“But I shot a man in Reno just to watch him die.”). The prosecutor in *Commonwealth v. Neblett* referred to Johnny Cash’s lyrics in his closing argument. Videotape: *Commonwealth v. Neblett*, Case No. 04-CR-01046, Tape 22/2/06 VCR#50 B-11, Aug. 10, 2006 (on file with the Circuit Court for Fayette County, Lexington, Kentucky). Well-known rapper Ice-T has also questioned whether we would believe that Johnny Cash shot a man just to watch him die. See *Russell Simmons Presents: Hip Hop Justice* (CourtTV television broadcast Oct. 6, 2004) available at http://www.courtTV.com/onair/hiphop_justice/video_excerpts.html.

did not shoot the deputy” or believe that he shot the sheriff but not the deputy.⁹¹ Rather, we accept that these artists as making purely artistic statements.⁹²

II. SOCIAL CONSTRAINTS AND ARTISTIC CONVENTIONS OF RAP MUSIC LYRICS

Principles of linguistic pragmatics and discourse analysis offer one means to combat the interpretive assumptions identified in Part I.⁹³ The two disciplines suggest that the aim of the defendant in authoring the lyrics is important to ascertaining the admissibility and utility of defendant-authored rap music lyrics because the speaker’s aim depends on context.⁹⁴ In the case of rap music lyrics, context includes the social constraints impacting rap music and the poetics of rap music lyrics. Consequently, Part II identifies and describes some of the important social constraints and artistic conventions to which courts are paying too little attention when determining the admissibility of defendant-authored rap music lyrics and of which jurors are not advised.

A. COMMERCIALIZATION

Rap music has moved from its street roots and into the corporate boardroom.⁹⁵ The present-day rap music industry is commercialized. Artists’ images are constructed and marketed for maximal financial profit. As part of the image construction process, rap music lyrics are composed to support a financially viable image. As a result of this commercialization, truth, accuracy, and authenticity – whether through image, lifestyle or lyrics – give way to monetary aims, and a monolithic image of rappers as violent, drug-involved, misogynistic thugs and

91. BOB MARLEY AND THE WAILERS, *I Shot the Sheriff*, on BURNIN’ (Island Records 1973).

92. Dyson, *supra* note 77, at xi, xii. As the author points out, few other art forms are denied their artistic heritage.

93. “Pragmatics is the study of intended meaning. This is distinct from semantics (the study of linguistic meaning) insofar as a given utterance is interpreted based on the intention of the speaker or writer, which may or may not be the same as the overt linguistic meaning of the sentence.” GERALD MCMENAMIN, *FORENSIC LINGUISTICS* 23 (2002). Relatedly, “[d]iscourse analysis is the study of language units beyond the sentence. These units of discourse in speech and writing are studied by relating them as communicative events to their cultural and social contexts of use. Such contexts include forms and purposes of talk associated with interviews, negotiations, debates, greetings, narratives of personal experience, and other types of natural conversations.” *Id.* at 22. Professor Paul Kirgis has applied pragmatics to the resolution of hearsay problems. *See* Kirgis, *supra* note 82. Beyond linguistics, many other scholarly disciplines can shed light on the intricacies of rap music, among them sociology, urban studies, communications theory, American studies, African-American studies, history, musicology, and English literary theory. *See* Dyson, *supra* note 77, at xiv.

94. *See* MCMENAMIN, *supra* note 93, at 23 (“[T]he successful communication of intended meanings (i.e., pragmatic uses of language) depends on reference to nonlinguistic information such as the identity and social relationships of speaker or writer and listener or reader; the place, time, and topic of conversation; the purpose of the communication; the language used, etc. Without this contextual information, the intended meaning of a sentence . . . may be misinterpreted or remain unknown.”).

95. *See* M. Elizabeth Blair, *Commercialization of the Rap Music Youth Subculture*, in *THAT’S THE JOINT! THE HIP-HOP STUDIES READER*, *supra* note 77, at 497.

criminals predominates in society.⁹⁶

The 1960s and 1970s were a time of tumultuous change in the country's social and legal landscape.⁹⁷ Rap music was born in the early 1970s in the gang-infested, crime-ridden, impoverished streets of Bronx, New York.⁹⁸ Rap music's potential for commercial and mainstream success became apparent in 1979 with the success of Rappers' Delight by the Sugarhill Gang, the first rap song to cross over to pop music charts.⁹⁹ With this success, it became apparent that rap music could command larger audiences and attain mass appeal beyond New York City. Some twenty-five years later, rap music did not die out as many had predicted at its inception.¹⁰⁰ By 2003, rap music was the second most purchased musical genre behind rock-and-roll; in the years since, it has consistently battled country music for second place behind rock-and-roll.¹⁰¹

Rap music has had a lasting influence on the American economy through its everyday presence in music, television, film, fashion, dance, and marketing.¹⁰² Consequently, the rap music industry has become highly commercialized. Artist signings, marketing plans, and production schedules are designed and driven by large corporations seeking to make a profit.¹⁰³ This commercialization permeates all facets and levels of the industry. Large corporations in the music industry sign and promote artists fitting a mold that is marketable to the buying audience. As part of the molding process, corporations seek out songs from lyricists that support the artists' images.¹⁰⁴ Famous, up-and-coming, and unknown artists all respond to this commercialization whether they are seeking or maintaining local, regional, national or global success. Aspiring artists will model their more successful counterparts. It is fair to say that few in the rap industry want to be starving artists.

One consequence of commercialization is that artist images and lyrical narratives are not necessarily truthful – whether in whole or in part.¹⁰⁵ Today, a

96. See WILLIAM E. PERKINS, *The Rap Attack: An Introduction*, in DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 20 (William E. Perkins ed., 1996); PERRY, *supra* note 77, at 128-29; S. CRAIG WATKINS, HIP HOP MATTERS: POLITICS, POP CULTURE, AND THE STRUGGLE FOR THE SOUL OF A MOVEMENT 1-7, 108-10 (2005).

97. See generally JEFF CHANG, CAN'T STOP WON'T STOP (2005). Chang's historical work grounds the origins and history of rap music in the sociological, legal, and political landscape beginning in the late 1960s.

98. See *id.* at 41-65; see also PERKINS, *supra* note 96. Many have more than adequately documented the history of hip hop culture. E.g., NELSON GEORGE, HIP HOP AMERICA 10, 18 (2005); ROSE, *supra* note 4, at 2. Discussions of the history of the rap music industry also appear in case law. See, e.g., *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). The discussion herein is only the most cursory of overviews.

99. See GEORGE, *supra* note 98, at 60; ROSE, *supra* note 4, at 56.

100. See GEORGE, *supra* note 98, at x ("Hip hop has outlived all its detractors . . .").

101. See RIAA 2006 Consumer Profile, *supra* note 4.

102. See Blair, *supra* note 95, at 497; Keith Negus, *The Business of Rap: Between the Street and the Executive Suite*, in THAT'S THE JOINT! THE HIP-HOP STUDIES READER, *supra* note 77, at 525, 536-37.

103. Kelefa Sanneh, *Gettin' Paid*, THE NEW YORKER, Aug. 20, 2001, at 60 (discussing "corporate rap").

104. See Tricia Rose, *Contracting Rap: An Interview with Carmen Ashhurst-Watson*, in THAT'S THE JOINT! THE HIP-HOP STUDIES READER, *supra* note 77, at 541-42.

105. The role of commerce in forcing an (autobiographical) author to adopt a persona that will

tension has arisen between authenticity and accuracy in the pursuit of entertainment and money-making.¹⁰⁶ Images and lyrics are constructed to sell a commercially viable, entertaining product appealing to the widest possible consumer audience regardless of actual truth or accuracy.¹⁰⁷ This is not to suggest that lyrics are absolutely or universally devoid of truth; however, accurate, historical representation is not the overriding goal. Consequently, distinguishing truth is not a straightforward proposition.

A second consequence of commercialization is that the image that predominates rap music in the public eye is that of the stereotypical gangster, thug, outlaw, or criminal.¹⁰⁸ Thus, the mainstream public generally perceives that creators and consumers of rap music condone and/or engage in violent, deviant, and criminal behaviors. Public perception is fostered by a number of co-occurring conditions. First, audiences like this image because it is youthful, rebellious, and invokes stereotypical, popular images.¹⁰⁹ Second, rap music espouses a youthful male dominance and superiority, romanticizes and glorifies crime, violence, drugs, and cars, and objectifies and marginalizes women.¹¹⁰ The third condition is the frequent media coverage of criminal matters involving prominent rap artists and their entourages and disputes, or “beefs,” between prominent rap artists and their entourages.¹¹¹ In the past several years, rap artists have received significant media coverage whether it is for their investigation, arrest, or charging in connection with criminal activities ranging from drug distribution to gun possession to sexual assaults to homicide.¹¹²

The sub-genre of rap music most commonly associated with this gangster, thug, or criminal image is that of “gangster rap” which originated in Los Angeles in the late 1980s. Gangster rap purports to reflect life in the inner city, both literally and metaphorically. Many fans and critics were introduced to rap music through gangster rap, and for many, rap music is defined solely by the gangster rap sub-

appeal to her audience has likewise been discussed in connection with autobiographical legal scholarship. See Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1286-87 (1995).

106. See *infra* Parts II.A and II.B.

107. See PERRY, *supra* note 77, at 128-29; WATKINS, *supra* note 96, at 108-10.

108. Rapper N.O.R.E., whose given name is Victor Santiago, testified as a defense witness in a murder trial: “‘Hard-core hip hop tends to sell more records It’s about selling an image.’” Larry Neumeister, *Rapper N.O.R.E. Testifies at Trial*, THE ASSOCIATED PRESS (New York), Jan. 11, 2007.

109. See PERRY, *supra* note 77, at 136 (“Part of the seduction of rap for mainstream America, particularly white young people, lies in its iconoclasm in relation to white American cultural norms. It is Other, it is hard, it is deviant. On the other hand, black listeners of hip hop, in a gesture revealing an anxiety about the increased commercialism of rap and a strong identification with the art form as their own, demand that hip hop music be ‘Real’ and remain true to the experiences of black America.”). See also Tsiolis v. Interscope Records, Inc., 946 F.Supp. 1344, 1349-50 (N.D.Ill. 1996) (expert testimony that “rap and metal music do appeal to basically the same audience, namely, adolescent boys, since both types of music were at least originally considered to be extreme music and since both are very powerful and energetic”).

110. See Tracy Connor, *They’re Rap Stars With Rap Sheets*, DAILY NEWS, Mar. 6, 2005 at 4.

111. “Beefs” that are either based in fact and resulting from some true disagreement or developed and promoted as a marketing scheme or generated and fostered by media coverage.

112. See Connor, *supra* note 110, at 4.

genre. Defining the bounds of gangster rap, however, is a difficult task.¹¹³ Some artists and lyrics are clearly gangster rap, while others may be more quixotic, defying categorization.

As a result of commercialization pressures, with few exceptions, the most prominent artists representing the public face of rap music present a single perspective. Successful lyricists maintain the image that works. Aspiring lyricists model what they hear and see from mega stars and adopt images designed to facilitate commercial success in the mainstream.

B. AUTHENTICITY

An avowed tenet of rap artists is that the artist and product should “Keep It Real.” This tenet has no singular meaning. “Keeping it real” may mean “the rejection of sanitized Hollywood depictions of life and of conscious efforts to cross over and become accepted by white audiences.”¹¹⁴ It may mean a rejection of simplistic rhymes lacking artistic sensibilities. Alternatively, it may be understood as an effort to reveal the complexities and depth of life in the inner city. Finally, it may refer to the glorification of crime and the ills of urban poverty.¹¹⁵

Nevertheless, as Professor Imani Perry has pointed out:

[K]eeping it real encompasses more than knowing the seamier side of life in the ghetto firsthand, even as violence and thuggishness have become symbolic elements of the hood. . . . The rapper’s aim is to convince an audience that his ‘shit is real,’ but this is a much more complex task than simply proving that the events he described actually happened to him.¹¹⁶

Artists may claim that their lyrics are truthful and accurate representations of their lives, beliefs, and conduct. For some, the harsh “reality” of the lyrics may be a thing of the past, repeatedly toted out to maintain authenticity. For some, the reality may be wholly or partially fabricated. For others, the reality may be true, not for the particular lyricist but for another individual or a community. It is equally likely that authenticity is “found in cinema verite representation of ghetto existence.”¹¹⁷ Regardless, authenticity in rap music “does not disallow fiction, imaginative constructions, or hip hop’s traditional journey into myth.”¹¹⁸

The notion that an artist is “keeping it real” invites the listener to believe that,

113. GEORGE, *supra* note 98, at 47-48.

114. PERRY, *supra* note 77, at 95.

115. *Id.* at 95-96. Hip hop engages the “culture of poverty” theories of the demise of the Black family and Black sociopathy. For many in the public, however, it actually, accurately, and realistically depicts Black life. *See id.* at 112.

116. *Id.* at 95 (internal quotations omitted).

117. *Id.* at 87. “In the late 1980s and 1990s, artists began appearing who personified gangsters without ever having experienced that lifestyle: record companies manufactured gangsters for their sensational appeal. The co-optation of hip hop by the mainstream therefore became associated with ‘fake gangsterism.’ Gangsterism turned into a commercial tool, sold for its gore like an action flick.” *Id.* at 94; *see also* MICHAEL ERIC DYSON, *BETWEEN GOD AND GANGSTA RAP* 169 (1996) (“[S]ignifying and play, distortion and hyperbole, lift studio gangsterism to an art”).

118. PERRY, *supra* note 77, at 87.

through his lyrics, the artist is accurately and truthfully representing his world. Moreover, “mass-produced hip hop maintains its ‘authenticity’ in part by encouraging artists to live out the artistic narratives they portray.”¹¹⁹ Thus, to support claims of authenticity, artists become enmeshed in criminal activities,¹²⁰ or even lay false claim to criminal activities. Not unexpectedly, then, artists must also deny that their images are manufactured in order to rebut charges of fake gangsterism and help their buying audience sustain their beliefs.¹²¹

C. POETICS

Similar to other art forms, rap lyrics have their own artistic or poetic conventions. The use of these conventions is commonly understood in more traditional arts such as fiction writing and poetry. Their utility is not, however, as well understood in the context of rap music lyrics. Accordingly, in considering the context surrounding rap music lyrics, sufficient attention must be given to the artistic framework in which lyrics are crafted.¹²² What follows is a discussion of several of the more prominent artistic conventions in rap music that bear on the evidentiary utility of rap music lyrics. In particular, I focus on the use of collective consciousness, metaphors and boasting, and narrative conventions.

1. Personal and Collective Knowledge

Both individual and collective experiences provide grist for rap music lyrics. Writing of Tupac Shakur, one of the most successful gangster rap artists of all time, Michael Eric Dyson queried:

Did Tupac draw from his own experiences or did he raid the experiences of others to spin his haunting tales of urban woe and social neglect? If he did, would he be

119. *Id.* at 90.

120. Their arrests are often generated by law enforcement agency targeting of rap music artists for monitoring and investigation for criminal activities. Law enforcement agencies in New York City, Los Angeles, Atlanta, Las Vegas, and Miami have all devoted resources to keeping abreast of rap artists’ disputes, criminal activities and histories, and general whereabouts. See Adam Matthews, *Seen Acting in Concert*, THE VILLAGE VOICE, Oct. 2, 2007; Glenn Gamboa and Sean Gardiner, *30 Years of Hip Hop*, NEWSDAY, Oct. 11, 2004; Dasun Allah, *NYPD Admits to Rap Intelligence Unit*, THE VILLAGE VOICE, Mar. 23, 2004.

121. See PERRY, *supra* note 77, at 94-95:

Hip hop heads made efforts to weed out the commercial gangsters from the ‘real’ ones, and so rumors of the suburban birthplaces and respectable middle-class childhoods of certain MCs surfaced as evidence of their inauthenticity, even though hip hop had been a cross-class art form for years. In order to retain a sense of authenticity and connectedness to black communities, and also for the glamour provided by celebrity, various artists began to live out the narratives of gangster lives. The list of hip hop artist arrested or imprisoned *since* becoming celebrities is extremely long Virtually every hip hop artist mentioned in the mainstream news suffered transmogrification into a gangster rapper, even if he or she came from a place that didn’t have gangs per se.

122. See Dyson, *supra* note 77, at xii (“Hip hop is still fundamentally an *art* form that traffics in hyperbole, parody, kitsch, dramatic license, double entendres, signification, and other literary and artistic conventions to get its points across.”) (emphasis in original).

different from any other art-ist whose primary obligation is to make art out of imagination, fiction, and fantasy? Stories don't have to be real to be true. Wouldn't Tupac have been artistically authentic in borrowing the lives, experiences, and stories of others as the grist for his powerful rap narratives?¹²³

Courts resolving intellectual property cases have addressed the use of both individual and collective experiences and the resulting ubiquity amongst rap music lyrics.¹²⁴

Rap music lyrics may be based on the life of the lyricist, the lives of individuals he knows, or the lives of individuals he has observed.¹²⁵ All sources of material and inspiration are fair game:

Hip hop music concerns itself with both the self and the we. Its consciousness is both of the ego and of the collective. While explorations and expressions of the self abound as descendants of big lies, toasts, and folk ballads from the African American oral tradition, they are not ultimately individualistic, even when referring primarily to the individual.¹²⁶

Lyricists can permissibly integrate the experiences of the author alongside the experiences of others because of witnessing and the collective experience of Blacks in America. As Professor Perry explains:

Witnessing proves incredibly important in hip hop. Being present for the ills of the ghetto and watching someone go through the transformations of drug abuse, murder, poverty, and mental illness can be as traumatic as experiencing those things. Hip hop at once witnesses and then testifies to certain events, whether or not the speaker participates in them, and acts as a witness to realism in the religious sense, as someone or something bears witness to life's hardship and difficulty.¹²⁷

Moreover, the intended audience, usually comprised of Blacks, has a shared historical and social experience in America. "The Real, or realism in hip hop as a movement, takes on two perspectives, 'telling' narratives and 'being' narratives, which in terms of understanding hip hop as the production of a community and of individual artists, are mutually dependent."¹²⁸ The shared experiences of the Black community reflect a commonality of experience. Translated into rap music lyrics, this commonality becomes a ubiquity of themes, language, images, and storylines used by rap music lyricists.

123. MICHAEL ERIC DYSON, *HOLLER IF YOU HEAR ME: SEARCHING FOR TUPAC SHAKUR* 157 (2001).

124. See *Hayes v. Ja Rule*, No. 1:03 CV 1196, 2005 WL 2136946, at *10-11 (M.D.N.C. Aug. 19, 2005) (discussing commonness of gangster life and racial injustice themes); *BMS Ent. Heat Music LLC v. Bridges*, No. 04 Civ. 2584(PKC), 2005 WL 1593013 at *3 (S.D.N.Y. July 7, 2005) (stating stock themes may be unoriginal for copyright purposes); *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, No. Civ.A. 02-0425, 2003 WL 1921999 at *3-4 (E.D.La. Apr. 21, 2003) (permitting expert testimony on history and common usage of phrases).

125. GEORGE, *supra* note 98, at 46-47.

126. See PERRY, *supra* note 77, at 88.

127. See *id.*

128. *Id.* at 91.

2. Metaphors and Boasts

Metaphor plays a critical role in rap music lyrics. At times, a lyricist will explicitly signal his use of metaphor, while on other occasions the use of metaphor will be obscured or entirely hidden.¹²⁹ Problems of interpretation and comprehension arise for those who are not attentive to the use of metaphors. Metaphor is the extreme example of contextually-based language.¹³⁰ A lyricist's choice "to use metaphor over more literal language is to display his talent or with words, a sort of verbal athleticism."¹³¹

In rap music lyrics, metaphors not only express hope and positivity but also "despair, stagnation, or destruction."¹³² Homicide serves as a frequent metaphor in rap music lyrics.¹³³ In homicide metaphors, "violence stands in as a symbolic explication of skill, courage, or power."¹³⁴ That is, murder represents one lyricist's ability to defeat or destroy another lyricist through a superior display of verbal dexterity. Reference to weapons, especially firearms, is frequently made in homicide metaphors. Weaponry metaphorically represents the microphone, the tool with which your opponent's defeat takes place.¹³⁵

Even when lyrics referencing homicide are not used metaphorically, the lyrics do not necessarily represent depictions of actual violence or an intention to commit violent acts. Instead, "[e]xaggerated and invented boasts of criminal acts should be regarded as part of a larger set of signifying practices. . . . Growing out of a much older set of cultural practices, these masculinist narratives are essentially verbal duels over who is the baddest motherfucker around."¹³⁶

3. Narratives

Rap music derives from oral and literary traditions of the Black community, and the narrative form is the classic form of lyrics.¹³⁷ These narratives, however, do not simply tell a story or describe an event experienced by or from the perspective of the lyricist.

In the rap music context, the narrative is frequently a Yarn.¹³⁸

129. *Id.* at 60.

130. GREEN, *supra* note 9, at 120.

131. *Id.* at 122.

132. PERRY, *supra* note 77, at 65.

133. *See id.* at 59 ("Hip hop music is a war of position, and the position one takes manifests itself in the performance or language. One of the most commonly used metaphors in this war is that of murder . . .").

134. *Id.* at 60.

135. *See* R. Kelley, *Kickin' Reality, Kickin' Ballistics: Gangsta Rap and Post-industrial Los Angeles*, in DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE, *supra* note 96, at 117, 121.

136. *Id.*

137. PERRY, *supra* note 77, at 77. Other forms include battle, dis or insult, message, news, boast, party and advisory. *See* Dick Hebdige, *Rap and Hip-Hop: The New York Connection*, in THAT'S THE JOINT! THE HIP-HOP STUDIES READER, *supra* note 77, at 223.

138. PERRY, *supra* note 77, at 77. *See also* Lenora Ledwon, *Diaries and Hearsay: Gender, Selfhood, and the Trustworthiness of Narrative Structure*, 73 TEMP. L. REV. 1185, 1198-99 (2000)

[T]he intention of the narrator of the Yarn is to tell outrageous stories that stretch and shatter credibility, overblown accounts about characters expressed in superlatives . . . We listen incredulously, not believing a single word, our delight based on skepticism and wondering whether the storyteller can top the last, preposterous episode he's spun – by definition the traditional Yarn is always episodic in structure, one outrageous lie after another.¹³⁹

Narratives also provide a means of witnessing and testifying in order to reveal and critique the experiences of others.¹⁴⁰ Nevertheless,

the difficulty of realism in hip hop comes from the autobiographical nature of the music, and of African American folk literary culture, which entails the telling of one's story in epic or comic terms. Artists tell about their lives, and it is the task of the critic to avoid making one-to-one correlations between the music and the artists, to avoid a venture into some strange brand of artistic determinism, even as he or she trusts the artist to tell the audience something.¹⁴¹

Finally, role-playing is a crucial facet of narrative. Artists frequently adopt mythical or real-life characters as alter egos or fictional personas.¹⁴² These characters may be genuinely identifiable in the artist's community.¹⁴³ Equally as likely, however, these characters may be from other forms of popular culture, pulp fiction, and Blaxploitation.¹⁴⁴ Common characters include the outlaw, thug, gangster, pimp, Hollywood-style mafioso, drug-dealer, and hustler.¹⁴⁵ The gangster role was an "identity perfected on the West Coast and drawn from the real-life gang battles over economic control of drug markets in communities from Los Angeles to Seattle."¹⁴⁶

(contrasting female writings with male writings). Female writings are relational, personal and concern romance and marriage. In contrast, male writings are individualistic, abstract, and tell the "story of the epic hero, with grand scale battles and struggles."

139. See PERRY, *supra* note 77, at 77, quoting CHARLES JOHNSON, BEING AND RACE: BLACK WRITING SINCE 1970 50 (1988).

140. *Id.* at 91-92 ("Even in a narrative context, the speaker provides an internal critique of sociological conditions and the prospects of social control through planned communities. The function of the rhyme, then, is to inform and enlighten, rather than simply depict.").

141. *Id.* at 90-91 (2004); see also Ralph M. Rosen and Donald R. Marks, *Comedies of Transgression in Gangsta Rap and Ancient Classical Poetry*, 30 NEW LITERARY HISTORY 897 (1999) ("Like many forms of subjective poetry, after all, gangsta rap insists on the pretense that the 'I' of its lyrics is the actual poet; and when this pretense is combined with transgressive content, it becomes even more difficult for an audience to distinguish the markers of poetic discourse and to separate an author's autobiographical reality from the fiction of the work."); GREEN, *supra* note 9, at 88-89 (claiming that speakers in some (sub) cultures value narrative style more highly than accuracy).

142. See PERRY, *supra* note 77, at 131.

143. See *id.* at 92 ("Various character types are consistently personified in hip hop. Some we might believe as 'real,' while others clearly come across as 'fictional'").

144. The stories of Dolemite and Stogolee were narratives about heroic figures repeated in communities across the country. *Id.* at 88-89.

145. See *id.* at 131-32. Other characters include martial artist, lover and scholar/intellectual. *Id.* at 131.

146. *Id.* at 131; see also DYSON, *supra* note 117, at 179.

III. RECONSIDERING THE UTILITY OF RAP MUSIC LYRICS AS CRIMINAL EVIDENCE

Ordinarily, judges rely on personal experience, general knowledge, and personal understandings of human conduct and motivation to determine whether potential evidence is relevant.¹⁴⁷ In many instances, such reliance is reasonable. As demonstrated in Parts I and II, however, when assessing the admissibility of defendant-authored rap music lyrics, judges generally operate without contextual information affecting the composition of rap music lyrics and in turn the evidentiary utility of the lyrics. It is unclear whether judges are outright ignoring contextual information or simply unaware of this information.¹⁴⁸ Regardless, a court's failure to factor this information into its analysis leads to inadequate admissibility decisions. In particular, this failure (1) permits artistic expression to masquerade as inculpatory, autobiographical statements, (2) circumvents the prohibition on character evidence, and (3) is unfairly prejudicial.

A. NOT INHERENTLY INCULPATORY

Courts often characterize defendant-authored lyrics as autobiographical statements that are inculpatory or confessions of criminal conduct rather than art. To the contrary, when viewed in light of social constraints and artistic conventions, it is evident that at times rap music lyrics may falsely or inaccurately depict the occurrence of events. In such instances, juries are exposed to what may be likened to false confessions.

Rap music lyricists are not similar to autobiographers or other non-fiction writers such as journalists or diarists. Non-fiction writers usually are understood to make truthful and accurate statements, whether about themselves or about other events or people. Such a treatment owes to the writing conventions of these types of expression and societal expectations regarding the role of such expression in society.

Accuracy and truthfulness are conventional norms, indeed the express aims of journalists. Their role is to provide the public with information about the world as it is.¹⁴⁹ Likewise, autobiographers are traditionally expected to write the authentic

147. BROWN ET AL., *supra* note 38, § 185.

148. *But see* Peter Tiersma & Lawrence Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 248 (2004) (discussing the use of pragmatic context in interpreting language in the context of police-citizen encounters). Tiersma and Solan suggest that "courts are significantly more likely to take pragmatic information into account when it benefits the government, and less so when it helps the accused." *Id.* "Whether consciously or not, their interpretive practices tend either to ignore or to take into account pragmatic information when it benefits police and prosecutors." *Id.* Tiersma and Solan have termed this behavior "selective literalism" and use the term "to describe the way in which courts opportunistically cling to a word's default meaning even when pragmatic factors would dictate that another sense of the word was intended." *Id.*

149. Chuck D of Public Enemy proclaimed rap music the "Black CNN". *See* Clarence Lusane, *Rap, Race, and Politics, in THAT'S THE JOINT! THE HIP-HOP STUDIES READER, supra* note 77, at 356. It is unclear what weight should be given this comment in light of the commercial evolution of rap music. *See supra* Part II.A.

truth: to accurately tell the story of one's life in a historically verifiable way.¹⁵⁰ So too, we anticipate truthfulness in diaries given their personal and reflective nature. Indeed, Professor Lenora Ledwon suggests that the diary "may be the essential form of female autobiography."¹⁵¹ It is both confessional and personal testimony.¹⁵²

Rap music lyricists are not in the category of non-fiction writers but instead are akin to fiction writers, such as novelists and scriptwriters.¹⁵³ We understand intuitively that fictional works are intended solely as commercial, literary works designed to entertain and at times inform. Fiction writers do not claim truth and accuracy, although they may strive for realism and authenticity in order to make their stories more credible to their audiences.¹⁵⁴ Consequently, we are unlikely to presume that fiction writers truthfully document their own actual experiences or intentions in their writings.¹⁵⁵

As artists, rap music lyricists are similar to fiction writers. Rap music lyrics consist of constructed images, metaphor, braggadocio, or exaggerated storylines. At times, a defendant-lyricist may incorporate the experiences of another – either in whole or in part – into his lyrics.¹⁵⁶ On top of this, the artist's effort to maintain authenticity – to "keep it real" – creates confusion regarding what is or is not the

150. See Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1260-71 (1995) (comparing the characteristics of autobiographical and fictional writings).

151. See Ledwon, *supra* note 138, at 1197.

152. See *id.* Ledwon discusses the use of diaries written by unavailable battered women as trial evidence (i.e., hearsay evidence) and concerns about their evidentiary trustworthiness. She further examines victim diaries for trustworthiness in light of legal, cognitive, and literary concerns. Finally, Ledwon concludes that such diaries should be admissible, despite constituting hearsay. *Id.* at 1203-06; but see Michael Mello & Paul Perkins, *Ted Kaczynski's Diary*, 22 VT. L. REV. 83 (1997) (arguing diaries are in violation and should not be admissible in criminal proceedings).

153. Treatment of actors is a more interesting question but again, it is unlikely that we automatically conclude that an actor believes what his character believes or intends to engage in real-life conduct along the lines of her character. See MUELLER & KIRKPATRICK, *supra* note 34, § 8.8 ("[W]hile ordinary people recite lines from plays or poems, and sing songs written by others, such verbal behavior has no practical importance in the trial of lawsuits, and hearsay issues need not be faced. We would likely interpret the communicative and expressive intent of poet, playwright, lyricist, or composer in one way And we would likely interpret in a different way the expressive and communicative intent of the person who sings the lyrics.") A musical performer, who is not the song's lyricist, would be treated the same as an actor.

154. But see JAMES FREY, *A MILLION LITTLE PIECES* (2005). This book was initially marketed as an autobiographical memoir; however, a year later *The Smoking Gun* revealed that his work was rather more a fictionalized autobiography. Events portrayed therein were fabricated or only loosely based on real events. See *A MILLION LITTLE LIES: THE MAN WHO CONNED OPRAH* (2006), available at <http://www.thesmokinggun.com/jamesfrey/0104061jamesfrey1.html> (last visited Oct. 30, 2007). The controversy sparked by this revelation was quite dramatic.

155. For example, it is unlikely that Stephen King or Edgar Allen Poe would be believed to have actually committed some of the horrific acts in their respective works or had the mindset to do so.

156. An individual who is not accustomed to the intricacies of rap music lyrics may assume the narrative is part of that individual's personal experience; that in order to have written the lyrics, the author must have experienced the lyrics. A listener who is part of that culture, part of that collective experience, however, will understand that this is not necessarily the case. See PERRY, *supra* note 77, at 140-41.

truth about a defendant artist and his life.¹⁵⁷ Is he creating fictional accounts of his life? Is he merely creating a character or are the lyrics his true alter ego? Where does art end and reality begin? What or who is literal and what or who is figurative? Thus, lyrics may not constitute a confession to an actual crime, much less the crime charged. They may instead be abstract representations of events or ubiquitous storylines frequently employed in rap music.

Consider, for example, the case of Ronnell Wilson who wrote:

Come teast Rated U Better have that vast and dat Golock/Leavea 45 slogs in da back
of ya head cause I'm getting dat bread I ain't goin stop to I'm dead¹⁵⁸

“Rated R” is the nickname used by Wilson. If the assumption is that rap music lyrics written in the first person are based on individual knowledge, then the inference is that Wilson is discussing his willingness to shoot someone. If, however, it is understood that rap music lyricists may not be speaking based on personal experience, it is possible to discount Wilson’s use of the first-person in determining whether the lyrics constitute a confession.

Literally interpreted, one might conclude that Wilson is depicting – realistically or fictionally – his robbery and shooting in the head of an individual for money and an intention to continue until he dies. Understood metaphorically, however, one might conclude that Wilson is describing his willingness to continue battling other rappers who would stand in the way of him achieving commercial success (i.e., earning his “bread” or money).¹⁵⁹ Wilson’s use of this battle or competitive metaphor is similar to untold numbers of rap lyricists – both popular and unknown, criminal-minded and not.

To suggest that Wilson’s lyrics can be understood *solely* as depicting a crime or other wrongful act strains credibility. Nevertheless, this is the way in which the prosecution and the court characterized the lyrics in his case. What of the possibility that Wilson was speaking metaphorically and about non-violent matters? Acknowledging that this is a possibility, yet permitting the prosecution to unilaterally characterize the lyrics as confessional, creates an almost insurmountable barrier for the defense to overcome in the case. Confessions stand at the pinnacle of prosecution evidence. For juries, confessions are highly convincing evidence of guilt. “With a confession, the jury is relieved of the need to accept the prosecutor’s word about who did what to whom, because the accused himself provides the jury with all they need to know.”¹⁶⁰ When courts or juries are

157. See Sean-Patrick Wilson, Comment, *Rap Sheets: The Constitutional and Societal Implications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 356 (2005).

158. United States v. Wilson, 493 F. Supp. 2d 484, 488-89 (E.D.N.Y. 2006).

159. One commentator has suggested that Wilson’s lyrics are not confessional but rather a bad homage to well-known rapper Notorious B.I.G.’s 1994 hit “Ready to Die.” (As I grab the glock, put it to your headpiece/One in the chamber, the safety is off release/straight at your dome homes, I wanna see cabbage.) Jabari Asim, *The Tell-Tell Rap?*, THE WASHINGTON POST, Dec. 26, 2006.

160. Sharon Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 219-20 (2006) (exploring false confessions resulting from police interrogation).

unable to discern false confessions or acknowledge the likelihood of a false confession, the defendant is fighting a losing battle: “[O]nce a jury is exposed to a confession of guilt it is difficult for jurors to put it aside, even when it is uncorroborated or flatly contradicted by other evidence.”¹⁶¹ Consequently, courts and jurors should critically examine whether defendant statements in rap music lyrics are so unreliable and untrustworthy as to liken themselves to false confessions which pose significant evidentiary concerns.

B. IMPROPER CHARACTER EVIDENCE

Character evidence “is not admissible for the purpose of proving action in conformity therewith on a particular occasion”¹⁶² Courts fail to perceive that admitting defendant-authored rap music lyrics is a “back door” method of admitting excludable character and propensity evidence. Permitting character and propensity evidence to be admitted before a jury has been roundly criticized. A juror exposed to evidence that arouses hostility against the defendant “may be satisfied with a somewhat less compelling demonstration of guilt than should be required.”¹⁶³

In presenting defendant-authored rap music lyrics as evidence, prosecutors ask jurors to draw impermissible inferences about the defendant. Recall that prosecutors are exhorted to show that

the *real* defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing that jury to that person. Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant’s true personality.¹⁶⁴

Thus, in the *Neblett* case, the defendant wrote:

So any nigga in the path to the flow of my cash
Will find that breathing is a privilege when taking your last¹⁶⁵

The prosecutor claimed that the lyrics were relevant to his case-in-chief during the guilt phase on the theory that the lyrics were a “reflection” of the defendant’s “soul.”¹⁶⁶

As revealed by the local prosecution training manual quoted at the outset of the Article, courts are admitting evidence that is primarily relevant because of its ability to facilitate character-based inferences and arguments.¹⁶⁷ Such an approach

161. *Id.* at 253.

162. FED. R. EVID. 404(a).

163. BROWN ET AL., *supra* note 38, §§ 185, 188 (circumstantial use of character evidence is “laden with the dangerous baggage of prejudice, distraction, and time consumption”).

164. JACKSON, *supra* note 2 (emphasis in original).

165. Videotape: *Commonwealth v. Neblett*, Case No. 04-CR-01046, Tape 22/2/06 VCR#50 B-11, Aug. 10, 2006 (on file with the Circuit Court for Fayette County, Lexington, Kentucky).

166. *Id.* The court ultimately ruled the lyrics were irrelevant and inadmissible during the guilt phase. Defendant was convicted, and the lyrics were later admitted in the sentencing phase.

167. Indeed, it has been pointed out that “earnest lawyers are forced to resort to scholasticism and

circumvents evidentiary rules and admits the functional equivalent of impermissible character or propensity evidence. Despite this functional equivalence, courts persist in preserving the fiction that prosecutors and jurors are not drawing improper inferences.¹⁶⁸ Empirical evidence exists, however, demonstrating precisely that what courts claim does not occur does occur. In 1999, Dr. Stuart Fischhoff, a psychologist acting as a defense consultant on a murder case, conducted a study that “explored the biasing effects of gangsta’ rap lyrics on subject perceptions of a murder trial defendant’s personality.”¹⁶⁹ The lyrics were those actually authored by the defendant.¹⁷⁰ The results of the study “strongly indicated that the defendant was seen as more likely to have committed a murder than had he not been presented as authoring such lyrics.”¹⁷¹ Moreover, the study demonstrated “that the writing of such rap lyrics [was] more damning in terms of adjudged personality characteristics than was the fact of being charged with murder.”¹⁷²

Dr. Fischhoff concluded that there is a “strong possibility that when jurors are exposed to such defendant image-impairing lyrics, they might become more disposed to and confident in a guilty verdict what with the added weight of the negative personality trait associations conjured up by . . . inflammatory lyrics.”¹⁷³ As a result of the research findings, the court excluded many of the lyrics from trial, and the most inflammatory lyrics were redacted. The trial ended in a deadlock.¹⁷⁴ This anecdote illustrates the likelihood that, in jurors’ minds, an impermissible link is drawn between defendants who author rap music lyrics and the propensity to commit crimes.

As a prophylactic measure, upon admitting defendant-authored rap music lyrics for consideration by jurors, courts routinely issue limiting or cautionary instructions to jurors. However, the effectiveness and appropriateness of limiting or cautionary instructions is optimistic at best. As Professor Uviller has eloquently pointed out:

To the ordinary human mind, struggling through life without the benefit of a legal education, the charged act – knowing acquisition of the jewels – is a single indivisible piece of behavior; the division between the prescribed and the proscribed uses of the fact of prior conviction may be a bit difficult to perceive. The layman’s difficulty, moreover, rests on a solid logical basis. The evidence of prior crime is admissible to show knowledge or the absence of mistake because a person who has once engaged in

stratagem to convert character to habit or propensity to motive and opportunity. The American rules of character evidence today do little credit to a profession priding itself on realistic and sensible standards to encourage the production of justice from the process of litigation.” Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 880 (1982).

168. See also Tiersma & Solan, *supra* note 148, at 248 (concluding that by ignoring pragmatics, the Supreme Court “preserve[s] the fiction that consensual searches are almost invariably voluntary”).

169. Stuart Fischhoff, *Gangsta Rap and A Murder in Bakersfield*, 294 J. OF APPLIED SOC. PSYCHOLOGY 795 (1999).

170. *Id.* at 799.

171. *Id.* at 795.

172. *Id.*

173. *Id.* at 797.

174. *Id.* at 804-05.

such a transaction demonstrates or acquires a trait of character that might be termed 'criminal sophistication.' Evidence of that trait supports the supposition that the defendant was criminally sophisticated in the transaction in question. Put more generally, evidence of the prior crime tends to prove that a defendant's conduct was criminal in the case in issue because of the assumed continuity and dominance of a relevant trait of character. Precisely the same principle would admit the evidence to prove the defendant's commission of the later crime as action in conformity with established character – the very device explicitly barred by the federal rules. It thus appears that, although an element of a crime or aspect may be proved by evidence of prior misconduct, the crime itself may not be. An inexplicable paradox can no longer be denied.¹⁷⁵

To avoid this paradox, defendant-authored lyrics that operate as the functional equivalent of impermissible character evidence should be deemed inadmissible.¹⁷⁶

C. UNFAIRLY PREJUDICIAL EVIDENCE

Closely related to the conclusion that defendant-authored lyrics operate as propensity evidence is the conclusion that defendant-composed lyrics are unfairly prejudicial. Unfair prejudice may be found where the evidence suggests that jurors might find guilt based on improper inferences, usually emotional in nature.¹⁷⁷ Where the prejudicial nature outweighs the relevance of the evidence, courts should exclude the evidence. Moreover, where the evidence is "other acts" evidence, the prejudicial impact is greater:

[E]rroneous admission of other acts evidence is one of the largest causes of reversal of criminal convictions. The proliferation of appeals is attributable to the highly prejudicial nature of evidence offered under FRE 404(b) Where the trial court erroneously admits evidence under FRE 404(b), such error is more likely to be prejudicial than other types of evidentiary error.¹⁷⁸

The admission of defendant-composed lyrical evidence plays on the biases of jurors against rap music and those who listen to or associate themselves with rap music.¹⁷⁹ Juror bias arises both from the artistic aspects of rap music lyrics as well as the social constructs surrounding the music. The bias is strong enough that the relevance of the evidence, if there is any, is outweighed by the prejudicial nature of the evidence.

Recall the discussion from Part II that lyrics are frequently constructed using stereotypical images and themes that have negative associations: the outlaw, the gangster, the criminal. Also, the topics of rap music lyrics are often criminal or destructive in nature. As prosecutors are aware, the lyrics resonate with jurors because they draw on familiar images of criminal defendants. Prejudice resulting from stereotypical themes or images in rap music is compounded by mainstream

175. Uviller, *supra* note 167, at 879.

176. See MICHAEL DORF, *supra* note 3.

177. FED. R. EVID. 403 advisory committee's note.

178. MUELLER & KIRKPATRICK, *supra* note 34, § 4.15 (internal citations omitted).

179. See *supra* Part III.B.

America's long-standing negative perception of rap music and rap music artists.¹⁸⁰ To the extent that individuals associate rap music with crime and criminal behaviors, they negatively perceive defendants who are involved with rap music. Artistic claims of authenticity in lyrics and lifestyle combined with increasingly common reports of rap music artists becoming enmeshed in criminal activities confirms the public's belief in the criminality of rap artists.

Nevertheless, courts remain convinced that defendant-authored lyrics are not unfairly prejudicial. To the contrary, judicial admission of rap music lyrics invites jurors to confirm their belief that defendant-lyricists are more likely to be involved in criminal activities. Dr. Stuart Fischhoff's study demonstrates that jurors use defendant-authored lyrics to draw improper inferences about jurors and are more likely to find the defendant guilty when lyrics are used as evidence.¹⁸¹ Courts are either underestimating the prejudicial impact of the lyrics on jurors or overestimating the ability of jurors to ferret out their biases and prevent those biases from impacting their decision-making.

IV. A BALANCED APPROACH TO RAP MUSIC LYRICS AS CRIMINAL EVIDENCE

As was demonstrated in Part I, trial courts are unlikely to deny prosecution attempts to admit defendant-authored rap music lyrics in criminal cases, and defense appeals of trial court admission decisions fall on deaf ears.¹⁸² Not surprisingly, then, prosecutors will continue to pursue the tactic of using defendant-composed rap music lyrics as criminal evidence. As demonstrated in Parts II and III, when making admissibility decisions, courts should receive and factor in contextual information surrounding the composition of rap music lyrics. Likewise, jurors determining the weight to defendant-authored lyrics should have such information. This contextualization, however, is not occurring.

Courts should take a balanced approach to the admission and evaluation of defendant-authored rap music lyrics in criminal matters. Such an approach must recognize that defendant-authored rap music lyrics are subject to interpretive ambiguity, be cognizant of the assumptions that defendant-authored rap music lyrics are necessarily autobiographical or inculpatory, and reveal the character-

180. Rap music has been targeted by moral reformers in both the policy and legal arena. In 1990, Tipper Gore's Parents Music Resource Center (PMRC) targeted rap music. See CHANG, *supra* note 97, at 393. In the 1990s, C. Delores Tucker, an activist and former state official, took on the rap music industry, especially gangster rap, for lyrics that she considered demeaning to women, obscene, and degrading to Blacks. Tucker v. Fischbein, 237 F.3d 275, 279 (3d Cir. 2001); see also CHANG, *supra* note 97, at 451-52. In 1992, public criticism of songs by Ice T's band Body Count – particularly "Cop Killer" and "KKK Bitch" – was deafening. See CHANG, *supra* note 97, at 396-98. During the recent controversy surrounding Don Imus' use of racial and gender-based slurs, Imus claimed that his verbal choices were permissible given rappers' use of such terms. This controversy has brought previous criticism rap music lyrics back to the forefront. See Teresa Wiltz & Darragh Johnson, *The Imus Test: Rap Lyrics Undergo Examination*, THE WASH. POST, Apr. 25, 2007, at C01.

181. Fischhoff, *supra* note 169 at 803.

182. Even when an appellate court deems the evidence erroneously admitted, the error usually does not prompt reversal. See, e.g., State v. Cheeseboro, 552 S.E.2d 300, 313 (S.C. 2001).

based and unfairly prejudicial nature of rap music lyrical evidence.

One option in response to the current approach is to suggest an absolute ban on the admission of rap music lyrics composed by defendants as evidence. An absolute ban is appealing in light of the complexity and attention necessary for determining whether lyrics should be admissible and what weight they are due. I do not, however, go this far. Such a scheme might have the effect of elevating form over substance: whatever is written in the form of rap would be inadmissible and the admissibility debate would simply shift to an evaluation as to whether particular writings are rap music lyrics. Moreover, I do not contend that lyrics can never be relevant or are always prejudicial.¹⁸³ My concern is how best to ensure that courts and jurors fairly consider such evidence.

A review of judicial decisions reveals that, upon admitting defendant-authored rap music lyrics, courts have suggested various strategies a defendant might attempt to prevent or rebut a prosecutor's evidentiary use of rap music lyrics. For example, if being used as "other acts" evidence at trial, the defendant should scrutinize whether the prosecutor has authenticated the lyrics as being authored by the defendant and whether the lyrics are being offered as impermissible propensity evidence.¹⁸⁴ If the lyrics have not been properly authenticated or are offered impermissibly as propensity evidence, a request to strike the evidence and motion for mistrial may be made. Further, during closing argument, a defendant can argue to the jury that the lyrics should be discounted in whole or in part because they are fantastical or braggadocio.¹⁸⁵ Finally, a defendant may object during the prosecution's closing argument if the argument becomes inflammatory or is character-based.¹⁸⁶

All of these means are defensive in nature. They suggest to a jury a lack of credible defense or inability or unwillingness to challenge the evidence. Defendants would likely prefer not to be limited to such defensive postures but rather have access to affirmative and offensive means of challenging such evidence.¹⁸⁷

One affirmative method to challenge the evidentiary value of defendant-authored lyrics would be to have the defendant testify regarding his crafting of the lyrics. One obvious concern, however, is that any such testimony he offers might indeed be incriminating and support, rather than rebut, the prosecution's efforts. Even where a defendant is not expected to testify in an incriminating manner, there may be other reasons beyond incrimination for not having the defendant testify.¹⁸⁸

183. That's not to suggest that further thought on this issue might not lead to that conclusion.

184. See, e.g., *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991).

185. See, e.g., *Bailey v. State*, 785 So. 2d 1071, 1076-77 (Miss. Ct. App. 2001).

186. *Id.*

187. After the court in *Wilson* denied the defense's proffered rap music expert, the defense "presented no evidence to soften the prosecution's portrayal of [the] violent rap lyrics" recovered from the defendant. Michael Brick, *In Case of 2 Slain Detectives, Defense Testimony is Brief*, N.Y. TIMES, Dec. 15, 2006, at B4.

188. See ROGER W. SHUY, LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM 202 (1993) (explaining why defense attorney may choose to have a linguistic expert testify rather than having their client testify).

Such reasons might include nervousness, inarticulateness, inappropriate demeanor, or language barriers. Furthermore, a defendant might be a poor historian or easily confused or distracted by questions. Any of these, and likely a host of other factors, may contribute to ineffective, and more problematically, damaging testimony. Thus, presenting a defendant to testify in his own words about his own words may be ineffectual.

Another affirmative means of combating the problem may be to offer lay witness testimony favorable to the defense.¹⁸⁹ Lay witness testimony, however, might be subject to the same concerns as a defendant's testimony. The prosecution may rightly raise the specter of defense bias. Finally, if the witness is not properly and adequately prepared before testifying, the possibility of unexpected and damaging revelations are not insignificant.

I suggest a third approach, which relies on affirmative change on the part of the courts. It is a two-pronged approach requiring (1) a point-of-view adjustment for judicial admissibility determinations and (2) the considered use of expert testimony by both judges and jurors. First, judicial determinations regarding the admissibility of defendant-written rap music lyrics from a subjective evaluation of the defendant-written rap lyrics should be based on an evaluation of the defendant's perspective, rather than the listener's. Additionally, the admissibility decision should be assessed in light of the artistic conventions and social constraints discussed in Part II. Second, defendants should be permitted to offer expert witness testimony on the composition of and societal response to rap music lyrics. An expert might offer testimony revealing that defendant-authored rap music lyrics are subject to interpretive ambiguity, are ubiquitous, constitute braggadocio, and are fantastical or fictional. Such testimony might undercut the assumption that defendant-authored rap music lyrics are autobiographical confessions of the crime charged, or an expression of mindset. Furthermore, expert testimony might reveal the character-based and inflammatory nature of rap music lyrical evidence.

I believe this approach can operate within the current evidentiary regime. Dramatic overhaul is not required. Moreover, this approach balances the interests of defendants, prosecutors, and society. It is designed to respect the artistic and creative value of rap music lyrics and dignity of defendant artists. This avenue minimizes the unfairly prejudicial effects of admitting rap music lyrics as criminal evidence. However, recognition of the public's interest in the prosecution of crimes and the utility of circumstantial evidence does not take a backseat. It prevents weakening of law enforcement through over-reliance on information "out of the mouth" of the suspect rather than independent development of evidence. It does not unfairly hamstring the prosecution's choice of evidence or narrative case theory.¹⁹⁰ Finally, both judges and jurors retain a role in determining the truth, falsity, or reliability of evidence.

189. After the court in *Wilson* denied the defense's proffered rap music expert, the defense reportedly contemplated "calling a young rap music fan, expert status aside, to present violent popular rap lyrics and discuss their meaning. That never happened." Brick, *supra* note 187, at B4.

190. See *Old Chief v. United States*, 519 U.S. 172, 186-89 (1997).

A. A NEW ANALYTICAL POINT-OF-VIEW

Assuming that the criminal adjudicatory process is concerned with truth, accuracy, and personal knowledge, it is unwise for courts to view defendant-written rap music lyrics as evidence inherently consistent with and as furthering those concerns. Recall that courts presently consider the admissibility of defendant's rap music lyrics from the viewpoint of everyday conversational speech and the perspective of the listener. Judges should approach the admissibility determination from a different vantage point—that of the lyricist.¹⁹¹ Judicial analysis should be in keeping with the social constraints and artistic conventions set forth in Part II.

In re-framing the analysis, judges should apply any one or all of the below viewpoints when determining the admissibility of defendant-authored rap music lyrics: (1) begin analysis from the point-of-view that rap music lyrics are metaphorical rather than literal; (2) begin analysis from the point-of-view that rap music lyrics are fictional, abstract, and entertaining representations of life rather than truthful or accurate; (3) begin analysis from the point-of-view that the information revealed or events depicted in rap music lyrics are not self-referential.

Optimally, the relevance determination would be made either prior to trial or during a hearing outside the presence of the jury. During the hearing, the prosecution would be obliged to expressly articulate a theory of relevance and proffer supporting information to overcome one of these analytical perspectives. To do so, the prosecutor should address and courts should resolve the following questions:¹⁹² (1) whether the lyrics were written before or after the charged offense or at some other point remote in time; (2) whether the lyrics provide details or information about the charged crime that only the perpetrator or a participant in the crime would know; (3) whether the case involves a crime receiving attention in the defendant's community such that facts and circumstances surrounding the crime would be public knowledge; (4) whether the statements of conduct or belief are consistent with evidence relating to the charged crime; (5) whether the statements of conduct or belief in the lyrics are corroborated by other evidence, such as eyewitness testimony, pictures, proof of prior conviction, or forensic evidence; (6) whether the language or themes in the lyrics are ubiquitous or provide evidence of a unique *modus operandi* or belief; and (7) whether the lyrics are internally consistent and coherent such that they accurately or reliably describe the alleged crime.

At the hearing on admissibility, defendants may opt to take an affirmative role and present evidence. A defendant who so chooses should be entitled to call

191. See Kirgis, *supra* note 82, at 275. Professor Kirgis has suggested that court's look to "speaker's meaning" to identify hearsay statements. "In many cases, the distinction between linguistic meaning and speaker's meaning has little or no significance, because they are equivalent. When a person uses language 'literally,' she intends to communicate what the conventional meaning of her words would indicate. Speaker's meaning and linguistic meaning differ primarily in the cases of metaphor, sarcasm, exaggeration, understatement, and related discursive techniques." See *id.* at 291.

192. Much of this list is adapted from Professor Davies' work on false confessions. Davies, *supra* note 160, at 242.

witnesses – both fact and expert.¹⁹³ These witnesses may offer testimony, as set forth above, to rebut any of the above matters to be addressed by the prosecution. At the request of the defendant and before admitting defendant's lyrics, the court may also consider whether the defendant intends to make intent, motive, or knowledge a genuine issue at trial.¹⁹⁴ Finally, at the conclusion of the hearing, trial courts should issue written findings on admissibility. They should make such findings irrespective of whether the defendant specifically requests findings.¹⁹⁵

This approach to judicial consideration of the admissibility of defendant-authored rap music lyrics as criminal evidence finds support in the existing structure and application of the rules of evidence. Placing on the prosecution the burden of demonstrating pre-trial a substantiated connection between defendant's rap music lyrics and its theory of the case is undoubtedly consistent with the requirement that the proponent of evidence affirmatively demonstrate relevance.¹⁹⁶ Moreover, the imposition of this obligation finds support in rules on conditional relevance for other acts evidence, personal knowledge, and the historical treatment of inculpatory defendant statements.

Before conditionally admitting defendant-authored lyrics as "other acts" evidence, courts may require the prosecution to proffer evidence proving up the "other acts" evidence and connecting its relevance to the elements of the offense charged:

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial. When ruling *in limine*, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.¹⁹⁷

Failing to do so allows highly prejudicial evidence to be put before the jury even before persuading the court that the evidence will ultimately be relevant in the larger context of the case.¹⁹⁸ Moreover, admitting "other acts" evidence because the prosecution contends it sheds a modicum of light on the defendant's intent or knowledge would effectively swallow the prohibition on character evidence.¹⁹⁹

193. See *infra* Part IV.

194. Certainly, where a defendant cannot or will not answer the question before trial, then he bears the risk that the evidence will be admitted.

195. MUELLER & KIRKPATRICK, *supra* note 34, § 4.16 ("Appellate courts have encouraged trial judges to make express findings in performing the required balancing of probative worth against unfair prejudice under FRE 404(b) and 403. Most reviewing courts, however, stop short of formally requiring such findings although some require trial judges to make findings if requested by defendants in criminal cases") (citations omitted).

196. See 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, *FED. PRAC. AND PROC. EVID.* § 5166 (1st ed. 1978).

197. *FED. R. EVID.* 404(b) advisory committee's notes.

198. This concern can be mitigated by strict application at this point of the prohibition of unfairly prejudicial evidence. MUELLER & KIRKPATRICK, *supra* note 34, § 4.15; *FED. R. EVID.* 403.

199. See MUELLER & KIRKPATRICK, *supra* note 34, § 4.17 ("[a]dmitting prior criminal acts whenever they shed light on defendant's intent would mean admitting such proof very often indeed, and little would be left of the rule that generally character evidence cannot be used to convict").

Thus, in contrast to current practice, courts should impose more stringent requirements on the prosecution before admitting defendant-authored rap music lyrics as evidence.

As has also been proposed in the confession context, the personal knowledge requirement of evidentiary rules suggests that, when determining admissibility, courts should examine defendant-authored rap music lyrics to determine whether they are based on the defendant's personal knowledge and experiences. The personal knowledge requirement provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."²⁰⁰ As a corollary, a witness should not be permitted to testify if his knowledge derives from the knowledge of others.²⁰¹ Courts that review whether a defendant had sufficient personal knowledge to make inculpatory statements in his lyrics might determine that the defendant learned information from others rather than as a result of his involvement in the crime.²⁰²

Finally, judges have historically prevented unreliable and untrustworthy inculpatory defendant statements from reaching jurors and likewise should ensure defendant-authored rap music lyrics are reliable and trustworthy evidence. Presently, admissions by party opponents do not require corroboration or indicia of reliability and trustworthiness before admission.²⁰³ At common law, however, courts applying evidence rules barred the admission of confession evidence "whenever the facts or circumstances surrounding the giving of the confession made its reliability uncertain."²⁰⁴ Current inquiry surrounding the admission of confessions focuses on the means of interrogation. The jurisprudential shift from reliability and trustworthiness to an emphasis on police interrogation tactics occurred over many decades beginning in the early part of the twentieth century.²⁰⁵ Ultimately, in *Connelly v. Colorado*, the Supreme Court fully endorsed the Due Process clause as being concerned solely with the voluntariness of a confession.²⁰⁶ Respecting all other issues, such as trustworthiness and reliability, the Court stated that evidentiary rules should govern admissibility.²⁰⁷ Thus, the prior approach to inculpatory statements is consistent with Supreme Court precedent and evidentiary rules should be stringently utilized to ferret out unreliable statements by defendants that are offered as criminal evidence.

B. UTILIZING EXPERT ASSISTANCE

The ideal means by which to challenge the admissibility and credibility of lyrical evidence offered by the prosecution is testimony by experts on rap music

200. FED. R. EVID. 602.

201. See Davies, *supra* note 160, at 232.

202. See *id.* at 233.

203. FED. R. EVID. 801(d) advisory committee's note.

204. Davies, *supra* note 160, at 238.

205. *Id.* at 238-40.

206. *Connelly v. Colorado*, 479 U.S. 157, 165-66 (1986).

207. *Id.* at 167.

lyrics.²⁰⁸ More particularly, an expert may offer testimony as to the modern-day social backdrop and poetics governing the authoring of rap music lyrics.²⁰⁹

Such expert testimony should be admissible under rules of evidence.²¹⁰ Federal Rule of Evidence 702 governs the admissibility of expert testimony. It states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.²¹¹

The rule further provides that “[i]f . . . other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise”²¹² An expert is not limited to testifying in opinion form but “may give a dissertation or exposition of scientific or other principles, relevant to the case, leaving the trier of fact to apply them to the facts.”²¹³

The intersection of language and the law has increasingly received scholarly attention.²¹⁴ Linguistic experts on pragmatics and discourse analysis can aid judges in performing their gate-keeping function. Additionally, linguistic experts can aid triers of fact in giving attention to aspects of language of which they would not otherwise be aware.²¹⁵ There is precedent for this use of experts in court cases. Courts have, for example, allowed expert testimony on speaker meaning and language in the context of out-of-court statements.²¹⁶

Nevertheless, while the presentation of expert testimony to judges and jurors is optimal, it is questionable whether courts would approve of such expert testimony.²¹⁷ Again, some courts have indicated that a defendant could simply

208. See Jennifer L. Groscup & Steven Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, 33 SETON HALL L. REV. 1141, 1141 (2003). Even if expert testimony is not permitted, defense counsel can use an expert as a consultant for strategy and argument purposes.

209. Additionally, an expert may offer testimony respecting the psychological biases against rap music and implicit proclivity or propensity nature of the evidence for use by the court in determining admissibility.

210. Janet E. Ainsworth, *Linguistics as a Knowledge Domain in the Law*, 54 DRAKE L. REV. 651, 659-66 (2006). The need for experts on the meaning of language in legal contexts has received a mixed treatment amongst scholars and the courts. See Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?*, 66 TENN. L. REV. 1167, 1168 (1999) (supporting the use of experts and identifying scholars questioning the use of experts).

211. FED. R. EVID. 702.

212. *Id.*

213. FED. R. EVID. 702 advisory committee’s note.

214. See Ainsworth, *supra* note 210.

215. See *id.* at 665.

216. See *id.* at 660-61.

217. Scholars have pointed out that criminal courts harshly evaluate the admissibility of expert evidence. See Groscup & Penrod, *supra* note 208, at 1146. Criminal defendants usually lose prosecution challenges to defense experts. See D. Michel Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left in the Dark?*, 64 ALB. L. REV. 99, 135 (2000).

argue – without benefit of evidentiary support – that the lyrics have little evidentiary weight or should not be taken in the light cast by the prosecution. Other courts have indicated that juries can apply their common sense to ascertain that the lyrics have little evidentiary weight or should not be taken in the light cast by the prosecution. Finally, courts have queried whether such testimony would be the proper basis for expert testimony.

At least one court permitted defense-offered expert testimony regarding the interpretation and import of rap music lyrics.²¹⁸ Nevertheless, another court has indicated that such expert testimony might be inadmissible. In *United States v. Wilson*, the defendant was charged in federal court with capital homicide for the shooting death of two undercover law enforcement officers. Prior to trial, the prosecution expressed its intent to admit lyrics apparently written by defendant after the shooting. The prosecution characterized the lyrics as a confession.

Shortly before trial, the defense noticed its intent to call an expert witness in rebuttal to the prosecution's evidence:

We plan on calling an expert in the field of Rap culture to testify about the common use of lyrics suggesting/depicting violence as a defining feature of Gangsta Rap. . . . The Rap expert is expected to testify that Rap music lyrics often describe violent and sexual acts, and other antisocial behavior, that are not necessarily rooted in actual events. The expert is also expected to testify that Rap music lyrics are often based on imagination and fantasy, rather than on reality. . . . [The expert] is expected to demonstrate that particular violent images and references in [Wilson's] raps were ubiquitous in popular culture during the relevant time period, and, specifically, that certain terms used in the 'rap' lyrics found on Mr. Wilson are quite common in the medium.²¹⁹

The prosecution objected to the expert testimony on grounds that the defense had provided improper notice and the court agreed. Having ruled that the defense expert's testimony was procedurally excludable, the court continued on to offer two distinct critiques of the proffered expert testimony, which are equally unconvincing. First, the court opined that the

testimony might be inadmissible even if it were properly noticed. . . . The court has, and it finds that no court on the Second Circuit or any other circuit has considered whether to permit an expert in hip hop culture to testify that an ostensible handwritten confession to certain aspects of a charged crime is "not necessarily rooted in actual events" and is instead "based on imagination and fantasy, rather than on reality."²²⁰

The court characterized the proffered expertise as "novel," stating:

To be sure, expert testimony about hip hop culture can clearly "assist the trier of fact to understand the evidence or to determine a fact in issue," . . . in certain categories of cases. For example, such testimony has been admitted in copyright cases. . . . Such testimony is also admitted in trademark cases. . . . This case is different. Wilson's lyrics are not offered in order to prove substantial similarity to other lyrics, nor is their

218. See *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001).

219. *United States v. Wilson*, 493 F. Supp. 2d 484, 486-87 (E.D.N.Y. 2006).

220. *Id.* at 489.

secondary meaning at issue. Instead, the Government offers Wilson's lyrics because "[t]hese lyrics, written in the two days following the murders of the victims and at a time when Wilson knew he was wanted by police for these crimes, constitute a direct and damning admission of Wilson's guilt."²²¹

Next, having rejected the defense's theory of relevance for its proposed expert testimony, the court offered "[i]f Wilson wishes to argue that the lyrics are impressionistic and therefore carry little weight, he may do so."²²² Finally, in concluding its discussion on this issue, the *Wilson* court offered the usual criticism befitting expert testimony: "It is the jury's job to determine whether to believe such an argument, however, and it would be counterproductive to permit an expert to function as a 'thirteenth juror' in resolving this issue."²²³

With respect to the first critique, the court failed to comprehend that courts already receive specialized testimony regarding the interpretation and import of defendant-authored rap music lyrics as criminal evidence. That is, the prosecution usually presents the evidence through a law enforcement witness – often an expert – who "connects up" the relevance of defendant's rap music lyrics for the jury. Claiming specialized knowledge, these same law enforcement officers routinely testify about drug jargon, the culture and operations of criminal organizations and gangs, as well as criminal sophistication of individual defendants.²²⁴ In relation to defendant-authored rap music lyrics, the officer will explain the meanings of terms in the lyrics and explain the prosecution's understanding of events depicted in the lyrics.²²⁵ In this way, the prosecution witness provides evidence for the prosecutor to make its argument that the defendant-authored lyrics are confessions to actual events or representative of defendant's mindset. Thus, permitting the defendant to offer specialized or expert testimony that the lyrics are "'not necessarily rooted in actual events' and . . . instead 'based on imagination and fantasy, rather than on reality'" is simply permitting the reverse of what courts routinely allow of prosecution witnesses, and should not pose a problem under current evidentiary rules.

With respect to the court's first critique, the court failed to comprehend that the use of expert testimony in intellectual property cases indeed provides fodder for the use of such similar expert testimony in the criminal adjudicatory context.²²⁶ As the court indicated, in trademark, copyright, and obscenity cases, courts routinely permit expert testimony regarding the meaning, interpretation, and poetics of rap music lyrics.²²⁷ This is itself an acknowledgment that rap music lyrics are not

221. *Id.* at 489-90.

222. *Id.* at 490.

223. *Id.*

224. Law enforcement officers routinely testify on such matters without question. *See* Moreno, *supra* note 83, at 6, 18-21; Groscup & Penrod, *supra* note 208, at 1147.

225. *E.g.*, *People v. Olguin*, 37 Cal.Rptr.2d 596 (Cal. Ct. App. 1994); *People v. Wright*, No. B162219, 2004 WL 516250 (Cal. Ct. App. Mar. 17, 2004).

226. "Utilizing research in linguistics where pertinent is no more inappropriate and no more threatening to the legal order than using economic insights has been." Ainsworth, *supra* note 210, at 668.

227. *Wilson*, 493 F. Supp. 2d at 489-90.

literal and self-defining. Consequently, to the extent that the same questions arise in criminal cases, the need for expert testimony should not be treated any differently. Indeed, as the *Wilson* court's analysis strikingly reveals, the need for expert testimony may be greater in the criminal context to combat the misapprehensions regarding defendant-authored rap music lyrics.

The *Wilson* court suggested that neither "substantial similarity to other lyrics, nor . . . secondary meaning [is] at issue" respecting the defendant's lyrics. Certainly, the prosecution was not offering the rap music lyrics for "substantial similarity" or "secondary meaning." The defense, however, was indeed offering the lyrics for this purpose. The defense sought to suggest through expert testimony that because the defendant's lyrics were similar to other rap music lyrics, they were based on fantasy and meant for entertainment, and had other metaphorical secondary meanings beyond those suggested by the prosecution. In other words, the prosecution's characterization of the lyrics as a "direct and damning" confession was discreditable. As can thus be seen, the use of expert testimony on the composition of rap music lyrics in civil contexts can be transferred to the criminal adjudicatory context quite easily.

With respect to its second critique, the court fails to comprehend that a defendant forced to make a closing argument lacking evidentiary support is a lame duck. Such an argument would likely draw from the prosecution an objection that such an argument relies on facts not in evidence. Moreover, an unsupported argument would likely carry little persuasive weight with jurors.

With respect to the court's third and final critique, when otherwise permissible under evidentiary rules, it is unclear why the defendant's strategic decision to present evidence through an expert witness should be restricted. Judicial concerns that expert testimony usurps the jury function have been undercut by empirical studies and accounted for by rules of evidence. First, Federal Rule of Evidence 702 "seems to permit expert opinion even when the matter is within the jurors' competence if specialized knowledge will be helpful."²²⁸ Additionally, Federal Rule of Evidence 704 states:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.²²⁹

Second, social scientists have concluded that jurors "are quite capable of evaluating scientific expert evidence fairly and without giving it excessive weight in their deliberations."²³⁰

228. BROWN ET. AL., *supra* note 38, § 13.

229. FED. R. EVID. 704.

230. Ainsworth, *supra* note 210, at 664 (internal citations omitted).

V. CONCLUSION

This Article contends that judicial approval of the use of defendant-authored rap music lyrics as substantive criminal evidence is problematic in the vast majority of circumstances. Courts permit lyrics to be admitted into evidence by characterizing them either as inculpatory statements regarding the crime charged or as other acts evidence demonstrating intent, motive, knowledge, or identity. Rarely do courts deny the admission of lyrics on grounds of lack of relevance, improper character evidence, or unfair prejudice. Courts' admissibility analyses are fraught with uninformed assumptions. They fail to treat defendant-authored rap music lyrics as art with all the attendant artistic conventions and aims. Rather, they treat the comprehension and interpretation of rap music lyrics as a matter within common knowledge. They literally translate the meaning of lyrics and expect that the lyrics convey self-referential narratives of true-life events.

In determining the admissibility of rap music lyrics, however, courts should be mindful of and give due consideration to the social constraints and artistic conventions influencing the composition of rap music lyrics. In particular, courts should be aware of the highly commercialized nature of the rap music industry, the desire to demonstrate authenticity that can establish or support commercial success, and the artistic conventions of rap music.

Factoring this information into the admissibility analysis would suggest to courts that defendant-composed lyrics are not necessarily inculpatory statements or expressions of intentions or beliefs. Rather, rap music lyrics are often art masquerading as life. Courts might conclude that the lyrics are relevant primarily because of improper character-based inferences and thus should be excluded. Finally, the unfair prejudice resulting from the use of rap music lyrics as criminal evidence would be revealed.

To combat the troubling aspects of admitting defendant-composed rap music lyrics, I do not propose the wholesale exclusion of such evidence. Instead, I suggest that courts should refocus their analytical perspective to determine admissibility and that the defense should be permitted to offer expert testimony respecting the composition of rap music lyrics to both judges and jurors. I believe these approaches ensure procedural and substantive protections for defendants as well as faithfully adhere to the aims of the adversary system and the concerns of the public.

I end with a final note of concern. The notion that individual artistic and creative expression unrelated to criminal activities may be unquestioningly used as evidence to investigate and prosecute criminal cases is disconcerting in and of itself. Nonetheless, the possibility that countless others may be affected by this prosecutorial tactic and resulting judicial treatment is more striking, as is the resulting impact on the creative output of society. It is unlikely that the dilemma surrounding the use of artistic expression as criminal evidence will forever remain limited to rap-writing defendants. We are presently in a technology-driven era of online, public venues for self-expression and self-analysis. The Internet has fostered a generation of individuals both willing and able to create art, bare souls,

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and spread messages in an exceedingly public manner. Law enforcement and prosecutors will train their sights on these widely accessible types of creative expression. It is not hard to conceive of a widespread attempt to silence the unapologetic, inharmonious, and unrefined voices of those within and without the mainstream by uncritical application of supposedly neutral rules. Certainty must exist regarding the continuation of unabated free expression regarding discomfiting topics.