R. v. Campbell: Rethinking the Admissiblity Of Rap Lyrics in Criminal Cases

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R. v. Campbell[1]

I'm shooting three
Nah, I ain't slipping with my wifey never
One shot, leave your brains on your Nikes
Broad day anywhere
One shot, make you flip like gymnastics
No stacks Nigga, the way I make it rain
You got your shots Nigga, like you Max Payne

R. v. Williams[2]

I just unload then I re-load
I take that 30-30, Right now it's that 12 gauge shotty
Bullets in your chest and your throat
I'm tryna get you bodied
I don't like being on the left nigga
It's my nigga Heartless Man
Woop! Woop! MOB Klick
Heartless ya

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1 2015 ONSC 6199 (Ont. S.C.J.), reported above at p. 1 [*Campbell*].

2 2013 ONSC 1076 (Ont. S.C.J.) [*Williams*]. These lyrics are from "Cocaine Alumni", one of six rap videos/lyrics the trial judge admitted. See the discussion *infra* at notes 35–38.

Ya ain't no way to save me, Drug Trafficker
Gun black like Africa
I'm in a murder beef Face up casket shut
So I shut a nigga movie down for acting up

R. v. Skeete[3]
Real niggaz don't crack to the coppers, muthafucka

Introduction

Campbell is a welcome decision. It is one of the few cases in North America to exclude rap lyrics as evidence of guilt in criminal cases.[4] Unlike in Canada, the issue of criminalizing rap has received considerable attention in the United States as evidenced by a number of recent newspaper articles and op-eds.[5] This comment begins with documenting the Canadian experience. It is a response to the call for research by two leading American scholars on the phenomenon of putting rap on trial,

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[3] 2012 ONSC 1643 (Ont. S.C.J.) [*Skeete*].

[4] For reference to the relevant Canadian and American cases, see the discussion *infra* at notes 6, 8–9 and 11–23.

[5] See Nick Wing, "If The Criminal Justice System Treated Other Music The Way It Treats Rap", *Huffington Post* (4 April 2015) online: <http://www.huffingtonpost.com/2015/04/02/criminal-justice-system-rap-lyrics_n_6978682.html>; Karlanna Lewis, "When Rap Music Is a Crime", *The Atlantic* (7 March 2015) online: <http://www.theatlantic.com/politics/archive/2015/03/when-rap-music-is-a-crime/386938/>; Brendan O'Connor, "Why Are Rap Lyrics Being Used As Evidence In Court?" *Vice* (3 November 2014) online: <http://noisey.vice.com/blog/rap-lyrics-as-evidence>; Alyssa Rosenberg, "How cops and prosecutors are putting rap music on trial", *Washington Post* (21 May 2014) online: <https://www.washingtonpost.com/news/act-four/wp/2014/05/21/how-cops-and-prosecutors-are-putting-rap-music-on-trial/>; Lorne Manly, "Legal Debate on Using Boastful Rap Lyrics as a Smoking Gun", *New York Times* (26 March 2014) online: <http://www.nytimes.com/2014/03/27/arts/music/using-rap-lyrics-as-damning-evidence-stirs-legal-debate.html>; and Erik Nielson & Charis E. Kubrin, "Rap Lyrics on Trial", *New York Times* (13 January 2014) online: <http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html>.

Professors Charis Kubrin and Erik Nielson. In their article, "Rap on Trial," they said this:

> we issue a call to scholars to critically examine the growing movement to turn rap lyrics against their authors. An important first step, we believe, involves quantifying the extent to which this practice has occurred and continues to occur. We have argued this is not an isolated practice and that the number of cases where rap lyrics are introduced as evidence in criminal trials appears to have grown over the recent past. But we do not know the exact number of cases that exist.[6]

After identifying the number of Canadian cases and the different contexts within which the issue is arising, the comment examines the Supreme Court of Canada decision in *R. c. Simard*[7] and the two leading trial decisions *Campbell* and *Williams*.

Generally speaking, the Canadian cases have failed to apply a culturally competent lens when assessing probative value and, to address the relevance of race and bias, when assessing prejudicial effect. This comment urges our courts to put the rap back in rap by taking a culturally competent and critical race approach to admissibility.

The Canadian Experience

It is difficult to get a complete sense of how often Canadian prosecutors (and defence counsel) are trying to use rap lyrics as incriminating or impeachment evidence, given that some cases may be unreported and, in others, the issue not contested by counsel. The survey conducted for this comment used reported cases and newspaper articles to identify some of these cases. Thirty-six (36) cases were identified, almost all of them within the last ten years. This is a significant number considering that in its *amicus* brief in the recent case of *State v. Skinner*,[8] the ACLU of New Jersey only identified eighteen (18) reported cases involving the admissi-

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6 Charis E. Kubrin & Erik Nielson, "Rap on Trial" (2014) 4 *Race & Justice* 185 at 203 ["Rap on Trial"].

7 2000 SCC 61, 39 C.R. (5th) 288 (S.C.C.) [*Simard*].

8 95 A.3d 236 (N.J. S.C., 2014) [*Skinner*]. In *Skinner*, the highest court in New Jersey excluded the accused's rap lyrics.

bility of rap lyrics in the United States.[9] Moreover, by way of comparison, I could only find one case dealing with the admissibility of music lyrics written by the accused outside of the context of rap. In that case, the lyrics of a metal/punk song ("Kill Kill Kill") were excluded by the Newfoundland Court of Appeal in a murder case.[10]

The results of the survey of the Canadian cases can be summarized as follows:

(1) rap used by the Crown as evidence of guilt (**16 cases**)[11];

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[9] Available online at https://www.aclu-nj.org/download_file/view_inline/1175/947/ [*ACLU-NJ Amicus Brief*]. The rap lyrics were admitted in 14 of the 18 cases. See further, Ashley G. Chrysler, "Lyrical Lies: Examining the Use of Violent Rap Lyrics as Character Evidence Under FRE 404(b) and 403", (unpublished) online: <http://www.law.msu.edu/king/2014-2015/Chrysler.pdf>).

[10] See *R. v. Parsons* (1997), 124 C.C.C. (3d) 92 (Nfld. C.A.). The court held at para. 57:

> When one considers the evidence as to the composition of the piece, the number of persons involved, the type of music which is a recognized, if not widely accepted one . . . in my view, there are some very serious deficiencies in its probative value. The prejudicial effect is a very great one and, in my view, substantially outweighs whatever probative value there might be. That situation cannot be corrected by any instructions which may be given to the jury with respect to its consideration of it. In my view, the trial judge was in error in admitting this tape into evidence.

Interestingly, in her 2007 article on the issue of putting rap on trial in the United States, Professor Andrea Dennis similarly reported that she could only identify "one case involving defendant-authored music lyrics admitted into evidence that did not appear to be rap music." Andrea Dennis, "Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence" (2007) 31 Colum. J. L. & Arts 1 at note 6.

[11] See *R. v. Moore*, 2015 ONSC 1107 (Ont. S.C.J.) [*Moore*] (in another ruling in the same case, Justice Dambrot excluded a rap song sung by Moore while in custody: see 2015 ONSC 1095 (Ont. S.C.J.)); *R. v. John* (2014) discussed in Alex Ballingall, "Rapper represents himself at trial: Lyrics land musician in court over alleged harassment, threats", *Toronto Star* (13 December 2) [*John*]; *R. v. Gardner*, 2014 ONSC 3292 (Ont. S.C.J.) [*Gardner*]; *Williams*, *supra* note 2; *R. v. Evans*, 2013 ONSC 2447 (Ont. S.C.J.); *R. v. B. (S.)*, 2013 ONSC 3139 (Ont. S.C.J.); *R. v. Deeb*, 2013 ONSC 4852 (Ont. S.C.J.) [*Deeb*]; *Skeete*, *supra* note 3; *R. v. Sappleton*, 2010 ONSC 5704 (Ont. S.C.J.) (a ruling admitting gang

(2) rap used as defence evidence (**5 cases**)[12];

(3) rap excluded at trial (**4 cases**)[13];

(4) rap and sentencing (**6 cases**)[14];

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expert evidence based, in part, on rap lyrics); *R. v. O. (T.)*, 2010 ONCJ 751 (Ont. C.J.) (rap lyrics were also used as part of the police investigation which was challenged under section 8: *R. v. O. (T.)*, 2010 ONCJ 334 (Ont. C.J.)); *R. v. Topey*, 2009 CarswellQue 9829 (C.Q.) [*Topey*] (also discussed in Sue Montgomery, "NDG man didn't try to kill cop", *Montreal Gazette* (20 September 2009)); *R. v. Riley* (2009) discussed in Betsy Powell, "Gang lyrics written in jail link suspect to Galloways", *Toronto Star* (9 June 2009) [*Riley*]; *R. v. Willis*, 2007 ONCJ 605 (Ont. C.J.); *R. v. Francis*, 2006 ONCJ 10 (Ont. C.J.); *R. v. Leslie*, 2005 CarswellOnt 2511 (Ont. S.C.J.) [*Leslie*]; *R. v. Emery* (1992), 8 O.R. (3d) 60 (Ont. Gen. Div.) [*Emery*].

[12] See *R. v. Ladurantaye*, 2015 ONSC 4103 (Ont. S.C.J.) [*Ladurantaye*]; *R. v. Whyte*, 2015 ONSC 7396 (Ont. S.C.J.) [*Whyte*]; *R. v. C. (R.)*, 2008 CarswellOnt 9876 (Ont. S.C.J.) [*C. (R.)*]; *R. v. Jacobson*, 2004 CarswellOnt 5733 (Ont. S.C.J.) [*Jacobson*]; and *R. v. Schell*, 2002 ABQB 829 (Alta. Q.B.) [*Schell*]. In *Ladurantaye*, the defence relied on the rap lyrics of the complainant to "paint a negative picture" of her as "a hardened individual . . . who engaged in criminal conduct . . ." (at para. 12). In *Whyte*, the defence wanted to use the rap lyrics of the person the accused was alleged to have assisted elude the police in support of a duress defence. In *C. (R.)*, it is not entirely clear who led the evidence, although it would appear that it was defence counsel based on the trial judge's reasons which state, "[a]s Mr. O'Brien submitted, the lyrics do not suggest an innocent young woman who does not understand anything about sexual activity and sexual language" (at para. 64). In *Jacobson*, the trial judge permitted Hall to cross-examine his co-accused, Jacobson, on whether "the rap lyrics tend to influence him to commit violent offences and shoot guns" (at para. 49), as it was an issue raised by Jacobson in his examination-in-chief. In *Schell*, the evidence related to the deceased and the defence wanted to use lyrics posted on his website as relevant to whether the deceased was killed by mistake as the Crown alleged.

[13] See *Campbell*, *supra* note 1; *R. v. Sinclair*, 2010 ONSC 7254 (Ont. S.C.J.) (trial judge refused to allow the defence to play a rap music video but did allow the defence to use photographs in the video for cross-examination purposes); *Simard*, *supra* note 7; and *R. v. Bernardo*, 1995 CarswellOnt 7227 (Ont. Gen. Div.), supplementary reasons given at 1995 CarswellOnt 7229 (Ont. Gen. Div.).

[14] See *R. v. Dillion-Jack* (2014), 2014 ONCJ 303 (Ont. C.J.) (at paras. 109–111); *R. v. A. (M.A.)*, 2010 BCPC 87 (B.C. Prov. Ct.) [*A. (M.A.)*]; *R. v.*

(5) rap and *Charter* applications (**4 cases**)[15]; and

(6) other (**1 case**).[16]

It should be noted that in some of these cases, the available records did not indicate whether admissibility was contested.

Crane (2010) discussed in Darcy Henton, "Drive-by shooter jailed 9 years", *Calgary Herald* (30 March 2010); *R. v. Lonechild* (2008) discussed in Betty-Ann Adam, "Send message about knives with Lonechild sentence: Crown", *Star-Phoenix* (5 April 2008) [*Lonechild*]; *R. v. Grant* discussed in Shannon Kari, "Strong sanctions needed to combat violent conduct, says judge", *Law Times* (14 November 2005); and *R. v. M. (B.)*, 2003 SKPC 83 (Sask. Prov. Ct.) at para. 38, additional reasons at 2003 CarswellSask 643 (Sask. Prov. Ct.), varied at 2003 CarswellSask 923 (Sask. C.A.).

In *Lonechild*, the lyrics were excluded. In *A. (M.A.)*, the sentencing judge considered the accused's composition and singing of rap lyrics in custody following his arrest as evidence to rebut the argument (at para. 193) that "the shootings could adequately be explained as a tragic but youthful burst of bad judgment." Rap lyrics were also introduced by the defence for sentencing purposes in *R. v. Marakah*, 2015 ONSC 1576 (Ont. S.C.J.) at paras. 37-38; *R. v. Ramirez*, 2012 ABPC 176 (Alta. Prov. Ct.); *R. v. Swite*, 2012 BCSC 1755 (B.C. S.C.) at para. 17; and *R. v. E. (G.A.)*, 1992 CarswellOnt 2220 (Ont. Gen. Div.). They were not included in the survey, as they were not being introduced against their maker for a negative or incriminating purpose.

[15] See *R. v. Felix*, 2013 ONCJ 261 (Ont. C.J.); *R. v. Alvarez*, 2009 CarswellOnt 5448 (Ont. S.C.J.); *R. v. Lucas*, 2009 CarswellOnt 3082 (Ont. S.C.J.), affirmed at 2014 ONCA 561 (Ont. C.A.); *R. v. Nicholas*, 2006 CarswellOnt 8958 (Ont. S.C.J.), affirmed at 2004 CarswellOnt 823 (Ont. C.A.).

[16] *R. v. H. (Y.T.)*, 2001 BCPC 10 (B.C. Prov. Ct.) at para. 18 (young offender transfer application).

In these cases, rap lyrics were constructed as relevant to motive,[17] intent,[18] knowledge,[19] duress,[20] opportunity, existence and/or membership in a gang,[21] a confession[22] and proof of the *actus reus*.[23] Other cases involved the use of rap on sentencing and as justification for police conduct during *Charter* applications.

This survey located only one appellate case — the 2000 Supreme Court of Canada decision in *Simard*. Surprisingly, it has never been cited in a rap lyrics case in Canada. In *Simard*, the Crown entered as an exhibit a compact disc which contained a number of rap songs written and performed by the accused. The Crown only wanted to rely on the cover, which displayed a picture of the accused, "for the purpose of contradicting two defence witnesses, including the appellant, with respect to certain statements they had made."[24] However, the trial judge decided to

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[17] See *Moore*, *supra* note 11; and *Skeete*, *supra* note 3. In *Moore*, part of the theory of the Crown was that he was an aspiring rap artist and that he "believed that it was critical for success as a rap artist to have a reputation for violence, and that reputation should be authentic" (at para. 6). Another part of the Crown's theory was that Moore was resentful and seeking revenge over his own shooting that left him permanently disfigured. According to the trial judge, his lyrics reflected both of these motives (at para. 8). In *Skeete*, the rap lyrics "Real niggaz don't crack to the coppers, muthafucka" were interpreted as relevant to a "code of silence" which the Crown alleged was breached by the victim and therefore was the motive for the shooting. Interestingly, the trial judge in *Skeete* was the same trial judge in *Campbell*.

[18] See *Deeb*, *supra* note 11; and *Topey*, *supra* note 11.

[19] See *Leslie*, *supra* note 11. In *Leslie*, the trial judge admitted a handwritten sheet of rap lyrics that was found on Leslie when he was arrested. One of the lyrics, "Got a back up 40 Cal Kel-Tec," referred to a calibre and firearm which was consistent with that used in the shooting. Leslie was an aspiring rap artist. Apparently, none of the public information about the shooting referred to the calibre and firearm.

[20] See *Whyte*, *supra* note 12.

[21] See *Williams*, *supra* note 2; *Gardner*, *supra* note 11 at para. 121; and *Riley*, *supra* note 11.

[22] See *Campbell*, *supra* note 1; and *Deeb*, *supra* note 11.

[23] See *John*, *supra* note 11; and *Emery*, *supra* note 11.

[24] *R. c. Simard* (2000), 151 C.C.C. (3d) 290 (C.A. Que.) at para. 20. No other information is given in the decision about the relevance of the CD cover.

listen to the rap music on his own motion and then used Simard's rap lyrics as follows:

> The court furthermore concludes, after listening to the CD filed with the court as exhibit P-17, that Mr. Simard was more than enthusiastic about the dramatic effects achieved by gunshots, as witnessed by more than thirty which can be heard in a number of his songs, including two (2) at the beginning of the song "Ta Yeul".
>
> After listening to this compact disk, the court has no choice but to conclude that the violent language of the accused and his attacks on the dignity, equality and integrity of women, are a reflection of the attitudes and behaviour he has adopted in his relations with women and, moreover, are in accordance with the acts, attitudes and sexual offences which he perpetrated on the complainant against her will.
>
> At the end of the song "C'est la chasse au trésor, mon trésor" ["It's a treasure hunt, my little treasure"], Mr. Simard takes pains to state that the lyrics of his songs are the fruit of his own philosophy and the result of his own raw experience. The court has no choice but to assimilate the experience undergone by the complainant to the experience of violence, control and domination of women which the accused preaches in his KC LMNOP philosophy which, in his own words, is the fruit of his own mind and thoughts on the matter.[25]

The Quebec Court of Appeal agreed that the trial judge had erred in using Simard's lyrics as autobiographical and as propensity evidence. Justices Proulx and Dussault held that "the respondent correctly concedes that the trial judge made an unusual use of the violent lyrics of violence and attacks against women uttered by the appellant in his songs."[26]

The Supreme Court of Canada affirmed in a short endorsement.[27] This is a significant precedent. If the rap lyrics in *Simard* could not be used to evidence a state of mind as it related to violence against women, it is

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[25] *Ibid* at para. 18.

[26] *Ibid* at para. 4. See also Justice Fish at paras. 21–22. The disagreement in the Court of Appeal was whether the trial judge's misuse of the evidence warranted a new trial. The majority held: "we are of the view that . . . this component did not play a conclusive role." *Ibid* at para. 4. Justice Fish disagreed and would have ordered a new trial.

[27] *Ibid*. Chief Justice McLachlin held:

> The Court would dismiss the appeal substantially for the reasons of Proulx and Dussault JJ.A. in the Quebec Court of Appeal, LeBel J.

difficult to see how rap lyrics about gangs, guns and drugs can be used, generally speaking, as evidence of opportunity, knowledge, interest or intent. Indeed, as the New Jersey Supreme Court held in *Skinner*:

> The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavours is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song "I Shot the Sheriff", actually shot a sheriff, or that Edgar Allan Poe buried a man beneath the floorboards, as depicted in his short story "The Tell-Tale Heart", simply because of their respective artistic endeavours on those subjects.[28]

Or that Freddie Mercury, who wrote "Mama, just killed a man. Put a gun against his head. Pulled my trigger, now he's dead" in Bohemian Rhapsody, actually killed anyone.[29]

In *Campbell*, the issue was the admissibility of a rap video, "I'm a hustler," which the Crown alleged contained lyrics that were similar to the circumstances of the killing and therefore constituted a confession.[30] The theory of the Crown was that the accused's girlfriend had left him for the deceased while he was in prison and that was the motive for the killing. With careful attention to the nature of rap music as a form of artistic expression, Justice Nordheimer held that the lyrics lacked sufficient meaning and specificity to enable him to conclude that there was a strong nexus between them and the killing.[31]

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dissenting. LeBel J. would allow the appeal substantially for the reasons given by Fish J.A. in the Quebec Court of Appeal.

[28] *Skinner*, *supra* note 8 at 251.

[29] This point is persuasively made with other examples as well in *ACLU-NJ Amicus Brief*, *supra* note 9 at 3, 10-11.

[30] The relevant lyrics are set out at the beginning of this piece.

[31] The trial judge's analysis of the lyrics in *Campbell*, *supra* note 1, can be found at paras. 13–22 of the decision. See further, *Deeb*, *supra* note 11 and *Topey*, *supra* note 11. In these two cases, rap lyrics were introduced as part of the Crown's case as a confession. It is unclear from the available records whether their admissibility was contested by the defence. In *Deeb*, the lyric relied on by the Crown was "[i]n the meanwhile gotta be patient 'n trust dat I don't get convicted for that gun I bust" (at para. 110). The Crown argued that the lyric reflected the accused's concern that he not be "convicted for the gun he

To give just two examples. The Crown alleged that the lyric "Nah, I ain't slipping with my wifey never" was in reference to the accused's girlfriend. Justice Nordheimer disagreed. He held that "wifey" likely referred to a gun because "it is common for criminals, gang members . . . to refer to guns in personal terms, especially female terms . . . including . . . 'girl', 'girlfriend, 'baby' . . .".[32] He further noted that "[t]his reality, in turn, drives the lyrics used in gangster rap in order to maintain the authenticity of that genre."[33] The lyrics before and after this one further supported this interpretation according to the trial judge. With respect to the lyric, "One shot, leave your brains on your Nikes," the Crown alleged it was relevant because the deceased was wearing Nikes. However, the trial judge held that "[t]hat fact, of course, only makes the deceased one among literally thousands of young men who would be wearing Nikes on any given day in the City of Toronto. It is hardly a unique identifier."[34]

The other leading trial decision is *Williams*.[35] In *Williams*, the two accused (Lavare Williams and Chael Mills) were charged with first degree murder. The theory of the Crown was that the accused shot the deceased because he was a member of a rival gang. The trial judge permitted the

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used or showed in this incident" (at para. 111). However, the trial judge refused to give the lyrics any weight because she was "uncertain as to whether the content . . . is based on direct or indirect experience or whether they are reflecting on something factual or fictitious" (at para. 112). In *Topey*, *supra* note 11, the accused was charged with attempted murder of a police officer and the Crown wanted to use lyrics found in his possession as evidence of intent. The trial judge held at para. 176:

> The violent handwritten texts found in the defendant's bedroom are no more convincing in establishing a probative link with the specific intent to kill. First, the defendant denied having written them and, second, even assuming that he had written them, the facts do not establish when he wrote them. It would be rash, to say the least, to conclude that there was a specific intent to kill on the basis of, among other things, documents written several years before.

[32] *Campbell*, *supra* note 1 at para. 15.

[33] *Ibid.*

[34] *Ibid* at para. 16.

[35] *Williams*, *supra* note 2. *Williams* is currently on appeal to the Ontario Court of Appeal.

Crown to lead *six* rap videos,[36] still shots from the videos, transcripts of the rap lyrics, additional rap documents written by the accused, and tattoo evidence.[37] The Crown alleged that the rap videos/lyrics were relevant to establish (1) that MOB Klick was a gang; (2) that Williams and Mills were members/associated with MOB; and (3) motive because a MOB member "Bubba" had been killed by a rival gang, Eglinton West Crips (EWC), and the victim was a member of the EWC. In admitting this evidence, Justice Clarke gave short shrift to the concern about the prejudicial effect of the sheer volume of rap lyrics and images. While he acknowledged that this was the largest number of rap videos a prosecutor had ever been permitted to introduce, he was of the view that they were less than the seventy-six (76) videos the Crown first proffered for evidence, were necessary for the Crown to make its case, and that the jury would not be overwhelmed with the benefit of proper instructions.[38]

Ensuring Cultural Competence and Shielding Racial Bias

Where admissibility has been contested, Canadian courts have used the *Seaboyer* exclusionary discretion to determine admissibility by assessing probative value (pv) and prejudicial effect (pe).[39] In applying *Seaboyer* in this context, it is necessary to recognize and factor in the concerns raised by using rap lyrics as criminal evidence. These concerns include (i) the cultural competence of trial actors to understand the nature and meaning of rap lyrics[40]; (ii) the negative impact of racial bias on the

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[36] The videos, many of which were posted on YouTube, include "Bloodz," "Hood Life," "Cocaine Alumni" (https://www.youtube.com/watch?v=2_7m0XhWZRA), "Chiibz Freestyle," "You Don't Really Want It?" (https://www.youtube.com/watch?v=2GMtbkGnsx8) and "Thug Mentality."

[37] See *Williams*, *supra* note 2 at paras. 163–226.

[38] *Ibid* at paras. 227–230.

[39] In cases of defence evidence, the nature of the balancing would be different. See *R. v. Grant*, 2015 SCC 9, 17 C.R. (7th) 229 (S.C.C.).

[40] For a good background on the nature of rap music, see Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* (Hanover, NH: Wesleyan University Press, 1994), and, in particular, as relevant to this discussion, at 2-3, 11-12, 55, 61, 101, 144. As Professor Rose notes (at 2):

> Rap music is black cultural expression that prioritizes black voices from the margins of urban America . . . From the outset, rap music

integrity of the trial and verdict; (iii) the criminalization of culture; and (iv) the chilling effect on artistic expression. To give effect to these concerns, courts must proceed with caution, as Justice Nordheimer did in *Campbell*. They must carefully scrutinize prosecutorial claims of probative value and ensure that they do not overestimate the meaning or value of the evidence given the nature of rap music and concerns associated with using artistic expression as criminal evidence. Courts must also recognize the very real likelihood that rap lyrics will trigger racialized stereotypes when assessing the prejudicial effect of the evidence.[41]

Assessing Probative Value

When will rap lyrics have sufficient probative value taking into account the policy concerns identified? As a general rule, rap lyrics should only be constructed as probative where there is a direct link between the lyrics and the crime being prosecuted. This is the approach taken in *Campbell*[42] and a number of courts in the United States. For example, in *Skinner*, it was noted that "we reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a *strong nexus* between specific details of the artistic composi-

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> has articulated the pleasures and problems of black urban life in contemporary America. Male rappers often speak from the perspective of a young man who wants social status in a locally meaningful way. The rap about how to avoid gang pressures and still earn local respect, how to deal with the loss of several friends to gun fights and drug overdoses, and they tell grandiose and sometimes violent tales that are powered by male sexual power over women.

See also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, The New Press, 2012) at 171–175; and Andrea Dennis, *supra* note 10 at 13-14, 22-23.

[41] In the United States, there have been similar arguments for factoring in the potential for racial bias when applying the rules of evidence. For example, in the context of bad character evidence and using prior convictions to impeach. See Montre D. Carodine, "The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule" (2009) 84 Ind. L.J. 521; and Chris Chambers Goodman, "The Color of Our Character: Confronting the Racial Character of Rule 404(b)" (2007) 25 Law and Inequality 1. See further, Sheri Lynn Johnson, "Racial Imagery in Criminal Cases" (1993) 67 Tul. L. Rev. 1739.

[42] *Campbell*, *supra* note 1 at para. 27.

tion and the circumstances of the offense for which the evidence is being adduced."[43] This is also the approach our courts have taken with accused-authored poems, stories and other writings. As Justice Corbett noted in *R. v. Liard and Lasota*:[44]

> The more similar the writings are to the actual murder, the stronger the inference that the author was interested in the very activity that happened. The more generalized the writings, the more they may only exhibit a "dark or disturbed thought pattern", the less probative the are to issues of motive, planning and state of mind.

In applying the "strong nexus" approach, the *Skinner* Court further observed that "extreme caution must be exercised when expressive work is involved particularly when such expression involves social commentary, exaggeration, and fictional accounts."[45] There is another reason to be cautious. As Professors Kubrin and Nielson observe in "Rap on Trial,"

> using rap lyrics as evidence . . . constitutes a pernicious tactic that plays upon and perpetuates enduring stereotypes about the inherent criminality of young men of color; the lyrics must be true because what is written "fits" with what we "know" about criminals, where they come from, and what they look like.[46]

What constitutes a direct link or "strong nexus" requires paying careful attention to cultural competence. The importance of thinking about cultural competence and admissibility was recognized by the Supreme Court of Canada in *Mitchell v. M.N.R.*,[47] a case dealing with the admissibility of Aboriginal oral history evidence. Justice McLachin, as she then was, held that "[i]n determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric tradi-

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[43] *Skinner*, *supra* note 8 at 251-252, 253 (emphasis added). See further, *Hannah v. State*, 23 A.3d 192 (Md. C.A., 2011); and *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky., 2006).

[44] 2013 ONSC 5457 (Ont. S.C.J.) at paras. 90, 92. See also, *R. v. Terry*, [1996] 2 S.C.R. 207, 48 C.R. (4th) 137 (S.C.C.); *R. v. Eng* (1999), 138 C.C.C. (3d) 188 (B.C. C.A.); *R. v. Sipes*, 2011 BCSC 640 (B.C. S.C.); *R. v. Lloyd-Owen*, 2005 CarswellOnt 10734 (Ont. S.C.J.); and *R. v. Mousseau*, 2002 ABQB 248 (Alta. Q.B.).

[45] *Skinner*, *supra* note 8 at 253. See also *Campbell*, *supra* note 1 at para. 25.

[46] "Rap on Trial", *supra* note 6 at 201.

[47] [2001] 1 S.C.R. 911 (S.C.C.).

tions of gathering and passing on historical facts and traditions" and that "[o]ral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective."[48]

Cultural competence, in this context, requires an understanding of the origins and nature of rap music.[49] All too often courts appear willing to construct rap as literal and inculpatory rather than as art. In *Williams*, for example, there was no analysis about the nature of rap music and the dangers of treating it as autobiographical and using literal interpretation in assessing relevance. Often times, again as in *Williams*, the only expert testifying about the meaning of the lyrics is a police officer and when accepted, it is done so on the assumption that only the police's interpretation speaks to the truth of the meaning imbedded in the words. But as the authors of "Rap on Trial" observe:

> As scholars who study rap music, the problem from our standpoint is that the fictional characters portrayed in rap songs are a far cry from the true personality of the artists behind them. The near-universal use of stage names within rap music is the clearest signal that rappers are fashioning a character, yet the first-person narrative form and rappers' frequent claims that they are "keepin' it real" (providing authentic accounts of themselves and "the hood") lend themselves to easy misreading by those unfamiliar with rappers' complex and creative manipulation of identify, both on and off the stage. This is particularly problematic with gangsta rap, where artists take on a criminal persona and offer embellished, graphic accounts of violence, sexual conquest, and other illicit activity. If audiences don't appreciate that these are genre conventions, they can easily begin to conflate artist with character and fiction with fact.[50]

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[48] *Ibid* at para. 34. See further the discussion of cultural competence and admissibility in David M. Tanovich, "*R. v. Hart*: A Welcome New Emphasis on Reliability and Admissibility" (2014) 12 C.R. (7th) 298.

[49] See Andrea Dennis, *supra* note 10 at 4, 12–16.

[50] "Rap on Trial", *supra* note 6 at 197. See further, the discussion in Andrea Dennis, *supra* note 10 at 12–23.

Professor Andrea Dennis, one of the leading academics on rap music in the United States, makes a similar point. She notes that courts make a number of flawed assumptions when admitting rap lyrics that include:

> (1) interpreting and understanding rap music lyrics as 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.[51]

Campbell is an important decision in this regard because Justice Nordheimer recognizes the dangers of treating rap lyrics literally:

> As with lyrics generally, but especially when it comes to rap, it is risky to take any word literally. It is common in rap lyrics, as it is in street language, to use code words for an item to avoid describing the item literally. This is especially true when talking about drugs and guns. . . . This reality, in turn, drives the lyrics used in gangster rap in order to maintain the authenticity of that genre.
>
> . . . Rap, particularly gangster rap, often deals with the subject matter of drugs, guns, shootings, violence and the like. The mere fact that an artist records a rap with lyrics that refers to such activities cannot be taken as an admission by the artist that they were involved in such activities, even where the lyrics are used in the first person. While there is a long history of artists singing about events as if they were personally involved in them when, in fact, they had no involvement in them at all.[52]

As a result, he carefully works through each of the lyrics relied upon by the Crown as being linked to the crime to conclude that the lyrics were too general and not sufficiently unique to be admissible.[53]

Assessing Prejudicial Effect

Using rap lyrics as evidence raises serious concerns about moral and reasoning prejudice. Indeed, a study by Stuart Fischoff found that those exposed to rap lyrics were more likely to find a Black suspect guilty of

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[51] Andrea Dennis, *supra* note 10 at 12.

[52] *Campbell*, *supra* note 1 at paras. 15, 25.

[53] *Ibid* at paras. 13–30.

murder than those not exposed.[54] In another study, Carrie Fried had her subjects listen to a Kingston Trio folk song, "Bad Man's Blunder," about the shooting of a police officer. One group of subjects was told it was a country song. The other group was told it was a rap song. Fried found that "subjects' reactions to the lyrics identified as rap . . . were significantly more negative than reactions toward the same lyrics identified as country."[55]

In assessing admissibility, courts must also factor in the very real danger that rap lyrics will trigger and inflame stereotypical assumptions triers of fact bring with them to court about race and crime. As Justice Doherty recognized in *R. v. Parks*[56] regarding anti-Black racism:

> I must accept the broad conclusions repeatedly expressed in these materials. Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil. In my opinion, there can be no doubt that there existed a realistic possibility that one or more potential jurors drawn from the Metropolitan Toronto community would, consciously or subconsciously, come to court possessed of negative stereotypical attitudes toward black persons.[57]

In other words, because of race, the potential for prejudice is much greater than that usually considered with bad character evidence.

These concerns about prejudicial effect justify taking a strict or cautious approach to assessing probative value. They also justify ensuring that measures are taken to limit jury exposure to this evidence. The availability of other evidence or defence admissions that speak to the Crown's

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[54] Stuart Fischoff, "Gansta' rap and a murder in Bakersfield" (1999) 29 J. Appl. Soc. Psychol. 795.

[55] Carrie B. Fried, "Who's afraid of rap? Differential reactions to music lyrics" (1999) 29 J. Appl. Soc. Psychol. 705 at 710–711.

[56] (1993), 24 C.R. (4th) 81 (Ont. C.A.).

[57] *Ibid* at 99.

purpose in leading the rap lyrics should be considered.[58] For example, if the defence is prepared to concede that the accused was a member of a gang, then there would be no need to lead the evidence of his rap lyrics for that purpose.[59] Similarly, how *many* lyrics/videos are admitted,[60] using only the lyrics rather than the videos and lyrics and appropriate editing[61] should be considered in an effort to minimize the prejudicial effect of the evidence.

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[58] This point is made in *Skinner*, *supra* note 8 at 253.

[59] See, for example, *R. v. Araya*, 2015 SCC 11, 17 C.R. (7th) 252 (S.C.C.) at para. 35 and *R. v. Handy*, 2002 SCC 56, 1 C.R. (6th) 203 (S.C.C.) at para. 74 ("if the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded . . .).

[60] In *R. v. Candir* (2009), 250 C.C.C. (3d) 139 (Ont. C.A.) at paras. 60–63, the Court of Appeal recognized that whether the evidence is cumulative is a relevant consideration in the *Seaboyer* exclusionary discretion analysis.

[61] For an example of careful editing, see *Evans*, *supra* note 11 at paras. 110–114. See also, *Leslie*, *supra* note 11 at paras. 8–9.