

Rapt Admissions: Comparing Proposed Federal Rule of Evidence 416 “Rap Shield” with the Rule 412 “Rape Shield”

ABSTRACT

Creative expression depicting illicit activity can cause jurors to infer improper conclusions about a defendant, even when the jurors attempt to analyze such evidence objectively. When the government seeks to admit a defendant’s creative work into evidence in a criminal trial, courts use existing evidentiary rules to balance the work’s probative value against its risk of unfair prejudice. These rules are supposed to prevent unfair prejudice, but various scholars have shown that courts do not always appreciate how unfairly prejudicial art can be. Rap music presents unique challenges because jurors may fail to discern the work’s literal versus symbolic meaning. Similarly, several decades ago courts struggled to exclude improper evidence of victims’ sexual histories from the courtroom until social pressure encouraged legislators to pass “rape shield” laws. Now, legislators in several states as well as Congress have proposed “rap shield” laws to exclude improper artwork evidence.

This Note analyzes proposed Federal Rule of Evidence 416, “Limitation on admissibility of defendant’s creative or artistic expression,” in the context of Federal Rule of Evidence 412, which governs admission of a victim’s sexual history in sex offense cases. Although proposed Rule 416 would protect artistic defendants and Rule 412 protects sexual assault victims, the two rules share various similarities; in particular, they both entail categorical rules of exclusion. This Note summarizes the Rule’s social and legal background and concludes by offering recommendations for its improvement.

TABLE OF CONTENTS

I.	BACKGROUND	815
	A. Social Developments	815
	B. Judicial Developments	821
	C. Legislative Developments	823
II.	EVIDENTIARY BACKGROUND	826

	<i>A. Logistics of Amending the Rules of Evidence</i>	826
	<i>B. Lessons from Rape Shield</i>	827
III.	PROPOSED RULE 416	831
	<i>A. Analysis</i>	831
	<i>B. Constitutional Concerns</i>	839
IV.	SOLUTION.....	841
V.	CONCLUSION.....	843

INTRODUCTION

Artists who express illicit activity through evocative music may sing a different tune when the government seeks to admit the artistic expression into evidence at trial. Since a work's intended meaning can be ambiguous, admitting artistic expressions at trial as literal admissions of wrongdoing or as evidence of propensity for criminal conduct may unfairly prejudice defendants who are facing criminal charges that reflect the content of their art.¹ This risk of unfair prejudice can arise from evidence in any art form—music, poetry, film—but the issue is surfacing most often, and most controversially, with rap music.² Rap presents unique challenges under the evidentiary rules because jurors may not only fail to discern between the work's intended literal versus symbolic meaning, but may also unwittingly succumb to the effect of the art itself and thus improperly impute a propensity for criminal conduct onto the defendant.³ Meanwhile, music industry representatives claim that the admission of rap music into evidence under the current rules has created a chilling effect on artistic expression that is contrary to the First Amendment.⁴

This topic has prompted extensive legal scholarship and, most recently, several proposed pieces of legislation throughout the United States that would limit a court's ability to admit artistic expression into evidence.⁵ Although evidentiary rules ideally minimize the potential for

1. See Hugh Toner, *Crazy Story: Admission of Guilt or Braggadocio? Defendant-Authored Drill Lyrics as Evidence in Trials*, 46 S. ILL. U. L. J. 377, 379 (2022).

2. See *id.* at 380.

3. See *id.* at 381–83, 404; Luke Walls, *Note and Comment: Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics To Prove Defendants' Character*, 48 SW. L. REV. 173, 186–88 (2019).

4. Press Release, Rep. Hank Johnson, *Congressmen Johnson, Bowman Introduce Bill To Protect Artists' 1st Amendment Rights* (July 27, 2022), available at <https://hankjohnson.house.gov/media-center/press-releases/congressmen-johnson-bowman-introduce-bill-protect-artists-1st-amendment> [perma.cc/ND9V-W5Q2].

5. S. 7527 § 60.77(2), 2021-2022 Leg. Sess. (N.Y. 2021); Assemb. B. 2799, 2021-2022 Reg. Sess. (Cal. 2022); Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

jury decisions based on emotion, they may not adequately protect against the risk of unfair prejudice that arises when evidence is too poignant for a jury to analyze dispassionately.⁶

This Note analyzes the pending federal legislation proposing Rule 416 and considers how existing Rule 412 (known as the rape shield) may provide relevant guidance for proposed Rule 416's revision and implementation. Part I discusses the social and legal background for proposed Rule 416. Part II reviews the process for amending the Federal Rules of Evidence before examining the social context behind Rule 412, which concerns evidence of a victim's sexual history at a rape trial, and which provides instructive points of comparison. Part III analyzes proposed Rule 416 and popular First Amendment claims, and Part IV recommends a solution to address shortcomings of proposed Rule 416 in its current form.

I. BACKGROUND

A. *Social Developments*

Artistic expression can reflect or comment on reality while simultaneously distorting or embellishing that reality.⁷ Art can also be biographical and speak in the first person.⁸ Without a meaningful context, an observer may not know if artwork depicts a social commentary, a literal account, a poetic description of real events, or a total fiction.⁹ A poem that recounts the motive for a crime, for example, may be either an autobiographical confession, a metaphor, aspects of both, or something entirely different.¹⁰ In any case, art that expresses violence can evoke powerful emotions in its audience, an attribute that

6. See Toner, *supra* note 1, at 383–84.

7. See Terezie Smejkalova, Presentation to the 2009 Critical Legal Conference, *Art as a Defence Argument in Court* 5 (Sept. 19, 2012) (transcript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149002 [perma.cc/J3N8-XCM5]) (“[T]here is no generally accepted value of art, no definition of an ‘art norm.’”); Anna Boskenbaum, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. CITY L. REV. 123, 169–71 (2005).

8. Walls, *supra* note 3, at 185–86.

9. Toner, *supra* note 1, at 379.

10. Cf. Jay Surdukowski, *Is Poetry a War Crime? Reckoning for Radovan Karadzic the Poet-Warrior*, 26 MICH. J. INT'L L. 673 (2005) (“Why should poetry, perhaps the most powerful maker of myth . . . be any different in the eyes of international law?”). Courts use various factors including “jest and hyperbole” to determine literal meaning of poetry. Boskenbaum, *supra* note 7, at 145.

artists can capitalize upon in the music industry but which can lead to inequitable results in a court of law.¹¹

Art can also lead to real consequences in people's lives. As Oscar Wilde famously claimed, "life imitates art far more than art imitates life,"¹² and the consequences of life imitating violence expressed as art can be especially troubling.¹³ Even though violent artistic expression generally enjoys protection under the First Amendment, the First Amendment does not insulate artists from the potential consequences of having their art admitted as evidence in court.¹⁴

Prosecutors may currently seek to introduce a defendant's artistic work as evidence in criminal trials.¹⁵ While it seems reasonable to admit an artistic work that is highly probative of the elements charged, highly evocative artwork can potentially cause unfair prejudice to defendants because juries may unwittingly rely on the works more broadly—albeit implicitly—as evidence of a defendant's propensity for crime.¹⁶

11. See, e.g., Hillary Hanson, *Murderabilia Has Andy Kahan, Victim Advocate, Up In Arms*, HUFFPOST, https://www.huffpost.com/entry/murderabilia-andy-kahan_n_1919258 [perma.cc/STA9-2ZNH] (Oct. 8, 2012) (describing the phenomenon of highly sought-after artwork and collectible "murderabilia" items sold by serial killers).

12. Oscar Wilde, *The Decay of Lying: An Observation*, in *INTENTIONS* 33, 35 (The Floating Press 2009) (1891) ("The imagination is essentially creative, and always seeks for a new form. The boy-burglar is simply the inevitable result of life's imitative instinct. He is Fact, occupied as Fact usually is, with trying to reproduce Fiction. . . . Literature always anticipates life. It does not copy it, but moulds it to its purpose."); see Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 *UCLA ENT. L. REV.* 345, 356 (2005).

13. See generally Howard Goldenthal, *View Into Minds of Killers? Look at Their Writing, Say Professors*, CBC/RADIO-CANADA (June 9, 2017), <https://www.cbc.ca/radio/thecurrent/the-current-for-june-9-2017-1.4152150/view-into-minds-of-killers-look-at-their-writing-say-professors-1.4152200> [perma.cc/VH6Y-M3V6] (discussing serial killers' expressive literary material as scripts for future crimes as well as inspiration for copycat actors); Boskenbaum, *supra* note 7, at 146 (discussing cases involving artwork by children and threats of school violence); Kory Grow & Jason Newman, *Marilyn Manson: The Monster Hiding in Plain Sight*, ROLLING STONE (Nov. 14, 2021), <https://www.rollingstone.com/music/music-features/marilyn-manson-abuse-allegations-1256888/> [perma.cc/AT3T-FLSC] (facing various civil and criminal investigations for abuse, Manson "argued in court filings that his accusers "are desperately trying to conflate the imagery and artistry of [his] 'shock rock' stage persona, 'Marilyn Manson,' with fabricated accounts of abuse." One alleged victim stated, "We give an awful lot of slack to men like this, and especially in the music industry . . . If you're not a womanizer and a complete misogynist, are you really a rock star at all?").

14. U.S. CONST. amend. I; see Wilson, *supra* note 12, at 360–61; see also *infra* discussion in Section III.B.

15. Adam Dunbar, *Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making* 8 (2017) (Ph.D. dissertation, University of California at Irvine) (ProQuest) (citing ALAN JACKSON, AM. PROSECUTORS RSCH. PROJECT, PROSECUTING GANG CASES: WHAT [LOCAL] PROSECUTORS NEED TO KNOW 15–16 (2004) ("Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant's true personality.")).

16. See *id.* at 75–76.

Once a trial court decides to admit artistic evidence, an appellate court will rarely reverse the ruling.¹⁷ Trial courts possess wide discretion in their evidentiary rulings, which appellate courts may only reverse upon finding abuse of this discretion.¹⁸ Consequently, on appeal, “it is difficult to reverse admission of rap lyrics, as prejudice to the defendant is difficult to prove when it is implicit and not easily perceived.”¹⁹ Even when appellate courts find that a trial court has improperly admitted evidence, the appellate courts will refuse to overturn the conviction if the error was harmless and “does not affect the ‘substantial rights’ of a party.”²⁰

The rap music genre has forced courts to consider to what extent art imitates life due to the unique range of artistic intent within the genre, some of which portrays compelling artistic renditions of violence as actual experiences.²¹ Expressive imitation of real life, however, is not always easily distinguishable from fictional expression; one artist may communicate actual personal experience literally or metaphorically, while another may generate equally vivid fictions presented as actual experiences for commercial gain.²² Some record deals thus include

17. See *United States v. Whittington*, 455 F.3d 736, 738 (6th Cir. 2006) (discussing evidentiary standards on appeal).

18. *Id.*

19. Toner, *supra* note 1, at 388. Sometimes the totality of the government’s case, not specific lyrics, can cause unfair prejudice to the defendant. See, e.g., Michael Levenson, *Judge Overturns Murder Convictions, Citing Use of Rap Lyrics at Trial*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/us/california-racial-bias-gary-bryant-diallo-jackson.html> [perma.cc/KTA2-8LXD] (convictions actually overturned due to the prosecution’s improper comments during closing arguments which arguably augmented the prejudicial nature of the lyrics introduced into evidence). Some scholars recommend continuing legal education courses on judicial implicit bias for courts that do not understand the extent of the content’s prejudicial danger. See Toner, *supra* note 1, at 407.

20. *Whittington*, 455 F.3d at 738; see also Dunbar, *supra* note 15, at 75–76 (discussing *Hilton v. Bell*, 2011 U.S. Dist. LEXIS 22883 (E.D. Mich. Mar. 8, 2011), in which the appellate court upheld defendant’s rape conviction because although his violent, misogynistic lyrics were “inadmissible character evidence,” defendant failed to prove that exclusion of the evidence would have resulted in his acquittal).

21. See Walls, *supra* note 3, at 184–85.

Through violent language and graphic imagery, rappers use metaphor in an attempt to shatter taboos, satirize racial stereotypes, or demonstrate agency in a socio-political environment where resources can be scarce... murder can represent hopelessness or frustration with injustice . . . drug use can represent nihilism . . . gun possession can be used metaphorically to represent masculinity.

Dunbar, *supra* note 15, at 9.

22. Wilson, *supra* note 12, at 351–55; see also ERIK NIELSON & ANDREA DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* 73, 114–15 (2019) (discussing prosecutor’s delayed use of rap as evidence in the 1990’s as a contemporaneous consequence of the “wars on drugs and gangs” and contrasting rap with “narcocorridos,” traditional songs typically commissioned by drug cartels: “distinctly nonfiction” although “intended to entertain”).

requirements for promoting images of criminality,²³ thereby perpetuating a situation where the exposed inauthenticity of a performer would incur serious financial loss for their record label.²⁴ This dilemma is particularly precarious for obscure artists who lack the resources that established celebrities enjoy to more easily convince juries that their artistic utterances are fictitious.²⁵

Recently, a subgenre known as “drill” has emerged, which is associated with darker, more literal descriptions of violence than other rap subgenres; the name itself refers to killing.²⁶ On the one hand, gangs use drill to convey threats by referencing recent, local acts of violence.²⁷ On the other hand, drill has gained mainstream popularity,

23. Wilson, *supra* note 12, at 351–55.

By listening to rap, middle-class white America was led to feel as if they were ‘eavesdroppers’ on the ‘putative, private conversations of the inner city.’ It appeared for the time being that the record companies had been successful in using gangsta rap music as their tool to sell stereotypes and prejudices to the American public.

Id. at 352.

When Marshall Bruce Mathers III (a.k.a. rapper “Eminem”/“Slim Shady”) stands before a court charged with assault, a crime often depicted in his many violently-themed songs, who does the judge and jury believe stands before them—Mr. Mathers III or Eminem? Are these persons one and the same? If not, who is the real Slim Shady[?]

Id. at 358.

24. “Whether an artist is performing provocative rap music or Christian worship music, they gain credibility through their authenticity. Either their content truly reflects their identity and experience or they are faking it, and this revelation could destroy their credibility.” Telephone Interview with Chi Michaels D. B. Lindquist, a.k.a., Brotha.Deep, Activist Sentenced Like Thieves (Dec. 23, 2022) (Lindquist is a recording artist, producer, and musician). Some rap artists have established themselves by promoting sobriety; the fact remains that they became popular, in part, with a unique persona and so an inconsistent revelation of their real lifestyle could still affect their credibility. *Contra* Walls, *supra* note 3, at 185–86.

25. NIELSON & DENNIS, *supra* note 22, at 16 (“[F]amous rappers are extended artistic respect and creative license, while amateurs are presumed to be rapping about their real lives, as if they have little artistic ability or aim.”).

26. See Toner, *supra* note 1, at 381; Mark James, *What is Drill Music? With 7 Top Examples & History*, MUSIC INDUSTRY HOW TO, (Dec. 15, 2021), <https://www.musicindustry-howto.com/what-is-drill-music/> [perma.cc/M9LR-2AW3]; FORREST STUART, BALLAD OF THE BULLET: GANGS, DRILL MUSIC, AND THE POWER OF ONLINE INFAMY 7 (2020).

[G]ang-associated youth are exploiting digital platforms to commodify urban violence and cash in on the public’s longstanding fascination with ghetto poverty. In the process, they’re forging a new, if often dangerous, pathway toward mobility, self-worth, and social support. . . . Art becomes reality when these disputes spill into the streets.

Id. at 2–7.

27. Many of the artists are not authentic and so all evidence must be analyzed properly, but many other artists are genuinely involved in hundreds of different [gang] sets that are going to war with each other. I’ve never seen anything like this; song after song of people taunting their rivals and referencing “ops,” actual murders. People are dying off of retaliations and these guys are getting millions . . . [A] girl gets shot in the head, and within ten minutes a video talking about her murder has a Geico commercial.

encouraging new artists to associate themselves with violence regardless of whether they have experienced it themselves in order to garner authenticity and boost their commercial success.²⁸ A common characteristic of drill is disrespecting the deceased: one song in particular, which rose to enormous popularity in late 2022, mocks the death of a murdered child.²⁹ As a result, the drill subgenre is readily associated with real violence, in part because violent individuals seek to capitalize on its commercial success,³⁰ and in part because art can in fact mimic life, although juries do not always discern when it does.³¹

Among the many forms of popular artistic expression, rap music is particularly vulnerable to the risk of unfair evidentiary prejudice.³²

Telephone Interview with Aaron Concepción, Sergeant, Fiat LVX Corp National Gang Intelligence Network (Nov. 18, 2022) (Concepción has testified as a gang expert in hundreds of criminal trials throughout the United States and provides training to law enforcement agencies). See, e.g., CLR Bruce Rivers, *Criminal Lawyer Reacts to DThang x Bando x TDot—Talk Facts*, (Dec. 7, 2021), <https://www.youtube.com/watch?v=QJv5-M9ol8s> [perma.cc/5D6K-36CX] (analyzing the song's references to gang sets, dozens of recent murders, and apparent admissions to shootings); Drill Informer, *Bronx Drill—The Most Disrespected Pt. 2*, (July 13, 2022), <https://www.youtube.com/watch?v=4x9c9swrlBs> [perma.cc/Y2T7-XP7P] (references to recent murders and discussion of “ops” throughout some of the most popular, recent drill songs).

28. Cf. Colin Moynihan & Azi Paybarah, *Tekashi 69 Testifies on Kidnapping Jim Jones and Cardi B*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/09/19/nyregion/tekashi-69-case-testimony-jim-jones.html> [perma.cc/Y845-MJDQ] (“The [gang] saw [Tekashi] as a source of money. He saw them as a crucial source of street cred.”).

29. Jody Rosen, *The Despair of Generation “Notti Bop,”* THE NEW YORKER (Dec. 7, 2022), <https://www.newyorker.com/culture/cultural-comment/the-despair-of-generation-notti-bop> [perma.cc/K2ZQ-LWLM]; HipHopDaily, *The Story of Notti Osama*, YOUTUBE (Nov. 19, 2022), <https://www.youtube.com/watch?v=2mwp5CuA9B4> [perma.cc/9PBF-MVBK]. After fourteen-year-old Ethan Reyes, a.k.a. Notti Osama, taunted many known gang members in his drill videos, one stabbed him to death and then another created a music video to mock his death with stabbing gestures and references. *Id.* Prosecutors dismissed charges for the stabbing, but the video has gone viral, with many people—including schoolteachers—naively imitating the dance. *Id.*; KYLE RICHHH, *NOTTI BOP* (RiteOrWrong KVH Entertainment 2022).

30. See Vidhaath Sripathi, *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. GENDER RACE & JUST. 207, 210–24 (2021); Ashley Southall, *As Shootings Increased, N.Y.C. Returned to Disputed Tactic: Gang Takedowns*, N.Y. TIMES (Aug. 6, 2021), <https://www.nytimes.com/2021/08/26/nyregion/nypd-shootings-gang-arrests.html> [perma.cc/WK8F-LQPP] (“[T]he majority of the more than 2,500 shootings recorded since the beginning of last year can be linked to gangs . . . as shootings have risen from historic lows in 2019 to their highest level in a decade . . . [politicians along with police are] vowing to dismantle gangs as the surest strategy for reducing gun violence.”).

31. Wilson, *supra* note 12, at 355 (“Today, we as a society have come to expect the content of rap lyrics to accurately depict the true lifestyle of the artists who profess them, and our views of particular rappers’ mental states and dispositions have been molded accordingly. Having fostered these pre-conceived notions of rap music and rap artists, it often comes as little or no surprise to the public when rappers known to glorify crime and violence get arrested for the kinds of illegal activities they profess in their lyrics.”). For a more detailed description of the genre’s historical and social evolution, see *id.* at 346–55.

32. Dunbar, *supra* note 15, at 70.

Multiple studies detailed in recent scholarship have shown that juries are more likely to associate lyrics with criminal activity, gang association, and aggressiveness when the lyrics are performed as rap than when the same lyrics are performed in other musical genres.³³ One study revealed a stark difference in jury perception between rap and country music, with heavy metal and punk in the middle.³⁴ Another study indicated that juries may associate a rap artist defendant with criminality without actually correlating the artist's lyrics to elements of crimes that the evidence was introduced to support, such as intent or knowledge.³⁵

However, more recent studies may alleviate these concerns. One study indicated that participants declined to speculate as to knowledge or intent based on lyrics from the four previously-analyzed genres.³⁶ Moreover, in this recent study, a participant's increasing age directly correlated with an increasing negative assessment of rap.³⁷ Nevertheless, these studies do suggest that, for the time being, when a court admits rap music into evidence, even when it is not probative of the facts in dispute, the work can unfairly prejudice the defendant as a diverse jury may infer—merely based on the genre—that the defendant

33. *Id.* Social historians and legal scholars have written extensively about concerns for bias when a defendant's own creative work depicting violence is introduced as evidence against them. *See id.* at 63.

34. *Id.* at 64–67. Research participants have associated both rap and heavy metal with violence, but “newspaper articles often frame rap music as threatening to society, whereas newspaper articles discussing rock music frame the music as threatening to the listener. More specifically, the concern is that rap music will cause listeners to commit crime, whereas listeners of rock will be more likely to engage in risky sexual behavior, excessive alcohol consumption, and self-harm.” *Id.* at 64 (discussing research from 1993 and 2003).

35. Dr. Stuart Fischhoff, a professor at California State University, conducted one of the first studies analyzing the prejudicial impact of rap lyrics in a murder trial. Wilson, *supra* note 12, at 372–73. Fischhoff's research revealed “that potential jurors were ‘significantly inclined’” to react “more harshly and with more disdain” towards rap lyrics themselves than towards a nonrapper accused of murder; “[t]he moral of the study: The rap lyrics were more damning . . . than the actual charge of murder.” *Id.* at 373. Furthermore, Fischhoff did not find any notable correlation between the demographics of the participants and their evaluations. *Id.* at 66.

36. Dunbar, *supra* note 15, at 67–68. Participants analyzing rap, heavy metal, punk, and country

responded similarly to whether the lyrics demonstrated that the writer had knowledge about a shooting. This trend was also detected for inferences of intent and motive. Thus, it appears that participants were not certain that the lyrics spoke to intent, motive, or knowledge of a crime, and that this view was not moderated by the genre label ascribed to the lyrics.

Id.

37. *Id.* Younger participants “showed no effect for genre label, while participants in the older category evaluated rap significantly more negatively than those in the country condition.” *Id.* at 40–41.

has a propensity for wrongdoing.³⁸ The Federal Rules of Evidence seek to guard against such unfair, emotional conclusions.³⁹

Public authorities have responded in various ways to drill rap's association with violence. Chicago, the birthplace of drill,⁴⁰ has pressured concert venues to prevent drill performances in an effort to stifle the genre's increasing popularity.⁴¹ Law enforcement agencies throughout the United States proactively monitor social media accounts to initiate investigations based on creative work.⁴² The New York City mayor, Eric Adams, held a press conference after a shooting where he hastily advocated for a social media ban on drill music and similar entertainment—and then quickly backtracked.⁴³ After announcing multiple indictments against several well-known rappers, one prosecutor stated: “I have some legal advice: don't confess to crimes in rap lyrics if you do not want them used.”⁴⁴ At the same time, some prosecutors openly recognize the “conundrum” of relying on evidence that is creative and thus subjective, particularly when the evidence constitutes a significant portion of the government's case.⁴⁵

B. Judicial Developments

Instead of proposing bright-line rules for admission of a defendant's artistic evidence, many courts apply fact-specific analyses

38. See *id.*; FED. R. EVID. 404.

39. See FED. R. EVID. 102, 403, 404.

40. Rosen, *supra* note 29.

41. See Andre Gee, *How Drill Music Took Over Chicago—and Was Almost Forced Out*, COMPLEX (June 10, 2021), <https://www.complex.com/music/chicago-drill-music-rap-forced-out> [perma.cc/48UF-6UQQ].

42. E.g., Ben Feuerherd, *Rhyme and Punishment: Inside the NYPD's Secret Sprawling Rap Unit*, N.Y. POST (May 30, 2019), <https://nypost.com/2019/05/30/rhyme-and-punishment-inside-the-nypds-secret-sprawling-rap-unit/> [perma.cc/MDD9-FNQY].

43. See Simon Vozick-Levinson, *New York City Mayor Eric Adams Declares War on Drill Rap*, ROLLING STONE (Feb. 11, 2022), <https://www.rollingstone.com/music/music-news/mayor-eric-adams-drill-rap-1299108/> [perma.cc/4MW7-QQBA].

44. See Justin Ivey, *Fulton County D.A. Puts Atlanta Rappers On Notice*, ALLHIPHOP (Aug. 29, 2022), <https://allhiphop.com/news/fulton-county-d-a-puts-atlanta-rappers-on-notice/> [perma.cc/XRD3-EF2P] (reporting on the press conference by District Attorney Fani Willis of Fulton County, Georgia).

45. See Jaeah Lee, *This Rap Song Helped Sentence a 17-year-old to Prison for Life*, N.Y. TIMES (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html?smtyp=cur&smid=tw-nytimes> [perma.cc/2TPJ-TWMS] (“Deborah Gonzalez, the district attorney who covers Athens-Clarke County in Georgia, said rap lyrics present a conundrum for prosecutors whose job is to prove guilt. She cautions those in her office against relying on rap lyrics without context or other convincing evidence, but she also sees how they could be valuable.”).

based on principles of relevance and unfair prejudice.⁴⁶ In *State v. Skinner*, the New Jersey Supreme Court reversed a defendant's murder conviction on the grounds that the lower court's admission of defendant's "disturbing," violent rap lyrics lacked a focused reference to specific facts of the charges.⁴⁷ The trial court admitted the evidence as "insight into defendant's alleged motive and intent" despite lacking any assertion "that the violence-laden verses were in any way revealing of some specific factual connection that strongly tied [the] defendant to the underlying incident."⁴⁸ The appellate court aptly recognized, "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 his floorboards."⁴⁹ The court held:

Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts . . . are not properly evidential unless the writing reveals a *strong nexus* between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact.⁵⁰

The appellate court rejected the government's argument that the ubiquity of rap music and the trial court's limiting instruction sufficiently mitigated the risk of unfair prejudice.⁵¹ *Skinner* stands out from hundreds of cases at the time where courts admitted defendants' rap into evidence; before *Skinner*, in analyzing the evidence, few courts had recognized its "uniquely prejudicial nature."⁵²

Some courts have followed *Skinner*'s approach and require a "strong nexus" between a defendant's artistic expression and the contested facts of the case.⁵³ At the same time, the evidence at issue in *Skinner* should have been inadmissible merely based on its lack of

46. See *State v. Skinner*, 95 A.3d 236, 252 (N.J. 2014) ("Our sister jurisdictions rarely have admitted a defendant's rap lyric compositions into evidence without a demonstration of a strong nexus between the subject matter of the lyrics and the underlying crime.").

47. See *id.* at 253.

48. See *id.* at 238.

49. See *id.* at 251. One response is that Marley and Poe did not attempt to convince the public that their expressive work reflected reality. See *id.*; Wilson, *supra* note 12, at 357–58 ("We do not label DeNiro and Gandolfini killers. . . . But perhaps our refraining from doing so stems from the fact that [they never] went on record—as so many rappers do—with the claim that their works depicted their own real-life thoughts and actions.").

50. See *Skinner*, 95 A.3d at 238–39 (emphasis added).

51. See *id.* at 251–52.

52. See Walls, *supra* note 3, at 176, 181.

53. See *Skinner*, 95 A.3d at 238–39; see, e.g., *United States v. Sneed*, 2016 U.S. Dist. LEXIS 104905, at *15 (M.D. Tenn. Aug. 9, 2016) ("The Government's argument has a fatal flaw; rapping about selling drugs does not make it more likely that Defendant Sneed did, in fact, sell drugs.").

relevance—apart from its additional unfair prejudice—and therefore the lack of a “strong nexus” was obvious and arguably did not require any new principle.⁵⁴ Yet because the very concept of artwork entails ambiguity, not every case will be as clear as *Skinner*.

C. Legislative Developments

From 2021 to 2022, state legislators in California, New York, and New Jersey, as well as representatives in Congress, introduced bills in their respective jurisdictions to amend their respective rules of evidence regarding a defendant’s creative work.⁵⁵ None of the states entirely follow the Federal Rules of Evidence, but these state bills predate the federal proposal and contain unique provisions for consideration.⁵⁶

The California bill (A.B. 2799)⁵⁷ states in its purpose statement, “existing precedent allows artists’ creative expression to be admitted as evidence in criminal proceedings without a sufficiently robust inquiry into whether such evidence introduces bias or prejudice into the proceedings.”⁵⁸ The law requires California courts to give minimal weight to the evidence if admitted, given that “the probative value of such expression for its literal truth or as a truthful narrative is minimal” unless the government can demonstrate a strong nexus to the criminal charges.⁵⁹ The law also specifically allows courts to consider “any additional relevant evidence offered by either party” to rebut inferences of racial stereotyping, character, or other propensity concerns, and this includes expert testimony concerning the prejudicial effect of the creative expression.⁶⁰

The New York bill (NY S7527) renders a defendant’s artistic expression presumptively inadmissible unless the government can establish various factors beyond the admissibility standard of clear and convincing evidence.⁶¹ The bill further requires that a party offering a

54. See Toner, *supra* note 1, at 199; *Skinner*, 95 A.3d at 251–52.

55. See S. 7527 § 60.77(2), 2021-2022 Leg. Sess. (N.Y. 2021); Assemb. B. 2799, 2021-2022 Reg. Sess. (Cal. 2022); Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

56. See S. 7527; C.A. Assemb. B. 2799; H.R. 8531.

57. See Assemb. B. 2799. This bill was signed into law in September 2022. *AB 2799 Evidence: Admissibility of Creative Expressions*, CALIFORNIA LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2799 [perma.cc/LX5N-EYLQ] (Oct. 3, 2022).

58. See *id.*

59. See *id.* § 352.2(a).

60. See *id.* § 352.2(b).

61. See S. 7527 § 60.77(2), 2021-2022 Leg. Sess. (N.Y. 2021). This bill was introduced in November of 2021 and, as of January 2023, is still sitting in the state assembly. See generally N.Y.

defendant's creative expression into evidence must show that the defendant intended the expression to communicate a literal meaning.⁶² Since the New York bill does not specifically allow the court to admit expert testimony as California's law has done, a party to a New York case must show that any proffered expert has "gained general acceptance" among a recognized expert community.⁶³ Without an amendment to the New York bill to loosen this state standard, it is unclear whether New York courts would accept rap experts as members of a "generally accepted" expert community who could authoritatively opine on its unfairly prejudicial effects.⁶⁴

The New Jersey bill (AJR178) amends three of New Jersey's evidentiary rules: relevance, character, and hearsay.⁶⁵ Instead of altering the presumption of admissibility like the California and New York bills, however, New Jersey's bill would categorically exclude all evidence of a defendant's creative work "in audio or video format."⁶⁶ The bill claims that such evidence of creative expression is unfairly prejudicial and violates New Jersey's state Confrontation Clause; moreover, "musical expression is a form of free speech protected by the First Amendment and should not be admissible into evidence or used as impeachment evidence in any criminal" trial.⁶⁷

In July of 2022, one month after New Jersey assemblymen introduced their bill, US congressmen introduced H.R. 8531, the Restoring Artistic Protection (RAP) Act, which proposes proposed Rule

S7527; *Senate Bill S7527*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2021/s7527> [perma.cc/9QLC-NSZF] (last visited Jan. 8, 2023).

62. See S. 7527 § 60.77(2)(a).

63. See *id.*; Assemb. B. 2799 § 352.2(b). Neither New York nor California follows the Supreme Court precedent regarding expert testimony. 1 CALIFORNIA EVIDENCE COURTROOM MANUAL 2 (2022); 2 BENDER'S NEW YORK EVIDENCE § 139.02 (2022).

64. See 2 BENDER'S NEW YORK EVIDENCE § 139.02.

65. See Assemb. J. Res. 178 (N.J. 2022). This bill entered the state assembly in June of 2022; within several months it entered the state senate and then both chambers referred it to their respective judiciary committees. See S. J. Res. 178 (N.J. 2022).

66. *Id.*

67. *Id.* The New Jersey bill is named "J.B.'s Law" in reference to a defendant convicted of drug distribution and money laundering in federal court "based in part on evidence from his creative and artistic expressions, specifically music lyrics and rap videos." *Id.*; *United States v. Gamory*, 635 F.3d 480, 488 (11th Cir. 2011). In 2011, the US Court of Appeals for the Eleventh Circuit affirmed this defendant's conviction, holding that the district court plainly erred in admitting an irrelevant rap video into evidence but that the error was harmless "in light of . . . overwhelming evidence." *Id.* at 484. It is unclear why this New Jersey bill references this decade-old federal case; the only apparent connection is that the defendant unsuccessfully appealed his sentence in 2022 with representation from a law firm in Newark, New Jersey. See *United States v. Gamory*, 2022 U.S. App. LEXIS 28868, at *1 (11th Cir. Oct. 18, 2022).

416.⁶⁸ Like the New York bill, proposed Rule 416 establishes a categorical exclusion rule for a “defendant’s creative or artistic expression,” which the government may overcome by proving several factors by “clear and convincing evidence.”⁶⁹ Proposed Rule 416 states:

Rule 416. Limitation on admissibility of defendant’s creative or artistic expression.

(a) CREATIVE AND ARTISTIC EXPRESSIONS INADMISSIBLE.—Except as provided in subsection (b), evidence of a defendant’s creative or artistic expression, whether original or derivative, is not admissible against such defendant in a criminal case.

(b) EXCEPTION.—A court may admit evidence described in subsection (a) if the Government, in a hearing conducted outside the hearing of the jury, proves by clear and convincing evidence—

(1) (A) if the expression is original, that [sic] defendant intended a literal meaning, rather than figurative or fictional meaning; or

(B) if the expression is derivative, that the defendant intended to adopt the literal meaning of the expression as the defendant’s own thought or statement;

(2) that the creative expression refers to the specific facts of the crime alleged;

(3) that the expression is relevant to an issue of fact that is disputed; and

(4) that the expression has distinct probative value not provided by other admissible evidence.

(c) RULING ON THE RECORD.—In any hearing under subsection (b), the court shall make its ruling on the record, and shall include its findings of fact essential to its ruling.

(d) REDACTION AND LIMITING INSTRUCTIONS.—If the court admits any evidence described in subsection (a) pursuant to the exception under subsection (b), the court shall—

(1) ensure that the expression is redacted in a manner to limit the evidence presented to the jury to that which is specifically excepted under sub-section (b); and

(2) provide appropriate limiting instructions to the jury.

(e) DEFINITION.—In this section, the term ‘creative or artistic expression’ means the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements or symbols, including music,

68. See Assemb. J. Res. 178; Press Release, *supra* note 4. The House referred the proposal to the Judiciary Committee, which subsequently referred it to the House Subcommittee on Crime, Terrorism, and Homeland Security. See *H.R. 8531—Restoring Artistic Protection Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/8531/all-actions> [perma.cc/R4FD-D6LB] (last visited Jan. 8, 2023).

69. See *Restoring Artistic Protection Act of 2022*, H.R. 8531 (proposed FED. R. EVID. 416); S. 7527, 2021-2022 Leg. Sess. (N.Y. 2021). Proposed Rule 416 uses the word “evidence” in two different ways: (1) the admission of certain statements into the evidence that comprises the record at trial, as well as (2) the burden for admissibility which the government must meet through enumerated factors, known as the standard of “clear and convincing evidence.” H.R. 8531.

dance, performance art, visual art, poetry, literature, film, and other such objects or media.⁷⁰

In a press release for this bill, Representative Johnson, citing support from artist coalitions and recording labels, warned that “without further Congressional action, the freedom of speech and of artistic expression present in music will continue to be stifled, and that expression will be chilled.”⁷¹ Representative Johnson further stated that the proposed rule in this bill would ensure “that our evidentiary standards protect the First Amendment right to freedom of expression” and provide the necessary “safeguards” to make the freedom of expression “a reality for all artists in America.”⁷²

II. EVIDENTIARY BACKGROUND

A. Logistics of Amending the Rules of Evidence

The proposal for proposed Rule 416 must pass through the established rulemaking process to become law.⁷³ Although proposed Rule 416 originated in Congress pursuant to congressional rulemaking authority, it is more common for new evidentiary rules to originate in the judicial branch.⁷⁴ Congress “implicitly recognize[d] that Congress is not the optimal venue for developing highly specialized evidentiary provisions”⁷⁵ and delegated legislative power to the US Supreme Court through the Rules Enabling Act⁷⁶ to “prescribe rules for the conduct of

70. H.R. 8531 § 2 (proposed FED. R. EVID. 416). Aside from several insignificant changes, proposed Rule 416’s definition of “creative or artistic expression” mirrors the definitions in the proposed state bills. *Compare id.*, with Assemb. J. Res. 178, S. 7527, and Assemb. B. 2799.

71. See Press Release, *supra* note 4.

72. *Id.*

73. See *Constitutional Authority Statement for H. R. 8531—Restoring Artistic Protection Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/8531/all-actions> [perma.cc/R4FD-D6LB] (last visited Dec. 21, 2022) (citing to the Necessary and Proper clause of the Constitution). There is currently no publicly pending Advisory Committee activity—or any additional legislative action—as of this writing regarding proposed Rule 416. See *Pending Rules and Forms Amendments*, UNITED STATES COURTS, <https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> [perma.cc/BSU2-PGR6] (last visited Jan. 8, 2023).

74. See H.R. 8531 (proposed FED. R. EVID. 416); Aviva A. Orenstein & Edward R. Becker, *The Federal Rules of Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 859 (1992) (as of 1992, Congress had introduced legislation establishing three of the six substantive amendments to the Federal Rules of Evidence).

75. See Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1904 (2019).

76. 28 U.S.C. §§ 2071 to 2077.

their business” with the assistance of committees.⁷⁷ Notwithstanding the Supreme Court’s committee expertise, Congress retained concurrent rulemaking authority to promulgate or amend Federal Rules.⁷⁸

Unfortunately, rules promulgated “by Congress have tended to be . . . political responses to specific incidents,” enacted with less analytical consideration than rules originating with the Supreme Court’s process.⁷⁹ Drafting specific rules to address an immediate problem may seem like a quick fix at the time, but the rulemaking process is “ill-suited to the task of chasing a moving target, and any attempt to codify constitutional doctrine with specificity runs the risk that further amendments will be necessary.”⁸⁰ Therefore, rules may require amendments when judicial application conflicts with the Constitution, when lower courts create significant confusion with disparate interpretations of a rule, or when “tectonic shifts in technology, trial practice, or society render rules obsolete.”⁸¹ The history of Federal Rule of Evidence 412 demonstrates the need for amendments when Congress acts hastily in response to social change.

B. Lessons from Rape Shield

The existing Rules prohibit the admission of evidence when the unfair prejudice that would result from its admission outweighs its probative value, with few exceptions.⁸² Although courts can misjudge the potential for unfair prejudice in any type of case, certain cases present heightened risk of unfair prejudice. The goal of the Rules is to deliver consistent and fair outcomes across the whole spectrum of cases,⁸³ and one way to guard against such heightened risk of unfair

77. *Overview for the Bench, Bar, and Public*, UNITED STATES COURTS, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [perma.cc/U9RH-27GD] (last visited Nov. 15, 2022).

78. *See* Capra & Richter, *supra* note 75, at 1902.

79. *See id.* at 1905; Victor Gold, *The Three Commandments of Amending the Federal Rules of Evidence*, 85 FORDHAM L. REV. 1615, 1616–17 (2017) (comparing Federal Rule of Evidence 413(b), a congressionally-enacted rule regarding evidence of prior molestation, which requires fifteen days of notice, with the rest of the Rules, which require notice in multiples of seven days).

80. *See* Capra & Richter, *supra* note 75 at 1879–81, 1901; *see also* Gold, *supra* note 79, at 1616–17 (explaining the history of Federal Rule of Evidence 807, the Residual exception to the hearsay rules in Federal Rules of Evidence 803 and 804).

81. Capra & Richter, *supra* note 75, at 1879–80, 1901.

82. *See* FED. R. EVID. 403.

83. *See id.*; Michael H. Graham, “Rape Shield” Statutes: Overview; *Fed. R. Evid. 412; Mode of Dress, Statements of Sexual Nature or Intention*, 48 CRIM. LAW BULL. 1378 (2012) (federal cases rarely involve sexual crimes).

prejudice is with specialized rules.⁸⁴ Rule 412 is such a rule, as it specifically governs the admission of a victim's sexual history in sex offense cases.⁸⁵

Sexual assault trials present a heightened risk of unfair evidentiary prejudice, as well as other social harm, from the defendant's proffers of the victim's sexual history.⁸⁶ Prior to Rule 412, defendants charged with rape could introduce evidence of a victim's prior sexual conduct on the basis that the victim's chastity or promiscuity could be relevant to whether the victim had consented to the conduct at issue.⁸⁷ This created adverse social effects: victim reporting decreased, even as instances of rape increased, because victims did not want to endure "victim-on-trial" cross-examinations about their sexual history.⁸⁸

To protect sexual assault victims, in 1978 Congress enacted Rule 412, known as the rape shield.⁸⁹ Constituencies pressured Congress to enact rape shield legislation: feminist groups sought ideological reform of cultural myths and law enforcement agencies sought systemic improvement of crime reporting.⁹⁰ Rule 412 thus "responded directly to changing societal consciousness regarding sexual assault."⁹¹

84. See Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 791–92 (1986); Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 880 (2011).

85. See Hines, *supra* note 84, at 884–85.

86. See *id.* at 883–84.

87. Galvin, *supra* note 84, at 765, 791–92.

88. *Id.* at 800–01 ("Admitting such evidence creates not only the danger that the jury will penalize the victim for her past behavior and acquit the defendant on a "she got what she deserved" basis, but also the possibility that the victim will be humiliated by the public airing of the most intimate details of her personal life, thus deterring future victims from reporting rapes to the authorities.").

89. FED. R. EVID. 412 advisory committee's note to 1994 amendment ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.").

90. Galvin, *supra* note 84, at 767.

91. Capra & Richter, *supra* note 75, at 1898, n.101 (citing 124 CONG. REC. 34,913 (1978); FED. R. EVID. 412 advisory committee's note to 1994 amendment) (statement of Rep. Holtzman) ("Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. . . [So] it is not surprising that it is the least reported crime."). *But see* David P. Leonard, *Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 322–40 (1995) (arguing that common law assumptions about promiscuity were "on the wane long before the rape shield rules," and that unlike Rules 412 to 415, "the rape shield rules harmonize well established evidence doctrine" regarding the inadmissibility of character evidence; the most pronounced way in which Rule 412 violated established law was the way in which it "single[d] out a particular type of evidence for exclusion.").

Rule 412 operates differently for criminal and civil cases. For criminal cases, Rule 412 provides a categorical rule of exclusion for character evidence relating to a victim's sexual behavior.⁹² The rule excludes such evidence except in three instances: when "exclusion would violate the defendant's constitutional rights,"⁹³ when the evidence is relevant to prove the defendant's identity, and when the evidence would reveal a prior consensual relationship with the defendant.⁹⁴ Absent such exclusion, evidence of a victim's sexual behavior would only show "sexual predisposition," which is analogous to inadmissible propensity evidence.⁹⁵ Unlike other rules of evidence, categorical rules—such as Rule 412—exclude evidence that does not fall under an enumerated exception, regardless of the purpose for introduction.⁹⁶

For civil cases, Rule 412 imposes a balancing test.⁹⁷ Rule 412(b)(2) only permits evidence of a victim's sexual history if its probative value "substantially outweighs" the risk of unfair prejudice to the victim.⁹⁸ This rule embodies a subtle but meaningful reversal of the starting point for the balancing test, from the standard presumptive *admissibility* of evidence unless outweighed by the risk of unfair prejudice (defined in Federal Rule of Evidence 403) to the presumptive *inadmissibility* unless the risk of harm is outweighed by probative value: this test is known as "reverse 403."⁹⁹

92. See Richard A. Nagareda, *Article: Reconceiving The Right To Present Witnesses*, 97 MICH. L. REV. 1063, 1108 (1999) ("[T]he current law of evidence consists of a mixture of 'rules' and 'standards.' . . . '[R]ules' . . . dictate the exclusion of particular types of evidence . . . on a categorical basis. Once one is within the category described, the evidence is excluded." In contrast, "standards' . . . merely inform, but do not dictate, the trial court's determination of admissibility."); Galvin, *supra* note 84, at 810 (Rule 412 "stands alone in Article IV" of the Rules).

93. FED. R. EVID. 412(b)(1)(C). However, some claim that this constitutional "provision is mere tautology." *Public Hearing on Rule 412: Hearing on Fed. R. Evid. 412 Before the Advisory Committee on the Federal Rules of Evidence* (1993) (statement of Danielle Ben-Jehuda, NOW Legal Defense & Education Fund), available at https://www.uscourts.gov/sites/default/files/fr_report/EV05-1993-min.pdf [perma.cc/C8YY-9L4H]; see FED. R. EVID. 402 (unconstitutional evidence is inadmissible).

94. FED. R. EVID. 412(b)(1)(A)–(B).

95. *Id.* at 412(a)(2). A victim's past promiscuity fails to illuminate the facts in dispute and is therefore irrelevant. See Capra & Richter, *supra* note 75, at 1897–98.

96. See FED. R. EVID. 412; Nagareda, *supra* note 92.

97. Hines, *supra* note 84, at 884–85; FED. R. EVID. 412 advisory committee's note to 1994 amendment ("The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief.").

98. FED. R. EVID. 412(b)(2).

99. Graham, *supra* note 83.

Given the reputational concerns for rape victims, Rule 412(b)(2) recognizes the “danger of harm to the victim” as something that can outweigh the probative value of the evidence and thus render it inadmissible.¹⁰⁰ Congress specified this separate standard for civil cases “in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.”¹⁰¹ This reverse 403 shift for civil rape cases provides a useful model for minimizing unfair prejudice from creative expression potentially admitted into evidence under proposed Rule 416, as discussed below in Part III.¹⁰²

Congress has amended Rule 412 several times after input from the judicial committee;¹⁰³ yet despite significant changes, many criticized the rule as deficient:

Everything considered, including the fact that a sexual offense as a federal crime is relatively rare, the reason . . . seems more an attempt to influence state legislatures and courts than to govern the admissibility of evidence in federal trials. . . . The fact that [Rule] 412 was drafted by Congress without the assistance of a proposal originating with an Advisory Committee probably has a lot to do with the deficiencies exhibited.¹⁰⁴

One criticism is that Rule 412’s categorical exclusions prevent criminal courts from considering other purposes for admitting the evidence.¹⁰⁵ For example, various state rape shield statutes include options for criminal courts to admit evidence of a victim’s prior sexual history for purposes of impeachment,¹⁰⁶ motive to make a false complaint, or other evidence challenging the allegations, such as age-inappropriate sexual knowledge by a minor or physical evidence from prior abuse.¹⁰⁷ Nevertheless, after Rule 412, the number of states

100. *Id.*

101. *Id.* (citing FED. R. EVID. 412 advisory committee’s note to the 1994 amendment).

102. *See infra* Part III.

103. *See* FED. R. EVID. 412 advisory committee’s notes.

104. Graham, *supra* note 83.

105. *See* Galvin, *supra* note 84, at 875 (discussing the feasibility of categorical rape shield statutes and advocating instead for purpose-based standards, especially since many courts apply the rules as standards anyway: “In most instances, the courts have reached the correct results, but only by ignoring the clear language of the statute and divining the underlying legislative purpose”).

106. Presumably other Rules still apply and permit impeachment of witnesses, but regardless, impeachment is a significant purpose that arguably should have been included in Rule 412. *See* FED. R. EVID. 607, 608.

107. FED. R. EVID. 412 advisory committee’s note to the 1994 amendment. This evidence permitted in various states would not be admissible under the 412(b) exceptions because it does not challenge the defendant’s identity or the victim’s consent but challenges the charges themselves.

with criminal rape shield laws increased by almost half and most now also have civil rape shield laws.¹⁰⁸

III. PROPOSED RULE 416

A. Analysis

Although proposed Rule 416 protects artistic defendants and Rule 412 protects sexual assault victims, both rules operate by excluding evidence unless the proffering party can demonstrate specific criteria.¹⁰⁹ Additionally, although obviously one rule pertains to victims and one to defendants, the two rules share similar social background and motivations.¹¹⁰ Under proposed Rule 416, the government must show that the defendant intended a literal meaning in the artwork in question and that the creative expression is uniquely probative and relates specifically to elements of the charges.¹¹¹ Despite the rules' similar method of operation, there are significant differences: while a defendant's artwork can offer significant probative value without conforming to the rule's factors, a victim's sexual history rarely has such probative weight.¹¹² Therefore, proposed Rule 416 should not categorically exclude evidence of a defendant's artwork the way that Rule 412 excludes victim history.¹¹³ As currently drafted, proposed Rule 416's exclusion overly restricts judicial discretion, even to the point of harming defendants.¹¹⁴

In an effort to promote coherence in the law and fairness for defendants, some scholars have proposed rap shield legislation that would a priori completely exclude a defendant's artistic content from admission as evidence in criminal trials.¹¹⁵ Some scholars and courts

108. Hines, *supra* note 84, at 880; Galvin, *supra* note 84, at 808 (more than twenty-five states had rape shield laws by 1976 and forty-eight states by 1986).

109. See H.R. 8531 § 2 (proposed FED. R. EVID. 416); FED. R. EVID. 412.

110. See H.R. 8531 § 2 (proposed FED. R. EVID. 416); FED. R. EVID. 412.

111. H.R. 8531 § 2 (proposed FED. R. EVID. 416).

112. See *id.*; FED. R. EVID. 412.

113. *Id.*

114. See H.R. 8531 § 2 (proposed FED. R. EVID. 416); see Limiting Instructions discussion *infra* notes 155–60 and accompanying text.

115. See Reyna Araibi, "Every Rhyme I Write": Rap Music As Evidence in Criminal Trials, 62 ARIZ. L. REV. 805, 837 (2020). The term rap shield, as first used, represented a total exclusionary rule for all rap music, but ironically proposed Rule 416—which is the focus of this Note and also carries a rap shield title—is more similar to Rule 412, commonly known as rape shield, which contains multiple exceptions to its presumption against admissibility. See *id.* ("Perhaps the most controversial solution is a complete ban on the use of rap music in criminal proceedings. Known as 'rap shield rules,' these legislative measures would prohibit rap lyrics and rap videos from being used as evidence. The proponents of 'rap shield rules' say they recognize the proposal is radical,

have argued that a mere presumption of inadmissibility would not sufficiently protect defendants whose artistic works draw heavily on “embellishment and fictional elements” in addition to “real world experience,” and that artists “take creative liberties that blur the line between fact and fiction. . . . Thus, the introduction of artistic expression as a party admission will often not further the end of ascertaining the truth.”¹¹⁶

The presence of artistic embellishment, however, does not preclude the presence of fact, and consequently a total ban on any artistic content produced by the defendant, without exceptions, would arguably contravene the purpose of the Rules, cited in Federal Rule of Evidence 102, which requires courts “to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination.”¹¹⁷ Proposed Rule 416 thus does not exclude all creative expression but significantly limits its admissibility by requiring the government to demonstrate certain factors, including that the defendant intended the expressive content literally either through the defendant’s direct creation or through the adoption of another’s literal assertion.¹¹⁸

Requiring a literal meaning for admissibility places a higher burden on the government to admit the creative expression than the Rules currently require under the low threshold standard of Federal Rule of Evidence 401.¹¹⁹ Under proposed Rule 416, if a defendant’s work is purely expressive or does not demonstrate “that the defendant intended to adopt the literal meaning of the expression as the

but they ‘don’t believe that the criminal justice system has the tools or willingness to set reasonable boundaries.’”).

116. *Bey-Cousin v. Powell*, 570 F. Supp. 3d 251, 255 (E.D.P.A. 2021) (stating that expressive work should be presumptively inadmissible).

117. *See Toner, supra* note 1, at 405–06; FED. R. EVID. 102. *Contra Bey-Cousin*, 570 F. Supp. 3d at 255.

118. H.R. 8531 § 2 (proposed FED. R. EVID. 416(b)(1) (defining derivative expression as when “the defendant intended to adopt the literal meaning of the expression as the defendant’s own thought or statement...”). Proposed Rule 416’s description of derivative meaning evokes the Opposing Party’s Statement hearsay exclusion. *See* FED. R. EVID. 801(d)(2) (“The statement . . . (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true...”).

119. FED. R. EVID 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”); FED. R. EVID 402 (“Irrelevant evidence is not admissible.”); *United States v. Whittington*, 455 F.3d 736, 738–39 (6th Cir. 2006) (holding that the evidence introduced by the prosecution was sufficiently relevant under Rule 401) (“The standard for relevancy under FRE 401 is ‘extremely liberal;’ prosecutors may ‘build an incremental case,’ and “even if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has the slightest probative worth.”).

defendant's own thought or statement," then the court would have to exclude the work even if it otherwise would meet the relevancy requirements of Rule 401.¹²⁰ Accordingly, under proposed Rule 416, a court would exclude evidence of a defendant's nonliteral, figurative work that another individual had misinterpreted as a literal threat.¹²¹

Because proposed Rule 416 defines creative work so broadly, any minute element of "expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements or symbols" would constitute expressive work.¹²² With such a rule, a defendant could insulate a confession from admissibility by rhyming it, by recording a video with the use of artistic filters, or even by claiming that they only confessed for dramatic effect and never intended it literally.¹²³ In all such instances, under proposed Rule 416, the trial court would first determine whether the defendant had intended the content literally before permitting the jury to consider it; proposed Rule 416 would therefore expand the role of the court and diminish the factfinding role of the jury.¹²⁴

In addition to requiring that proffered artistic expression be literal, proposed Rule 416 would also require that the expression be "relevant to an issue of fact that is disputed" and "refer to the specific acts of the crime alleged."¹²⁵ This requirement for laser-like focus on the specific alleged acts would be much more particular than Rule 401's broad standard for relevance or even *Skinner's* "strong nexus"

120. H.R. 8531 § 2 (proposed FED. R. EVID. 416 (b)(1), 416(b)(3)); FED. R. EVID. 401.

121. *Cf. Elonis v. United States*, 575 US 723, 740 (2015) (reversing defendant's conviction for threats he rapped on social media and remanding the case to determine whether the threat statute contained a *mens rea* requirement).

122. H.R. 8531 § 2 (proposed FED. R. EVID. 416(e)).

123. Several individuals charged with storming the US Capitol have created videos of their exploits; one individual "rapped about his riot experience to the tune of Shaggy's 'It Wasn't Me.'" Michael Kunzelman, *Man charged with storming Capitol made rap videos about riot*, ASSOC. PRESS (Jan. 13, 2022), <https://www.billboard.com/music/rb-hip-hop/south-dakota-man-charged-capitol-riot-rap-videos-1235019121/> [perma.cc/XRJ2-6267].

124. See THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY § 1.2 (3d ed. 2002) ("In one sense, the division of powers between judge and jury is a function of the traditional fact/law distinction." But "jurors are laypersons who might not understand or sympathize with the complex exclusionary principles of evidence law. . . . Thus, the very task the jurors are required to perform makes at least some of them singularly unsuited to uphold the policies of evidence rules . . . As a result . . . the trial judge has the key responsibility of making evidentiary rulings that ensure both that the jurors hear admissible evidence and that they be shielded from inadmissible evidence."); Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 U.S. 1077, 1078–83 (2013) (arguing that under a textualist view of the Sixth and Seventh Amendments, it is unconstitutional to exclude relevant evidence even if prejudicial because the jury, not the judge, is the factfinder).

125. Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

requirement.¹²⁶ Instead, proposed Rule 416's requirements for literal intent and tight nexus to elements of the charges would preclude the government from introducing a defendant's creative expression for a variety of otherwise permissible reasons.¹²⁷

Prosecutors, for example, would not be able to introduce a defendant's nonliteral artwork along with an art therapist's testimony as evidence of the "defendant's state of mind at the time he or she committed the crime, to determine the potential for rehabilitation, and perhaps even to reveal patterns that offer insight into the impetus having committed such an act."¹²⁸ Nor could prosecutors introduce video evidence of a defendant displaying and dismantling realistic-looking prop firearms to contradict a defendant's claim of lacking any knowledge of firearms.¹²⁹

Similarly, although creative artwork relevant to a defendant's membership in a criminal organization (e.g., tattoos of insignia or photographs depicting gang signs) may illustrate motive, identity, or other facts supporting the government's case, these would be inadmissible under proposed Rule 416 unless the defendant's membership was an element of the offense, which is rare except in prosecutions under the expansive Racketeer Influenced and Corrupt Organization Act (RICO).¹³⁰ Absent RICO charges, which are often challenging and resource heavy for the government, proposed Rule 416 would place an arduous burden on the government when prosecuting

126. See FED. R. EVID 401; *State v. Skinner*, 95 A.3d 236, 238–39 (N.J. 2014).

127. H.R. 8531. Another individual charged with storming the US Capitol "included video clips of the riot" in his music video. If his performance or lyrics in the video demonstrated any creativity, then proposed Rule 416 would apply and the government would only be able to introduce the video as evidence of the crime itself and not of the defendant's opportunity, knowledge, etc. See Kunzelman, *supra* note 122; see, e.g., *United States v. Herron*, 2014 U.S. Dist. LEXIS 63872, at *4 (E.D.N.Y. May 8, 2014) (denying defendant's motion to preclude the prosecution from introducing defendant's rap videos "for various purposes: to establish the . . . enterprise; the defendant's role as leader of the enterprise; the relationships of trust among the defendant and his co-conspirators . . . the defendant's unlawful possession and use of firearms; and specific crimes committed by the defendant to further the goals of the enterprise and to maintain his position as its leader").

128. See DAVID E. GUSSAK, ART ON TRIAL: ART THERAPY IN CAPITAL MURDER CASES 15 (2012).

129. See, e.g., Rich Hill Ent, *RH Billz x Ant Balla x Baby Balla—Makk Talk (Shot by CHD)*, YOUTUBE (Apr. 4, 2021), <https://www.youtube.com/watch?v=2d-ARWPNV-Y> [perma.cc/FK7C-ZKGF] (music video with opening disclaimer about the use of props); *Herron*, 2014 U.S. Dist. LEXIS 63872, at *4.

130. See 18 U.S.C. § 1962(c) (1984). States have their own versions of this federal crime and may use their charge more often, but this Note focuses on federal cases. Gang membership itself, apart from criminal activity, is not illegal. See *Chicago v. Morales*, 527 U.S. 41 (1999) (holding that a municipal ordinance was unconstitutionally vague when it prohibited suspected gang members from loitering).

gangs, given their existing—and consequently increasing—reliance on creative expression.¹³¹

Proposed Rule 416 would additionally exclude evidence that the government can currently proffer under Federal Rule of Evidence 404's character evidence rule.¹³² Rule 404 provides, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."¹³³ Character evidence is doubly objectionable: it carries low probative value as well as high risk of unfairly prejudicing the jury.¹³⁴ Rule 404 excludes evidence when offered to prove propensity for bad character but permits it for proper purposes, such as establishing motive, knowledge, etc., or "when character is an operative issue of a claim or defense."¹³⁵ Unlike Rule 412's categorical rule, Rule 404's purpose-based rule permits the government to proffer evidence as long as the main purpose for its admission is not propensity.¹³⁶

Artwork, however, is often impossible to dissociate from a reflection of the artist's character, so even artwork offered for a proper purpose may influence the jury subconsciously as tending to show

131. See *supra* Section I.A; see, e.g., *United States v. Graham*, 293 F. Supp. 3d 732, 734–41 (E.D.M.I. 2017) (admitting defendants' rap videos into evidence when defendants allegedly used YouTube to brag about the criminal activities of their street gang, located within the Michigan zip code 48205, which they referenced to on video as "4-8-2-0-Die."); *Four Members of the Seven Mile Bloods Street Gang Convicted of Racketeering and Other Related Offenses*, UNITED STATES DEP'T OF JUST. (Aug. 27, 2018), <https://www.justice.gov/opa/pr/four-members-seven-mile-bloods-street-gang-convicted-racketeering-and-other-related-offenses> [perma.cc/LAQ8-YKKT] (press release for the conviction at trial for *Graham*).

132. See Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

133. FED. R. EVID. 404.

134. Leonard, *supra* note 91, at 311 ("Simply put, so-called character 'traits' are extremely weak predictors of conduct. . . . [C]haracter evidence—even specific instances of conduct unless they were nearly identical to the one at issue in the case—is of very low probative value. The problem, however, is that, psychological learning to the contrary notwithstanding, character evidence carries a very high intuitive value. This high intuitive quality raises the distinct possibility that the jury will greatly overvalue character evidence as a predictor of conduct, and make an inaccurate assessment of the facts. As a result, character evidence risks destroying the truth-determination function of the trial, a very high cost for evidence of low probative value.").

135. FED. R. EVID. 404 committee's notes to proposed rules. Some argue that prosecutors only use artistic evidence as proof of other purposes if the defendant created the artwork prior to the crime. NIELSON & DENNIS, *supra* note 22, at 14 ("[It] cannot be an after-the-fact-confession . . . prosecutors instead argue that the lyrics are evidence of . . . motive.").

136. FED. R. EVID. 404. Almost all the Federal Courts of Appeals replace Rule 404's propensity prohibition with erroneous multifactor tests and "fictitious 'exceptions' to Rule 404(b)," based on misinterpreted dicta from *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988); Dora W. Klein, *A (Mis)application of Rule 404(b) Heuristics*, 71 U. MIAMI L. REV. 706, 710–13 (2018). The purposes referenced in 404(b)—knowledge, motive, etc.—are *examples* of proper purposes for admission of character evidence, not exceptions that the evidence must satisfy. *Id.* at 685.

character, and thus propensity.¹³⁷ While many types of character evidence also risk inflaming the jury emotionally, artwork is, by nature, especially powerful.¹³⁸ As a result, some rap shield advocates argue that Rule 404 fails to protect artistic defendants from the risk of unfair prejudice inherent in nonliteral, expressive content.¹³⁹ Proposed Rule 416 attempts to address this arguable deficiency in Rule 404 with its specific relevance rule so that the government would only be able to proffer evidence to prove specific elements of the charges, not for the other purposes listed by Rule 404 such as motive, intent, etc.¹⁴⁰

Proposed Rule 416 would operate the same way as Rule 412 (rape shield) in criminal trials: both rules prevent courts from conducting a Rule 403 balancing test for evidence unless the evidence meets specific criteria.¹⁴¹ Rule 403 permits courts to “exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁴² Proposed Rule 416 makes no mention of this, but presumably courts could still use Rule 403 to exclude artwork that passes proposed Rule 416’s admissibility requirements; defendants should always attempt to argue that the evidence is unfairly prejudicial and therefore inadmissible.¹⁴³ Courts

137. See, e.g., Lee, *supra* note 45.

138. See Wilson, *supra* note 12, at 174.

139. Walls, *supra* note 3, at 173. See, e.g., NIELSON & DENNIS, *supra* note 22, at 75–78 (discussing Commonwealth v. Sequoyah Native Hawkins, No. 1184 MDA 2012, 2014 Pa. Super. Unpub. LEXIS 2169 (Feb. 7, 2014), where the appellate court affirmed defendant’s voluntary manslaughter conviction holding that the trial court’s admission of defendant’s video performance of violent lyrics was not error when introduced as character evidence to rebut defendant’s reputation for peacefulness, which defendant had placed at issue).

140. Compare Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022), with FED. R. EVID 404.

141. See FED. R. EVID 403; FED. R. EVID 412(a), 412(b)(1); H.R. 8531. The Rule 403 balancing test only excludes evidence that is *unfairly* prejudicial. See FED. R. EVID. 403. All probative evidence tending to show that a defendant committed a crime is “inherently prejudicial” because it is, by definition, disadvantageous to the defendant’s defense. See 2 J. WEINSTEIN, M. BERGER, & J. MCLAUGHLIN, WEINSTEIN’S FEDERAL EVIDENCE § 403.04[1]. In contrast, “[u]nfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.” United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993).

142. FED. R. EVID 403. “Courts have characterized [Rule] 403 as an extraordinary remedy to be used sparingly.” United States v. Meester, 762 F.2d 867, 875 (11th Cir. 1985) (collecting cases). Nevertheless, courts often exclude evidence under Rule 403, and some scholars have argued that the 403 balancing test unconstitutionally obstructs the jury’s role as factfinder since judges exclude evidence more frequently during jury trials than during bench trials. Klein, *supra* note 123.

143. FED. R. EVID. 403; H.R. 8531 § 2 (proposed FED. R. EVID. 416).

have struggled to apply Rule 403 to rules that do not explicitly replace or remove this balancing test; some scholars argue that the Rule 403 balancing test applies to all Rules, but regardless, this seeming oversight is likely to cause confusion.¹⁴⁴

Another aspect of proposed Rule 416(b)(4) is that it would diminish the court's ability to evaluate cumulative evidence.¹⁴⁵ Under Rule 403, a court may assess proffered evidence in relation with other factors, and "one factor in balancing unfair prejudice against probative value under Rule 403 is the availability of other means of proof."¹⁴⁶ If the proffered evidence does not carry distinct probative value, whether because it is cumulative—and therefore adds no probative value to the other evidence—or because it only adds unfair prejudice, then Rule 403 already excludes it.¹⁴⁷ In contrast with the broad consideration of various factors under Rule 403, under proposed Rule 416 the court would simply ask if the proffered evidence carries "distinct probative value not offered by other admissible evidence."¹⁴⁸ In effect, both rules eliminate cumulative evidence, but proposed Rule 416 would eliminate the measure of the court's judicial discretion in the analysis of potentially cumulative evidence, as it would prevent the court from considering the proffered evidence in the greater context of the government's case.¹⁴⁹

Proposed Rule 416 would also change the conventional admissibility standard by requiring the government to prove the existence of factors beyond a clear and convincing admissibility standard.¹⁵⁰ Several other specialized Rules carry their own distinct standards, but the authoritative default is the preponderance

144. See Aviva A. Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1491–92, 1512–13 (2005) ("Rule 403's centrality to evidence law derives from the fact that it modifies almost every rule, with the exception of Rule 609(a)(2), and it epitomizes the trial judge's vast discretion in admitting or excluding evidence, a hallmark of our judicial system.").

145. Compare H.R. 8531, with FED. R. EVID. 403.

146. *United States v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996); see H.R. 8531; Walls, *supra* note 3, at 195 (recommending exclusion for rap lyrics when introduced "for the same purpose" as other, admitted evidence).

147. See FED. R. EVID. 403.

148. H.R. 8531.

149. Leonard, *supra* note 91, at 340 (discussing the uncertainty of judicial discretion for excluding evidence under Rules 413 to 415) ("It is difficult to imagine . . . that Congress intended to turn the trial judge into a kind of administrative clerk rather than a person whose job is to exercise careful judgment in the context of each situation.").

150. H.R. 8531.

standard.¹⁵¹ While many scholars and judges hope to raise the current preponderance standard, particularly for character evidence, increasing this standard only for artistic evidence would not advance that goal.¹⁵² Instead, proposed Rule 416 would convey that a defendant's expressive work merits stronger protection than a defendant's prior felony convictions.¹⁵³ Statistically, a changed proof standard may have little effect, but the change would obscure already-murky evidentiary waters.¹⁵⁴

Once a court determines that evidence is admissible, courts may use limiting instructions under Federal Rule of Evidence 105 to limit unduly prejudicial content.¹⁵⁵ Sometimes courts redact portions of evidence, such as hearsay statements within a video, before admitting the content into evidence.¹⁵⁶ After a jury has seen the evidence, courts may provide cautionary or curative instructions if the defendant requests it.¹⁵⁷ Limiting instructions, however, are "double-edged": they command the jury to reconsider something they have seen or heard and are highly conspicuous, as is the evidence they refer to.¹⁵⁸ Therefore, defendants often avoid requesting limiting instructions since a jury that may have not noticed or disregarded problematic evidence would likely remember it after the judge calls their attention to it.¹⁵⁹ However, proposed Rule 416 would take away the defendant's discretion to request such an instruction by requiring that if courts have admitted

151. See FED. R. EVID 609; 3 FEDERAL EVIDENCE PRACTICE GUIDE § 13.07(3) (2022); FED. R. EVID 804 advisory committee's note to 1997 amendment (adopting the "usual Rule 104(a) preponderance of the evidence standard").

152. But see Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) To Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 825 n. 287.

153. Compare FED. R. EVID 609(a)(1)(B) (balancing test for a defendant's prior felony convictions is in between 403 and reverse 403, although such convictions are only admissible for impeachment purposes), with Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022) (balancing test for a defendant's artistic work is clear and convincing evidence).

154. See 2 COURTROOM CRIMINAL EVIDENCE § 2916 (2022) (proof of clear and convincing evidence "requires a high degree of probability" compared with a preponderance of the evidence).

155. See FED. R. EVID. 105 ("[T]he court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."); *United States v. Rembert*, 851 F.3d 836, 836–40 (8th Cir. 2017) (affirming the defendant's conviction when the district court provided a limiting instruction, even though "the government *could* have isolated images" from the defendant's Facebook video displaying vulgar language and "possibly, in hindsight, the playing of the entire video was surplusage").

156. See e.g., *United States v. Herron*, 2014 U.S. Dist. LEXIS 63872, at *13–14 (E.D.N.Y. 2014) (permitting admission of short excerpts of lyrics instead of eight entire music videos).

157. See FED. R. EVID. 105; 2 COURTROOM CRIMINAL EVIDENCE, *supra* note 152, § 102.

158. Dora W. Klein, "Obviate!": *Addressing Magical Thinking About Limiting Instructions And Character Evidence*, 82 U. PITT. L. REV. 135, 149–50 (2020).

159. See *id.*

any evidentiary material pursuant to its exceptions, they “shall . . . provide appropriate limiting instructions to the jury.”¹⁶⁰ Proposed Rule 416 clearly intends to help defendants, but in these circumstances, it could backfire.

B. Constitutional Concerns

Courts do not violate the First Amendment by admitting defendants’ artwork into evidence, but the allegation that they do is serious and merits a brief analysis.¹⁶¹ The First Amendment protects preeminent freedoms—particularly minority views and unpopular opinions—and freedom of political criticism is the bedrock of democracy.¹⁶² However, these protections do not extend to threats¹⁶³ or alleged criminal activity;¹⁶⁴ the enforcement of criminal law is essential for a functioning society. Proposed Rule 416 does not criminalize the content itself, but only applies to its treatment within a courtroom.¹⁶⁵ Moreover, proposed Rule 416 would not prevent the government from proffering evidence of a defendant’s noncreative speech or other conduct that the First Amendment protects.¹⁶⁶ A defendant’s freedom of

160. Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

161. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”). The Government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content,” and a law is “content-based” when it targets speech based on its communicative content.” *Reed v. Town of Gilbert*, 576 U.S. 155, 162–63. *But see* Assemb. J. Res. 178 (N.J. 2022) (“musical expression is a form of free speech protected by the First Amendment and [therefore] should not be admissible into evidence.”).

162. See Michael Render (a.k.a. Killer Mike), *Foreword to NIELSON & DENNIS*, *supra* note 22, at ix–xi.

163. The discussion *supra* in Section I.A of this Note regarding state-prevented performances is relevant to the background of proposed Rule 416 but the jurisprudence delineating state action is beyond the scope of this Note.

164. See U.S. CONST. amend. I. *Compare* *Houston v. Hill*, 482 U.S. 451, 453–72 (1987) (statute was unconstitutional because it prohibited speech interfering with law enforcement action), *with* *Colten v. Kentucky*, 407 U.S. 104, 105–120 (1972) (defendant’s arrest did not violate the First Amendment when his conduct—not mere speech—amounted to disorderly conduct).

165. See *United States v. Carpenter*, 2022 U.S. App. Lexis 31605, at *8 (2d Cir. Nov. 16, 2022) (“The First Amendment is no bar to the evidentiary admission of rap lyrics where, as here, the artistic expression “is not ‘itself the proscribed conduct.’”). *Contra* *NIELSON & DENNIS*, *supra* note 22, at 113 (“[C]ourts haven’t interpreted the First Amendment to apply to rules of evidence and legislatures haven’t enacted rules prioritizing free speech over evidence. Each case, then, becomes a case-by-case assessment as to whether the rules of evidence permit or prohibit the evidence. And as we’ve seen, that’s a train wreck.”).

166. *Contra* *NIELSON & DENNIS*, *supra* note 22, at 113. Nielson & Dennis maintain that rap is uniquely punished by the evidentiary rules:

We believe the potential for chilling effects is obvious. If a rap lyric can land you in jail, it follows that you’ll think twice before writing one. . . . Given the scope of rap on trial

expression does not merit higher protection than their freedom of speech.¹⁶⁷

Nevertheless, in the press release announcing proposed Rule 416, Representative Johnson claims that, “It is no longer enough that the Bill of Rights guarantees that freedom: without further Congressional action, the freedom of speech and of artistic expression present in music will continue to be stifled, and that expression will be chilled, until the voices behind that protected speech are silenced.”¹⁶⁸ A chilling affect claim can be difficult to prove, and it is questionable to claim a chilling effect when the industry is doing so well and is premised on a countercultural stance that an alleged chilling effect could serve to reinforce, and therefore which ironically might help, instead of hurt, the industry.¹⁶⁹ For example, tattoos depicting gang affiliation or other illicit conduct—e.g., teardrop tattoos which occasionally signify homicide—are legal but nevertheless can be highly relevant in criminal trials.¹⁷⁰ In this instance, the protest of a chilling effect would not make sense; legitimizing the art would destroy its appeal. While a demonstrated chilling effect would still be a serious issue, the current evidentiary rules do not create a violation under the First Amendment.

The stronger rationale in Representative Johnson’s press release for proposed Rule 416 is the concern for unfair criminal convictions.¹⁷¹ The press release describes a seventeen-year-old boy, Tommy Canady, who was sentenced to life in prison after his “conviction heavily relied upon lyrics he wrote,” the only other evidence he faced was flimsy and circumstantial.¹⁷² The press release further

and the massive potential for chilling effects, courts have an obligation to seriously reconsider their position

because this constitutes “a systematic exclusion of rap music from the protection of the First Amendment.” *Id.*

167. *Contra* Press Release, *supra* note 4 (“Freedom of speech is the constitutional foundation the framers thought necessary to enable a new and free society to craft not only its own destiny through commerce and innovations, but through culture, expression, and art”).

168. Press Release, *supra* note 4; *see* Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. (2022).

169. *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1638 (2013) (“A claim of a chilling effect necessarily rests upon suppositions about the deterrent effects of law. These suppositions rest in turn upon predictions about the behavior of speakers under counterfactual conditions.”).

170. *See, e.g.*, *United States v. Beasley*, 72 F.3d 1518, 1527 (11th Cir. 1996) (“A person’s beliefs, superstitions, or affiliation with a...group is properly admissible where probative of an issue in a criminal prosecution.”). *Contra* NIELSON & DENNIS, *supra* note 22, at 6 (“[T]he criminal justice system has effectively denied rap music the status of art. . . . No other fictionalized form, musical or otherwise, is treated this way in court.”).

171. *See* Press Release, *supra* note 4.

172. Press Release, *supra* note 4; Lee, *supra* note 45.

states that “As of 2020, prosecutors in over 500 criminal cases have used artists’ lyrics as evidence against the artist.”¹⁷³ This statistic presumably refers to the research mentioned by Nielsen and Dennis in their authoritative 2019 work, *Rap on Trial*.¹⁷⁴ As the authors themselves mention, the total number is likely much higher than five hundred, although this would only constitute a tiny fraction of criminal cases.¹⁷⁵ Finally, although the press release presents the situation as a constitutional catastrophe, it is impossible to say in how many of these cases the defendant’s artwork would have been admitted into evidence even if proposed Rule 416 had been enacted.¹⁷⁶

IV. SOLUTION

A new Rule highlights the need for courts to evaluate proffered evidence in the context of changing cultural norms.¹⁷⁷ Both Rule 412 and proposed Rule 416 speak to evidence that can evoke strong emotions in a jury.¹⁷⁸ Unlike the rape shield for criminal cases, however, proposed Rule 416 concerns evidence that may be relevant to aspects of the case outside of the specific elements of the charges.¹⁷⁹ Therefore, a categorical rule, which would exclude potentially probative evidence and thus frustrate the overall goal for “ascertaining the truth,” is not

173. Press Release, *supra* note 4.

174. NIELSON & DENNIS, *supra* note 22, at 68–69 (“To date, we’ve identified more than five hundred cases involving rap as evidence. But we can also say with confidence that the true number is virtually unknowable given the data collection limitations of today. There is no single resource . . . even when jurisdictions do make records publicly available, databases do not necessarily collect all the information.”). Nielsen and Dennis do not specify that their statistic involves cases that have advanced to trial; to the contrary, the reference to sealed indictments indicates that the research involved cases that resolved through pleas. *Id.*

175. *See id.* A simple search on LexisNexis displays over two thousand and six hundred results for cases involving rap introduced as evidence in criminal trials. Search for “rap & introduce! & evidence,” LEXISNEXIS, lexisnexis.com (enter the keyword search, then exclude the keyword “rap sheet” and filter by “cases” and “criminal” case type). While many of the website entries pertain to the same case (multiple judges can each decide multiple motions on a single case as it progresses through appeals and other proceedings), this search reveals over eight hundred results in the Washington State Courts of Appeal alone. *See id.*

176. *See* Press Release, *supra* note 4; H.R. 8531 § 2 (proposed FED. R. EVID. 416).

177. Some argue that courts apply Rule 403 improperly:

By relying on the legislative history of the new rules and announcing a presumption of admissibility, courts have forsaken the traditional operation of [Rule] 403. They have thereby limited, and in some cases abandoned, their traditional role as gatekeepers. Ironically, and seemingly oblivious to the irony, these same courts nevertheless tout [Rule] 403 as the guarantor of due process.

Orenstein, *supra* note 143, at 1490–92.

178. *See* FED. R. EVID. 412(b)(2); H.R. 8531 §2 (proposed FED. R. EVID. 416).

179. FED. R. EVID. 412; H.R. 8531 § 2 (proposed FED. R. EVID. 416).

the best approach.¹⁸⁰ Instead, the new rule should impose a presumption of inadmissibility while permitting the government to proffer a defendant's artistic work for non-propensity purposes.

Proposed Rule 416 should adopt the reverse 403 standard from Rule 412 for civil cases.¹⁸¹ Under this approach, a defendant's creative work would be inadmissible unless the government could show that "its probative value substantially outweighs the danger" of unfair prejudice.¹⁸² Congress enacted this balancing standard for civil sex offense cases instead of extending the criminal categorical exclusion in light of the complex landscape of character evidence in civil litigation.¹⁸³ The social environment is similarly changing for rap music as younger people do not seem to exhibit the same reaction to rap music as the older generation.¹⁸⁴

To qualify for a reverse 403 analysis, the proffered content should first contain sufficient creativity or expressivity.¹⁸⁵ Proposed Rule 416 currently applies to any modicum of expression or creativity,¹⁸⁶ and this is far too broad: a video performance of lyrics requires effort and is expressive, but a video with an added face filter or emoji should not merit heightened protection. While one might argue that artistic speech should not receive any distinction from the Rules because it does not enjoy greater protection under the First Amendment than nonartistic speech, courts must recognize that creative expression can influence a jury much more powerfully than nonexpressive content.¹⁸⁷

180. FED. R. EVID. 102; Leonard, *supra* note 91, at 341 (criticizing Federal Rules of Evidence 413 and 414 for prioritizing policy over the search for truth: "Evidence law is hardly neutral today from a substantive standpoint," but neither is it pervasively substantive in effect. For the most part, the rules of evidence are designed to facilitate the truth-seeking function rather than serve substantive policy.").

181. See FED. R. EVID. 412(b)(2).

182. FED. R. EVID. 412(b)(2). Proposed Rule 416 should not change the burden of admissibility from a preponderance of the evidence to a clear and convincing standard unless the Advisory Committee is prepared to update the other character rules as well. See *supra* Section III.A.

183. See FED. R. EVID. 412(b)(1)(C); FED. R. EVID. 412 advisory committee's note to 1994 amendment.

184. Dunbar, *supra* note 15, at 40–41. *Contra* Walls, *supra* note 3, at 190 (jurors will likely view the police as the protagonist). The *Skinner* court rejected the government's claim of mainstream popularity, but ultimately only required a "strong nexus" of relevance and did not impose a categorical rule or even a heightened balancing test. See *State v. Skinner*, 95 A.3d 236, 238–39 (N.J. 2014).

185. See H.R. 8531 §2 (proposed FED. R. EVID. 416(e)).

186. See *id.*

187. See NIELSON & DENNIS, *supra* note 22, at 113.

Proposed Rule 416 should also establish notice requirements for the government to proffer artistic evidence, including an indication of the intended purpose for use at trial.¹⁸⁸ Unlike Rule 412 for criminal cases, which involves victims who are technically mere witnesses and not primary parties to criminal cases, proposed Rule 416 applies to defendants who enjoy a sufficient “right to attend and be heard” through motion practice.¹⁸⁹ Therefore, proposed Rule 416’s “Ruling on the Record” requirement should imitate Rule 404’s requirements and permit motion practice in lieu of hearings.¹⁹⁰

Lastly, even if the issue at hand does not arise often in federal cases, proposed Rule 416 may influence states to pass or amend similar legislation.¹⁹¹ For example, a Rule encouraging courts to consider the availability of expert testimony could affect the proposed legislation in New York.¹⁹² Depending on the quality of an expert witness, their testimony may mitigate risks of jury bias more effectively than the court’s own limiting instructions.¹⁹³

V. CONCLUSION

Federal courts need a new Rule to analyze defendants’ creative works because artwork, which is by its nature a form of heightened expression, can influence a jury more dramatically than other evidence.¹⁹⁴ Creative expression can forcefully provoke jurors to infer improper conclusions about a defendant, even when they seek to analyze the evidence objectively.¹⁹⁵ The best solution, however, is not for Congress to impede judicial discretion with a categorical rule of exclusion. A balancing test, especially one that starts with a defendant-protecting presumption of inadmissibility, would sufficiently remind courts that such evidence carries substantial risk of undue

188. See FED. R. EVID. 404(b)(2)(3). See generally *United States v. Merriweather*, 78 F.3d 1070, 1076 (6th Cir. 1996) (“[W]e do not mandate hypertechnicality . . . whether 404(b) evidence is admissible for a particular purpose will sometimes be unclear until late in the trial because whether a fact is “in issue” often depends on the defendant’s theory and the proofs as they develop.”).

189. FED. R. EVID. 412(c)(2).

190. H.R. 8531 §2 (proposed FED. R. EVID. 416(c)); FED. R. EVID. 404.

191. Cf. Galvin, *supra* note 84, at 808 (federal rape shield law influenced state legislation).

192. See 2 BENDER’S NEW YORK EVIDENCE § 139.02.

193. See Klein, *supra* note 157, at 141. Expert witnesses can craft narratives that offer alternative explanations of evidence. Cf. Dunbar, *supra* note 15, at 78–81 (discussing coherence-based reasoning: jurors naturally desire complete narration and may consider a piece of evidence differently when placed in context with criminal allegations at trial).

194. See Toner, *supra* note 1, at 379.

195. See *id.*

prejudice, yet it would permit courts to admit artistic evidence when appropriate to pursue just outcomes at trial.¹⁹⁶

The proposal for Rule 416 should state as follows:

Rule 416. Character Evidence: Creative or Artistic Expression.

(a) CREATIVE AND ARTISTIC EXPRESSIONS INADMISSIBLE—Except as provided in subsection (b), evidence of a defendant’s creative or artistic expression is not admissible against such defendant in a criminal case to prove that the defendant acted in accordance with any character trait.

(b) EXCEPTION—A court may admit evidence described in subsection (a) after making its ruling on the record, if:

- (1) the work is offered for a non-propensity purpose;
- (2) the work’s probative value substantially outweighs its danger of unfair prejudice, considering the totality of the circumstances; and
- (3) the expression is relevant to an issue of fact in dispute.

(c) NOTICE—In a criminal case, the prosecutor must:

- (1) provide reasonable notice of such evidence that the prosecutor intends to offer;
- (2) articulate the permitted purpose for the proffered evidence; and
- (3) do so in writing before trial, unless an exception for good cause is granted.

(D) DEFINITION—In this section, the term “creative or artistic expression” means a work created with the primary purpose of artistic expression or which contains more than an insignificant amount of creativity or imagination in the production or arrangement of forms, sounds, words, movements or symbols, including music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.¹⁹⁷

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196. See FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

197. This proposed statute copies phrases from FED. R. EVID. 404, FED. R. EVID. 412, and H.R. 8531 § 2 (proposed FED. R. EVID. 416).

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