UIC Law Review

Volume 48 | Issue 4 Article 5

2015

Amending Rape Shield Laws: Outdated Statutes Fail to Protect Victims on Social Media, 48 J. Marshall L. Rev. 1087 (2015)

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AMENDING RAPE SHIELD LAWS: OUTDATED STATUTES FAIL TO PROTECT VICTIMS ON SOCIAL MEDIA

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I. INTRODUCTION

Picture this: in Houston, Texas, a sixteen-year-old girl named Jada was brutally raped, and then forced to relive the ordeal when the rape went viral on the Internet.[1] Students at her school made light of the rape by sharing photos of themselves online, imitating

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[1] Tara Culp-Ressler, *16-Year-Old's Rape Goes Viral On Social Media: 'No Human Being Deserved This,'* THINK PROGRESS (July 10, 2014, 9:07 AM), http://thinkprogress.org/health/2014/07/10/3458564/rape-viral-social-media-jada/.

the position of Jada's unconscious body with the hashtag "#jadapose."[2] The hashtag was used so much that it even "trended" as popular on the social media site Twitter.[3] Jada is now home-schooled.[4]

This story actually happened, and unfortunately it is not an anomaly.[5] In fact, it shares a harsh vein of similarity with countless other news stories in the United States and abroad.[6] Stories like this reflect the proliferation of the use of social media in rape culture during an age when texting and Internet sites like Facebook, Twitter, and Instagram are king.[7] But what are the ramifications further down the road, after the initial media frenzy, when the case goes to trial? Traditional rules pertaining to admissibility of evidence have failed to keep up with the fast-paced and ever-changing technological sphere.[8]

This Comment will first discuss the discoverability and

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[2] *Id.*

[3] *Id.*; *see also What Do Twitter Trends Mean?*, HASHTAGS.ORG, www.hashtags.org/platforms/twitter/what-do-twitter-trends-mean/ (explaining that "[a] trend on Twitter refers to a hashtag-driven topic that is immediately popular at a particular time. A hashtag is a keyword or phrase that is preceded with a pound (#) sign, as with #NBAFinals or #USElections.").

[4] Inae Oh, *16-Year-Old's Alleged Rape Goes Viral and Now She's Speaking Out*, THE HUFFINGTON POST (July 11, 2014, 4:59 PM), www.huffingtonpost.com/2014/07/10/jada-teen-rape-_n_5574831.html.; *see also* Alicia W. Stewart, *#IamJada: When abuse becomes a teen meme*, CNN (July 18, 2014, 3:51 PM), http://www.cnn.com/2014/07/18/living/jada-iamjada-teen-social-media/ (noting also that Jada chose to speak out publicly against her alleged rapist and has been called "brave" and "a hero" by her supporters).

[5] *See, e.g.,* Paula Newton, *Canadian teen commits suicide after alleged rape, bullying*, CNN (April 10, 2013, 5:31 PM), www.cnn.com/2013/04/10/justice/canada-teen-suicide/index.html; Rebecca Campbell, *The Dark Side of Social Media: A New Way to Rape*, CNN (April 17, 2013, 5:44 AM), www.cnn.com/2013/04/16/opinion/campbell-rape-social-media/ (discussing the emergence of rape evidence on social media and its repercussions); Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (Dec. 16, 2012), www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html?pagewanted=all&_r=0.

[6] *See* Tisha Lewis, *Teen rape cases magnified by social media, cyber bullying*, FOX 32 NEWS (April 19, 2013, 9:00 PM), www.myfoxchicago.com/story/21967547/teen-rape-cases-magnified-by-social-media-cyber-bullying (pointing out the alarming number of teen rape cases that have gained increased attention due to the cyber bullying that occurs on social media).

[7] Derek Thompson, *The Most Popular Social Network for Young People? Texting*, THE ATLANTIC (June 19, 2014, 9:07 AM), www.theatlantic.com/technology/archive/2014/06/facebook-texting-teens-instagram-snapchat-most-popular-social-network/373043/.

[8] *See, e.g.*, Laura E. Diss, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841, 1843-44 (2013)(discussing the proliferation of social media evidence, specifically involving sexual harassment cases in the workplace).

admissibility of social media evidence in criminal and/or civil sexual assault cases. Section II(A) provides a broad overview of both federal and state rape shield laws, including the legislative policies behind their enactments, as well as the modern expansion of social media in the context of the legal system. Section II(B) will address the modern utility of social media in the context of the legal system. Section III first analyzes how courts look at discoverability and admissibility of social media evidence generally, and then focuses on sexual assault cases specifically. Further, Section III explores a criminal defendant's Sixth Amendment argument against the application of rape shield laws to social media evidence. In conclusion, Section V proposes a modernization of the rules of admissibility in order to reflect the vast amount of social media evidence currently available during the litigation process.

II. THE INTERSECTION BETWEEN RAPE SHIELD LAWS AND SOCIAL MEDIA

A. History and Policy behind Rape Shield Laws

Federal Rule of Evidence (hereinafter "FRE") 412[9] was enacted to "provide for the protection of the privacy of rape victims."[10] At old common law, evidence of the victim's sexual history was permitted in forcible rape cases.[11] The victim's prior sexual behavior constituted an exception to the general rule of inadmissibility of character evidence.[12] This normally inadmissible character evidence was allowed because it was "relevant [as a] character trait" as well as to the victim's "credibility."[13]

Jury instructions like the following are particularly illustrative of how the victim's character evidence was used in the courtroom:

> Evidence was received for the purpose of showing that the female person [. . .] was a woman of unchaste character. A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again.[14]

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[9] FED. R. EVID. 412.

[10] Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540 (1978).

[11] Rebekah Smith, Comment, *Protecting The Victim: Rape and Sexual Harassment Shields Under Maine and Federal Law*, 49 ME. L. REV. 443, 451 (1997).

[12] *Id.*

[13] *Id.*

[14] *Id.* (quoting Edwinna G. Johnson, Note, *Evidence – Rape Trials – Victim's Prior Sexual History*, 27 BAYLOR L. REV. 362, 368 n.32 (1975));

Essentially, the court allowed the use of evidence of a victim's prior sexual conduct "to impeach her credibility as well as demonstrate her desire for sexual relations on the occasion charged."[15] As a result," even when the circumstances of the alleged crime differed completely from the woman's reputed sexual activity, her reputation . . . provided a sufficient basis for the inference of present consent."[16]

The problem with the development of this rationale, according to critics, was that the focus of rape trials centered on the victim rather than the defendant.[17] This in turn shifted the shame of the crime onto the victim; the rape somehow became the victim's fault.[18] Therefore, the principle purpose behind the enactment of FRE 412 is to overcome the inverted process of a rape trial (i.e., shifting the focus to the victim's prior sexual acts), and to protect rape victims from degrading disclosures about the intimate moments of their private affairs.[19]

Consequently, FRE 412(a) outlines the prohibited uses of evidence involving alleged sexual misconduct in a civil or criminal proceeding.[20] There are two types of evidence prohibited under this rule.[21] The first type of evidence barred is that which is offered to prove that a victim engaged in other sexual behavior.[22] The second

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Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, California Jury Instructions, Criminal, 10.06, at 327 (3d rev. ed. 1970).

[15]P.N. Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1169-70 (1995).

[16] Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 95-96 (1977-78).

[17] *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764 (1986) (quoting 124 CONG. REC. 34, 913 (1978) (quoting Rep. Elizabeth Holtzman who, while speaking in support of the Privacy Protection for Rape Victims Act, said, "[b]ullied and cross-examined about their prior sexual experiences, many [female victims] find the trial almost as degrading as the rape itself. Since rape trials become inquisition into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime").

[18] *See* Jessica Valenti, *In Rape Tragedies, the Shame is Ours*, THE NATION (Apr. 17, 2013), www.thenation.com/article/173911/rape-tragedies-shame-ours# (explaining that "[w]omen and girls are the ones expected to carry the shame of the sexual crimes perpetrated against them[,] [...] a tremendous load to bear, because once you're labeled a slut, empathy and compassions go out the window. The word is more than a slur – it's a designation").

[19] United States v. Cardinal, 782 F.2d 34, 36 (6th Cir. 1986), *cert. denied*, 476 U.S. 1161 (1986), *rehearing denied*, 478 U.S. 1032 (1986) (quoting 124 CONG. REC. H. 11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann)).

[20] FED. R. EVID. 412(a).

[21] FED. R. EVID. 412(a)(1).

[22] FED. R. EVID. 412(a)(1).

type of prohibited evidence includes evidence offered to prove a victim's sexual predisposition.[23]

However, FRE 412(b) offers exceptions to the inadmissibility of prior sexual experience evidence in both criminal and civil cases.[24] In criminal cases, evidence may be admitted if (i) it goes to proving that someone other than the defendant was the culprit, (ii) it aids the defendant in proving the victim's consent, or (iii) its exclusion would violate the defendant's constitutional rights.[25] Alternatively, a court may admit the evidence in a civil case if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party, and only if the victim has placed his or her own reputation in controversy.[26]

The federal system, in enacting FRE 412, provided a guideline for states to follow.[27] Since the passage of FRE 412, legislatures in all fifty states have enacted their own rape shield laws in accordance with the federal rule.[28] States have adopted various approaches in doing so, some opting for more restrictive laws while others remained friendlier to defendants than their federal counterpart.[29]

Underlying the existence of both federal and state rape shield laws are strong policy concerns regarding a rape victim's privacy.[30] In fact, before FRE 412 and its state counterparts existed, some described the intrusive and oftentimes degrading process of cross-examining the witness's sexual history as a "second rape."[31]

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[23] FED. R. EVID. 412(a)(2).

[24] FED. R. EVID. 412(b)(1)-(2).

[25] FED. R. EVID. 412(b)(1)(A)-(C).

[26] FED. R. EVID. 412(b)(2).

[27] *See* Kerry C. O'Dell, *Criminal Law Chapter: Evidence in Sexual Assault*, 7 GEO. J. GENDER & L. 819, 829-33 (2006)(exploring how various states' rape shield statutes compare to FRE 412).

[28] *See id.* at 829-33 (examining the different statutory approaches to rape shield laws enacted in various states: "The Michigan Approach," "The Federal Approach," "The New York Approach," "The California Approach," and "The New Jersey Approach").

[29] *Id.* at 828 (characterizing "The Michigan Approach" and "The Federal Approach" as more restrictive and the remaining three approaches as more defendant-friendly).

[30] *See, e.g.*, Leah DaSilva, Note, *The Next Generation of Sexual Conduct: Expanding the Protective Reach of Rape Shield Laws to Include Evidence Found on Myspace*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 211, 221 (2011) (asserting that the "overarching goal" of rape shield laws is the protection of victim privacy).

[31] *See* Bonnie Birdsell, Note, *Reevaluating Gag Orders and Rape Shield Laws in the Internet Age: How Can We Better Protect Victims?*, 38 SETON HALL LEGIS. J. 71, 78 (2008) (citing Megan Reidy, Comment, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?*, 54 CATH. U. L. REV. 297, 319-20 (2004))(explaining the idea of a "third rape" which occurs when, after the humiliating cross-examination, the victim is then subjected to invasive media attention and scrutiny during the

Additionally, both federal and state courts echo the importance of protecting a victim's privacy from broader public dissemination through rape shield laws.[32]

B. Social Media Overview

1. A Brief History of Social Media

Online social networking sites have quickly become a cultural phenomenon, especially with the young adult population.[33] Called the "soda fountains" of the twenty-first century, online networking connects users faster and more broadly than ever before.[34] Social networking includes online "interaction using technology with some combination of words, photographs, video, or audio."[35] Online technology users across the globe access social media sites more frequently than even their own email accounts.[36] In fact, according

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trial); *see also* Valenti, *supra* note 18 (arguing that "whenever we blame a woman for being attacked – when we speculate about what she was wearing, suggest she shouldn't have been drinking or that she stayed out too late – we're making the world safer for rapists").

[32] *Accord* Michigan v. Lucas, 500 U.S. 145, 150 (1991)(noting that rape shield laws reflect "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy"); *Cardinal*, 782 F.2d at 36 (holding that the "basic policy of [FRE] 412 ."is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives" (internal quotation omitted)); People v. Sanders, 191 Ill. App. 3d 483, 486 (4th Dist. 1989) (explaining that the policy supporting the Illinois rape shield law "prevents the defendant from harassing and humiliating the complaining victim with irrelevant evidence of her reputation for chastity or of specific prior sexual activity with third persons"). It also "promotes effective law enforcement because victims will be more likely to report sexual offenses when the details of their prior sexual activity cannot be made public." *Id.*

[33] Timothy Stenovec, *Myspace History: A Timeline of the Social Network's Biggest Moments*, THE HUFFINGTON POST (Aug. 29, 2011, 5:12 A.M.), www.huffingtonpost.com/2011/06/29/myspace-history-timeline_n_887059.html(discussing the explosion of MySpace use, particularly among young adults); *see also* Taylor Soper, *Multi-tasking: 40% of young adults use social media in the bathroom*, GEEKWIRE.COM (Feb. 10, 2014, 7:03 P.M.), www.geekwire.com/2014/nielsen-digital-consumer-report/ (citing a recent Nielsen Digital Consumer Report that found 40% of 18-24 year-olds "access a social network in the bathroom").

[34] John S. Wilson, Comment, *Myspace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1219-20 (2007); *see also* Laurie L. Baughman, *Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites By Domestic Violence Perpetrators*, 19 WIDENER L.J. 933, 933 (2010)(describing the popularity of social networking sites with United States users).

[35] Diss, *supra* note 8, at 1842.

[36] *Id.* (citing Breanne M. Democko, Comment, *Social Media and the Rules on Authentication,* 43 U. TOL. L. REV. 367, 367 (2012)). This statistic is based on data gathered in 2009. *Id.*

to a 2012 study by the Nielsen Company, consumers afford 20 percent of their laptop usage and 30 percent of their cellphone usage to social media.[37]

For instance, the social media platform Myspace was founded in 2003.[38] By November of 2004, the site had five million registered users.[39] A year later, it was the "fifth most-viewed internet domain in the [United States]."[40] Registered Myspace users capped out at 75.9 million users in America in 2008.[41] By 2008, however, a new social network eclipsed Myspace's popularity.[42] Facebook, founded by Mark Zuckerberg in 2004, which was more popular internationally at first, quickly gained traction in the United States.[43] In fact, by 2012 Facebook's more than one billion users spent an average of twenty minutes daily on the site.[44] Today, Twitter, Facebook, and LinkedIn rank as the top three most popular social networking sites.[45]

With its ever-expanding popularity, social media became a breeding ground for provocative material.[46] For example, at its conception, Myspace founder Chris DeWolfe developed the social network with a *laissez-faire* attitude.[47] He described his site as a

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[37] *State of the Media: The Social Media Report*, NIELSEN CO. (Dec. 4, 2012), available at www.nielsen.com/us/en/insights/reports/2012/state-of-the-media-the-social-media-report-2012.html; *see also Social Networking Fact Sheet*, PEW RESEARCH INTERNET PROJECT (Jan. 2014), available at www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (stating that "[a]s of January 2014, 74% of online adults use social networking sites"). "As of September 2014, 71% of online adults use Facebook, 23% of online adults use Twitter, 26% use Instagram, 28% use Pinterest, [and] 28% use LinkedIn." *Id.*

[38] Patricia Sellers, *MySpace Cowboys*, FORTUNE (Aug. 29, 2006, 9:20 AM), http://archive.fortune.com/magazines/fortune/fortune_archive/2006/09/04/8384727/index.htm.

[39] Stenovec, *supra* note 33, slide 4.

[40] *News Corp in $580m Internet Buy*, BBC NEWS (July 19, 2005, 9:03 A.M.), news.bbc.co.uk/2/hi/business/4695495.stm.

[41] Stenovec, *supra* note 33, slide 13.

[42] Michael Arrington, *Facebook No Longer The Second Largest Social Network*, TECHCRUNCH (June 12, 2008), http://techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/.

[43] *Id.*

[44] Angela C. de Cespedes Wenke, *Defense in the Age of Social Media*, TRIAL PRACTICE (Dec. 14, 2012), http://apps.americanbar.org/litigation/committees/trialpractice/articles/fall2012-defense-age-social-media.html.

[45] Randy Milanovic, *The World's 21 Most Important Social Media Sites and Apps in 2015*, SOCIALMEDIATODAY.COM (April 13, 2015) www.socialmediatoday.com/social-networks/2015-04-13/worlds-21-most-important-social-media-sites-and-apps-2015 (ranking Twitter, Facebook, and LinkedIn, respectively, at the top of most popular social media sites).

[46] DaSilva, *supra* note 30, at 215-16.

[47] *See id.* (focusing on MySpace's "distinct laissez-faire attitude" due to "the originating intentions of its founders").

place "all about letting people be what they want to be."[48] Social media creators envisioned the sites as places to foster free speech and relied on the users themselves to refrain from posting inappropriate content.[49]

Unsurprisingly, not everyone refrained.[50] Soon, terms like "Myspace Sluts" and "Facebook Whores" became part of the cultural vernacular.[51] More recently, image-centric social media applications like Instagram and Snapchat have helped to facilitate the spread of provocative images online.[52] Technology platforms

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[48] Sellers, *supra* note 38.

[49] *See* Ann Friedman, *When Rape Goes Viral*, NEWSWEEK (July 24, 2013, 4:45 A.M.), www.newsweek.com/2013/07/24/when-rape-goes-viral-237742.html (stating that while Facebook does have a policy against hate-speech, "most popular social-media sites, like Twitter and Tumblr, have no such community standards. Their terms of use lean toward unfettered free speech, placing the onus on users not to post or share objectionable content").

[50] *See id.* (recounting pages of Facebook "with titles like 'Violently Raping Your Friend Just for Laughs'").

[51] *See Definition of "MySpace Whores"*, URBAN DICTIONARY, www.urbandictionary.com/define.php?term=Myspace+Whore (last visited Oct. 3, 2014) (defining "MySpace Whore" as "a girl who uses myspace (sic) to flirt with many guys that she would like to 'meet' *cough*HOOK UP WITH*cough*" or "a huge whore who posts pictures to sell herself online, especially on band sites because she's hoping to get all the lame freaky old emo guys to sleep with her"); *Definition of "MySpace Slut"*, URBAN DICTIONARY, www.urbandictionary.com/define.php?term=myspace%20slut (last visited Oct. 3, 2014) (defining "MySpace Slut" as "sort of like a myspace (sic) whore but usually worse. Myspace whores usually post nude…pictures on myspace. But myspace sluts do the same thing. But going further by actually fucking someone they met on myspace"); *Definition of "Facebook Whore"*, URBAN DICTIONARY, www.urbandictionary.com/define.php?term=facebook+whore (last visited Oct. 3, 2014) (defining "facebook whore" as "someone who seeks attention from anyone they can get on facebook…[p]osting 'posing' pictures...multiple online relationships, posting slutty comments on walls/pictures…and just general whoring").

[52] *See* Maria Vultaggio, *Kendall Jenner Poses Nude After Kim Kardashian: Kourtney Kardashian Posts Instagram Photo*, INT'L BUS. TIMES (Sept. 7, 2014, 9:15 PM), www.ibtimes.com/kendall-jenner-poses-nude-after-kim-kardashian-kourtney-kardashian-posts-instagram-photo-1681036; Mike Wass, *Miley Cyrus Whips Out Her Boobs on Instagram (Again): See The Pop Diva's Sexy Bath Antics*, IDOLATOR (Oct. 1, 2014) www.idolator.com/7564943/miley-cyrus-nude-boobs-bath-instagram-pics; Caroline Moss, *Snapchat Has An Underage Porn Problem – And No Clear Way To Fix It*, BUS. INSIDER (Oct. 2, 2014, 2:12 PM) www.businessinsider.com/snapchat-underage-porn-2014-10; Grace Macaskill & Gemma Aldridge, *Perverts begged teen prom queens for naked selfies on Snapchat*, MIRROR UK (Sept. 6, 2014, 6:35 PM) www.mirror.co.uk/news/uk-news/perverts-begged-teen-prom-queens-4176207; *but see* Corilyn Shropshire, *What's the bigger worry: Naked photos leaked or being hacked?*, CHICAGO TRIBUNE (July 9, 2015, 2:50 P.M.), www.chicagotribune.com/business/ct-mastercard-report-0710-biz-20150709-story.html (finding that 55 percent of consumers would rather have a nude photograph of themselves leaked online than have their financial data hacked).

beyond the Internet, like sending photographs via text-messaging, have further added to this phenomenon.[53] And posts on social media of provocative photographs are not always the user's doing; rather, they are often hacked and leaked without the subject's consent.[54] In either case, the result has been a culture of victim-blaming, a catastrophic consequence for rape and sexual assault victims who decide to press charges.[55]

2. Social Media and Litigation

The abundance of photographic and substantive content evidence available on social media has changed the landscape of litigation.[56] Investigators at colleges and universities were among the first to utilize social media sites for evidentiary purposes.[57] Examining social media sites also became popular with police departments when investigating criminal gang activity.[58] For example, in 2012, the Chicago Police Department developed a social media investigation task force to monitor gang behavior after certain gang members bragged online about crimes they committed.[59] However, gangs are not the only group to record their

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[53] *See* Thompson, *supra* note 7 (discussing the popularity of text-messaging).

[54] *See FBI 'addressing' leak of celebrity nude photogs, Apple says iCloud not breached*, CHICAGO TRIBUNE (Sept. 2, 2014, 2:36 P.M.), www.chicagotribune.com/entertainment/chi-celebrity-nude-photos-leaked-20140902-story.html (recounting the "mass hacking" of "dozens of ... female actresses, models and athletes").

[55] *See* Amy Odell, *How Not to Respond to the JLaw Nude Photo Leak*, COSMOPOLITAN (Sept. 1, 2014), www.cosmopolitan.com/entertainment/celebs/news/a30633/heres-how-not-to-respond-to-the-celebrity-nude-photo-leak/ (addressing the "widely-held [view] that celebrities shouldn't keep nude photos of themselves on a phone or computer if they don't want [them leaked]"); *see also Avoiding Victim Blaming,* CTR. FOR RELATIONSHIP ABUSE AWARENESS, http://stoprelationshipabuse.org/educated/avoiding-victim-blaming/ (warning that victim-blaming "marginaliz[es] the victim/survivor").

[56] DaSilva, *supra* note 30, at 217.

[57] *See* Edward M. Marisco, Jr., *Social Networking Websites: Are Myspace and Facebook the Fingerprints of the Twenty-First Century?*, 19 WIDENER L.J. 967, 969 (2010)(chronicling an incident that took place at Pennsylvania State University in 2005, when "[u]niversity [p]olice used Facebook to identify students who rushed the field after [an] Ohio State [football] game").

[58] *Id.* at 970.

[59] Mark Guarino, *Ohio Rape Case: Evidence on Social Media Creates New World for Justice*, CHRISTIAN SCIENCE MONITOR (Jan. 8, 2013), www.csmonitor.com/USA/Justice/2013/0108/Ohio-rape-case-Evidence-on-social-media-creates-new-world-for-justice-video. Cities like Chicago, New York, and Philadelphia created specialized units to monitor gang-affiliated social media sites. *Id.* Specifically in Chicago, police launched a social media investigation into rapper Keith Cozart, a.k.a. Chief Keef. *Id.* Using sites like Twitter and YouTube, Chief Keef bragged about a gang rival he had "gunned down." *Id.*

culpable behavior online.[60] Driving this trend is a generation that grew up alongside the emergence of social media.[61]

A social media site can be a litigator's goldmine, and "[i]f a picture is worth a thousand words, then a social media profile is priceless in litigation."[62] Lawyers quickly caught onto the value of social media evidence as a persuasive tool in the courtroom.[63] Due to its prevalence, attorneys across the globe value social media evidence.[64] Moreover, whereas traditional conversations fail to provide hard evidence, "communication via social media [...] leaves behind a digital trail of information referred to as electronically stored information or ESI."[65]

Electronically stored information (hereinafter "ESI") found on social networks has become important in all types of cases, including "criminal matters, family law, personal injury cases, criminal law, business torts, and employment disputes."[66] Illustratively, according to a 2010 American Academy of Matrimonial Lawyers study, 81 percent of attorneys "have seen an increase" in the use evidence found on social media sites during the course of a divorce proceeding.[67] Social media sites are useful to lawyers for a number of reasons.[68] Specifically, attorneys use the Internet for researching parties, fact-finding, determining the

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[60] *Id.*

[61] *See id.* (characterizing Millennials as a generation brought up on social media, "conditioned to record and transmit most aspects of their lives – even if those details are criminal").

[62] Diss, *supra* note 8, at 1842.

[63] *See* John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 468 (2011) (citing examples of attorneys using Facebook statements to incriminate defendants in a criminal case, Twitterpics or YouTube videos to sway the court in a child-custody case, and LinkedIn testimonials to influence the outcome in employment litigation).

[64] Diss, *supra* note 8, at 1843.

[65] Michelle J. Childs, *Social Media and the Federal Rules of Evidence*, ABA (Aug. 22, 2013), http://apps.americanbar.org/litigation/committees/trialevidence/articles/summer2013-0813-social-media-federal-rules-evidence.html.

[66] Michael R. Holt & Victoria San Pedro, *Social Media Evidence: What You Can't Use Won't Help You: Practical Considerations for Using Evidence Gathered on the Internet*, 88 FLA. BAR J., no. 1, Jan. 2014, at 9, *available at* www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/78eec84889b66af085257c4a0073203a!OpenDocument&Highlight=0,88,Fla,Bar,J,no,1*.

[67] *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers, Facebook is Primary Source for Compromising Information*, AM. ACAD. OF MATRIMONIAL LAWYERS (Feb. 10, 2010), www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-.

[68] Mariel Goetz, *Social Media Evidence in Civil Litigation*, 21 TRIAL EVIDENCE, no. 2, Summer 2013, at 7.

truth of damages asserted, and undermining witness credibility.[69]

Furthermore, use of social media in the courtroom is influencing more than just lawyers and parties to the lawsuit.[70] With social media, jurors now have the capability to peruse online resources while in the midst of a trial.[71] Due to its nature, "social media may pervade every aspect of a case because Internet sites are readily accessible to jurors, attorneys, and courts themselves both before and during trials."[72]

One outcome of this widespread availability of information on the Internet is that it poses a risk to juror impartiality.[73] Access to social media by jurors has resulted in a number of mistrials and overturned convictions in criminal matters.[74] During trials, there have been instances of jurors tweeting case details, friend-requesting the victim's family, and even posting the verdict before the trial's conclusion.[75]

Another consequence of the ubiquitous nature of social media and its effect on jurors is occurring at a microscopic level.[76]

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[69] *Id.*

[70] *See* Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010), *available at* www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208 (explaining how juror online misconduct has resulted in an alarming number of mistrials).

[71] *Id.*

[72] Paul W. Grimm, et al., *Admissibility and Authentication of Social Media*, 14 TORTSOURCE, no. 1, Fall 2011, at 1.

[73] Nicole L. Waters & Paula Hannaford-Agor, *Jurors 24/7: the Impact of New Media on Jurors, Public Perceptions of the Jury System, and the American Criminal Justice System*, at 2-5, www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/Jurors_%2024-7_REV011512.ashx (last visited Oct. 24, 2014).

[74] *See* Katie L. Dysart & Camalia M. Kimbrough, *#Justice? Social Media's Impact on the U.S. Jury System,* ABA (Aug. 22, 2013), http://apps.americanbar.org/litigation/committees/trialevidence/articles/summer2013-0813-justice-social-media-impact-us-jury-system.html (discussing jury trial challenges and consequences of social media use).

[75] *See e.g.*, Dimas-Martinez v. State, 385 S.W.3d 238, 249 (Ark. 2011) (describing how juror's tweets resulted in the reversal of a death row inmate's murder conviction); Sluss v. Commonwealth, 381 S.W.3d 215, 229 (Ky. 2012) (discussing two jurors who friend-requested the victim's mother, resulting in the reversal of a murder conviction and remand to the trial court); Jameson Cook, *Macomb judge rejects convicted murderer's new-trial request*, THE OAKLAND PRESS (June 16, 2014, 5:04 P.M.), www.theoaklandpress.com/general-news/20140616/macomb-judge-rejects-convicted-murderers-new-trial-request (explaining that a motion for new trial was denied after jurors post details on Facebook about the murder trial from the jury room); Ed White, *Juror Hadley Jons Punished For Posting Verdict on Facebook*, THE HUFFINGTON POST (May 25, 2011, 5:30 P.M.), www.huffingtonpost.com/2010/09/02/hadley-jons-juror-punishe_n_703877.html (involving a judge who ordered an ousted juror, who prematurely posted a guilty verdict on Facebook, to write a five-page essay about the constitutional right to a fair trial).

[76] Waters & Hannaford-Agor, *supra* note 73, at 2.

Scientific research suggests that "new media" is changing the way that jurors think, neurologically speaking.[77] Trials are traditionally long, drawn-out procedures that require juries to process a large amount of disparate information while remaining mindful of the entire story.[78] Online technology, however, could provide instant and nuanced results in the way jurors process evidence.[79] Accustomed to the immediate gratification that Internet search engines can provide, jurors struggle with today's antiquated trial system.[80] Moreover, access to information on the Internet influences reliability on one's own cognitive function.[81] Thus, jurors might struggle with the urge to verify information they receive during trial by turning to the Internet.[82]

Specifically in sexual assault cases, when strong online visibility and increased media publicity are available to juries, the result negatively impacts the victim.[83] In a 1996 study, researchers found that male participants in a simulated acquaintance rape trial who became exposed to "general rape publicity"[84] became more pro-defendant.[85] Additional studies have demonstrated that when juries are exposed to large doses of sexual violence, they are more likely to recommend shorter prison terms for convicted rapists.[86] Media publicity influencing rape trials has skyrocketed with the popularity of social networking sites.[87]

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[77] *Id.*

[78] *Id.*

[79] *See* Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1286 (2001)(arguing that computers in the courtroom would make a powerful tool for jurors by allowing them to process information quickly).

[80] Waters & Hannaford-Agor, *supra* note 73, at 2.

[81] *Id.*

[82] Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 302 (2010).

[83] Joel Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failure of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L., no. 3, 2000, 677-711, available at http://ist-socrates.berkeley.edu/~maccoun/LP_LiebermanArndt.pdf.

[84] "General rape publicity" in the study referred to the exposure of jurors to articles victims wrote about being sexually assaulted by an acquaintance. *Id.* at 696 (citing C. Mullin, D.J. Imrich & D. Linz, *The impact of acquaintance rape stories and case specific pretrial publicity on juror decision-making*, 23 COMM. RESEARCH 100-35 (1996)).

[85] *Id.*

[86] *See* Edith Greene, *Media Effects on Jurors*, 14 LAW & HUM. BEHAV., no. 5, Oct. 1990, 439, 446-47 (discussing a 1982 study by Zillman and Bryant exposing subjects to pornography involving violence and aggression toward women and finding that it may lead to a loss of compassion for rape victims).

[87] *See generally* Anna Wagner, *Social Media's Effect on Rape Culture*, THE QUINNIPIAC CHRONICLE (Jan. 30, 2013), www.quchronicle.com/2013/01/social-medias-affect-on-rape-culture/ (connecting rape culture in media outlets with a

Essentially, jurors in sexual assault cases come to the jury box entrenched in a world where social media glamorizes sexual violence and promotes rape culture.[88]

Finally, social media has expanded the scope of litigation.[89] Today, due to the increased availability of social media evidence, there are causes of action that were non-existent a couple of decades ago.[90] Some examples include claims for defamation for statements made on Twitter, crimes for creating false online personas, and the ability to perfect personal service on a defendant via social media.[91] Oftentimes, social network users do not realize that their online profiles may become part of a lawsuit, even though their profiles are protected by privacy settings.[92] Compounding the issue, social science suggests that many technology users are "unusually honest" on social media, meaning they post things online that they may not ever say in real life.[93] Legal developments like these mean that when it comes to discoverability and admissibility, courts struggle with applying traditional rules to new technology.[94]

III. THE APPLICATION OF RAPE SHIELD LAWS TO SOCIAL MEDIA EVIDENCE

This section will first discuss the development of how courts look at discovery and admissibility of social media evidence. After exploring the broad deference that courts give to discovery and the stance courts take on admissibility, the analysis will then focus narrowly on sexual assault cases. In doing so, it will discuss the application of traditional rape shield laws to social media evidence. Finally, the analysis will explore a criminal defendant's potential Sixth Amendment argument against the application of rape shield laws to social media evidence.

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larger tendency victim-blaming in the general public).

[88] *Id.*

[89] Browning, *supra* note 63, at 969.

[90] *Id.* (citing John G. Browning, *The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law* 149-63 (2010)).

[91] Browning, *supra* note 63.

[92] Goetz, *supra* note 68.

[93] Diss, *supra* note 8, at 1844 (explaining how individuals' honesty on social media, even about illegal activities, can be used later to "undermine their credibility in litigation"); *see also* Kathryn R. Brown, Note, *The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs*, 14 VAND. J. ENT. & TECH. L. 357, 359 (2012).

[94] Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 888 (2013).

A. Discoverability and Admissibility of Social Media Evidence

1. Discovery

The discovery rules governing the use of social media is still amorphous.[95] Following principles favoring broad discovery, courts have generally allowed disclosure of social media evidence.[96] Some of the difficulty in establishing novel discovery rules for social media stems from re-examining privacy principles.[97] Proponents of admitting social media evidence claim that the very concept of "social media" precludes any expectation of privacy.[98] Courts agree with this reasoning, and generally hold that what a person knowingly posts to public social media sites is discoverable information.[99] The assumption is that when one discloses information online, "there can be no reasonable expectation of privacy."[100]

A 2010 case, *E.E.O.C. v. Simply Storage Mgmt., LLC*, illustrates the position courts have taken on this issue.[101] Ruling on the discoverability of social media content, the court applied broad discovery principles under Fed. R. Civ. P. 26[102] and

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[95] Diss, *supra* note 8, at 1850.

[96] *See* Baughman, *supra* note 34, at 963 (saying that "a court is not likely to find that a person who posts his or her personal information on the Internet has reserved any right to privacy in this information").

[97] McPeak, *supra* note 94, at 889. Even though social media websites were created to expand communication in a globalized world, their users maintain privacy expectations. *Id.* McPeak argues that courts should expand their narrow definition of privacy and examine the concept on a spectrum when it comes to social media in civil litigation. *Id.* She asserts that "the sheer scope and quantity of data available in a social media account" and "the unfettered access to this volume of detailed data [...] may itself constitute a valid privacy concern." *Id.*

[98] Seth I. Koslow, Comment, *Rape Shield Laws and the Social Media Revolution: Discoverability of Social Media – It's Social Not Private*, 29 TOURO L. REV. 839, 851-52 (2013).

[99] Marisco, *supra* note 57, at 975.

[100] Wilson, *supra* note 34, at 1233-34; *see also* Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 861 (Cal. Ct. App. 2009)(holding that information disclosed on Myspace was already public and thus plaintiff could not satisfy her burden of proving the tort of public disclosure of private facts); Emma W. Sholl, Comment, *Exhibit Facebook: The Discoverability and Admissibility of Social Media Evidence*, 16 TULANE J. TECH. & I.P. 207, 208 (2013) (describing publicly disclosed information on Facebook as generally discoverable).

[101] E.E.O.C. v. Simply Storage Mgmt., 270 F.R.D. 430 (S.D. Ind. 2010). In *Simply Storage*, the E.E.O.C. filed a sexual harassment complaint against two defendant businesses. *Id.* at 432. The defendants requested production of all content on the plaintiffs' social networking sites. *Id.* The court considered that the broad scope of discovery might pose a problem of relevance. *Id.* at 434-35.

[102] FED. R. CIV. P. 26.

concluded that certain social media information is subject to disclosure.[103] Later in 2010, the New York case *Romano v. Steelcase* reinforced the court's reasoning in *Simply Storage* by holding that social media sites are not private.[104] The *Romano* court posited that, despite the plaintiff's privacy settings, information she had published on her Facebook and Myspace accounts was discoverable.[105]

Despite court opinions to the contrary, litigants have tried various tactics to circumvent the discoverability of social media evidence - one even asserting a "social-networking privilege"[106] – but they have been largely unsuccessful. Courts also generally reject the argument that social media evidence is protected by the constitutional right to privacy guaranteed by the Fourth Amendment.[107] In *Katz v. United States*, the United States Supreme Court established that what a person "knowingly exposes to the public" is not protected under the Fourth Amendment.[108] However, privacy expectations vary for different types of information.[109] Information may be classified three ways: public, private, or quasi-private.[110] Naturally, public information is

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[103] *E.E.O.C.*, 270 F.R.D. at 434. Specifically, the court allowed disclosure of information including "any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS [social networking site] applications" that referred to any emotional state or were likely to produce any emotional state. *Id.* at 436. Moreover, certain third-party communications, photographs, and videos were discoverable if they contextualized the plaintiffs' own communications. *Id.*

[104] Romano v. Steelcase, Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010).

[105] *Id.* (reasoning that when plaintiffs bring a cause of action placing their *physical* condition at issue, then information necessary to the defense of that action are subject to disclosure). The *Romano* plaintiff claimed her injuries prohibited her from traveling. *Id.* at 429. Thus, when the plaintiff's social networking pages contained pictures of her recent trips out of state, the photographs were material and necessary to the defense. *Id.* at 429-30. *But see* Giacchetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. 112, 116 (E.D.N.Y. 2013) (disagreeing with *Romano* by concluding that a civil plaintiff's Facebook postings were neither relevant, nor would lead to admissible evidence, to her damages claim for emotional distress).

[106] Opinion on Defendants' Motion to Compel Discovery at 1, McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285 (2010) (No. 113-2010). In *McMillen*, the court reasoned that the adoption of new privileges is not favored. *Id.* Further, in order to establish a new privilege, the claimant must establish: (1) the communication originated under the belief of confidentiality; (2) confidentiality is essential to maintaining the relationship between the affected parties; (3) the relationship is valued by the community; and (4) the importance of the relationship outweighs the need for disclosure. *Id.* The court then held that the claimant could not satisfy those requirements because of the public nature of social networking sites like Facebook and MySpace. *Id.*

[107] Goetz, *supra* note 68, at 8.

[108] Katz v. United States, 389 U.S. 347, 351 (1967).

[109] Sholl, *supra* note 100, at 211.

[110] *Id.*

afforded the least amount of constitutional protection while private information garners the highest level of protection.[111] Courts generally categorize quasi-private information (e.g., information on Facebook that is only viewable by a user's "friends" and not the general public), as public communication.[112] Thus, while data shows that the average Facebook user believes their social-networking data to be private, courts resoundingly hold that it is public.[113] Instead, if parties wish to keep sensitive information contained on social media from disclosure, courts generally expect parties to seek an appropriate protective order.[114]

However, a more recent 2013 district court decision out of New York narrowed social media discovery in a civil case.[115] *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.* involved a civil claim brought under the Americans with Disabilities Act.[116] The court rejected the defendant's discovery request for all information contained on the plaintiff's social media accounts.[117] In doing so, the court noted that "the fact that the information [Defendant] seeks is in an electronic file as opposed to a file cabinet does not give [Defendant] the right to rummage through the entire file."[118] The *Giacchetto* approach of requiring narrowly-tailored discovery requests for social media information reflects the current trend.[119] Some courts have especially upheld this approach in dealing with cases of a sensitive nature, like sexual harassment claims.[120]

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[111] Steven D. Zanzberg & Janna K. Fischer, *Privacy Expectations in Online Social Media – An Emerging Generational Divide?*, 28 NOV. COMM. LAW. 1, 26 (Nov. 2011).

[112] Sholl, *supra* note 100, at 212.

[113] *Id.*

[114] Goetz, *supra* note 68, at 7-8 (citing E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010)); *see also Protective Order Law & Legal Definition*, USLEGAL, http://definitions.uslegal.com/p/protective-order/ (a "protective order[] may be issued to prevent a disclosure that would prejudice the legal process from being used to harass, embarrass, or cause someone undue burden or expense").

[115] Giacchetto, 293 F.R.D. at 116.

[116] *Id.* at 113.

[117] *Id.* at 116.

[118] *Id.* (quoting Howell v. Buckeye Ranch, Inc., No. 11-CV-1014, 2012 WL 5265170, at *1 (S.D. Ohio Oct. 1, 2012).

[119] Jaelynn Jenkins, *Grappling With Social Media as a Legal Practitioner*, 26 UTAH BAR J., YOUNG LAWYERS DIVISION, no. 1, Jan. 2013, at 60, *available at* www.mountainwestlaw.com/File/d72634be-14db-4b9b-b037-fca96bd3ba9a.

[120] Sholl, *supra* note 100, at 224 (citing Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc., 2:06-CV-0078-JCM, 2007 WL 119149 (D. Nev. Jan. 9, 2007) (requiring more narrowly-tailored discovery requests in sexual harassment case); *Simply Storage*, 270 F.R.D. at 433.

2. Admissibility

Generally, courts treat social media evidence and non-social media evidence in the same manner.[121] Just like any other piece of evidence, in order to get social media evidence admitted at trial, a lawyer must be able to prove that the information is relevant (pursuant to FRE 401 and 403),[122] authentic (under FRE 901),[123] and not barred by the rules against hearsay (pursuant to FRE 801-807).[124] Additionally, the social media evidence must conform to the original writing under the best evidence rule.[125]

Lorraine v. Markel Am. Ins. Co. is particularly instructive in regards to the admissibility of ESI.[126] There, the court conducted a complete analysis of ESI admissibility under the evidentiary rules, including those regarding relevancy, authenticity, and hearsay.[127] Specifically, *Lorraine* acknowledged that "[e]stablishing that ESI has some relevance is generally not hard for counsel"[128] but cautions lawyers to "pay careful attention to [the authenticity] requirement."[129] The court then discusses the various ways different courts have analyzed ESI authenticity under FRE 901(b), which "provides examples of how authentication may be accomplished."[130] Finally, the court recognized that the hearsay analysis is similar for ESI evidence, one of the main issues being "whether electronic writings constitute 'statements' under Rule 801(a)."[131] Although *Lorraine* dealt with the enforceability of an arbitration judgment and not directly with evidence found on social media sites, its application of the evidentiary rules remains relevant for purposes of social media content.[132]

The large role that social media plays in everyday life usually means that its content will satisfy the FRE 401 "any tendency"

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[121] Diss, *supra* note 8, at 1855.

[122] FED. R. EVID. 401, 403; *see also* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 (D. Md. 2007).

[123] FED. R. EVID. 901; *see also* Baughman, *supra* note 34, at 946-49.

[124] FED. R. EVID. 801-807; *see also* Sholl, *supra* note 100, at 220-21; Childs, *supra* note 65.

[125] Josh Giluland, *The Admissibility of Social Media Evidence*, LITIGATION NEWS, http://apps.americanbar.org/litigation/litigationnews/trial_skills/030413-tips-admissibility-ESI.html; *see also* FED. R. EVID. 1002 (requiring "[a]n original writing, recording, or photograph [...] in order to prove its content unless [the Federal Rules of Evidence] or a federal statute provides otherwise").

[126] *Lorraine,* 241 F.R.D. at 585.

[127] *Id.* at 540-55.

[128] *Id.* at 541.

[129] *Id.* at 542.

[130] *Id.* at 544-45.

[131] *Id.* at 564.

[132] *Id.* at 534-35.

test.[133] However, some courts have found that, under FRE 403, the probative value of social media evidence is not outweighed by its prejudicial effect.[134] Even if the evidence passes the FRE 401 and 403 relevance requirements, the evidence must not violate the rules against inadmissible character evidence.[135] Like all evidence, information found on social networking sites, including photographs, cannot be admitted to prove bad character.[136] For example, a Myspace profile page submitted to prove that the defendant in a criminal case committed a series of bank robberies constituted inadmissible character evidence under FRE 404 because past criminal behavior cannot be used to prove a current criminal charge.[137]

Once a party clears the relevance hurdle, the social media evidence must then be authenticated.[138] Authenticity is established through a showing of genuineness and proof that the evidence has not been tampered with.[139] Therefore, the party seeking to admit the evidence needs to demonstrate that the content derives from the account of the person it is submitted against.[140] Verification that he or she was the original author of the content is also required.[141] The process of authentication of social media evidence includes testimony from whomever researched the page, including when and how the pages were located and the circumstances of the search, along with the social media pages.[142] Due in part to the very personal nature of most social media profiles, authenticity is typically easy to establish.[143]

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[133] Diss, *supra* note 8, at 1856-57.

[134] *Id.* (citing E.E.O.C. v. The Orig. Honeybaked Ham Co. of Ga., Inc., 2012 WL 5430974, at *2-*3 (Dist. Colo. Nov. 7, 2012). Prejudicial effect outweighs probative value when there exists "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403, Notes of Advisory Committee on Proposed Rules.

[135] FED. R. EVID. 401, 403; *see also* FED. R. EVID. 404 (stating that "[e]vidence 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 trait," and then providing limited exceptions).

[136] Giluland, *supra* note 125 (citing Quaqliarello v. Dewees, 2011 U.S. Dist. LEXIS 86914, at *7-8 (E.D. Pa. Aug. 4, 2011)).

[137] United States v. Phaknikone, 605 F.3d 1099, 1112 (11th Cir. 2010); *but see* United States v. Castillo, 409 F. App'x 350, 350 (11th Cir. 2010) (holding that when a prosecutor in a trial for illegal weapon possession sought to admit Myspace photographs of the defendant holding an AR-15 assault rifle, the evidence was admitted).

[138] People v. Clevenstine, 891 N.Y.S.2d 511, 514 (N.Y. App. Div. 2009).

[139] *Id.*

[140] Grimm, *supra* note 72 (citing Commonwealth v. Williams, 926 N.E.2d 1162 (Mass. 2010)).

[141] *Id.*

[142] Browning, *supra* note 63, at 480.

[143] *See* State v. Bell, 2008-Ohio-592, 882 N.E.2d 502, 512 (C.P. Clermont Cnty. Ct 2008) (calling the authentication threshold "quite low").

Unlike authenticity, hearsay is a greater obstacle to the admission of social media evidence.[144] Hearsay can be ubiquitous on social media;[145] however, it usually fails to prevent social media content from being admitted into evidence due to the many available exceptions to the rule.[146] So, for example, unsworn statements on a Facebook page made by a third party out-of-court declarant as to the defendant's liability constitute inadmissible hearsay under Rule 801.[147] On the other hand, inculpatory Facebook messages made by a defendant charged with first-degree murder are not inadmissible hearsay but rather a party admission.[148]

In determining the admissibility of social media evidence, courts look to the purpose for which the information is offered.[149] Evidence is only hearsay if it is offered for the truth of the matter asserted.[150] In sexual assault cases, oftentimes information that could not come in as evidence is presented to a jury to impeach the witness, which takes it out of the realm of hearsay.[151] For example, the case *In re K.W.* involved a victim who alleged child-abuse but was later impeached when the court allowed the jury to view suggestive photographs posted online along with use of provocative language.[152] Similarly, an Ohio appellate court affirmed the use of social media content used to demonstrate that the victim in a statutory-rape case indicated that she was eighteen on her MySpace page, when she was really only thirteen years old.[153]

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[144] *See generally Lorraine,* 241 F.R.D. at 562-76 (examining the steps that should be taken to overcome exclusion of ESI evidence due to hearsay).

[145] Baughman, *supra* note 34, at 949-50.

[146] Sholl, *supra* note 100, at 220; *see Lorraine,* 241 F.R.D. at 562-76 (exploring the numerous hearsay exceptions under which ESI may be admitted).

[147] Giluland, *supra* note 125 (citing Miles v. Raycom Media, Inc. 2010 U.S. Dist. LEXIS 122712, at *7-9, n.1 (S.D. Miss. Nov. 18, 2010)).

[148] *Id.* (citing People v. Oyerinde, 2011 Mich. App. LEXIS 2104, at *26-27 (Mich. Ct. App. Nov. 29, 2011)).

[149] Browning, *supra* note 63 at 480.

[150] FED. R. EVID. 801(c)(2).

[151] *Id.* at 482.

[152] In re K.W., 666 S.E.2d 490, 494 (N.C. Ct. App. 2008). The victim claimed she was a virgin before the rape, but her "Myspace page contain[ed] suggestive photos," including one captioned, "[I] may not be a virgin but I still gotta innocent face." *Id.* The court found that this evidence should have been admissible to impeach the victim, but found it to be harmless error as the defendant did "not offer[] a persuasive argument that the outcome of the hearing would have been different had the website been admitted." *Id.*

[153] State v. Gaskins, 2007-Ohio-4103, No. 06CA0086-M, 2007 WL 2296454 (Ohio Ct. App. Aug. 13, 2007).

B. Applying Rape Shield Laws to Social Media Content

Although courts may treat the two similarly in terms of discoverability and evidentiary rule application, social media evidence is fundamentally different than traditional evidence, or even other types of ESI.[154] The most important distinction for the purposes of this Comment is that a social networking profile does not always portray the true character of the user.[155] Indeed, an article in *Time* warned readers against interchanging an individual's Facebook profile for their true identity, calling it a "terrible mistake."[156]

Images posted onto sites like Facebook and Instagram are influenced by social norms.[157] Society today encourages certain traits via public platforms, like social media, which do not always reflect the user's true personality.[158] Interestingly, a 2008 study found that social media profile pictures most often "depict users as attractive and interested in romantic relationships."[159] However, the profile photograph is not the only information that can potentially paint a deceiving picture.[160] Uninvited users can also view a Facebook profile's "likes," or those whom a Twitter user follows –- both of which can provide a "potentially inaccurate" portrayal of a person's character.[161]

Thus, this potentially deceptive social media evidence could mislead jurors in sexual assault cases into thinking that the victim consented to the crime.[162] For example, one court prohibited the

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[154] *See* Andrew C. Payne, Note, *Twitigation: Old Rules in a New World*, 49 WASHBURN L. J. 841, 863-64 (2010)(identifying four key distinctions between ESI and social media content). Social media is different from other kinds of ESI because: (1) it is permanently stored on a server beyond the user's control; (2) it is used by hundreds of millions of people; (3) it serves as a platform for intensely personal and private information; and (4) not all social media sites operate the same way. *Id.*

[155] Brown, *supra* note 93, at 381-82.

[156] *Id.*

[157] *Id.; see Facebook's Zuckerberg Says Privacy No Longer A "Social Norm"* (VIDEO), THE HUFFINGTON POST (May 25, 2011, 3:10 P.M.), www.huffingtonpost.com/2010/01/11/facebooks-zuckerberg-the_n_417969.html (showing an interesting aside regarding social norms and Facebook). Facebook founder Mark Zuckerberg explaining that his social media site is designed to reflect current social norms. *Id.* Zuckerberg argues that he no longer believes privacy on the Internet to be considered a social norm. *Id.*

[158] Brown, *supra* note 93, at 381-82.

[159] Diss, *supra* note 8, at 1864-65 n. 138 (citing Brown, *supra* note 98, at 368).

[160] *Id.* at 1859.

[161] *Id.* (citing Lev Grossman, *Person of the Year 2010: Mark Zuckerberg*, TIME (Dec. 15, 2010), www.time.com/time/specials/packages/article/0,28804,2036683_2037183,00.html).

[162] *Id.* at 1865; *see generally* Amy Adele Hasinoff, *Sexting as media*

defense in a case involving the aggravated sexual assault of a minor from questioning the young victim about "whether she had a Facebook page and what kinds of pictures she posted there" because, if allowed, "[t]he trial would be converted from one that judges the defendant's conduct to one that places the victim and her family on trial."[163] Unfortunately, victims aren't always allotted this sort of protection because FRE 412 and a majority of state rape shield laws provide an exception to prior sexual behavior evidence if offered to prove consent.[164] Admitting this type of evidence, however, could change the course of the trial.[165] Social media content, like photographs, invite accusations that prompted the passage of rape shield laws in the first place, such as: What is she wearing? She must have been asking for it. Was she drunk? She wanted it at the time.[166]

In *Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc.*, a 2007 civil case involving a sexual harassment claim, the court chose to apply FRE 412 in limiting discovery of the plaintiff's social media and barring admission of similar evidence.[167] Applying the narrowly-tailored discovery requirement, the court chose to limit disclosures specifically to information relevant to the plaintiff's claim or alleged damages.[168] Relying on FRE 412, the court said that the fact that the plaintiff enjoyed sexually-promiscuous activity privately did not preclude her finding similar actions offensive at work.[169] Following this reasoning, the court ruled the information irrelevant, not discoverable, and inadmissible at trial.[170]

The analysis is identical in a civil or criminal sexual assault case.[171] Civil plaintiffs and criminal victims should not be denied protection of rape shield laws simply because evidentiary rules do not specifically provide that protection.

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production: Rethinking social media and sexuality, NEW MEDIA & SOCIETY, at 5 (May 24, 2013), http://gendertech.visuality.org/wmst320_readings/sexting_mediaproduction.pdf (quoting a reporter who stated that "[w]hen people see [] sexy pictures, they are more apt to have sexual relations which will lead to teen pregnancy."). The reporter was interviewing a girl who, when she was 12 years old, had had a photograph of her in a bra disseminated without her consent. *Id.* She later became pregnant at 15. *Id.*

[163] Fleming v. State, 455 S.W. 3d 577, 588 (Tex. Crim. App. 2014).

[164] FED. R. EVID. 412.

[165] *See* Diss, *supra* note 8, at 1865 (noting that a picture of a plaintiff in a revealing dress could sway the jury into thinking she encouraged sexual advances).

[166] Friedman, *supra* note 49.

[167] *Mackelprang*, 2007 WL 119149, at *6-*8.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Compare Fleming*, 455 S.W. 3d at 588-89 (a criminal case) *with Mackelprang*, 2007 WL 119149, at *6-*8 (a civil case).

C. Defendants' Sixth Amendment Argument

Although policy arguments overwhelmingly support the enforcement of rape shield laws, critics have raised concerns that the laws infringe on defendants' Sixth Amendment constitutional rights to confront an adverse witness.[172] The Sixth Amendment, which is incorporated against the states by the Fourteenth Amendment Due Process Clause, states that "in all criminal prosecutions, the accused shall enjoy the right to [...] be confronted with the witnesses against him."[173] Essentially, the Confrontation Clause constitutionally guarantees defendants in all criminal cases the right to confront their accusers.[174] In criminal sexual assault cases—like in all cases—this includes the right of their counsel to conduct a full and comprehensive cross-examination of the victim.[175]

In 1974, the United States Supreme Court expressly recognized the importance of a criminal defendant's right to impeach a witness through cross-examination in *Davis v. Alaska*.[176] The Court held that the defendant's right to "probe into the influence of possible bias in the testimony of a crucial identification witness," outweighed plaintiff's right to privacy.[177] In so holding, the *Davis* Court determined that "rape shield rules must yield to a criminal defendant's right to cross-examine witnesses for bias or improper motive."[178]

The importance of the Confrontation Clause was reiterated by the Supreme Court in 1988 in *Olden v. Kentucky*.[179] *Olden* concerned a defendant who claimed the victim lied about the rape in order to protect her relationship with another man.[180] The Court, citing its reasoning in *Davis*, ruled that the jury likely would have significantly altered their impression of the victim's credibility had the defendant been permitted to cross-examine her

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[172] U.S. CONST. amend. VI.

[173] U.S. CONST. amend. VI.

[174] *See* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 992 (2008) (contending that "the right to confront one's accusers is a basic tenet of our system of criminal justice").

[175] *Id.* at 992-93.

[176] Davis v. Alaska, 415 U.S. 308, 319 (1974).

[177] *Id.*; *see also* State v. De Lawder, 344 A.2d 446, 455 (Md. Ct. Spec. App. 1975) (Michigan appellate court holding that the *Davis* applied retroactively to a rape case and granting defendant a new trial to permit defendant's right to cross-examine the witness as to certain prior acts of sexual intercourse).

[178] Smith, *supra* note 11, at 465 n. 133 (quoting *Latzer v. Abrams*, 602 F. Supp. 1314, 1319 (E.D.N.Y. 1985) and its application of *Davis v. Alaska*).

[179] Olden v. Kentucky, 488 U.S. 227, 232 (1988), *declined to extend by* Nevada v. Jackson, 133 S. Ct. 1990 (2013).

[180] *Id.*

as to her sexual history.[181] Therefore, in addition to considering the rights of the victim, courts have looked to the Sixth Amendment in terms of the "broader interest of the government in fairly administering justice."[182]

Conversely, some Courts of Appeals have held that the victim's rights to privacy and freedom from a degrading cross-examination substantially narrow the defendant's Sixth Amendment rights under the Confrontation Clause.[183] The First Circuit, in *Ellsworth v. Warden*, found a sexual assault defendant's Sixth Amendment right to confront witnesses was not violated when the court denied the introduction of evidence of a prior sexual assault experienced by the victims.[184] The *Ellsworth* court reasoned that cross-examining the witnesses about prior sexual assault claims they had made previously was routinely excluded by courts under FRE 412.[185] Thus, FRE 412 overcame the defendant's Confrontation Clause rights as to cross-examining the victim about her history of sexual assault claims.[186] Similarly, the Ninth Circuit, in *Wood v. Alaska*, found that a defendant's Sixth Amendment rights to impeach a victim by using her prior sexual history may be outweighed by the potential prejudicial effect that the testimony would have on a jury.[187]

Dispositive of the fact that courts have come down on both sides of the Sixth Amendment issue, FRE 412 and a majority of its state counterparts contain built-in protections for defendants' Sixth Amendment rights.[188] In fact, ten states and the District of Columbia have adopted rape shield laws modeled completely on FRE 412.[189] Approximately twenty states, though not identical to

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[181] *Id.* at 231 (observing that *Davis* supported defendant's constitutional right to cross-examine the witness as to her motivation for testifying). *See also* United States v. Stamper, 766 F.Supp. 1396 (N.C. 1991), *aff'd without op.*, 959 F.2d 231 (1992) (ruling that the defendant was allowed to cross-examine the victim even though it included evidence of past sexual behavior because defendant's constitutional interests and possible loss of liberty outweighed the possible embarrassment of the victim).

[182] Neeley v. Commonwealth, 437 S.E.2d 721, 725 (Va. App. 1993).

[183] Klein, *supra* note 174 (collecting cases).

[184] Ellsworth v. Warden, N.H. State Prison, 333 F.3d 1, 7 (1st Cir. 2003).

[185] *Id.*

[186] *Id.*

[187] Wood v. Alaska, 957 F.2d 1544, 1552-54 (9th Cir. 1992) (holding that evidence that the victim showed the defendant sexually provocative pictures of her in *Penthouse* magazine was not probative that she consented to having sex with him on the occasion in question). The court held that admission of such evidence risked substantial confusion and prejudice by the jury. *Id.*

[188] *See* FED. R. EVID. 412 (b)(1)(C) (providing an exception to the general rule of inadmissibility for evidence "whose exclusion would violate the defendant's constitutional rights"); *see also* O'Dell, *supra* note 27, at 829-33 (listing different state approaches to rape shield law enactments).

[189] *See* MIL. R. EVID. 412 (West, WESTLAW through 2012); CONN. GEN. STAT. ANN. § 54-86f (West, WESTLAW through 2014 Feb. Reg. Sess.); D.C.

the federal rule, allow the defendant to argue a Sixth Amendment violation.[190]

The balance of social policy and legal precedent therefore supports a modernization of rape shield statutes to include protection of certain social media evidence. FRE 412 and state rape shield laws should be amended to reflect this modernization. An amendment is long overdue in order to bring outdated rape shield statutes into the twenty-first century.

IV. RAPE SHIELD STATUTES SHOULD BE MODERNIZED TO ACCOUNT FOR SOCIAL MEDIA EVIDENCE

This section proposes methods for handling social networking service ("SNS") evidence. SNS evidence becomes most relevant in two stages of any case: discovery and trial.[191] However, the different nature and purpose of discovery mandates a more liberal approach than that of admissibility of SNS evidence at trial. Admissibility of SNS evidence, on the other hand, should be prohibited. This proposal will briefly discuss the role of SNS evidence in discovery and then address a proposed amendment regarding admissibility.

CODE ANN. § 22-3022 (WESTLAW through Sept. 22, 2014); HAW. REV. STAT. ANN. § 626-1 R. 412 (Michie, WESTLAW through 2014 Reg. Sess.); 725 Ill. COMP. STAT. ANN. 5/115-7 (West, WESTLAW through 2014 Reg. Sess.); IOWA CODE ANN. R. 5.412 (West, WESTLAW through Aug. 15, 2014 Reg. Sess.); ME. R. EVID. 412 (West, WESTLAW through Oct. 1, 2014); OR. REV. STAT. § 40.210 (WESTLAW through July 1, 2014 Reg. Sess.); TENN. R. EVID. 412 (WESTLAW through July 15, 2014); UTAH R. EVID. 412 (WESTLAW through Apr. 15, 2014).

190 *See* ALA. R. EVID. 412 (WESTLAW through May 1, 2014); D.C. CODE ANN. § 22-3022 (WESTLAW through Sept. 22, 2014); FLA. STAT. ANN. § 794.022 (West, WESTLAW through 2014 Spec. "A" Sess.); GA. CODE ANN. § 24-2-3 (*repealed*); IND. CODE ANN. § 35-37-4-4 (West, WESTLAW through 2014 2d Reg. Sess.); KY. R. EVID. 412 (Banks-Baldwin, WESTLAW through July 1, 2014); LA. CODE EVID. ANN. art. 412 (WESTLAW through 2013 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 233, § 21B (West, WESTLAW through 2014 2d Ann. Sess.); MICH. COMP. LAWS ANN. § 750.520j (West, WESTLAW through 2014 Reg. Sess.); MINN. STAT. ANN. § 609.347 (West, WESTLAW through 2014 Reg. Sess.); MO. ANN. STAT. § 491.015 (West, WESTLAW through 2014 2d Reg. Sess.); MONT. CODE ANN. § 45-5-511 (WESTLAW through 2013 Reg. Sess.); N.H. REV. STAT. ANN. § 632-A:6 (WESTLAW through 2014 Reg. Sess., ch. 330); OHIO REV. CODE ANN. § 2907.02(D)(West, WESTLAW through 2013-2014); OKLA. ST. ANN. tit. 12, § 2412 (West, WESTLAW through Sept. 1, 2014 2d Reg. Sess.); 18 PA. CONS. STAT. ANN. § 3104 (West, WESTLAW through 2014 Reg. Sess. Act 1-131); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op., WESTLAW through 2013 Reg. Sess.); VT. STAT. ANN. tit. 13, § 3255 (WESTLAW through 2013-2014 Adj. Sess.); VA. CODE ANN. § 18.2-67.7 (Michie, WESTLAW through 2014 Reg. Sess. & cc. 1-2 1st Spec. Sec.); WIS. STAT. ANN. § 972.11 (West, WESTLAW through Apr. 25, 2014 Act 380).

191 *See* Sholl, *supra* note 100, at 215-22 (exploring discoverability and admissibility of SNS evidence in detail).

A. SNS Evidence Should Remain Discoverable For Narrowly-Tailored Requests

Discoverability of SNS evidence is an important tool in both criminal and civil litigation.[192] Without broad discovery rules, parties would be unable to fully develop their case.[193] Because our nation's jurisprudence includes a long history of adhering to principles of broad discovery,[194] courts should continue to retain discretion over permitting discovery of SNS evidence.[195]

As many courts have held, discovery requests of a victim's social media profile should remain narrowly tailored to the specific issues of the case.[196] As with any case, both parties in a civil or criminal sexual assault case are entitled to comprehensive discovery requests during litigation.[197] However, admissibility of this type of discoverable content—namely, social media evidence—is another matter entirely.[198]

B. FRE 412 and State Rape Shield Statutes Should Be Amended to Prohibit SNS Evidence at Trial

This Comment proposes that SNS evidence, which the victim

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[192] *Id.* at 215-219.

[193] *See* Richard L. Marcus, *E-Discovery Beyond the Federal* Rules, 37 U. BALT. L. REV. 321, 325-33 (discussing the development of broad discovery rules in our nation's jurisprudence).

[194] *See* Hickman v. Taylor, 329 U.S. 495, 506 (1947) (holding that discovery provisions are to be applied as "broadly and liberally as possible"). However, the Court also recognizes that "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Id.* at 507; *see also* FED. R. CIV. P. 26 Notes of Advisory Committee on Rules – 1946 Amendment, *Subdivision (b)* (deeming the purpose of discovery to be allowing a "broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case").

[195] *But see* Mallory Allen & Aaron Orheim, *Get Outta My Face[Book]: The Discoverability of Social Networking Data and the Passwords Needed to Access Them*, 8 WASH. J. L. TECH. & ARTS 137, 153 (2012)(warning litigants that "[b]ecause data use and privacy policies on social networking sites are constantly evolving to comply with changing regulatory law and public opinion, litigants should be careful when relying on the precedential value of previous decisions").

[196] *See, e.g., Giachetto*, 293 F.R.D. at 116 (narrowing social media discovery in civil case; Jenkins, *supra* note 119 (noting that the *Giachetto* approach reflects the current trend in social media discovery); Sholl, *supra* note 100 (social media discovery is especially narrowed in sexual harassment cases).

[197] FED. R. CIV. P. 26.

[198] FED. R. EVID. 412 (showing that the Federal Rules of Evidence provide no explicit guidance on the admissibility of social media evidence). In fact, they tend to limit admissibility in sexual assault and rape cases. FED. R. EVID. 412.

voluntarily posts online and falls within the scope of FRE 412, should be inadmissible at trial.[199] Therefore, Congress should amend FRE 412 to provide clarity on the admissibility of SNS evidence.[200] Following the addition of an SNS clause to the federal rule, state legislatures should enact similar provisions in their respective rape shield statutes.[201] A modernization accounting for SNS evidence would uphold the original objectives of FRE 412.[202] After all, rape shield statutes are in place to protect the victim's privacy.[203]

Furthermore, these rules aim to shield the victim from the embarrassment and sexual stereotyping likely to occur during a rape trial.[204] Therefore, the rule bars sexual history or innuendo evidence whether it is offered for substantive purposes or impeachment of the victim.[205] FRE 412(a)(1) prohibits admission of evidence of the victim's prior "sexual behavior."[206] This "behavior" includes any activity that implies sexual intercourse or sexual

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[199] *See* Brown, *supra* note 93, at 379 (stating "[t]he admission of Facebook photographs in litigation carries the risk that fact-finders will place undue emphasis on potentially inaccurate evidence").

[200] *See* Dickerson v. United States, 530 U.S. 428, 437 (2000) (stating that "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution"). *See* Allison L. Pannozzo, Note, *Uploading Guilt: Adding a Virtual Records Exception to the Federal Rules of Evidence*, 44 CONN. L. REV. 1695, 1695 (2012)(explaining that "despite the prevalence of email and social networking evidence in the legal field, the Federal Rules of Evidence have remained inadequate for dealing with this type of technology").

[201] O'Dell, *supra* note 27. All 50 states have enacted some version of FRE 412. *Id.* at 829.

[202] *See* Pannozzo, *supra* note 200, at 1695 (advocating updated Federal Rules of Evidence in the context of a virtual records exception).

[203] *See* FED. R. EVID. 412 Notes of Advisory Committee on Rules – 1994 Amendment (explaining that the objectives of FRE 412 are "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 infusion of sexual innuendo into the factfinding process").

[204] *Id.* The Advisory Committee goes on to say "the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." *Id.*

[205] *See* Perkins v. Warren, Civil No. 11-6264, 2014 WL 1569488, at *12 (D.N.J. Apr. 16, 2014) (explaining that "when cross-examining an accused the prosecutor may not pursue a line of questioning which places before the jury 'innuendo evidence' or inferences of evidence which the State could not get before the jury by direct testimony of the witness and which [the accused has] no opportunity to challenge meaningfully.") (internal quotation omitted); *see id.* (explaining that FRE 412 bars evidence "relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim").

[206] FED. R. EVID. 412(a)(1).

contact.[207] Furthermore, the drafters of the rule intended "behavior" to include "activities of the mind."[208]

The purpose behind the adoption of FRE 412 supports an explicit inclusion of social media evidence within the rule's protection.[209] Case law to date has not provided a definitive answer as to whether rape shield laws protect this evidence.[210] Consequently, Congress and state legislatures should clarify the judiciary's ambiguity regarding the admissibility of SNS evidence.[211] Legislators can achieve this by simply adding a provision to the existing FRE 412. Rule 412 currently contains four subsections: (a) Prohibited Uses; (b) Exceptions; (c) Procedure to Determine Admissibility; and (d) Definition of "Victim."[212] Congress should amend FRE 412 by adding an additional definition to subsection (d) as follows:

> (d) Definitions.
>
> (1) *Victim*. In this rule, "victim" includes an alleged victim.
>
> (2) *Evidence.* In this rule, "evidence" includes information voluntarily posted on any social networking service ("SNS").

This addition to the federal rule is necessary for four reasons. Specifically, the amendment to FRE 412 will allow the law to keep up with technological advancements, maintain its original purpose, prevent victim-blaming, and acknowledge cultural developments.

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[207] FED. R. EVID. 412 Notes of Advisory Committee on Rules – 1994 Amendment (citing United States v. Galloway, 937 F.2d 736 (10th Cir. 1991), *cert. denied,* 113 S. Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736, 739 (8th Cir. 1983 (birth of an illegitimate child inadmissible).

[208] FED. R. EVID. 412 Notes of Advisory Committee on Rules – 1994 Amendment. The Advisory Committee gives the example of fantasies or dreams as to what might constitute "activities of the mind." *Id.* The committee also cites to 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure*, §5384 at p. 548 (1980), which states that "[w]hile there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind." *Id.*

[209] *See id.* (saying that FRE 412 "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").

[210] Diss, *supra* note 8, at 1855. Most courts admit social media evidence as they would traditional evidence. *Id.* However, courts vary in how they treat social media evidence in sexual misconduct cases. *Id.* at 1859-65.

[211] *Id.*

[212] FED. R. EVID. 412.

1. Keep Up with Technological Advancements

The Federal Rules of Evidence remain painfully out of date when it comes to changes in technology.[213] Technological advances have changed the traditional platform of evidentiary procedures.[214] Furthermore, while the Federal Rules of Civil Procedure updated discovery rules for electronically stored information (ESI), the same cannot be said for admissibility of electronic evidence.[215]

2. Maintain the Original Purpose of FRE 412

Secondly, failing to add a provision for SNS evidence would result in the very bias that FRE 412 seeks to protect victims against.[216] Clarity on the inadmissibility of SNS evidence is necessary to prevent the trial from centering on the actions of the victim.[217] SNS evidence has the potential to be unfairly prejudicial to a victim for a number of reasons.

One reason is the high probability that the cases at issue will involve an acquaintance rape scenario.[218] When a defendant seeks to introduce SNS evidence in a rape or sexual assault case, there is a high probability that the parties were acquaintances on a social media platform before the alleged assault occurred.[219] This is a

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[213] Pannozzo, *supra* note 200.

[214] Hon. J. Michelle Childs, *Applying the Federal Rules of Evidence to the Latest Innovations in Personal Communications Technology*, DRI.ORG, www.dri.org/DRI/course-materials/2013-Women/pdfs/09_Childs.pdf, at 91.

[215] *See* FED. R. CIV. P. 34. *Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes* (amending the Rule in 2006 to provide and update for electronically stored information (ESI)).

[216] *See* FED. R. EVID. 412 Advisory Committee's Notes (outlining the purposes for enacting the rule).

[217] *See* Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?* 84 J. CRIM. L. & CRIMINOLOGY 554, 555 (1993)(discussing how rape law reform groups believed that many rapists were convicted of a lesser offense because the victim, rather than the perpetrator, was put on trial).

[218] *Acquaintance Rape*, RAPE, ABUSE & INCEST NATIONAL NETWORK (2009), https://www.rainn.org/get-information/types-of-sexual-assault/acquaintance-rape. Acquaintance rape involves "coercive sexual activities that occur against a person's will by means of force, violence, duress, or fear of bodily injury." *Types of Sexual Violence*, MOVINGTOENDSEXUALASSAULT.ORG, http://movingtoendsexualassault.org/information/types-sexual-violence/. The rape is committed by someone they know, like a friend or acquaintance. *Id.*

[219] *See Adding Friends & Friend Requests*, FACEBOOK.COM, www.facebook.com/help/360212094049906/ (last visited Nov. 14, 2014)(describing Facebook's policies for "friending" other Facebook users).

Most social media sites, like Facebook, require users to be friends before they can interact on each other's profiles. *Id.* In order to become friends with a user on Facebook, one must send a friend request. *Id.* That person then has the option of accepting or deleting the request. *Id.* The Facebook Adding

problem because research demonstrates that acquaintance rapes result in far fewer incarcerations than rapes involving strangers.[220] Society's general perception that acquaintance rapes are less serious crimes is a dangerous one.[221] Social interactions occur in cyberspace today perhaps even more than they occur in person.[222] Social networks - specifically dating websites - facilitate these relationships. This in turn could increase the likelihood of acquaintance rape scenarios.[223]

3. Prevent Victim-Blaming

Another reason SNS evidence is likely to be unfairly prejudicial is that allowing its admission would escalate instances of victim-blaming.[224] This result directly contradicts the goals of FRE 412 and rape shield laws in general.[225] What a victim posts

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Friends & Friend Requests Policy tells users to only send friend requests to people they have a "real-life connection to," like friends, coworkers or classmates. *Id.*

[220] *See* Bachman & Paternoster, *supra* note 217, at 571 (positing that "rapists who victimize acquaintances are less likely to be incarcerated than those who victimize strangers"). Bachman & Paternoster argue that acquaintance rape is objectively less serious because it is less likely to involve violence. *Id.* Moreover, acquaintance rapes are less likely to involve another felony like kidnapping. *Id.*

[221] *See Sexual Assault Resources – Acquaintance Rape*, FAIRMONT STATE UNIVERSITY, www.fairmontstate.edu/studentservices/sexual-assault-resources/sexual-assault-resources-acquaintance-rape(stating that obstacles to coping & recovery for victims include common social myths such as "the attack was incited through suggestive dress or intimate acts such as kissing").

[222] *See* Emily Snow, *Intimacy and Face-to-Face versus Computer Interaction*, 3 BRIDGEWATER STATE UNIV. UNDERGRAD. REV. 37, 38 (2007), *available at* http://vc.bridgew.edu/undergrad_rev/vol3/iss1/9 (stating that "one of the most common forms of internet use is that of using the internet to meet and communicate with people").

[223] *See, e.g.,* David Kushner, *The Six Seconds Between Love + Hate,* ROLLING STONE (May 21, 2014), www.rollingstone.com/culture/news/the-six-seconds-between-love-and-hate-a-vine-romance-gone-wrong-20140521 (writing about a social media relationship on the social media site Vine that resulted in a rape accusation). Vine is an app that was launched in 2013 that allows users to record and share six second video clips. *Id.* Two popular Vine users, Jessi Smiles and Curtis Lepore, began flirting through publicly-shared Vine clips. *Id.* After interacting online, they eventually met in person. *Id.* A few weeks later, Smiles brought rape charges against Lepore. *Id.*

[224] *See* Valenti, *supra* note 18 (discussing the problems inherent in victim-blaming). "[W]henever we blame a woman for being attacked – when we speculate about what she was wearing, suggest she shouldn't have been drinking or that she stayed out too late – we're making the world safer for rapists." *Id.*

[225] *See Rape Shield Laws and Game Theory: The Psychological Effects on Complainants Who File False Rape Allegations*, 32 LAW & PSYCHOL. REV. 135, 137 (2008) (listing three goals of rape shield laws). First, rape shield laws aim to "maintain the focus of the respective trial on the alleged rapist's culpability

online is irrelevant to the defendant's culpability.[226] This fact is especially crucial given popular misconceptions about women and fears of false rape accusations.[227]

If a court allows jurors to see social media content, such as provocative profile photographs of the victim, it can create doubt as to the veracity of the victim's claim.[228] A jury should not have access to such potentially prejudicial information because it distracts from the real issue on trial.[229] Additionally, social media evidence can be particularly effective in persuading jurors.[230] Moreover, victim-blaming also defeats the original purpose of FRE 412 and rape shield laws because it discourages victims from reporting instances of rape and sexual assault.[231]

4. Acknowledge Cultural Trends

Psychological studies and statistics demonstrate that publishing provocative content online is a cultural phenomenon.[232] Consequently, voyeurs cannot take any SNS evidence appearing to convey sexual tendencies of a victim at face value.[233] Particularly with young people, posting online is a central aspect of quotidian

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and not on the victim's sexual history." *Id.* Second, "the victim's sexual history, no matter how promiscuous, is irrelevant to the accused's culpability." *Id.* Finally, rape shield laws "make it more likely that a victim will come forward and report rape." *Id.*

[226] *Id.*

[227] *See generally* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125, 126 (1998)(pointing out that even though false rape reports mirror false reports of other crimes – about two percent – popular misconceptions about false rape has caused distorted views on the issue). "[T]he fear of false rape accusations and the popular misconceptions about the tendency of women to lie about being raped, have suffused American law since the colonial period." *Id.*

[228] *See* Deborah Jones Meritt, *Social Media, The Sixth Amendment, and Restyling: Recent Developments in the Federal Rules of Evidence*, 28 TOURO L. REV. 27, 47 (2012)(stating that SNS evidence "carries special weight" with jurors).

[229] Emily M. Janoski-Haehlen, *The Courts are all a 'Twitter': the Implications of Social Media Use in the Courts*, 46 VAL. U. L. REV. 43, 45-51 (2011-2012); *see also* Pannozzo, *supra* note 200, at 1720 (acknowledging that the "most obvious implication of admitting email and SNS evidence is the possibility of unfairly prejudicial information coming into trials").

[230] *See* Meritt, *supra* note 228, at 47 (citing the old maxim that "seeing is believing" when describing how social media evidence "can dramatically illustrate guilt or liability").

[231] *See Rape Shield Laws and Game Theory, supra* note 225, at 137 (identifying encouraging victims to report rape as a purpose of rape shield laws).

[232] *See* DaSilva, *supra* note 30, at 215 (acknowledging provocative content on MySpace).

[233] Brown, *supra* note 93, at 359.

life.[234] Studies demonstrate that exposure to sexual content causes adolescents to show increased sexual behavior in their own lives.[235]

Especially when evaluating teenage girls, researchers discovered that media urges girls to be beautiful so that they can attract a man.[236] Media content, online or elsewhere, pushes women to attach particular psychological significance to their appearance.[237] Logically, this cultural ideal is reflected in how women portray themselves on their social networking accounts.[238] Therefore, allowing content that has become ingrained in our cultural psyche will unfairly mislead the factfinder in a rape trial.[239] This misguided prejudice is precisely what rape shield laws and FRE 412 sought to abolish.[240] In rape and sexual assault cases, the implications for the victim are simply too dire.[241]

V. CONCLUSION

The innovation of social networking has created cultural, psychological, and legal changes, which have profoundly impacted rape and sexual assault victims.[242] Jurisprudence cannot protect these victims from the cultural and psychological repercussions

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[234] Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickhur, *Social Media & Mobile Internet Use Among Teens and Young Adults*, ERIC, http://files.eric.ed.gov/fulltext/ED525056.pdf. 93 percent of teens 12-17 and young adults ages 18-19 go online. *Id.* at 2. 74 percent of adults use the internet. *Id.* at 4.

[235] S. Liliana Escobar-Chaves et al., *Impact of the Media on Adolescent Sexual Attitudes and Behaviors,* 116 PEDIATRICS 303, 312 (2005). "As adolescents went from the 10th percentile to the 90th percentile in exposure to sexual content on TV, the likelihood they would begin to have sexual intercourse in the next 12 months doubled." *Id.*

[236] *Id.* at 318. "Teenage-girl magazines include an average of [more than] 80 column inches per issue on sexual topics ([about] 1-6 articles)." *Id.* "Content analysis indicates that magazines aimed at teen girls provide messages that girls should be beautiful and plan their lives to attract a man, and girls are depicted as object of male sexual desire in editorial content as well as in advertising material." *Id.*

[237] *Id.*

[238] Brown, *supra* note 93 at 382.

[239] *Id.*

[240] *See* FED. R. EVID. 412 Advisory Committee's Notes (stating "[t]he 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").

[241] *Id.*

[242] *See generally* DaSilva, *supra* note 30, at 211 (noting that "rape has a long history in American jurisprudence"); Lieberman & Arndt, *supra* note 83 (discussing how social phenomena influence the legal system); Diss, *supra* note 8, at 1864-65 (describing generally how social media has influenced discovery and admissibility in litigation).

social media causes, but we can improve their legal protections. Unfortunately, current rape shield laws have failed to adapt in order to encompass technological progress.[243] Legislatures need to update rape shield laws to account for SNS evidence that can be irrevocably damaging to victims during a rape or sexual assault trial. The proposed amendment still maintains the defendant's legal and constitutional rights. Our legal system must strive to keep pace with a modernized and ever-changing world. Rape and sexual assault victims do not have a choice. We do.

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[243] Bopst, *supra* note 227.