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## **Rape Shield Laws and the Social Media Revolution: Discoverability of Social Media—It's Not Private**

Seth I. Koslow

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## Rape Shield Laws and the Social Media Revolution: Discoverability of Social Media—It's Not Private

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## **RAPE SHIELD LAWS AND THE SOCIAL MEDIA REVOLUTION: DISCOVERABILITY OF SOCIAL MEDIA— IT'S SOCIAL NOT PRIVATE**

*Seth I. Koslow*<sup>\*</sup>

### **I. INTRODUCTION<sup>1</sup>**

Rape Shield laws serve a valuable purpose in our society.<sup>2</sup> Before Rape Shield laws, rape victims were forced to prove that they were in fact victims, as opposed to willing participants.<sup>3</sup> To demonstrate that the victim was a willing participant, a defendant was allowed to introduce evidence regarding the victim's sexual predisposition or prior sexual behavior.<sup>4</sup> Thus, the defendant's strategy was to show that the victim had either consented or "must have asked for

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<sup>\*</sup> J.D. Candidate 2013, Touro College Jacob D. Fuchsberg Law Center; B.S. 2004 in Business Administration, American University. I would like to thank Associate Dean Myra Berman and Professor Dan Subotnik for inspiring and motivating me to write on this subject. To Brittany Fiorenza and Avi "Sarge" Goldstein, I cannot thank you enough for your assistance. I would also like to thank my loving wife, Jill, whose unconditional love and encouragement were invaluable to me throughout the research, writing, and editing of this Comment, not to mention law school in general. Also, a very special thank you to Grandma Dear because, without you, I might not have been a member of the *Law Review*. Finally, thank you to my family for their love and support.

<sup>1</sup> For the purposes of this Comment and continuity, the "victims" discussed herein will all be referred to in the female gender and men will commit all of the "attacks." All sentiments and thoughts expressed herein, however, apply with equal strength and weight to either sex in similar situations.

<sup>2</sup> FED. R. EVID. 412 advisory committee's note ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.").

<sup>3</sup> Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 80 MINN. L. REV. 763, 825 (1986) (discussing a defendant who intended to show that the victim fabricated her story so that her parents would not punish her for being a willing participant).

<sup>4</sup> *Id.*

it.”<sup>5</sup> As a result of these tactics, and in a very real sense, victims were being “victimized” for a second time.<sup>6</sup> Instead of being a victim of an insulated crime like rape, where only the attacker and victim are present, rape victims were being victimized in a courtroom, in public, for everyone to see. For obvious reasons, victims felt it best to remain anonymous.<sup>7</sup> Instead of coming forward in the hope of bringing their assailants to justice, victims felt it was safer to stay out of the public eye.<sup>8</sup> It was bad enough being a victim of rape; the whole world certainly did not need to know about the victim’s reputation for being promiscuous or prude.

In response to this problem, and in the interest of prosecuting more sexual offenders, Congress and the states began introducing Rape Shield laws<sup>9</sup> that were designed to protect rape victims and encourage them to come forward against their attackers.<sup>10</sup> These laws are intended to prevent defendants from exposing a victim’s prior sexual activities at trial as a means of defending his own actions.<sup>11</sup> Federally, the law limits the availability of information a defendant may present regarding a victim during a trial.<sup>12</sup> While the wording may differ between the federal rules and each state, the statutes are universally intended to “end the ‘degrading and embarrassing disclosure of intimate details about the victims’ private lives.”<sup>13</sup>

While Rape Shield laws serve a vital purpose in our society, this Comment argues that, with the proliferation of Social Media

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<sup>5</sup> Elizabeth J. Kramer, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 318 (1998).

<sup>6</sup> Tracey A. Berry, *Prior Untruthful Allegations Under Wisconsin’s Rape Shield Law: Will Those Words Come Back to Haunt You?*, 2002 WIS. L. REV. 1237, 1243 (2002).

<sup>7</sup> Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1594 (2007) (“Because of the personal, sexual nature of the crime, and of the many ways in which rape victims are maligned in the media and the courtroom, it is understandable that victims wish to remain anonymous.”).

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., FED. R. EVID. 412 (Federal “Rape Shield”); ARIZ. REV. STAT. ANN. § 13-1421 (2012) (Arizona’s “Rape Shield”); MICH. COMP. LAWS ANN. § 750.520j (West 2012) (Michigan’s “Rape Shield”).

<sup>10</sup> FED. R. EVID. 412 advisory committee’s note (“By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”).

<sup>11</sup> FED. R. EVID. 412(a)(1).

<sup>12</sup> *Id.*

<sup>13</sup> Jason M. Price, *Constitutional Law—Sex, Lies and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim’s Motive to Fabricate*, 18 W. NEW ENG. L. REV. 541, 551 (1996) (citing 124 CONG. REC. 34, 913) (1978)) (statement by Rep. Mann).

websites, certain evidence of a victim's prior sexual activities should be discoverable and admissible in court on the ground that they are not private. Section II provides the history and rationale behind Rape Shield laws; section III discusses the impact of Rape Shield on the accused; section IV provides a general explanation of how prolific Social Media websites have become; section V discusses the effect of the proliferation of Social Media websites on the evidentiary rules of discoverability and admissibility; section VI provides a workable hypothetical, which establishes the baseline for the rationale behind this Comment, and section VII concludes with a recommendation for a modification to existing Rape Shield laws.

## II. HISTORY OF RAPE SHIELD

Rape has been a crime on the books for nearly two centuries,<sup>14</sup> but the extensive level of protection afforded to victims through Rape Shield laws is a relatively modern phenomenon.<sup>15</sup> Rape laws have required varying levels of action from victims, in order to prove they were, in fact, raped.<sup>16</sup> Depending on the era, a victim would have had to prove she was raped through corroboration or by showing that she displayed "utmost" or "reasonable" resistance to the attacker's attempt.<sup>17</sup>

Notwithstanding the aforementioned requirements of proof, a victim of an alleged rape was traditionally forced to establish that she was not unchaste, as a practical matter.<sup>18</sup> Before Rape Shield, defense teams tried to show that the victim had "ask[ed] for it" by being too promiscuous,<sup>19</sup> as opposed to having been a victim of a crime. It was believed that if a woman was unchaste, she had somehow placed herself in a situation that would warrant, or even justify, the resulting

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<sup>14</sup> *People v. Abbot*, 19 Wend. 192 (1838) (accusation of rape).

<sup>15</sup> *Winfield v. Virginia*, 225 Va. 211, 213 (Va. 1983) (a case of first impression involving a sexual assault prosecution and the admissibility of evidence in light of the "rape shield" provision of Code §18.2-67.7).

<sup>16</sup> Richard A. Wayman, Note, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865, 868-71 (1992) (discussing the history of rape shield statutes).

<sup>17</sup> Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 985 (2008) (discussing the impact of Rape Shield Laws on the accused and their constitutional rights).

<sup>18</sup> Wayman, *supra* note 16, at 869.

<sup>19</sup> Orenstein, *supra* note 7, at 1588.

actions of her attacker.<sup>20</sup> Supporters of the common law evidentiary rules, which allowed evidence of a victim's extra-marital or pre-marital sexual activities, believed that a woman's unchaste ways were relevant to whether a woman consented to the alleged attack.<sup>21</sup> Defense teams questioned victims regarding their prior sexual behavior in an effort to show that the victim "failed to personify a model of sexual modesty."<sup>22</sup> Therefore, under common law, unless she could prove that she was a virgin before the alleged attack, the general public rarely believed a victim had been actually raped.<sup>23</sup>

In order to determine if the alleged rape was a crime, or simply a situation that the victim invited upon herself, courts repeatedly permitted inquires into the personal and sexual history of the victim.<sup>24</sup> In 1838, a New York court allowed "[t]he prosecutrix [to] be shown to be in fact a common prostitute; so also a previous voluntary connection between her and the prisoner may be proved; and evidence may be given of particular acts and associations, indicating on her part a want of chastity."<sup>25</sup>

In an effort to protect rape victims, feminist organizations, as well as law enforcement, argued that allowing defendants to discuss a woman's sexual history was unfair and unjustifiable.<sup>26</sup> As a result, the first Rape Shield law was enacted in Michigan in 1974.<sup>27</sup> Over the course of twenty-four years, Congress and all fifty states enacted Rape Shield laws with the overarching goal of protecting a victim's privacy.<sup>28</sup> The last state to enact a Rape Shield law was Arizona in

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<sup>20</sup> *Abbot*, 19 Wend. at 192.

<sup>21</sup> Price, *supra* note 13, at 550.

<sup>22</sup> Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 54 (2002).

<sup>23</sup> Orenstein, *supra* note 7, at 1587 ("Any prior sexual activity on her part . . . was deemed to undermine the veracity of her claim . . .").

<sup>24</sup> *Abbot*, 19 Wend. at 192.

<sup>25</sup> *Id.*

<sup>26</sup> Price, *supra* note 13, at 550 (citing Wayman, *supra* note 16, at 869-71):

They argued that: (1) sexual morality had changed since the adoption of the common-law doctrine which allowed evidence about the victim's unchaste character; (2) exclusionary laws are needed to protect "complainants from a 'second rape' in the courtroom;" and (3) rape shield laws would attempt to balance "gender-bias in the determination of consent."

*Id.*

<sup>27</sup> MICH. COMP. LAWS ANN. § 750.520j (West 2013).

<sup>28</sup> Anderson, *supra* note 22, at 88.

1998.<sup>29</sup>

The rationale behind Rape Shield laws was based on a concern that victims feared coming forward.<sup>30</sup> The belief was that “by protecting the victim’s sexual privacy, the whole [rape trial] process may be less traumatic for her.”<sup>31</sup> Victims feared that their prior sexual conduct would be displayed for all to see in the public forum of a courtroom.<sup>32</sup> There was also concern that, after having her sexual history examined in the court, a woman may feel as though “she ha[d] done something wrong by having sex.”<sup>33</sup> Rape Shield laws allowed victims to seek justice, without being victimized by the court of public opinion.<sup>34</sup>

These statutes are designed to place restrictions on the types of evidence that may be discoverable and admissible with regard to the sexual conduct of rape victims.<sup>35</sup> As a result of these rules, defense teams are no longer allowed to present evidence in order “to prove that a victim engaged in other sexual behavior” or “to prove a victim’s sexual predisposition.”<sup>36</sup> In effect, these rules have served to change a defendant’s strategy from attempting to show the victim’s sexual tendencies, to showing the victim’s mendacity.<sup>37</sup> These rules have proven to be beneficial by reducing the number of blatant attempts to embarrass, shame or discourage a victim from testifying against her attacker.<sup>38</sup>

Without a doubt, the common law doctrine that a female victim somehow invited the crime of rape, simply because of her prior sexual escapades or employment,<sup>39</sup> offers no protection to actual rape victims. However, as a result of current rape shield rules, the pendu-

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<sup>29</sup> ARIZ. REV. STAT. ANN. § 13-1421 (2012). See also 1998 ARIZ. LEGIS. SERV. 281 (West).

<sup>30</sup> Anderson, *supra* note 22, at 88.

<sup>31</sup> Price, *supra* note 13, at 564 (citing Lisa M. Dillman, Note, *Stephens v. Miller: Restoration of the Rape Defendant’s Sixth Amendment Rights*, 28 IND. L. REV. 97, 113 (1994)).

<sup>32</sup> *Id.* at 563.

<sup>33</sup> *Id.* at 564.

<sup>34</sup> *Id.*

<sup>35</sup> See generally FED. R. EVID. 412(a)(1)(2).

<sup>36</sup> *Id.*

<sup>37</sup> Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125, 132 (1998).

<sup>38</sup> Orenstein, *supra* note 7, at 1599 (“[B]latant attempts to invade the privacy of the victim, shame her or otherwise discourage her from testifying have been limited by rape shield.”).

<sup>39</sup> *Abbot*, 19 Wend. at 192. Prostitutes were long considered to lack “general moral character,” thus rendering their claims of rape unsubstantiated. *Id.*

lum of proof required in rape cases has swung in disfavor of the defendant, to the extreme. As Professor Richard Klein puts it, “in the last thirty-five years, there has been a steady erosion of the due process rights of those accused of rape.”<sup>40</sup> In effect, Rape Shield rules have given alleged victims carte blanche to accuse a person of rape, absent any proof, without fear of any repercussions.

### III. IMPACT OF RAPE SHIELD LAWS ON THE ACCUSED

Men have faced the threat of false rape accusations since biblical times.<sup>41</sup> There are a myriad of reasons why a woman would fabricate a rape; some of those reasons include a desire to hide her own promiscuity, a desire/fantasy to be raped, or a desire for vengeance.<sup>42</sup> “One also wonders whether the emotional nature of rape, the public pressure to catch strangers who rape, and racist stereotyping of rapists influence police to use different tactics in rape cases, resulting in more false confessions and testimony.”<sup>43</sup> For whatever reason, innocent men run the risk of being accused of a rape they did not commit.<sup>44</sup> The impact of these false accusations is very real.<sup>45</sup> It occurs frequently enough to warrant the creation of a website called the “Community for the Wrongly Accused,” a successor to the False Rape Society, which regularly tracks false rape accusations through its website blog.<sup>46</sup>

One of the most recent infamous cases involved rape charges against the Duke University lacrosse team in 2006.<sup>47</sup> Duke University is a school with students of diverse backgrounds;<sup>48</sup> many of the students are wealthy.<sup>49</sup> In March 2006, the Duke lacrosse team held a

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<sup>40</sup> Klein, *supra* note 17, at 982.

<sup>41</sup> Bopst, *supra* note 37, at 125. See Denise R. Johnson, *Prior False Allegations of Rape: Falsus In Uno, Falsus in Omnibus*, 7 YALE J.L. & FEMINISM 243 (1995).

<sup>42</sup> Johnson, *supra* note 41, at 243.

<sup>43</sup> Orenstein, *supra* note 7, at 1591.

<sup>44</sup> *Id.*

<sup>45</sup> COMMUNITY OF THE WRONGLY ACCUSED, <http://www.cotwa.info/> (last visited Apr. 18, 2013) (a regularly updated website containing blog postings about false rape accusations across the country).

<sup>46</sup> *Id.*

<sup>47</sup> *Looking Back at the Duke Lacrosse Case*, DUKE U., <http://today.duke.edu/showcase/lacrosseincident/> (last visited Apr. 18, 2013).

<sup>48</sup> *Profile of the Class of 2015*, DUKE U., <http://admissions.duke.edu/images/uploads/Class2015Profile.pdf> (last visited Apr. 18, 2013).

<sup>49</sup> *Cost & Financial Aid*, DUKE UNDERGRADUATE ADMISSIONS, <http://admissions.duke.edu/>



party where two African American exotic dancers were invited to provide entertainment.<sup>50</sup> At one point during the party, the two dancers were separated and one of the dancers was dragged into a bathroom where she claimed she was “hit, kicked and strangled” by one of the players.<sup>51</sup> The accuser further indicated that she was told by one of the players, “Sweetheart, you can’t leave.”<sup>52</sup> Almost immediately, the lacrosse rape story made headlines across the country.<sup>53</sup>

Two players were indicted by May of 2006.<sup>54</sup> The District Attorney handling the case, Mike Nifong, took it upon himself to wage a very public war against the defendants.<sup>55</sup> He thought it was his duty to convict the defendants as a result of “the circumstances of rape,” which showed “a deep racial motivation” for the events that took place at the party.<sup>56</sup> However, after continued investigation, the prosecution determined that there were too many flaws in the case and too many inconsistencies in the victim’s stories.<sup>57</sup> Eventually, the rape charges were dropped,<sup>58</sup> but the damage to the Duke players’ reputations was done.

The impact of the false accusations by the exotic dancer was swift and overwhelming.<sup>59</sup> The players did not have the opportunity to even attempt to rebut the claims of both the accuser and the District Attorney before they were indicted.<sup>60</sup> Much of what was said

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application/aid (last visited Apr. 18, 2013).

<sup>50</sup> Karla Shuster, Tom Rock, Steven Marcus & Tom Allegra, *Details in Duke Rape Investigation Emerge*, NBC SPORTS, <http://nbcsports.msnbc.com/id/12080776/> (last updated Mar. 30, 2006).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Duke Rape 2006*, GOOGLE, <http://www.google.com> (indicating that over 5,000,000 results were associated with the term “Duke Rape 2006”).

<sup>54</sup> State of North Carolina, *Indictment of Collin Finnerty: First Degree Forcible Rape* (2006), available at <http://f11.findlaw.com/news.findlaw.com/cnn/docs/duke/fnnrty41706ind1.gif>; State of North Carolina, *Indictment of Reade William Seligman: First Degree Forcible Rape* (2006), available at <http://files.findlaw.com/news.findlaw.com/cnn/docs/duke/slg41706ind1.gif>.

<sup>55</sup> R. Taylor Matthews, *The Duke Lacrosse Rape Case – A Public Branding, Is There a Remedy?* 52 ST. LOUIS U. L.J. 669, 670 (2011) (Mr. Nifong granted more than fifty interviews to national news media outlets).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 671 (“[T]he accuser’s ever-evolving tale made the claim that she was raped at the Duke lacrosse party even more doubtful. The accuser gave varying accounts of the rape, claiming she was raped by ‘five guys,’ then claiming she was raped by ‘three men,’ while also stating that ‘no one forced her to have sex.’”).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Matthews, *supra* note 55, at 678.

was received as fact, until the investigation concluded.<sup>61</sup> The players' names became well-known nationwide and, unfortunately, synonymous with the term "Duke Rape Case."<sup>62</sup>

While it is true that the exonerated players have some remedies available to them,<sup>63</sup> as the saying goes, you can't "unhear" what you've already heard. These innocent young men will be forever tied to the "Duke Rape Case." Furthermore, it is likely that a defamation lawsuit against the District Attorney or the State of North Carolina would not be successful.<sup>64</sup>

#### IV. PROLIFERATION OF SOCIAL MEDIA

As of the publication of this Comment, Facebook, Twitter and LinkedIn are the major players in the Social Media world.<sup>65</sup> Since 2003, these three sites have recruited members at a record setting pace.<sup>66</sup> A person would be hard-pressed to find a member of Generation-Y (or the next generation) who does not have an active account with at least one of these networks.<sup>67</sup> The proliferation of social networking, in less than a decade, has created a public forum through which children and adults can exchange communications and digital media, stay updated with current events, or even make plans for a given evening.<sup>68</sup> Often this information is "posted" on someone's "wall," which is available to the general public, or at a minimum, the wall owner's "friends."<sup>69</sup>

As expected, Social Media sites are exactly that, social, not private. It is readily apparent that Social Media has changed the way

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<sup>61</sup> See *id.* at 676 (noting that "the media disseminated the statements [made by the District Attorney] worldwide on television, in the newspaper and on the Internet").

<sup>62</sup> See generally *id.* at 676-77.

<sup>63</sup> *Id.* at 697. The players could have potentially brought a defamation suit for money damages. *Id.* at 697.

<sup>64</sup> Matthews, *supra* note 55, at 697 (since the County Prosecutor position was created by the North Carolina Constitution, "the chances of a successful defamation action against the county, the state or the prosecutor in his official capacity are remote").

<sup>65</sup> *Top 15 Most Popular Social Networking Sites: November 2012*, EBIZMBA, <http://www.ebizmba.com/articles/social-networking-websites> (last visited Apr. 18, 2013).

<sup>66</sup> Joanna Brenner, *Pew Internet: Social Networking*, PEW INTERNET (Nov. 13, 2012), <http://pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx> (last visited Apr. 18, 2013).

<sup>67</sup> *Id.*

<sup>68</sup> See generally FACEBOOK, <http://www.facebook.com/> (last visited Apr. 18, 2013).

<sup>69</sup> *Id.*

people live their lives.<sup>70</sup> Many people use these sites for “networking” but there are studies suggesting, in fact, that people are not really networking as much as they are “broadcasting their lives to an outer tier of acquaintances . . . .”<sup>71</sup>

## V. IMPACT OF SOCIAL MEDIA INFORMATION AVAILABLE AS EVIDENCE

Social Media has greatly impacted the judicial process. “Less than 10 years ago, there was no cause of action for defamation by Twitter, no crime of creating a false online persona, and it would not have been possible to serve a defendant with process via a social networking site—yet all three exist today.”<sup>72</sup> The age of Social Media can be defined in one word: More.<sup>73</sup> With the proliferation of Social Media websites, more people have more access, to more information, more readily than ever before.<sup>74</sup> In fact, even if an individual is not a member of a social networking site, “there is no denying the fact that Social Media content can serve as an excellent and unparalleled source of information.”<sup>75</sup> The availability of this information has a distinct impact on discovery and the courts.<sup>76</sup> Attorneys are using these websites, more often than ever before, to find information about their clients, opposing parties, judges, and jurors alike.<sup>77</sup>

Traditionally, courts frowned upon information that originat-

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<sup>70</sup> Jonathan E. DeMay, *The Implications of the Social Media Revolution on Discovery in U.S. Litigation*, A.B.A. (Summer 2011), available at [www.condonlaw.com/attachments/brief\\_sum11\\_demay.pdf](http://www.condonlaw.com/attachments/brief_sum11_demay.pdf) (“The explosive growth of Social Media, coupled with the continuing transition from the use of desktop and laptop computers to increasingly powerful mobile devices, has provided virtually instantaneous and constant access to an increasingly interconnected digital world . . .”).

<sup>71</sup> *Primates on Facebook*, THE ECONOMIST (Feb. 2009), <http://www.economist.com/node/13176775>.

<sup>72</sup> John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 469 (2011).

<sup>73</sup> DeMay, *supra* note 70, at 55 (discussing the explosive growth of Social Media and the availability of access to the digital world).

<sup>74</sup> *Id.*

<sup>75</sup> John M. Miller, *Is MySpace Really My Space? Examining the Discoverability of the Contents of Social Media Accounts*, 30 TRIAL ADVOC. Q. 28, 28 (2011).

<sup>76</sup> Christopher Hopkins, *Using Iphone Location in Data Discovery*, 30 TRIAL ADVOC. Q. 4, 6 (2011) (“E-discovery has been a hot, if not over-emphasized, issue, and broad discovery orders have been the subject of several appeals.”).

<sup>77</sup> Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics and Social Media*, 98 ILL. B.J. 366 (2010). Attorneys also use this information to confirm or undermine their clients’ cases. *Id.*

ed on the Internet.<sup>78</sup> Courts viewed this information as unreliable, useless, and merely gossip.<sup>79</sup> However, more recently, courts have begun to embrace the Internet as not only a legitimate source of information, but also a valuable tool for attorneys.<sup>80</sup> Moreover, some federal judges have gone so far as to confirm their judicial intuition through Internet research.<sup>81</sup> Courts have begun to embrace media content as discoverable, but only after balancing a number of factors.<sup>82</sup>

There is a growing trend today to allow evidence from Social Media websites.<sup>83</sup> Most courts now allow discovery of relevant information that a user posts on Facebook, LinkedIn, or Twitter accounts.<sup>84</sup> In fact, courts have allowed discovery of information from Social Media in cases ranging from personal injury to sexual harassment.<sup>85</sup> As one might expect, attorneys must adhere to rules and regulations regarding discovery and ethics.<sup>86</sup> Generally speaking, courts tend to apply traditional rules to ethical matters when it comes to the use of social media.<sup>87</sup> Before a court decides if it will allow discovery of the information, courts balance several factors including relevancy, need for the information, alternative availability of the information, and “the privacy interests of the party from whom the information is sought.”<sup>88</sup>

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<sup>78</sup> See Browning, *supra* note 72, at 470 (discussing the “sea of change” in attitudes of the courts regarding evidence which comes from the Internet).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 470.

<sup>81</sup> *Id.* (citing *United States v. Bari*, 599 F.3d 176, 181 (2d Cir. 2010) (per curiam)).

<sup>82</sup> Miller, *supra* note 75, at 28. (Those factors include: “[T]he relevancy of the information sought, the need for information in the subject litigation, the availability of the information from other sources, and the privacy interests of the party from whom the information is sought.”).

<sup>83</sup> See generally Browning, *supra* note 72 (discussing how trial and appellate courts in various jurisdictions have begun to allow discoverability of Social Media content).

<sup>84</sup> Boggs, *supra* note 77, at 367.

<sup>85</sup> Miller, *supra* note 75, at 29 (Social Media discovery has been used as a means to “review[] personal messages sent by an employee in a sexual harassment case to assessing a plaintiff’s loss of enjoyment damages in a personal injury defense case by reviewing his or her photographs posted online after an accident”).

<sup>86</sup> Sandra Hornberger, *Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence*, 27 TOURO L. REV. 279, 285 (2011).

<sup>87</sup> *Id.* at 290.

<sup>88</sup> Miller, *supra* note 75, at 28.

### A. Privacy Settings on Social Media Websites

Social Media websites generally have usage restrictions and privacy settings.<sup>89</sup> However, it is usually up to the individual to determine what information is available and who has access to that information.<sup>90</sup> In general, if the settings are not adjusted, these websites allow everyone on the network to see the information that a person has posted.<sup>91</sup>

Social Media sites, like Facebook, allow a user to provide “status updates” which can contain anything from a random thought, to details about the user’s weekend.<sup>92</sup> Furthermore, users who have access to a person’s “wall” (depending on the privacy settings) can not only see what the person has written, but also comment if they so desire.<sup>93</sup> Twitter functions slightly differently. A user on Twitter can post up to 140 characters in what is called a “tweet.”<sup>94</sup> These “tweets,” similar to status updates, can range from internal thoughts to details of the past weekend’s events.<sup>95</sup> Depending on privacy settings, this information is made available to other users (“followers”) only, or anyone who has access to a computer and the Internet.<sup>96</sup> Facebook, for example, allows users to disseminate photos and videos, so long as the content does not violate usage policies of the site.<sup>97</sup>

These sites also allow, and in fact urge, users to create a

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<sup>89</sup> *Facebook Legal Terms*, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited Apr. 18, 2013); *The Twitter Rules*, TWITTER, <https://support.twitter.com/articles/18311-the-twitter-rules> (last visited Apr. 18, 2013) (users can adjust their settings to control how many people have access to the information contained on the user’s page).

<sup>90</sup> *Facebook Privacy Settings and Tools*, FACEBOOK, <http://www.facebook.com/settings/?tab=privacy&ref=mb> (last visited Apr. 18, 2013).

<sup>91</sup> *Id.*

<sup>92</sup> Junichi P. Semitsu, *From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291, 293 (2011) (“[Facebook] is a controlled ecosystem that inspires its inhabitants to share personal information and reveal intimate thoughts.”).

<sup>93</sup> David Narkiewicz, *The Dangers of MySpace, Facebook and YouTube*, 30 PA. LAW. 56, 57 (2008) (discussing how his teenage son and friends have the ability to post what they want on each other’s Social Media pages, which are freely viewable to the public at large).

<sup>94</sup> *About Twitter*, TWITTER, <https://twitter.com/about> (last visited Apr. 18, 2013).

<sup>95</sup> *Id.*

<sup>96</sup> Semitsu, *supra* note 92, at 316 (indicating that while Twitter users may require that only pre-approved users be allowed to “follow” their “tweets,” Twitter’s privacy policy indicates that users should not assume that the information they are posting is private).

<sup>97</sup> *Facebook Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards> (last visited Apr. 18, 2013).

unique profile with specific details about themselves.<sup>98</sup> Information such as location, birthday, sex, relationship status, interests, and languages the user speaks are suggested topics for a user to share with the Social Network.<sup>99</sup> Many users find these sites to be useful ways to express themselves and to meet other people with whom they can associate and relate.<sup>100</sup>

Finally, these sites generally provide a listing of “friends” or “followers” which generally represent who the user is associated with.<sup>101</sup> Most often, these sites require that the user accept a person as a “friend” or “follower.”<sup>102</sup> Information exchanged among “friends” on these sites can be divided into three categories, generally based on how accessible the information is to the public.<sup>103</sup> At its core, Social Media information is available to the public on the whole.<sup>104</sup> “[S]emi-private information includes content that is restricted to either a self-selected group of ‘friends’ or a wider, unmanageable group . . . .”<sup>105</sup> Lastly, most Social Media sites allow for “private messages,” akin to emails, which users can send to each other on an individual basis.<sup>106</sup> The individual user generally has the ability to define what information is available to each group.<sup>107</sup> Depending on the user’s privacy settings, the information he or she posts, as well as the friends/followers the user has, can be available to anyone with a computer and Internet connection.

The question then becomes, what information, if any, should courts recognize as viable evidence? Depending on the jurisdiction, some attorneys have been more successful than others in persuading

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<sup>98</sup> Semitsu, *supra* note 92, at 293.

<sup>99</sup> *Facebook User Page*, FACEBOOK, <http://www.facebook.com/seth.koslow/info> (last visited Apr. 18, 2013).

<sup>100</sup> Semitsu, *supra* note 92, at 293.

<sup>101</sup> *Facebook User Friend Page*, FACEBOOK, [http://www.facebook.com/seth.koslow/friends?ft\\_ref=mni](http://www.facebook.com/seth.koslow/friends?ft_ref=mni) (last visited Apr. 18, 2013).

<sup>102</sup> *Facebook Friend Request Page*, FACEBOOK, <http://www.facebook.com/?sk=ff> (last visited Apr. 18, 2013).

<sup>103</sup> Evan E. North, *Facebook Isn’t Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1288 (2010).

<sup>104</sup> *Id.* (this level of public disclosure is very general; it “may include any text or media that is available to the general public”).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

courts to allow status updates as evidence.<sup>108</sup> In New York, one court found that a Facebook status update, along with other corroborating evidence, was sufficient to establish an alibi.<sup>109</sup> However, a Missouri court held that status updates that were not “even tangentially related to the events of the night in question” were inadmissible on relevance grounds.<sup>110</sup> Some attorneys find that basic profile information can be useful evidence,<sup>111</sup> and some attorneys find a user’s friend/follower list can be an excellent starting point for potential witnesses.<sup>112</sup>

### B. Is What a Person Posts on the Internet “Private”?

Some believe that information which is available online “should not enjoy the same privacy protection as information maintained in someone’s private home.”<sup>113</sup> While the Internet may foster the idea that a person can remain anonymous, the fact that people are more willing to share information online results in private information becoming public.<sup>114</sup> A computer savvy person can gain access to virtually any information that is placed on the Internet. However, at what point does a person’s conduct on the Internet turn from private to public activity? Depending on the individual user’s privacy settings, anything and everything a user posts on his or her profile is ostensibly accessible to the rest of the Facebook, LinkedIn, or Twitter community.

While it is common knowledge that the Internet is not “pri-

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<sup>108</sup> Peter S. Kozinetis & Aaron J. Lockwood, *Discovery in the Age of Facebook*, 47 ARIZ. ATTY. 42, 44 (2011) (“In many cases, particularly where a party’s physical condition, mental state or lifestyle is at issue, the relevance of [S]ocial [M]edia is clear, and courts have not hesitated to permit broad discovery of such information.”).

<sup>109</sup> Browning, *supra* note 72, at 472. See Damiano Beltrami, *I’m Innocent. Just Check My Status on Facebook*, N.Y. TIMES (Nov. 11, 2009), [http://www.nytimes.com/2009/11/12/nyregion/12facebook.html?\\_r=0](http://www.nytimes.com/2009/11/12/nyregion/12facebook.html?_r=0) (discussing how defendant Rodney Bradford, suspected of robbery, provided an alibi for his whereabouts at the time of the crime through the use of his Facebook status updates).

<sup>110</sup> Browning, *supra* note 72, at 472; see also *State v. Corwin*, 295 S.W.3d 572, 579 (Mo. Ct. App. 2009).

<sup>111</sup> Browning, *supra* note 72, at 472 (some attorneys have found information regarding an individual’s contacts or employer, found on LinkedIn, to be useful).

<sup>112</sup> *Id.* at 471.

<sup>113</sup> Hornberger, *supra* note 86, at 281 (quoting Tiffany M. Williams, *Social Networking Sites Carry Ethics Traps and Reminders*, A.B.A. LITIG. NEWS (Aug. 27, 2009), [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/social-networking-ethics.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/social-networking-ethics.html)).

<sup>114</sup> Browning, *supra* note 72, at 485.

vate,” something not as well established, but that must be considered, is the point when something available on the Internet becomes “public.” Currently, the average user on Facebook has 120 “friends,” which means that, at a minimum, the information the user posts is disseminated to 120 people the moment it is posted.<sup>115</sup> Furthermore, it is not uncommon for users to have more than 500 “friends,” which means the information they post is shared with at least that many people.<sup>116</sup> The actual number of people who see the information could be significantly higher, depending on the user’s privacy settings.<sup>117</sup>

### C. Social Media Evidence in Other Areas of the Law

“Given [the] abundance of photos, video, statements and other content flooding social networking sites, it is hardly surprising to find lawyers from virtually all areas of practice digging for such digital dirt.”<sup>118</sup> According to a survey from the American Academy of Matrimonial Lawyers (“AAML”), over 81% of AAML members indicated that they had used social networking sites as a source for evidence in 2010, more so than they had five years earlier.<sup>119</sup> Matrimonial attorneys are not alone when it comes to mining Social Media sites for valuable information.<sup>120</sup> The practice areas that have reaped the benefits of Social Media discovery range from prosecutors and criminal defense attorneys to defamation attorneys and securities litigators.<sup>121</sup>

In 2006, the Federal Rules of Civil Procedure dealing with electronic discovery were amended.<sup>122</sup> The Rules now include

<sup>115</sup> Cameron Marlow, *Maintained Relationships on Facebook*, FACEBOOK (Mar. 9, 2009), [http://www.facebook.com/note.php?note\\_id=55257228858](http://www.facebook.com/note.php?note_id=55257228858).

<sup>116</sup> *Id.* (discussing that average users have 120 friends, which means some users have significantly more and others significantly fewer friends).

<sup>117</sup> *Facebook Privacy Settings and Tools*, *supra* note 90 (users can control who sees their updates, pictures, and postings via this “privacy settings” page).

<sup>118</sup> Browning, *supra* note 72, at 467.

<sup>119</sup> *Big Surge in Social Networking Evidence Says Survey of Nation’s Top Divorce Lawyers*, AM. ACAD. OF MATRIMONIAL LAWS. (Feb. 10, 2010), <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey->.

<sup>120</sup> Browning, *supra* note 72, at 467.

<sup>121</sup> *Id.*

<sup>122</sup> Hornberger, *supra* note 86, at 293 (citing Therese Craparo & Anthony J. Diana, *The Next Generation of E-Discovery: Social Networking and Other Emerging Web 2.0 Technologies (Tip of the Month)*, MONDAQ (Aug. 4, 2009), <http://www.mondaq.com/unitedstates/x/84000/IT+internet/The+Next+Generation+of+EDiscovery+Social+Networking+and+Other+Emerg>



“broad language permitting discovery ‘stored in any medium’ ” in order to adapt to rapid and constant changes in technology and communication.<sup>123</sup> While the proliferation of Social Media sites is a somewhat new phenomenon, some courts are allowing information from these websites to be discovered, as long as the subject matter is related to an issue being litigated.<sup>124</sup>

#### **D. Case Law on the Discoverability of Social Media Evidence**

In *EEOC v. Simply Storage Mgmt., LLC*,<sup>125</sup> the Equal Employment Opportunity Commission (“EEOC”) filed a complaint, on behalf of two claimants, on the ground of sexual harassment against their employer, “Simply Storage.”<sup>126</sup> During the discovery phase, four requests were made for various copies of digital information from the claimants’ Social Media pages.<sup>127</sup> The EEOC argued, in relevant part, that the requests should be denied because “they improperly infringe on the claimants’ privacy, and will harass and embarrass the claimants.”<sup>128</sup>

In response to the requests, the court discussed the possibility that discovery of the claimants’ social networking sites could reveal private information that might be embarrassing, but the court deter-

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ing+Web+20+Technologies+Tip+of+the+Month.

<sup>123</sup> *Id.*; see also FED. R. CIV. P. 26(b)(1):

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

*Id.*

<sup>124</sup> Hornberger, *supra* note 86, at 293.

<sup>125</sup> 270 F.R.D. 430 (S.D. Ind. 2010).

<sup>126</sup> *Id.* at 432.

<sup>127</sup> *Id.* Defendant SNS sought, through four requests, photographs or videos posted by the complainants as well as electronic copies of the complainants’ Facebook and MySpace profiles, including comments, messages and pictures. *Id.*

<sup>128</sup> *Id.*

mined that this possibility was not overly significant.<sup>129</sup> The court reasoned that simply because a person expects his or her communications to remain private, it does not follow that the person's communications should be protected from discovery.<sup>130</sup> The court ruled that "the mere fact that the claimants' profiles had been set on private did not preclude the requested discovery."<sup>131</sup> Furthermore, the court noted that Social Media sites, like Facebook, are designed for people to communicate with other people, not just to talk to themselves.<sup>132</sup> Significantly, the court allowed the discoverability of information that was being sought because it "revealed, referred or related . . . to events that could reasonably be expected to produce a significant emotion, feeling or mental state."<sup>133</sup>

In *Romano v. Steelcase, Inc.*,<sup>134</sup> the defendant, Steelcase, moved the court for an order granting access to "current and historical Facebook and MySpace pages and accounts . . . ." <sup>135</sup> The defendant sought this information to counter the plaintiff's claims of injuries and loss of enjoyment of life.<sup>136</sup> The plaintiff opposed the order citing a violation of her Fourth Amendment right to privacy.<sup>137</sup>

In response to the plaintiff's Fourth Amendment assertion, the court noted that requiring a plaintiff to disclose information from his or her Facebook page was not a violation of privacy because a user of Social Media does not have a "legitimate reasonable expectation of privacy" about the information the user posts or shares.<sup>138</sup> Furthermore, an individual's privacy concerns, by definition, are lessened when that person chooses to disclose information to others, and therefore, since Facebook (and other Social Media sites) cannot guarantee complete privacy, an individual has no expectation of privacy when posting on a Social Media site.<sup>139</sup>

In *Mackelprang v. Fidelity Nat'l Title Agency of Nevada*,

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<sup>129</sup> *EEOC*, 270 F.R.D. at 437.

<sup>130</sup> *Id.*

<sup>131</sup> Miller, *supra* note 75, at 32 (citing *EEOC*, 270 F.R.D. at 434).

<sup>132</sup> *EEOC*, 270 F.R.D. at 437 ("Facebook is not used as means by which account holders carry on monologues with themselves." (citing *Leduc v. Roman*, available at <http://www.canlii.org/en/on/on/onsc/doc/2009/2009canlii6838/2009canlii6838.html>)).

<sup>133</sup> Miller, *supra* note 75, at 321 (citing *EEOC*, 270 F.R.D. at 436).

<sup>134</sup> 907 N.Y.S.2d 650 (Sup. Ct. 2010).

<sup>135</sup> *Id.* at 651.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 655.

<sup>138</sup> *Id.* at 656.

<sup>139</sup> *Romano*, 907 N.Y.S.2d at 657.

*Inc.*<sup>140</sup> the plaintiff brought suit for gender-based sexual harassment.<sup>141</sup> The plaintiff alleged that one of defendant's vice-presidents "began sending her inappropriate and sexually explicit emails on her office computer on at least a weekly basis."<sup>142</sup> The plaintiff further alleged that another vice-president coerced her to have sexual relations by threatening to fire her husband if she refused.<sup>143</sup> As time progressed, the sexually explicit emails and coerced sexual encounters occurred more frequently.<sup>144</sup>

In response to the suit, Fidelity Title brought a motion to compel before the court seeking email communications allegedly sent through Plaintiff's MySpace profile.<sup>145</sup> MySpace refused to provide the content of the private messages absent a signed release from the plaintiff.<sup>146</sup> The plaintiff argued that the information requested was "irrelevant and improperly invade[d] plaintiff's privacy."<sup>147</sup> Furthermore, it was argued that the defense was merely conducting a "fishing expedition."<sup>148</sup>

The district court agreed with the plaintiff.<sup>149</sup> The court found that "even if the Myspace e-mail accounts did contain e-mails related to the plaintiff's sexual promiscuity, the relevance of such information was tenuous" at best, since the Myspace profiles were created after the harassment was alleged to have occurred.<sup>150</sup> In effect, the court held that a defendant could not simply seek discovery of a plaintiff's Social Media content simply based on the existence of a profile.

The Sixth Circuit, in *Guest v. Leis*,<sup>151</sup> found that Social Media

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<sup>140</sup> No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007).

<sup>141</sup> *Id.* at \*1.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (Ultimately, the plaintiff's husband was fired. The plaintiff complained to the human resources department but nothing was done with regard to her complaint; in fact, she was warned not to bring it up again. Finally, the plaintiff attempted to commit suicide at her office. Plaintiff was eventually diagnosed with post-traumatic stress disorder, major depressive disorder, and panic disorder stemming from her interactions with co-workers and supervisors at Fidelity Title).

<sup>145</sup> *Mackelprang*, 2007 WL 119149, at \*2.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (noting that the defendant "has nothing more than suspicion or speculation as to what information might be contained in the private messages").

<sup>150</sup> *Miller*, *supra* note 75, at 31; *see also Mackelprang*, 2007 WL 119149, at \*2.

<sup>151</sup> 255 F.3d 325 (6th Cir. 2001).

users “logically lack a legitimate expectation of privacy in the materials intended for publication or public posting.”<sup>152</sup> In effect, the user consents to the sharing of information he or she posts on Social Media sites at the moment the account is created.<sup>153</sup> The court in *Romano* indicated that the entire reason for the existence of Social Media sites is to share information with others.<sup>154</sup> Also, the court held that by joining a Social Media site, like Facebook, a user consents to sharing her information, thus waiving privacy rights to the information she posts.<sup>155</sup> The court recognized that “[i]n this [Social Media] environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.”<sup>156</sup>

In *McMillen v. Hummingbird Speedway, Inc.*,<sup>157</sup> the plaintiff filed suit to recover for personal injuries suffered in a rear-end collision.<sup>158</sup> Defense counsel filed a motion to compel discovery of the plaintiff’s Social Networking/Media site information on the ground that “those areas to which they did not have access could contain further evidence pertinent to [plaintiff’s] damages claim.”<sup>159</sup> The plaintiff argued that “communications shared among one’s private friends on social network computer sites” should be considered “confidential and thus protected against disclosure.”<sup>160</sup>

In response the court noted that notwithstanding the fact that messages can be sent privately to other users, “it would be unrealistic to expect that such disclosures would be considered confidential.”<sup>161</sup> The court also stated, rather bluntly, that “[w]here there is an indication that a person’s social network sites contain information relevant to the prosecution or defense of a lawsuit . . . access to those sites should be freely granted.”<sup>162</sup>

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<sup>152</sup> *Id.* at 333.

<sup>153</sup> Miller, *supra* note 75, at 30 (citing *Romano*, 907 N.Y.S.2d at 657).

<sup>154</sup> *Romano*, 907 N.Y.S.2d at 657.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (quoting Dana L. Flemming & Joseph M. Herlihy, *What Happens When the College Rumor Mill Goes Online? Privacy, Defamation and Online Social Networking Sites*, 53 B.B.J. 16, 16 (2009)).

<sup>157</sup> No. 113 - 2010 CD, 2010 WL 4403285 (Pa. Com. Pl. Ct. Sept. 9, 2010).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *McMillen*, 2010 WL 4403285, at \*1.

<sup>162</sup> *Id.*

In *Moreno v. Hanford Sentinel, Inc.*,<sup>163</sup> a MySpace user posted, on her own page, disparaging comments about her hometown.<sup>164</sup> The user's comments were posted as an op-ed piece in the local paper, naming the user and using quotes from her MySpace page.<sup>165</sup> The response from the community was devastating.<sup>166</sup> The user sued the paper and the author for invasion of privacy.<sup>167</sup> The appellate court, in upholding the dismissal of the case, determined that once the information was posted on the "hugely popular internet site," the comments were no longer considered private.<sup>168</sup>

In *Bass ex rel. Bass v. Miss Porter's School*,<sup>169</sup> a student brought suit against her former private high school alleging, among other things, breach of contract, negligent and intentional infliction of emotional distress, and breach of fiduciary duty.<sup>170</sup> The plaintiff, Tatum, was elected head of Student Activities at Miss Porter's School and, as a result, was required "to work with the director of school activities to provide and organize all the social activities of the school, whether . . . at the school or in cooperation with other schools."<sup>171</sup> Part of the plaintiff's responsibilities included organizing the school's annual prom.<sup>172</sup> For the 2008-2009 school year, school officials decided to hold a multi-school "consortium prom."<sup>173</sup> At the Porter School, opinions among students regarding the consortium prom were split.<sup>174</sup> Some of the students who opposed the consortium prom idea began harassing Tatum.<sup>175</sup>

In a request for production, the defendants requested documents from the plaintiff's Facebook page that related to the allegations of teasing or taunting.<sup>176</sup> The plaintiff argued that "the production of information [demanded by defendant was] irrelevant and

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<sup>163</sup> 91 Cal. Rptr. 3d 858 (Cal. Ct. App. 2009).

<sup>164</sup> *Id.* at 861.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Moreno*, 91 Cal. Rptr. 3d 862.

<sup>169</sup> 738 F. Supp. 2d 307 (D. Conn. 2010).

<sup>170</sup> *Id.* at 310.

<sup>171</sup> *Id.* at 313.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (as opposed to a traditional prom).

<sup>174</sup> *Bass*, 738 F. Supp. 2d at 314.

<sup>175</sup> *Id.*

<sup>176</sup> *Bass, ex rel. Bass v. Miss Porter's School, et al.*, Civil No. 3:08cv1807 (JBA), 2009 WL 3724968, at \*1 (D. Conn. Oct. 27, 2009).

immaterial . . . .”<sup>177</sup> The court determined that “the relevance of the content” contained on the user’s Social Media website with regard to liability and damages is “more in the eye of the beholder than subject to strict legal demarcations . . . .”<sup>178</sup> The court noted, “Facebook usage depicts a snapshot of the user’s relationships and state of mind at the time of the content’s posting.”<sup>179</sup>

It is evident that various courts have recognized the significance and public nature of information posted on Social Media sites. “[I]f a litigant feels that information was good enough to share with his or her Facebook ‘friends’ and later asserts claims to which that information may be relevant, then the information is good enough to produce to the other side in discovery.”<sup>180</sup> It is time for Rape Shield laws to conform to the recent trend and permit the discoverability and admissibility of relevant Social Media evidence into rape trials.

## VI. RAPE SHIELD APPLICATION: A HYPOTHETICAL

The Rape Shield laws provide that evidence that a victim engaged in other sexual behavior, prior to the alleged rape, is inadmissible on the Federal level in both civil and criminal proceedings,<sup>181</sup> unless the information falls under one of the exceptions in Federal Rape Shield Laws.<sup>182</sup> Federal Rules of Evidence Rule (F.R.E.) 412(b) provides the following exceptions:

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

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<sup>177</sup> *Id.* at \*1.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Browning, *supra* note 72, at 494.

<sup>181</sup> FED. R. EVID. 412(a).

<sup>182</sup> *See id.* at 412(b).

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.<sup>183</sup>

The rationale for these rules, as stated earlier, is to protect victims from being victimized a second time by putting their private lives on display during a public trial.<sup>184</sup>

The best way to examine the proposed change to the Rape Shield rule is to work through a realistic hypothetical. Assume the following: Sara and Bob meet through mutual friends and connect on the social networking site Facebook. Bob is a well-established doctor, well known in the community, and is running for city council. Sara is also fairly well known. She is a yoga instructor at a local studio and has a tremendous following among students, most of whom are her friends on Facebook. Sara and Bob begin talking and accept one another as Facebook "friends." Sara and Bob have not adjusted the privacy settings on their accounts from the default settings; therefore, anyone who would like to search for either of them on Facebook can gain access to their information, wall, postings, and pictures.<sup>185</sup>

Sara and Bob start developing a relationship, or so it seems. Bob asks Sara out on a date. Sara happily agrees. After dinner with Bob that evening, Sara returns to Bob's house and they proceed to consummate their new relationship in Bob's bedroom. For all Bob knows, Sara was interested and willing to participate in the evening's activities. Sara never said no, nor did she provide any indication to Bob that she wanted to stop what was happening. In fact, Sara, intending to relieve her sexual drought, initiated the sexual activities.

The next day, for whatever reason, Sara decides that sleeping with Bob was a mistake, a mistake for which she was determined to have a remedy. Sara believes that Bob went too far the night before,

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<sup>183</sup> *Id.*

<sup>184</sup> Price, *supra* note 13, at 564.

<sup>185</sup> Matt McKeon, *The Evolution of Privacy on Facebook: Changes in Default Profile Settings Over Time*, BUS. INSIDER (May 7, 2010), <http://www.businessinsider.com/the-evolution-of-privacy-on-facebook-2010-5?op=1>.

and, in fact, she has convinced herself that she was raped.

Sara learns from one of her friends about the Rape Shield statute in her state and, like many other women, she now feels comfortable pressing charges against Bob.<sup>186</sup> Sara initiates a criminal complaint and civil proceeding against Bob, stating that he engaged in sexual misconduct on the night of their first date. The local newspapers pick up the story almost immediately. The story is the top headline for two consecutive weeks. There is not a person in town now that does not know about “Dr. Bob, the rapist.” Dr. Bob’s reputation is ruined. He is forced to withdraw from the city council election and he has lost virtually all of his female patients. Many of his male patients have been contemplating switching doctors as well.

At trial, Bob’s attorney seeks to introduce evidence indicating that Sara and Bob had consensual sex on the night of their first date. Bob’s attorney moves to introduce Sara’s Facebook status updates from the days preceding the alleged attack. Since Bob and Sara are friends, Bob had seen some of these postings the day before his date with Sara. The updates include comments such as, “oh, it’s been too long, I need some loving!” and “I feel like a sex camel, how do they go so long without water???”

Bob’s defense team also seeks to introduce a “private message” that Sara sent to her friend on the morning of the alleged attack. In the message, Sara simply writes: “I can’t wait to whore it up tonight, I am definitely going to get me some tonight!” Sara’s attorney argues that the evidence should be inadmissible, relying on the Rape Shield law.

Applying F.R.E. 412, as it currently reads, to this hypothetical, Sara’s status updates would be undiscoverable and inadmissible.<sup>187</sup> Bob could only offer the status updates as evidence of Sara’s sexual predisposition, which is prohibited. Since they are not subject to one of the existing exceptions to the Rule,<sup>188</sup> a court would be inclined to exclude them, under Rape Shield laws. The rationale of

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<sup>186</sup> See John Lausch, *Stephens v. Miller: The Need to Shield Rape Victims, Defend Accused Offenders and Define a Workable Constitutional Standard*, 90 NW. U. L. REV. 346, 346 (1995) (where the victim took the stand at her attacker’s trial, but without the protection of a Rape Shield statute, she might not have even filed a police report).

<sup>187</sup> FED. R. EVID. 412(a). Prohibited Uses: The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim’s sexual predisposition. *Id.*

<sup>188</sup> *Id.* at 412(b)(1).



Sara's attorney is that Sara's private life should not be "dragged through the mud," especially after having experienced such a traumatic ordeal when Bob sexually assaulted her.

As F.R.E. 412 reads, Bob is defenseless against the forthcoming criminal or civil matters. For Bob, it is simply his word versus Sara's, the "victim." Since Bob admits that he and Sara had consensual sexual relations, Bob would not be offering the statements Sara made on Facebook to "prove that someone other than [Bob] was the source of the semen, injury, or other physical evidence;"<sup>189</sup> therefore, Sara's Facebook status updates would not be admissible under the first exception. Furthermore, since the comments made by Sara on Facebook did not directly discuss her intentions with Bob specifically, Bob would not be permitted to introduce her comments under the second exception, which allows evidence of specific instances of a victim's sexual behavior with respect to the person accused.<sup>190</sup> Ultimately, since Bob does not have a constitutional right to introduce evidence of Sara's Facebook commentaries,<sup>191</sup> Bob would be prohibited from offering any of the Facebook information at his criminal or civil trial,<sup>192</sup> despite the fact that he has evidence to indicate that Sara intended to have sexual relations on the night in question. Moreover, at his impending civil trial, Bob may again be precluded from offering the Facebook status updates as evidence of Sara's mental state at the time of the incident. Sara's attorney will argue that the probative value of revealing her "private" Facebook posts does not outweigh the danger of the harm she will face by having her "private" life dragged through the mud.

Bob's seemingly innocuous date with Sara has ruined his life, his business, and his political career. The direct, specific evidence of Sara's plans for the evening is deemed inadmissible and Bob is left hopeless.

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<sup>189</sup> *Id.* at 412(b)(1)(A).

<sup>190</sup> *Id.* at 412(b)(1)(B).

<sup>191</sup> FED. R. EVID. 412(b)(1)(C).

<sup>192</sup> *See id.* at 412(a)(b).

## VII. PROPOSED CHANGES TO RAPE SHIELD

### A. Social Media Postings Should be an Exception to Rape Shield Laws

As F.R.E. 412 currently reads, Bob's attorneys have little or no viable defenses against Sara's allegations; it is simply her word versus his. Although Rape Shield laws are important and should remain in effect, it is critical to give all parties a fair trial. Therefore, F.R.E. 412 should be changed to allow discoverability of Social Media updates to level the playing field in a scenario such as this one.

As discussed earlier, various fields of law are allowing, if not welcoming, the discoverability of evidence from Social Media sites. Applying this case law to the previous hypothetical would likely make Sara's comments admissible and potentially save an innocent man's reputation and livelihood.

As the case law indicates, Sara should not have a reasonable expectation of privacy in her Facebook postings; Sara's comments, desires, and sexual predisposition in days leading up to, and on the night of the date with Bob, were already public. Furthermore, Sara's "private" note to her friend on Facebook should also be admissible on the ground that notes sent on Social Media sites, by definition, are not private. Allowing Bob to introduce them would not result in Sara's victimization for a second time during a trial. Sara's postings defeated the rationale behind Rape Shield laws and have effectively allowed Sara to use the Shield as a sword against Bob.

The rationale for Rape Shield laws is noble, useful, and effective. Protection of victims from being re-victimized in the public forum of a court and trial is necessary. Furthermore, Rape Shield laws have been found to serve a legitimate governmental interest by "furthering the truth-seeking process," which increases the likelihood rapists will be prosecuted.<sup>193</sup> However, at what cost should the victim's privacy be protected? As evidenced in the "Duke Rape" case, Rape Shield laws are opening the door to false accusations and "rogue" prosecutors who seek to punish accused rapists. The accusers have little, if any, reason to second-guess an accusation of rape. As indicated earlier, some "victims" feel compelled to construct ra-

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<sup>193</sup> Anderson, *supra* note 22, at 159.

ther lavish stories of sexual assault, without a fear of the consequences of their actions. Protecting the victim from a public victimization is a valid concern; however, with the proliferation of Social Media, Rape Shield laws should be amended to allow the admissibility of information which is distributed on what is already a very public forum. When people share their thoughts, feelings, emotions, pictures, and videos with hundreds, thousands, or perhaps millions of other users in cyberspace, should that information still be considered private? To protect the falsely accused, Federal Rule of Evidence 412 should contain an additional exception which would render admissible information exchanged publicly, via social networking sites.

### **B. Three-Pronged Test for Discoverability of Social Media Evidence**

To insure that a victim's rights are maintained at the highest-level possible, and in keeping with the concept of justice, courts should apply a three-prong test to determine discoverability of evidence on Social Media websites. This test is derived from a combination of the holdings in three cases: *EEOC v. Simply Storage Management*,<sup>194</sup> *Romano v. Steelcase Inc.*,<sup>195</sup> and *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*<sup>196</sup>

The test should require that the party seeking the discovery first establish that the victim's Social Media content is relevant to an issue in the case.<sup>197</sup> Second, the defendant should have to produce some evidence to show the likelihood of relevant evidence on the victim's Social Media site.<sup>198</sup> Finally, courts should require that the discovery requests for Social Media information not be overbroad.<sup>199</sup> Therefore, the defense would have to provide a narrowly tailored discovery request for discovery of Social Media information.<sup>200</sup>

### **C. Application of Three-Pronged Test to Hypothetical**

In the earlier hypothetical, Sara's comments would likely be

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<sup>194</sup> *EEOC*, 270 F.R.D. 430.

<sup>195</sup> *Romano*, 907 N.Y.S.2d 650.

<sup>196</sup> *Mackelprang*, 2007 WL 119149.

<sup>197</sup> *Miller*, *supra* note 75, at 32.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 33.

<sup>200</sup> *Id.*

deemed inadmissible, even though all of her “friends,” and anyone else who might have searched her page, had access to her comments. Since her thoughts, feelings and sexual desires were offered to the public at large, the court should apply the three-pronged test to determine if her status updates and message to her friend are discoverable.

Applying the first prong of the three-prong test—relevancy of the information to an issue in the case—a court would likely find that Sara’s Facebook statuses, with regard to her forthcoming date with Bob, contain content that is relevant to a key issue in the case—her intentions with Bob. Sara’s desire for “some loving” and intentions to “get some” on the night of her date with Bob would likely be considered relevant to her plans for the night with Bob. While the information is not necessarily probative of her consent, it does provide some basis for Bob’s defense.

Bob would easily satisfy the second prong of the test, the production of evidence from the moving party, because of the relevant evidence on the victim’s Social Media site. Since Bob and Sara were “friends” on Facebook, Bob would be able to present visual evidence of Sara’s statuses pertaining to her plans for the upcoming date, as well as her sexual intentions and desires.

With regard to the third prong of the test, the court must require that Bob’s request for discoverability of Sara’s statuses not be overbroad. To insure that Bob’s defense team does not use evidence of Sara’s sexual desires to embarrass or harass Sara, Bob’s defense team would be limited to requesting the court to compel discovery of Sara’s Facebook statuses reflecting her sexual intentions and desires for her upcoming date with Bob specifically.

Rape Shield laws should include an exception for Social Media information which is relevant to the victim’s intentions, desires and state of mind relating to the alleged attack, temporally, implicitly or specifically, such that a defendant has some ability to present a defense against life-altering, potentially false accusations. This exception should not represent *prima facie* evidence of a victim’s consent. On the contrary, this exception will require a victim to provide some additional evidence to indicate that she did not in fact consent. It should also be noted that Social Media information here does not constitute pictures, provocative poses, or clothing choices of the victim. This exception must only relate to communications by the victim, relevant to the alleged attack, either on her profile, or through a

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private message.

The Federal Rules of Evidence, as well as state Rape Shield laws, must adapt to the ever-changing technologically enhanced environment we live in today. Case law in myriad areas of law has recognized not only the viability and importance of Social Media information, but also that Social Media information is, by definition, not private. Applying the proposed changes to Rape Shield laws will protect a victim's privacy while simultaneously allowing the accused to conduct adequate discovery to present a viable defense.