TWITTER WARS: HOW THE KENTUCKY GENERAL ASSEMBLY AND COURTS SHOULD STRIKE BACK AGAINST VIRTUAL VICTIM-BLAMING IN SEXUAL ASSAULT CASES

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I. INTRODUCTION

Imagine this: you are Stephanie Stella, a resident of Toronto out on a date with an acquaintance.[1] The experience turns sexual, and though consensual at first, the night quickly turns darker when he begins to engage in acts you were not ready for.[2] After this night, he is brought up on charges of sexual assault and harassment, but by the trial's end in February 2016, he is acquitted of all charges.[3] Why? Because on the night in question, you posted an article on Facebook concerning consent—and as the judge ruled, "the fact that [Stella] did look up articles about consent when she was home leads me to think that there was some genuine confusion on her part as to whether or not she was consenting."[4]

While it is true that this case was decided on more than just this one factor, this story serves as a striking example of how powerful social media and electronic communications are in the courts today. Every day, people post more and more about their lives and their relationships; they even use these electronic communications in sexual situations. As the U.S. Department of Justice reported, "11% of teenagers and young adults say they have shared naked pictures of themselves online or via text message. Of those, 26% do not think the person whom they sent the naked pictures to shared them with anyone else."[5] Unfortunately, in sexual assault and rape cases, this kind of evidence is too-frequently admitted into evidence, used to discredit victims,

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[1] Manisha Krishnan, *How Rape Victims' Social-Media Feeds Are Being Used Against Them in Court*, VICE (Aug. 17, 2016, 2:05 PM), http://www.vice.com/read/how-rape-complainants-are-having-their-social-media-feeds-used-against-them-in-court.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Raising Awareness about Sexual Abuse: Facts and Statistics*, U.S. DEP'T OF JUST., https://www.nsopw.gov/en-US/Education/FactsStatistics (last visited Jan. 8, 2017).

and used to put them on trial. While attempts have been made over the years to prevent victim-blaming in sexual assault cases, especially with the introduction of rape shield laws in the 1970s, many of these implementations are becoming outdated with the increasing advancement and use of technology in the world.

Therefore, this Note will discuss how the Kentucky General Assembly and Kentucky courts may better interpret Kentucky Rule of Evidence (KRE) 412, Kentucky's own rape shield statute, to ensure that social media that is too prejudicial against sexual assault victims is not admitted needlessly at trial. Section I will discuss the evolution of rape shield laws as a whole—including the reasons they were first implemented and any growth they have undergone since their enactment—and explore the increasing use and legal relevance of social media in the world today. Section II will then examine how the courts generally handle evidence under rape shield statutes. Section III will delve into the arguments for limiting admission of social media and electronic evidence in these cases. Further, Section IV will discuss the counter-arguments to this expanded protection, mainly the defendant's Sixth Amendment argument against the expanded scope of rape shield laws and the specter of false reports of sexual assault. Section V will propose that, to better address this issue, the Kentucky General Assembly should adopt an amendment to KRE 412 to define sexual behavior and include social media and electronic communications. Section VI proposes that, alternatively, Kentucky courts could adopt this interpretation of their own volition if the General Assembly is unable to amend the statute itself.

II. HISTORY OF RAPE SHIELD LAWS IN AMERICA

A. Pre-Rape Shield Law Common Law and the Impetus for Change

Despite the infamous and notorious nature of rape, the definition of this crime has been historically vague and has often failed to properly explain the crime itself.[6] In Victorian Era England, rape consisted of three elements: "vaginal intercourse, force, and nonconsent."[7] However, the courts in England required more than simply proving these three basic elements, as the common law also forced the prosecution to prove that victims had used the "utmost resistance" to fend off their attackers and preserve their chastity.[8]

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[6] I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 833 (2013) (citing JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 897 (5th ed. 2004)).

[7] *Id.* (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 318 (7th ed. 2001)).

[8] Rebekah Smith, Comment, *Protecting the Victim: Rape and Sexual Harassment Shields Under*

This difficult burden of proof was most likely influenced by a societal fear of false rape accusations that could destroy a man's reputation and standing in society.[9] Perhaps the best example of this paranoia was represented by Sir Matthew Hale, Lord Chief Justice of the Court of the King's Bench, who is often quoted for stating that a rape accusation was "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[10] Like many other common law doctrines, this tradition and thinking migrated to America and took root in the American legal landscape as well.[11]

Thus in America, a woman was most likely unable to pursue any legal action against her attacker unless she "had modeled herself on an ideal of sexual virtue and feminine modesty."[12] In order to satisfy this requirement, it was expected for the man "in charge of the women's sexuality" to bring the charge against the woman's alleged attacker.[13] Further, if a woman was unchaste, American courts usually found that she had an unusual character trait which made it likely that she had in fact consented to the sexual act.[14] And going against the usual prohibition on propensity evidence, "evidence that was thought to show a propensity towards sexual relations was always admissible to suggest consent in the particular instance."[15]

B. Common Law Evidentiary Rules in Sexual Assault Cases

Because of this inherent distrust of female witnesses, defendants in rape cases were allowed to question victims about their pasts, which included the victims' sexual histories.[16] While it is true that character evidence and testimony was generally prohibited at trial, one exception was when the

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Maine and Federal Law, 49 ME. L. REV. 443, 450 (1997).

[9] *Id.*

[10] *Id.* at 449 (citing 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (P.R. Glazebook ed., 1971) (1736)).

[11] *See* People v. Benson, 6 Cal. 221, 223–24 (1856) ("There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless . . . .").

[12] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 64 (2002).

[13] *Id.*

[14] J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 547–48 (1980) ("[C]ourts reasoned that most women were virtuous by nature and that an unchaste woman must therefore have an unusual character flaw. This character trait had caused her to consent in the past (when, obviously, a 'normal' woman would never have consented) and made it likely that she would consent repeatedly.").

[15] *Id.* at 548.

[16] Smith, *supra* note 8, at 450–51.

defendant was accused of rape.[17] The reasoning behind this exception was two-fold: "[T]he victim's sexual history was a relevant character trait. The other justification was that the victim's sexual past was relevant to the credibility of the victim."[18] The second rationale served to not only put the victim on trial for any past sexual experiences she may have undergone, but also tied into why early American courts required victims to show they had used the utmost resistance to fight off their attacker: to reinforce the myth of the pure victim and resolve the issue of consent in these cases.[19]

The reasoning behind this rationale was that courts would often find that it was "more probable that an unchaste woman would assent to such an act."[20] In fact, the courts would go so far as to say that "[t]his class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed."[21] Therefore, defense attorneys commonly used this evidentiary doctrine to shift the focus of the trial onto victims, often asking them intimate questions about their sexual history—even asking if they used contraceptives and who they associated with.[22] However, the courts drew a distinction between men and women in this regard because, as one Missouri court found, "[i]t is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman."[23] In fact, given the general prohibition on propensity evidence, it was often more difficult to introduce evidence of the defendant's sexual history than it was to introduce evidence about the victim's past.[24] Thus, women also were put on trial alongside

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[17] Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765–66 (1986).

[18] Smith, *supra* note 8, at 451.

[19] *See* Capers, *supra* note 6, at 836 ("[C]ourts allowed such evidence on the theory that a woman who had consented to sex once possessed a 'character for unchastity' and thus was more likely to have consented to sex on the occasion in question. Put differently, prior sexual activity was probative of consent.") (citations omitted).

[20] People v. Collins, 186 N.E.2d 30, 33 (Ill. 1962).

[21] People v. Johnson, 39 P. 622, 623 (Cal. 1895).

[22] Capers, *supra* note 6, at 837 ("[E]ven in a stranger rape case, a complainant could be subjected to questions about whether she had had intercourse before, how many times, how old she was when she had intercourse for the first time, and with how many men. Defense lawyers relied on this common law rule to also question complainants about their use of contraceptives, whether they frequented bars or nightclubs, and even their association with blacks.") (citation omitted).

[23] Missouri v. Sibley, 33 S.W. 167, 171 (Mo. 1895).

[24] Capers, *supra* note 6, at 838–39.

defendants for their actions in any case that dealt with sexual assault and rape. This led to these crimes being some of the most underreported crimes in the country.[25]

C. The Push for Reform

After years of enduring this treatment at trial, various feminist and law enforcement groups banded together to pass legislation to limit the evidence that could be brought in about a victim's sexual past.[26] Beginning in the 1970s, these groups managed to facilitate the passage of various federal laws to protect sexual assault victims; they persuaded legislators that these statutory protections were necessary to encourage victims to report these assaults and assist prosecutors in convicting sexual predators, who used character assassination as a tactic at trial.[27] Further, feminist groups contributed to the discussion by questioning how a woman's sexual history could be indicative of her veracity as a witness and attacking the courts' handling of sexual assault cases as misogynistic and based around stereotypes of women.[28] Through the combined efforts of these two groups, legislatures began adopting rape shield laws to protect victims of sexual assault, the most important and far sweeping one being the passage of Federal Rule of Evidence (FRE) 412.[29] Under this rule, evidence of a rape victim's sexual conduct and predisposition is not admissible at a civil or criminal trial unless it falls under one of these three exceptions: (1) specific instances of sexual conduct, when offered to prove that someone other than the defendant was the culprit; (2) specific instances of sexual conduct between the survivor and the defendant when offered "to prove consent or if offered by the prosecutor"; or (3) a catch-all exception regarding "any evidence whose exclusion would violate the defendant's constitutional rights."[30] FRE 412 also establishes that this kind of evidence can only be admitted if its probative value substantially outweighs any unfair prejudice to the survivor, instituting another level of protection for these kinds of victims.[31]

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[25] Smith, *supra* note 8, at 453.

[26] *See* Kim Loewen, *Rejecting the Purity Myth: Reforming Rape Shield Laws in the Age of Social Media*, 2 UCLA WOMEN'S L.J. 151, 154 (2015) ("Starting in 1974, states began to adopt variations of Rape Shield laws to protect survivors who choose to testify against their assailants. The laws came to pass through alliances between feminist and law enforcement groups who wanted to curtail the trend of requiring survivors to justify their own sexual conduct to prove themselves 'worthy' of justice.").

[27] Galvin, *supra* note 17, at 767.

[28] *Id.* at 767–68.

[29] Loewen, *supra* note 26, at 154.

[30] FED. R. EVID. 412.

[31] *Id.*

Eventually, individual states adopted their own versions of this rape shield statute into their own rules of evidence, which led to the creation of four categories of these statutes:

> The "Michigan model" (used by twenty-five states) "prohibits the use of sexual conduct evidence, but creates limited, specific exceptions." This is the strictest model in terms of amount of evidence restricted. In contrast, the "Texas model" (used by eleven states, including Colorado) "gives trial courts great latitude to admit sexual history evidence using a traditional balancing of 'probative value' against 'prejudicial effect' standard." . . . Between these two opposites lie the "federal model" and the "California model." The federal model (used by seven states) "essentially adopts the Michigan model, but adds a provision allowing defendants to introduce sexual history evidence falling outside one of the enumerated exceptions if doing so is 'constitutionally required.'" Under the "California model" (used by seven states), "sexual history evidence is barred or admitted depending on whether it is offered to prove consent or whether it is offered for credibility purposes."[32]

Kentucky likewise adopted a rape shield statute under KRE 412 in 1990; it was later adopted by the Kentucky Supreme Court in 1992.[33] Under legal scholar Harriett Galvin's framework, Kentucky's version of the rape shield statute would fall under the Michigan model.[34] However, despite the wide adoption of these statutes and the decades that have passed since their adoption, these laws still come under fire for constitutional issues, such as for violating the defendant's right to confront their accuser under the Sixth Amendment.[35] This controversy has made the courts and their interpretations of these statutes that much more important—they must effectively protect both the victims of sexual assault and the rights of defendants in criminal cases. And their interpretations can vary drastically based upon the jurisdictions that cases take place in.[36] However, despite these differences,

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[32] Josh Maggard, *Courting Disaster: Re-Evaluating Rape Shields in Light of* People v. Bryant, 66 OHIO ST. L.J. 1341, 1354–55 (2005) (citations omitted).

[33] KY. R. EVID. 412.

[34] Galvin, *supra* note 17, at 905.

[35] *See* Maggard, *supra* note 32, at 1356 ("Rape trials quickly devolve into 'he said/she said' affairs, where the innocent may in theory be easily and falsely accused, and the responsibility of any justice system is to ensure that criminal defendants have every opportunity to defend themselves. Quite clearly, rape shield statutes significantly restrict the opportunity to defend, as their intent is to control the flow of information a defendant can introduce to influence a jury."); *see also* Tanford & Bocchino, *supra* note 14, at 555 ("On its face a restrictive rape victim shield law denies the defendant the ability to pursue certain questions on cross-examination and to elicit testimony from his own witnesses.").

[36] *See* Leah DaSilva, *The Next Generation of Sexual Conduct: Expanding the Protective Reach of*

one common theme remains: given the peculiar nature of sexual assault cases and the historical treatment of these victims and cases by juries and the courts,[37] legislation was needed to protect these victims and ensure that propensity evidence could not be used to discredit their stories.[38]

D. The Legal Evolution of Social Media

Because social media has become such an integral and widespread fixture in many people's lives, the use of evidence from social media sites has become more important than ever.[39] Among teens and adults alike, the use of technology and social media to communicate with other people has increased; naturally, some of these communications result in provocative and sexual content.[40] And unfortunately, not all of these communications are

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Rape Shield Laws to Include Evidence Found on Myspace, 13 SUFFOLK J. TRIAL & APP. ADVOC. 211, 226–27 (2008) ("The first interpretation of sexual conduct was narrowly construed, centering on the need for actual, physical contact between the victim and another individual. . . . The second school of thought drastically contrasts the first by interpreting the term sexual conduct to include expressed willingness to engage in physical contact, rather than requiring physical contact itself.").

[37] *See* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 983 (2008) ("The peculiarities of rape statutes, coupled with longstanding juror cynicism toward women who claimed they were raped by an acquaintance, led to the revelation in the landmark study of jurors by Kalven and Zeisel in the 1960s that jurors were more inclined to acquit defendants in rape cases than was true for any other charge. Jurors were found to focus not just on the legal issues involved relating to force used and lack of consent, but also to be judgmental as to the alleged victim's character and provocative conduct and ways that the woman could have contributed to the occurrence.") (citation omitted).

[38] FED. R. EVID. 412 advisory committee's note to 1994 amendment ("Rule 412 seeks to achieve these objectives by barring 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.").

[39] *See* Sydney Janzen, *Amending Rape Shield Laws: Outdated Statutes Fail to Protect Victims on Social Media*, 48 J. MARSHALL L. REV. 1087, 1093 (2015) ("For instance, the social media platform Myspace was founded in 2003. By November of 2004, the site had five million registered users. A year later, it was the 'fifth most-viewed internet domain in the [United States].' Registered Myspace users capped out at 75.9 million users in America in 2008. By 2008, however, a new social network eclipsed Myspace's popularity. Facebook, founded by Mark Zuckerberg in 2004, which was more popular internationally at first, quickly gained traction in the United States. In fact, by 2012 Facebook's more than one billion users spent an average of twenty minutes daily on the site. Today, Twitter, Facebook, and LinkedIn rank as the top three most popular social networking sites.") (citations omitted).

[40] Sara Gates, *Adult Sexting On The Rise: 1 In 5 Americans Send Explicit Text Messages, Poll Finds*, HUFFINGTON POST (June 8, 2012), http://www.huffingtonpost.com/2012/06/08/adult-sexting_n_1581234.html ("Though the Lookout survey revealed habitual sexting among baby boomers and parents — one out of five moms and dads — the largest percentage of 'sexters' still falls within the 18- to 34-year old category, at 40 percent. Between men and women, the largest number of males who sext are between 18 and 34, while women who sext tend to be older, in the 35- to 44-year-old range. . . . Past reports drew from a 2010 Pew Research Center poll that found six percent of Americans over 18 sent

done consensually or privately. For example, a study reported by *The Washington Post* asked 480 undergraduate respondents whether their most recent partner had pressured them into having sex or sending sexual pictures against their will, and how he or she had done so. It also measured the impact these experiences had over time—whether the victim had developed depression, for instance, or whether they sometimes cried without knowing why. Of the students surveyed, seventy-one percent had sexted — and twenty percent, one in five, had been coerced into sending the messages.[41]

This use and prevalence does not seem to be decreasing anytime soon—more and more people are becoming members of existing social media platforms, and they are forced to upgrade to stay in touch with the world around them.[42] In fact, one need only observe the ways the Internet has helped numerous Americans establish personal relationships to understand how this technology is changing the way people connect. For example, the Pew Research Center reported in February of 2016 that the percentage of eighteen to twenty-four year olds who have used online dating sites has almost tripled over the last few years, going from ten percent in 2013 to twenty-seven percent in 2016.[43] And this trend is also occurring in other age groups, with twelve percent of fifty-five to sixty-four year olds also engaging in online dating, doubling from the six percent who engaged in the practice in 2013.[44]

As a result, more and more attorneys are utilizing these platforms during the fact-finding process to research witness credibility and other factors.[45] For instance, a 2010 American Academy of Matrimonial Lawyers study found that eighty-one percent of lawyers have observed an increase in the use of social media evidence in divorce proceedings.[46] Further, this increase in

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a racy photo, while 15 percent of adults received such a photo. Within the 18-to-29 demographic, the number of adults sexting was higher: 31 percent sent a photo and 13 percent were on the receiving end of a nude or nearly nude pic."); Michelle Castillo, *One in Four Teens Admit to Sexting, Study Finds*, CBS NEWS (July 3, 2012), http://www.cbsnews.com/news/one-in-four-teens-admit-to-sexting-study-finds ("The results showed that over one-fourth of the teens admitted to sending a sext, but more girls (68.4 percent) were asked to send a sext more than boys (42.1 percent). Teens between the ages of 16 and 17 were more likely to be propositioned for a sext, and the requests declined in those 18 and older.").

[41] Caitlin Dewey, *The Sexting Scandal No One Sees*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/04/28/the-sexting-scandal-no-one-sees.

[42] *See* Janzen, *supra* note 39, at 1093.

[43] Aaron Smith, *15% of American Adults Have Used Online Dating Sites or Mobile Dating Apps*, PEW RES. CTR. (Feb. 11, 2016), http://www.pewinternet.org/2016/02/11/15-percent-of-american-adults-have-used-online-dating-sites-or-mobile-dating-apps.

[44] *Id.*

[45] *See* Janzen, *supra* note 39, at 1096.

[46] *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers, Facebook is Primary Source for Compromising Information*, AM. ACAD. OF MATRIM. L. (Feb. 10, 2010), http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey- ("Overall, 81% of AAML members cited an increase in the use of evidence from

technology has changed the legal landscape by introducing new causes of action that were impossible decades ago, such as defamation suits for posts made on social media sites and for making false online alter egos.[47] These innovations have caused courts across the country to struggle with how this kind of evidence should be admitted in various cases and grapple with how traditional rules of evidence apply to these new modes of communication and technology.[48] And this new growing dependency on this type of communication illustrates the need to examine how this kind of evidence is handled by the courts and how it fits under these rape shield statutes today.

III. ANALYSIS

A. How Courts Examine Evidence in Sexual Assault Cases

Despite the different statutes in various jurisdictions, most courts follow the same steps to employ a rape shield law at trial.[49] To begin with, the court must determine if the evidence hoping to be admitted will be considered under the state's rape shield statute.[50] This determination must be made because non-sexual evidence will not be excluded under this type of statute.[51] However, the scope of what is sexual conduct or behavior will vary based on the jurisdiction.[52] In Kentucky, given the wording of KRE 412, the courts have interpreted this statute to prohibit certain kinds of evidence.[53] However,

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social networking websites during the past five years, while just 19% said there was no change. Facebook is the primary source of this type of evidence according to 66% of the AAML respondents, while MySpace follows with 15%, Twitter at 5%, and other choices listed by 14%.").

[47] Janzen, *supra* note 39, at 1099 (citing 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)).

[48] 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).

[49] DaSilva, *supra* note 36, at 222.

[50] *Id.* at 222–23.

[51] *Id.*

[52] *Id.* at 226–27 ("The first interpretation of sexual conduct was narrowly construed, centering on the need for actual, physical contact between the victim and another individual. . . . The second school of thought drastically contrasts the first by interpreting the term sexual conduct to include expressed willingness to engage in physical contact, rather than requiring physical contact itself.").

[53] *See* Basham v. Commonwealth, 455 S.W.3d 415, 419 (Ky. 2015) ("It is correct that, under the right facts and circumstances, evidence of inadvertent exposure to pornographic material would not be subject to KRE 412's protective shield because it would not be evidence of the alleged victim's sexual behavior or predisposition."); Dennis v. Commonwealth, 306 S.W.3d 466, 472 (Ky. 2010) (evidence of a previous false accusation is not considered other sexual behavior and is thus admissible to attack the credibility of a complaining witness); Luckett v. Commonwealth, No. 2004-CA-001175-MR, 2005 WL 564178, at *3 (Ky. Ct. App. Mar. 11, 2005) ("We agree with Luckett's contention that KRE 412 does not require the prior sexual behavior to be of the same nature as the charged behavior, and we agree that both oral sex and vaginal sex constitute 'sexual behavior.'").

no clear definition of what kinds of evidence are specifically precluded by this statute has been given yet by the courts. KRE 412 provides that, barring certain exceptions, a defendant is not allowed to introduce evidence in any criminal or civil case involving allegations of sexual assault that is "offered to prove that any alleged victim engaged in other sexual behavior" or "offered to prove any alleged victim's sexual predisposition."[54] These statutes reflect "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."[55] This forces the courts to rely on precedent and jurisdiction-particular law to govern their interpretations of their respective rape shield statutes and determine whether the conduct is protected under the statute.[56] Thus, if the evidence is deemed to be past sexual conduct under the meaning prescribed by the relevant statute, then the court must determine whether an exception under the legislation applies. Therefore, "evidence must be classified as past sexual conduct and fall outside an exception in order to be inadmissible under the governing rape shield law."[57] To achieve this finding, courts are given fairly broad discretion to determine whether conduct falls under the provisions of the rape shield law and to ensure that other considerations, such as the protection of the defendant's constitutional rights, are examined as well.[58] Therefore, if the statute does not explicitly bar the admission of the evidence, it is up to the court to decide if the evidence should be barred at trial. This can create discrepancies in how the evidence is handled within the jurisdiction and allow the judge's own personal beliefs to affect the admission of this evidence.

Today's courts, including those in Kentucky, have adopted various tests under their rules of evidence to determine what is admissible against an alleged victim in a sexual assault case.[59] In Kentucky and many other states, courts have adopted a test that is modeled after the one adopted by the United States Supreme Court in *Michigan v. Lucas*.[60] It seeks to balance the interests of the defendant versus the state's interests on a case-by-case basis to "determine whether the rule relied upon for the exclusion of evidence is 'arbitrary or disproportionate' to the 'State's legitimate interests.'"[61] Kentucky courts have held that excluding evidence is not arbitrary "if it

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[54] KY. R. EVID. 412.

[55] Michigan v. Lucas, 500 U.S. 145, 150 (1991).

[56] DaSilva, *supra* note 36, at 222.

[57] *Id.* at 223.

[58] *See id.* at 224–25.

[59] Montgomery v. Commonwealth, 320 S.W.3d 28, 42 (Ky. 2010).

[60] Michigan v. Lucas, 500 U.S. 145 (1991).

[61] *Montgomery*, 320 S.W.3d at 42 (internal citations omitted).

meaningfully furthers a valid purpose the rule was meant to serve."[62] Further, "courts have weighed the 'importance of the evidence to an effective defense, [and] the scope of the ban involved' against any prejudicial effects the rule was designed to guard against."[63] Adopting this kind of test has allowed the courts to consider various factors in the admission or barring of evidence, including the probative value of the evidence and the effect the evidence would have on the defendant's credibility.[64] For example, in *Montgomery*, the Kentucky Supreme Court upheld the trial court's exclusion of evidence concerning a victim's sexually-explicit MySpace page because "the excluded evidence posed a substantial threat of casting K.B.'s character in a bad light and distracting the jury from the real issues in the case, the principal evils which KRE 412's shield is intended to avoid."[65]

The courts have adopted this balancing test for a variety of reasons. The most pertinent reason is because the risk of attack on the victim's character is so high in these cases. The courts must be careful in admitting or excluding evidence to preserve the defendant's constitutional rights to a fair trial, while also protecting "victims from unduly harassing cross-examination and to eliminate from trials immaterial evidence about the victim's character."[66] In fact, the Supreme Court ruled on this issue in the context of a rape shield law in *Michigan v. Lucas*.[67] There, the Court held that the Sixth Amendment right to present relevant evidence "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," but that these restrictions "may not be arbitrary or disproportionate to the purposes they are designed to serve."[68] Thus, these tests have attempted to reinforce the primary purpose of these rape shield laws: "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."[69]

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[62] *Id.* (internal citations omitted).

[63] *Id.* (citing White v. Coplan, 399 F.3d 18, 24 (1st Cir. 2005)).

[64] *Id.*

[65] *Id.* at 43. The court also ruled that the "exclusion of the evidence was neither arbitrary nor disproportionate, and on that ground, accordingly, the trial court did not abuse its discretion under KRE 412 or deprive Montgomery of any constitutional right." *Id.*

[66] *Id.* at 39.

[67] Michigan v. Lucas, 500 U.S. 145 (1991).

[68] *Id.* at 149–51 (internal quotation marks and citations omitted); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 678–79 (1986) (giving trial judges wide latitude to impose reasonable restrictions on cross-examination); United States v. Scheffer, 523 U.S. 303, 308 (1998) (giving state lawmakers deference "to establish rules excluding evidence from criminal trials").

[69] Janzen, *supra* note 39, at 1090.

IV. ARGUMENTS TO PROTECT VICTIMS

A. The Courts' Recognition of the Importance of One's Reputation on the Internet

This need to limit the admissibility of social media evidence in sexual assault cases runs hand-in-hand with the increased recognition that one's reputation on the Internet is important to everyday life. Courts have begun to recognize that statements and activity on the Internet can have far reaching effects on a party's reputation and can have legal repercussions, given the nature of the statements and actions.[70] One example that has been discussed by the courts and legal profession as a whole has been the role of lawyers on the Web, how their actions on the Internet can affect trials, and disciplinary hearings for their postings.[71] Further, the American Bar Association (ABA) in Kentucky and other states has also issued various ethical opinions limiting lawyers' abilities to investigate potential jurors and improperly communicate with them.[72] For example, while the ABA has found that a lawyer may passively review a juror's public social media profile, they may not personally send or order someone else to send a friend request to a juror to access their private information.[73]

In relation to sexual assault and molestation matters, states are now introducing legislation to limit what convicted sexual offenders can post and do on social media sites. The most prominent example right now is a North Carolina statute that prohibits any registered sex offender from posting on any site that allows minors under the age of eighteen to post or join the site, including Facebook and Twitter.[74] This statute, which will be litigated in a

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[70] *See* Doe v. Coleman, 497 S.W.3d 740, 747 (Ky. 2016); Dendrite Int'l Inc. v. Doe, 775 A.2d 756, 765–66 (N.J. Super. Ct. App. Div. 2001). While neither of these cases ruled that the statements made on these sites were libelous, the courts did acknowledge that these statements could be considered as such if the plaintiff made a proper founding that the statements fulfilled the requirements of libel.

[71] *See* Christina Vassiliou Harvey, Mac R. McCoy & Brook Sneath, *10 Tips for Avoiding Ethical Lapses When Using Social Media*, A.B.A.: BUS. L. TODAY (Jan. 2014), http://www.americanbar.org/publications/blt/2014/01/03_harvey.html (The Illinois Supreme Court "suspended an assistant public defender from practice for 60 days for, among other things, blogging about clients and implying in at least one such post that a client may have committed perjury.").

[72] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

[73] *Id.* at 4 ("It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. . . . This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.").

[74] Eugene Volokh, *Supreme Court Agrees to Consider N.C. Ban on Sex Offenders' Access to Most*

matter before the Supreme Court,[75] is but one example of legislatures taking steps to protect victims from sexual predation on the Internet.[76] It reinforces the idea that one's contacts and interactions on the Internet must be protected by both the courts and the legislatures. This finding is timelier than ever because studies have shown that young people are the heaviest users of social media and thus are at the most risk of being manipulated or attacked online.[77] And because of the prevalence of social media, cyberbullying in relation to sexual assault is also on the rise. Several victims have been harassed and shamed after videos or photos of their assaults were posted online; this has led to studies finding that seventy-six percent of women under the age of thirty have experienced some form of online harassment.[78] But despite the potential evidentiary value of these photos and videotapes, many victims are unable to come forward and press charges because of both the treatment they receive online and the potential use of this evidence at trial to argue that they consented to the act. Thus, these women may turn to more drastic and self-destructive methods to resolve their pain.[79] Because social media can be

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Prominent Social Networks, WASH. POST (Oct. 28, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/28/supreme-court-agrees-to-consider-n-c-ban-on-sex-offenders-access-to-most-prominent-social-networks ("The law isn't limited to people who are in prison or on probation (whose First Amendment rights are sharply reduced because of that); it applies even to people who have finished serving their sentences. Nor is the law limited to sex offenders who committed crimes against minors (though I think that too would be unconstitutional). Rather, the law makes it a crime for any registered sex offender to either post to such a site or even read it, on the theory that the law is needed 'to prevent registered sex offenders from prowling on social media and gathering information about potential child targets.'").

[75] *Id.*

[76] *See New Jersey Enacts Law Limiting Sex Offenders' Internet Use*, ASSOCIATED PRESS (Dec. 28, 2007), http://www.nydailynews.com/new-york/new-jersey-enacts-law-limiting-sex-offenders-internet-article-1.276688.

[77] Ian W. Holloway et al., *Online Social Networking, Sexual Risk and Protective Behaviors: Considerations for Clinicians and Researchers*, U.S. NAT'L LIBR. OF MED. (Jan. 28, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4309385 ("While these data indicate the growing popularity of SNS across the population as a whole, young people between the ages of 18-29 are the heaviest SNS users. SNS use rose sharply between 2005 and 2013 for young adults (ages 18-29), whose use increased from 9% to 89%, and for teens (ages 12-17), who experienced a more modest increase from 55% in 2006 to 81% in 2012.").

[78] Elle Hunt, *Online Harassment of Women at Risk of Becoming 'Established norm', Study Finds*, GUARDIAN (Mar. 7, 2016), https://www.theguardian.com/lifeandstyle/2016/mar/08/online-harassment-of-women-at-risk-of-becoming-established-norm-study.

[79] Erin Fuchs, Michael B. Kelly & Gus Lubin, *Social Media Makes Teen Rape More Traumatic Than Ever*, BUS. INSIDER (Apr. 12, 2013), http://www.businessinsider.com/the-impact-of-social-media-on-rape-2013-4 ("While images posted online could make it easier to convict perpetrators, rapists could also use video tapes or pictures as evidence that a girl consented to sex, Campbell said. Girls wouldn't let somebody take their picture if they weren't consenting to sex, the argument goes."). This article goes on to cite numerous cases where a victim took her life after the treatment she received online in response to posted videos and photos.

admitted to attack a victim's credibility and allow an attacker to go free—and because it can cause a victim to be attacked after the conclusion of a trial[80]—the admission of this evidence further discourages victims from coming forward and reporting a crime that is already underreported.[81]

B. The Under-Reporting of Sexual Assault Crimes

For years, it has been generally accepted that crimes involving sexual assault are notoriously underreported. Some studies show that sixty-three percent of sexual assaults go unreported, with only two to ten percent of these reports being false accusations.[82] The reasons behind this underreporting are various and multifaceted, but one clear reason is that many women fear that they will be demonized by the media because of "the pervasive endorsement of rape myths and sexual objectification of women, both of which are legitimized by everyday media."[83] In essence, the media's portrayal of various rape myths perpetuates a rape culture in the United States that shifts the blame from the sexual predators to the victims of these sexual assaults and, as a result, discourages reporting of such crimes.[84] An example of this victim blaming can be seen in the now-infamous Duke Lacrosse case, where

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[80] *See* Holly Jeanine Boux & Courtenay W. Daum, *At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the "Real" Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L. TECH. & POL'Y 149, 180–81 (2015) ("At trial, the same social media and communicative technology that can be used to challenge prevailing rape myths in the minds of jurors also have the potential to be used against victims. . . . If victims' social media can be mined in this manner it could have a chilling effect on the prosecution of cases as well as victims coming forward with allegations of sexual assault if they know that past posts that paint them in a negative light can be taken out of context and used against them. . . . Outside of the courtroom, social media and communicative technology evidence can be used to attack victims and exacerbate slut shaming and victim blaming in the aftermath of a rape.").

[81] *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Jan. 16, 2017); Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS: NEWSHOUR (Dec. 11, 2014, 1:30 PM), http://www.pbs.org/newshour/rundown/four-five-acts-campus-sexual-assault-go-unreported-police ("Only about 20 percent of campus sexual assault victims go to police, according to a new Justice Department report providing insight into why so many victims choose not to pursue criminal charges. About one in 10 say they don't think what happened to them is important enough to bring to the attention of police. Other reasons they don't go include the views that it is a personal matter or that authorities won't or can't help. One in five said they fear reprisal.").

[82] *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (last visited Jan. 17, 2017).

[83] Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059, 1060 (2015).

[84] *Id.* at 1064. The article goes on to describe several rape myths that are promoted in rape culture. It also demonstrates how many citizens subscribe to and believe some, if not all, of these myths.

the accuser was called, among other things, a "stripper"; "after the complainant's accusation was found to be false, she was vilified, to extreme degrees."[85]

However, even if a victim does report a crime, it is very possible that the perpetrator will escape any serious punishment for the crime. As a survey conducted by the Rape, Abuse & Incest National Network (RAINN) found in 2012, "out of every 1000 rapes, 994 perpetrators will walk free," and "[p]erpetrators of sexual violence are less likely to go to jail or prison than other criminals."[86] And recent incidents involving notable citizens, such as college athletes, have led to an increased awareness of how lenient the court system can be in these cases.[87] One need only read the impact statement of Brock Turner's victim in order to understand the effects that Turner's unusually-light sentence[88] will have on her life and on the lives of other victims of sexual assault.[89] And while the Brock Turner case will remain infamous for years to come, other cases have achieved their own level of infamy and illustrate that, despite the gains made in areas such as sexual assault on college campuses, many problems still persist. In fact, one need only a Netflix account to watch a documentary that explores this very issue.[90] The documentary entitled *Audre and Daisy* explores the cases of Audrie Potts and Daisy Coleman, two teenage girls on opposite sides of the country who were sexually assaulted after parties and afterwards were bullied online by their classmates.[91] In both cases, photos of the incidents were circulated on the Internet and used to shame the victims, eventually causing Audrie to commit suicide and Daisy to attempt the same.[92] As filmmaker Bonni Cohen points out, the film illustrates how this kind of story is happening across the

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[85] Loewen, *supra* note 26, at 157 (citing Capers, *supra* note 6, at 856).

[86] *Criminal Justice System*, *supra* note 81.

[87] Zerlina Maxwell, *Rape Culture is Real*, TIME (Mar. 27, 2014), http://time.com/40110/rape-culture-is-real.

[88] Sam Levin, *Brock Turner Released from Jail After Serving Half of Six-Month Sentence*, GUARDIAN (Sept. 2, 2016), https://www.theguardian.com/us-news/2016/sep/02/brock-turner-released-jail-sexual-assault-stanford. Turner was originally sentenced to six months in prison but was released after three months for good behavior. *Id.*

[89] *See* Andrew Buncombe, *Stanford Rape Case: Read the Impact Statement of Brock Turner's Victim*, INDEPENDENT (Sept. 2, 2016), http://www.independent.co.uk/news/people/stanford-rape-case-read-the-impact-statement-of-brock-turners-victim-a7222371.html.

[90] Pam Grady, *Film Explores Tragic Pairing of Sexual Assault and Social Media*, S. F. CHRON. (Dec. 24, 2015), http://www.sfchronicle.com/movies/article/Local-filmmakers-explore-sexual-assault-and-6719919.php.

[91] Nosheen Iqbal, *Audrie and Daisy: An Unflinching Account of High-School Sexual Assault*, GUARDIAN (Sept. 19, 2016), https://www.theguardian.com/lifeandstyle/2016/sep/19/audrie-and-daisy-high-school-sexual-assault-netflix-shame-bullying-teenagers-online.

[92] *Id.*

nation and how "trial by social media" is becoming increasingly prevalent in American society.[93] In fact, Cohen points out in another interview how changing technology has worsened the effects of sexual assaults.[94] Co-filmmaker Jon Shenk explains that "[t]he difference between how we grew up with these issues and how kids are growing up now really is one of the things that divides our generations very sharply. . . . In terms of social media, cell phones, the Internet, it really does change the relationship kids have with sex and sexual identity."[95] And because of the even larger generational gap between judges and these victims, many may worry that judges will not recognize this cultural evolution unless they are given direction on it.[96] This has led to discussion over when judges should be forced to retire.[97]

Another more recent example of this issue also occurred at Stanford, where a sophomore reported to the university that a football player had sexually assaulted her. This action and two hearings, which resulted in a 3-2 finding that the player had committed the act, were not enough to warrant disciplinary action; he was allowed to continue playing football for the university.[98] In fact, considering the prevalence of sexual assault on college campuses,[99] experts such as Gina Maisto have found that universities simply lack the resources to effectively determine the validity of these claims; "[e]ven if schools have the resources to do so, exercising oversight of the entire process often leads to a perception of institutional bias and a lack of

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[93] *Id.* ("'The most surprising thing is the similarities,' says Cohen. 'That's why we wanted to tell a story in the suburb of San Francisco and in rural Missouri. Even though they're worlds apart in terms of where they are in the country and the kinds of lives they are leading, when it came to these cases they were eerily similar. It was extremely surprising to us that this kind of behaviour is happening no matter where you live.' Their film, Audrie and Daisy, is a stark, unflinching account of high-school sexual assault and trial by social media.").

[94] Grady, *supra* note 90.

[95] *Id.* (quotation marks omitted).

[96] *See* Joseph Goldstein, *The Oldest Bench Ever*, SLATE (Jan. 18, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_oldest_bench_ever.html ("About 12 percent of the nation's 1,200 sitting federal district and circuit judges are 80 years or older, according to a 2010 survey conducted by ProPublica. Eleven federal judges over the age of 90 are hearing cases—compared with four just 20 years ago. (One judge, a Kansan appointed by President John F. Kennedy, is over 100.) The share of octogenarians and nonagenarians on the federal bench has doubled in the past 20 years.").

[97] William E. Raftery, *Increasing or Repealing Mandatory Judicial Retirement Ages*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2016/Increasing-or-Repealing-Mandatory-Judicial-Retirement-Ages.aspx (last visited Feb. 4, 2017).

[98] Joe Drape & Marc Tracy, *A Majority Agreed She was Raped by a Stanford Football Player. That Wasn't Enough.*, N.Y. TIMES (Dec. 29, 2016), http://www.nytimes.com/2016/12/29/sports/football/stanford-football-rape-accusation.html.

[99] *See id.*

faith in the reliability of outcomes."[100] This behavior has led to the realization that a rape culture has permeated American society and that "[w]hat we really despise is the *idea* of rapists: a terrifying monster lurking in the bushes, waiting to pounce on an innocent girl as she walks by. . . . But actual rapists, men who are usually known to (and often loved by) their victims? Men who are sometimes our sports heroes, political leaders, buddies, boyfriends and fathers? Evidence suggests we don't despise them nearly as much as we should."[101] Thus, all of these factors illustrate that despite recent gains in this field, victims of sexual assault are still bereft of many protections and need to be guaranteed certain defenses to better protect their rights and their ability to procure a fair trial that avoids putting their own private lives on trial.

C. Privacy on Social Media versus the Need to Protect Victims

Because of the increasing intersection between the Internet and one's private life, the courts have had to tackle the question of whether posts and information on the Internet are actually considered private. An argument that has been brought forward to justify the admission of social media evidence is that the inherent nature of the Internet deprives any user of the reasonable expectation that anything they post or do on the Internet will remain private.[102] For example, the United States Court of Appeals for the Sixth Circuit found in *Guest v. Leis* that parties who posted on public forums on the Internet "would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting."[103] Some courts have gone beyond merely admitting public posts and have also ordered the disclosure of the plaintiff's Facebook login information to the defendant's attorneys, giving counsel twenty-one days to inspect the plaintiff's profile before allowing them to change their login information.[104] However, while

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[100] *Id.*

[101] Maxwell, *supra* note 87 (internal quotations omitted).

[102] Seth I. Koslow, *Rape Shield Laws and the Social Media Revolution: Discoverability of Social Media—It's Social Not Private*, 29 TOURO L. REV. 839, 854 (2013).

[103] Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001); *see also* Romano v. Steelcase, Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010) ("[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, '[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.'").

[104] Margaret DiBianca, *Discovery and Preservation of Social Media Evidence*, AM. B. ASS'N: BUS. L. TODAY, http://www.americanbar.org/publications/blt/2014/01/02_dibianca.html (last visited Jan. 17,

this finding may be true in some cases, the Kentucky Rules of Evidence (KRE) and the Federal Rules of Evidence (FRE) hinge not on the issue of privacy, but rather relevancy.[105] As a response to the continuous attacks on victims of sexual assault in court, rules such as KRE 412 and FRE 412 were instituted because "legislators made a choice to clarify for the judiciary which issues are actually relevant to the credibility of survivors."[106] Beyond this reasoning, other courts have recognized the dangers in allowing defendants free roam of non-public social media information, with one Michigan court finding that "the Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view. . . . Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there *might* be something of relevance in Plaintiff's Facebook account."[107] Further, a major issue with these public posts is that most users are aware of the public nature of these sites and growing concerns about privacy have led more people to fabricate information about themselves on these sites.[108]

This reality thus creates an issue for the courts where many judges should be hesitant to admit this evidence because of the difficulty in authenticating the information or the heightened risk that the information will be untrustworthy and could carry a significant danger of misleading or confusing the jury.[109] One may argue that juries should be given the ability to determine whether these posts are trustworthy and that this factor goes more toward weight rather than admissibility. However, the fact Congress and the state legislatures have already adopted these measures for more conventional evidence illustrates their fear that evidence regarding this subject matter in sexual assault cases carries a special risk of being misconstrued and used to shift the focus onto the victim rather than the defendant.[110] Further, as recent events have shown, the issue of people just

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2017) (citing Largent v. Reed, No. 2009-1823, 2011 WL 5632688, at *6 (Pa. Ct. Com. Pl. Nov. 8, 2011)).

[105] *See* Loewen, *supra* note 26, at 160.

[106] *Id.* at 161.

[107] Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012). The court also ruled against the discovery request into the plaintiff's Facebook account because the scope of the discovery was overly broad and because the defendant failed to make "a sufficient predicate showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 389.

[108] *See* Doug Gross, *Survey: 1 in 4 Users Lie on Facebook*, CNN (May 4, 2012), http://www.cnn.com/2012/05/04/tech/social-media/facebook-lies-privacy ("In a survey of 2,000 households, 25% of users said they falsified information in their profiles to protect their identity, Consumer Reports said. That's up from 10% in a similar survey two years ago.").

[109] Loewen, *supra* note 26, at 158 (citing Scott R. Grubman & Robert H. Snyder, *Web 2.0 Crashes Through the Courthouse Door: Legal and Ethical Issues Related to the Discoverability and Admissibility of Social Networking Evidence*, 37 RUTGERS COMPUT. & TECH. L.J. 156, 165 (2011)).

[110] *See id.* at 154–55.

accepting what they see or read from the Internet is true is a real danger—for example, Facebook is now under fire for the number of fake news stories that circulated on the site during the 2016 presidential election and the possible effects these stories had on the election's outcome.[111] Finally, if the courts were to allow this evidence under the rape shield statutes, the result would go against the express wishes of Congress and the subsequent state legislatures that have adopted these protective laws since the creation of FRE 412.[112] While it is true that there will be times that such evidence may be necessary for trial, the exceptions already created under KRE 412 should provide enough safe harbors to ensure the defendant's rights are not abused and that the jury is free to determine the truth of the matter.

IV. PROTECTING THE DEFENDANT'S RIGHTS

A. Danger of False Reporting

One pertinent issue that has always been present with cases involving sexual assault is the possibility that the victim is lying about the attack. Because of the inherent, vile nature of sexual assaults, many scholars have criticized rape shield laws: "As a result of current rape shield rules, the pendulum 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.'"[113] And since one of the primary purposes of enacting this kind of legislation is to promote reporting of these crimes, many critics argue that these laws also make it easier for victims to make false allegations against their supposed attackers.[114] The effects these allegations can have on an accused's personal life can be quite damaging, such as in the Duke Lacrosse case, where the lacrosse players' reputations were forever damaged by the false allegations and the fact they would "be forever tied to the . . .

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[111] Dave Lee, *Facebook's Fake News Crisis Deepens*, BBC NEWS (Nov. 15, 2016), http://www.bbc.com/news/technology-37983571 ("Earlier on Monday Facebook denied claims that a tool to whittle out fake news had been created before the election, only to be shelved due to concerns it would make Facebook look like it was censoring conservative views.").

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

[113] Koslow, *supra* note 102, at 843–44 (citing Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 982 (2008)).

[114] *Id.* at 844 (discussing a few reasons why victims may make such false claims, including "a desire to hide her own promiscuity, a desire/fantasy to be raped, or a desire for vengeance").

case."[115] Thus, critics would argue that expanding these laws and barring the admission of more evidence would only increase the number of false rape accusations and leave the accused unable to defend themselves.

However, these arguments fail to take into account certain facts, including the finding that statistics regarding "false reporting are frequently inflated, in part because of inconsistent definitions and protocols, or a weak understanding of sexual assault."[116] According to the National Sexual Violence Resource Center (NSVCR), a review of research regarding false reports of sexual violence found that the percentage of false allegations range from two to ten percent, the problem being that many of these reports do not clearly define what a false allegation is and often include reports that are not false but are merely baseless and thus do not meet the legal criteria to obtain a conviction but are still truthful accounts.[117] Further, while it is true that someone falsely accused will experience damage to their reputation, their accuser will rarely receive no punishment for the false accusation.[118] For example, in the Duke Lacrosse case, after the woman's accusations were proven to be false, the accuser did not benefit from the accusations at all; she is now considered one of the most infamous examples of a false rape accuser and is in fact in more dire straits than the men she falsely accused.[119]

B. The Defendant's Sixth Amendment Rights

In all criminal cases, the courts must ensure that defendants' Sixth Amendment rights are not violated and that defendants are allowed to present full defenses for the charges brought against them.[120] Since the passage of rape shield legislation, one counterargument has always been that the statutes will limit defendants' abilities to present complete defenses to the asserted charges; by limiting a defendant's available sources of evidence, a case can devolve into the defendant's word versus the victim's word.[121] Many defense attorneys opposed this new legislation and found that "the combination of

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[115] *Id.* at 846.

[116] *False Reporting*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf (last visited Jan. 17, 2017).

[117] *Id.*

[118] Loewen, *supra* note 26, at 157.

[119] Jessica Luther, *"I'm Broken": The Duke Lacrosse Rape Accuser, 10 Years Later*, VOCATIV (Mar. 10, 2016, 12:43 PM), http://www.vocativ.com/295731/im-broken-the-duke-lacrosse-rape-accuser-10-years-later. Crystal Magnum, the accuser in the Duke case, is currently in jail for the second degree murder of her boyfriend and is facing fourteen years in prison as a result. *Id.*

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

[121] Koslow, *supra* note 102, at 861.

rape shield laws and the admissibility of the defendant's past sex crimes put defendants at a significant disadvantage from the outset of their trials."[122] The theory is predicated on the fact that a mere allegation of sexual assault can have disastrous effects on the accused, leave him vulnerable to false accusations, and cause irreparable damage to his reputation.[123] However, the Supreme Court has found that, while these rights are an important part of the trial process, they may give way to competing governmental interests, including "preventing harassment of witnesses, jury prejudice, confusion of the issues, danger to witnesses, or repetitive or marginally relevant questioning."[124] The Supreme Court has not explicitly stated a per se rule to illustrate when these interests can outweigh the defendant's constitutional rights. But numerous cases, including *Michigan v. Lucas*,[125] have found that statutes which give trial judges the discretion to weigh the interests will more than likely be held constitutional, while rules "that force trial judges to restrict defendants' rights to confrontation or compulsory process . . . inevitably run into constitutional problems in some cases."[126] Thus, while mechanical applications of these laws will encounter constitutional challenges, the growing consensus among the courts is that, so long as the judge is given some discretion to weigh the evidence and determine whether it is admissible, the use of the statute will usually be upheld.[127] However, the courts should not be granted such discretion without some guidance from the statute to ensure that they enforce the will of the legislature.[128] This calls for the inclusion of new categories of evidence that have been created since the statute's ratification, including evidence found on social media sites and other new forms of communication.

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[122] David E. Fialkow, *The Media's First Amendment Rights and the Rape Victim's Right to Privacy: Where Does One Right End and the Other Begin*?, 39 SUFFOLK U. L. REV. 745, 759 (2006).

[123] *See* Koslow, *supra* note 102, at 845–46.

[124] Daniel Lowery, *The Sixth Amendment, the Preclusionary Sanction, and Rape Shield Laws:* Michigan v. Lucas, *111 S. Ct. 1743 (1991)*, 61 U. CIN. L. REV. 297, 300 (1992).

[125] Michigan v. Lucas, 500 U.S. 145 (1991).

[126] Lowery, *supra* note 124, at 305.

[127] *Id.* at 300–01.

[128] *See* Janzen, *supra* note 39, at 1113.

V. RESOLUTION

A. The Kentucky Legislature Needs to Institute Protections for Electronic Communications

As technology continues to grow and alter the ways people interact with one another, so too must the law change to accommodate those changes and ensure that the wishes of Congress and the Kentucky state legislature are properly carried out. Despite one's best wishes to believe in other people's better angels, or that society has somehow moved past the victim blaming days of the twentieth century, these beliefs simply do not measure up to reality. One need merely look at the 2016 presidential election to see how rampant and widespread misogyny still is in American society, such as with women receiving death threats for attempting to speak out about sexual assault allegations against President Trump[129] or President Trump's own online attacks against former Miss Universe Alicia Machado.[130] In fact, misogyny has become so prevalent that leaders in Britain organized a movement to take back the Internet to ensure that women are protected from harassment online.[131] These facts illustrate that, simply put, the treatment of women both offline and online just has not improved as much as society may wish to believe.[132] The power of these posts and communications has only increased with time. It continues to bully or seemingly punish women for speaking out—or for just being present online.[133]

In order to combat this trend, the Kentucky General Assembly must take steps to ensure that this kind of information will not be used to simply attack victims in sexual assault cases. However, electronic communications may not automatically be considered under KRE 412, given its unique character.[134] Thus, the best way to facilitate this change is for the Kentucky legislature to amend KRE 412 to specify that electronic and social media communications

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[129] Roray Carroll, *Woman Accusing Trump of Raping Her at 13 Cancels Her Plan to Go Public*, GUARDIAN (Nov. 3, 2016), https://www.theguardian.com/us-news/2016/nov/02/donald-trump-rape-lawsuit-13-year-old-cancels-public-event.

[130] Phillip Elliot, *Hillary Clinton: 'Who Gets Up at 3 in the Morning to Engage in a Twitter Attack?'*, TIME (Sept. 30, 2016), http://time.com/4515348/hillary-clinton-donald-trump-tweets.

[131] Sandra Laville, *Research Reveals Huge Scale of Social Media Misogyny*, GUARDIAN (May 26, 2016), https://www.theguardian.com/technology/2016/may/25/yvette-cooper-leads-cross-party-campaign-against-online-abuse.

[132] *Id.*

[133] *Id.*

[134] *See* DaSilva, *supra* note 36, at 229 ("Unlike traditional behavioral models, however, behavior found on MySpace faces a less straightforward fit under existing definitions of sexual conduct because of its novel construction.").

are implicated by the rape shield legislation.[135] Under KRE 412, the type of evidence that is affected by this law has been vaguely described as concerning past acts illustrating the victim's "sexual behavior."[136] However, a key factor in the KRE is that the legislature failed to provide any definition of what sexual behavior could entail, which seems to be the trend for many jurisdictions.[137] Amending KRE 412 to contain an illustrative, but not necessarily restrictive, definition of what sexual behavior entails would allow the Kentucky General Assembly to promote Congress' intent to protect victims of sexual misconduct from victim blaming and invasions of their privacy, while still giving trial judges some level of discretion in determining how to apply KRE 412.[138] Fortunately, the advisory committee notes for FRE 412 include a definition of sexual behavior, which encompasses "all activities that involve actual physical conduct . . . or . . . imply sexual intercourse or sexual contact. In addition, the word 'behavior' should be construed to include activities of the mind, such as fantasies and dreams."[139] Since Congress found that even fantasies and dreams should be included in this definition,[140] it is not a stretch to presume that social media and electronic evidence would also be implicated under this definition.[141] Thus, to ensure that this intent is properly enforced, and to give the courts guidance, the Kentucky General Assembly should amend KRE 412 to provide this definition of sexual behavior, perhaps framing it as such:

> KRE 412(a)(3): "Sexual behavior" includes, but is not limited to:
> All activities that involve actual physical conduct,
> Activities that imply sexual intercourse or contact,
> Communications, electronic or otherwise, that depict or involve sexual activity or provocative images,
> Activities of the mind or dreams, and
> Any other activities the court finds is implicated by this definition.
> This definition would codify this finding that sexual behavior is continuing to evolve and still allow the courts discretion to determine whether the evidence falls under the auspices of the statute, given new cultural norms

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[135] *See* Janzen, *supra* note 39, at 1113 (the best way to resolve the ambiguity surrounding evidence from social media sites is to amend FRE 412 to implicate evidence from social media sites).

[136] KY. R. EVID. 412(b)(1)–(2).

[137] *See* DaSilva, *supra* note 36, at 224.

[138] FED. R. EVID. 412 advisory committee's note to 1994 amendments (subdivision (a)).

[139] *Id.* (citations omitted).

[140] *Id.*

[141] *See* Janzen, *supra* note 39, at 1112.

and societal changes.[142]

B. Alternatively, Kentucky Courts May Voluntarily Adopt This Interpretation

If the legislature is unable to amend the legislation in such a way, Kentucky courts may be able to adopt this interpretation on their own. Luckily, as previously discussed, in Kentucky, the wording of KRE 412 currently allows trial judges a great deal of discretion in determining what is implicated by the rape shield statute.[143] And the advisory committee notes of FRE 412, on which KRE 412 is based, can easily be construed to limit the admission of such evidence.[144] Further, cases such as *Montgomery*[145] have helped set the groundwork in Kentucky to allow the Kentucky Supreme Court, or a higher federal court in the Sixth Circuit, to rule that such communications and posts are implicated by KRE 412 and thus must satisfy one of the enumerated exceptions to be admitted in a sexual assault case.[146] Doing so will ensure that this evidence is only admitted when it's necessary for the jury to come to a fully-informed decision and avoid embarrassing or blaming the victim.[147] However, the issue with this solution is that the courts would be forced to wait until a case is brought before them to adopt this interpretation. Unfortunately, many of these cases end at the trial court level and thus go relatively unnoticed.[148] As scholars like Michelle Anderson have pointed out:

> Because of the usual prohibition on interlocutory appeals from evidentiary rulings in criminal cases and because the state cannot appeal an acquittal, when a judge admits a complainant's sexual history and the defendant is wrongly acquitted, the case is not reviewed by a higher court. The central problem with admitting a complainant's unchaste sexual history is the risk it poses of leading the decision maker to acquit a defendant unjustly, and yet these cases in which such unjust acquittals occur are the most difficult to access and critique. Appellate decisions are limited to those in which the

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[142] *Id.* at 1113.

[143] *See* KY. R. EVID. 412.

[144] Unlike other states' rape shield laws, which only limit evidence regarding a victims' sexual conduct, KRE 412 limits admission of "sexual behavior." *Id.* at (a)(1). This can be interpreted by the courts as encompassing electronic and social media communications.

[145] Montgomery v. Commonwealth, 320 S.W.3d 28, 42 (Ky. 2010).

[146] *Compare* KY. R. EVID. 412, *with* FED. R. EVID. 412 (both detailing the exceptions under which evidence against the victim could be admitted in a sexual assault case).

[147] *See* Janzen, *supra* note 39, at 1112.

[148] Anderson, *supra* note 12, at 95.

> government wins, and this limitation hinders the ability to assess the way rape shield laws work at trial.[149]

Thus, it is possible that the issue would take years to reach an appellate court. The damage it could wrought on victims in the meantime would be unimaginable, and it would most likely go unreported and unnoticed.[150] While it would be preferable for the legislature to effectuate this change, either solution would ensure that victims are not just protected in their real world private activities, but also in their virtual actions as well.

VI. CONCLUSION

For people like Stella and many victims—both those who came forward with their stories and those who did not—the damage that others, including the legal system, have wrought cannot be undone. For centuries, victims of sexual assault have had to face a system that has put them on trial and degraded them for things as inconspicuous as what they wore or said at the time of the attack. It took until the 1970s to implement special protections for these victims and encourage them to come forward to report these crimes. While this development was a vital step, the conversation is now shifting once again, with a greater focus being thrust upon how people portray themselves online. And given the anonymous and vitriolic nature of the Internet, these victims are once again facing persecution and attack for things ranging from their public profile pictures to leaked private photos and conversations. This type of behavior cannot be allowed to infect the courtroom and threaten to undo the progress these laws have garnered over the past few decades. Americans have often recognized the need for change and adaptation. Since the lines between the real and virtual worlds have begun to blur, the courts must recognize that same reality. Times have changed; Kentucky can be one of the first states to recognize this fact and encourage other states to do the same. Otherwise, unlike the great Secretariat, Kentucky may find that it is not leading the charge for reform, but is instead being dragged reluctantly across the finish line.

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[149] *Id.*
[150] *Id.*