The Next Generation of Sexual Conduct: Expanding the Protective Reach of Rape Shield Laws to Include Evidence Found on Myspace

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THE NEXT GENERATION OF SEXUAL CONDUCT: EXPANDING THE PROTECTIVE REACH OF RAPE SHIELD LAWS TO INCLUDE EVIDENCE FOUND ON MYSPACE

The crime of rape has a long history in American jurisprudence. Rape shield laws, however, are comparatively new and less tried by the test of time. Though rape shield laws differ in detail across jurisdictions, their collective premise is to restrict admissibility of the sexual conduct of rape victims. In the late 1970s and early 1980s, when the majority of states enacted rape shield statutes, the term "sexual conduct" labeled a rape victim’s history of unchaste behavior. Thus, the original connotation of sexual

1 See State v. George, 1 Del. Cas. 161, *1-2 (1797) (allowing a slave’s master to testify on slave’s behalf in trial regarding “offense of a rape”); Monroe v. Maples, 1 Root 422, *1 (1792) (referring to “rape” in a description of complaint). See generally Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451 (1857) (discussing American revival of English laws that criminalized act of rape); Definition of Indictable Crimes, 2 Del. Cas. 235, *1 (1797) (defining indictable crime of rape as “the unlawful carnal knowledge had of the body of a woman by force and against her will, or without force if under the age of ten years”).


3 See, e.g., FED. R. EVID. 412 (deeming evidence inadmissible if offered to prove “alleged victim engaged in other sexual behavior” or “alleged victim’s sexual predisposition,” with exception); ALA. R. EVID. 412 (stating that “evidence relating to the past sexual behavior of the complaining witness . . . shall not be admissible . . . except as otherwise provided in this rule.”); MASS. GEN. LAWS ch. 233, § 21B (2000) (asserting restrictions on admissibility of “evidence of the reputation of a victim’s sexual conduct” and “specific instances of a victim’s sexual conduct” within context of various sex crime cases). This Note will refer to rape cases, yet many rape shield laws apply to a range of sex crimes that include, but are not limited to, rape. See, e.g., ALA. R. EVID. 412 (applying, non-exclusively, to “rape, sodomy, sexual misconduct, sexual abuse or carnal knowledge”); DEL. CODE ANN. tit. 11, § 3508 (1998) (applying to “any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact; an attempt to commit any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact” and other sex crimes); 725 ILL. COMP. STAT. 5/115-7 (1998) (applying, non-exclusively, to “predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, or criminal transmission of HIV . . .”).

4 See, e.g., Crawford v. State, 492 S.W.2d 900, 901 (Ark. 1973) (reviewing admissibility of prosecuting witness’s chastity regarding alleged rape); Woodruff v. State, 101 N.W. 1114, 1118 (Neb. 1904) (discussing admissibility of evidence pertaining to alleged rape victim’s chastity); Wright v. State, 1 S.W.2d 1095, 1096 (Tex. Crim. App. 1928) (discussing defendant’s burden to prove doubt as to prosecuting witness’s chastity within rape context); see infra notes 53-57 and accompanying text (discussing enactment of most state rape shield statutes in 1970s and 1980s).
conduct was limited to sexual intercourse.⁵ Through the years this definition broadened as attorneys sought rape shield protection for alternative sexual behaviors.⁶ Initially, the meaning expanded slightly to include physical, sexual acts other than sexual intercourse.⁷ Yet evolving social norms begged to further stretch the definition.⁸

Currently, the wild popularity of online social networking will again force courts to contemplate the meaning of sexual conduct.⁹ Online social networking has become the modern bedrock of interpersonal communication, often replacing hand-written, telephonic, and even face-to-face exchanges.¹⁰ MySpace.com (MySpace) is one of the largest and most popular servers of this contemporary trend.¹¹ A combination of comprehensive technology and lenient regulations make MySpace a forum of relatively boundless self-expression, which has resulted in rampant exhibition of sexual behavior.¹² Consequently, existing interpretations of sexual conduct must be updated to include sexual conduct found on MySpace.

This note will examine the term "sexual conduct" as it is used within rape shield laws and suggest a reformed definition in view of modern behaviors found on MySpace.¹³ Following this introduction, Part II will discuss the short and dramatic history of MySpace. Part III will review the history of rape shield laws by way of founding goals and cross-

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⁵ See Merriam-Webster’s Online Dictionary, Definition of Chastity, http://www.m-w.com/dictionary/chastity (last visited Mar. 26, 2008) (defining chastity as “abstention from unlawful sexual intercourse” or “abstention from all sexual intercourse”).
⁶ See infra notes 7-8 and accompanying text (listing forms of sexual conduct other than sexual intercourse that were discussed within the rape shield context).
⁹ See Donald Carrington Davis, MySpace Isn’t Your Space: Expanding the Fair Credit Reporting Act to Ensure Accountability and Fairness in Employer Searches of Online Social Networking Services, 16 KAN. J.L. & PUB. POL’Y 237, 238-39 (2006-2007) (discussing popularity of online social networking services that have in turn impacted social communication).
¹⁰ See infra notes 24-26 and accompanying text (describing ways MySpace users can communicate through MySpace profiles).
¹² See infra notes 32-35 and accompanying text (describing sexual behaviors exhibited on MySpace profiles).
¹³ For the purposes of this Note, the term “past sexual conduct” will refer to the provisions of all rape shield laws, although other like terms are used synonymously in differing jurisdictions. Compare GA. CODE ANN. § 24-2-3 (1995) (referring to “past sexual behavior”), with KAN. STAT. ANN. § 21-3525 (1995) (referring to “previous sexual conduct”), and FLA. STAT. § 794.022 (2000) (referring to “prior consensual sexual activity”).
jurisdictional commonalities. Part IV will examine evolving characterizations of sexual conduct and scrutinize the existing and disparate definitions. Part V will forecast classification of behavior found on MySpace. In conclusion, Part VI will suggest the need for a comprehensive definition of sexual conduct that includes behavior found on MySpace and like environments. As MySpace changes the classic understanding of sexual conduct, courts and legislatures alike will be forced to refine ineffective definitions and make room for the next generation of sexual conduct.

I. HISTORY OF MYSPACE

A. MySpace Popularizes Online Social Networking

Over the past two decades, online social networking has become a universal phenomenon.14 In the 1990s, Classmates.com and Evite.com paved the way as some of the first providers of online social networking services.15 These pioneers provided a simple cyber forum and facilitated online connections amongst users.16 Friendster.com materialized in 2002 and gave users elaborate, new technology to forge a greater number of more intimate connections.17 A few months later, MySpace landed on the scene and influenced communication more extensively than any other pre-existing online social-networking service.18

14 See Lawrence M. Friedman, The Land of Linkedin, 22 CBA REC. (Chicago Bar Ass'n, Chicago, Ill.) Jan., 2008, at 48 (defining online social networking as connecting individuals with like interests or needs within an online forum).


MySpace grew into a multi-million dollar business in a mere eighteen months by transforming online social-networking from an innovative tool to an everyday essential. Since January 2007, three years after its official public launch, MySpace has maintained a rank in the top ten most heavily visited websites in the United States. The intense popularity of MySpace has led to a culture in which users replace traditional forms of communication with MySpace facilitated communication. Beyond social application, MySpace facilities serve a range of user and purposes such as background checks for employment recruiters and free promotion for amateur musicians.

The foundation of MySpace is user profiles. Upon registering for MySpace, a new user receives a blank webpage to post personally selected information. The term "post" defines the act of electronically attaching content, such as text, photos, videos and sounds, from a user's computer hard drive onto his or her online profile. The end result is an intimate accessible version of MySpace. Id.

19 Sellers, supra note 18 (describing Rupert Murdoch's purchase of Intermix Media, parent company of MySpace, for $580 million dollars).


24 MySpace, About Us, http://www.myspace.com/Modules/Common/Pages/AboutUs.aspx (last visited Apr. 8, 2008) (describing MySpace user profiles: "Your profile is Your Space on the Web, where you can describe yourself, hobbies and interests. You can even upload pics and write journals.").

25 See Merriam-Webster's Online Dictionary, Definition of Post, http://www.m-
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bulletin board of handpicked words, images and sounds.26

B. MySpace Use Turns Provocative

In addition to ground-breaking technology, MySpace encompasses a distinct laissez-faire attitude thanks to the originating intentions of its founders.27 Given their aversion to rules and regulations, MySpace founders Tom Anderson and Chris DeWolfe deliberately created MySpace as an “open” website where users could freely express themselves.28 While certain profile content is prohibited, MySpace’s Terms and Conditions expressly state that MySpace “is not responsible or liable for content.”29 Thus enforcement of acceptable content is implicitly left to parents, teachers, users themselves, or, perhaps, to no one.30

This uninhibited environment combined with evolving standards of social expression has evoked provocative usage.31 Many MySpace profiles are riddled with vulgar language, and drug and alcohol illustratives.32

w.com/dictionary/posting (last visited Apr. 8, 2008) (defining term “post” as verb that means to “publish (as a message) in an online forum (as an electronic bulletin board)’’); Marcelo Halpern, User Generated Content—Key Issues, 901 PLI/Pat. 203, 218 (2007) (defining “posting” in the MySpace forum as “displaying or publishing...any content on or through the MySpace Services...’’); see also MySpace, Frequently Asked Questions about Profile Design, http://www.myspace.com/ (follow “FAQ” hyperlink; then follow “How do I add color, graphics, & sounds to my Profile page?’’ hyperlink) (last visited Mar. 26, 2008) (describing procedure of designing MySpace profile).


28 See Sellers, supra note 18 (quoting MySpace founders’ goal to build an “open” forum).


31 See infra notes 32-35 and accompanying text (exemplifying provocative ways that users express themselves through their MySpace profiles).

32 See David Narkiewicz, The Dangers of MySpace, Facebook and YouTube, 30 PA. LAW. (Pa. Bar Ass’n) Feb., 2008 at 56, 57 (noting MySpace user that posted “‘sex, drugs and rock and roll’” on list of interests); Robert Sprague, Googling Job Applicants: Incorporating Personal Information Into Hiring Decisions, 23 LAB. LAW 19, 36-37 (2007) (discussing employment recruiters discovery of potential candidates “risqué ‘photographs and provocative comments about
ual expressions, such as racy photographs and depictions of sexual exploits, are also epidemic. The slang term “MySpace Whores” was coined to describe users that post sexually charged content on their profiles. Taking advantage of the enormous public audience available through MySpace, some users intentionally use sexual behavior to seek attention. Tila Nguyen, stage name Tila Tequila, launched herself to celebrity status much to the thanks of her provocative MySpace profile. Known for her sexual photographs and videos and unfiltered self-expression, Tila’s profile exists as one of the most viewed on MySpace.

In 2006, the judicial branch saw its first case in which the basis for complaint was an individual’s MySpace profile. Numerous cases have
followed, many presenting novel ways in which MySpace impacts communication, self-expression, and, subsequently, the law. In some extreme instances of exploitation, MySpace has facilitated communication between sexual predators and under-aged youth, which has produced in-person meetings and subsequent heinous crimes.

As a result of the increased impact of MySpace on the legal world, courts have already begun to develop a framework for utilizing electronic evidence in the courtroom. Evidence found on MySpace is treated within this framework. Like all evidence, electronic evidence must satisfy preliminary evidentiary concerns, including hearsay, authentication, demonstration of best evidence, and relevancy standards. Once these threshold

reprimand. Id. at 505-06. The Pennsylvania District Court held that no constitutional violation occurred and denied the plaintiff’s request for a temporary restraining order. Id. at 509.


See Elizabeth A. Ritvo, Jeffrey P. Hermes & Samantha L. Gerlovin, Online Forums and Chat Rooms in Defamation Actions, 24 COM. LAW 1, 19 (2006) (listing evidentiary concerns raised by plaintiffs seeking to admit content found on internet). The anonymous environment of the internet can make authentication of electronic evidence an especially complex problem. Id. at 20-21; see also Givens, supra note 41, at 103-08 (detailing complexity of authenticating electronic evidence).
issues have been addressed, courts often determine admissibility of electronic evidence by considering equivalent, non-electronic material. For example, when determining admissibility of electronic mail, the court may analogize to admissibility of non-electronic mail. Developing case law in the field of electronic evidence has allowed the admissibility of electronic business records, proof of criminal intent by way of online chatroom communication, and confession of wrongdoing through electronic mail. Some states have gone a step further and specifically include electronic evidence within statutory language or in the nature of the crime itself.

III. UNDERSTANDING RAPE SHIELD LAWS

A. Old Habits Die Quickly – The Seachange of Rape Shield Law

The now infamous case of People v. Abbot, an 1838 New York case, may spur a modern day gasp. In his Abbot decision, Judge Cowen rhetorically asked, “And will you not more readily infer assent [to sexual intercourse] in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?” This notorious quote illustrates the historical view that a rape victim with a reputation for sexual promiscuity is less...
credible than a virginal rape victim.\textsuperscript{51} Not surprisingly, judicial practice at the time of Judge Cowen’s decision allowed admission of a rape victim’s past sexual conduct.\textsuperscript{52}

In contrast, current federal and state laws restrict the admissibility of a victim’s past sexual conduct during a rape trial.\textsuperscript{53} The term rape shield law came to entitle these type laws, though legal application affects victims of many sex crimes in addition to rape.\textsuperscript{54} In 1974, Michigan became the first jurisdiction to enact a rape shield law.\textsuperscript{55} The federal government and remaining forty nine states followed, most within several years.\textsuperscript{56} Arizona was the last state to enact a rape shield statute in 1998, though rape shield protection existed there through case law doctrine since 1976.\textsuperscript{57}


\textsuperscript{52} See supra note 49-51 and accompanying text (showing that prior case law allowed victim’s chaste behavior or prostitution to go to her credibility in a courtroom).


\textsuperscript{54} See People v. Bryant, 94 P.3d 624, 629 n.3 (Colo. 2004) (noting “crime formerly described as rape, from which the rape shield statute obtained its name, is now defined by statute as various forms of sexual assault.”).

\textsuperscript{55} MICH. COMp. LAWS § 750.520j (1974); see also Anderson, supra note 51, at 81 (noting Michigan as first jurisdiction to enact rape shield law).

\textsuperscript{56} See FED. R. EVID. 412. The federal government enacted its first version of federal rape shield law on October 28, 1978. \textit{Id.} Amendments to Federal Rule of Evidence 412 followed in 1988 and 1994, both of which expanded the Rule’s reach. \textit{Id.} All fifty states of the United States and the District of Columbia currently have a state statute, state rule of evidence, or both, that puts forth goals similar to Rule 412. See, e.g., ALASKA STAT. § 12.45.045 (2000); IND. CODE § 35-37-4-4 (1998); TEX. R. EVID. 412.


\textit{But see} Anderson, supra note 51, at 81 n.150 (noting that “only Arizona has not passed a rape shield law of any kind”); Chen Shen, \textit{Study: From Attribution and Thought-Process Theory to Rape-Shield Laws: The Meanings of Victim’s Appearance in Rape Trials}, 5 J. L & FAM. STUD.
than a century of widely accepted propensity reasoning in rape cases, the entire American judicial system transformed its view in essentially a decade.58

B. Rape Shield Laws Aim to Protect the Rape Victim

The purpose of rape shield laws is multi-sided.59 The first, and perhaps primary, goal is to prevent propensity reasoning.60 In the context of a rape case, propensity reasoning infers a victim’s consent to the alleged rape because of the victim’s consent to past sexual conduct.61 This improper use of character evidence creates illogical assumptions.62

Rape shield laws also aim to reduce admission of potentially inflammatory evidence.63 Sexual conduct is a socially sensitive topic that faces divergent moral judgments based upon the critic’s principles and the conduct’s nature.64 For instance, a substantial history of unusual sexual

58 See supra notes 53-57 and accompanying text (detailing history of rape shield law enactment that spanned sixteen years, with majority occurring mid-decade).
59 See infra note 61 and accompanying text (describing rape shield goal to prevent reasoning based on propensity); infra note 63 and accompanying text (describing rape shield goal to prevent inflammatory evidence from reaching jury); infra note 67 (describing rape shield goal to sustain trial focus on defendant’s alleged crime and not victim’s behavior); infra note 70 and accompanying text (describing rape shield goal to protect victim privacy).
60 See supra notes 61-62 (confering purpose of rape shield laws to limit evidence that shows propensity of rape victim to consent to sexual conduct).
conduct is likely to confront significantly harsher moral judgment than a modest history of common sexual conduct.\textsuperscript{65} Rape shield laws provide a blanket exclusion of all past sexual conduct, regardless of how extensive or uncommon, which helps to avoid typecasting, and subsequent condemnation.\textsuperscript{66}

Rape shield laws also strive to direct the fact finder's analysis to case evidence that creates or defeats reasonable doubt of the defendant's guilt.\textsuperscript{67} By excluding evidence that pertains to the victim's past sexual conduct, the trial can clearly focus on the defendant's conduct as it relates to the alleged crime.\textsuperscript{68} The victim is not on trial in a rape case, nor are the victim's historical and personal sexual choices.\textsuperscript{69}

Lastly, the protection of victim privacy is an overarching goal of rape shield laws.\textsuperscript{70} Without fear of past sexual conduct finding public viewship, victims can seek justice against their perpetrators at a lesser personal cost.\textsuperscript{71} Protection of complainant privacy in turn encourages the reporting of rape and ultimately serves the government's interest by aiding the prosecution of rape perpetrators.\textsuperscript{72}

\textsuperscript{65} See Garron, 827 A.2d at 254 (discussing potential for evidence of victim's prior sexual behavior to stereotype victim as "promiscuous or of low moral character"); Sheline, 955 S.W.2d at 45 (discussing potential for unfair prejudice against victim when alleged sexual history introduced into evidence).


\textsuperscript{67} See Sheline, 955 S.W.2d at 44 (noting existence of "two rape trials at the same time" when victim's prior sexual history is permitted as rape trial's focus); State v. Detonancour, 34 P.3d 487, 491 (discussing purpose of rape shield law to prevent "charge against the defendant being converted into a trial of the victim"); Bryant, 94 P.3d at 629 (noting allowance of victim's past sexual conduct into evidence places "the victim on trial").

\textsuperscript{68} See Grobman, supra note 64, at 271 (discussing rape trial focus on victim morality rather than defendant conduct).

\textsuperscript{69} See Grobman, supra note 64, at 271 (presenting importance of focusing rape trial on defendant conduct and not victim behavior).

\textsuperscript{70} See Jason M. Price, Note, 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, 561-62 (1996) (discussing rape shield law protection of victim's privacy interests); Michigan v. Lucas, 500 U.S. 145, 153 (1991) (Stevens, Marshall, JJ., dissenting) (maintaining rape shield laws provide needed safeguards against invasion of victims' privacy); Jeffries v. Nix, 912 F.2d 982, 986 (8th Cir. 1990) (noting one of several rape shield law goals is to protect victims' privacy); Anderson, supra note 51, at 86-94 (explaining rape shield laws exist to protect victim's privacy).

\textsuperscript{71} See supra note 70 (supporting rape shield goal to protect victim privacy). Many rape shield statutes have procedural requirements that restrict the discussion of rape shield issues to an in camera setting, to further protect the victim's privacy. See, e.g., ALA. R. EVID. 412; GA. CODE ANN. § 24-2-3 (1995); KAN. STAT. ANN. § 21-3525 (1995).

\textsuperscript{72} See Galvin, supra note 53, at 767 (noting belief that rape shield laws would protect victims' privacy, which would increase victims' reporting of sexual crimes); see also Bryant, 94
C. Applying Rape Shield Laws in Different Jurisdictions

All rape shield laws both limit the admissibility of evidence and provide exceptions to the limitation.\(^73\) It is the span of the overarching limitation and the magnitude of the exceptions that differentiate individual rape shield laws.\(^74\) For example, the Michigan rape shield law limits the admissibility of "the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct" and provides a list of exceptions based on specific, factual instances.\(^75\) The California rape shield law contrasts this model by restricting evidence of the victim’s "sexual conduct" when such evidence is offered to attack the victim’s credibility, thereby the exception is built into the limitation itself.\(^76\)

Notwithstanding disparities, the process of employing a rape shield law at trial follows similar steps in all jurisdictions.\(^77\) First, the evidence in question must be deemed past sexual conduct because all rape shields are premised on the evidentiary exclusion of a victim’s past sexual conduct.\(^78\) The terms “past” and “sexual conduct” have no universal meaning, thus jurisdiction-specific law and precedent will guide the analysis.\(^79\) If evidence

\(^73\) See supra note 3 and accompanying text (noting underlying use of rape shield laws to restrict, with exception, admissibility of evidence of rape victim’s sexual conduct).

\(^74\) See Anderson, supra note 51, at 94-97 (categorizing rape shield laws into four groups based on similarity of application); see infra notes 75-76 (giving examples of Michigan and California rape shield statutes to show general inadmissibility schemes and exceptions to such schemes).

\(^75\) MICH. COMP. LAWS § 750.520j (1991).

\(^76\) CAL. EVID. CODE § 782.

\(^77\) See infra note 78 and accompanying text (illustrating preliminary procedural requirement of determining evidence to be past sexual conduct); see infra note 81 and accompanying text (explaining second procedural requirement of analyzing evidence of past sexual conduct within jurisdiction-specific exceptions to overarching evidentiary limitation).


\(^79\) Compare ALA. R. EVID. 412 (defining explicitly “evidence relating to past sexual behav-
is determined to be past sexual conduct, the relevant rape shield law governs. The evidence is then tested against exceptions to the umbrella rape shield limitation, which may allow admissibility of the evidence despite classification as past sexual conduct. In sum, evidence must be classified as past sexual conduct and fall outside an exception in order to be inadmissible under the governing rape shield law.

IV. DEFINING “SEXUAL CONDUCT”

Given the impact of classifying evidence as sexual conduct, the definition of sexual conduct is pivotal to the outcome of a rape trial. Yet, few jurisdictions have a clear statutory definition or established case law interpretation against which to analyze evidence of potential sexual conduct. Some jurisdictions cite the term “sexual conduct” within their rape shield law, but do not provide a statutory definition of its meaning. In

ior” within rape shield law), and GA. CODE ANN. § 24-2-3 (1995) (defining “past sexual behavior” through direct statutory language), with MASS. GEN. LAWS ch. 233, § 21B (2000) (providing no statutory definition of “victim’s sexual conduct”), and CAL. EVID. CODE § 782 (giving no definition of victim’s sexual conduct within rape shield statute). See supra notes 104-10 and accompanying text (explaining broad interpretation of jurisdictions that define sexual conduct to include a “willingness to engage” in sexual behavior); supra notes 112-17 and accompanying text (presenting jurisdictions that interpret past sexual conduct within narrow limitations).

See supra note 78 and accompanying text (noting all evidence governed by rape shield law must first be deemed sexual conduct).

See, e.g., IND. CODE § 35-37-4-4 (1998) (allowing evidence of “victim’s pregnancy at time of trial was not caused by the defendant” as an exception to the Indiana rape shield law’s general restrictions); see also State ex rel Juvenile Dep’t of Jackson County, 58 P.2d at 836 (assessing victim’s past sexual conduct within statutory exceptions to Oregon rape shield law). Some rape shield laws allow, by exception, all evidence of the victim’s past sexual conduct with the defendant and other state rape shield laws allow, by exception, evidence of the victim’s past sexual conduct with the defendant only for the purpose of proving consent to the alleged crime. Compare IND. CODE § 35-37-4-4 (1998) (allowing evidence of victim’s past sexual conduct with defendant for any purpose), with 725 ILL. COMP. STAT. 5/115-7 (1998) (allowing evidence of victim’s past sexual conduct with defendant only to prove consent).

See supra note 78 and accompanying text (discussing rape shield laws govern only evidence determined to be sexual conduct); supra note 81 and accompanying text (explaining exceptions that remove rape shield applicability even when preliminary showing of sexual conduct is present).

See Garron, 827 A.2d at 260-61 (reviewing on appeal decision to exclude evidence of victim’s prior sexual conduct); supra note 78 and accompanying text (noting all evidence governed by rape shield law must first be deemed sexual conduct).

See supra notes 85-86 and accompanying text (exemplifying jurisdictions that provide no statutory definition or an unclear statutory definition of sexual conduct); supra notes 86-89 and accompanying text (exemplifying jurisdictions that have developed confusing and inadequate case law definitions of sexual conduct).

See, e.g., MASS. GEN. LAWS ch. 233, § 21B (2000) (giving no definition of “victim’s sexual conduct” through statutory language); DEL. CODE ANN. tit. 11, § 3508 (1998) (placing restric-
those jurisdictions that provide a statutory definition, it is often broad or ambiguous.\textsuperscript{86} The Delaware case of \textit{State v. Franklin}\textsuperscript{87} illustrates an obscured interpretation within case law.\textsuperscript{88} The \textit{Franklin} court held that the term “prior sexual acts” should not be specifically defined, but rather interpreted on a case-by-case basis, without mandatory guidance by case law doctrine.\textsuperscript{89} Confusion is equally exemplified by the Tennessee rape shield statute, in which the term “sexual activity” is used to define itself within the statute.\textsuperscript{90}

The 1986 case of \textit{State v. Carmichael}\textsuperscript{91} waged a direct attack on the term “sexual conduct.”\textsuperscript{92} In \textit{Carmichael} the defendant challenged the constitutionality of the Kansas rape shield statute based on vagueness of the legislated term “sexual conduct.”\textsuperscript{93} The Court reasoned that an average person could determine the meaning of sexual conduct as used within rape shield law, and therefore it was not an overly vague term.\textsuperscript{94} Though the court did not validate the vagueness claim, \textit{Carmichael} highlighted a foundational issue in rape shield law jurisprudence.\textsuperscript{95}

Yet, in the decades that followed \textit{Carmichael}, little clarification evolved as courts sidestepped the chief problem.\textsuperscript{96} Some courts tackled peripheral concepts, such as the meaning of \textit{past} within the term past sexual

\textsuperscript{86} See ALA. R. EVID. 412 (defining “past sexual behavior” with both very specific language, such as “mode of dress” and very broad language, such as “sexual mores contrary to the community standards and opinion of character for those traits”); IND. CODE § 35-37-4-4 (1998) (listing six varieties of restricted “sexual conduct” evidence without providing clarification on meaning of term “sexual conduct” itself).

\textsuperscript{87} 855 A.2d 274 (Del. 2004).

\textsuperscript{88} State v. Franklin, 855 A.2d 274, 279 (Del. 2004) (disempowering case law doctrine that interpreted admissibility of prior sexual acts).

\textsuperscript{89} Id.

\textsuperscript{90} TENN. R. EVID. 412 (using redundant language to define “sexual behavior” as “sexual activity of the alleged victim other than the sexual act at issue in the case”).

\textsuperscript{91} 727 P.2d 918 (Kan. 1986).

\textsuperscript{92} State v. Carmichael, 727 P.2d 918, 924-25 (Kan. 1986) (analyzing whether Kansas rape shield statute is void for vagueness because the term “sexual conduct” is unclear); see also Young v. State, 429 So. 2d 1162, 1163 (Ala. Crim. App. 1983) (denying Alabama rape shield statute void for vagueness regarding definition of “evidence relating to past sexual behavior.”).

\textsuperscript{93} \textit{Carmichael}, 727 P.2d at 924 (discussing defendant’s argument that state rape shield statute void due to vagueness of term “sexual conduct”).

\textsuperscript{94} Id. at 925.

\textsuperscript{95} Id.

\textsuperscript{96} See deMeule, supra note 72, at 162-65 (discussing courts’ struggle to comprehensively define sexual conduct and consistently classify varying evidence of victim behavior).
conduct.97 Other courts circumvented the dilemma by categorically defining particular victim behavior as sexual conduct or not sexual conduct, rather than defining "sexual conduct" itself.98 For example, a majority of jurisdictions classified evidence of a victim's contraction of a sexually transmitted disease as sexual conduct.99 Conversely, many courts classified evidence of a victim's prior false accusation of a rape as not sexual conduct.100

Especially ambitious courts confronted the foundational ambiguity and revealed improved definitions of sexual conduct.101 These rare juris-


98 See infra notes 99-100 and accompanying text (describing bright line classification of sexually transmitted diseases and false accusations of rape).


101 See supra notes 104-10 and accompanying text (demonstrating jurisdictions that apply a narrow interpretation of sexual conduct); supra notes 112-17 and accompanying text (describing jurisdictions that apply a broadened definition of sexual conduct).
dictions developed two diverging schools of thought. The first interpretation of sexual conduct was narrowly construed, centering on the need for actual, physical contact between the victim and another individual. The Court of Appeals of Ohio articulated this view in State v. Barnes when admissibility of the victim’s dating history under the Ohio rape shield statute was at issue. The court interpreted the term “sexual activity” as physical, sexual behaviors, and explicitly listed the included physical acts. Reasoning followed that the victim’s dating history was not physical behavior and subsequently not governed by the Ohio rape shield statute.

Similar to Barnes, the 1993 case of People v. Jones examined the term sexual conduct as it applied to an Illinois rape shield law exception. The exception allowed admissibility of sexual conduct between the victim and the defendant in contradiction of the general evidentiary limitation. The Jones court reasoned that “some physical interaction” between the victim and defendant was necessary to constitute sexual conduct and held, therefore, that voyeurism was not within the definition of sexual con-

\[102\] See supra notes 104-10 and accompanying text (presenting jurisdictions that follow narrow interpretation of sexual conduct to require physical behavior); supra notes 112-17 and accompanying text (describing jurisdictions that apply a broad interpretation of sexual conduct).

\[103\] See supra notes 104-10 and accompanying text (discussing Barnes and like cases that exemplify a narrow interpretation of term past sexual conduct).


\[106\] Id. at *7 (emphasizing physicality requirement of definition of “sexual activity” as used within Ohio rape shield statute). The Barnes court gave a lengthy, comprehensive explanation of their physicality requirement:

Sexual activity [as used within the Ohio rape shield statute] is defined as sexual conduct or sexual contact or both. Sexual conduct includes vaginal intercourse, anal intercourse, fellatio, and cunnilingus. Sexual contact includes any touching of an erogenous zone of another for the purpose of sexually arousing or gratifying either person.

\[107\] Id.; see also In re Johnson, 573 N.E.2d 184, 188 (Ohio Ct. App. 1989) (holding that evidence of victim’s sexual desires were outside definition of sexual activity under state rape shield statute). In the 1992 case of State v. Jones, the Court of Appeals of Ohio revisited evidence of a victim’s sexual desires. State v. Jones, 615 N.E.2d 713 (Ohio Ct. App. 1992). While the Jones Court cited In re Johnson, the analysis sidestepped interpretation of the term sexual activity and instead referred to evidentiary relevance or lack thereof. Id. at 719-20. The Jones Court held that evidence of the victim’s sexual desires was irrelevant and therefore inadmissible. Id. at 720.


\[109\] People v. Jones, 636 N.E.2d 604, 610 (Ill. App. Ct. 1993) (holding that voyeurism is not within statutory definition of sexual conduct because it does not involve “some physical interaction”).
duct.\(^{110}\)

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.\(^{111}\) In the 2006 case of *State v. Alberts*,\(^ {112}\) evidence that the victim skinny-dipped with a third party was considered under the Iowa rape shield law.\(^ {113}\) The defendant argued that skinny-dipping is "not a claim of prior sexual activity because no actual sexual contact occur[s]."\(^ {114}\) The *Alberts* court reasoned, however, that under the circumstance skinny-dipping was a sexual activity because it presented a likely attempt by the victim to engage in physical, sexual activity at a later time.\(^ {115}\) Accordingly, the *Alberts* court held that the Ohio rape shield law protected against admissibility of victim's act of skinny-dipping.\(^ {116}\) A number of other jurisdictions that follow the broader construction have decided that use of birth control and mode of dress are within the meaning of past sexual conduct.\(^ {117}\)

\(^{110}\) *Id.*

\(^{111}\) See discussion *infra* notes 112-17 and accompanying text (discussing jurisdictions that do not define sexual conduct in terms of actual, physical conduct); *see also* People v. Casas, 226 Cal. Rptr. 285, 289 (Cal. Ct. App. 1986) (holding that meaning of sexual conduct includes actual sexual acts as well as an expressed "willingness to engage" in such acts); *Wright*, 776 P.2d at 1297-98 (holding that ""past sexual behavior" means a volitional or non-volitional physical act that the victim has performed for the purpose of the sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person.") (emphasis added); People v. Ivers, 587 N.W.2d 10, 14 (Mich. 1998) (developing a test to determine inclusion of evidence under definition of prior sexual conduct based on "whether the statements do or do not amount to or reference specific conduct") (emphasis in original). In Tennessee, though the state rape shield statute provides an unproductive definition of sexual behavior, the 2001 case of *State v. Marsh* provided the most expansive interpretation of sexual conduct to date:

The term sexual behavior [as used within the Tennessee rape shield statute] embraces all types of sexual conduct, including heterosexual and homosexual behavior. It also deals with sexual intercourse as well as every other variety of sexual expression. It may include fetishes as well as pre- and post-intercourse behavior.


\(^{112}\) 722 N.W.2d 402, 408 (Iowa 2006).

\(^{113}\) *State v. Alberts*, 722 N.W.2d 402, 408-10 (Iowa 2006) (discussing application of Iowa rape shield law's definition of sexual conduct to victim's act of skinny-dipping).

\(^{114}\) *Id.* at 408 (noting defendant's argument against inclusion of skinny-dipping within meaning of prior sexual activity).

\(^{115}\) *Id.* at 409. *But see* State v. Baker, 679 N.W.2d 7, 10 (Iowa 2004) (citing *State v. Zaer-inger*, 280 N.W.2d 416 (Iowa 1979)) (holding evidence of victim's nude photographs not within definition of sexual behavior under Iowa rape shield law).

\(^{116}\) *See Alberts*, 722 N.W.2d at 409-10.

V. ANALYZING THE INCLUSION OF MYSPACE WITHIN THE DEFINITION OF SEXUAL CONDUCT

The protective power of rape shield laws struggles to sustain strength given rapid changes in the way victims exhibit sexual conduct. Historically, the term sexual conduct referred to a victim’s chastity or lack thereof. Yet, disappearing judicial use of the term chastity evinces its outdated connotation of sexual conduct. Today’s society no longer exists in strict terms of chaste and unchaste behavior, but rather includes new and alternative models of sexual conduct.

The current MySpace craze has given way to still newer forms of sexual conduct as a result of fresh technology, largely unrestricted usage and anonymity. Sexual expressions found on MySpace, like sexually explicit language or nude photograph postings, are widespread. The continued upsurge of MySpace popularity will only further the practice of such behaviors.

As time persists, contemporary sexual behaviors presented within the MySpace forum will undoubtedly face legal inquiry in the realm of rape shield law. Under current rape trial procedure, once preliminary evidentiary concerns, such as hearsay, relevancy, best evidence and authentication, are addressed, MySpace evidence would be measured against jurisdiction-specific rape shield law. All rape shield law requires a threshold...
finding of sexual conduct. Thus, like traditional evidence, evidence derived from MySpace must first be held as sexual conduct. 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.

All behavior that exists on MySpace is the result of posting, which requires a volitional act of the user and is thus conduct by definition. Yet, whether a specific instance of MySpace behavior is sexual conduct varies by jurisdiction. The definition of sexual conduct depends on the showing of physical behavior. Under some jurisdictions, such as Ohio and Illinois, the term sexual conduct requires a showing of physical behavior. In contrast, other jurisdictions, like Oregon, California, Michigan and Tennessee, interpret sexual conduct without a requirement of physical behavior, allowing evidence that shows an expressed willingness to engage in sexual conduct.

As an online social-networking tool, MySpace intrinsically lacks physical behavior. Rather, in the MySpace environment the only physical behavior exists between the user and computer hardware. Thus, in jurisdictions that narrowly construe sexual conduct to require physical sexual behavior, MySpace evidence will be categorically denied from rape

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127 See supra note 78 and accompanying text (noting all evidence governed by rape shield law must first be deemed sexual conduct).
128 See supra note 78 and accompanying text (noting all evidence governed by rape shield law must first be deemed sexual conduct); supra notes 44-45 and accompanying text (explaining procedure of comparing electronic and non-electronic evidence to determine admissibility at trial).
129 See supra notes 24-26 and accompanying text (describing method by which MySpace users “post” information onto MySpace profiles).
130 See supra notes 25-26 and accompanying text (detailing definition of posting as it pertains to MySpace).
131 See supra notes 104-10 and accompanying text (discussing jurisdictions that narrowly interpret meaning of sexual conduct); supra notes 112-17 and accompanying text (discussing jurisdictions that broadly interpret meaning of sexual conduct).
132 See supra notes 104-10 and accompanying text (giving detail to jurisdictional interpretation of sexual conduct that require physical behavior); supra notes 112-17 and accompanying text (giving detail to jurisdictional interpretation of sexual conduct that allow “willingness to engage”).
133 See supra notes 104-10 and accompanying text (explaining narrow interpretations of sexual conduct used by some jurisdictions, including Ohio and Illinois).
134 See supra notes 112-17 and accompanying text (explaining broad definition of sexual conduct used by some jurisdictions when applying rape shield law).
135 See supra notes 24-26 and accompanying text (discussing act of posting information onto MySpace profiles).
136 See supra note 25 and accompanying text.
shield protection. Alternatively, in jurisdictions that define sexual conduct to include an expressed willingness to engage in sexual conduct, MySpace evidence will be analyzed alongside more traditional models of sexual behaviors.

VI. INCLUDING THE NEXT GENERATION OF SEXUAL CONDUCT

The founding premise and succeeding objectives of rape shield laws are of great importance to the protection and empowerment of rape victims. Yet, when intimate evidence of a victim’s past sexual conduct is left for interpretation under inconsistent and outdated definitions of sexual conduct, the good intentions of rape shield laws lose worth. As of the writing of this note, sexual conduct has dozens of definitions ranging from redundant, legislatively prescribed language to contradictory case law doctrine. While the courts haphazardly search for a comprehensive solution, rape shield laws straddle the line between value and ineffectiveness. And, with the daily introduction of new models of past sexual conduct, such as those found on MySpace, the already quaking law may fail its purpose altogether.

Moving forward, it is necessary for all jurisdictions to revise current definitions of past sexual conduct by including a victim’s expressed willingness to engage in sexual conduct. Behavior found on MySpace and like internet environments is inherently non-physical, but rather illustrative behavior in the form of words, imagery and sounds. By updating the definition of sexual conduct to include non-physical sexual conduct, behavior existing on MySpace would be protected by rape shield law alongside traditional models of sexual conduct. Otherwise, all behavior found on MySpace would categorically fall outside the protective reach of rape shield law. In today’s society, where individuals increasingly rely on MySpace to develop primary networks of communication and self-expression, unconditionally ignoring all such behaviors is short-sighted and, more importantly, ruinous to the purpose of rape shield law.

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137 See discussion supra notes 104-10 and accompanying text (giving detail to narrow interpretation of sexual conduct by some jurisdictions that require physical behavior).

138 See supra notes 112-17 and accompanying text (discussing jurisdictions where finding of sexual conduct requires expressed willingness to engage in sexual conduct and not strictly physical behavior).