



## SPECIAL ISSUE ON SEXTING

# Sexting as ‘Sexual Behavior’ Under Rape Shield Laws

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### Abstract

*As part of the proliferation of online communications, there has been a global increase in sexually explicit social media messages and consensual sexting among teenagers and adults of all ages. As a result, these kinds of electronic communications have begun to be used as evidence in a wide variety of court cases, including sexual harassment and discrimination cases. However, courts have only begun to consider whether such communications, particularly sexting communications, should be usable to impeach a sexual assault complainant, or whether these kinds of communications should be protected under rape shield laws as sexual “conduct” or “behavior.” This article traces the history of rape shield laws in four common law countries: the United States, Canada, the United Kingdom, and Australia, and, using the history and purpose of these laws, argues that sexting should be protected under rape shield laws to protect sexual assault victims from unnecessary questioning about evidence that is likely to be embarrassing, prejudicial, and irrelevant to the case.*

Keywords: Sexting, Rape Shield, Cyber Harassment, Social Networking Sites, Sexual Assault, International Comparison, Victimization.

### Introduction

In today’s world, it is almost impossible to go a day without going online. This reality is especially true for younger generations, with the Pew Center finding in 2015 that 92 percent teens report that they go online daily (Lenhart, 2015). But while the Internet may be useful for innocuous tasks such as genealogy reports and posting about family reunions, scholars and journalists have begun to recognize the more sinister undercurrents of the web. From cyber bullying to harassment and beyond, the web can be used to affect people’s lives in a multitude of harmful ways. For example, the Internet has made it that much easier to harass and attack victims online, with *The Guardian* finding that 76 percent of women in America under the age of 30 have experienced some form of online

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harassment (Hunt, 2016). Cyber-harassment and similar crimes are also global phenomena; a 2014 EU study revealed that one in ten women surveyed reported they had experienced at least one instance of cyber-harassment since the age of 15 (European Agency for Fundamental Rights, 2014).

But perhaps the most disturbing aspect of this trend is how courts around the world have begun to admit electronic evidence that is to be used to attack a sexual assault victim's credibility at trial. The use of evidence of a sexual assault complainant's prior sexual history has been controversial for decades. As early as the 1970s, scholars have criticized rape trials by noting that "the ordeal faced by the complaining witness" in these trials and have argued that the traumatic experience of being put on trial as a victim "is one of the reasons rape is such an under-reported crime" (Rudstein, 1976). The Bureau of Justice Statistics has found that from 1992 to 2000, "[o]nly 36 percent of rapes, 34 percent of attempted rapes, and 26 percent of sexual assaults were reported" (National Institute of Justice, 2010). While the reasons for not reporting varied, the Bureau's study found that common reasons included "shame, embarrassment, or desire to keep the assault a private matter", "[f]ear of not being believed or of being accused of playing a role in the crime", and "[l]ack of trust in the criminal justice system."

To ameliorate this trend, legislatures across began adopting legislation to encourage victims to report these kinds of crimes and prevent defendants from attacking victims at trial. Perhaps the most well-known type of legislation created to protect sexual assault victims is rape shield laws, which are laws that are meant to protect rape victims' privacy and prevent defendants from using evidence of a victim's previous sexual history to impeach their testimony (Janzen, 2015). The purpose of such laws are to "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."

A growing number of nations have implemented these kinds of protections for sexual assault victims, but for the purposes of this paper we will focus on four common law jurisdictions that have adopted formal rape shield laws: the United States, Canada, the United Kingdom, and Australia. This article will explore how these three countries adopted their current rape shield legislation while also briefly noting what some other countries have done or are doing to protect victims of sexual assault at trial. Next, the article will delve into how sexting and other forms of social media have been used as evidence at trial in sexual assault and other related cases. Finally, this article will show how this kind of evidence has been handled by jurisdictions that have different kinds of rape shield laws, highlight remaining issues, and argue that sexting should be considered sexual behavior that is protected by rape shield laws.

### **Rape Shield Laws in Varying Jurisdictions**

Common law jurisdictions are distinct from their civil law counterparts due mainly to the adversarial nature of their trials and the ability of their judges to make law (Capowski, 2012). Common law systems therefore structurally lend themselves to harsh questioning of witnesses in the interests of presenting a vigorous defense. The judicial discretion inherent in common law systems also allow judges wide latitude in what kinds of evidence

they will allow, typically with a requirement that the evidence not unduly prejudice the jury against one party or another. These competing values – a vigorous, adversarial defense, judicial discretion, and the exclusion of overly prejudicial evidence – are all an essential part of understanding the history of rape shield laws in common law countries, particularly those that come from the British tradition. In addition, as shown below, European civil law countries and other jurisdictions have also grappled with rape shield laws and arrived at their own unique solutions.

### 1. United States

Despite America’s passage of rape shield legislation, its treatment of sexual assault victims has been, and even continues to be, less than ideal. In the early colonial days of America, many British common law concepts were transferred to the new nation (Anderson, 2002). British common law and, thus, by extension, American common law, required prosecutors to prove three elements to convict a defendant of rape: “vaginal intercourse, force, and nonconsent” (Capers, 2013). However, prosecutors were also required to prove that the victim had used utmost resistance to fight off the defendant. To that end, defendants were allowed to bring in evidence of a victim’s prior unchaste conduct because courts often found that it was “more probable that an unchaste woman would assent to such [a sexual] act (*People v. Collins*, 1962).” Thus, while most courts prohibited the use of propensity evidence generally, they made an exception to this common law rule for rape cases (Galvin, 1986).<sup>3</sup> Courts reasoned that this exception was justified because “[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 (*People v. Johnson*, 1895).”

Courts also allowed this kind of evidence in rape cases because of a societal belief that unchaste women were prone to making false rape accusations that threatened the man’s reputation and place in society (Smith, 1997). To ensure that such accusations were not made, American courts viewed unchaste women as being less trustworthy (Tanford & Bocchino, 1980). Due to this rule, it was often easier to introduce evidence about a victim’s sexual background than it was to introduce evidence about the defendant’s history (Capers, 2013). Therefore, in order for a woman to have any chance at a successful prosecution, she would be forced to model “herself on an ideal of sexual virtue and feminine modesty” (Anderson, 2002). However, this reasoning did not apply to men because, as one Missouri court noted, “[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” (*State v. Sibley*, 1895). Thus women alone were often put on trial alongside their attackers, which contributed to the historic underreporting of sexual assault in America (Smith, 1997).

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<sup>3</sup>See also Tanford and Bocchino, 1980 (“courts 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.”). Similarly, if woman became pregnant, her assailant would not be charged with rape because courts believed that a woman could not conceive unless she consented to the sexual encounter (Sweeny, 2014b).



This trend continued on for years until the 1970s when feminist groups and law enforcement groups worked together to reform the rules of evidence (Loewen, 2015). These groups managed to persuade Congress to pass legislation to regulate what kinds of evidence can be admitted in sexual assault cases to better protect victims from harassment and humiliation at trial and to encourage victims to report these crimes and testify at court (Galvin, 1986). The most important product of these efforts resulted in the passage of Federal Rule of Evidence (FRE) 412 (Loewen, 2015). Under FRE 412, evidence of a rape victim's sexual predisposition or history is not admissible unless it includes: specific acts of sexual conduct to prove the defendant did not commit the sexual assault, specific acts of sexual conduct between the victim and the defendant to show consent, or "any evidence whose exclusion would violate the defendant's constitutional rights" FRE 412 also prevents any of this evidence from being admitted at trial unless the evidence's probative value outweighs any unfair prejudice to the victim (FRE 412).

Individual states later adopted their own versions of FRE 412, resulting in every state adopting some form of rape shield legislation to protect victims of sexual assault (Maggard, 2005), though how the states interpret these laws do vary (DaSilva, 2008). Scholars such as Galvin usually categorize these varying laws as follows: (1) the "Michigan model," which is the strictest model and limits admission of evidence about sexual conduct barring a few limited exceptions, (2) the "Texas model," which allows judges a large amount of latitude to determine whether the probative value of the evidence outweighs its prejudicial harm, (3) the "federal model," which follows the Michigan model except it has a catch-all provision allowing for such evidence when it is "constitutionally required", and (4) the "California model" which only allows evidence of sexual conduct to be admitted if it is being used to prove consent or determine credibility" (Maggard, 2005). Different approaches therefore give judges different levels of discretion, with some models allowing judges the discretion to admit evidence if it not unduly prejudicial or if it is constitutionally required.

## 2. Canada

Prior to rape shield laws being introduced in Canada, a woman complainant's sexual reputation was routinely put on display and her prior sexual conduct could be questioned by the defense (Tang, 1998). According to Canadian courts, a woman's prior consent to sexual intercourse with a man other than the defendant was important evidence in establishing her consent. In addition, a woman's testimony, even though under oath, was not trusted and her testimony alone could not be used to convict in sexual assault cases. In 1983, Canada's Criminal Code was amended to restrict the use of evidence of the victim's prior sexual behavior, but those provisions were struck down as unconstitutional by the Supreme Court of Canada in the 1991 case *R v. Seaboyer*. According to the Canadian Supreme Court, Section 146 of the Criminal Code was too rigid and it therefore violated the defendant's right to a fair trial under Sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

In response to *Seaboyer*, the Canadian Parliament created section 276 of the Canadian Criminal code, which gives judges discretion to determine the relevance of sexual history evidence. However, according to the statute, the evidence cannot be admitted to support an inference that the victim is more likely to have consented, or that her testimony "is less worthy of belief" (Dublin Rape Crisis Centre, 1998). On the other hand, judges can

allow evidence of prior sexual behavior if it relates to “a specific instance of sexual activity” that is relevant to an issue to be proved at trial, as long as the evidence has “significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.” Accordingly, Canada does place substantial restrictions on evidence concerning a victim’s sexual history but still allows judges to determine what evidence is relevant and probative enough to be admitted.

### 3. United Kingdom

Unsurprisingly, as in the United States and Canada, the United Kingdom’s legal system has historically mistrusted a woman’s statement that she was raped (Bain, 2010). Indeed, British courts often admitted evidence concerning a victim’s sexual history that was “used to discredit the complainant, influence findings on consent and subject the complainant to humiliation and distress” (Thomson Reuters Foundation, 2015).

Some efforts were made in the 1970s to protect victims: section 2 of the Sexual Offences (Amendment) Act 1976 excluded sexual history evidence, unless the judge determined that it would be “unfair to the defendant to exclude it.” However, the vagueness of the term “unfair” left much discretion to the judge, with the result being that sexual history evidence was routinely admitted in sexual assault trials (Winter, 2004). Consequently, concerns were raised in the 1970s about the prejudicial effect this evidence had in these cases and, in 1999, the Youth Justice and Criminal Evidence Act was passed to further limit the admission of such evidence.

Section 41 of the Youth Justice and Criminal Evidence Act 1999 originally allowed sexual history evidence only if it was directly relevant to the case. However, the House of Lords later ruled in *R v. A (Complainant’s Sexual History)* that, under the United Kingdom’s Human Rights Act, judges must allow such evidence if failure to do so would deprive a defendant of a fair trial. This fair trial requirement reintroduced judicial discretion, giving judges the ability to allow evidence of victims’ sexual history, sometimes including statements the victim made about her sexual history to the defendant or others. For example, *R v. W* allowed evidence of complainant’s “previous statements or complaints about [her] sexual behavior” if there is evidence that those statements were false because those statements relate to the complainant’s credibility.<sup>4</sup> Otherwise, such statements should not be allowed under section 41. Accordingly, in the United Kingdom, if a “complainant’s sexual past could have affected the defendant’s belief in consent, section 41 is powerless to prevent complainants from a humiliating inquiry” (McEwan, 2006).

Moreover, despite the improvements made in the Youth Justice and Criminal Evidence Act 1999, as reported in *The Guardian*, controversy has surrounded the legislation because, since its passage, numerous courts have failed to enforce it (Travis, 2017). According to *The Guardian*, a 2015–16 study by the Northumbria court observers panel “found questioning of the prior sexual conduct of the victims in 11 cases” out of thirty cases observed. Due to this lack of enforcement, legislators in the House of Commons recently attempting to adopt a rape shield like law to better protect victims of sexual assault and encourage women to report said crimes. The Sexual Offences (Amendment) Bill 2016–17 contained “measures to protect sexual assault victims who are attending school or college, place limits on the disclosure of a victim’s name by police to a

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<sup>4</sup>See also *R v. T*; *R v. H*, [2002] All ER 683.



rapist the victim does not know, and extend the range of offences that can be referred to the court of appeal for unduly lenient sentences.” While the bill had support from numerous parties, it fell due to the dissolution of Parliament on May 3, 2017 in anticipation of the General Election (UK Parliament, 2017). It is unclear whether the bill will be reintroduced when Parliament reconvenes.<sup>5</sup>

#### 4. Australia

As in other common law countries, since the 1970s and 1980s, Australia has been amending its laws to restrict or even eliminate questions about a victim’s sexual history or reputation in sexual assault cases (Kennedy, et al., 2012). The aim of these reforms is to reduce the trauma victims feel when going through a trial and being questioned on the stand. Today, almost every jurisdiction in Australia prohibits the introduction of evidence of the complainant’s sexual reputation, with one jurisdiction allowing such evidence to be admitted with the court’s permission. Section 41 of the Commonwealth Evidence Amendment Act 2008 now states that a court “must disallow” any question put to a witness if the court believes it is improper, which includes questions the court deems humiliating or insulting. Australia has also instituted other reforms aimed at assisting victims, including allowing the victims to bring a person of their choice with them for emotional support, and allowing victims to testify via closed circuit television so they do not have to see their alleged assailant.

Unfortunately, judicial discretion has apparently undermined many of the reforms Australia has attempted to impose. Under section 53 of the Evidence (Miscellaneous Provisions) Act 1991, judges have the discretion to allow evidence of the complainant’s prior sexual history if the judge deems it “relevant to the facts at issue” or the victim’s credibility. Even the laws requiring judges to disallow improper questions still allow the judge to determine whether the question is, in fact, improper, and such determinations are subject to rape myths and other misconceptions of sexual assault and sexual assault victims. Accordingly, scholars report that sexual reputation evidence is still routinely allowed through creative lawyering, particularly in cases where the victim and the assailant had a prior relationship (Kennedy et al., 2012).

#### 5. Other Jurisdictions

Common law jurisdictions that follow the British tradition are not the only ones who have instituted rape shield laws. As part of feminist reform movement of the 1970s, civil law and other jurisdictions have adopted their own legislation to govern sexual assault cases. Several countries within the Council of Europe have passed laws that restrict, to various degrees, the use of evidence of a victim’s prior sexual history. For example, in Spain, Finland and Sweden, judges are either allowed or required to exclude such evidence, either because it violates the victim’s right to privacy or because the judge deems it irrelevant. Notably, all of these countries rely on the discretion of their judges,

<sup>5</sup> Legislation in Scotland has taken a similar, and more successful, path. Section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 attempted to limit the introduction of a victim’s sexual history into evidence but, due to the wide discretion given to judges to admit the evidence in the interests of “fairness,” research showed that the law was largely being ignored. In response, the Scottish Parliament passed the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which provides stricter rules to discourage the use of evidence regarding the victim’s sexual history (Bain, 2014).

which, as discussed above, may leave the door open to intrusive and ultimately irrelevant questioning on deeply personal matters (The Dublin Rape Crisis Centre, 1998). In contrast, in Austria, victims are not required to answer questions regarding their prior sexual acts, while, in Croatia, a 2009 law guarantees the right to privacy to victims and, specifically, a victim’s prior sexual behavior and sexual preferences cannot be used as evidence (Radacic & Turkovic, 2010).

Outside of Europe, there is similar variance in laws that protect victims of sexual assault at trial. For instance, in 2009, Japan created a lay judge system where “six randomly selected voter registrars and three professional judges decide on the adjudication of serious crimes” including rape resulting in injury or death (Suzuki, 2016). This reform increased citizen participation in these cases, and has helped lead to harsher penalties for convicted rapists and increased “[k]nowledge of sexual violence, particularly of victims, [which] may contribute to an improved image of these victims and more importantly, improved treatment by society at large.”

India also instituted reforms, as previously India’s legal system allowed defense attorneys to question victims about their sexual history to prove that the victim had consented to the sexual act (Thomson Reuters Foundation, 2015). In fact, under the Indian Evidence Act of 1872 § 155(4) “when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.” However, over time, these laws were amended to better protect women in these cases and, after the infamous Nirbhaya Rape case in 2012 (Indian Express, 2017), the resulting international controversy prompted the passage of the Criminal Law Amendment Act of 2013. The law amended previous Acts to establish that “evidence of the character of the victim or of such person’s previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent” (Thomson Reuters Foundation, 2015). Thus, while evidence of a victim’s previous sexual history could be admitted for other reasons, the current law prevents defendants from using such evidence to attack a victim’s character.

South Africa has also passed legislation to govern a complainant’s testimony in sexual assault cases. Similar to India and other nations, before 1989, a defendant in a sexual assault case could introduce evidence about a victim’s sexual history to attack their character (Thomson Reuters Foundation, 2015). Section 227 of the Criminal Procedure Act was amended to prevent a defendant from introducing evidence concerning a victim’s sexual history unless the court deemed the evidence was relevant or the prosecution previously introduced evidence about the issue. Thus, as the court found in *S v Zuma*, evidence concerning sexual history can be introduced when it is “aimed at the investigation of the real issues in this matter and . . . [is] fundamental to the accused’s defence.” This reform stands in contrast to other countries such as Singapore, which still allows the courts to have great discretion in admitting a victim’s sexual history if it could be used to prove the victim’s state of mind or is relevant to the case (Thomson Reuters Foundation, 2015). Likewise, Pakistan still allows impeachment of a victim’s character in a case of sexual assault but prevents admission of any evidence illustrating the defendant’s bad character “unless evidence has been given that he has a good character, in which case it becomes relevant.”

The variety of rape shield laws show that countries are still trying to balance protecting victims and preserving the defendant’s right to a fair trial. Overwhelmingly, these



evidentiary issues are left to the judge to decide, with varying restrictions. Judicial discretion is therefore still the key issue in these cases. As discussed below, the emerging issue of electronic evidence highlights the potential pitfalls of giving judges too much discretion over a new, modern kind of evidence.

### **The Evolution of Social Media and Electronic Communications as Evidence**

Technology has changed the ways in which people live their everyday lives and, as a result, courts across the world have been forced to adjust to this societal shift. Consequently, evidence from the web and other electronic sources has become more valuable at trials due to the abundance of personal information attorneys can find regarding litigants and other witnesses in a case (Diss, 2013). This trend has resulted from the fact that more people, especially younger generations, spend more time on the web, with the Pew Research Center reporting in 2017 that “69% of the public uses some type of social media” (Pew Research Center, 2017). This trend is not just limited to the United States; an estimated 2.34 billion people across the world accessed social media sites regularly in 2016 (eMarketer, 2016).

The web has also assisted lawyers and courts. For example, a study by the American Academy of Matrimonial Lawyers had found that, in 2010, 81 percent of attorneys had used evidence from social media sites in their cases (Browning, 2017). And across the world the courts themselves have employed the Internet to fulfill their own duties, such as when the Australian Capital Territory Supreme Court became the first court to ever deliver a summary judgment verdict via Facebook and with the United Kingdom even issuing an injunction through Twitter.

As social media and other electronic evidence have come into more common usage, courts have struggled with fitting this kind of evidence within traditional evidentiary rules and standards. Scholars have argued that electronic evidence should be broadly admissible in sexual harassment and discrimination cases “[b]ecause social media sites record interactions with others over time, social media may also help plaintiffs seeking to prove crimes that involve a long pattern of behavior such as stalking, cyber bullying, or harassment” (Diss, 2013). A landmark case in this field has been *Equal Employment Opportunity Commission v. Simply Storage, LLC*, in which the court found that evidence from social media sites such as Facebook were discoverable as long as they fulfilled the relevancy requirements under the Federal Rules of Evidence. However, in another sexual harassment case, *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, the court referred to FRE 412 by allowing only social media evidence specifically concerning the plaintiff’s sexual harassment claim and barring admission of private MySpace messages that the plaintiff had sent before working for the defendant.

Numerous courts have made similar verdicts in sexual harassment cases, ruling that evidence of a plaintiff’s off-duty sexual conduct with third parties is generally not admissible due to the fact “[t]he courts applying Rule 412 have declined to recognize a sufficiently relevant connection between a plaintiff’s non-work related sexual activity and the allegation that he or she was subjected to unwelcome and offensive sexual advancements in the workplace” (*Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, 2007). However, this reasoning has not been universally followed and the permissive language of FRE 412 has allowed many judges to exercise their own discretion and admit evidence that unduly prejudices the jury against the plaintiff (Diss, 2013). Moreover, the

controversy over how electronic evidence should be handled by the courts goes beyond this line of cases and also implicates how this kind of evidence is perceived in sexual assault cases globally.

### **Sexting and Rape Shield Laws**

Despite the existence of rape shield laws and similar legislation around the world, courts vary in each jurisdiction on how to best handle electronic evidence relating to a victim’s prior sexually explicit statements or activity online, including sexting. Sexting takes many different forms but the National Center for Missing & Exploited Children defines sexting as “youth sending sexually explicit messages or sexually explicit photos of themselves or others to their peers” (Mummert 2010). While, traditionally, this form of communication has been linked to teenagers and mobile devices, the proliferation and explosion of technology has allowed citizens in all demographics to engage in the practice with a myriad of electronic devices, with studies finding that one in three adults in the United States have engaged in some form of sexting (Pepitone, 2014). When this kind of action takes place or is implicated in a sexual assault case, the question then becomes whether or not such evidence should be affected by the jurisdiction’s rape shield law or not.<sup>6</sup>

With regard to rape shield laws in the United States, while most state statutes follow FRE 412, there are differences in how these laws handle evidence, including electronic evidence that is brought forward to discredit a victim (Ashtari & Thompson, 2006). For example, in Delaware, the defendant can introduce electronic evidence to attack a victim’s character “[i]f the evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant,” as opposed to Alabama where such evidence can be admitted “[i]f past sexual behaviors directly involved the participation of the accused.” Generally, however, courts will engage in a balancing test 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’” (*Montgomery v. Commonwealth*, 2010).

Factors the courts have considered in these cases have included the evidence’s importance to the defendant’s case, the probative value of the evidence, and the prejudicial effect of such evidence on the jury. For instance, in *Montgomery v. Commonwealth*, the Kentucky Supreme Court upheld barring admission of the victim’s sexually explicit MySpace page due to the fact “the excluded evidence posed a substantial threat of casting [the complainant’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.” Likewise, in the Pennsylvania case *Commonwealth v. Morgan*, the court held that preventing the defendant from introducing evidence from the victim’s Facebook page was not an abuse of discretion because of the overwhelming physical evidence presented at trial and “[t]he proposed evidence was not “so highly probative of the witness’s credibility that such evidence [was] necessary to allow/permit a jury to make a fair determination of the defendant’s guilt or innocence.”

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<sup>6</sup> Of course, electronic evidence must also satisfy several other rules of evidence before it can be admitted in court, such as relevance and authenticity requirements. See Diss, 2013.



However, other jurisdictions have interpreted their own rape shield laws differently. For example, in Oregon, a defense attorney was able to use evidence from the victim's MySpace page to dismiss a sexual assault charge that was brought before a grand jury (Ward, 2007). A North Carolina court likewise admitted evidence from a victim's MySpace page that contained suggestive photos of the victim and contained statements that contradicted the victim's testimony (*In re K.W.*, 2008).

And defense attorneys and other scholars have argued that such evidence should be admissible even under rape shield laws because of the lessened expectation of privacy one enjoys on the Internet and when communicating electronically, stating that "if a litigant feels that information was good enough to share with his or her Facebook 'friends' and later asserts claims to which that information may be relevant, then the information is good enough to produce to the other side in discovery" (Koslow, 2013). In fact, the Sixth Circuit recognized in *Guest v. Leis* that social media "[u]sers would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting." Scholars also argue that barring the admission of such evidence deprives the defendant of their Sixth Amendment right to confront their accuser and makes it easier for women to make false rape allegations (Koslow, 2013).

Ultimately, while there has been little case law on how sexting would be handled under these preexisting rape shield laws, prior cases involving social media evidence indicate that sexting messages would be treated similarly to other forms of electronic communication. Thus, courts would most likely handle this issue on a case by case basis by relying on whether the evidence is relevant and authenticated before applying a balancing test to determine if the evidence should be admitted at trial or not. Factors that may be considered include the probative value of the evidence, the prejudicial effect the evidence may have on the jury, whether barring the admission of the evidence will deprive the defendant of their right to confront their accuser, and whether the evidence deals with sexual conduct or behavior.

A key issue that may develop is the fact that no current rape shield law statutorily defines whether electronic communications are considered sexual "conduct" or "behavior," which would make them inadmissible under rape shield laws (Janzen, 2015). Therefore, judges must use their own discretion and experiences to determine whether or not such communications are considered sexual "conduct" or "behavior."

In the United States, the advisory committee notes for FRE 412 include a definition of sexual behavior, which encompasses "all activities that involve actual physical conduct . . . or that imply sexual intercourse or sexual contact." In addition, the advisory committee notes state that the word "behavior" should be construed to include activities of the mind, such as fantasies and dreams." Such a broad definition of behavior could easily include sexting. Among state courts, however, there is a jurisdictional split as to whether prior sexual conduct only includes physical sexual acts or whether it can include "expressed willingness to engage in physical contact" (DaSilva, 2008). Similar differences exist internationally. For example, in the United Kingdom, rape shield laws include statements regarding prior sexual acts, as long as those statements are not being used to impeach the witness's credibility (*R v. W*, 2005).

Given the age of some judges on the bench (Goldstein, 2011) and the fact many judges struggle with understanding new technological advances (Sullivan, 2015); it is difficult to predict how judges will view sexting evidence. However, the rise of sexting over the past

few years (Scientific American, 2017) and its potential use in sexual assault cases indicate that this question will be tackled sooner or later by the courts in due time. Without further reform, this issue will most likely be resolved by judges on a jurisdictional basis and may result in evidence being admitted that “can be irrevocably damaging to victims during a rape or sexual assault trial” (Janzen, 2015).

There are several reasons why sexting should be considered sexual conduct or behavior. First, not all sexting consists of sexually explicit words or messages. More often, sexting is the transmission of sexually explicit images, which is more akin to a sexual act. In addition, some types of sexting are considered sexual acts under criminal law, which, in many jurisdictions, explicitly criminalizes the transmission or even possession of sexually explicit images of minors (Sweeny, 2014a).

More importantly, however, evidence of prior sexting carries little probative value. Although it may be a sexualized act, sexting is not the same as engaging in sexual activity with another person. The prevalence of sexting among teens compared to rates of sexual activity indicates that many teens who engage in sexting are not sexually active.<sup>7</sup> In fact, some scholars have compared it to flirting (Haynes, 2012), which is a far cry from a consensual sexual encounter; especially if the complainant engaged in sexting with people other than the defendant. Accordingly, sexting should be considered sexual conduct or behavior under rape shield laws.

However, even if sexting were covered by rape shield laws, that is no guarantee that it will be excluded from trial. As noted above, most rape shield laws require judges to weigh the evidence’s probative value against its prejudicial effect and it is here that rape shield laws may fail to protect victims. Evidence of sexting, especially among teenaged girls, is likely to be extremely prejudicial against the complainant. Although common among young people, prior zealous prosecutions of sexting under child pornography laws, despite any evidence of lack of consent or other wrongdoing, indicates that police, prosecutors, and judges view sexting as a criminal act itself, which can only lead to mistrust and disapproval of a sexting complainant (Sweeny, 2014a).

More troublingly, not everyone who engages in sexting does so consensually, as a study by *The Washington Post* has shown. *The Washington Post’s* survey of 480 of undergraduates revealed that “71 percent had sexted — and 20 percent, one in five, had been coerced into sending the messages” (Dewey, 2015). Accordingly, evidence of prior acts of sexting has little bearing on a complainant’s likelihood of consenting to sexual acts with a defendant. However, the large amount of deference given to judges in rape shield evidence decisions in the vast majority of jurisdictions could easily result in judges over-valuing evidence of prior acts of sexting and allowing that evidence in despite its low probative value.

## Conclusion

Rape shield laws, although increasingly common internationally, take various forms and have varying levels of effectiveness. Many countries still struggle with balancing the desire to protect victims and encourage sexual assault reporting, with the need to protect the defendant’s right to a fair trial. Judicial discretion, though arguably useful to help

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<sup>7</sup>Compare Centers for Disease Control and Prevention, 2015 (In a 2015 survey, 41 percent of high school students surveyed reported that they had had sexual intercourse) *with* (Martinez-Prather & Vandiver, 2014) (56 percent of college students surveyed said they had received a sexting image in high school).



strike the right balance, has shown itself to be too dismissive of the privacy of sexual assault victims. Accordingly, rape shield laws have been and are still currently being reformed around the world.

Despite their flaws, these laws are still an improvement over prior tendencies to allow defense attorneys to discredit and humiliate victims. Rape shield laws therefore need to be read more expansively, with greater emphasis placed on the limited evidentiary value of prior sexual conduct. More specifically, rape shield laws, whenever possible, should be interpreted to include sexting and judges should be educated on the prevalence of sexting and its role in the lives of teenagers and young adults. Doing so will fulfill these laws' purpose of protecting victims from being put on trial themselves, which will hopefully lead to higher reporting rates and convictions for sexual assault.

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