REENEVALUATING GAG ORDERS AND RAPE SHIELD LAWS
IN THE INTERNET AGE:
HOW CAN WE BETTER PROTECT VICTIMS?

By Bonnie Birdsell*

I. INTRODUCTION............................................................................................................ 72
II. SAVANNAH DIETRICH AND SOCIAL MEDIA EXPLOITATION .......... 75
III. AN OVERVIEW OF CURRENT LAWS AFFECTING RAPE VICTIMS
AND THEIR ORIGINS........................................................................................................... 77
   A. A History of Rape Victims at Trial and Attempts to Protect
      Their Privacy.................................................................................................................. 78
   B. A Distinct Inconsistency in Rights and Rulings Plagues
      Juvenile Courts Due to the Lack of a Federal Standard
      Governing Juvenile Sexual Assault Cases.............................................................. 80
   C. The Origin and Purpose of Gag Orders................................................................. 81
IV. A NEW SCENARIO: SOCIAL MEDIA HAS CREATED A VASTLY
    ALTERED LEGAL LANDSCAPE FOR BOTH VICTIMS AND THEIR
    ASSAILANTS .................................................................................................................... 83
   A. Rape Shields Do Little to Protect a Victim’s Loss of Privacy in
      the Face of Social Media’s Pervasiveness and Permanence ............ 83
   B. In the Course of Contemporary Rape Prosecutions, Especially
      Juvenile Proceedings, Gag Orders Entered Against a Victim
      Impair the Victim’s Ability to Heal By Inventing a
      Reclaiming Narrative.............................................................................................. 88
V. THE PROTECTION OF VICTIMS’ RIGHTS MUST BE BALANCED
   AGAINST THE CONSTITUTIONAL RIGHTS OF DEFENDANTS....... 89
VI. A PROPOSED SOLUTION ............................................................................................. 91
VII. CONCLUSION .............................................................................................................. 96

* J.D. Candidate, 2014, Seton Hall University School of Law; B.A. in General Music,
  Truman State University, 2010. I wish to thank Professor JennyBrooke Condon and
  Suzanne Cevasco for their guidance during the writing of this Note.
I. INTRODUCTION

The Internet is an increasingly pervasive social phenomenon.\(^1\) Unfortunately, this pervasive phenomenon is not without its dark side. The Internet frees users from the restraints of traditional information-gathering and authority. It also serves to circumvent the conventional constraints of society concerning matters of rape, pornography, sexual assault, and sexual exploitation.\(^2\) This circumvention can, and does, manifest itself in a number of disturbing scenarios for victims of sexual assault. In addition to the already harrowing acts of sexual assault victims may suffer, many find themselves subjected to an additional degradation of being tormented by photographs or messages posted online.\(^3\)

This Note will address the ineffectiveness of gag orders and current rape laws, which were designed to protect victims, in an age when an individual’s privacy can be decimated with the click of a button. There are many changes that could be made to the current rape shield laws and victims’ rights statutes to keep pace with changes in social behavior brought about by the Internet, especially with regard to social media. Social media is such a ubiquitous platform, and is so easily abused by assailants, that it is necessary to reshape current laws to address acts of exploitation that occur through social media. Such acts of exploitation via social media are particularly harmful to minor victims.\(^4\)

The most troubling issue is the ease with which a victim’s identity can become public knowledge via the Internet in general, and specifically through social media platforms such as Facebook and Twitter.\(^5\) For more than forty years, motions to protect victims’

---

\(^1\) Michael M. O’Hear, EDITORS OBSERVATIONS: Perpetual Panic, 21 FED. SENT’G REP. 69, 74 (2008).

\(^2\) Id.


\(^4\) Amit Shertzer, Note, Plaintiff Anonymity During Civil Litigation of Childhood Sexual Abuse Cases, 33 CARDOZO L. REV. 2199, 2201-02 (2012).

\(^5\) See id. at 2202-03.
identities have been commonplace in the courts. In fact, victims’ rights statutes, which were put in place with the goal of protecting victims’ privacy by preventing their names and personal information from being disclosed to the public, were enacted in most state legislatures in the mid-1980s. Rape shield statutes, by contrast, operate on the state and federal levels, and are applied in an attempt to ensure fair trials for rape victims. These statutes govern the manner of a victim’s treatment during the trial process. Protecting victims’ privacy and ensuring their safety from additional negative treatment has long been an important legislative goal. The advent of the Internet age, however, necessitates a reevaluation of those statutes in order to guarantee that victims’ privacy is protected in the most effective ways possible. Any efforts to reevaluate the statutes must reflect the role played by social media in our society, and must seek to protect victims from dangers wrought by social media.

Social media is an easily accessible forum that assailants (and the assailants’ supporters, such as family members and friends) can utilize in a number of ways to inflict harm on a victim. For example, assailants can post pictures and videos of their attacks, making them instantly available to an expansive group of people. Assailants can also reveal the identity of their victim in a way that is incredibly humiliating by making the disclosure in front of the victim’s friends and family. Assailants can further torment their victims by using private messages and public posts to revictimize them, whether by contacting those victims, posting about the victim, or having friends

---

6. Id. at 2206.
8. Id. at 298.
9. Id. at 300.
10. See id. at 308.
and family post in support of the assailant publicly or via private message.\(^{13}\)

The routine use of gag orders in sexual assault cases is also a concern in a society increasingly focused upon social media. In some instances, gag orders can prevent victims from accessing a crucial facet of recovery: the ability to control their narratives.\(^{14}\) A narrative, or a victim’s ability to tell his or her own story, is an important element not only of the victim’s recovery, but of the recovery of other victims as well. It can be an important tool for promoting unity throughout the victim community as a whole, and it can also be essential to the development of law and society by bringing to light gaps left by existing laws.\(^{15}\) But recognizing the threat that social media may silence victims’ voices does not mean that the rights of defendants should be disregarded. The defendants’ rights must also be considered, especially before and during trial, when there is a presumption of innocence. Legislators must strike a balance between the two sets of rights. The current rape shield laws need to be reevaluated to keep pace with the new challenges presented by modern technology and social media if those laws will be expected to carry out their original purpose of protecting sexual assault victims.

Part I of this Note describes the particular case of Savannah Dietrich, a minor victim of sexual assault whose case was both hindered and helped by social media. Part II discusses rape shield laws in their current state and the original intentions behind those laws, and considers the appropriate usage of gag orders when the victim’s identity has already been made public by the assailant through social media. There, the Note argues that gag orders, which often undermine a victim’s ability to claim his or her own narrative, must be reimagined so that they include consideration of the significant role narrative plays in a victim’s recover. Part III analyzes how such “gag order” laws protect victims in practice rather than in theory, and leads to a conclusion that the laws are insufficient protection in today’s technologically-advanced world. Part IV

---


\(^{15}\) See id. at 81.
balances the rights of victims to maintain anonymity against the constitutional rights of the accused assailants. Finally, Part V proposes possible changes to the current laws to respond to the new challenges presented by social media and explores the creative ways courts are handling these new privacy violations and balancing them against the victims’ best interests.

II. SAVANNAH DIETRICH AND SOCIAL MEDIA EXPLOITATION

In August 2011, sixteen-year-old high school sophomore Savannah Dietrich attended a party with her friends. Dietrich and friends consumed alcohol at the gathering and, after drinking too much, Dietrich passed out. While unconscious, two fellow students, whom Dietrich knew and had previously trusted, sexually assaulted her. It was not until a month afterward that Dietrich learned that her assailants had photographed the assault and posted the lewd pictures to the Internet, where anyone, including her friends, family, other students, and complete strangers could view them.

Dietrich, horrified by the public photographs, was determined to seek justice. Unlike many victims of sexual assault, she pressed charges and followed the case through to trial. Without informing Dietrich, however, the prosecutor offered her assailants a plea deal whereby they pled guilty to sexual abuse in the first degree and a misdemeanor count of voyeurism; Dietrich was outraged. Adding insult to injury, the presiding judge issued a gag order that covered the entire proceeding, thereby preventing Dietrich from discussing the case. The gag order barred Dietrich from disclosing her dissatisfaction with the trial’s outcome or revealing her assailants’ identities. In granting the defendants anonymity, the judge did not

---

16 Dietrich Article, supra note 12.
18 Dietrich Article, supra note 12.
19 Id.
20 Lash, supra note 17.
21 Id.
22 Id.
23 Id.
24 Maxwell S. Kennerly, Savannah Dietrich: A Right to Lie, But Not to Criticize a Plea
appear to take into account that the assailants’ act of sharing photographs with others ruined any chance at anonymity for the victim. Dietrich defied the judge’s order by posting her assailants’ names online in a Twitter tirade. She wrote on the social media website, “[t]hey said I can’t talk about it or I’ll be locked up... Protect [sic] rapist is more important than getting justice for the victim in Louisville.” Later, she told the press, “[t]hey got off very easy... and they tell me to be quiet, just silencing me in the end.”

Dietrich’s response immediately caught the media’s attention. Her name soon appeared in newspapers across the country and her form of vigilante justice was fiercely debated in the blogosphere. Even if victims’ identities are somehow revealed, news sources typically do not print their names, especially if the victims are minors. Dietrich and her parents, however, granted permission for her identity to be made public so her story can serve as an example.

In response to the postings and the media attention, the defendants’ attorneys filed a motion for contempt against Dietrich for defying the gag order, which carried the potential of a $500 fine and up to six months in jail. Ironically, a sentence for contempt would have meant more jail time for Dietrich than her assailants

---

20 Lash, supra note 17.
27 Dietrich Article, supra note 12.
28 Id.
29 Id.
30 Id. supra note 17.
31 Id.
32 Id.
faced, given their plea bargain. Public outcry was instantaneous, and within days, defense attorney David Meija withdrew the motion, claiming that it was the futility of the motion, not the public’s reaction, that caused him to drop the charge. Speaking to the press, Meija bemoaned his clients’ loss of anonymity while ignoring the fact that Dietrich, the victim, never had a chance at privacy.

Dietrich’s case is a prime example of the manner in which the current rape laws, as well as the current, and somewhat cavalier method, of issuing gag orders, often fail to result in justice for the victim. Privacy violations via the Internet in Dietrich’s case are twofold. First, the assailants committed a violation of Dietrich’s privacy when they posted pictures of their attack online. Second, Dietrich committed her own violation of privacy by posting her assailants’ names online. These are two examples of privacy violations insufficiently handled by existing rape shield laws.

III. AN OVERVIEW OF CURRENT LAWS AFFECTING RAPE VICTIMS AND THEIR ORIGINS

It is necessary to view the original rape shield laws and victims’ rights statutes within their historical context. While the statutes may have been effective when enacted, the technological world has changed so rapidly within the last half century that they can no longer effectively serve their purpose. What is perhaps more troubling is that technology is constantly evolving, and therefore continuously altering the landscape of the complications between social media and privacy rights. The statutes still offer some measure of protection, but they are now woefully inept at protecting victims’ privacy.

32 Lash, supra note 17.
33 Id.
34 Id. Of the many resources reviewed for this Note, not one printed the names of her assailants.
35 Kennerly, supra note 24.
36 Id.
A. A History of Rape Victims at Trial and Attempts to Protect Their Privacy

Rape shield statutes were first created and implemented at state and federal levels to ensure that rape victims could receive “fair trial[s].” 38 Such statutes are necessary in sexual assault cases because the history of the criminal justice system’s treatment of rape, unlike other crimes, is rife with instances of victims being treated as defendants at trial. 39 Historically, defense attorneys engaged in the common and accepted trial strategy of referring to a victim’s past history or sexual predispositions (real or rumored) to discredit that victim’s testimony—a practice which many advocates and legislators found unsavory and sought to change. 40 Before rape shields were implemented, it was not uncommon for defense lawyers to take advantage of cross-examinations as opportunities to interrogate victims concerning topics such as past sexual history, behavior, and manner of dress. 41 Due to the nature of the crime, private, intimate, and potentially embarrassing details about a victim’s life became especially significant. 42 Some critics have described these kinds of cross-examinations as subjecting the victim to a “second rape,” acknowledging the immense violation of privacy, humiliation, and extreme distress often suffered by the victim during the course of these cross-examinations. 43

Rape shield laws have proven particularly important when the victims in question are female. 44 Research has shown that impartial observers—for instance, jury members—generally perceive women to be less credible than men, a potential advantage easily exploited by defense attorneys. 45 Social science studies have shown that women are often considered, at face value, to be no more credible than children. 46

---

38 Reidy, supra note 7, at 298.
39 Id.
40 Id.
41 Id. at 308.
42 Id. at 309.
43 Id.
44 Goodmark, supra note 14, at 116.
45 Id.
46 Id.
2013]

REEEVALUATING GAG ORDERS

Recognizing the twin injustices of smear tactics and social prejudice, the federal courts responded by implementing Rule 412 of the Federal Rules of Evidence, and almost all jurisdictions in the United States have enacted their own rape shield laws. \(^{47}\) Rule 412 is widely viewed as the nation’s strongest rape shield and is in fact often used as a template for state shields. \(^{48}\) It functions as a “constitutional catch-all” and governs the evidence that is admissible in any federal sexual assault proceeding. \(^{49}\) Specifically, it prohibits the admission of evidence in either a criminal or civil proceeding to prove that a victim had, within a close period of time, engaged in sexual behavior other than the alleged attack, as well as prohibiting evidence offered in an attempt to prove, or make sufficient implications about, a victim’s sexual predisposition. \(^{50}\) Some exceptions may be made in criminal cases, however. \(^{51}\) The first exception allows evidence of specific instances of behavior that attempt to prove that bodily fluid, injuries, or other pieces of physical evidence could be byproducts of another sexual encounter in addition to the alleged assault. \(^{52}\) The second exception allows evidence of specific instances of sexual behavior with respect to the defendant if offered to prove consent. \(^{53}\) The third and final exception allows evidence that would violate the defendant’s constitutional rights if excluded. \(^{54}\)

Legislatures have also implemented victims’ rights statutes as a means of combating yet another form of victim degradation. \(^{55}\) Despite the patent degradation wrought by a “second rape,” many victims are subject to further indignity. This additional violation, sometimes referred to as a “third rape,” occurs when a victim unwittingly becomes the subject of media attention. \(^{56}\) When this happens, the rape, the events surrounding the rape, and the personal

---


\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Fed. R. Evid. 412(a)(1) and (2).

\(^{51}\) Fed. R. Evid. 412(b)(1).

\(^{52}\) Fed. R. Evid. 412(b)(1)(A).


\(^{54}\) Fed. R. Evid. 412(b)(1)(C).

\(^{55}\) Reidy, *supra* note 7, at 310.

\(^{56}\) *Id.* at 320.
details of the victim’s life are frequently played out on a public scale and in some cases, a national scale.\textsuperscript{57} This “third rape,” via social media exposure, is not covered by the current laws. Rape shield statutes, by nature of their formation, only function effectively within the courtroom—they can have no force outside it, nor are they meant to.\textsuperscript{58} Because of this, many states have implemented victims’ rights statutes designed to prevent the media from publishing victims’ names and other information central to their identities.\textsuperscript{59}

\textbf{B. A Distinct Inconsistency in Rights and Rulings Plagues Juvenile Courts Due to the Lack of a Federal Standard Governing Juvenile Sexual Assault Cases}

The effectiveness of rape shields and victims’ rights statutes is even more complicated in the context of juvenile courts.\textsuperscript{60} Because juvenile courts are not governed by a federal statute, and because the Supreme Court has not ruled that juveniles are entitled to the same procedural guarantees as adults, states have created their own unique laws to govern their proceedings, creating varied, uncertain, and inconsistent rights for juveniles indifferent states.\textsuperscript{61}

Legislative bodies of various jurisdictions continue to implement rape shield statutes; however, the judiciary as a whole is not particularly supportive of these privacy-protecting statutes when journalists assert that the statutes violate the First Amendment to the Constitution.\textsuperscript{62} Although courts recognize the need to balance the rights of victims and the freedom of the press, whenever a direct conflict arises between the two sets of rights, state courts typically favor the media’s constitutional right of freedom of speech and expression by invalidating victims’ rights statutes.\textsuperscript{63}

Some advocates argue against a federal juvenile statute, asserting

\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 325.
\textsuperscript{59} \textit{Id.} at 311.
\textsuperscript{61} \textit{Id.} at 202.
\textsuperscript{62} Reidy, supra note 7, at 312.
\textsuperscript{63} Clark, supra note 60, at 220; Reidy, supra note 7, at 312.
that rape shield laws and victims’ rights statutes encroach upon the civil rights of all Americans.64 Perhaps surprisingly, these citizens believe this is true even when the statutes specifically protect the privacy rights of minors.65 Individuals oppose this type of protective legislation as contrary to civil rights and instead assert that the guarantee of a “public trial,” as provided for in the Sixth Amendment, requires complete transparency in the judicial system.66 They claim that laws protecting victims’ identities are the product of lawmakers seizing a political opportunity, and thus a chance at reelection, by passing laws that are essentially civil rights limitations even though they are preferred by a majority of citizens.67 The potential erosion of civil liberties through the concealment of portions of judicial proceedings, as well as the dangers of such concealment, are two important aspects to be contemplated when assessing the effectiveness and necessity of statutes of this kind that encourage a certain level of secrecy.68 This view is not inconsistent with the preference of the courts, as evidenced by their frequent affirmation of the rights of the press over a victim’s right to privacy.

These are some of the competing and varied interests and concerns that must be considered when contemplating drafting new types of victim-sheltering legislation. As the courts have insisted, there is a delicate balance that must be struck between defendants’ civil liberties, victims’ rights, and the rights of other parties to the proceedings.

C. The Origin and Purpose of Gag Orders

Gag orders, or protective orders, are issued by a court to prevent the parties involved in a proceeding, or anyone else in the courtroom, from disclosing the events of the court to the press or other outsiders.70 Judges may issue them based upon their own

65 Id. at 447.
66 Id., supra note 64, at 447.
67 Id.
68 Reidy, supra note 7, at 312.
69 Id.
judgment, or in response to a request by one of the parties to the proceeding. Gag orders are common in cases involving minors, where courts endeavor to protect the identity of the accused in hopes that juvenile offenders will be rehabilitated and able to return without stigma to society as stable and productive adults.

While gag orders are meant to prevent the parties from discussing the details of the events that transpired in court, they are not intended to prevent the parties from expressing their satisfaction or dissatisfaction with the events of the court or the outcome. Neither does a gag order serve to “erase the event[s]” of the court from history. A gag order is not a time machine, nor is it analogous to an expungement. Essentially, the gag order is meant to function as an added protection for victims in many cases, for defendants in the case of minors, and to sometimes conceal the details of a verdict and sentencing.

Even if a gag order is issued to protect a victim’s identity, it is not always effective. Given that, when a court case involves social media, the victim’s name is frequently already attached to the incident in a personal way and on a forum easily and frequently accessed by his or her friends and family, which party the court seeks to protect by issuing a gag order is an important question. If the court intends to protect the victim, then the gag order in these instances is nothing more than a vain attempt to put the toothpaste back in the tube, considering that the privacy of the victim has already been lost to the Internet. If the intent is to shield minor defendants from exposure, one must consider the implications of fairness and justice to the victim. The debate becomes whether it is more important to protect the identities of minor criminals in order to give them the


71 Id.
73 Kennerly, supra note 24.
74 Id.
75 Id.
opportunity to be rehabilitated, or to protect a victim’s dignity and free speech rights.77

In cases such as Savannah Dietrich’s, where her identity had already been revealed prior to trial and the judge placed a gag order on the proceedings after their close, one could conclude that the order was issued more as a matter of course than with an actual expectation of effectiveness.78 When a gag order serves merely to bind a victim from discussing the events of a trial or, more importantly, when it keeps one from complaining about an outcome one sees as unfair, the gag order intrudes upon a victim’s right to free speech guaranteed by the First Amendment.79

There is a dearth of case law on the constitutionality of gag orders that limit parties closely tied to a case. The few courts that have addressed the issue of orders silencing victims have generally found the gag order to be unconstitutional, reasoning that limiting parties’ expression requires strict standards and a narrowly-tailored purpose.80 Considering the judiciary’s tendency to value the media’s First Amendment rights over a victim’s right to privacy, this view appears to be consistent.81 It would be patently inconsistent to allow the media the right to reveal information about a victim while simultaneously depriving the victim of the right to reveal information about his or her own case.

IV. A NEW SCENARIO: SOCIAL MEDIA HAS CREATED A VASTLY ALTERED LEGAL LANDSCAPE FOR BOTH VICTIMS AND THEIR ASSAILANTS

A. Rape Shields Do Little to Protect a Victim’s Loss of Privacy in the Face of Social Media’s Pervasiveness and Permanence

The Internet brings a new complication to sexual assaults and, by default, sexual assault legislation.82 The Internet gives individuals the ability to access sexually explicit materials more easily than ever

---

77 Katz, supra note 72.
78 Lash, supra note 17.
79 Kennerly, supra note 24.
80 Id.
81 Reidy, supra note 7, at 312.
82 O’Hear, supra note 1.
before—in some cases, whether that individual is searching for them or not.\textsuperscript{83} Even unwitting individuals can easily be directed to explicit content that features minors, and, similarly, the Internet also provides the ability to connect sexual predators with potential underage victims.\textsuperscript{84} The Internet gives society at large the means to skirt traditional sources of authority by creating the illusion of anonymity and privacy, and some take advantage of this capability with abandon.\textsuperscript{85} Unfortunately, there are far too many instances of victim exploitation online. This exploitation occurs in many ways and on a plethora of social media platforms, and it is occurring with increasing frequency.

In September 2010, a girl was brutally raped at a rave in Pitt Meadows, British Columbia.\textsuperscript{86} This attack was not only horrifying, but public, and the event was so confused and disorienting that it is not clear how many witnessed the attack.\textsuperscript{87} Rather than intervene, several other concertgoers filmed and photographed the attack.\textsuperscript{88} Much of this documentation was subsequently posted to Facebook and other social media websites.\textsuperscript{89} After the attack, no witnesses could be convinced to come forward voluntarily and as such, prosecutors lacked sufficient evidence as to the attackers’ identities and could not move forward with the case.\textsuperscript{90} Ultimately, prosecutors charged three individuals in the event.\textsuperscript{91} One man, who was above the age of majority, was charged with sexual assault.\textsuperscript{92} However, this charge was stayed due to a lack of evidence.\textsuperscript{93} The prosecutors charged the other two individuals with production and distribution of child pornography for recording the events and posting them online, a charge that would have been impossible had the prosecution been

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Jennifer Chandler, Rape and the Harmful Impact of Social Media, BLOGHER (Feb. 15, 2012), http://www.blogher.com/rapeandharmfulimpactsocialmedia.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Pitt Meadows Article, supra note 11.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
un able to access the material on social media platforms.94

Though its impact can be negative, social media can also have a
positive influence on sexual assault investigations and prosecutions.
As in the above example, it can be used as persuasive evidence of a
particular individual’s guilt. Pictures and video can also often bring to
light a persona different from one an assailant may present during
courtroom proceedings.95 This type of evidence can be especially
effective when the assailant does not fit society’s vision of a typical
assailant, such as when the defendant is a successful student or
athlete, looks particularly young, or boasts a sterling reputation in the
community.96

The impact of social media is, however, a “double-edge[d]
sword,” largely because the “Internet never forgets.”97 In many
instances, assailants wittingly or unwittingly utilize social media to
revictimize those they attacked. Revictimization occurs when
assailants remind the victim of the attack via photographs, messages,
or perhaps even by just appearing on their computer screen.98 When
revictimization takes place online, it may endlessly reoccur due to the
Internet’s permanent nature.99 Unlike physical paper photographs
and newspaper articles, items posted online exist perpetually in
unprecedented ways.100 Though the revictimization of Dietrich and
the Pitt Meadows victim was public, victims can also be forced to
relive their attacks through private social media communication, such
as private messaging on Facebook or direct messaging on Twitter.

A high school student in Arizona found herself the victim of
such private revictimization after she and her parents brought
charges against an older student, alleging that the older student
violently raped her on multiple occasions.101 After the charges became
public knowledge at her school, the victim received threats and

94 Id.
95 Cohen, supra note 37.
96 Id.
97 Id.
98 Chandler, supra note 3.
99 Cohen, supra note 37.
100 Id.
2012).
insults from her classmates through private messages on Facebook.\(^{102}\) The students called her names, disparaged her, harassed her for “putting [their] friend . . . in prison for the rest of his life,” and threatened her with bodily harm.\(^{103}\) The victim eventually became so afraid of her classmates that she avoided going to school, causing her grades to suffer.\(^{104}\) Regardless of her status as a rape victim in the eyes of the law, social media forced the girl to endure other forms of abuse and derision.

For an assailant’s supporters and for individuals looking to degrade victims, particularly women, the Internet and social media has become a gathering place. Facebook groups such as “Throwing Bricks at Sluts” and “Abducting, Raping and Violently Murdering Your Friend, as a Joke” are wildly popular and, for far too many individuals, are considered acceptable and amusing groups in which to take part.\(^{105}\) The latter group has amassed approximately 16,600 “likes” on Facebook.\(^{106}\) This trend also extends to social media giant Twitter, as evidenced by some of the site’s “trending topics.”\(^{107}\) These topics include such phrases as “[r]easons to beat your girlfriend” and “[w]orst names for a vagina.”\(^{108}\) There is now a large and organized faction of individuals who use the Internet to both post and consume content geared toward sexual assault and exploitation.\(^{109}\) These people have been able to create a community through which they can quickly and easily circulate this exploitative content.\(^{110}\)

In many instances, social media platforms now expedite the revictimization that rape shield laws and victims’ rights statutes attempted to prevent. When assailants post photographs, videos, or

\(^{102}\) Id. at 1137.

\(^{103}\) Id.

\(^{104}\) Id.


\(^{106}\) Id.

\(^{107}\) Twitter features a list of “trending topics” on its homepage. The list consists of subjects that are, through the use of an algorithm, determined to be the most popular and most frequently mentioned subjects on the website at any given moment. TWITTER HELP CENTER, https://support.twitter.com/entries/166357-the-twitter-glossary (last visited Sept. 29, 2012).

\(^{108}\) Bidisha, supra note 105.

\(^{109}\) O’Hear, supra note 1.

\(^{110}\) Id.
comments about assaults on social networking sites that are accessible by the victim and the victim’s friends and family, that victim is forced against his or her will to relive the attack’s details.111 The Internet operates effectively as a “digital echo chamber,” in which media can reverberate, surfacing and resurfacing at times, at a frequency completely outside the victim’s control.112 Revictimization via social media occurs in one fashion when the images circulate within the parameters of a victim’s friends and family, but happens again if those images go viral to strangers on the Internet.113

As discussed above, the purpose of rape shield laws and victims’ rights statutes is to prevent an individual’s renewed victimization in the courts and in the media.114 But because these statutes do not incorporate protections from social media exposure and attacks, they are woefully unfit to prevent a person from revictimization via the Internet. It is possible, and indeed probable, that motions for victim anonymity are becoming more common at trial, due in large part to the Internet’s ever-increasing pervasiveness.115 Rape shields only operate inside a courtroom, and victims’ rights statutes apply only to media publication of victims’ identities. As such, both are currently incapable of preventing the dissemination of information by defendants themselves through social media, rather than informational dissemination by defense attorneys or the traditional media for which the statutes were originally designed. As society changes, its laws must adapt as well.

In many instances, social media presents a challenge to victim privacy even before a victim brings charges when an assailant threatens to reveal the victim’s identity online.116 Publication of photographs or disclosure of information can be used as a threat by the assailant to prevent the victim from bringing charges.117 If victims strongly believe they will be unable to maintain their anonymity, they may be even more unwilling, than many already are, to bring charges.

111 Chandler, supra note 3.
112 Cohen, supra note 37.
113 Id.
114 Reidy, supra note 7, at 311.
115 Shertzer, supra note 4, at 2206-07.
116 Dietrich Article, supra note 12.
117 Shertzer, supra note 4, at 2210.
against their attackers.\textsuperscript{118} To combat this “chilling effect,” some courts have granted anonymity to victims at the expense of the “openness at any price” policy advocated by those who believe in complete judicial transparency.\textsuperscript{119} These courts consider granting anonymity as necessary to overcome the new challenges to privacy posed by social media.\textsuperscript{120}

\textbf{B. In the Course of Contemporary Rape Prosecutions, Especially Juvenile Proceedings, Gag Orders Entered Against a Victim Impair the Victim’s Ability to Heal By Inventing a Reclaiming Narrative}

Prohibiting a victim from telling his or her story, or even from discussing the details of a court case, is detrimental not only from a First Amendment perspective as discussed above, but also from a psychological one.\textsuperscript{121} The process of sharing the details of such a traumatic event and the legal proceedings surrounding it often helps victims to address the violence they have suffered and thus helps them to heal.\textsuperscript{122} The mental and physical effects of rape, and the lingering after-effects, often go much deeper than the act itself.\textsuperscript{123} Rape, and the apprehension and memory thereof, manifests in the mind as a frequent sense of dread, nagging, and anxiety, which instills in many women a necessary mindset of constant vigilance.\textsuperscript{124} The stories that victims share with their loved ones, the media, or other victims can give these individuals the chance to define the event for themselves.\textsuperscript{125} In a sense, it is a method of taking control of an event over which the victim actually had no control.\textsuperscript{126} This kind of self-definition is important for victims in general, but it is especially important for victims of rape and sexual assault, who have historically

\textsuperscript{118} Id.
\textsuperscript{119} Id. at 2210-11 (internal quotation marks omitted).
\textsuperscript{120} Id.
\textsuperscript{121} Goodmark, supra note 14, at 80.
\textsuperscript{122} Id. at 79-80.
\textsuperscript{124} Id. at 984.
\textsuperscript{125} Goodmark, supra note 14, at 118.
\textsuperscript{126} Id.
been shamed and silenced by the rest of society.\footnote{127}

Allowing victims to have a voice, and to use that voice, is crucial to the evolution of rape shield laws because only victims are truly able to testify regarding the impact and effectiveness of those laws.\footnote{128} It is essential to make legislators aware of victims’ discontent with the laws governing this topic so that they, in their capacity as lawmakers, may fully understand the suitability or unsuitability of their laws in a real-world context. In fact, it is absolutely central to the legal system to recognize its shortcomings or inaccuracies in order for there to be a possibility of propelling it forward.\footnote{129}

V. THE PROTECTION OF VICTIMS’ RIGHTS MUST BE BALANCED AGAINST THE CONSTITUTIONAL RIGHTS OF DEFENDANTS

Recognizing the threat that social media presents by silencing victims’ voices does not mean that the rights of defendants should be disregarded. It is fundamentally unfair, and contrary to American notions of justice, that the accused be forced into the public eye before a case’s resolution.\footnote{130} Likely due to the stigma surrounding rape and the prosecution of rapists, defendants whose identities are made public may suffer the consequences of being labeled a sex offender by society even in cases in which they are found not guilty. The “harsh public gaze” faced by defendants can be just as severe, if not more so, as the backlash against victims.\footnote{131} After withdrawing a motion for contempt against Dietrich for revealing the identities of her assailants, one of the defense attorneys, in reference to his client’s lost anonymity, commented that “[t]he horse is out of the barn; nothing is bringing it back.”\footnote{132} It is true that society as a whole is less likely to perceive this loss of anonymity as a severe injustice to convicted defendants, but it can create unfortunate and debilitating consequences for defendants whose names are later cleared.

One major concern for defendants is the limitations rape shield

\footnote{127} Id.
\footnote{128} Id. at 81.
\footnote{129} Id.
\footnote{130} See Shertzer, supra note 4, at 2212 (discussing plaintiff anonymity in the context of civil litigation of childhood sexual abuse cases).
\footnote{131} Id.
\footnote{132} Lash, supranote 17.
laws place on the crossexaminations of alleged victims.\textsuperscript{133} Federal Rule of Evidence 412, the rule regarding the federal rape shield, places strict limits on the evidence that may be admissible in sexual assault cases.\textsuperscript{134} Defense attorneys, defendants, and defendants’ rights advocates frequently, and perhaps not unfairly, argue that the limitations placed upon crossexaminations violate the defendant’s constitutional rights.\textsuperscript{135} The Sixth Amendment provides that “the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\textsuperscript{136} The Supreme Court has stated that “crossexamination is the principal means by which the believability of a witness and the truth of his testimony are tested.”\textsuperscript{137} Without the ability to challenge the reliability of a witness, a defendant’s case can be crippled severely.

As the movement for victims’ rights has gained momentum and achieved some measure of results, there has been an inevitable backlash against it in favor of defendants’ rights. For example, in an article entitled “Perpetual Panic,” Michael M. O’Hear, Associate Dean for Research and Professor of Law at Marquette University Law School, calls the victims’ rights movement a “sex crimes panic.”\textsuperscript{138} He claims it is nothing more than an overreaction by the public at large to a crime that in reality is much less pervasive than the media makes it appear.\textsuperscript{139} O’Hear also dismisses the history of rape victim mistreatment and marginalization as a “perception.”\textsuperscript{140} Based on these views, he insists that the current negative attitude of the public towards sex crimes is merely an overreaction and that legislators should consider implementing “sunset provisions” upon any new sexual assault legislation.\textsuperscript{141} A sunset provision places an expiration

\textsuperscript{133} Klein, supranote 123, at 992.
\textsuperscript{134} See FED. R. EVID. 412 (“(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim’s sexual predisposition”).
\textsuperscript{135} Klein, supranote 123, at 992.
\textsuperscript{136} U.S. CONST. amend. VI.
\textsuperscript{137} Klein, supranote 123, at 996 n.87 (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974) (quotations omitted)).
\textsuperscript{138} O’Hear, supranote 1.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
2013] REEVALUATING GAG ORDERS 91
date of sorts on legislation, typically about ten years after enactment.142 During the suggested sunset period, O’Hear believes that “panic” will subside and the laws can return to their previous state.143 One purpose of such a sunset provision would be to ease the minds of legislators, who want to be sensitive to the public’s interests but who do not wish to implement statutes with long-lasting detrimental effects upon criminal defendants.144

One more moderate and less cynical way to consider protecting a convicted defendant’s rights is in proportion to the rights that the defendant has effectively removed from the victim. For instance, one can consider to what extent society is concerned with or is benefitting from protecting the identity of an assailant who has publicized the identity of his victim.145 A victim posting the names of her convicted assailants to a social media site is hardly comparable to the assailant taking pictures of the victim during an assault and posting them before charges are filed or a criminal trial has occurred.146 An inversely proportional method is reasonable if only because, as the harm to the victim increases, the convicted assailant’s rights should decrease. A legislatively-struck balance, however, would be beneficial for all parties involved because it would create a concrete standard.

VI. A PROPOSED SOLUTION

What can we do when laws are no longer capable of serving the purpose for which they were created? It is unquestionably important to protect individuals from sexual assault and abuse, especially minors.147 Minors are generally more impressionable and therefore, more susceptible to, the varying mental, emotional, and physical harms that accompany sexual abuse.148 Minors are also more likely to suffer these harms long-term, often enduring far into adulthood.149

The current rape shield laws are limited in that they only

142 Id.
143 Id.
144 O’Hear, supra note 1.
145 Kennerly, supra note 24.
146 Id.
147 Shertzer, supra note 4, at 2201-02.
148 Id.
149 Id.
function as evidentiary protections. While these laws protect victims within the walls of a courtroom, they leave them vulnerable outside in the court of public perception. Legislation—especially laws concerning a crime as sensitive as rape—can only be as strong as victims perceive it to be when they are considering seeking its protection. If victims believe that a law is weak, and particularly if they do not trust the government to stand behind a law’s promise, then victims cannot reasonably be expected to rely upon such a law. If victims perceive the law to be strong, however, rape shield advocates assert that this would result in a higher percentage of both reported and prosecuted crimes. Current victims’ rights statutes and amendments fail to properly exclude from the media some types of harmful information about a victim’s past, and definitely do not include strong enough penalties for those who violate the statutes. As such, the current statutes leave massive gaps in the victim’s protection, which can easily be exploited by defense attorneys, the media, and assailants.

A number of courts have instituted balancing tests to determine whether or not it is appropriate to grant a victim anonymity in a particular case. While the tests vary among different jurisdictions, they tend to center around many of the same factors. These factors typically include: “(1) personal information of the ‘utmost intimacy’; (2) admission by a victim of violating state laws or government regulations or engaging in prohibited conduct; and (3) challenges to constitutional, statutory or regulatory validity of government activity.” Judges will grant a victim anonymity based mainly on the innocence of the victim’s own activities at the time of the attack. This is unfortunate and inappropriate because engaging in a simultaneous

150 Haddad, supra note 47, at 210.
151 Id.
152 Id. at 221.
153 Id.
154 Id. at 189.
155 Reidy, supra note 7, at 326.
156 Id.
157 Shertzer, supra note 4, at 2217; see also S. Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712-13 (5th Cir. 1979).
158 Shertzer, supra note 4, at 2217.
159 Id. at 2216; see also S. Methodist, 599 F.2d at 713.
unsavory or even illegal activity does not make a sexual assault victim any less of a victim. Sixteen-year-old Savannah Dietrich’s alcohol consumption did not give her assailants the right to violate her body. Neither did the Pitt Meadows victim’s presence at a rave give her assailants the right to repeatedly and savagely rape her.

Some advocates believe that legislatures should enact victims’ rights statutes that are rapespecific. According to these advocates, the ideal composition of these statutes would contain tight language, barring the media from publishing any information at all about the victim before and during the course of the trial. An additional portion of the statutes would contain not only those changes that ensure a stricter ban on publishing information, but also harsher and more clearly defined punishments for those who violate that ban.

Victims’ rights advocates have also voiced concerns about the victims’ rights with respect to the defendants’ ability to plea-bargain. Specifically, advocates worry that a prosecutor’s deal with a defendant often denies the victim’s initial input, approval, or in some cases, even notice, of the plea bargain. One potential remedy would be to make the victim central to the plea-bargaining process, allowing him or her to give input as to the terms, and requiring a victim’s approval before offering any plea. The justification for this type of involvement is much the same as the rationale for enforcing rape shield statutes; namely the idea that, as the witness has already been victimized, it would be unjust for him or her to be again victimized by the courts by having a plea bargain made without the victim’s consent. This is especially true when the victim is one of the few willing to see a prosecution through trial.

In contrast, without her knowledge beforehand, Dietrich’s assailants received an incredibly lenient plea deal, part of which included a misdemeanor count of voyeurism for the online

---

160 Reidy, supra note 7, at 327.
161 Id.
162 Id. at 328-29.
163 See Lash, supra note 17.
164 See id.
165 See id.
166 See id.
distribution of photographs of the assault. One penalty that could be created for such an action, in addition to a charge of voyeurism, is a separate charge for the posting of self-created explicit criminal content to the Internet, or to social media specifically. It is one thing to distribute sexually explicit content, but it is quite another to take such a permanent move as to post photographs of an attack on a platform easily accessible to a victim’s friends and family in a manner that ensures that the victim can never know for certain if all copies of the photographs have been destroyed.

In the case of the victim that was raped by multiple men at a rave in British Columbia, the courts issued an inappropriate, though admittedly unorthodox, punishment. One of the few individuals who actually could be charged in the case, a minor, pled guilty to a charge of making or publishing obscene matter. The judge ordered him to write an apology to the girl whose brutal rape he filmed and distributed; in addition, the boy was ordered to write an essay for the court on the positive and negative aspects of social media. Punishment of this kind might make a fine addition to another, harsher punishment, but alone it appears to be a mere slap on the wrist.

In terms of gag orders, one possible solution is to make the issue part of the adversarial process. A general gag order could be implemented over the trial proceedings initially, especially when minors are involved. Making the issuance of a gag order over the terms of a plea agreement or a sentencing motion arguable by the parties, however, would give both sides the opportunity to present their reasoning for or against entering the gag order, just like any other motion. This could still potentially result in a gag order being issued over the victim’s objection, posing a problem in terms of the victim’s First Amendment rights.

---

107 Dietrich Article, supra note 12.
108 Cohen, supra note 37.
109 Although the procedural specifics of this decision are not binding on U.S. courts, this case is instructive because of both the strong element of social media involved as well as the creativity employed by the judge in determining the assailant's punishment. See Pitt Meadows Article, supra note 11.
110 Id.
111 Id.
112 Katz, supra note 72.
The primary public outrage in Dietrich’s case resulted from the fact that she was being silenced with respect to revealing the terms of the plea agreement, rather than the fact that she was being prohibited from revealing the identities of her assailants.\textsuperscript{173} It is the normal practice to protect the identity of minors that are parties to court proceedings, even when they are the defendants.\textsuperscript{174} A reasonable and practicable alternative would be to allow gag orders to extend only to the identities of the minor parties involved, rather than cloaking in secrecy the details of plea agreements and sentencing. Forbidding a sexual assault victim from discussing the terms of a case, especially when he or she would be expressing discontent with the proceedings, is a violation of the right to free speech under the First Amendment.\textsuperscript{175} Preventing a victim from sharing his or her story or discussing feelings about the event can also severely inhibit the ability to heal from an incident, as discussed above.\textsuperscript{176}

But what about vigilante justice? Should victims be allowed to protect themselves if and when the current laws cannot? Dietrich posted her assailants’ names to Twitter in defiance of the court’s gag order, which revealed her as a victim not only to her friends and family but ultimately made her a national headline.\textsuperscript{177} Victims in the distant past resorted to vigilante justice much more often than in the present day.\textsuperscript{178} In the present day, however, courts are much more capable of addressing criminal wrongs that vigilante justice should, ideally, not be necessary.\textsuperscript{179} A reaction like Dietrich’s—taking to the Internet to achieve some brand of social justice—is only going to become more prevalent as individuals place increasingly more of themselves, their feelings, and their problems online. If some of the proposals included here are implemented, the occasions in which a victim would feel driven to resort to this kind of desperate gesture would decrease. A victim should never have to resort to resources

\textsuperscript{173} Lash, supra note 17.
\textsuperscript{174} Id.
\textsuperscript{175} Kennerly, supra note 24.
\textsuperscript{176} Goodmark, supra note 14, at 114.
\textsuperscript{177} Lash, supra note 17.
\textsuperscript{179} Id.
outside of the courts to secure justice.

VII. Conclusion

The current rape shield laws and victims’ rights statutes were put in place in an attempt to protect the privacy of victims in two ways: rape shields are meant to keep defense attorneys from assassinating the character of a victim by confronting them with their personal sexual history or predisposition during cross-examination, while victims’ rights statutes prohibit the media from publishing the names of victims. These, along with the gag orders routinely placed over sexual assault proceedings, are meant to guard a victim’s privacy in the hopes that the victim will be able to return to a relatively normal life after the trial is over. Additionally, it is a widely held belief among victims’ rights advocates that victims will be more likely to come forward and press charges against their assailants if they believe they can do so under relative anonymity.

Regrettably, however, the Internet and social media now make it possible to completely circumvent these statutes. Assailants can use social media platforms to strip their victim of privacy and revictimize them by harassing them via private message or posting pictures and text that may remind the victim of the attack. Assailants can also use the threat of revealing a victim’s identity on a public forum to convince the victim not to press charges, which is completely contrary to the purpose and goals of the privacy statutes discussed above.

For these reasons, the current statutes need to be reevaluated to take online activity, and specifically social media activity, into account. Additional penalties should be imposed on those who reveal a victim’s identity online or post pictures of an attack online, especially in a forum as personal as social media. Privacy should also be considered proportionally; if an assailant destroys a victim’s chance at privacy, he or she should have no right to privacy.

Gag orders, and the manner in which they are implemented, must also be reevaluated. Rather than allowing judges to issue gag orders in lieu of a motion, the process of issuing gag orders in sexual assault cases should be solely a part of the adversarial process to allow for unusual situations such as Savannah Dietrich’s, in which a victim who had already lost her anonymity was banned from revealing the identities of her assailants. To that end, if a gag order is
implemented, it should only extend to the identities of the minor parties involved and not to the entire proceedings. To bind a victim from sharing his or her dissatisfaction with the outcome of a trial is a clear violation of his or her First Amendment rights. Furthermore, prohibiting a victim from telling any part of his or her story, including his or her dissatisfaction, is detrimental to the victim’s healing process and detrimental to the possibility of laws evolving to address gaps and inefficiencies. Victims must be able to express their discontent with the current laws in order for legislators to be aware of the flaws in the system. Otherwise, the failings of the law will never be rectified.

As society progresses, so too must the law if it is to remain relevant. The Internet and social media have become fixtures in our culture, and the laws must be reevaluated to ensure they are shielding the parties they were created to protect. Otherwise, there can be no hope that the legal system will encourage victims to seek its protection, will see their cases through to trial or, most importantly, will protect victims of sexual assault from suffering further harm.