AT THE INTERSECTION OF SOCIAL MEDIA AND RAPE CULTURE: HOW FACEBOOK POSTINGS, TEXTING AND OTHER PERSONAL COMMUNICATIONS CHALLENGE THE “REAL” RAPE MYTH IN THE CRIMINAL JUSTICE SYSTEM

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Abstract
This article examines the involvement of smartphones and social media in the execution of sexual assaults when perpetrators and their peers document rapes via handheld technology and then share these depictions using this technology and social media platforms. Particular attention is focused on the how the interactions among communicative technologies, social media, and acts of rape provide an opening to undermine rape culture, including pervasive myths about what constitutes “real” rape, within the U.S. legal system. At the reporting stage, social media depictions and exchanges may provide sufficient evidence to challenge local “rape tolerance” and push legal actors to investigate and prosecute alleged cases of sexual assault and rape. Similarly, at trial this evidence may inform prosecutorial and judicial decisions as well as juror deliberations. At the same time as they create openings to challenge hegemonic rape culture as it exists within the legal system, these technologies create new outlets for victim blaming and may complicate discussions about female and male responsibility and sexuality, both in rape cases and society more broadly. Ultimately, while social media simultaneously challenges and reinforces rape culture across social and legal environments, this article concludes that social media evidence introduces opportunities for victims seeking redress through the criminal justice system to challenge the dominant rape narratives including the “real” rape and “she is

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lying” myths as they function in the legal system.

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INTRODUCTION

While sexual violence has always been epidemic in American culture and society, in the past few years a new dimension to these crimes has emerged as photos and videos of teenage girls being raped1 have been widely shared on social media via computers and smartphones. In a shocking pattern, cases where a teenage girl has been raped by acquaintances have repeatedly come to the attention of peers and the public (and oftentimes the victims themselves) as a result of the dissemination of depictions and/or descriptions of the rape by the perpetrators, their accomplices, and others via computers, smartphones, and social media.2 This information has been shared via text message, Twitter,

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1. For the purposes of this article, the Federal Bureau of Investigation’s (FBI) definition of rape will be used. Effective January 1, 2013, the FBI changed its definition of rape for gathering statistical information. The definition of Rape is as follows: “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” Frequently Asked Questions About the Change in the UCR Definition of Rape, FED. BUREAU INVESTIGATION (Dec. 11, 2014), http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions. Thus, rape includes digital penetration of the victim’s anus or vagina as well as inserting foreign objects into the victim’s anus or vagina. This is in stark contrast to the previous definition of rape which was limited to “[t]he carnal knowledge of a female forcibly and against her will.” Id. The previous definition led many law enforcement officers to exclude oral and anal penetration, as well as penetration with foreign objects and/or fingers, from reported rape statistics. Id.

Notably, in Steubenville, Ohio a sixteen year old female was raped by two sixteen year old males, and the crime only came to the attention of the public, local, and national media because the perpetrators and their accomplices extensively documented and described the events of the night on Twitter, YouTube, and Instagram, widely sharing this information throughout the local community. In addition, the recent suicides of two young women—Audrie Pott and Rehtaeh Parsons—after each was raped, and depictions of the rapes were shared among their peers, raise questions about the effect that technological advances in personal communication and the advent of social media have on not only rape culture, but also on investigations and prosecutions of rapes within the United States criminal justice system. To that end, this article posits that interactions among communicative technologies, social media, and the act of rape in the United States provide opportunities to undermine rape culture, including rape myths, at all stages of the legal process. Social media evidence may prove crucial in informing a law enforcement official’s decision to investigate alleged cases of sexual assault and rape, a prosecutor’s decision to file charges, and may affect case handling inside and outside of the courtroom, including jurors’ deliberations at trial.

In order to examine the interactions among social media, rape culture, and the criminal justice system, we will focus attention on the role that rape myths, specifically the “real” rape myth, play in the decisions of legal actors and the ramifications of the continuing power of these myths for rape victims. Rape myths are powerful tools that work to substantiate a rape culture in society, and undermine rape investigations and prosecutions in courtrooms, and the legal system more broadly. As such, opportunities for challenging, and undermining, rape myths must be explored and exploited. In *Rape and the Culture of the Courtroom*, Taslitz examines how prevailing cultural narratives surrounding rape interfere with rape prosecutions, and challenges individuals interested in reforming rape law and culture to stop “bemoan[ing] cultural tales that oppress women and paint a rape victim as incredible. Instead, we must work toward incremental change in rape stories. We achieve such change by pointing out weaknesses in the application of some cultural narratives to a particular case and by giving jurors new information.” The proliferation of rape depictions and the discussions of these assaults—both by perpetrators and

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3. See, e.g., Burleigh, supra note 2 (“From Instagram to texting, young people with raging hormones and low impulse control are passing around what amounts to child pornography.”).
4. See Macur & Schweber, supra note 2 (providing an in-depth discussion of the Steubenville, Ohio rape case).
5. See, e.g., Burleigh, supra note 2 (identifying these two victims by name because their identities have been widely shared in the national media whereas the Steubenville victim has not been publicly identified).
their accomplices bragging about their exploits and the peer and community-wide response that often follows—that occurs on social media and is shared via private personal communications provides such an opportunity to work toward incremental change and challenge existing rape culture. These depictions and discussions can point out the weaknesses and blatant falsehoods inherent in rape myths as they apply to individual victims, thereby forcing law enforcement, prosecutors, and jurors to think beyond the parameters of contemporary American rape culture.

To that end, this article examines how rape myths affect the ways that rape and sexual assault cases are dealt with both in the legal system and in societal discourse more broadly, and focuses attention on how social media has emerged into this context to affect rape culture in the United States. Particular attention is focused on the “real” rape frame—the fiction that “real” rapes are perpetrated by violent strangers—and the “women are liars” rape myth—the belief that most women who report rapes are lying—that substantiates the former. When female rape victims report rapes that do not conform with the expectations associated with the “real” rape frame—e.g. when a woman reports that she has been raped by an acquaintance—they are frequently dismissed by peers and the legal system as liars, consistent with the “she is lying” myth. Yet, new technologies and the frequent, growing use of social media have the potential to undermine the “she is lying” myth and how it works to substantiate the “real” rape versus “simple” rape or “bad sex” distinctions that are a cornerstone of rape culture in the United States. The depictions and descriptions of young women being sexually assaulted that are posted on social media and shared via smart phones and text messages document, and verify, rapes that do not conform to the “real” rape frame. This evidence makes it more difficult to write rape victims off as liars, and puts pressure on the criminal justice system to recognize that these accounts are legitimate and should be investigated as crimes. Attention is focused on the important role that new communicative technologies are playing in sharing information about acquaintance rapes and how the documentation of this criminal behavior leads actors, both inside and outside of the legal system, to respond. While legal actors, including law enforcement and prosecutors, have taken notice of the heavy usage of social media in documenting acquaintance rapes in some instances, in other situations a variety of actors outside of the legal system—ranging from community activists acting alone to internationally-known groups such as Anonymous—have responded to the lack of action by legal actors by availing themselves of the same social media platforms and technologies to increase public awareness of these issues, and push police and prosecutors into pursuing cases and charges. As such, this


9. Both “simple” rape and “bad sex” distinctions will be discussed at length in upcoming sections of the article.

10. See Sarah Jones, The Protesters of the Steubenville Rape Case Inspire Real Change, POLITICUS
article examines how social media evidence opens opportunities to challenge the dominant “real” rape narrative for victims seeking redress through the criminal justice system, and for those that seek to increase justice for these victims.

I. **THE SOCIAL CONSTRUCTION OF RAPE: RAPE CULTURE AND RAPE MYTHS IN THE UNITED STATES**

For decades, feminists and rape reform advocates have drawn attention to what is often described as the “rape culture” present in the United States. In Susan Brownmiller’s groundbreaking work *Against Our Will: Men, Women and Rape*, she begins with a discussion of the “mass psychology of rape” and explains that

Man’s discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times, along with the use of fire and the first crude stone axe. From prehistoric times to the present, I believe, rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.

While there is no definitive or exhaustive listing of the various components that constitute rape culture in the United States, various socio-cultural and legal elements intersect to construct and substantiate a rape culture. Sexual violence and rape being validated, justified, and obfuscated, and the constraints on women and their behavior, are key parts of rape culture. However, in addition to the violence itself, the discourse employed to discuss these issues is a central component of rape culture. The ways in which society speaks about issues of sexual violence and rape serve to reinforce, normalize, and rationalize the sexual violence itself. Importantly, these discourses also condition, and often determine, how institutional actors within the criminal justice system, such as law enforcement, prosecutors, judges, and jurors, respond to and evaluate rape allegations.

While multiple categorizations and critiques of the problematic linguistic aspects of rape culture exist, a particularly salient conceptual framework is the “rape myth” frame. The “rape myth” frame informs how the general
population and varied groups of political and legal elites understand rape in the United States, and it is used analytically by individuals studying rape culture.\textsuperscript{13} Further, it can be evidenced both inside and outside of the courtroom, and is deployed (sometimes unintentionally) by those participating in the political and legal forums surrounding these issues as well.\textsuperscript{14} As a key part of rape culture more broadly, these rape myths exist across institutional locations and circulate not only in popular conversations about rape (both online and offline), but also are reflected in the discussions and policy outcomes related to the issue of sexual violence.\textsuperscript{15} These discourses, and the substantive policies and decisions that follow, make it difficult for rape victims to seek legal redress.

Where rape culture exists victims often are discouraged from reporting rapes when they happen because “a rape culture condones physical and emotional terrorism against women as the norm.”\textsuperscript{16} Rape is normalized as an inevitable occurrence in the course of human affairs. As such, rape is understood to be an inevitable part of war and genocide,\textsuperscript{17} a tool of social control (in settings ranging from southern antebellum plantations to prisons as well as influencing women’s behavior as they move about their communities),\textsuperscript{18} an unfortunate side-effect of alcohol-infused events,\textsuperscript{19} a turn-on for males and females alike when depicted in mainstream media and pornography,\textsuperscript{20} the right of husbands and male significant others to force their wives and female partners to have sex against their will,\textsuperscript{21} and “case[s] of ‘incorrigible teenagers’ drinking alcohol and having sex.”\textsuperscript{22} Even in those cases where a victim does come forward, formal charges often are not filed or

\begin{footnotes}
\footnote{13}{Martha R. Burt, \textit{Cultural Myths and Supports for Rape}, 38 J. PERSONALITY & SOC. PSYCHOL. 217–219 (1980) (“The burgeoning popular literature on rape . . . all points to the importance of stereotypes and myths—defined as prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists—in creating a climate hostile to rape victims. Examples of rape myths are ‘only bad girls get raped’; ‘any healthy woman can resist a rapist if she really wants to’; ‘women ask for it’; ‘women ‘cry rape’ only when they’ve been jilted or have something to cover up’; ‘rapists are sex-starved, insane, or both.’”\textsuperscript{10} See, e.g., ESTRICH, supra note 11.}

\footnote{14}{See \textit{Taslitz}, supra note 7.}

\footnote{15}{See Justin Wedeking, \textit{Supreme Court Litigants and Strategic Framing}, 54 Ant. J. POL. SC. 617, 617 (2010) (“There is an extensive literature devoted to gauging how much influence parties have on U.S. Supreme Court decisions.”).}

\footnote{16}{\textit{Transforming a Rape Culture}, supra note 11, at vii.}

\footnote{17}{See BROWN MILLER, supra note 11, at 31–113 (discussing sexual violence as related to several national and international wars); CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 144–233 (2006) (discussing sexual violence against women and its progression over the course of history).}

\footnote{18}{BROWN MILLER, supra note 11, at 11–15.}

\footnote{19}{See \textit{Sanday}, supra note 11, at 11 (noting that rape is sometimes understood as a byproduct of alcohol consumption).}

\footnote{20}{See BROWN MILLER, supra note 11, at 288 (identifying rape as a widely depicted fantasy); TASLITZ, RAPE AND THE COURTROOM, supra note 7, at 33 (examining the theme of rape as seduction).}

\footnote{21}{See Carol J. Adams, \textit{I Just Raped My Wife! What Are You Going To Do About It, Pastor? The Church and Sexual Violence, in Transforming a Rape Culture} 57 (Emilie Buchwald, Pamela Fletcher & Martha Roth, eds., 1993) (discussing sexual violence and marital rape and the role of the church therein).}

\footnote{22}{These are the words of Robert Rice, the Nodaway County prosecutor, discussing the allegations in the Maryville, Missouri rape case in which he declined to file charges against the alleged attackers of fourteen year old Daisy Coleman: “They were doing what they wanted to do, and there weren’t any consequences. And it’s reprehensible. But is it criminal? No.” Dagan Arnett, \textit{Nightmare in Maryville: Teens’ Sexual Encounter Ignites a Firestorm Against Family}, KAN. CITY STAR (Oct. 12, 2013, 9:10 PM), http://www.kansascity.com/news/special-reports/maryville/article329412/Nightmare-in-Maryville-Teens’-sexual-encounter-ignites-a-firestorm-against-family.html.}
\end{footnotes}
perpetrators are not convicted because of the pervasive influence of rape myths at various stages of the criminal justice process.\textsuperscript{23} As a result, rape victims are less willing to report rapes because they fear that they will not be believed or that they will cooperate with intrusive criminal and legal investigations only to have no charges pressed or acquittals in cases that proceed to trial.\textsuperscript{24} Thus, one of the most damaging side effects of rape culture is that it discourages victims from reporting rapes. Low reporting rates work to substantiate other elements of rape culture because the few rapes that are reported and the even fewer rapes that are then pursued by law enforcement often validate the “real” rape myth that “real” rapes are perpetrated by violent strangers and not by those already known to the victim.\textsuperscript{25} This in turn makes it harder for victims of acquaintance rapes to challenge the stereotypes about rapists and rape victims and provides cover to male rapists that do not fit the image of the wild-eyed stranger attacking random women. As such, rape myths both substantiate and perpetuate rape culture.

Using Burt’s early description of rape myths, they are most commonly “defined as prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists.”\textsuperscript{26} Rape myths are many but popular discourses include myriad variations on the following themes: disbelief of women’s rape claims (e.g. “she is lying”); victim blaming and slut shaming (e.g. “she was asking for it”); the myth of masculine aggressive sexuality (e.g. “boys will be boys”); and “real” rape is a violent act perpetrated by a stranger.\textsuperscript{27} While each myth can be analyzed individually, it is important to acknowledge that they are mutually reinforcing discourses and that they intersect and overlap to substantiate a rape culture that empowers men to rape and trains women to be silent victims.\textsuperscript{28} The combined effect of these different variables is to create an environment where rape is understood to exist but is implicitly accepted and explicitly ignored.

While they may be called myths in the literature, this label does not imply that the events described as myths do not occur but rather that they occur with much less frequency than their constant repetition would suggest. Franiuk et al. eloquently make this point, noting that “[a]lthough it is possible that for any specific case the above beliefs may not actually be myths (i.e., the ‘she is lying’ allegation is accurate if a woman has made a false report), these are ‘myths’ in the sense that data do not generally support these popular beliefs about sexual assault.”\textsuperscript{29} Generally, people do not believe these myths in order to be malicious, misogynist, or intentionally insensitive but rather because they

\begin{thebibliography}{99}
\bibitem{24} Id.
\bibitem{26} Burt, supra note 13, at 217.
\bibitem{28} A major component of rape culture is the extent to which “women are trained to be rape victims” from a young age in the United States. BROWNMILLER, supra note 11, at 309.
\bibitem{29} Renae Franiuk et al., Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case, 14 VIOLENCE AGAINST WOMEN 287, 289 (2008).
\end{thebibliography}
are useful to individuals struggling to understand the often-shocking reality and prevalence of sexual assault. Rape myths and cultural narratives help people to deal with the disconnect between the reality of sexual assault, which is profoundly unjust and a violation of an individual’s personal integrity and sense of safety, and the fact that sexual assault is widespread in the United States and is frequently committed by those with close ties to the victims. Unsurprisingly, the dissonance between these dynamics is profoundly troubling for many men and women and belief in rape myths can function as a self-protective mechanism to deal with this dissonance. In this way, believing in these myths “protects the believer from sensing his or her own vulnerability to similar coerced events.” While these beliefs can be useful by helping people cope on an individual level with the contradictory ideas that women are sexually assaulted with frequency while those that assault them largely go unpunished by the legal system as well as society more generally, these myths are highly problematic because of their broader implications. As Franiuk et al. argue, “[b]y using rape myths to explain away the majority of sexual assaults that occur, a culture maintains that sexual assault is a serious violation that should be punished harshly (in the rare instances) when it does occur.”

At the societal level, rape myths have seemed to dominate the public conversation on violence against women for several decades. Indeed, many scholars argue that “[i]t is by now common knowledge that myths and stereotypes about rape and rape victims abound.” This is particularly true in the American legal context where legal procedures and decisions “continue to be informed by culturally-powerful interpretive frameworks that legitimate male violence and reproduce gendered inequalities.” As such, “the law ostensibly constrains male violence against women but in substance allows such violence to continue.” Interestingly, rape myths have both persisted in the public and political discourse about sexual violence as they have simultaneously been challenged by feminist scholars and organizations. Despite these many challenges, rape myths endure as common beliefs in the population with significant consequences for society at large and the rights and interests of women in particular.

30. See Burt, supra note 13, at 218 (discussing the “just world” hypothesis where people only choose to believe the myths in order to protect “the believer from sensing his or her vulnerability to similar coerced events”).
31. Id.
32. Id.
33. Franiuk et al., supra note 29, at 289.
36. Id. at 61 (quoting SUE LEEs, RULING PASSIONS: SEXUAL VIOLENCE, REPUTATION, AND THE LAW 2 (1997)).
37. For scholarly critique of rape myths, see Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977); BROWNmiller, supra note 11; SUE LEEs, SEXUAL PASSIONS: SEXUAL VIOLENCE, REPUTATION AND THE LAW (1997); KIMberly A. LonsWAY & Louise F. Fitzgerald, Rape Myths: In Review, 18 PSYCh. OF WomEn Q. 133 (1994); MacKINNON, supra note 11; JAMES PtACEk, BATTERED WOMEn IN THE COURTROOM: The power of judicial responses (1999).
Within the broader rape myth frame several subframes, or specific yet largely erroneous beliefs about sexual violence, have been identified. In her seminal article on rape myths, Burt enumerated seven of these myths, and in the decades since, several other scholars have contributed to the expansion of this list. One subframe that is especially salient for an examination of how these discourses circulate on social media and in the legal system is the "real" rape myth. "Real" rape involves "gang rapists, men who use or threaten to use deadly weapons, and, most importantly, strangers. Real rape makes sex without a woman’s consent a crime. However, even for real rape, an exception to the consent requirement often exists when a woman’s behavior or dress is deemed ‘provocative.’”

Discussed extensively by Estrich and others, this false belief that only rapes which fit a stereotypical model of rape are "real" rapes reinforces the idea that rapes where the circumstances do not fit this narrow mold—e.g. where the victim knows the attacker, where there are drugs and/or alcohol involved, or where there are not high levels of physical violence that can be evidenced after the fact—are not “real” rapes. Estrich contrasts “real” rape with the much more frequently occurring “simple” rapes, also called “normal” rapes, “other sex crimes,” or “acquaintance” rapes. These “simple” rapes may involve “rape by someone the woman knows and who does not use a weapon or significant physical force against her. In a simple rape, a woman can be subjected to sex without her consent and in the face of her protests.”

In contrast to “simple” rapes, rapes that involve strangers jumping from the bushes, evidence of extreme physical violence (apart from the rape itself) after the fact, and victims who are able to demonstrate that they resisted as much as possible are deemed “real” rapes. In these cases, “[c]ourts and jurors tend to assume that a woman raped by a stranger did not consent—

38. Franiuk et al. identify the following specific myths from Burt’s analyses (see Burt, supra note 13): (a) myths about the victim lying and having ulterior motives; (b) myths about the victim “asking for it” with her behavior; (c) myths about the type of woman who is likely to be a victim of rape (which largely depict rape victims as promiscuous); (d) myths that excuse perpetrator behavior; (e) myths that depict perpetrators as “sex-crazed psychopaths”; (f) the belief that rape itself is a trivial event; and (g) myths that rape is a natural occurrence. Franiuk et al., supra note 29, at 288–89.

39. See Linda Coates, Janet Beavin Bavelas & James Gibson, Anomalous Language in Sexual Assault Trial Judgements, 5 DISCOURSE & SOC’Y 189 (1994) (adding the myth consensual sex can be conflated with rape, and observing that often vocabulary which is used to describe sexual assault is more suitable to consensual acts than to assault). See also Stewart et al., supra note 34, at 160 (highlighting the notion that rape is not distinguished from sex, and arguing that “the belief that rape is a sex act rather than an assault” can be correctly identified as a common cultural myth about sexual violence).


41. ESTRICH, supra note 11; LEES, supra note 37; Coates et al., supra note 39; Stewart et al., supra note 34.

42. ESTRICH, supra note 11, at 5.


44. See FORELL & MATTHEWS, supra note 40, at 224.

45. Id.

46. See generally id. (defining the characteristics of “real rape”).
unless she is a prostitute or was dressed like she was ‘looking for trouble.’”

However, despite this acceptance in the courts, it should be noted that victims of these “real” rapes nevertheless may be vilified by their communities or families, even while they are able to avoid questions that victims of “simple” rape must face such as whether or not they actually consented.

Within the hegemonic discursive paradigm of “real” rape, instances of rape that fall outside of this narrow definition are seen by the community at large and the legal system in particular as not “real” rape and thus as legal, tolerable, or both. Often, these crimes will be dismissed with invocation of related myths that it was not “real” rape because “the victim had it coming” and/or the “victim is a liar.” Indeed, Stewart et al. found that the reasons for a rape being evaluated as not “real” can vary widely and include the victim having “a prior relationship with the assailant, a delay in reporting the crime, being a prostitute, a black woman, a welfare recipient, a hitchhiker, obese, or being under the influence of drugs.” This is reiterated by Forell and Matthews who note that based on this type of criterion some women are essentially viewed by society and the courts as unrapeable. These women “may be bad or black or his wife or the kind of woman or girl who was looking for trouble or a ‘good time.’” Either way, the “real” rape frame sets her victimization outside of the popular conception of what is allowable for a rape victim and therefore her rape is judged to be not real.

Highlighting how this discourse of “real” versus “simple” rapes is profoundly gendered, male victims also are challenged by this discourse separating “real” rapes from “simple” rapes, but in very different ways than female victims. For male victims of rape, their masculinity itself is challenged by their victimization. For example, it has been reported that after being raped “male victims considered their reputation as ‘real men’ to have been undermined.” However, as Forell and Matthews point out, a male victim is generally not asked by the justice system whether he “really wanted it,” or whether he communicated his lack of consent to his attacker. The system also does not ask whether he was intoxicated, what he was wearing, or why he was hitchhiking or walking alone late at night. Rather, a man’s lack of consent is assumed based on the coercive or violent circumstances of the attack.

Indeed, it appears that the “real” rape standard falls squarely on women who are victims of rape, and seemingly not on male victims of the same crimes.

47. Id. at 229.
48. Id.
49. See Stewart et al., supra note 34, at 160 (“Common cultural myths and stereotypes about rape include . . . that women lie about being raped, and the belief that women are responsible for their own victimization.”).
50. Id., at 166.
51. FORELL & MATTHEWS, supra note 40, at 229.
52. Id.
53. LEES, supra note 37, at 96.
54. FORELL & MATTHEWS, supra note 40, at 229.
While male victims are affected by the discourses separating “real” from “nonreal” victims they experience this in very different ways than female victims.

In her research, Estrich at times describes the rapes that fall outside of the “real” rape framework as “normal rapes,” and the term “normal” is darkly appropriate in a couple of ways. First, numerically, they truly are more “normal” in the sense that rapes that involve factors that set them outside of the “real” rape frame are far more common than instances of “real” rape. In a 1998 study, Tjaden and Thoennes found that of the rapes reported by women that they surveyed, 86% of these reported rapes had been committed by people whom these women knew. The U.S. Department of Justice estimates this number to be lower, finding in the 2005 National Crime Victimization Study that approximately two-thirds of rapes are committed by a person that is known to the victim and that 73% of sexual assaults are perpetrated by someone who is a non-stranger to the victim. Second, by differentiating “simple” rapes as outside of the “real” rape framework, these rapes are normalized as experiences that are basically typical, and not as incidences of illegal physical sexual violence that are criminalized as a matter of law. The consequences of the broad acceptance of the “real” rape versus “simple” rape binary are effectively summarized by Kim, who notes that the “baseline of rape crimes is rape at its most extreme, such that other versions of rape are considered lesser, and thus minimized.” However, a more detailed examination of these effects is warranted in order to grasp how these consequences are manifested and exhibited in the United States’ criminal justice and legal systems.

B. “She’s Lying”: A Key Component of the “Real” Rape Myth

Women who have been raped often fear that their assertions will not be believed by friends, family, the public, law enforcement, and other individuals in a position of authority and power. All too often, these women are right. Judges and juries continue to be skeptical of rape, demanding greater proof than for many other types of crimes and demonstrating deep suspicion of victims. In the usual robbery case, for example, the victim’s identification of the defendant alone results in conviction . . . . Rarely is the robbery victim portrayed as deranged or a liar. But rape is different. With rape, the victim’s truthfulness is almost always challenged . . . . Or the problem is her character . . . . Consequently, we demand corroboration in the form

55. See Estrich, supra note 11; Susan Estrich, Rape, 95 Yale L.J. 1087 (1986) (discussing the use of the term “normal” to describe rapes).
of physical evidence of force, prompt report, eyewitnesses, and tributes to pure character. Yet, the majority of rape cases leave no wounds, not even bruises or scratches. Thus, the presumption when a woman reports a rape is that she is lying unless she can prove otherwise by providing indisputable physical evidence or corroborating witnesses. Absent incontrovertible evidence, law enforcement may discourage a victim from filing charges or opt not to pursue a case.

Why are female rape victims not believed? According to Raphael, “Disbelief of women who report rape rests on two foundations: (1) assertions that the majority of rape claims are false, and (2) minimization of rape as ‘bad sex.’” Consistent with the first point, women who state that they have been raped are often written off as liars. There are various explanations offered for why a woman would concoct a fictitious rape including an attempt to cover infidelities, seeking revenge and/or trying to punish the alleged male rapist(s). The fact that many women often postpone reporting rapes—and during these delays evidence is washed away or destroyed and physical wounds begin to heal—is offered as evidence that the rape did not in fact occur and that the woman is lying because if she had been truly raped she would have reported it immediately. At the same time, many women find that their rape claims are ignored or dismissed because authorities do not believe that they were raped but rather engaged in “bad sex.” “Bad sex” is a term coined by Katie Roiphe to explain the morning after regrets or embarrassment a woman may feel about her actions (or inactions) during a sexual encounter including putting herself in compromising positions and/or engaging in sex or promiscuous behavior. According to Roiphe, “bad sex” often results from poor judgment or regrets but it is not rape: “If a woman’s ‘judgment is impaired’ and she has sex, it isn’t necessarily always the man’s fault; it isn’t necessarily always rape.”

Thus, the general skepticism that individuals express about the prevalence of rape combined with institutional apathy when responding to rape reports are

60. TASLITZ, supra note 7, at 6.
two major factors in creating and sustaining American rape culture. These facets of rape culture are simultaneously substantiated by the myth that most female rape victims are liars and perpetuate the myth by bluntly disregarding women’s voices and experiences. Those institutions that are complicit in systematic apathy include law enforcement, institutions of higher education, and religious organizations. Part of this apathy is predicated on the belief that most rape claims are false, but another aspect of institutional apathy is the desire to protect an organization or entity over the individual. In these instances, it is easier to dismiss a single victim’s claim than to jeopardize the integrity and/or solvency of an institution.

Indeed, evidence suggests that systemic apathy exists across the criminal justice system. While it is not true for all law enforcement officials and prosecutors, rape myths including the “real” rape frame affect the manner in which many of these actors approach and handle rape cases. For example, many “critics also allege that prosecutors’ assumptions regarding ‘real rapes’ and ‘genuine victims’ lead them to decline to file charges in cases in which it is clear that a sexual assault occurred but in which it also is clear that the odds of proving the case to a jury are low.” Thus, even though it has been recognized as a problem for several decades, institutional apathy within the criminal justice system in the handling, investigating and prosecuting of rape cases continues to abound.

The fact that female rape victims are dismissed as liars further contributes to the existence and maintenance of rape culture. First, fear that one will not be believed leads rape victims to avoid reporting rapes and sexual assaults. Thus, for many rape victims “their initial reaction to rape . . . is often consistent with cultural expectations: silence.” Yet, the consequences of these silences are vast. As Miller and Biele explain, “most rapes go unreported

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70. Zvan, supra note 63.
71. As recent events indicate, institutions of higher education may go to great lengths to avoid controversies associated with sexual violence. Recent examples include Penn State’s negligence in the Jerry Sandusky case and the University of Colorado’s claimed ignorance of sexual assaults involving football recruits and players.
73. Shen, supra note 67.
76. Id. at 1381.
78. TASHLITZ, supra note 7, at 24.
because women are not believed. It’s in men’s interest to disbelieve, and women disbelieve because the truth frightens and appalls them.80 When rapes go unreported the myth that rape is a rare occurrence is substantiated. In addition, those women who do come forward and then have their cases pursued by law enforcement are usually those victims with extensive physical evidence of the attack (i.e. the proof that they are not in fact liars)81 which further perpetuates the myth that “real” rape is demonstrably violent. This in turn makes it difficult for rape victims who delay reporting or who do not have extensive physical injuries to find support within the legal system and other institutions.

II. “REAL” RAPE IN THE LEGAL SYSTEM

The dimensions of the “real” rape frame present in the legal system are in many ways continuous with the existence of rape culture that exists in other institutional locations and in society more broadly.82 This is unsurprising because a foundational tenet of sociolegal literature is that “law has a distinctly social basis; it both shapes—and is shaped by the society in which it operates.”83 As such, the criminal justice system plays an integral role in the construction and perpetuation of rape myths. While other institutional locations may provide greater opportunities for challenging rape discourse and dismantling rape culture,84 it is important to examine rape culture as it exists within the legal environment for two key reasons. First, rape myths are prevalent in the criminal justice system and it is essential to challenge these stereotypes within their institutional context. Second, tacit acceptance of rape myths within legal venues validates and sanctions these myths in other institutional and social contexts.

Rape myths, the “real” rape frame in particular, are already in the legal domain and influencing the conduct of law enforcement85 as exemplified by “[t]he discourses of rape that surround the criminal justice system’s treatment of rape . . . [and] construct stranger rape as ‘real rape’ and render the vast majority of rapes invisible” marking victims of rape whose experiences deviate from the hegemonic “real” rape model as liars.”86 The “real” rape frame informs how actors within the criminal justice system respond to rape victims. As feminist legal and sociolegal scholars have noted, “[w]hen women bring a claim of rape before the law, such utterances of non-consent do not face an
open field of democratic consent, but rather a highly regularized and over-
determined one, since all such utterances take place in a context already cross-
hatched by power, genres and discourses." In order to challenge these
structures of power and "track and expose law’s implication in women’s
disadvantage with a view to bringing about transformative social and political
change," they must be met and addressed in the legal institutional settings
within which they occur.  

In addition, legal discourses and proceedings are powerful influences
beyond the criminal justice system in American society and the acceptance of
rape myths within the former may legitimate their presence in the latter. This
process of legitimation is the second key reason that the “real” rape discourse
must be examined, addressed, and challenged in the legal environment.
Though legal claims do not have the same power as scientific claims, “law is
able to make the same kinds of claims to truth as the sciences and, in so doing,
exercise a power that is seen as legitimate. It does this not simply through
judgments, but in the disqualification of other accounts." A legal system that
deploys the “real” rape frame when evaluating a victim’s account empowers
other institutional and community actors to disqualify particular accounts of
sexual violence. The actions of law enforcement and actors within the criminal
justice system not only affect the litigants, but also shape the future terrain of
the law and societal discourse more broadly. Specifically, the accounts of
victims whose circumstances of victimization are different than the conditions
of the “real” rape model are silenced and disqualified as they are written off as
liars because their victimization falls outside of the dominant understanding of
what is sexual violence. Legal language itself is especially powerful and as
rape culture is largely grounded in problematic discourse its power and
reification in the legal environment substantiates the legitimacy of rape myths
in ways that have significant repercussions for not only the victims and the

87. Nina Philadelphoff-Puren, The Mark of Refusal: Sexual Violence and the Politics of
88. Joanne Conaghan, Reassessing the Feminist Theoretical Project in Law, 27 J.L. & SOC’Y 351, 359
(2000).
89. Challenging power structures that disadvantage women (as well as minorities and often in an
intersectional way) is not novel, and the American legal system has long been implicated in this way and
simultaneously challenged by feminist legal scholars and practitioners. For instance, “[i]t is well known that
the history of the offence of rape expresses a commitment not so much to sexual autonomy as to property
rights: its essence was damage to the proprietary value of virginity or chastity to an ‘owning’ male rather than
any recognition of a women’s interest in her own sexual freedom.” NICOLA LACEY, UNSPEAKABLE SUBJECTS:
FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 106 (1998). However, the law has evolved since this time in
conjunction with explicit challenges brought by feminist legal actors, scholars, and activists, as well as with
the evolution of social mores on sexuality and sexual violence. Indeed, a “study of the history of rape would
have told the jury that rape law has a long and complex past. It changes even without amendment as a
society’s moral attitudes toward women change.” Linda R. Hirshman, Moral Philosophy and the Glen Ridge
Rape Case, 17 HARV. J.L. & PUB. POL’Y 101, 102 (1994). At the same time, law goes beyond reflecting
society’s attitudes and morals to legitimate and shape society and its values and priorities. See Estrich, Rape,
supra note 55. In this manner, law is implicated in legitimizing and perpetuating the myth that “real” rapes are
committed by violent strangers, and that when sexual violence happens in other situations the victims must be
lying about it because their victimization deviates from the model understood and punished by the legal
system.
90. Comack, supra note 83, at 64.
91. Coates et al., supra note 39, at 189.
accused but society at large. 92

Researchers have found that rape myths have an effect across both the legal system and the population more generally. Stewart et al. found:

[C]ultural myths and stereotypes about rape were embraced at all levels of the justice system and by all parties involved. It became clear that victims, police, district attorneys and judges were all drawing upon the same shared definitions of rape, definitions influenced by cultural myths and stereotypes, in making decisions about the processing and merits of a rape case. 93

Marsh et al. found similar patterns among law enforcement officers and prosecutors. 94 For example, they explain that law enforcement considered the existence of a prior or current sexual relationship when deciding whether or not to request a warrant in rape and sexual assault investigations thereby substantiating the “real” rape frame. 95 Similarly, absent substantial physical evidence that a violent attack occurred, prosecutors often determine that they do not have sufficient evidence to persuade a jury that a victim’s account is believable. 96 These findings reflect similar beliefs found among trial judges who “have characterized acquaintance rape as ‘friendly rape,’ ‘felonious gallantry,’ and ‘assault with failure to please.’” 97 These egregious examples echo Estrich’s assessment of the judicial embrace of the “real” rape stereotype:

Far from challenging that bias, common law judges have given it the force of law. By adopting and enforcing the most insulting stereotypes of women victims of simple rapes, they have enshrined distrust of women in the law, legitimated the male fantasy, and ensured that rape trials would indeed be real nightmares – for the women victims. 98

The extant research indicates that “however deeply violative of the victim’s person, date rape is rarely if ever found by a judge or jury to be real rape,” 99 thereby substantiating and perpetuating the “real” rape frame. Within the court system, this belief in the “real” versus “simple” rape dichotomy is highly influential in determining which rapes are prosecuted. This is because prosecutors believe these stereotypes themselves and they are aware that potential jurors believe in the “real” rape stereotype as well. 100 In interviews, prosecutors mentioned over and over again, sexual assaults are among the most difficult cases to try. Because it is not in their best interests to pursue unwinnable cases, prosecutors’ preoccupation with conviction rates

92. Id. at 190.
93. Stewart et al., supra note 34, at 161–62.
94. MARSH ET AL., supra note 43.
95. Id. at 97.
96. Id. at 99.
97. FORELL & MATTHEWS, supra note 40, at 227.
98. ESTRICH, supra note 11, at 56.
prevents marginal CSC [Criminal Sexual Conduct] cases from entering the criminal justice system. . . A prosecutor’s assessment of a case’s winnability is a gauge of more than an individual’s ambitions or attitudes; it is also probably a fairly accurate reflection of community attitudes toward and tolerance for expanded definitions of sexual assault.  

Indeed, prosecutors are well aware that juries are swayed by these powerful social norms and myths in rape cases. Due to the combined effects of prosecutorial belief in “real” rape and their understanding that this belief is widely accepted in the general population from which juries are selected, “prosecutors accept pleas to lesser charges and lesser sentences more frequently in cases involving nonstereotypical victims of rape and nonstereotypical rape scenarios than in those that conform closely to stereotypes.”

Ultimately the prosecutorial, judicial, and overall legal validation of the idea that victims whose experiences fall outside of this hegemonic norm are untruthful and not really rape victims has effects that spread beyond the court system. This understanding not only confirms societal beliefs of the validity of “real” rape, but more alarmingly, because of the meaning-making power and moral force of legal discourse, it effectively reifies the myth and gives legal weight to this problematic belief and discourse. As Coates et al. note, “in describing the acts involved in sexual assault, particularly when the accused is not a stranger to the victim, the language used to ‘fit words to deeds’ creates their meaning.” This meaning—that rapes that do not meet the narrow “real” rape framework are de facto legal—is passed from the legal system to the population where societal beliefs that rapes that do not meet the “real” rape standard are less violent and traumatizing already abound.

The effect of this legitimization extends beyond the legal system and has ramifications for women that are immediate and obvious. Both victims and rapists are aware that “real” rapes are, in essence, the only ones prosecuted. Simultaneously, victims of sexual violence that occurs in other circumstances are disbelieved. This creates a situation where “appropriate” men are given broad sexual access to women with whom they are acquainted, regardless of the woman’s wishes. Ultimately, this “protects rapists by failing to provide their victims with legal recourse . . . A woman on a casual date with a virtual stranger has almost no chance of bringing a complaint of sexual assault before the courts.” This is reflected in Konradi’s findings that women who knew their attackers and had verbally resisted their assailants but had not put up sustained physical resistance all “had some reservations about reporting to

103. Coates et al., Anomalous Language, supra note 39, at 190.
104. See generally, Marsh et al., supra note 43 (evaluating the lower rates of reporting and prosecuting “non-traditional” rapes).
105. Forell & Matthews, supra note 40, at 224.
police and each disclosed her feelings of violation to many others to determine an appropriate course of action.\textsuperscript{107} In contrast,

Forty-three percent of the survivors who decided on their own to report the[ir] rape said that they did not actively deliberate or weigh pros and cons. They experienced the interactions they had with their assailants as reportable rapes. That is they recognized them as sexual violation and as criminal in nature while they were taking place. In general, the sexual assaults they reported conformed closely to cultural stereotypes of “real” rape.\textsuperscript{108}

Thus, the evidence indicates that the “real” rape myth is self-perpetuating as women self-select themselves out of the category of reliable and/or believable rape victims based on their knowledge and understanding of the “real” rape myth. The expectation that one’s rape will not be recognized as “real” leads women to suffer in silence. Those women who do report rapes to law enforcement must confront and run the gauntlet of stereotypes and assumptions about their rapes versus “real” rapes that inform the actions and considerations of law enforcement and prosecutors. Time and again, the “real” rape threshold is established as a stranger rape (versus an acquaintance rape) that is so violent it produces extensive injuries that serve as evidence that the victim resisted her assailant. Absent this evidence, a woman’s rape often is discounted as not “real” and the victim written off as a liar. The consequences of society’s increasing embrace of social media and personal communicative technologies, however, has the potential to increase justice for victims of sexual violence and rape by providing the corroborating evidence that is unfortunately needed to substantiate many women’s rape accounts in the criminal justice system.

III. THE GROWTH OF SOCIAL MEDIA

Changes in technology and personal communications combined with the prevalence of social media provide new opportunities to challenge rape culture and the accompanying rape myths, particularly the myth that women who report rapes that do not conform with the “real” rape frame are liars. The extensive press coverage of the 2012 Steubenville, Ohio rape case in which a sixteen year old female was raped by two sixteen year old males both of whom were later convicted in juvenile court highlights the roles that smartphones and social media played in the events of the evening when the rape occurred as well as their significance in the following weeks and months during the investigation and prosecution of the crime.\textsuperscript{109} The prevalence of smart phones has made it easier than ever before to document events as they unfold via photos, videos or texts. In the United States, fifty-six percent of American adults are smartphone owners,\textsuperscript{110} and most adults are rarely without their

\textsuperscript{107} Konradi, supra note 102, at 20–21.

\textsuperscript{108} Id. at 17.

\textsuperscript{109} See Macur & Schweber, supra note 4 (highlighting Internet postings about the party where the rape is alleged to have occurred).

In addition, smartphones provide users with quick access to social media platforms that enable the dissemination of information to a broad audience. Recipients may then share this content with others via repostings, retweets, and forwards. In a matter of seconds, events unfolding in real time may be broadly shared with a remote audience around the world including many individuals who are able to access the content on their phones.

A study conducted by International Data Corporation for Facebook found that not only are “Smartphones... the central social, communication, and information tool for growing numbers of younger Americans...[but] among smartphone owners age 18–44, making phone calls accounts for only 16% of the total time spent with their devices, whereas the remaining 84% of time is spent texting and interacting with email and social networks.” Similarly, “across 10 popular applications and smartphone activities, email (78%) is the most popular among smartphone users age 18-44, followed by browsing the Web (73%), and accessing Facebook (70%).” Thus, the presence of technology in the lives of young to middle-aged adults is ubiquitous and the use of social media comprises a sizeable portion of the time people are spending on their smartphones.

In fact, use of social media is the number one single most common thing that people do online across devices. Social media use is habitual and more platforms regularly are coming online to capitalize on the huge demand. The standard-bearer is Facebook which continues to grow its membership. In January 2013, Facebook reported that it had 1.06 billion monthly active users and a sizeable portion of these individuals access Facebook via their mobile devices. As such, access to social media is only a touch away for many Facebook users and these individuals uploaded 219 billion photos and “logged 1.13 trillion ‘likes’” in 2012. Committed to growth, Facebook acquired Instagram in April 2012. Founded in 2010 as a photo sharing service, Instagram added video sharing in 2013 and had 300 million active users by January 2015 who had shared 16 billion photos and posted an average of 55 million photos per day. Other popular social media sites include LinkedIn,
Pinterest, Twitter, and Snapchat and new venues are continuously opening new ways to connect online. As such, Facebook and other social media platforms are a common way for individuals to share information with one another in an easy and quick fashion.

Individuals are increasingly relying on services such as YouTube to view and share video content as well. According to YouTube, it has one billion unique visitors per month who watch six billion hours of video every month. In addition, YouTube “reaches more U.S. adults ages 18-34 than any cable network.” As such, individuals may film events using their smartphones and upload the videos to YouTube where they may be shared with a restricted audience or the mass public.

The combined effect of advances in handheld technologies and social media is to revolutionize the way that individuals communicate with one another. Smartphone technology puts a camera in the hand of any individual and enables him or her to be a photographer or videographer. As such, individuals now have the means to document any and all events. At the same time, technological advances provide these individuals with the ability to instantly share these depictions by emailing and texting from their phones or by posting them to widely viewed social media platforms such as Facebook, Instagram, or Snapchat. Given the prevalence of social media in people’s lives, events unfolding in real time often are documented, disseminated, and then viewed by others immediately. Thus, even if individuals regret posting comments, photos or videos and attempt to remove them at a later time the reality is that this information likely has been viewed and possibly shared with others prior to any attempts to delete content. These developments have major consequences for a society that is increasingly obsessed with documenting and sharing every personal act including sexual assaults and rapes.

Technological advances and the growth of social media provide law enforcement officers and prosecutors with access to videos and photos of a broad array of crimes and this evidence is useful in both criminal investigations and prosecutions. This article focuses on the use of social media evidence in the investigation and prosecution of rape crimes because of the fact that rape victims often are treated profoundly differently than the victims of other crimes within the criminal justice system. Notably, the presumption does not exist that most crime victims are liars. As such, when an individual reports that she has been robbed, law enforcement officers are not


121. Id.

122. For example, courts have ruled that Facebook photographs are discoverable and admissible in both civil and criminal litigation, see Kathryn R. Brown, The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs, 14 VAND. J. ENT. & TECH. L. 357, 374–76 (2011–2012); Agnieszka A. McPeak, The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data, 48 WAKE FOREST L. REV. 887, 911 (2013); Emma W. Sholl, Exhibit Facebook: The Discoverability and Admissibility of Social Media Evidence, 16 TUL. J. TECH. & INTELL. PROP. 207, 220 (2013).
inclined to challenge the victim’s veracity or question whether or not a “real” robbery occurred. Conversely, as demonstrated by the prior discussion of the “real” rape frame, the myth that rape victims are liars is pervasive in society and the criminal justice system. Reflecting the fact that criminal investigations and prosecutions of rape crimes are distinct from the treatment of other crimes, technological advances have unique and significant implications for how rape is handled in the criminal justice system in the era of social media.

IV. THE INTERACTION BETWEEN SOCIAL MEDIA AND RAPE MYTHS

The evidence is clear that the ubiquitous use of smartphones and social media is playing a role in the execution of sexual assaults as perpetrators document their actions and/or brag about their sexual conquests via handheld technology and social media. The numerous rapes documented on social media, including the Steubenville, Ohio case, Audrie Pott, and Rehtaeh Parsons, exemplify this trend. There are numerous pros and cons to these technological developments in the context of rape investigations and prosecutions, specifically as they pertain to challenging or reinforcing the “real” rape frame. At the most basic level, however, while social media both challenges and reinforces rape culture across social and legal environments in the United States, it also introduces opportunities for victims seeking redress through the criminal justice system to challenge the dominant rape narratives because both legal and social actors can use social and communicative media as tools to challenge the “real” rape and “she is lying” myths as they function in the legal system. Given the need to challenge the dominant discourse within legal institutions, we examine how social media can be used by legal actors in cases dealing with rape and sexual assault and draw attention to the instances in which it is already being used to these ends.¹²³

As was discussed above, substantial evidence has documented how the “real” rape frame is hegemonic among both social and legal actors, and this is expressed in the legal environment through the common belief that victims of sexual assault who have been victimized by crimes that fall outside of these limited (and rare) circumstances are in some way untruthful. It is in this context that social media and communicative technologies have the potential to make a difference and challenge institutional apathy within the criminal justice system. Communicative technology and social media may be used to challenge the “female victims are liars” myth in several ways. First, social media communications may be utilized as evidence to persuade otherwise reticent police and prosecutors to investigate and take a case. Second, social media evidence may be introduced at trials and used to challenge the “she is lying” myth and other stereotypes about male rapists and female victims in the minds of juries and judges. This would further the goal of achieving more justice for

¹²³. By including these normative discussions, this article contributes to the feminist legal scholarship by recognizing that while “feminist scholarship, particularly in law, tends to be fuelled by an idea that things ought not to be as they currently are . . . feminist theoretical engagement can play a role in envisioning how they might be,” Conaghan, supra note 88, at 375.
rape victims by providing concrete evidence in support of victims’ allegations and replacing the dominant sociolegal narrative that female rape victims are liars. At the same time, the use of social media in rape investigations and prosecutions comes with drawbacks that must be addressed as we debate the potential these new media have in sexual assault cases.

A. At the Reporting Stage: Social Media and Communicative Technologies Challenge Evidentiary Insufficiency and Local Rape Tolerance

Unlike those who fall victim to other crimes, victims of rape face much stricter scrutiny at all stages of the legal process including legal rules used to impose “onerous and unusual evidentiary requirements, designed to cast doubt on the victims’ truthfulness.” Studies of police disposal of rape cases have found that disbelief of victims starts with the police and continues with the early involvement of prosecutors well in advance of the courtroom. As Spohn and Tellis note:

law enforcement officials may present the case to the prosecutor prior to making an arrest and, based on the prosecutor’s assessment of the evidence in the case and evaluation of the credibility of the victim, either make an arrest or (inappropriately) clear the case exceptionally. The role of prosecutor, in other words, may begin well before an arrest is made and the decisions he or she makes may influence, indeed determine, how the case is cleared.

Much of police and prosecutorial discretion at this point in the process is tied to the importance of evidence in determining whether or not to file charges and bring cases. For example, prosecutors rely on the sufficiency standard when deciding whether or not there is adequate evidence to pursue a case. This standard requires corroborating evidence beyond the victim’s testimony and this can be an especially high threshold in sexual assault cases. As Spohn and Tellis explain when discussing the trial sufficiency standard used by the Los Angeles County District Attorney’s Office:

the deputy district attorney will file charges only if there is sufficient evidence to prove the case beyond a reasonable doubt at a jury trial. Moreover, the policy in sexual assault cases is that charges will not be filed without some type of corroboration of the victim’s testimony: DNA evidence that establishes the identity of the perpetrator, injuries to the victim, witnesses who can corroborate the

125. Spohn & Tellis, supra note 76, at 1381–82.
126. Id. at 1382.
127. In the early 1990s, Spohn and Horney asked prosecutors how important thirteen evidentiary factors were to their charging decisions, and asked judges, prosecutors, and defense attorneys how important the same factors were for persuading jurors that a defendant in a rape case should be convicted. Cassandra Spohn & Julia Horney, Rape Law Reform: A Grassroots Revolution and Its Impact 112 (1992). They found that “the types of evidence deemed most important [were] legal factors closely related to the elements of the crime which the prosecutor must prove,” and which in the case of sexual assault can be particularly challenging to gather. Id. at 113.
victim’s testimony, or physical or medical evidence that is consistent with the victim’s account of the incident. Many of the respondents interviewed for this project emphasized that rejection is likely if the incident is a “she said/he said” situation in which the victim is claiming that she was forced to engage in sexual relations but the suspect contends that the sexual acts were consensual and there is no corroboration of the victim’s testimony. In fact, when asked whether there are any types of “she said/he said” cases that would be filed without corroboration of the victim’s allegations, one deputy district attorney replied “No. That would be a violation of office policy. There are cases where I would like to, but no.”

The sufficiency standard has clear and measurable effects in rape cases. Notably, the cases typically disposed of before they ever reach a courtroom are ones that fall outside of the “real” rape frame where the victim is most likely to be accused of lying or not believed by a jury. Examples of these cases include those where there is a lack of physical evidence, there are no witnesses, and the victim and the suspect knew each other prior to the assault.

Many of these cases are disposed at this stage because they fall outside of the “real” rape frame. However, they have the possibility of being productively brought to trial in those instances where there is available social media evidence. The utility of social media and communicative technologies is that they can provide corroborating evidence that aids law enforcement and prosecutors in meeting the sufficiency standard. Descriptions and depictions of acquaintance rapes shared on social media challenge law enforcement officers’ and prosecutors’ common assumptions about victims’ motives to lie and provide them with evidence to introduce in the courtroom. When confronted with photos and videos of unconscious female victims being sexually violated by their peers it is difficult for the criminal justice system to dismiss these assaults as “bad sex” and not “real” rape. Similarly, descriptions of assaults by the assailants and their peers often include frank recognition that the females are in fact the victims of unwanted sex acts.

In addition, using social media and communicative technology in rape and sexual assault cases holds largely untapped potential because these types of evidence do not present some of the key problems that come with other types of evidence in sexual assault and rape cases. Perhaps most importantly, this includes the need to gather physical evidence almost immediately after the assault has been committed lest the evidence be contaminated or destroyed. This evidence collection often is impossible due to the fact that many victims wait to come forward to report their assaults to the police. Indeed, one of the biggest challenges identified by police and prosecutors working on sexual assault cases is the time that elapses between an assault and the victim’s decision to report the crime. During that time, biological and physical evidence degrades or disappears. In contrast, unless permanently deleted,
photographic evidence that is displayed on social media does not disappear in the same way as physical evidence that may be present either on the body of the victim, the rapist, or in the location where the rape occurred. In fact, evidence from social media is often shared beyond the control of the initial user/sharer. This has the effect of making it impossible for a rapist or friends of the accomplice to control this evidence once the “share” button has been pressed, and far easier for police or prosecutors to obtain this evidence even if time has passed since the initial assault. Recognizing this potential, police departments and prosecutors have started to use Facebook as a means of gathering evidence, and are turning to social media to investigate crimes and criminals. Ultimately, Johnson has noted, Facebook seems to be an increasingly “integral piece of the law puzzle.” This has been a particularly promising avenue for the gathering of evidence because the bar for police to access social media content, unlike many other types of evidence, is not very high. Unlike other types of evidence or personal communication, there do not appear to be many legal protections for personal social media, and “[w]ith some confidence, it could be stated ‘that there is no reasonable expectation of privacy for information posted on one’s personal web site.’” Even for those that have argued that there may be some limited expectations of privacy, these limits can be worked around relatively easily because of the shared nature of social media information and evidence. As Johnson explains:

At a distance, it appears that Facebook users have an expectation of privacy in their pages, to the extent that the Fourth Amendment would be triggered if police tried to use Facebook information in a criminal investigation. But it is not that simple because police can use the information on other people’s Facebook pages, separate from the individual user, with no constitutional issues due to the Fourth Amendment’s standing requirement.

Another benefit of social media/communicative technology evidence is that these resources are likely to be especially popular tools of communication among teenagers and young adults, and it is within this demographic group—e.g. on college and university campuses—that acquaintance rape and those rapes that do not fall within the parameters of the “real” rape paradigm are likely to be especially widespread. Due to the fact that rapes among high school and college students often are acquaintance rapes, victims face the

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133. Johnson, supra note 131, at 186.
134. As such, “[s]ome criminal defense attorneys tell their clients to shut down their Facebook accounts in lieu of the police using these pages to collect evidence . . . .” Id. at 186.
135. Marsico, supra note 132, at 975.
137. “More than one-in-four college-aged women report that they have been victims of rape or attempted rape, and one-in-five college women report that they have been raped in college. In most cases, these rapes are perpetrated by persons known to the victim, and the vast majority of these rapists are serial offenders who rape an average of six victim-survivors.” Kam, supra note 58, at 274.
“real” rape stereotype as well as the “bad sex” interpretation of what went on during their assaults. These victims confront both peer and institutional apathy including the fact that “university administrators rarely believe the few students who report their rapes, often continuing to place blame on the victim by asking how she was dressed and whether she encouraged the rape.” As with sexual assaults in other environments, social media evidence could challenge the prevailing dimensions of the “real” rape myth in the face of peer and institutional apathy if a victim is able to produce pictures of the assault and/or text and social media conversations that discuss an assault in ways that differentiate it from consensual sex.

Finally, social media may act as a forum for organizing individuals and groups to put pressure on reticent law enforcement officers and prosecutors to take action in rape cases. This organized pressure especially could be useful in challenging “local rape tolerance” where local law enforcement and/or community members demonstrate “local apathy or disbelief regarding the perpetration of rape crimes [and] inadequate investigation and prosecution of rape cases.” Recent actions by crime bloggers and computer hackers working either as individuals or as a collective—e.g., the international hacker collective known as Anonymous—illustrate how citizens are using social media to organize and publicize rape cases that are not being pursued by law enforcement. These developments reflect the possibility that more people in society may be willing to put pressure on police and prosecutors to take rape reports seriously and that they will use the tools of personal communicative technology and social media to translate their goals into reality.

Thus, substantiating evidence such as photos and videos posted on social media sites and shared via handheld technologies may be powerful tools for validating women’s rape claims and challenging the “real” rape myth at the reporting and investigating stages of the criminal justice process. To that end, the practice of rapists and their accomplices sharing photos and videos of rape acts with one another and over social media may be used to aid women who report rapes by providing visual evidence and/or first and second person accounts that the rape in question occurred. This evidence can be used to overcome local rape tolerance and prompt law enforcement to investigate rape reports and enable prosecutors to meet evidentiary standards and bring cases to trial. At the same time, should institutional apathy persist despite the presence of social media evidence, citizens may use social media to organize and bring public pressure to bear on a reluctant criminal justice system.

The now infamous Steubenville, Ohio rape case illustrates social media’s potential in challenging the “real” rape myth. This case highlights how social media and communicative technology can be useful in getting police to take action in rape cases. In this instance, police were alerted that there was

138. Id. at 275.
139. Id. at 274.
extensive social media content documenting the victim throughout the night of the assault including alleged depictions of the assault as well as witnesses and peers discussing the events on social media and via text messages. These depictions and descriptions served to alert the victim to the rape—she had no memory of the assaults—and prompted her to report the assault to the police. The social media content then provided law enforcement with corroborating evidence that a rape had occurred and gave law enforcement leverage in interviewing witnesses and the assailants. In addition, and as was clearly the case in Steubenville, rape depictions can make it harder for police to be apathetic when a rape is reported and this evidence may aid law enforcement in their investigations and the state when prosecuting crimes. Even though the Steubenville victim could not testify about the rape because she was unconscious during the assault(s), the visual evidence and the corroborating testimony evidenced that a rape occurred and enabled the prosecutor to pursue the case in the courts. At trial, the victim testified that “she was ‘embarrassed and scared’ after hearing about the night she was allegedly sexually assaulted while intoxicated. ‘I honestly did not know what to think because I didn’t remember anything,’ she testified. The teen pieced together the night’s events from Twitter, Instagram photos, a YouTube video, text messages and witnesses.”

After the victim reported the rape, prosecutors seized and analyzed thirteen cell phones as evidence and reviewed 96,270 text messages and 3,188 phone calls as well as 308,586 photos and 940 videos. The seizure of personal cell phones and the extensive examination of the content on those devices are examples of how the police are starting to pay attention to new media in rape cases. As a result of this investigation, law enforcement uncovered numerous videos of and texts about the assaults on the victim. These depictions included photos and videos of the victim being sexually violated that were deleted by the sender and recipients once the police initiated an investigation. Yet, the fact that the content had been shared between parties provided the police with leverage when investigating. One individual who videotaped the victim’s sexual assault “told police that he was in the back seat of his Volkswagen Jetta with Mays and the girl when Mays proceeded to flash the girl’s breasts and penetrate her with his fingers, while the player videotaped it on his phone. The player, who shared the video with at least one person, testified that he videotaped Mays and the girl ‘because he was being

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144. Trent Mays is one of two individuals charged and convicted of raping a minor in this case. Id.
stupid, not making the right choices.’ He said he later deleted the recording.”

This individual would go on to provide key testimony at the trial of the two assailants: “While in the car, ‘Trent [Mays] started fingering her, that’s when I took out my phone and started filming,’ the witness testified, saying he was able to see the alleged victim’s vagina. The girl, he said, did not initiate contact with Mays and was only mumbling while in the car.”

In addition to photos and videos of the assaults, law enforcement found numerous videos and photos of the unconscious victim being carried around a party by a handful of males including an infamous and widely available photo posted on Instagram by a young man in attendance. Furthermore, party attendees and other teens in the community shared descriptions of the events with one another via text and Twitter as well as one lengthy YouTube video in which an intoxicated male makes fun of the victim and laughs about the assault. Notably, the YouTube video was deleted by the poster but individuals, including Internet crime bloggers and hackers, looking for the video were able to find it and reposted it online. The same individual depicted in the YouTube video posted numerous tweets that night including one that said; “Song of the night is definitely Rape Me by Nirvana,” and another that said “You don’t sleep through a wang in the butthole” in an alleged reference to the inebriated and unconscious victim. To that end, the depictions and descriptions of an unconscious victim being violated by multiple males or by a single male before his peers may make it more difficult for the defendants and/or law enforcement to write off the assault as an example of “bad sex” or “morning after” regrets.

Finally, social media provides a venue for a victim’s supporters to rally to put pressure on apathetic institutions and challenge local rape tolerance. This strategy was successfully demonstrated by the role of Anonymous and various bloggers putting pressure on law enforcement to take action in the Steubenville case, and the recent pressure placed on the Royal Canadian Mounted Police to reopen the Rehtaeh Parsons case in Nova Scotia. Similarly, the existence of these depictions may prompt other institutions besides law enforcement to

145. Id.
147. Abad-Santos, supra note 143.
148. Id.
149. When word spread about the rape of the 16-year old female in Steubenville the posters and recipients of Instagram photos, tweets and YouTube videos attempted to delete the depictions but Alexandria Goddard, a crime blogger, was able to locate some of the deleted images and videos and began to post the content on prinniefied.com to pressure law enforcement to take action. Id.
151. Abad-Santos, supra note 143.
152. Macur & Schweber, supra note 4.
respond to rape allegations. Widespread dissemination of rape photos and videos combined with text messages and social media postings about a rape may make it impossible for athletic teams, institutions of higher education and secondary schools to look the other way when a rape is reported. Vanderbilt University’s swift response to allegations that four members of the football team gang-raped a female in a campus dorm—the accused players were quickly dismissed from the team and suspended from the University—may have been expedited by the fact that the perpetrators texted teammates about the assault and allegedly disseminated videos and/or photos of the rape to other individuals.\textsuperscript{154}

B. Utility at Trial: Social Media and Communicative Technology as Evidence

Social media and communicative technologies also hold potential for their use at trial. For instance, this type of evidence can decrease plea bargain opportunities for defendants if social media provides documentation to substantiate a victim’s account at trial thereby eliminating he said/she said ambiguities. This type of evidence is beginning to be used in this context.\textsuperscript{155} As Koslow observed:

There is a growing trend today to allow evidence from Social Media websites. Most courts now allow discovery of relevant information that a user posts on his or her Facebook, LinkedIn, or Twitter accounts. In fact, courts have allowed discovery of information from Social Media in cases ranging from personal injury to sexual harassment. As one might expect, these jurisdictions require that attorneys adhere to rules and regulations regarding discovery and ethics. Generally speaking, courts tend to apply traditional rules to ethical matters when it comes to the use of social media. Before a court decides if it will allow discovery of the information, courts balance several factors including relevancy, need for the information, alternative availability of the information, and “the privacy interests of the party from whom the information is sought.”\textsuperscript{156}

Social media may be used by prosecutors to not only substantiate victims’ accounts but to challenge those told by defendants as well. Overcoming the he said/she said dynamics that often unfold when prosecuting rape cases is essential for debunking the myth that female rape victims are liars, and social media and communicative technologies provide a potential tool for investigating a suspect’s version of events.\textsuperscript{157} As Spohn and Tellis note:


\textsuperscript{155} Seth I. Koslow, Rape Shield Laws and the Social Media Revolution: Discoverability of Social Media – It’s Social Not Private, 29 TOURO L. REV. 839, 848 (2012).

\textsuperscript{156} Id.

\textsuperscript{157} Id.
Prosecutors . . . spoke of the need to examine the suspect’s history—prior relationship partners, friends, acquaintances, and family who can speak to behavioral patterns—and criminal record—including crime reports and arrests, not just convictions. They emphasized the importance of these types of evidence, which could be used to demonstrate the suspect’s propensity towards aggressive behavior, sexual or otherwise. Also of importance, they noted, are such things as the suspect’s post-assault behavior in terms of attempts to contact the victim, activity on social media websites such as Facebook, and, perhaps most importantly, whether the suspect made any incriminating admissions to the police.\footnote{158}

Similar to law enforcement officers mining social networking sites when investigating crimes, prosecutors have been able to introduce social media content in the courts despite defendants’ privacy objections.\footnote{159} While concerns about the admissibility of such evidence have been raised,\footnote{160} courts have repeatedly established an authenticity threshold that is “quite low.”\footnote{161} These low thresholds make it easier for prosecutors to introduce correspondence, pictures, videos, etc. from social media sites at trial.\footnote{162}

Social media and communicative technology evidence can be used productively by courtroom actors, particularly prosecutors, to challenge stereotypes and speculations in jurors’ minds. This is a vitally important part of a prosecutor’s job because “juries demand corroboration, speculate about a victim’s character, and hypothesize about motives for her to lie. And they often do so with conspicuous malice.”\footnote{163} To that end, social media may help prosecutors build a more convincing story grounded in concrete evidence that eliminates opportunities for jurors to speculate and craft their own hypotheses. Jury research “reveals that jury reasoning is story-based, [and that] juries convert evidence into familiar stories, filling in gaps in the evidence where needed to craft a coherent tale. Whom jurors believe turns on the consistency

\footnote{158} Spohn & Tellis, supra note 76, at 1405.  
\footnote{160} Despite the low threshold for admitting social media content into evidence, prosecutors and judges must be concerned about hearsay. “Obviously, if the Facebook account holder posts on his or her own site, the statements would not be hearsay. However, a person can open a social networking account under someone else’s name and communicate through that account; thus, postings on the account must be proven to be made by the person whose name appears on the account. But postings by others could be construed as hearsay evidence. Police and prosecutors must carefully work to authenticate evidence gathered from social networking sites and ensure that hearsay, if it exists, falls within one of the enumerated exceptions in the Federal Rules of Evidence.” Marsico, supra note 132, at 975.  
\footnote{161} Browning, supra note 159, at 481. More specifically, “the key to authenticating evidence from a party or witness’s social networking profile is to demonstrate the connections between that individual and the evidence being offered.” Id. at 484.  
\footnote{162} It should be acknowledged that low thresholds for admitting evidence from social media have the potential to cut both ways. Koslow, for instance, has argued that “Rape Shield rules have given alleged victims carte blanche to accuse a person of rape, absent any proof, without fear of any repercussions;” Koslow, supra note 155, at 844, and that “with the proliferation of Social Media websites, certain evidence of a victim’s prior sexual activities should be discoverable and admissible in court on the grounds that they are not private” Id. at 841. This type of argument highlights the drawbacks that might also come with the increased use of social media in sexual assault cases.  
\footnote{163} TASLITZ, supra note 7, at 7.
of each witness’s testimony with the plausible stories that juries create based upon their preexisting stock.”

Because so many of these “preexisting stock” are rooted in myth, concrete evidence can fill in gaps where otherwise rape myths would prevail. Taslitz has described this phenomenon, noting that “juries in possession of uncertain and limited relevant information are more inclined to draw on stereotypes and cultural stories as aids to their decision.”

Recognizing the potential of social media, attorneys on both sides of sexual assault cases have been using the information gathering potential of social media in the courtroom. As Witte notes, this was perhaps inevitable because:

Essentially, millions of Americans voluntarily keep detailed journals of their daily thoughts and activities and then send them out into the information vortex of the Internet for viewing and comment. Were that not enough, most believe that these sites are private—adding to the candid nature of their posts, messages, and photographs. From a trial attorney or prosecutor’s viewpoint, these pages may be the single richest source of evidence regarding an individual’s thoughts and actions available today.

Thus, social media has the potential to provide jurors with concrete information that challenges the prevailing cultural myths and narratives about rape by introducing graphic depictions into evidence. In particular, visual depictions of unconscious young women being raped by their peers may challenge the “real” rape myth and act as evidence that a crime did occur and prove that the victim was incapable of giving consent. For example, one widely shared Instagram photo of the Steubenville rape victim shows the unconscious young woman being carried through a party by two young men: one man is holding her arms and another man is holding her legs.

According to a third young man, who posted the photo on Instagram (including the accompanying comment “sloppy”), the photo was taken at a party prior to the sexual assault which occurred at another location later in the evening:

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164. Id. at 7–8.
165. Id. at 40.
166. Koslow, supra note 155. As Koslow notes, this is not confined to the use of social media and communicative technology usage for evidence at trial, and “the availability of this information has a distinct impact on discovery and the courts. Attorneys are using these websites, more than ever before, to find information about their clients, opposing parties, judges, and jurors alike.” Id. at 847. Similarly, these effects have spread beyond attorneys, as “more recently, courts have begun to embrace the Internet as not only a legitimate source of information, but also a valuable tool for attorneys. Moreover, some federal judges have gone so far as to confirm their judicial intuition through Internet research. Courts have begun to embrace media content as discoverable, but only after balancing a number of factors.” Id. at 848.
167. Derek S. Witte, *Your Opponent Does Not Need a Friend Request to See Your Page: Social Networking Sites and Electronic Discovery*, 41 MCGEORGE L. REV. 891, 893 (2010). Browning reiterates Witte’s argument, noting that “[g]iven this abundance of photos, video, statements, and other content flooding social networking sites, it is hardly surprising to find lawyers from virtually all areas of practice digging for such digital dirt. A February 2010 study conducted by the American Academy of Matrimonial Lawyers revealed that 81% of the attorneys responding reported finding and using evidence from social networking sites in their cases. The most popular source of such information was Facebook, with 66% of all respondents indicating that they had found evidence on that site.” Browning, supra note 159, at 467.
“While I wasn’t at the home where the alleged assault took place, there is no doubt that I was wrong to post that picture from an earlier party and tweet those awful comments.” Thus, the Instagram photo provides evidence that the Steubenville victim was inebriated to the point that she was unconscious prior to the assault. Furthermore, as previously stated, the Steubenville rape victim did not even know that she had been sexually assaulted until she and her family read about the incident in the local newspaper which had been alerted to the assault by the numerous related Instagram, YouTube and Twitter postings. Similarly, in the Audrie Pott case, Pott had no recollection of the assault and police relied on photo documentation shared via cell phone and social media to arrest “three 16-year-old boys on sexual battery charges. . . amid allegations that she was ‘savagely assaulted by her fellow high school students while she lay on a bed completely unconscious’—only to have cellphone photos of the attack get shared amongst the 1,400 students” at her high school. The visual depiction of an unconscious Audrie Pott being sexually assaulted is incontrovertible evidence that she was not “asking for it” because she was literally incapable of giving consent and/or participating in consensual sexual activity. Questions of consent are obliterated by these depictions and descriptions of rapes of unconscious victims leaving no doubt that the victims were incapable of offering consent and refuting any suggestion that the rape allegation is merely a misunderstanding. Thus, these visual depictions may be used by prosecutors as evidence in criminal trials to substantiate that the act in question was a rape and provide jurors with visual evidence of a powerful counternarrative to the “real” rape myth.

In addition, defendants and their accomplices often take to social media to brag about their conquests. During the Steubenville trial a forensic computer expert testified about graphic text messages disseminated by the assailants describing the events of the nights:

Most of the messages were between Mays and friends, in which the football player gives differing accounts of what took place at the party and how much sexual contact he had with the alleged victim. In one instance, he claims to have had sex with the alleged victim, in other incidences he says the girl masturbated him and in others he says he digitally penetrated the girl.

These statements can be introduced as evidence at trial. Indeed, this reflects a continuation of common police practices:

For decades, police have utilized confessions and admissions, made by criminals to their friends, to secure sufficient evidence to prosecute these individuals for their criminal activities. This same philosophy applies to social networking sites because criminals “cannot resist bragging about their handiwork.” Fifty years ago, criminals’ mouths got them into trouble. Now, criminals brag on

169. Id.
170. Macur & Schweber, supra note 4.
171. Abad-Santos, supra note 143.
172. Goldman & Dooley, supra note 146.
MySpace or Twitter, which likewise get them into trouble.\textsuperscript{173}

Depictions shared on social media that are entered into evidence in criminal rape prosecutions have the potential to challenge the prevailing rape narratives and the “real” rape frame in particular. As previously noted, these stereotypes are powerful because they inform legal deliberations surrounding rapes as “Juries in possession of uncertain and limited relevant information are more inclined to draw on stereotypes and cultural stories as aids to their decision.”\textsuperscript{174} Visual depictions of unconscious female rape victims being assaulted by their male acquaintances introduced as evidence at trial serve to challenge many of the assumptions about “real” versus acquaintance rapes. For example, an unconscious victim is unlikely to manifest bruises or injuries resulting from a physical struggle, but these defensive wounds are often expected by jurors as evidence that a “real” rape transpired; social media evidence may overcome these expectations.\textsuperscript{175} Furthermore, even if the victim is unconscious because she is intoxicated, depictions of a group of males raping an unconscious female do not jive with the rape narrative of a drunk woman sending mixed messages and “provoking” the assault. There is nothing ambiguous about the gang rape of an unconscious teenager. These depictions have the power to counter the prevailing narratives about “real” rape that often inform jury deliberations.

C. The Costs of and Limitations on the Use of Social Media Evidence

Despite the potential benefits that come with these new technologies, there are significant costs as well. Throughout this discussion of the utility that social media and communicative technologies have in challenging the “she’s lying” component of the “real” rape frame, it is vital to remain cognizant of the reality that along with the potential to bring positive change and increased justice in the area of sexual assault and rape, these technologies create new outlets for victim blaming and complicate discussions about female and male responsibility and sexuality in rape cases as well.

At trial, the same social media and communicative technology that can be used to challenge prevailing rape myths in the minds of jurors also have the potential to be used against victims. For example, the myth that “she was asking for it” through her manners or dress or past behavior could be brought up through social media posts or photos. Indeed, as Busby argues:

The “reasonable doubt” standard in sexual violence cases falls well short of a positive response to the question “Is she lying?” Rather it approaches, “Are you convinced about her version of the events?” Therefore, if the defense lawyer can undermine a complainant’s credibility in some way or make the case that a different interpretation of the events is possible, a “reasonable doubt” may

\textsuperscript{173} Marsico, supra note 132, at 972.
\textsuperscript{174} Taslitz, supra note 7, at 40.
\textsuperscript{175} Teresa P. Scalzo, Overcoming the Consent Defense, VOICE 2 (2006), http://www.ndaa.org/pdf/the_voice_vol_1_no_7_06.pdf.
exist and the defendant should be acquitted.\textsuperscript{176}

If victims’ social media can be mined in this manner it could have a chilling effect on the prosecution of cases as well as victims coming forward with allegations of sexual assault if they know that past posts that paint them in a negative light can be taken out of context and used against them. In fact, lawyers have already attempted this strategy:

defendant in a forcible rape case tried to admit the victim’s statements from her Facebook page about both her drinking habits and her injuries on the night the crime was committed. Although the evidence was suppressed and the appellate court upheld the decision, the case still demonstrates how a Facebook user’s statements can become discoverable admissions in a lawsuit—civil or criminal.\textsuperscript{177}

Outside of the courtroom, social media and communicative technology evidence can be used to attack victims and exacerbate slut shaming and victim blaming in the aftermath of a rape. In the Steubenville case, the sixteen year old victim was attacked by community members on social media. One Facebook post read:

\texttt{d}ont feel bad bc we r talking about a girl also known as steubenvills “train whore” going to parties over there every weekend and foul shit going down. had her brother not found out and told her father would anything been said otherwise...No bc its what she didFalseEVERY weekend. . .facts people u should look into them.\textsuperscript{178}

The author of this Facebook post drew attention to the victim’s alleged promiscuity to suggest that she got what she deserved on the night of the documented rape. Even in the aftermath of the Steubenville rape trial in which the accused were convicted of the crime, the office of the Attorney General for the state of Ohio has been monitoring social media and pressing charges against individuals threatening the life of the victim.\textsuperscript{179} Similarly, Audrie Pott was horrified to learn via social media that the depictions of her rape were disseminated among her peers.\textsuperscript{180} In a Facebook exchange, a male acquaintance of Audrie Pott told her:

\begin{quote}
JOSH: lol that shit gets around haha everyone knows mostly everything hahahah

AUDRIE: oh my god. . . i fucking hate people.\textsuperscript{181}
\end{quote}

Pott confronted one of the male perpetrators on Facebook after the assault and accused him of sharing the photos.\textsuperscript{182} Audrie wrote that the “whole school knowsFalseDo you know how people view me now? I fucked up and I can’t do anything to fix itFalseOne of my best friends hates me. And I now have a reputation I can never get rid of.”\textsuperscript{183} Writing to another boy on Facebook, she

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\textsuperscript{176} Busby, supra note 84, at 263.

\textsuperscript{177} Witte, supra note 167, at 894 (internal citations omitted).

\textsuperscript{178} Abad-Santos, supra note 143.

\textsuperscript{179} Abad-Santos, supra note 143.

\textsuperscript{180} See Burleigh, supra note 2 (discussing Audrie’s disappointment with the Facebook postings).

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Id.
said, “My life is over. I ruined my life and I don’t even remember how.” Thus, the ease of sharing information via social media and handheld technologies can have negative consequences by increasing opportunities for peers and community members to blame victims and enhancing the shame and self-blame felt by many rape victims. Audrie Pott committed suicide eight days after she was raped.

Thus, even in those instances in which the evidence substantiates that the victims are not lying about a rape, community members and peers may exonerate male rapists in the court of public opinion because they perceive that the victim’s behavior justified the rape and law enforcement may follow suit. Victim blaming and slut shaming are two key components of rape culture that are difficult to overcome even when rapes are documented and shared via social media. Indeed, if rape shield laws were supposed to remove rape cases from the court of public opinion, cases involving social media may drag these crimes back into this venue. In the end, however, the most likely limitation on the use of social media in rape and sexual assault cases is that legal actors retain discretion in investigating and pursuing criminal cases. Social media opens up the possibility that more evidence can be mustered to challenge problematic rape myths, and that this can be used to push for the successful prosecution of rape cases outside of the “real” rape model. However, just because this potential is opened up for legal actors to take action does not mean they will do so. Indeed, this is evidenced by the Steubenville case where external community pressure was necessary to prompt legal actors to pursue the case. Specifically, it took the international involvement of the Internet hacker collective Anonymous for this to happen reminding us that institutional apathy towards rape is a very high bar to overcome.

D. The Normative Implications of Social Media Depictions of Rape

Apart from changes in the criminal justice system’s treatment of rape, depictions of rape shared on social media may have the capacity to challenge the cultural and normative assumptions about rape and rape victims as well. While a full exploration of this potential is beyond the scope of this article, any discussion of the criminal justice system’s current treatment of rape must acknowledge the mutually constitutive relationship between social norms and legal culture. As such, when evaluating the changes that social media can bring to the criminal justice system, it is important to note that similar implications may exist for society more broadly, but they are likely to be limited in their potential without prior criminal justice reform.

The possibility for challenging the normative assumptions surrounding rape is rooted in the reality that the criminal justice system’s treatment of rape

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184. Id.
185. Id.
186. Abad-Santos, supra note 143.
187. Id.
188. At the same time, it should be noted that social media depictions and discussions of rapes may work to problematically reinforce socio-cultural assumptions about rape and rape victims as well.
victims reflects widely shared socio-cultural assumptions about “real” rape and simultaneously draws on and supports society’s problematic views about women and gendered violence. This continuity between social and legal discourses emphasizes law’s social basis and demonstrates how contemporary American society’s definitions of and perceptions about the elements of “real” rape and “genuine” rape victims work to substantiate and sanction the legal system’s mistreatment of victims who deviate from the “real” rape paradigm. Ultimately, “[r]ape myths embedded in the legal discourse of sexual assault...reflect powerful social discourses about sexual violence.”

Reflecting this mutually constitutive relationship between legal and social influences, social media depictions of rape—in particular, of males raping their female peers—have the potential to challenge the rape myth paradigm in myriad ways not only for law enforcement and prosecutors but for society as well.

For example, evidence gathered from social media may challenge both the “bad sex” and “real” rape myths not only as they exist in the courtroom, but also as they circulate in society. Concerning the former, the fiction that female rape victims are liars and/or trying to cover “bad sex” is one of the foundational rape myths that exists as part of rape culture both inside and outside of the criminal justice system. Consistent with this myth, females who report rapes are often understood by criminal justice actors, as well as their peers and others in society, to be acting on spurious motives including punishing a male sex partner, providing cover for promiscuous behavior or “morning after” regrets, and/or seeking attention. More specifically, allegations are often made that women who are raped while they are drunk are not “real” rape victims but rather the victims of their own bad choices. Depictions of the rapes of female victims on social media, however, may work to challenge this normative assumption about the interplay between alcohol and sexual assault. For instance, the images, videos, and second and third party descriptions of the Steubenville rape victim show that she was unconscious, moved among locations, and sexually violated while others watched. These facts were all made available to the victim’s and perpetrators’ peers as well as a broader online community via social media, and have since been shared with law enforcement and anyone seeking this content out on the Internet. Thus, in this instance, stereotypical arguments that the victim consumed too much alcohol, consented to sex acts, and then came to regret her actions after the fact were undermined by the videos and photos related to the night’s events because these images graphically provided evidence attesting to the fact that she was in no condition to provide consent.

The utility of this evidence extends beyond the courtroom to the “court of public opinion” where these depictions may mitigate some of the victim

189. Estrich, supra note 11.
191. ROIPHE, supra note 68.
192. Id.
193. Abad-Santos, supra note 143.
194. Id.
blaming that accompanies acquaintance rapes.\textsuperscript{195} Due to the extensive media coverage surrounding this case, the pictures and other social media captured and disseminated about this victim have the broader potential to be powerful agents of social change beyond the Steubenville community.\textsuperscript{196} As the public becomes aware of and is exposed to depictions from cases like these where unconscious young women are sexually violated by their male peers, it is potentially much more difficult for people to callously write off rape allegations as fictitious or mere misunderstandings because people will have seen clear evidence to the contrary. In this way, this new type of evidence may challenge some individuals’ preconceived notions about rape crimes and work to educate people who are ignorant of the realities of rape.

In addition to the public ignorance that underlies the “bad sex” myth, many people—both inside and outside of the legal system—also make the related and statistically problematic assumption that “real” rape involves strangers physically and violently assaulting women in dark alleyways whereas acquaintance rape is the result of the misunderstandings discussed above.\textsuperscript{197} Here, too, social media evidence of peer-on-peer rapes demonstrates that instances of sexual violence and coercion also occur in what are often considered to be safe locations in one’s neighborhood and community, and these depictions conceivably may be useful as a means to educate people that rape occurs outside of the narrow and comparatively rare scenarios captured by the “real” rape myth. In this way, social media has the potential to expand the “real” rape frame to include acquaintance rapes by providing visual evidence that “real” rape can and does occur absent weapons and physical abuse beyond the act of the rape itself. Further, social media evidence may be promising as a way to lessen the social stigma for women who report rapes but are challenged by peers or members of the community because they lack the physical evidence associated with resisting a sexual assault. Oftentimes, allegations of acquaintance rape combined with the absence of physical evidence demonstrating that the victim resisted provide ammunition to accusations from the community that a “real” rape did not occur. The depictions shared via social media, however, establish that perpetrators need not exercise force beyond the minimal amount required to complete the assault when raping an incapacitated victim because she cannot physically resist the sexual assault if she is unconscious. As such, social media evidence may challenge people’s preconceptions about the victims and perpetrators of rape crimes by providing an alternative or supplement to the physical evidence that the public considers to be the standard of proof for rape crimes.

Despite the theoretical possibilities that people’s problematic

\textsuperscript{195} That being said, the Steubenville rape victim continues to be blamed for her assault and the vitriol directed at her on social media ramped up again in March 2013 when Trent Mays and Ma’lik Richmond were convicted of digitally penetrating the victim. In fact, two individuals were charged with threatening the victim via Twitter after the verdicts were announced. Alexander Abad-Santos, \textit{These Steubenville Rape Apologists May Make You Forget You’re Mad at CNN}, \textit{WIRE} (March 20, 2013), http://www.thewire.com/national/2013/03/steubenville-rape-twitter-cnn/63349/.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{ROIPHE}, supra note 68.
preconceptions about rape may be challenged by interactions with social media evidence, it is important to remember that the depictions of rape shared among peers via social media are considered acceptable for dissemination precisely because they are not consistent with the “real” rape paradigm. Rape myths are so pervasive and commonly accepted that individuals share photos and videos of themselves and their peers committing sexual assaults without fear of repercussions or considerations of culpability. Unfortunately, these assumptions about rapists’ de facto immunity from legal prosecution as well as from condemnation in the public sphere are often correct. Thus, the impetus for any long-term normative shifts in society’s views on rape victims and rape crimes likely will be contingent on the criminal justice system’s response to and handling of sexual assaults and rapes disseminated over social media. If the criminal justice system utilizes these photos, videos, and descriptions to overcome evidentiary insufficiency at the reporting and trial stages and successfully prosecutes these rapes it will pose a substantive challenge to the “real” rape paradigm because the legal consequences for offenders will substantiate the gravity of the crime. The extent to which social media evidence challenges norms and practices within the criminal justice system will determine whether or not social norms and rape culture change as well. As noted above, rape myths are powerful social norms that are so-called because they directly contradict longstanding findings from the research on rape. To date, the existing evidence refuting these myths has not changed society’s normative assumptions about rape. As such, it is unlikely that public exposure to social media evidence alone will change a rape culture that has historically been so impervious to evidence.

CONCLUSION

The “real” rape frame informs how both the criminal justice system and society in general understand rape and operationalize it as a crime. A significant contributor to the maintenance of rape culture in the United States is the belief that acquaintance rapes are not “real” rapes and that women who suggest otherwise are liars. The he said/she said dynamics of acquaintance rapes create ambiguities that work to the detriment of female victims seeking to pursue their cases in the criminal justice system because uncertainty allows individuals to resort to stereotypes and myths. Due to the fact that the “real” rape myth pervades all aspects of the legal system—from law enforcement officers’ investigations to prosecutorial discretion when bringing charges to judges’ and jurors’ deliberations in cases—the absence of corroborating evidence or testimony to substantiate a woman’s rape claim opens opportunities for rape myths and assumptions to take hold and dictate outcomes in ways that work to the detriment of female victims seeking justice in the legal system. Yet, the widespread use of social media and handheld communicative technologies and the practice of documenting one’s each and every action and sharing these posts, photos, and videos with peers and beyond produces evidence that may be used to substantiate women’s rape reports and challenge the “real” rape myth.
The role of social media in rape investigations and prosecutions may go a long way toward challenging local “rape tolerance” by forcing actors in the criminal justice system “to prioritize and treat rape as seriously before the law as it is treated in name.” At the reporting stage, social media evidence may prod law enforcement to investigate a claim and provide police officers with leverage when interviewing potential witnesses and suspects. In addition, prosecutors may be more likely to file charges and take a case to trial if they are able to submit social media discussions and depictions as evidence. Finally, at trial, social media evidence may be used in various ways to persuade jurors that a rape occurred and the accused is guilty of a crime. At each phase of the criminal justice process, social media evidence may be utilized to challenge commonly held assumptions about what constitutes a “real” rape versus a “simple” rape as well as stereotypes about rape victims and their culpability in sexual assaults.

To be clear, there are limitations to this potential. Notably, the social media evidence discussed above will only be beneficial if actors within the criminal justice system consider and utilize this content. Thus, a key limit of the suggestions proposed herein is that they require actors who are actively interested in pursuing an agenda for change. In addition, while a handful of rape cases have attracted national attention because of social media’s role in events, the known victims in each of those cases was a young, conventionally attractive white woman. As such, those rape cases involving social media that have attracted the attention of the national media and the public reflect class and race privileges and suggest that preexisting intersectional hierarchies and dynamics may continue to inform who is deemed a credible rape victim.

In closing, social media evidence has the potential to challenge rape myths within the criminal justice system and given the societal and systemic obstacles confronting rape victims any mechanism that has the potential to achieve justice for individual victims and undermine institutional apathy and rape tolerance should be explored. In the future, if social media evidence increases the successful prosecution of rapes beyond the narrow “real” rape paradigm and leads female victims—those whose assaults are documented and shared on social media and those whose rapes are not—to believe that law enforcement will take their claims seriously even when they do not conform with the expectations of the “real” rape frame, more victims may come forward and may broaden both the legal system’s and society’s definitions and understandings of criminal rape. We hope that this article is one step in moving our society and legal system in that direction.

198. Kim, supra note 58, at 267.