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Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement

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I. INTRODUCTION

The #MeToo movement[1] has inspired a wave of testimony from survivors of sexual misconduct. In response, there has been a corresponding influx of retaliatory defamation lawsuits brought by the individuals accused of sexual misconduct. The retaliatory use of defamation lawsuits has the effect of deterring survivors from reporting, therefore chilling the free exercise of their First Amendment rights. There are many reasons why survivors think twice about reporting sexual misconduct committed against them, and fear of liability for defamation should not be one of them.

This phenomenon of using defamation suits as a retaliatory measure is so widespread that even the President of the United States of America has used them as a tool to silence his own accusers.[2] In an interview with Courthouse News, attorney Lisa Bloom reported that, while on the presidential campaign trail, President Donald Trump threatened survivors who were accusing him of sexual assault with defamation suits.[3] As a candidate for president, Trump publicly announced that he was going to sue women claiming he sexually assaulted them.[4] Bloom told Courthouse News that she "actually had clients who were considering coming out publicly and after he said that, they were afraid and they didn't want to because they said, '[h]e's going to sue us.'"[5]

This is exactly the problem with retaliatory defamation suits. They are meant to scare survivors into silence, and they are quite effective to that end.[6] Individuals accused of sexual misconduct are increasingly using defamation suits as "a way to put pressure on an accuser to make her go away."[7] If successful, these defamation suits have the power to chill the survivor's "First Amendment right to

1. The #MeToo movement was founded in 2006 with the goal of "reframing and expanding the global conversation around sexual violence." *History & Vision*, METOO, https://metoomvmt.org/about/ (last updated 2018).

2. Daniel Jackson, *Sex-Assault Accusers Turn to Defamation Lawsuits in #MeToo Era*, COURTHOUSE NEWS SERV. (Jan. 25, 2018), https://www.courthousenews.com/sex-assault-accusers-turn-to-defamation-lawsuits-in-metoo-era/ ("Even the threat of a lawsuit can chill an alleged victim's plans to speak out.").

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

petition the government."[8] Worse yet, "defamation cases which are being used as a bullying tactic by law firms and individuals, who wish to silence a victim (MeToo survivor) are absolutely unfair and are an abuse of this legislation."[9] This Comment will discuss the escalation of this emerging crisis and propose potential solutions to this widespread problem.

This Comment will proceed in two Parts. Part I will discuss the legal background of defamation law in the United States, and how the law differs depending on whether the claim is being brought by a private figure or a public figure. Part II will discuss the use of retaliatory defamation suits by individuals accused of sexual misconduct.[10]

II. DEFAMATION

"The law of defamation is the imperfect mechanism by which the law attempts to reconcile the competing interests of freedom of expression and the protection of individual reputation."[11] Defamation suits were created to "provide[] a legal remedy for a person whose reputation has been sullied by false statements of fact."[12] Federal law defines defamation as "any action or other proceeding . . . alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person."[13]

In the United States, defamation is a state law claim, so the elements to state a claim for defamation can differ depending on what

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8. BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 35:41 (2d ed.), Westlaw (database updated June 2019).

9. *"Criminal Defamation Cases Against 'MeToo' Victims Unfair,"* ECON. TIMES (Nov. 12, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/criminal-defamation-cases-against-metoo-victims-unfair/articleshow/66592510.cms (quoting Email from Anjuli Pandit, Former Exec., Tata Group, to Press Trust of India (2018)); *see also* Melanie Mason, *Ex-Assemblyman Matt Dababneh, Under Legislative Investigation on Sexual Misconduct Allegations, Sues Lobbyist for Defamation*, L.A. TIMES (Aug. 15, 2018), https://www.latimes.com/politics/la-pol-ca-matt-dababneh-defamation-suit-20180814-story.html (arguing that survivors of "sexual harassment or sexual assault ha[ve] every right to report what happened without suffering retaliation like this" (quoting Jean Hyams)).

10. This Comment will not address the defamation suits that are founded and brought as a result of a person being truly defamed, but rather, the phenomenon discussed, and the solutions proposed herein, are in reference to defamation suits brought for the sole purpose of defaming survivors.

11. MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET 4 (3d ed. 2010).

12. AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION 161 (2009); *see also* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (noting that the essence of a defamation claim is the right to protect one's good name).

13. 28 U.S.C. § 4101(1) (2012).

state the claim is being brought in.[14] However, despite the differences among the states, the *typical* elements to establish a prima facie cause of action for defamation include the following:

(1) a false and defamatory statement concerning another;
(2) an unprivileged publication to a third party;
(3) fault amounting at least to negligence on the part of the publisher; and
(4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[15]

Defamation suits in general are either considered libel or slander.[16] The only difference between the two is the method in which the statement is published.[17] The statement is considered slander if it is spoken and is considered libel if it is written; but both are separate forms of defamation, which are generally proven using the same set of elements above.[18]

A. Private Figures

Another crucial distinction within the defamation cause of action is the difference between private figure plaintiffs and public figure plaintiffs.[19] The reason this is such an important contrast in defamation law is because of the standard the plaintiff will have to meet in proving their claim. If the person defamed is a private figure, the burden of proving that the relevant statement is defamatory is significantly lower than if the person defamed is a public figure.[20]

When the plaintiff (defamed individual) is a "purely private individual[], they are generally able to recover damages where the material defaming them is false, and the defendant was at least *negligent* as to the truth or falsity of the material."[21] To prove negligence in this context, the defamation plaintiff simply must show that the defendant did "not exercis[e] reasonable care to determine if

14. *See* COLLINS, *supra* note 11, at 11.
15. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).
16. Ivie Guobadia & Emily Haigh, *Title IX and Defamation: An Emerging Challenge Facing Higher-Education Institutions*, LITTLER (Jan. 5, 2018), https://www.littler.com/publication-press/publication/title-ix-and-defamation-emerging-challenge-facing-higher-education.
17. *See* RESTATEMENT (SECOND) OF TORTS § 558.
18. *Id.*
19. COLLINS, *supra* note 11, at 547-50.
20. *See id.*
21. *Id.* at 549 (emphasis added).

the statements [made] were false" prior to making them.[22] This is the standard for private individuals who bring defamation claims.

As Part II.B will explain, the negligence burden becomes much higher when the plaintiff is a public figure.[23] In *Gertz v. Robert Welch, Inc.*, the Court held that the standard for private individuals bringing defamation suits must be lower than suits brought by public figures for three reasons: (1) private individuals are more vulnerable to defamatory statements given that they do not have an opportunity to publicly refute defamatory statements; (2) private individuals do not purposefully expose themselves to increased risk of injury from defamatory statements; therefore, they are more deserving of the ability to recover; and (3) the state has a legitimate "interest in compensating injury to the reputation of private individuals."[24] The Court in *Gertz* ultimately held that "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual,"[25] therefore lowering the burden of proof for a private figure defamation plaintiff that had been set out ten years earlier in *New York Times Co. v. Sullivan*.[26]

In conclusion, private figures bringing defamation suits must generally prove that the individual who made the defamatory statement against them was negligent in his or her determination of the truthfulness of the statement.[27] This is a low standard and is much easier to establish than the standard that public figures must meet in proving defamation.[28]

B. Public Figures

In *Sullivan*, the United States Supreme Court first discussed defamation actions brought by public figures.[29] "The effect of that decision and its progeny is that where the plaintiff is a 'public figure' . . . defendants will only be liable for damages in a defamation action . . . where the plaintiff proves with 'convincing clarity' that the

22. Johnita P. Due, *This Court Ruling Could Silence Victims of Sexual Misconduct*, CNN, https://www.cnn.com/2017/10/26/opinions/defamation-silence-women-opinion-due/index.html (last updated Oct. 27, 2017).

23. *See* COLLINS, *supra* note 11, at 547-49; discussion *infra* Part II.B.

24. 418 U.S. 323, 342-45 (1974).

25. *Id.* at 347.

26. *See* 376 U.S. 254, 283-84 (1964) (holding that *all* defamation plaintiffs must prove actual malice to prevail on a defamation claim).

27. COLLINS, *supra* note 11, at 549.

28. *Id.* at 547-49.

29. 376 U.S. at 256.

defendant published false, defamatory material with actual malice . . . ."[30] Actual malice means "with knowledge of its falsity or with reckless disregard for its truth or falsity."[31] These decisions dictating the burden for public versus private figures are important in the context of the #MeToo movement because courts often hold that defamation plaintiffs will automatically become limited purpose public figures if they choose to respond to allegations through the media, which has been a typical reaction to public allegations of sexual misconduct.[32] This heighted burden is beneficial for defamation defendants (survivors) because the individual accused of sexual misconduct, the defamation plaintiff, would be forced to prove that the survivor made a false allegation with actual malice, instead of negligent disregard for the truth, in order to win the defamation case.

Although the *Sullivan* Court decided that it had "no occasion . . . to determine how far" the public figure classification would extend,[33] the Court held two years later in *Rosenblatt v. Baer* that public officials "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" are to be considered public figures.[34] The next year, the Court expanded the definition of public figures to include more than just governmental officials. The Court held in *Curtis Publishing Co. v. Butts* that "a 'public figure' who is *not* a public official may also recover damages for a defamatory falsehood."[35] In 1974, the Court clarified what types of individuals could be considered public figures that are not public officials. The Court in *Gertz* held that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention" are public figures.[36] This further expansion of the public figure classification has led to many more types of individuals being treated as public figures by the courts.

The Supreme Court has also established that individuals can be public figures for a limited purpose; they can become what the courts now refer to as "limited purpose public figures."[37] "Individuals . . .

30. COLLINS, *supra* note 11, at 548.
31. *Id.*
32. *See* McKee v. Cosby, 874 F.3d 54, 61-62 (1st Cir. 2017).
33. 376 U.S. at 283 n.23.
34. 383 U.S. 75, 85 (1966).
35. 388 U.S. 130, 155 (1967) (emphasis added).
36. 418 U.S. 323, 342 (1974).
37. COLLINS, *supra* note 11, at 548.

become 'limited purpose public figures' where they inject themselves, or are drawn, into a particular public controversy . . . [though they will only be considered] public figures in relation to alleged defamations that are germane to their participation in the controversy."[38] The elements that a defamation defendant must prove in order to show that the defamation plaintiff is a limited purpose public figure are (1) the existence of a public controversy, (2) the defamation plaintiff "thrust[ed] themselves [in]to the forefront" of said controversy, and (3) that the plaintiff thrust him or herself with the purpose of "influenc[ing] the resolution of the issues involved."[39]

Public figures (whether for a limited purpose or not) who bring defamation suits have a higher burden of proving falsehoods than do private figures.[40] They must prove that the defamatory statements were made "with reckless disregard . . . or [knowledge of] falsity," whereas private individuals must generally prove that the defamatory statements were made negligently.[41]

Therefore, public figures have lesser protection when faced with defamation suits. Courts have indicated that reporting survivors of "sexual misconduct . . . will . . . be classified as [limited purpose] public figures simply because they've spoken up to give public accounts of the crimes against them."[42] If this judicial trend continues, then hopefully the same logic would be applied to the person accused of sexual misconduct. Ideally, those accused of sexual misconduct would become limited purpose public figures simply because a survivor has spoken up to make public accusations. This logic follows because, realistically, the same amount of attention (or more) is drawn to an individual accused of sexual misconduct as is drawn to the survivor who reports to the media, regardless of whether or not the accused speaks out to the media in response. If the courts do decide to classify those accused of sexual misconduct as limited purpose public figures, they could potentially create stronger protections for survivors being sued for defamation because defamation plaintiffs would need to prove that the survivor acted with actual malice and recklessly disregarded the truth in making her claim, as discussed above.

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38. *Id.*
39. *Gertz*, 418 U.S. at 345.
40. COLLINS, *supra* note 11, at 548-49.
41. *See id.*
42. Due, *supra* note 22.

One well-known case that exemplifies the trend of treating survivors as limited purpose public figures is *McKee v. Cosby*.[43] Kathrine McKee, a well-established actress and performer, filed suit against Bill Cosby, "an internationally renowned celebrity and entertainer."[44] The two had met after McKee appeared on the *Bill Cosby Show*, Cosby's television program, in 1971.[45] When she finally decided to speak out about her assault years later, McKee reported to the media that "Cosby forcibly raped her" in his hotel room several years after meeting him in 1974.[46] Her allegations came in 2014, "after more than twenty other women had publicly accused Cosby of sexual assault," contributing to the escalation of the #MeToo movement.[47] In response, Cosby's attorney sent a letter of admonishment[48] to the *Daily News*, the media outlet that reported on McKee's allegations.[49] McKee contends that "on the same day [Cosby's attorney] sent the [l]etter to the Daily News, he leaked copies of it to the media," which "appeared in news outlets around the world."[50] McKee brought a defamation suit[51] in the United States District Court for the District of Massachusetts alleging that the dissemination of copies of the letter from Cosby's attorney defamed her because of the derogatory accusations made about McKee in the letter.[52] The district court granted Cosby's motion to dismiss the defamation suit,[53] and McKee appealed.[54] One of the questions on appeal was whether or not McKee was a limited purpose public figure and therefore subject to the actual malice standard.[55]

To classify McKee as a public figure, the court had to determine whether: (1) there was "a matter of 'public controversy' . . . prior to the

43. 874 F.3d 54 (1st Cir. 2017), *cert. denied*, No. 17-1542, 139 S. Ct. 675 (2019).
44. *McKee*, 874 F.3d at 58.
45. *Id.*
46. *Id.*
47. *Id.*
48. The relevant portions of the letter that referenced McKee stated that the *Daily News* should not have published McKee's "never-before-heard tale" and argued that the *Daily News* "ignor[ed] or fail[ed] to investigate what [Cosby's lawyer] called 'evidence undermining [McKee's] reliability.'" Due, *supra* note 22 (quoting *McKee*, 874 F.3d at 58).
49. *McKee*, 874 F.3d at 58.
50. *Id.* at 59.
51. This Comment will almost exclusively discuss defamation suits brought by individuals *accused* of sexual misconduct; *McKee v. Cosby* is being used only to demonstrate the court's decision to consider a survivor of sexual assault a limited purpose public figure solely because she chooses to report the misconduct she experienced.
52. *McKee*, 874 F.3d at 58-59.
53. McKee v. Cosby, 236 F. Supp. 3d 427, 454 (D. Mass. 2017).
54. *McKee*, 874 F.3d at 58-59.
55. *Id.* at 61-62.

alleged defamation," and (2) McKee thrust herself to the forefront of the controversy, *or* (3) McKee "otherwise 'engage[d] the public's attention in an attempt to influence its outcome.'"[56]

Despite McKee's argument that "her dispute with Cosby [was] a self-contained, private dispute—'purely a matter of private concern,'" the court ultimately held that a public controversy existed when McKee lodged sexual assault allegations against Cosby to the media.[57] The court took into consideration the way McKee publicized her allegations (to the press, after decades of silence) and that she reported after twenty others had already come forward, essentially implying that she knew she was joining a movement.[58]

The court went on to note that this method of coming forward satisfied the second prong of the limited purpose liability element analysis because reporting to the media necessarily thrusted McKee to the forefront of the Cosby controversy, especially when she sought to influence the outcome of the controversy.[59]

Because the court found that McKee was a limited purpose public figure, it held that "she may not recover damages for a defamatory statement unless . . . she can prove that the statement was made with '"actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'"[60] Although McKee argues that she should not be deemed a limited purpose public figure just because she was "involved in or associated with a matter that attracts public attention,"[61] the court ultimately decided that because she voluntarily and deliberately came forward to accuse Cosby (as opposed to prior cases where the defamation plaintiff was "dragged unwillingly into the controversy"),[62] she purposefully "invit[ed] public scrutiny."[63] Therefore, the court held, "as a matter of law that McKee [wa]s a limited-purpose public figure."[64]

There has not yet been a case before the Supreme Court in which the Court has had to determine whether or not an individual accused of

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56. *Id.* at 61 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974)).
57. *Id.* at 62.
58. *Id.*
59. *Id.*
60. *Id.* at 61 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).
61. *Id.* at 62 (quoting Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979)).
62. *Id.* (quoting *Wolston*, 443 U.S. at 166).
63. *Id.* (quoting Pendleton v. City of Haverhill, 156 F.3d 57, 69 (1st Cir. 1998)).
64. *Id.* Taking into account McKee's status as a limited purpose public figure, the court concluded its analysis by affirming the district court's decision to grant Cosby's motion to dismiss the defamation suit. *Id.* at 65.

sexual misconduct can become a limited purpose public figure simply by being accused in the media (assuming the accused is not already a public figure like Bill Cosby), just as it has repeatedly decided that a survivor can become a limited purpose public figure simply by reporting to the media.[65] However, a strong argument can be made that when accused of sexual misconduct, those accused do become limited purpose public figures. One could argue that a controversy exists any time someone is publicly accused of sexual misconduct and that those accused thrust themselves to the forefront of the conflict when they publicly respond, *especially* when seeking to influence the outcome of the controversy, just like McKee did in her case. If this argument were to succeed in court, the defamation plaintiff (the accused) would have to meet the actual malice standard instead of the negligent standard in his defamation suit against the survivor. This heightened burden of proof would provide an important protection for survivors moving forward in the #MeToo movement and should be considered a potential reprieve for survivors in the context of the retaliatory defamation suits that this Comment discusses.

C. Defamation in Louisiana

Consistent with federal Supreme Court cases, "Louisiana has always recognized the individual rights of freedom of the press and of speech, always warning that the abuse of these liberties would not be tolerated . . . under the state's Civil Code."[66] In Louisiana, a cause of action for defamation arises out of a violation of Civil Code Article 2315.[67] Just like the federal case law, Louisiana defamation laws serve the purpose of protecting reputation and good name. In order to prove defamation in Louisiana specifically, the plaintiff must establish:

(1) false and defamatory statement concerning another,
(2) unprivileged publication to a third party,
(3) fault, requiring negligence, or greater, on the part of the publisher and

65. *See* COLLINS, *supra* note 11, at 548 ("Whether the 'actual malice' requirement applies where a public figure sues a non-media defendant has not been resolved by the United States Supreme Court.").

66. MICHAEL A. KONCZAL & GERALD V. FLANNERY, DEFAMATION LAW IN LOUISIANA, 1800-1988, at 108 (1989).

67. *See* LA. CIV. CODE ANN. art. 2315 (2010).

(4) resulting injury.[68]

Put another way, the plaintiff "must prove 'that the defendant, with actual malice or other fault, published a false statement with defamatory words which caused plaintiff damages.'"[69] Louisiana defines "a communication [as] defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise exposes a person to contempt or ridicule."[70] The Louisiana Supreme Court has held that this necessarily implicates any "communication which [addresses] an element of personal disgrace, dishonesty, or disrepute."[71] Therefore, Louisiana defamation law undoubtedly creates a cause of action for individuals who have been publicly accused of sexual misconduct, assuming they satisfy all the elements stated above.

III. RETALIATORY DEFAMATION SUITS FILED IN RESPONSE TO ACCUSATIONS OF SEXUAL MISCONDUCT

As the #MeToo movement has gained momentum, "there has been a surge in retaliatory defamation lawsuits by [alleged] abusers."[72] These defamation suits are being used to silence survivors from reporting acts of sexual misconduct.

In 2002, sixteen-year-old Alice Glass met indie rock star, Ethan Kath, while he was on tour with his rock band, Kill Cheerleader.[73] Three years later, when Kath started a new band, Crystal Castles, he invited Glass to join as a vocalist.[74] The band attained widespread success and achieved mainstream recognition as it traveled the world

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68. WILLIAM E. CRAWFORD, 12 LOUISIANA CIVIL LAW TREATISE: TORT LAW 469 (2d ed. 2009).

69. Trentecosta v. Beck, 96-2388, p. 10 (La. 10/21/97); 703 So. 2d 552, 559 (quoting Sassone v. Elder, 626 So. 2d 345, 350 (La. 1993)).

70. Fitzgerald v. Tucker, 98-C-2313, p.11 (La. 6/29/99); 737 So. 2d 706, 716 (La. 1999) (quoting *Trentecosta*, 96-2388 at p. 10, 703 So. 2d at 559).

71. *Id.*

72. Bruce Johnson & Davis Wright Tremaine, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips.*, ACLU (Jan. 22, 2018), https://www.aclu.org/blog/womens-rights/worried-about-getting-sued-reporting-sexual-abuse-here-are-some-tips ("Many lawyers say they've seen a spike in defamation lawsuits in recent years.").

73. Amy Zimmerman, *The Indie Rocker Accused of Sexually Abusing Young Fans*, DAILY BEAST, https://www.thedailybeast.com/the-indie-rocker-accused-of-sexually-abusing-young-fans (last updated Feb. 17, 2018).

74. *Id.*

performing at shows and festivals.[75] The band reveled in this success for nine years until Glass, who had received numerous individual awards for her "pioneering spirit and an uncompromising approach to music,"[76] abruptly announced her intention to leave Crystal Castles.

Glass described her departure as "the culmination of years of . . . sexual assault, manipulation, and physical and emotional abuse" perpetrated by Ethan Kath, the leader of the band.[77] Glass released a "lengthy statement" where she described the sexual assault she experienced at the hands of Kath for the nine years that she worked as his bandmate. In response, "Kath [immediately] filed a defamation suit against Glass . . . . accus[ing] [her] of releasing 'false and malicious lies to the online world.'"[78] Glass reported in an interview with the *Daily Beast* that the defamation suit from Kath was "meant to intimidate the other alleged victims who 'probably don't have access to a lawyer and so they'd be too scared to speak out if they think they'll be sued for hundreds of thousands of dollars.'"[79] This is exactly the problem this Comment seeks to address—the legal silencing of survivors by threat of a defamation lawsuit.

Alice Glass was one of the lucky ones, particularly because she had the means to defend against her retaliatory defamation suit and the courage to speak out under threat of lawsuit. As is exemplified by Glass's case, there has "definitely been an uptick" in recent years in retaliatory defamation suits, which are being used "as a strategy to silence survivors."[80] Individuals accused of sexual misconduct often file these "shameless lawsuits they know they can't win but which they hope will intimidate" survivors and force them into silence.[81]

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75. *Id.*

76. *Id.* (quoting Jamie Fullerton, *Crystal Castles Get John Peel Award for Innovation at Shockwaves NME Awards*, NEW MUSICAL EXPRESS (Feb. 23, 2011), https://www.nme.com/news/music/crystal-castles-2-36-1299451).

77. *Id.*

78. *Id.* (quoting Verified Complaint for Damages at 2, Palmieri v. Osborn, No. BC681889 (C.D. Cal. Nov. 3, 2017)).

79. Noah Yoo, *Facing Defamation Suit, Alice Glass Speaks Out Against Former Crystal Castles Bandmate Ethan Kath*, PITCHFORK (Feb. 17, 2018), https://pitchfork.com/news/facing-defamation-suit-alice-glass-speaks-out-against-former-crystal-castles-bandmate-ethan-kath/ (quoting Zimmerman, *supra* note 73).

80. Katherine Mangan, *Blasted as Predators, Professors Are Fighting Back with Lawsuits*, CHRONICLE HIGHER EDUC. (July 12, 2018), https://www.chronicle.com/article/Blasted-as-Predators/243918 (quoting Carly N. Mee, Interim Executive Director of SurvJustice).

81. *Hollywood's Notorious Men Retaliate Against #MeToo Movement*, EARTHRIGHTS INT'L (Aug. 20, 2018), https://earthrights.org/blog/hollywoods-notorious-men-retaliate-against-metoo-movement/.

Financial burdens should be considered at the forefront of the discussion regarding this crisis. Alice Glass was fortunate that as a twenty-five-year-old acclaimed rock star, she had the means to defend against the defamation suit that was brought against her. However, not all survivors are so lucky. Defending against these retaliatory defamation suits "can be enormously expensive."[82] In fact, the financial burden of defending against a defamation suit is one of the main reasons these suits tend to evoke so much fear in survivors. In one instance, defending against a defamation suit that was brought by an individual accused of sexual misconduct cost the survivor "nearly $20,000 to defend herself. Some months, her legal bills have reached as high as $6,000—more than twice her monthly income."[83] In that particular case, the accused perpetrator knew the survivor did not have the financial capacity to defend against an expensive lawsuit.[84] "[T]he proceedings for defamation cases often drag on for months, making paying a lawyer by the hour a steep expense."[85]

Experts in the field are concerned that this influx in defamation suits filed against survivors "will further discourage reporting."[86] This fear stems from the systematic oppression that survivors are already facing when it comes to reporting. Even without the threat of being hit with a defamation lawsuit, "[s]urvivors . . . already face a myriad of hurdles when it comes to reporting their assault, including victim blaming, stigmatization, and officials not taking their accusations seriously, among others."[87] Overall, the threat of a defamation lawsuit acts to silence survivors from coming forward.

The introduction to this Comment provided the example of Donald Trump's use of retaliatory defamation suits. But neither the President of the United States nor Ethan Kath of Crystal Castles is the only person who has recently attempted to use retaliatory defamation suits to silence survivors. The news media has brought to light

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82. Hazel Cills, *Students Accused of Sexual Misconduct Are Increasingly Filing Defamation Suits Against Their Accusers*, JEZEBEL (Dec. 5, 2017), https://jezebel.com/students-accused-of-sexual-misconduct-are-increasingly-1821026491.

83. Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017), https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing/.

84. *Id.*

85. Jackson, *supra* note 2.

86. Sarah Friedmann, *Reporting Sexual Assault on Campus Is Becoming Riskier Than Ever—Here's Why*, BUSTLE (Dec. 6, 2017), https://www.bustle.com/p/reporting-sexual-assault-on-campus-is-becoming-riskier-than-ever-heres-why-7209692.

87. *Id.*

innumerable similar instances. Just to name a few, comedian Jasmine Pierce was sued for defamation for $38 million after accusing fellow comedian Aaron Glaser of being a rapist.[88] Writer Moira Donegan was handed a $1.5 million defamation lawsuit by author Stephen Elliot after she created "the 'Shitty Media Men' list, a crowdsourced Google spreadsheet that names more than 70 men as alleged perpetrators of sexual misconduct."[89] Fifty-two-year-old jazz musician, Steve Coleman, delivered a defamation lawsuit to his teenage protégé who accused him of sexual misconduct.[90] Political figures are also involved as Plaintiffs: Matt Dababneh, ex-assemblyman of the California legislature "filed a defamation []suit . . . against a lobbyist who accused him of" sexual misconduct.[91] These are just a few examples of what has unfortunately become a widespread phenomenon that this Comment addresses.

There is no question that defamation suits are being used as a retaliatory tool to mute survivors. The solutions proposed in Part V of this Comment aim to eliminate the use of defamation suits for this sole purpose.

IV. DEFAMATION CLAIMS USED TO COMBAT TITLE IX COMPLAINTS

This Part exclusively discusses retaliatory defamation lawsuits in the context of university settings because the use of these suits to silence survivors is particularly common on college campuses. Although defamation suits have been around for quite some time, defamation "claims arising from scholarship and academic debate are

88. *A Comedian Called Out an Alleged Rapist—and Was Sued for $38 Million*, PUB. PARTICIPATION PROJECT (Nov. 2, 2017), https://anti-slapp.org/slapp-blog/2018/8/14/a-comedian-called-out-an-alleged-rapistand-was-sued-for-38-million.

89. Michelle Kaminsky, *The 'Shitty Media Men' Defamation Lawsuit Is a Danger to Both Free Speech and the #MeToo Movement*, FORBES (Oct. 22, 2018), https://www.forbes.com/sites/michellefabio/2018/10/22/the-shitty-media-men-defamation-lawsuit-is-a-danger-to-both-free-speech-and-the-metoo-movement/#3feb20d17be9. Donegan's attorney argued in this article that the purpose "of the [defamation] case is not actually to succeed against my client, or maybe not even to go forward with the case at all . . . but to file it to send a strong message to other women that if you do this you will be sued." *Id.*

90. John Annese, Elizabeth Keogh & Nancy Dillon, *Famed Jazz Saxophonist Accused of Sexual Misconduct by Former Protégé Now Suing for Defamation*, N.Y. DAILY NEWS (Oct. 12, 2018), https://www.nydailynews.com/news/ny-news-jazz-star-steven-coleman-defamation-lawsuit-sexual-harassment-20181011-story.html.

91. Mason, *supra* note 9 ("Including Dababneh, three legislators resigned after public accusations of sexual harassment as the groundswell of the #MeToo movement hit California's state Capitol last fall.").

a relatively recent phenomenon."[92] In recent years, defamation lawsuits have been used as a tool to respond to claims of Title IX violations on college campuses.[93]

A. Sexual Misconduct in Educational Settings—A Brief History of Title IX

In 1972, Title IX of the Education Amendments was enacted by Congress.[94] Title IX prohibited discrimination on the basis of sex.[95] Initially, Title IX served the exclusive purpose of enforcing equal access to athletics at institutions of higher education receiving federal funding.[96] The first time Title IX was used to address sexual misconduct was eight years later when the United States Court of Appeals for the Second Circuit decided *Alexander v. Yale University*.[97] There, female graduates of Yale University sued their alma mater alleging that the sexual harassment that they had experienced while enrolled at Yale University violated Title IX.[98] The court held that, because the students had already graduated the university and were no longer subject to the misconduct, they were not able to state a justiciable case or controversy.[99] Even though the plaintiffs alleging sexual misconduct in this case did not prevail, they moved the fight against sexual misconduct using Title IX forward by bringing it into the courts.

Sixteen years later, a district court in California heard a case alleging a Title IX violation by a high school student who had experienced repeated instances of sexual harassment while in school.[100] There, the court granted the plaintiff's motion for reconsideration, setting out specific standards plaintiffs must meet (as adopted from

92. GAJDA, *supra* note 12, at 161.

93. Kingkade, *supra* note 83.

94. *See* Title IX, 20 U.S.C. § 1681 (1972).

95. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a).

96. *History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), https://www.womenssportsfoundation.org/advocate/title-ix-issues/history-title-ix/history-title-ix/.

97. *See* 631 F.2d 178 (2d Cir. 1980); Tyler Kingkade, *How a Title IX Harassment Case at Yale in 1980 Set the Stage for Today's Sexual Assault Activism*, HUFFINGTON POST, https://www.huffpost.com/entry/title-ix-yale-catherine-mackinnon_n_5462140 (last updated June 10, 2014).

98. *Alexander*, 631 F.2d at 181.

99. *Id.* at 183-84.

100. Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1416 (N.D. Cal. 1996).

Title VII) in order to prove they were subject to a hostile environment because of sexual harassment based on gender under Title IX.[101]

Finally, after prompting from courts deciding cases like *Petaluma City School District*, the Office of Civil Rights (OCR) within the Department of Education (DOE) issued the *1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*.[102] This guidance document set out the sexual harassment policy standards schools must conform to in order to be in compliance with Title IX.[103] This was extremely significant because it was the first time the OCR had indicated that sexual misconduct is a violation of Title IX.

From that point forward, Title IX became an important tool in combating sexual misconduct in educational settings. Guidance documents from the DOE[104] as well as prominent Circuit and Supreme Court cases[105] advanced students' rights to be free from sexual misconduct on the theory that sexual misconduct is discrimination on the basis of sex and therefore a violation of Title IX.

The most prominent advancement was the 2011 Dear Colleague Letter issued by the DOE under the Obama administration.[106] This guidance document, again issued by the OCR, sets out the requirements under Title IX for schools that want to continue receiving federal assistance.[107] The document "explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence."[108]

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101. *Id.* at 1427.

102. Norma V. Cantu, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T EDUC. (Mar. 13, 1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html.

103. *Id.*

104. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011) [hereinafter 2011 Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

105. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 184 (2005) (holding that Title IX prohibits schools from retaliating against individuals who complain of sex discrimination); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 654 (1999) (holding that Title IX covers student-on-student harassment); Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 968 (9th Cir. 2010) (holding plaintiffs who allege Title IX violations do not have to give the university "notice and opportunity to cure" before bringing suit).

106. 2011 Dear Colleague Letter, *supra* note 104.

107. *Id.*

108. *Id.*

The letter was backed by enormous support from survivors' rights advocates, including the Association of Title IX Administrators.[109]

Because of how wide-ranging the survivor protections were under these new guidelines, the letter paved the way for many more findings of "responsible" in Title IX investigations. In response, there has been a corresponding growth in the amount of defamation claims brought by respondents against petitioners and universities alike.

Six years after the 2011 Dear Colleague Letter was issued, on September 22, 2017, the Department of Justice, operating under the Trump administration, rescinded the Dear Colleague Letter of April 4, 2011, as well as the April 29, 2014 Questions and Answers document on Title IX and Sexual Violence.[110] However, despite the rollback on survivors' rights that came along with this rescission, there has not been an equal decrease in retaliatory defamation suits.

B. Defamation Lawsuits Brought by Title IX Respondents

About one in every six female college students has reported that she was sexually assaulted during her time in college.[111] The #MeToo movement has inspired student survivors of sexual misconduct to share their stories and file Title IX complaints at their universities, but at what cost? "On college campuses, survivors of alleged sexual assault are increasingly facing an additional hurdle after reporting an incident—the possibility of a defamation lawsuit from the accused."[112] This new trend is causing reporting of sexual misconduct on college campuses to become even more perilous for survivors of assault, and leaves them "even further disincentivized to come forward with allegations."[113]

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109. Letter from Neena Chaudhry & Lara S. Kaufmann, Seniors Counsels, Nat'l Women's Law Ctr., to Honorable Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ. (Feb. 8, 2012), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/nwlc_ltr_to_ocr_re_prep_of_evidence_std_2_8_12_2.pdf; *see* Letter from Brett Sokolow, Esq., Exec. Dir., Ass'n of Title IX Adm'rs, et al., to Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ. (Feb. 7, 2012), https://www.shatteringthesilence.org/wp-content/uploads/2012/02/Organizational-Sign-on-for-DCL-re-Sexual-Violence-2012-FINAL-Sign-on.pdf.

110. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues (Sept. 22, 2017) [hereinafter 2017 Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

111. *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/campus-sexual-violence (last updated 2019).

112. Friedmann, *supra* note 86.

113. *Id.*

The filing of defamation lawsuits in response to sexual misconduct cases used to be relatively uncommon, but "it has now become almost 'reflective' for those who are accused."[114] Reports show that 72% of respondents who file lawsuits in response to violations in the Title IX adjudicatory process sue not only their university, the entity conducting and pursuing the Title IX investigation,[115] but also their accuser.[116] Experts in this field have said that though it is "difficult to track how many defamation lawsuits arising from campus sexual assault cases are filed nationwide . . . [the] numbers . . . point to a clear uptick."[117]

There is no question that there has been an escalation in defamation lawsuits in response to Title IX allegations.[118] "[D]efamation lawsuits . . . are a new tool in the battle over Title IX enforcement and are proving to be serious obstacles to students filing sexual misconduct complaints."[119] Worst of all, in many cases, defamation lawsuits are being filed as a strategic move, to purposefully threaten sexual assault survivors into silence.[120]

This increase in defamation lawsuits brought by students accused of sexual misconduct accelerated after one case of public prominence—the case of Florida State University (FSU) quarterback, Jameis Winston.[121] Erica Kinsman, a fellow student of Winston's at

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114. *Id.* In preparing this article, *Bustle News* reviewed an interview of Colby Bruno, a lawyer at the Victim Rights Law Center, who reported that "just a few years ago, only around 5 percent of her cases related to campus sexual assaults involved the accused suing the alleged victim. Now, over half of Bruno's cases involve a defamation lawsuit." *Id.*

115. Though this Comment will focus on defamation suits brought against accusers of sexual misconduct, it is important to note that many institutions of higher education have also fallen victim to this influx of retaliatory defamation suits. *See* Guobadia & Haigh, *supra* note 16.

116. Friedmann, *supra* note 86; *see* Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 754 (D. Md. 2015).

117. Kingkade, *supra* note 83; *see* Friedmann, *supra* note 86.

118. Kingkade, *supra* note 83.

119. *Id.*

120. Friedmann, *supra* note 86.

121. In 2013, Jameis Winston was the first college freshman to win the Heisman trophy, which "recognizes the outstanding college football player whose performance best exhibits the pursuit of excellence with integrity," the year after he was publicly accused of sexual assault by Erica Kinsman, a fellow student at Florida State University. *Heisman Trust*, HEISMAN https://www.heisman.com/heisman-trust/ (last visited Feb. 19, 2020); Laura Wagner, *FSU Pays $950,000 to Woman Who Accused Jameis Winston of Sexual Assault*, NPR (Jan. 25, 2016), https://www.npr.org/sections/thetwo-way/2016/01/25/464332250/fsu-pays-950-000-to-woman-who-accused-jameis-winston-of-sexual-assault.

FSU, publicly accused[122] him of sexual battery after he allegedly raped her while she was a student at FSU.[123] Winston responded by filing a counterclaim for defamation.[124] In the end, the case settled and "Winston was never prosecuted or disciplined."[125]

Cases like these are not a rarity. In 2016, a former Tulane University football player filed a defamation suit against a student who alleged he had raped her.[126] The survivor alleged that "Davis had sexually assaulted her in his campus apartment in the early morning of Jan. 31."[127] Davis was subsequently expelled from the university by the hearing board that found him responsible.[128] Reactively, Davis filed a defamation suit against his accuser in the Civil District Court Parish of Orleans, Louisiana, which is still pending.[129]

The mere possibility of a potential defamation suit can have a deterrent effect on a student's decision to make a Title IX complaint, even if the defamation suit never comes to fruition.[130] Sometimes, this can even be the purpose of filing a defamation lawsuit.[131] "Often, these lawsuits are filed just to scare a student into not reporting their assault or withdrawing their claims, even when there is sufficient evidence to support them."[132] And as discussed in Part III, defending against these lawsuits can be extremely expensive for the survivor, therefore creating an additional and unnecessary barrier to reporting.[133]

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122. *See* THE HUNTING GROUND (Chain Camera Pictures 2015). This documentary about campus sexual assault featuring Kinsman aired despite threats by Winston's legal team to sue the network if it proceeded. Jim Zarroli, *CNN Airs Documentary on Sexual Assault, Despite Legal Threats*, NPR (Nov. 22, 2015), https://www.npr.org/sections/thetwo-way/2015/11/22/457027388/cnn-will-air-documentary-on-sexual-assault-despite-legal-threats.

123. Marc Tracy, *Jameis Winston and Woman Who Accused Him of Rape Settle Lawsuits*, N.Y. TIMES (Dec. 15, 2016), https://www.nytimes.com/2016/12/15/sports/football/jameis-winston-erica-kinsman-lawsuit.html.

124. Kinsman v. Winston, No. 6:15-cv-696-Orl-22GJK, 2015 WL 12839267, at *1 (M.D. Fla. Sept. 15, 2015).

125. Tracy, *supra* note 123.

126. Guerry Smith, *Former Tulane Safety Leonard Davis Files Petition for Damages Against Student Who Said He Raped Her, Leading to His Expulsion*, ADVOCATE (Oct. 30, 2016), https://www.theadvocate.com/new_orleans/sports/tulane/article_7188ad4e-9cb2-11e6-8ce1-1b0ca5e6ee6d.html.

127. *Id.*

128. *Id.*

129. Order on Motion to Remand, Davis v. Doe, No. 18-1592 (E.D.L.A. May 1, 2018); Smith, *supra* note 126.

130. Kingkade, *supra* note 83; *see also* Jackson, *supra* note 2 (noting that defamation suits are being used as a tool to force survivors to disappear).

131. Kingkade, *supra* note 83.

132. Cills, *supra* note 82.

133. *See* discussion *supra* Part III.

The handling of these complex situations can pose serious ethical dilemmas for universities as well. If not handled properly, defamation lawsuits can force universities into dropping Title IX claims in some circumstances.[134] "If an alleged victim backs out of filing a complaint to avoid being sued for defamation, for example, a college might close the case by having all parties sign a nondisclosure agreement and letting the accused rapist withdraw from school and have the allegation erased."[135] In these situations, the university protects the survivor from being forced to be in the same living and learning environment as their alleged perpetrator, but the university also "pass[es] onto other campuses students who could be dangerous" with clean slates and no documented history of sexual misconduct.[136] Overall, it is clear that we must enact legislative and judicial remedies to reconcile the use of retaliatory defamation suits on and off college campuses.

V. POTENTIAL OPPORTUNITIES TO ELIMINATE RETALIATORY DEFAMATION SUITS

While this Comment does not deny that some defamation claims are legitimate and founded, the solutions proposed herein are aimed at addressing suits brought for the sole purpose of silencing survivors. There is no doubt that the increase in retaliatory defamation suits has had a chilling effect on survivor's ability to report, and "#MeToo victims do not have sufficient protections from defamation lawsuits by their abusers."[137] We cannot let the silencing of survivors through the threat of defamation lawsuits become a regular practice by those accused of sexual misconduct. To that end, this Comment discusses several potential solutions to this developing crisis.

A. Fifty State Adoption of Recent California Model Law

The most effective solution to this pressing problem is a full fifty state adoption of a recently enacted California model law (Bill No. 2770). A recent law[138] passed in July of 2018, which became effective on January 1, 2019, in California, "creat[ed] new protections for

134. Kingkade, *supra* note 83.

135. *Id.*

136. *Id.*

137. Bruce E.H. Johnson & Antoinette Bonsignore, *Protect #MeToo Victims from Retaliatory Lawsuits*, SEATTLE TIMES, https://www.seattletimes.com/opinion/protect-metoo-victims-from-retaliatory-lawsuits/?utm_source=facebook&utm_medium=social&utm_campaign=article_left_1.1 (last updated Jan. 23, 2018).

138. A.B. No. 2770, 2018 Leg. Sess., Reg. Sess. (Cal. 2018).

employers, witnesses, and complainants from defamation lawsuits related to making, assisting, or discussing good-faith sexual harassment claims and investigations."[139] The bill "seeks to strike a balance between encouraging individuals to report misconduct while protecting individuals from false accusations made with a complete disregard for the truth, hence the 'without malice' condition."[140] This Comment proposes that this new bill serve as a model to be adopted by the states,[141] which would provide the same protections for survivors across the country. As it stands, Bill No. 2770 protects employees from defamation suits[142] "when [employees] accuse someone of inappropriate behavior [sexual misconduct], as long as they do so in good faith."[143]

Bill No. 2770 is expansive in the communications that it protects but unfortunately not in the scope that it extends to. In terms of the communication it protects, it protects almost any good faith discussion or reporting of sexual harassment claims or investigations.[144] Bill No. 2770 added three types of "privileges" that can be used as a defense to defamation claims.[145] Most significantly for purposes of this Comment, any "sexual harassment complaints (written or oral) that employees make without malice, and based upon credible evidence" are privileged and therefore protected from defamation claims.[146] However, Bill No. 2770 goes even further to protect current and former employers so that they are able to "answer whether the decision to not rehire a current or former employee is based on the employer's determination that the employee engaged in sexual harassment, so long as the statements are

139. A.B. No. 2770, 2018 Leg. Sess.; Paul M. Huston, *New California Law Extends Defamation Privilege to Communications Related to Sexual Harassment Claims and Investigations*, NAT'L L. REV. (July 27, 2018), https://www.natlawreview.com/article/new-california-law-extends-defamation-privilege-to-communications-related-to-sexual.

140. Huston, *supra* note 139.

141. Because defamation is a state law claim, adoption of a federal statute would not necessarily prove helpful. Instead, this Comment proposes a model law that all states would be encouraged to adopt.

142. Louisiana also has one statute that protects employees from "fraudulent or frivolous" defamation suits, but only those filed by their employer, not by coworkers. LA. REV. STAT. § 13:3381 (2018).

143. Nadine Sebai, *New Law Will Protect California Employees from Defamation Lawsuits After Reporting Sexual Harassment*, CAP. PUB. RADIO (Dec. 20, 2018), http://www.capradio.org/articles/2018/12/20/new-law-will-protect-california-employees-from-defamation-lawsuits-after-reporting-sexual-harassment/.

144. Huston, *supra* note 139.

145. *Id.*

146. *Id.*

made without malice."[147] This is a substantial step in the fight to end sexual misconduct (especially in the workplace) because it will prevent employees who have engaged in sexual misconduct from flying under the radar as they move from job to job.

Unfortunately, Bill No. 2770, while noble in its protection of survivors, only applies to defamation suits in the employment setting. The bill was originally enacted by California with the purpose of preventing harassers from "suing former employers for defamation when the latter advise prospective employers that the job seeker was terminated because of sexually harassing behavior," though it has had the effect of limiting harassers from being able to "wriggle out of their self-imposed predicaments by filing defamation lawsuits against those seeking justice."[148]

Qualifying those accused of sexual misconduct as limited purpose public figures, as discussed in Part II.B would make this solution even more effective. If those accused of sexual misconduct were deemed limited purpose public figures when they bring defamation claims against survivors, then they would need to prove that the statement was made with actual malice. Because the Model California Law provides that a defamation defendant will be protected if her accusation was made in good faith, the defamation plaintiff would not be able to prove an essential element of the claim, therefore ensuring that it is dismissed as timely as possible.

Though Bill No. 2770 exclusively governs allegations of sexual misconduct and responding defamation suits springing from the employment setting, the ideal model statute would not be so restricted in scope. This Comment advocates for the adoption of a model law by all fifty states restricting *any* defamation suit brought in response to an allegation of sexual misconduct made in *good faith*, no matter what setting that claim is brought in. This Comment further advocates for the burden of proving bad faith to rest on the plaintiff bringing the defamation suit.

Overall, the full-state adoption of the model law would protect *any* survivor (not just employees at companies in California who must conform to bills like Bill No. 2770) from being exposed to a retaliatory

147. *Id.*

148. Jennifer Barrera, *Harassment Victims and Employers Need Protection from Defamation Lawsuits*, CAL. CHAMBER COM. ALERT (Apr. 27, 2018), https://calchamberalert.com/2018/04/27/harassment-victims-and-employers-need-protection-from-defamation-lawsuits/.

defamation suit and would protect survivors from the financial and psychological burdens of a false lawsuit so it would encourage survivors to speak out and say #MeToo. Eventually, laws like these will force individuals who engage in sexual misconduct to face the consequences of their actions instead of deflecting them with retaliatory lawsuits, and the laws will hopefully contribute in the eradication of sexual violence in this country.

B. Utilization of Anti-SLAPP Laws

Many states have adopted Anti-SLAPP statutes, which aim to prevent "strategic lawsuit[s] against publication participation" (SLAPP).[149] These strategic lawsuits "are intended to intimidate the target by draining their financial resources and dragging them through years in the court system."[150] A perfect example of a SLAPP lawsuit is a retaliatory defamation claim.

In response to a growing number of lawsuits that were "threaten[ing] a citizen's right to petition . . . . and recognizing that traditional legal remedies such as abuse of process or malicious prosecution claims and motions for summary judgment were inadequate tools to ameliorate the problem, states enacted legislation," which we now know as Anti-SLAPP statutes.[151] These statutes create a special motion to strike for defendants that is "designed to guard against meritless lawsuits brought with the intention of chilling or deterring the free exercise of a defendant's First Amendment right to petition the government by threatening would-be activists with litigation costs."[152] Although these state statutes[153] were originally created to prevent corporations from suppressing whistleblowers,[154]

149. LEE & LINDAHL, *supra* note 8.

150. Evan Mascagni, *How a Proposed First Amendment Law Would Protect Survivors of Domestic Violence and Sexual Assault in Ohio*, PUB. PARTICIPATION PROJECT (Nov. 9, 2017), https://anti-slapp.org/slapp-blog/2017/11/9/how-a-proposed-first-amendment-law-would-protect-survivors-of-domestic-violence-and-sexual-assault-in-ohio.

151. Yount v. Handshoe, 2014-919, pp. 9-10 (La. App. 5 Cir 5/28/15); 171 So. 3d 381, 387.

152. LEE & LINDAHL, *supra* note 8.

153. Even though Anti-SLAPP statutes are not federal statutes, the United States Court of Appeals for the Fifth Circuit has held that Anti-SLAPP statutes apply in federal courts under the *Erie* doctrine because these statutes are "functionally substantive." *See* Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168-69 (5th Cir. 2009).

154. Kingkade, *supra* note 83; *see also Anti-SLAPP Statutes and Commentary*, MEDIALAW.ORG, http://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1 (last visited Feb. 19, 2020) (noting that "the actual resolution of the plaintiff's claims—for

they now provide defendants, like those defending against retaliatory defamation claims, "a statutory motion designed to minimize the litigation costs associated with the defense of meritless suits."[155]

Anti-SLAPP statutes are particularly applicable to the issue discussed in this Comment because survivors who decide to speak out or report sexual misconduct are necessarily chilled from free exercise of their First Amendment rights when their reports are met with responsive defamation lawsuits. The reason that retaliatory defamation claims impose First Amendment violations on reporting survivors is because these reports are "statement[s] that [survivors] should be able to make without liability[, a]nd it's a public policy concern."[156]

Anti-SLAPP motions allow "victims to ask the courts to decide whether a lawsuit has any legal merit before the victim is forced to endure unnecessary and time-consuming discovery."[157] If the judge grants the motion, all the financial burdens of litigation discussed in Part III are eliminated for the defamation defendant. If a defendant prevails on an Anti-SLAPP motion, the meritless suit will be dismissed quickly, and attorney's fees will be awarded to the party whom the original suit was brought against.[158] Not only does this support survivors financially, but it also ensures that they will be able to retain and compensate competent legal counsel for their defense.

Different states have different standards of proof for the defendant of a defamation claim to prevail on an Anti-SLAPP motion. In Louisiana, for example, the burden rests on the plaintiff bringing the defamation suit to establish a "probability of success."[159] This approach is somewhat common, and the Louisiana Second Circuit has itself acknowledged the vast similarities between Louisiana's Anti-SLAPP statutes and California's Anti-SLAPP statutes.[160] California's progressive Anti-SLAPP statutes have served as a model for other

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defamation, tortious interference or related theories—was a secondary motivation at best" for enacting Anti-SLAPP statutes).

155. LEE & LINDAHL, *supra* note 8.

156. Kingkade, *supra* note 83 (quoting Krista Lee Baughman).

157. Johnson & Bonsignore, *supra* note 137. This article also noted that continuous court appearances particularly affect survivors who could be traumatized by being "forced to personally confront their abusers." Fortunately, these regular court appearances would also be eliminated by effective Anti-SLAPP statutes. *Id.*

158. Yount v. Handshoe, 2014-1919, p. 10 (La. App. 5 Cir. 5/28/15), 171 So. 3d 381, 387.

159. LA. CODE CIV. PROC. ANN. art. 971 (2012).

160. Thomas v. City of Monroe La., 36-526, pp. 6-7 (La. App. 2 Cir. 12/18/02); 833 So. 2d 1282, 1286.

states who have enacted them.[161] California offers the "broadest scope of protection . . . which protects not only traditional petitioning activity but speech made in connection with issues of public concern."[162] Louisiana courts in particular have often "looked to California precedent in interpreting Louisiana's provisions."[163]

Louisiana's probability of success standard is akin to California's "probability of prevailing" standard, which requires "a determination 'that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment.'"[164]

This standard is beneficial to defamation defendants. Under this standard, the burden rests on the plaintiff bringing the defamation suit to prove it has merit, instead of on the defendant to prove that the statements he or she made were in fact true (which is the standard the defendant must meet to prove truth, as will be discussed in Part V.C).[165] Therefore, defamation defendants who have access to Anti-SLAPP statutes have a much lower burden and a much higher chance of prevailing.

In addition to the lower burden, the benefits to Anti-SLAPP statutes for defamation defendants in sexual assault cases are abundant. As previously stated, the special motion is financially beneficial to survivors/defendants of defamation suits. If they prevail on the special motion, the plaintiff is forced to pay their attorney's fees. This gives survivors better access to legal counsel and also nips costly litigation in the bud that has the potential to drag on for years. It also allows defamation defendants to have suits against them dismissed swiftly, so they can move on from these traumatizing events. Most importantly, these statutes help to ensure that survivors of sexual misconduct do not become victims of the legal system that is meant to protect them.

Despite all the benefits, there are some considerable issues with using Anti-SLAPP statutes as the sole remedy for retaliatory state defamation claims. For one, not all states have Anti-SLAPP statutes in

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161. Several states have replicated the California model (Indiana, Louisiana, Oregon, Colorado, Nevada, Tennessee, and Oklahoma). *Anti-SLAPP Statutes and Commentary*, *supra* note 154.

162. *Id.*

163. Lozovyy v. Kurtz, 813 F.3d 576, 584 (5th Cir. 2015).

164. *Id.* at 584 (quoting D'Arrigo Bros. v. United Farmworkers, 244 Cal. App. 4th 790, 800 (Cal. Ct. App. 6th 2014)).

165. *See* discussion *infra* Part V.C.

place.[166] In fact, twenty-one states do *not* have Anti-SLAPP statutes at all.[167] For this reason, this Comment proposes enactment of a federal Anti-SLAPP statute that, again, mimics the legislation passed by California. California's Anti-SLAPP statute is the most ideal model because it "protects not only traditional petitioning activity but speech made in connection with issues of public concern" as previously stated.[168]

The second issue with SLAPP motions is that they typically call for mini trials on the merits before the court will grant them. Courts want the nonmoving party to prove, in response to a SLAPP motion, the "likelihood of success on the merits" before they decide on the motion.[169] The demand for these mini trials indicates that the SLAPP solution will not *always* avoid the cost of litigation and lack of access to competent legal counsel problems discussed previously.

Because of these drawbacks to the reliance on Anti-SLAPP statutes, this Comment proposes utilization of the California Model Rule, discussed in Part V.A, as the most effective solution to this problem. Overall, however, Anti-SLAPP statutes and the option to make the special motion to dismiss under Anti-SLAPP legislation can prove vitally important to eradicating retaliatory defamation suits and ensuring First Amendment rights *especially* to survivors of sexual misconduct.

C. Truth as a Defense

Given that the making of a "false statement" is an essential element to prove defamation, survivors being sued for defamation can always use truth as a defense—that is, they can prove that their allegations of sexual misconduct are true and that the misconduct actually did occur as they reported. Truth is an absolute defense to a defamation claim.[170] However, the defamation defendant (the survivor)

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166. *Anti-SLAPP Statutes and Commentary*, *supra* note 154.

167. *Id.* ("As of June 2019, 29 states have anti-SLAPP statutes: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Tennessee, Utah, Vermont.").

168. *Id.*

169. Order Granting Plaintiff/Counter-Defendant's Special Motion to Dismiss at 6, Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l, No. 2014 CA 002273 B (D.C. Super. Ct. Apr. 7, 2015).

170. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 770 (1986). Louisiana courts have adopted this to be true. *See* Martin v. Lincoln Gen. Hosp., 588 So. 2d 1329, 1333 (La. App. 2 Cir. 1991).

would have the burden of proving that the defamatory statement is unequivocally true in fact.[171]

The problem with using truth as a defense is that in practice, sexual assault is extremely difficult to prove. "Many states . . . still require the prosecution to prove that the sexual contact was the product of force, as well as being nonconsensual."[172] Even the Violence Against Women Act (a progressive piece of legislation passed in 1994 that expanded women's rights to be free from violence and sexual violence in particular)[173] allows federal courts "to read into state criminal codes an additional force requirement even if the state statute only requires nonconsensual sex to prove rape."[174]

Worse yet is the requirement of corroboration to prove that the allegations are true. The corroboration requirement proves difficult with sexual misconduct cases because "there are usually only two witnesses to the crime—the victim and the defendant."[175] The Model Penal Code, as replicated by many states, provides that "[n]o person shall be convicted of any felony [including sexual violence] . . . upon the uncorroborated testimony of the alleged victim."[176] Rape is one of the only two crimes codified in the Model Penal Code that requires corroborating evidence, despite the fact that it is incredibly difficult to provide.[177]

Though "truth as a defense" sounds like a simple solution, in effect it can create acute obstacles for survivors. To prove the truth of the allegations, survivors will not only have to relive the assault, which can be "re-traumatizing" and "emotionally draining,"[178] but they would have to find a way to produce evidence of a crime that typically comes down to he-said-she-said.

This strategy proves particularly unhelpful to survivors when the accused is willing to lie to counter the survivor's testimony. Defendants

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171. *Phila. Newspapers, Inc.*, 475 U.S. at 770.

172. Wendy Rae Willis, Note, *The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2213 (1992).

173. Violence Against Women Act, H.R. 1502, 102d Cong. (1st Sess. 1991).

174. Willis, *supra* note 172, at 2213-14.

175. Mary Wood, *City Attorney Shares Reality of Prosecuting Sexual Assault Cases*, U. VA. SCH. L., https://www.law.virginia.edu/news/2001_02/zug.htm (last visited Jan. 29, 2020).

176. MODEL PENAL CODE § 213.6(5) (1980).

177. *See id.* § 241.1(6) (stating that perjury is the only other crime in the Model Penal Code that requires corroboration); *see also* H.B. 106, 2017 Leg., 2017 Sess. (N.H. 2017) (providing an example of a corroboration bill brought to the table in the New Hampshire state legislature; "that a victim's testimony in a sexual assault case shall require corroboration").

178. Friedmann, *supra* note 86.

in sexual misconduct cases often argue in court that the sex was consensual as their defense.[179] In fact, in recent years this "is the most common and the most difficult [defense] to defeat."[180]

Further, this option still poses a significant financial burden on survivors. Recall the defamation defendant/survivor in Part III whose legal bills she pays to defend herself "have reached as high as $6,000 [per month]—more than twice her monthly income."[181] In sum, though using the truth as a defense seems like a simple fix to defending against retaliatory defamation suits, in actuality, it can prove incredibly difficult in practice.

VI. CONCLUSION

The retaliatory use of defamation lawsuits has the effect of deterring survivors from reporting, therefore chilling the free exercise of their First Amendment rights. The pattern of legal abuse is readily detectable and must be stopped. Every seventy-three seconds, an American is sexually assaulted.[182] Put another way, 433,648 individuals survive sexual assault every year in the United States.[183] "Among undergraduate students, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force, violence, or incapacitation."[184] Despite this uncontrolled crisis, only 75% of sexual assaults are reported by survivors.[185] This is a problem. It is not possible to change the culture around sexual misconduct if those that are brave enough to speak out are being subsequently slapped down and silenced by retaliatory defamation suits. The threat of these defamation suits must be eliminated in order to support the progression of the #MeToo *movement* and ensure that it does not just become a brief #MeToo *moment* in time.

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179. Wood, *supra* note 175.

180. *Id.*

181. Kingkade, *supra* note 83. This article also discussed a defamation suit brought against defendant Bridget Mahoney by her ex-husband, which ended up costing her $100,000 to defend against.

182. *Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK (2019), https://www.rainn.org/statistics.

183. *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK (2019), https://www.rainn.org/statistics/victims-sexual-violence.

184. *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK (2019), https://www.rainn.org/statistics/campus-sexual-violence.

185. *Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK (2019), https://www.rainn.org/statistics/criminal-justice-system.