THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 23 | Issue 2

Fall 2020

The Impact of the #MeToo Movement on Defamation Claims Against Survivors

Shaina Weisbrot
CUNY School of Law

THE IMPACT OF THE #METOO MOVEMENT ON DEFAMATION CLAIMS AGAINST SURVIVORS

Shaina Weisbrot†

INTRODUCTION

The #MeToo movement has confirmed what many already know from experience: the rates of abuse, harassment, and other forms of gender-based violence are astronomically high.[1] Nationwide, 81% of women and 43% of men report experiencing some form of sexual harassment or assault in their lifetime.[2] At least one-third of women aged 18 to 24, Black

† J.D, CUNY School of Law, 2020; M.P.A, New York University, 2013; B.A., Rutgers University, 2008. I would like to thank the CUNY Law Review staff for their immensely helpful edits and feedback. Additionally, I am thankful for Professor Julie Goldscheid and Jennifer Becker's vital help conceptualizing this Note and their guidance throughout the writing process. I am also indebted to my parents and grandmother, Elaine Schankler – without all of you, my goals would still be a vision and I am forever grateful for your unwavering encouragement and belief in me. Finally, my deep appreciation goes to my endlessly supportive husband, David Krupnik, whose love and patience throughout my law school journey was immeasurable. All errors and omissions in this Note are mine.

[1] *See* STOP STREET HARASSMENT ET AL., THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 9-10 (2018), https://perma.cc/S55Q-BUBP.

[2] U.C. SAN DIEGO CTR. ON GENDER EQUITY AND HEALTH ET AL., MEASURING #METOO: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 10 (2019), https://perma.cc/47U5-LAUW.

women, and lesbian or bisexual women reported sexual harassment in the past six months, the highest prevalence across demographics.[3] While the #MeToo movement did not create this culture of abuse, it has increased the number of people who want to tell their stories.[4]

Tarana Burke founded the #MeToo movement in 2007, which then spread like wildfire on October 15, 2017, when Alyssa Milano tweeted, "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[5] "The next day, 609,000 posts carried that hashtag," and over the course of a year the hashtag appeared in almost 14 million tweets.[6] Prior to the first #MeToo tweet, there were other highly publicized allegations of systemic abuse and harassment in the entertainment industry, but now the movement had a name, several faces, and was increasingly difficult to ignore.[7] As the movement continued to gain steam, businesses fired at least 201 men due to accusations of sexual harassment or assault, and state and local legislation protecting employees' rights regarding abuse allegations emerged in 15 states.[8]

Stories of abuse are rising across multiple contexts, from the criminal legal system, where the percentage of rapes or sexual assaults that were reported to police rose by 17% in 2017, to workplace settings, where the

---

[3] *Id.* at 11.

[4] *See, e.g.*, Collin Binkley, *#MeToo Inspires Wave of Old Misconduct Reports to Colleges*, ASSOCIATED PRESS (Oct. 13, 2018), https://perma.cc/Y3R6-DAFB. For instance, in the first half of 2018, Michigan State University received 22 complaints from two decades ago or longer. In the previous five years combined, there were just nine cases that old. *Id.*

[5] Stephanie Zacharek et al., *The Silence Breakers*, TIME (Dec. 18, 2017), https://perma.cc/VB2P-D4V9.

[6] Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://perma.cc/TN45-BEKW.

[7] *See, e.g.*, Gottwald v. Sebert, 172 A.D.3d 445 (N.Y. App. Div. 2019); Graham Bowley, *Bill Cosby Assault Case: A Timeline from Accusation to Sentencing,* N.Y. TIMES (Sept. 25, 2018), https://perma.cc/7X2M-KWKC.

[8] Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.,* N.Y. TIMES (Oct. 29, 2018), https://perma.cc/7MSV-NJY8; *#MeToo: Its Impact and What's Happening Now*, Am. Bar Ass'n (Sep. 2019), https://perma.cc/PY6K-J2UM. Fifteen states have passed reforms to protect workers from sexual harassment since October 2017: Arizona, California, Connecticut, Delaware, Illinois, Louisiana, Maryland, Nevada, New Jersey, New York, Oregon, Tennessee, Vermont, Virginia, and Washington. NAT'L WOMEN'S LAW CTR., PROGRESS IN ADVANCING METOO WORKPLACE REFORMS IN #20STATESBY2020 5-14 (2019), https://perma.cc/9TMQ-244W. Additionally, Congress has introduced the BE HEARD in the Workplace Act, which strengthens and expands current antidiscrimination laws. Vania Leveille & Lenora M. Lapidus, *The BE HEARD Act Will Overhaul Workplace Harassment Laws,* ACLU (Apr. 10, 2019, 11:15 AM), https://perma.cc/A9FS-DCJQ.

number of sexual harassment complaints filed with the Equal Employment Opportunity Commission (EEOC) increased by 13.6% in 2018.[9] Furthermore, the Time's Up Legal Defense Fund, created in support of the #MeToo movement, has received more than 3,500 requests in the year and a half they have been operating for assistance in addressing workplace sexual harassment. Two-thirds of those requests have come from low-income workers, who are often the target of retaliation and harassment.[10] However, survivors remain fearful and hesitant to report the abuse they have experienced, acutely aware that institutional accountability mechanisms often fail and that they might never find the justice that they seek.[11]

As a result of greater access to public forums and the criminal and civil legal systems' inadequate treatment of sexual abuse or harassment cases, survivors are increasingly using other platforms to expose abuse they were subjected to.[12] The criminal legal system is a daunting avenue to pursue, since reporting abuse often involves a rigorous process with a low rate of success.[13] Moreover, it can take years for some survivors to process the trauma they have experienced, and statutes of limitations can prevent them from pursuing claims after the time limits for claims expire.[14] In addition, some survivors do not anticipate achieving their goals through criminal and civil litigation; rather, they find solace in telling their story to the public. Others find support and relief in raising their voices or warning others about their experience with a particular person or institution, which makes it necessary to ensure that survivors are legally protected when threatened by a defamation claim from the person or institution who harmed them.[15]

---

[9] RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2017, at 1 (2018), https://perma.cc/TSB5-SKJG; Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data (Apr. 10, 2019), https://perma.cc/7YU9-PCPV.

[10] Kara Fox & Antoine Crouin, *Men Are Suing Women Who Accused Them of Harassment. Will It Stop Others from Speaking Out?*, CNN WORLD (June 5, 2019, 4:24 PM), https://perma.cc/RJB7-KXFB; Tina Tchen, Editorial, *#MeToo Identified a Disease that Infects Business. We Still Have a Long Way To Go*, CNN BUS. (Oct. 15, 2018, 8:29 AM), https://perma.cc/UV7K-AW3N.

[11] *See* Tchen, *supra* note 10.

[12] *E.g.*, Asia Fields, *UW Students Publish Online 'Rape List' out of Hopelessness*, SEATTLE TIMES (Oct. 26, 2018, 3:25 PM), https://perma.cc/CTE8-V4P8.

[13] *The Criminal Justice System: Statistics*, RAINN, https://perma.cc/PD2C-4GTK (last visited May 3, 2020).

[14] *See* LYNN LANGTON & JENNIFER TRUMAN, U.S. DEP'T OF JUSTICE, SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME (2014), https://perma.cc/L5QV-7PKE. For a list of relevant statutes of limitations by state, see *State by State Guide on Statutes of Limitations*, RAINN, https://perma.cc/B98J-KVTV (last visited May 3, 2020).

[15] Moira Donegan, *I Started the Media Men List: My Name is Moira Donegan.* N.Y. MAG.: THE CUT (Jan. 10, 2018), https://perma.cc/2HG7-SPB4; Fields, *supra* note 12; Kate

A troubling number of cases illustrate that when survivors share stories of their abuse, the accused may respond with defamation claims,[16] which are known as strategic lawsuits against public participation or SLAPPs.[17] The Time's Up fund has found that the number of defamation claims in response to survivors' stories was higher than they expected, and they were "surprised to see how many people have come to them for help in defamation cases."[18] Colby Bruno of the Boston-based Victim Rights Law Center reported that, previously, about 5% of her caseload of alleged campus sexual assaults involved an accuser facing a defamation suit from the alleged perpetrator. Now, a little more than half do.[19] In Washington, frustration at the lack of institutional response to abuse claims and fear of retribution—like SLAPPs—led anonymous University of Washington college students to compile lists of sexual assault allegations that grew to nearly 400 submissions, with students from other schools asking how they could create their own lists.[20] The students' fears were validated when three men threatened to sue unless their names were removed from the list.[21] The experience of the University of Washington students and other cases of sexual abuse raise questions about how survivors can share their stories and protect themselves legally.

The defamation claims and lawsuit threats that survivors have experienced indicate that future survivors may want to assess the likelihood that their abuser will litigate in response to an allegation of abuse or violence made in forums outside of criminal and civil litigation, as well as the very real risk of the abuser's success based on the available defenses.[22]

Thayer, *Sexual Assault Survivors Are Publicly Accusing Attackers on Social Media. But at What Cost?*, CHI. TRIB. (Dec. 14, 2018, 5:00 AM), https://perma.cc/AT6D-NFFY.

[16] *See, e.g.*, Bensussen v. Tadros, No. BC682869, 2018 WL 2390162, at *1 (Cal. Super. Ct. Mar. 8, 2018); Gottwald v. Sebert, 172 A.D.3d 445 (N.Y. App. Div. 2019); Verified Complaint for Damages & Demand for Jury Trial at 2, Palmieri v. Osborn, No. BC681889 (C.D. Cal. Nov. 3, 2017); Bailey Loosemore, *Haymarket Whiskey Bar: Woman Who Says Owner Drugged Her Files Countersuit,* LOUISVILLE COURIER J. (Dec. 26, 2017, 7:00 AM), https://perma.cc/2RDX-NCAF; Gene Maddaus, *Brett Ratner Drops Libel Suit Against Rape Accuser,* VARIETY (Oct. 2, 2018, 6:15 PM), https://perma.cc/7HHG-U9QK.

[17] *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989); Brandi M. Snow, *SLAPP Suits,* FIRST AMEND. ENCYCLOPEDIA, https://perma.cc/V7WS-K3K6 (last visited May 3, 2020).

[18] Fox & Crouin, *supra* note 10.

[19] Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017, 11:26 AM), https://perma.cc/2KRW-MDEU.

[20] *See* Fields, *supra* note 12.

[21] *Id.*

[22] Statements made in the context of judicial proceedings are outside the scope of this article because they are privileged material, precluding defamation litigation. RODNEY A. SMOLLA, LAW OF DEFAMATION § 8:5 (2d ed. 2019). This article focuses on claims made by survivors in non-privileged forums, specifically statements made to the public through social media or within survivors' communities.

This Note considers the viability of several defenses that survivors can employ if they find themselves faced with a defamation claim after they have disclosed their experience of abuse.

Part I begins with an overview of the defamation elements and defenses, using examples to illustrate how these claims have been interpreted in cases brought against gender-based violence survivors. Part II explores some recent, highly publicized lawsuits that have the possibility of setting new precedent and providing a roadmap for litigators to use when assessing how to defend their clients in defamation cases. These highly publicized cases include ones where a survivor-plaintiff alleges that the abuser-defendant has defamed them by denying their claims of abuse and by arguing that the survivor is a dishonest, untruthful, or a generally difficult person.[23] The survivor turns to a defamation claim to defend their reputation or because there has been some negative impact on their livelihood.[24] However, for many survivors with fewer financial resources, these types of lawsuits are out of reach, and their struggles continue to remain largely in the dark with minimal legal protection.[25] Consequently, this paper evaluates the outcomes of some defamation cases brought against abusers solely to determine the impact they may have on cases where the survivor faces SLAPP-based defamation charges.

Finally, this article concludes with suggestions on how to respond to defamation claims, with a particular focus on anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) lawsuits, as they serve as a practical defense when survivors allege that the defamation claims brought against them are solely a tool to silence their voices and prevent future survivors from speaking their truth.

I. AN OVERVIEW OF DEFAMATION

Defamation has been a common law cause of action since the late-15th century.[26] Grounded in state tort case law and bolstered by state constitutional and statutory law, defamation has evolved haphazardly and

---

[23] *See generally* McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017); Judd v. Weinstein, No. CV 18-5724 PSG (FFMx), 2019 WL 2881248 (C.D. Cal. Apr. 2 , 2019); Clifford v. Trump, 339 F. Supp. 3d 915 (C.D. Cal. 2018), *appeal filed*, No. 18-56351 (9th Cir. Oct. 16, 2018); Green v. Cosby, 138 F. Supp. 3d 114 (D. Mass. 2015); Dickinson v. Cosby, 250 Cal. Rptr. 3d 350 (Ct. App. 2019); Zervos v. Trump, 171 A.D.3d 110 (N.Y. App. Div. 2019).

[24] *See* cases cited *supra* note 23.

[25] Tchen, *supra* note 10. Two-thirds of requests to Time's Up Legal Defense Fund came from low-income workers, where nearly 40% are women of color and one in ten is a member of the LGBTQ community. *Id.*

[26] Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 552-53 (1903). During the period from 1475 to 1610, six percent of several hundred cases that were filed in English courts constituted defamation claims. It is worth noting that the vast majority of these defamation claims were related to sexual immorality. *Id.*

varies by U.S. jurisdiction.[27] The elements of defamation have developed through the centuries, with the modern judiciary referring to state law or the Restatement of Torts in case analyses.[28] The analysis set forth in this article primarily focuses on the elements of defamation in the context of cases involving sexual harassment or violence as defined in a variety of states across the nation.

A. Elements of a Defamation Claim

The elements of a defamation claim vary slightly but rely generally on the same four principles that are established in the Restatement Second of Torts.[29] The Restatement defines the elements of defamation as "a false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting at least to negligence on the part of the publisher; and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[30] A claim for defamation is an umbrella term that incorporates the "twin torts of libel and slander," where spoken words are slander and written defamatory words are libel.[31]

---

[27] *See supra* note 22 § 1:1.

[28] *See generally* Malla Pollack, *Litigating Defamation Claims*, in 128 AM. JUR. TRIALS 1, § 2 (2013). For example, New York defamation law is grounded in common law: "To state a claim for defamation under New York law, the plaintiff must allege: (1) a false statement about the plaintiff; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on the part of the publisher; and (4) that either constitutes defamation per se or caused special damages." *Id.*; Thai v. Cayre Grp., Ltd., 726 F. Supp. 2d 323, 329 (S.D.N.Y. 2010). "To establish a prima facie case of defamation in Tennessee, the plaintiff must establish that: 1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." Sullivan v. Baptist Mem'l Hosp., 995 S.W.2d 569, 571 (Tenn. 1999). Under Ohio law to establish a libel claim, a plaintiff must show "1) a false statement, 2) defamatory to the plaintiff, 3) published to a third party, 4) by a defendant who was at least negligent, and 5) damaging to the plaintiff's reputation." Parry v. Mohawk Motors of Mich., Inc., 236 F.3d 299, 312 (6th Cir. 2000). In Montana, libel is "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation." MONT. CODE ANN. § 27-1-802 (West 2019). And in North Dakota, libel is "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes the person to be shunned or avoided, or which has a tendency to injure the person in the person's occupation." N.D. CENT. CODE ANN. § 14-02-03 (West 2020).

[29] *See, e.g.*, 128 AM. JUR. TRIALS 1, § 2 n.3 (2013).

[30] RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW. INST. 1977).

[31] *See* SMOLLA, *supra* note 22, §§ 1:10-11.

All states have implemented a statute of limitations to allot a timeframe for when a defamation claim may be pursued. Each state prescribes its own statute of limitations, which is often one or two years (with some variations).[32] However, a few jurisdictions apply the discovery rule, where the statute of limitations begins to run on a cause of action at the time the injured party discovers, or, through the exercise of reasonable diligence, could have discovered facts supporting the cause of action within the applicable period.[33] A prima facie defamation claim cannot survive unless the claim is within either the statute of limitations or the discovery rule, as required by the state where the action would take place.

The first element of a defamation claim requires that the defendant make a false and defamatory statement concerning the plaintiff.[34] "Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, only statements alleging facts can properly be the subject of a defamation action."[35] In addition, the Supreme Court has focused on whether the allegedly defamatory statement implies an "assertion of fact" about a person that is "provably false," thus establishing two factors that require consideration when determining whether the statement is defamatory: the language employed in the statement itself and the type of speech involved.[36]

For instance, in a defamation case brought by an adult film star, Stephanie Clifford, against President Trump, President Trump was able to defeat her defamation claim based on the "type of speech" analysis.[37] Ms. Clifford alleged she had been in an intimate relationship with President Trump and filed her defamation claim after he tweeted that she was lying about being threatened by a man he hired and that her whole story was a "con job."[38] While the plaintiff established that the language in President Trump's speech itself contained factual statements, the reviewing court analyzed the text of the single tweet as well as its context and ultimately determined that the statement was a non-actionable opinion characterized as "rhetorical hyperbole," which was further influenced by

---

[32] *See* Practical Law Practice Note Overview 3-619-6023, *Defamation Basics State Laws Chart: Overview* (West 2020).

[33] *See generally* Francis M. Dougherty, Annotation, *Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action,* 35 A.L.R.4th 1002 § 2 (1985).

[34] RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW. INST. 1977).

[35] 50 AM. JUR. 2D *Libel and Slander* § 28 (2020). While a statement must be false to be defamatory, true statements can be defamatory where they create a false impression. The test for determining whether a statement is one of fact or opinion is discussed below in Section I.B.

[36] *See* Milkovich v. Lorain Journal Co.*,* 497 U.S. 1, 19-20 (1990).

[37] Clifford v. Trump, 339 F. Supp. 3d 915, 919, 926 (C.D. Cal. 2018), *appeal filed*, No. 18-56351 (9th Cir. Oct. 16, 2018).

[38] *Id.* at 926.

the plaintiff presenting herself as a political adversary.[39] Therefore, while the president's tweet did include verifiably true or false statements, the reviewing court's characterization of it as "rhetorical hyperbole" meant it was not to be understood as a literal statement about the plaintiff and therefore protected from defamation liability.[40]

Beyond whether or not a statement can be proven true or false, it is not always clear which party carries the ultimate burden of proving its falsity, as this overlaps with the defense of truthfulness of the statement at issue. Therefore, while the plaintiff must establish the prima facie case of falsity, the standard of proof and the party bearing the burden of proof may vary depending on the jurisdiction and circumstances surrounding the case.[41] This is one of the greatest challenges survivors will face, because it requires the survivor to publicly present the details of their traumatic experience to prove their own truthfulness, when there is often minimal evidence of the violence other than the survivor's own testimony. Thus, having a clear standard on who bears the burden of proving fact or fiction prior to making allegations is in the survivor's best interest.

The second element of proving defamation requires that the oral or written statement be defamatory. Courts frequently rely on the Restatement's definition of *defamatory*, which is harming "the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[42] "The courts ordinarily assume, without question or discussion, that language which is merely abusive is not, per se, a basis for an action of defamation," but there is no general rule as to "what words are defamatory and what are not," and "each case depends largely on its own facts."[43] While the Restatement suggests that derogatory statements are, minimally, ones that cause harm to an individual or group's reputation as understood by a substantial and respectable minority of the community, some jurisdictions go as far as to proclaim that a derogatory statement is one that is "somewhat shocking" and "contains 'elements of personal disgrace,'" thus requiring a higher bar to establish a prima facie case of defamation.[44]

---

[39] *Id.*

[40] *Id.*

[41] *See* 128 AM. JUR. TRIALS 1, § 8 (2013).

[42] RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977).

[43] Annotation, *Abusive Words as Slander or Libel,* 37 A.L.R. 883 (1925).

[44] Means v. ABCABCO, Inc., 315 S.W.3d 209, 214-15 (Tex. App. 2010) (quoting ROBERT D. SACK, SACK ON DEFAMATION § 2-12 (3d ed. 2009) (1999)); *see* Reed v. Scheffler, 218 F. Supp. 3d 275, 283-84 (D.N.J. 2016) (holding that the mayor's statements to a local newspaper that the homeowner was derelict in taking care of his mother's home did not harm the homeowner's reputation and estimation in the community because they did not rise to the level of contempt or ridicule, thus prohibiting the homeowner's defamation claim); Jackson

Intent is the third element of a defamation claim, and the standard applied depends on the plaintiff's status as either a private or public figure. *New York Times Company v. Sullivan* broadly established that public officials cannot recover damages for a defamatory falsehood relating to official conduct unless the publication of that falsehood was made with actual malice.[45] Subsequently, the Supreme Court broadened the term "public official" to include public figures and private individuals whose purposeful activity "amounted to a thrusting of [their] personality into the 'vortex' of an important public controversy."[46] *Gertz v. Robert Welch, Inc.* further refined the standard by concluding that states may impose liability with a less demanding showing than in *New York Times* when the plaintiff is a private individual.[47]

In a climate where individuals can become public figures overnight through social media pages and viral videos, defining a public figure becomes increasingly difficult. *Gertz* provides the prevailing all-purpose public figure test, which defines a public figure as an individual who has achieved "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."[48] A second category of public figures is the limited-purpose or vortex type, where one who "voluntarily injects himself or is drawn into a particular public controversy"[49] that existed prior to the alleged defamation or engages "the public's attention in an attempt to influence [an] outcome" becomes a public figure for a limited range of issues.[50] The issue of whether a particular public figure belongs to the first or the second category must be resolved as a matter of law and may require a fact-sensitive determination.[51]

The public versus private figure analysis is based on the recognition that there is a need both to protect an individual's reputation and to encourage an open and free press.[52] If an individual is in the public eye,

---

v. Mayweather, 10 Cal. App. 5th 1240, 1264-65 (Ct. App. 2017) (holding that an ex-boyfriend's assertion that he broke off a relationship with his girlfriend because she had an abortion and his comments that she had cosmetic surgery on her face and other parts of her body were not sufficient to establish a prima facie case of defamation because the statements in question did not expose the girlfriend to "hatred, contempt, ridicule, or obloquy").

[45] New York Times Co. v. Sullivan, 376 U.S. 254, 283-84 (1964).

[46] Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967).

[47] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

[48] *Id.* at 351.

[49] Grenier v. Taylor, 234 Cal. App. 4th 471, 484 (Ct. App. 2015) (quoting Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 253 (1984)).

[50] *Gertz*, 418 U.S at 352.

[51] McKee v. Cosby, 874 F.3d 54, 61 (1st Cir. 2017) (quoting Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 561 (1st Cir. 1997)); RESTATEMENT (SECOND) OF TORTS § 580A cmt. c (AM. LAW INST. 1977).

[52] *See Gertz*, 418 U.S. at 341-42 (describing an individual's "right to the protection of his own good name" as a concept of any decent system of ordered liberty and the protection of

there may be a greater need for information about their actions, and those who speak out should not have to live in fear of liability when they have publicized such information for good-faith purposes.[53] In addition, public figures have greater access to large audiences through the media; therefore, they have a "greater opportunity to rebut defamatory statements" and will reach a wider range of people than a private party might.[54] Courts have presumed that those who become media public figures do so voluntarily, thus "invit[ing] attention and comment," and should be aware that they are vulnerable to derogatory claims that could be made against them.[55] Consequently, the Supreme Court requires a public figure plaintiff in a defamation case to demonstrate a higher level of fault, known as actual malice, or reckless disregard by the defendant as to whether the statement was false or not. Alternatively, for private figure plaintiffs, individual jurisdictions may define their own standard of liability, like mere negligence.[56]

"Actual malice" has two definitions in defamation cases, depending on the jurisdiction.[57] The Restatement defines a person who acts with actual malice as one who "knows that the statement is false and that it defames the other person, or acts in reckless disregard of these matters."[58] In common law, actual malice is defined by evidence of ill will or hatred that, alone, is insufficient to show liability for defamation in most courts.[59] Instead, "actual malice" focuses on the defendant's attitude toward the truth or falsity of the statement, and not the defendant's attitude toward the plaintiff.[60] For example, where a defendant shared his concerns to other members in the church community about their pastor's inappropriate behavior with women, the court found there was no actual malice because the defendant believed his source of information to be credible, and he did not seriously doubt the veracity of the allegations.[61]

---

private personality as states' prerogative under the Ninth and Tenth Amendments); RESTATEMENT (SECOND) OF TORTS § 580A cmt. a (AM. LAW INST. 1977).

[53] *See Gertz*, 418 U.S. at 344-45.

[54] Jackson v. Mayweather, 10 Cal. App. 5th 1240, 1260 (Ct. App. 2017) (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 398 (2001)).

[55] *Id.*

[56] *Gertz*, 418 U.S. at 328; Gen. Prods., Co. v. Meredith Corp., 526 F. Supp. 546, 551 (E.D. Va. 1981) (finding that because the plaintiff was not a public figure, the standard of liability for defamation is defined by the Commonwealth of Virginia and thus could be premised on mere negligence); RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (AM. LAW INST. 1977).

[57] *See* BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 35:82 (2d ed. 2018).

[58] RESTATEMENT (SECOND) OF TORTS § 580A (AM. LAW INST. 1977).

[59] *See* LINDAHL, *supra* note 57.

[60] *Id.*

[61] Campone v. Kline, No. 03-16-00854, 2018 WL 3652231, at *11-12 (Tex. App. Aug. 2, 2018).

Reckless disregard as to falsity is likely not an issue for survivors who allege abuse, as they are making claims about events they experienced firsthand. While common law standards for reckless disregard vary within the context of a public figure's defamation claim, the Supreme Court has found, and the Restatement confirms, that reckless disregard is only satisfied when the defendant made the false statement with a high degree of awareness of probable falsity.[62] When a survivor alleges sexual assault, their claims are typically about the abuse inflicted upon them by the perpetrator. Thus, the perpetrator's allegation that the survivor is fabricating their claims entirely precludes the reckless disregard of truth analysis.

However, a survivor-defendant's defense is complicated when the perpetrator alleges that the survivor acted with malice because they allegedly fabricated the claim of abuse with a motive of hatred or ill will, particularly when the survivor feels understandable animosity toward the perpetrator based on the abuse they endured.[63] In a jurisdiction that considers hatred or ill will as part of their assessment for malice, evidence of the survivor-defendant's sadness due to the plaintiff's actions or love for the plaintiff may negate the malice accusation. Furthermore, a claim of malice may be considered questionable when the survivor-defendant alleged abuse after a relationship that appeared loving, which may not always be a viable solution when that previously loving or affectionate relationship appears to have turned into one of animosity. On the other hand, if there was harassment or a sexual assault with little-to-no relationship between the parties, public figure plaintiffs will likely have a more difficult time putting forth evidence of common law malice that would lead someone to fabricate such a damaging allegation.[64]

Survivors' speech may have more protections when the plaintiff is a public figure since the bar for intent that the plaintiff has to meet is rather high, which is only reasonable given that public figures often have access to more financial and legal resources than survivors do. This may have been a factor in some recent settlement agreements: celebrity plaintiffs like movie director Brett Ratner, rapper Nelly, and soccer player Cristiano Ronaldo, all of whom sued survivors for libel, have all agreed to settle with the survivor-defendants.[65] One potential explanation for the plaintiffs' choice to settle is their awareness that they must establish that the

---

[62] St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964)); RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (AM. LAW INST. 1977).

[63] *See, e.g.*, Jackson v. Mayweather, 10 Cal. App. 5th 1240, 1261 (Ct. App. 2017).

[64] *See* Amanda Ottaway, *Judge Hears Libel Case over 'Shitty Media Men' List,* COURTHOUSE NEWS SERV. (Mar. 1, 2019), https://perma.cc/XAG8-UCSW.

[65] Lewis Kamb, *Rapper Nelly Settles Sexual-Assault Lawsuit with Seattle-Area Woman*, SEATTLE TIMES (Sept. 28, 2018, 11:38 AM), https://perma.cc/4ZVU-JQE8; Maddaus, *supra*

survivor-defendant acted with "actual malice" or with knowledge that the statement "was false or with reckless disregard of whether it was false or not."[66] However, actual malice may be inferred from the defendant's statements or actions if the plaintiff can demonstrate that the defendant fabricated the allegation or that their allegations were a product of their imagination.[67] This continues to be the intent standard for abuse allegations in defamation cases brought by public figures. If a fact-finder determines that the accuser published an allegation of sexual assault or attempted rape that never happened, the conclusion will be "that the defendant knew that the events were false because she necessarily never experienced them."[68] Consequently, to satisfy the actual malice claim, public figure plaintiffs most likely need to establish that the survivor's alleged instances of abuse never occurred or, if there is some truth to the survivor's allegations, that the investigation could cause the plaintiff more harm than good if their abusive behaviors are exposed while trying to clear their name. Therefore, while survivor-defendants face an exorbitant amount of financial and legal resources in a legal claim brought against them by a public figure, the high threshold required to prove intent provides some explanation for why celebrity-plaintiffs often opt to settle rather than pursue the lawsuit.

Lastly, to satisfy a defamation claim, the plaintiff-perpetrator must demonstrate either an actual injury or defamation per se. Defamation per se refers to defamatory language in which the meaning is apparent on the face of the communication, and there is thus no requirement to prove a special harm.[69] Defamation per se is divided into slander per se and libel per se.[70] Slander per se, unlike libel per se, is typically subdivided into categories.[71] These categories often include allegations of crime, disease, allegations injurious to another in his or her trade, or imputations of chastity on a woman.[72] Slander per se can be particularly troublesome for survivors who allege abuse or harassment, which may fall into the category

note 16; Ken Ritter, *Lawyer: Ronaldo Rape Accuser Was 'Emotionally Fragile' at Time of Settlement*, ASSOCIATED PRESS (Oct. 3, 2018, 9:30 AM), https://perma.cc/Z4HF-GEWD.

[66] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[67] St. Amant v. Thompson, 390 U.S. 727, 732 (1968); Ratner v. Kohler, No. CV 17-00542 HG-KSC, 2018 WL 1055528, at *9 (D. Haw. Feb. 26, 2018).

[68] Chastain v. Hodgdon, 202 F. Supp. 3d 1216, 1222 (D. Kan. 2016).

[69] SMOLLA, *supra* note 22, § 7:20 ("The term 'per se' refers to defamation whose defamatory meaning is apparent on the face of the communication or, in other words, defamation whose defamatory character can be established without the introduction of extrinsic evidence."); RODNEY A. SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, AND PRINT § 6:34 (2d ed. 2019) [hereinafter SMOLLA, RIGHTS AND LIABILITIES].

[70] *See* 128 AM. JUR. TRIALS 1, § 2 (2013).

[71] *See id.*

[72] SMOLLA, RIGHTS AND LIABILITIES, *supra* note 69, § 6:34.

of criminal activity and thus constitute slander per se. If the abuser then sues the survivor for defamation and the survivor is found liable, there will be a damages award without any other proof of injury. In addition, depending on the profession of the abuser, injury in their office, profession, trade, or business could also lead to certain damages. When an alleged injury does not fall into one of the defamation per se categories, a jury must decide on a damages award by assessing whether the survivor-defendant's statements negatively impacted the abuser-plaintiff's reputation within the relevant community. However, this assessment must be supported by admissible evidence and cannot be presumed in the absence of proof.[73] "Actual injury" may include "personal humiliation, and mental anguish and suffering, provided they are proved to have been sustained."[74]

Survivors making a claim of abuse or harassment will also want to be aware of the criminal defamation statutes in their state and any potential risk of criminal prosecution, because "criminal defamation prosecution and conviction remain constitutionally viable in many jurisdictions where sanctioned by state law."[75] Twenty-four states continue to have criminal defamation statutes on the books, despite the Supreme Court instituting several limitations on permissible criminal defamation statutes and suggesting that criminal libel and slander laws have no place in modern society.[76] The American Civil Liberties Union is currently challenging a New Hampshire criminal defamation statute for being impermissibly vague and ripe for abuse by public officials who seek to punish their critics.[77] Criminal defamation statutes can cause serious damage to the livelihoods of survivors. For instance, a Georgia woman was incarcerated as a result of her ex-husband's claim that she defamed him when she posted on Facebook that he would not bring their children Tylenol.[78]

---

[73] *See* RESTATEMENT (SECOND) OF TORTS § 621 (AM. LAW INST. 1977).

[74] *Id.* cmt. b.

[75] DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 4:5 (2019).

[76] Garrison v. Louisiana, 379 U.S. 64, 77-78 (1964) (finding Louisiana's criminal defamation statute unconstitutional because it directs punishment for true statements made with actual malice, contrary to the *New York Times* rule prohibiting punishment of truthful criticism and because the statute punishes false statements without regard to if they were made with ill will); *see Map of States with Criminal Laws Against Defamation*, ACLU, https://perma.cc/Q68S-JXDS (last visited Feb. 24, 2020). The following states currently have criminal defamation statutes: Alabama, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Id.*

[77] *See* Conor Friedersdorf, *The ACLU Takes Aim at Criminal-Defamation Laws*, ATLANTIC (Dec. 18, 2018), https://perma.cc/M55F-9TER.

[78] Notably, Georgia's criminal defamation statute was held unconstitutional in 1982, so the defendant sued her ex-husband and the police captain for malicious prosecution and false

When alleging abuse or harassment, an important protective measure that survivors should take is to determine if there is a criminal statute in the applicable jurisdiction. Due to technological and social media advancements, defamation claims can now spread across many states and even the whole nation. Knowing where criminal or civil liability may be enforced based on the venue rules of each state is an important factor when determining the potential consequences of sharing a story of abuse.

B. Defenses to Defamation

The applicable defenses for defamation include truth and opinion. Familiarity with these defenses is one way to help survivors of gender-based violence put forth their most effective defamation defense with the goal of dismissing the claim as quickly as possible.

The defense of truth is often the most viable option for victims. However, the burden of proof in defamation cases can make this defense challenging, as the plaintiff-perpetrator needs only to put forth some evidence of a statement of fact by the defendant that can be proven false with the plaintiff's prima facie case.[79] If the defendant-survivor brings the truth defense after the plaintiff provides their evidence that the defaming statement was untrue, the defendant can then admit their own evidence that the allegation was true. In the highly publicized defamation case brought by Kathrine Mae McKee, an alleged sexual assault survivor, against well-known Hollywood actor Bill Cosby, over statements contained in Cosby's attorney's letter to a newspaper, the First Circuit determined that because the letter Cosby's attorney wrote was "heavily footnoted with citations to articles and other sources," it "'detail[ed] extensive underlying facts as support for the author's assertions as to McKee's lack of credibility."[80] As a result, the court dismissed McKee's defamation claims because the citations and sources established that the statements made by Cosby and his attorney provided the underlying facts to prove the truth and thus were not false.[81] Consequently, in some jurisdictions, one way to prevent a defamation claim when making allegations against an abuser may be by ini-

---

arrest under 42 U.S.C § 1983. King v. King, 342 F. Supp. 3d 1364, 1382 (M.D. Ga. 2018) (dismissing all claims against plaintiff's defendant-husband because he was not acting under color of state law and dismissing false-arrest claims because malicious prosecution is the "exclusive remedy"), *appeal dismissed*, No. 18-14358 (11th Cir. Nov. 6, 2019); *see* Zola Ray, *Georgia Deputy Sheriff Arrests Ex-Wife for Unflattering Facebook Post*, NEWSWEEK (Mar. 9, 2018, 5:34 PM), https://perma.cc/QYV6-E66T.

[79] *See supra* note 41.

[80] McKee v. Cosby, 874 F.3d 54, 63 (1st Cir. 2017) (quoting McKee v. Cosby, 236 F. Supp. 3d 427, 442 (D. Mass. 2017)).

[81] *Id.* at 64-65.

tially disclosing the non-defamatory facts that underlie the original assertions, although doing so may be uncomfortable or painful for some survivors.

A defense of truthfulness also allows survivors some flexibility, as "minor inaccuracies" will not prove a falsity claim as long as the substance, gist, or sting of the charge is generally accurate.[82] Floyd Mayweather, a famous boxer, was sued by his ex-girlfriend for defamation because of his claim that he ended their relationship because she had an abortion, as well as his airing of information about her plastic surgeries.[83] However, the court ruled that these statements were not defamatory or false because she did have an abortion, even if it wasn't the impetus for the ending of their relationship, and she did have plastic surgery, even if the statements about her surgeries were not entirely accurate.[84] Therefore, the statements Mayweather made were truthful in substance, and the reviewing court reversed the order denying Mayweather's special motion to strike Ms. Jackson's defamation claims.[85]

The fact-versus-opinion defamation defense relies on the premise that claims must be based on provable facts, not constitutionally protected pure opinions.[86] The Restatement adheres to *Gertz*'s decision that expressions of opinion which cannot be a basis for a defamation action regarding matters of public concern also logically cannot be a basis for defamation actions concerning private matters.[87] Defamation cases brought under a state law generally adhere to this interpretation of *Gertz* and also recognize the distinction between pure opinion statements and mixed statements of opinion.[88] Mixed statements of opinion imply "that the speaker knows certain facts, unknown to [the speaker's] audience, which support [the speaker's] opinion and are detrimental to the person [being discussed]."[89] A mixed statement of opinion may include allegations by sur-

---

[82] Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (citing Heuer v. Kee, 59 P.2d 1063, 1064 (Cal. Dist. Ct. App. 1936)).

[83] Jackson v. Mayweather, 10 Cal. App. 5th 1240, 1261 (Ct. App. 2017).

[84] *Id.* at 1261-62.

[85] *Id.* at 1262-64.

[86] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea . . . .But there is no constitutional value in false statements of fact."); *see* RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (AM. LAW INST. 1977).

[87] *Gertz*, 418 U.S. at 339; *See* RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (AM. LAW INST. 1977).

[88] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 87.

[89] Steinhilber v. Alphonse, 68 N.Y.2d 283, 290 (1986).

vivors that an individual is a rapist or an abuser, since the survivor's allegation suggests there are facts that the public does not know about.[90] This raises unique challenges for survivors who want to speak out. Characterizing a person based on the abuse they subjected the victim to may be sufficient for defamation because they are conferring a fact about that individual, namely that the individual harmed them in some way.[91] Recent high profile cases of sexual assault indicate that a survivor's allegations of abuse are provable as true or false and are not matters of opinion.[92]

As a policy matter, arguing that claims of assault and harassment are opinions is a slippery slope: doing so permits parties to claim that what constitutes an abusive behavior is open to interpretation, not a factual matter. For example, Matthew Landan, a bar owner in Kentucky, sued an unknown woman for defamation after she posted a picture of him online with the caption, "MATTHEW LANDAN IS A RAPIST."[93] In response, the defendant moved for dismissal of the case, arguing truth as a defense, and countersued, claiming that the bar owner had filed a lawsuit with improper intentions.[94] The defendant likely chose the defense of truth over the fact-versus-opinion defense because doing so put the focus on whether her statement was false based on a generally accepted definition of sexual assault, rather than leading to an examination of whether a sexual assault was committed pursuant to the survivor-defendant's perspective of the perpetrator's actions. The cases of gender-based violence allegations discussed throughout this article indicate that the most reliable defense available in defamation cases brought against survivors is truth because any claims of abuse ultimately rely on statements of facts. Survivor-defendants who raise an opinion defense in a gender-based violence lawsuit risk troubling implications that abusive behaviors are merely misinterpreted by the survivor and that the abuser's actions did not fall outside of the scope of what was legally permissible.

C. Privileges Affecting Defamation Claims

Both absolute privilege, which absolves the defamer of all liability regardless of intent, and qualified privilege, which depends on whether the plaintiff can prove fault or malice, apply in defamation lawsuits at

---

[90] *See* Dickinson v. Cosby, 17 Cal. App. 5th 655, 685-86 (Ct. App. 2017) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).

[91] *See* Goldman v. Reddington, 417 F. Supp. 3d 163, 175-76 (E.D.N.Y. 2019).

[92] *See* Green v. Cosby, 138 F. Supp. 3d 114, 133 (D. Mass. 2015) (applying California law); Giuffre v. Maxwell, 165 F. Supp. 3d 147, 156 (S.D.N.Y. 2016) (applying New York law).

[93] Bailey Loosemore, *supra* note 16.

[94] *In Counter-Lawsuit, Woman Claims Haymarket Whiskey Bar Owner Spiked Her Drink*, WDRB (Dec. 26, 2017), https://perma.cc/PG9V-KWUY.

common law.[95] Both privileges have developed and evolved through time as a result of the common law policy that "the perceived social benefit in encouraging free speech or the discharge of governmental responsibility sometimes outweighs the individual's underlying right to a good reputation."[96] In the context of defamation litigation against survivors, this section focuses specifically on the absolute privilege of statements made in furtherance of litigation and judicial proceedings, and the qualified privilege of common interest.

Survivors who bring claims against an abuser in either civil or criminal court may invoke the litigation or judicial proceeding privilege, an absolute privilege which has been developed to "encourage candor by parties involved in litigation."[97] Some jurisdictions permit a broad range of proceedings to qualify for a litigation privilege defense, applying the label of judicial proceedings to all formal legal proceedings and to all verbal statements and written documents having "some relation" to the legal proceeding.[98] This covers all statements that are related to litigation, including out-of-court communications, as long as they are "pertinent to a good faith anticipated litigation."[99] California has broadly established that the communication must be in "furtherance of a judicial proceeding" as an "object of litigation." A desire for vindication does not meet that standard.[100] In addition, statements made prior to the commencement of anticipated litigation or a judicial proceeding are privileged, but that privilege can be lost when a plaintiff-perpetrator can prove that the anticipated litigation was not initiated in good faith—that is, where the threat to commence litigation was merely a negotiating tactic and not a serious proposal in good faith contemplation of going to court.[101] The privilege is also not voided by re-publications of the statement outside the judicial process, such as on the internet or in a newspaper.[102]

The "common interest" qualified privilege is one of the more viable defenses for survivors of gender-based violence who face defamation

---

[95] ELDER, *supra* note 75, § 2:1; SMOLLA, *supra* note 22, § 8:2 ("In a true absolute privilege situation, liability is totally foreclosed without regard to the fault or mental state of the defendant.").

[96] Park Knoll Assocs. v. Schmidt, 59 N.Y.2d 205, 208 (1983); *see* ELDER, *supra* note 75, § 2:1.

[97] D'Annunzio v. Ayken, Inc., 876 F. Supp. 2d 211, 219 (E.D.N.Y. 2012).

[98] *See* ELDER, *supra* note 75, § 2:5 (referring to the jurisdictions of Ohio, Connecticut, Washington, D.C, California, Pennsylvania, and New York, among others).

[99] LINDAHL, *supra* note 57, § 35:45; *see* Rodriguez v. Panayiotou, 314 F.3d 979, 988 (9th Cir. 2002).

[100] *Rodriguez*, 314 F.3d at 988.

[101] *See* Edwards v. Centex Real Estate Corp., 53 Cal. App. 4th 15, 35 (Ct. App. 1997); LINDAHL, *supra* note 57, § 35:45.

[102] LINDAHL, *supra* note 57, § 35:45.

claims. Several states have statutes that protect communications between interested persons, while others have developed the common interest privilege through common law.[103] The Restatement establishes that a publication is conditionally privileged "if the circumstances lead any one of the several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know."[104] This privilege carries some elasticity, as it covers friends or family within survivors' support systems as well as in defined communities like education systems, businesses, or religious organizations.[105]

Some anti-SLAPP defenses "protect any speech that is made in any forum in connection with any issue of public interest" or public concern, creating a broader scope of protection than the common interest privilege allows.[106] Some courts consider statements about alleged "violence against women" a matter of public interest in an anti-SLAPP defense, acknowledging that violence against women is a "widespread concern" requiring public conversations to "shine a light" on the matter.[107] Yet in order to satisfy this prong, the statements must "concern a person in the public eye or conduct that could directly affect large numbers of people beyond the participants of the [alleged] conversation" in which the statements were made.[108] Therefore, the availability of the anti-SLAPP defense discussed later is a more appropriate defense for statements made publicly, while the common interest privilege may withstand allegations made to defined communities or support systems.

In recognition of survivors' emotional and physical needs, some courts have found that survivors' allegations made in furtherance of their legitimate interest in personal safety for themselves or those close to them

---

[103] *See generally Defamation Basics State Laws Chart: Overview*, *supra* note 32.

[104] RESTATEMENT (SECOND) OF TORTS § 596 (AM. LAW INST. 1977).

[105] *Id.*

[106] Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 FIRST AMEND. L. REV. 441, 454 (2019). Jurisdictions in this category include California (CAL. CIV. PROC. CODE § 425.16 (West 2020)), Connecticut (CONN. GEN. STAT. ANN. § 52-196a (West 2020)), Washington, D.C. (D.C. CODE ANN. § 16-5501 (West 2020)), Illinois (735 ILL. COMP. STAT. ANN. 110/15 (West 2020)), Indiana (IND. CODE ANN. § 34-7-7-1 (West 2020)), Kansas (KAN. STAT. ANN. § 60-5320 (West 2020)), Louisiana (LA. CODE CIV. PROC. ANN. ART. 971 (2019)), Maine (ME. REV. STAT. ANN. tit. 14, § 556 (2019)), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2020)), Oregon (OR. REV. STAT. ANN. § 31.150 (West 2020)), Rhode Island (9 R.I. GEN. LAWS ANN. § 9-33-2 (West 2019)), Texas (TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2019)), and Vermont (VT. STAT. ANN. TIT. 12, § 1041 (West 2020)). *Id.* at n.98.

[107] Bensussen v. Tadros, No. BC682869, 2018 WL 2390162, at *6 (Cal. Super. Ct. Mar. 8, 2018); Saunders v. Jannusi, No. B292287, 2020 WL 1300880, at *4 (Cal. Ct. App. Mar. 19, 2020).

[108] *Jannusi*, 2020 WL 1300880, at *4.

fall within the common interest privilege. This common interest privilege extends beyond the absolute privilege of abuse that may be alleged in criminal legal or medical systems because it covers members of survivors' support system when the allegations are not published to a "broad public forum such as the school newspaper or a social media network."[109] The United Stated District Court for the District of Maryland has recognized that there are times when a sexual assault victim will want to speak about abuse they have experienced to those in their lives and that requires protection for policy reasons:

> Victims would have to weigh, on the one hand, the value of reaching out for help in the aftermath of a traumatic sexual assault, and on the other hand the risk that they could be subject to civil liability for defamation if the occurrence of sexual assault is contested by the alleged perpetrator. Fortunately, Maryland courts do recognize a conditional privilege for such statements.[110]

The common interest privilege has also been applied to allegations of abuse that occur in defined communities, such as church congregations, education systems, or medical facilities[111]—all communities that have faced sexual assault scandals. Specifically, courts have repeatedly found that alleged defamatory statements are of interest to other members of a church. For example, in *Terry v. Davis Community Church*, the subject matter that related to the church's interests was a youth pastor's inappropriate behavior with a member of his youth group.[112] In that case, the California court decided that the board report given to church members regarding the youth pastor clearly involved the members' shared interest because it "involved the societal interest in protecting a substantial number of children from predators."[113] Despite there being no criminal charges and no proof that a particular adult was a sexual predator, the defamation claim was dismissed because the sharing of information furthered society's interest in protecting minors from predators, particularly in a church program where community members expect their children to be safe.[114] A Texas Court of Appeals has applied the same analysis to cases where adults were subjects of abuse, recognizing that church mem-

---

[109] Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 759 (D. Md. 2015).

[110] *Id.* at 759.

[111] *See* Grenier v. Taylor, 234 Cal. App. 4th 471 (Ct. App. 2015); Terry v. Davis Cmty. Church, 131 Cal. App. 4th 1534 (Ct. App. 2005); Schwaiger v. Avera Queen of Peace Health Servs., 714 N.W.2d 874 (S.D. 2006); Campone v. Kline, No. 03-16-00854-CV, 2018 WL 3652231 (Tex. App. 2018).

[112] *Terry*, 131 Cal. App. 4th at 1538.

[113] *Id.* at 1547.

[114] *Id.*

bers have a common interest in knowing about their spiritual leaders' inappropriate behavior towards women.[115] The California and Texas decisions indicate that community members' safety can be prioritized over reputation.

However, "a plaintiff can defeat a privilege claim at the motion to dismiss stage by plausibly alleging that the defendant acted with actual malice in making the statements at issue."[116] Again in the church context, one defendant proved that they did not have actual malice when sharing information about their church leader by demonstrating that they kept the allegations within the church community and genuinely trusted the information that was shared with them.[117] On the other hand, Harvey Weinstein's motion to dismiss Ashley Judd's defamation claim failed under the common interest privilege because Judd alleged that Weinstein acted with malice by "showing that the [statement] was motivated by hatred or ill will towards the plaintiff."[118] Judd argued that Weinstein made statements about her personality to Peter Jackson with the purpose of sabotaging her chances of being cast in the *Lord of the Rings* films because she rejected his sexual advances. [119] Judd then put forth evidence showing that Weinstein's claims that his comments were made for the purpose of protecting the *Lord of the Ring*'s director's hiring decisions could not be true, establishing a plausible inference that Weinstein was motivated by hatred or ill will.[120] The two common interest defenses raised in the church context survived because there was no evidence that the defendants' statements were untrue and because the defendants shared the information only with interested individuals.[121] Therefore, where it is plausible or even likely that statements made by an alleged defamer were untrue, there is a greater chance that they may be found to have been made with malice and not for the purpose of common interest.

The experience of Moira Donegan, the creator of the "Shitty Media Men" list, highlights the opportunities for alleged abusers to weaponize defamation claims against survivors and is an example of a scenario

---

[115] *Campone*, 2018 WL 3652231, at *10-11.

[116] Judd v. Weinstein, No. CV 18-5724 PSG (FFMx), 2018 WL 7448914, at *7 (C.D. Cal. Sept. 19, 2018).

[117] *See Campone*, 2018 WL 3652231, at *11-12.

[118] *See Judd*, 2018 WL 7448914, at *7 (quoting Taus v. Loftus, 151 P.3d 1185, 1210 (Cal. 2007)).

[119] *Id.* at *8.

[120] *Id.*

[121] *See Terry*, 131 Cal. App. 4th at 1557 (Ct. App. 2005); *Campone*, 2018 WL 3652231, at *11.

where common interest may be a viable defense.[122] Donegan anonymously distributed a spreadsheet to her peers in the publishing and media industry to identify and warn against those who had caused harm within their professional community.[123] After her identity was exposed, she was immediately sued for defamation, with those named seeking out the identities of the contributors in order to challenge their claims.[124] If exposed, the contributors will have to defend themselves against claims of false and defamatory intentional statements.[125] Included in their consideration will be the defenses addressed here—truth and opinion—as well as the privileges, most notably the common interest privilege. The experiences of Moira Donegan and her peers demonstrate the extensive need for survivors of abuse to have viable legal strategies when defending themselves against defamation lawsuits.

II. SIGNIFICANT DEFAMATION CASES ARISING FROM THE #METOO MOVEMENT

As would be expected, when individuals are accused of sexual abuse or harassment, defamation lawsuits follow shortly thereafter.[126] While victims have felt more empowered to speak up in the wake of #MeToo, those in positions of institutional power have used their resources to strike back with legal consequences, like Brett Ratner, who immediately sued an alleged victim for defamation after she posted about how he subjected her to abuse online.[127] This case eventually settled, as have others with similar circumstances, which suggests that high-profile or celebrity abusers wield legal and financial power over victims that speak out about their abuse.[128] For survivors, a settlement can often appear to be the best option, particularly when they cannot afford the emotional and financial costs of

---

[122] *See* Nona Willis Aronowitz, *The Creator of the Shitty Media Men List Isn't Done*, VICE (Nov. 18, 2019, 10:15 AM), https://perma.cc/4SD5-KDV8.

[123] *See id.*

[124] *See, e.g.*, Ruth Spencer, *Stephen Elliott Sues Moira Donegan, Creator of Shitty Media Men List*, N.Y. MAG.: THE CUT (Oct. 11, 2018), https://perma.cc/8MQL-G4M7.

[125] Aronowitz, *supra* note 122.

[126] *See* Gottwald v. Sebert, 172 A.D.3d 445 (N.Y. App. Div. 2019); Bensussen v. Tadros, No. BC682869, 2018 WL 2390162, at *6 (Cal. Super. Ct. Mar. 8, 2018); Palmieri v. Osborn, No. BC681889, 2018 WL 3911123 (Cal. Super. Ct. Mar. 16, 2018); Donegan, *supra* note 15; Loosemore, *supra* note 16.

[127] Maddaus, *supra* note 16.

[128] *See id.*; Kamb, *supra* note 65; Madison Pauly, *She Said, He Sued*, MOTHER JONES, Mar./Apr. 2020, https://perma.cc/F8NU-4XQX; Ritter, *supra* note 64.

civil litigation.[129] Furthermore, they may fear the shame of being found liable for a defamation claim, which suggests dishonest character and tarnishes their reputation. For example, an alleged victim who spoke out about a sexual assault by Cristiano Ronaldo, an international soccer star, now faces not only a countersuit for defamation but also widespread public shaming by him and his public relations team and attacks on her character—even after they had agreed to settle the case.[130] However, the widely-publicized cases that do not settle shed some light on how victims can expect to evaluate a settlement offer or prepare their defenses in case they find themselves facing a defamation lawsuit.

There are several lawsuits where survivors have successfully argued for a defamation claim's dismissal, either through an anti-SLAPP defense or a common interest or qualified privilege, each respectively discussed below. SLAPPs are deterred in many states by anti-SLAPP laws, which protect an individual's discourse when it involves a matter of public concern.[131] For instance, a California court granted a church leader-defendant's motion to strike after the defendants distributed a report to the church about the Minister of Youth-plaintiff's inappropriate relationship with one youth group member.[132] The court determined that protecting children is a matter of public interest[133] and that the plaintiffs had failed to establish a probability of prevailing on the elements of a defamation claim under the anti-SLAPP defense, as the plaintiffs did not put forth evidence that the defendants' statements or report contained a provably false assertion of facts.[134] The court also found for the defendants based on the common interest privilege defense, because the information was distributed to a select group of people who had an interest in protecting their children from potential offenders.[135]

Additionally, when singer-songwriter Margaret Osborn's (aka Alice Glass) former boyfriend, Ethan Kath, claimed her allegations of sexual, physical, and emotional abuse were defamatory, the California Supreme Court dismissed Kath's defamation claim through an anti-SLAPP countersuit.[136] The defendant established that her speech was protected, the

---

[129] *See* Kamb, *supra* note 65; Maddaus, *supra* note 16; Pauly, *supra* note 128; Ritter, *supra* note 65.

[130] Ritter, *supra* note 65.

[131] See Bruce Johnson & Davis Wright Tremaine, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips.*, ACLU (Jan. 22, 2018, 4:00 PM), https://perma.cc/GSA3-8JFW.

[132] Terry*,* 131 Cal. App. 4th at 1558 (Ct. App. 2005).

[133] *Id.* at 1547.

[134] *Id.* at 1553-55.

[135] *Id.* at 1556-57.

[136] Palmieri v. Osborn, No. BC681889, 2018 Cal. Super. LEXIS 3068, at *1 (Super. Ct. Feb. 23, 2018).

first prong of the anti-SLAPP defense, because the statements were made in a public forum, the internet, and the allegations involved a topic of widespread public interest: entertainers who allegedly committed sexual misconduct.[137] Next, the court held that Kath's claims of his and Osborn's loving relationship via statements from Osborn's emails and diaries were not sufficient evidence to dispute the allegations of abuse, because they were conclusory and procedurally defective and thus did not demonstrate the probability that Kath would prevail on the merits of his claim.[138]

A Texas court similarly relied on state anti-SLAPP legislation, the Texas Citizens Participation Act ("TCPA"), to dismiss a defamation claim against several parishioners of the Sai Temple of Spiritual Healing who had shared information that the founder of the temple behaved inappropriately toward three women.[139] The defendants put forth an anti-SLAPP defense and a Texas common law defense of qualified privilege, which protects statements made without actual malice.[140] The court determined that the TCPA applied because allegations that the plaintiff made multiple women feel uncomfortable "touch[ed] on issues of . . . public safety (whether he made women feel unsafe)," satisfying the anti-SLAPP "matters of public concern" element.[141] The court found that the statements were also protected by qualified privilege because "the people to whom [the Defendants] spoke, a third person, or one of their family members had an interest that was sufficiently affected by the statement," and the statements were made without actual malice, established by their actual reliance and trust in the people who shared the information with them.[142] Cases in California and Texas thus show that anti-SLAPP and common interest privileges are two possible responses to defamation claims that can successfully result in case dismissals.

Additionally, several high-profile cases where defendants have raised anti-SLAPP defenses are currently pending resolution, leaving legal experts speculating on what the outcomes of these cases will mean for defamation law. Most notable is celebrity-singer Kesha's anti-SLAPP defense, which she raised after being sued for defamation for accusing her former manager of sexual assault and which remains unsettled.[143] Another pending case involves Kentucky bar owner Matthew Landan, who has sued an unnamed woman for defamation after she posted a picture of him

---

137 *Id.* at *7-8.

138 *Id.* at *9-11.

139 *See Campone*, 2018 WL 3652231, at *1-2, *13 (Tex. App. 2018).

140 *See id.*

141 *Id.* at *7.

142 *Id.* at *11-12.

143 *See* Gottwald v. Sebert, 172 A.D.3d 445 (N.Y. App. Div. 2019).

online with the caption, "MATTHEW LANDAN IS A RAPIST."[144] In response, the survivor-defendant has both moved for dismissal, arguing truth as a defense, and countersued, claiming that the plaintiff filed a lawsuit with improper intentions.[145] These ongoing cases raise questions about First Amendment rights as well as the standard of maliciousness required when the plaintiff is a public figure.

Defamation claims by survivors against their alleged abusers are also continuing to emerge as part of the #MeToo movement. Notably, famous Hollywood actor Bill Cosby has been sued for defamation by several victims who claim he sexually assaulted them.[146] One such alleged victim, Katherine McKee, reported in a publicized interview with the New York Daily News that Cosby had raped her 40 years ago.[147] Cosby's attorney then wrote a letter to the *Daily News* on Cosby's behalf, and McKee alleges he leaked this letter to the media, which reported on its contents widely.[148] McKee then sued Cosby for defamation, asserting 24 defamation counts based on various parts of the letter.[149] The First Circuit Court of Appeals affirmed the district court's dismissal of the defamation claim, and McKee's petition for a writ of certiorari was denied by the Supreme Court.[150] Seven other women sued Bill Cosby for defamation when his representatives accused them of lying about the abuse and have since settled their claims.[151] However, Cosby will not be financially contributing to the settlement, because the insurance company involved decided to settle for him and will be paying the claims.[152] Cosby maintains his innocence, denies the plaintiffs' allegations, and is pursuing a countersuit against each of them for tarnishing his reputation.[153] The judge has not yet approved the insurance settlement, and the countersuits are pending.[154]

---

[144] Loosemore, *supra* note 16.

[145] *See supra* note 94 ("[The plaintiff's aim was not] to protect his rights but instead 'to intimidate other victims from sharing their experiences with Landan, prevent further allegations against him, prevent (the woman) from sharing her experience with Landan, and prevent lawful protest against his alleged actions.'").

[146] *See* McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675 (2019); Green v. Cosby, 138 F. Supp. 3d 114 (D. Mass. 2015); Dickinson v. Cosby, 17 Cal. App. 5th 655, 685-86 (Ct. App. 2017).

[147] *See McKee*, 874 F.3d at 58.

[148] *Id.* at 59.

[149] *Id.*

[150] *Id.* at 65; McKee v. Cosby, 139 S. Ct. 675 (2019).

[151] Graham Bowley, *7 Women Suing Bill Cosby Reach Settlement in Defamation Case*, N.Y. TIMES (Apr. 5, 2019), https://perma.cc/ZA8Z-U8D9.

[152] *Id.*

[153] *Id.*

[154] *Id.*

Alternatively, President Trump has raised constitutional defenses in response to defamation lawsuits arising from statements he made about women who accused him of sexual harassment. The Appellate Division of New York's Supreme Court in the First Department has rejected President Trump's argument that he is not subject to suit in a state court as a sitting president and, more importantly, has ruled that the defamation cause of action brought against him satisfies the minimal standard necessary to proceed.[155] This ongoing New York case provides an opportunity for legal scholars to analyze any potential decisions or settlements that may result. Harvey Weinstein is another public figure who faces a defamation lawsuit stemming from the #MeToo era.[156] Actress Ashley Judd initiated a lawsuit when she learned later in her career that director Peter Jackson had not hired her for *The Lord of the Rings* movie because Weinstein told him that Judd was "a nightmare" to work with. Judd alleged that Weinstein made this statement to retaliate against her for rejecting his sexual advances, unbeknownst to Jackson.[157] Judd alleged that Weinstein's statements caused her harm by damaging her career opportunities, and her defamation claim remains pending in the U.S. District Court for the Central District of California.[158]

It is too soon to ascertain any definite trends across the landscape of current and ongoing defamation cases. However, these cases provide some information that attorneys and survivors can use when conducting a cost-benefit analysis as to whether and how their claims of abuse should be made, anonymous or otherwise. They also provide examples of defenses to consider if there are concerns about a pending or potential defamation lawsuit against a survivor. Furthermore, these cases not only offer the possibility of additional precedent to follow, but may also shape public opinion in a way that impacts survivors' strategic choices.

III. ANTI-SLAPP AS A DEFENSE FOR SURVIVORS ALLEGING ABUSE

Anti-SLAPP statutes provide a defense strategy against defamation claims.[159] These statutes deter lawsuits that interfere with the constitutional rights of freedom of speech and which are meant to harass those

---

[155] Zervos v. Trump, 171 A.D.3d 110, 129-30 (N.Y. App. Div. 2019).

[156] *See* Judd v. Weinstein, No. CV 18-5724 PSG (FFMx), 2018 WL 7448914 (C.D. Cal. Sept. 19, 2018).

[157] *Id.* at *2.

[158] *Id.* at *8, *11.

[159] *See generally* George L. Blum, Annotation, *Application of Anti-SLAPP ("Strategic Lawsuit Against Public Participation") Statutes to Invasion of Privacy Claims*, 85 A.L.R. 6th 475, § 2 (2013).

who have exercised that right,[160] and where the plaintiff's purpose of their lawsuit is solely to deplete the defendant's energy and drain their resources.[161] Approximately 21 states have some form of anti-SLAPP statutes, and they vary in scope and effectiveness, with some states focusing primarily on acts of retaliation against individuals who have attempted to participate in the governmental process or procure some other type of government action.[162] Other states, like California, have broadened the reach of their anti-SLAPP statute to cover any exercise of free speech rights on matters of public concern.[163] One attorney arguing a California case in which a court ruled that the state's anti-SLAPP legislation protected the defendant's comments about her alleged harasser said that making claims of abuse is a "free speech issue" and a "public policy concern."[164] She argued that survivors should feel safe making statements about the abuse they experienced without liability so that the abuse can be addressed through proper channels.[165]

A. The Mechanics of an Anti-SLAPP Defense

Where broad anti-SLAPP statutes are available, they provide an additional procedural vehicle with which to strike down a defamation claim.[166] They allow defendants to bring a special motion to dismiss or strike a frivolous lawsuit or claim where the only goal of the lawsuit is to silence the defendant.[167] The anti-SLAPP defense provides a remedy through a summary judgment-like procedure that stays all discovery, weeding out meritless claims by ending litigation before the initiation of

---

[160] *Id.*; SMOLLA, RIGHTS AND LIABILITIES, *supra* note 69, § 6:98 ("Defamation actions are a common form of SLAPP suit. Such a suit might arise, for example, when a local citizens group, the Not In Our Back Yard Coalition, protests against plans to open a new retail store, 'BigMart,' in the neighborhood. If in the course of a zoning board meeting, a member of the group heavily criticized BigMart, it is possible that BigMart might bring a lawsuit against the individual and the citizens' group for libel. Such a 'strategic' suit against those participating in the processes of government may have a chilling effect on the grass-roots exercise of First Amendment rights, such as petitioning the government for a redress of grievances.").

[161] *See* Bowley, *supra* note 151.

[162] SMOLLA, RIGHTS AND LIABILITIES, *supra* note 69, § 6:98.

[163] *Id.*

[164] *See* Kingkade, *supra* note 19.

[165] *Id.*

[166] *See supra* note 156; Bensussen v. Tadros, No. BC682869, 2018 WL 2390162, at *1 (Cal. Super. Ct. Mar. 8, 2018); Comstock v. Aber, 212 Cal. App. 4th 931 (Ct. App. 2012); *supra* note 136.

[167] George Blum et al., *Anti-Strategic Litigation Against Public Participation (anti-SLAPP) Statutes*, 71 C.J.S. PLEADING § 675 (2020).

invasive discovery procedures or a trial that raises the risk of re-traumatizing the victim.[168] The ability to stop a defamation case as early as possible is significant because survivors face more than just the risk of a financial loss from a settlement or a judgment: along the way, they must pay attorney's fees, experience wasted time and lost wages, and relive painful memories, often in detail.

The resolution of an anti-SLAPP motion in a defamation lawsuit involves two steps. First, the defendant must establish that their allegedly defamatory statement(s) arose from a protected activity.[169] "The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to their asserted liability—and whether that activity constitutes protected speech or petitioning."[170] This requirement is meant to protect the defendant's right of free speech when it is connected to a public issue.[171] Importantly, some state statutes cast a wide net with regards to public safety, permitting statements made in any official proceedings authorized by law, even if made outside of the courtroom with no function of the court or its officers involved,[172] while others specifically permit issues of health and safety.[173]

Second, if the defendant makes the required showing that their activity is protected, the burden shifts to the plaintiff to demonstrate the merits of their claim by establishing sufficient evidence of each element of the claim in question.[174] This is an additional barrier for the plaintiff, as they are then responsible for establishing that their case is likely to succeed on

---

[168] Baral v. Schnitt, 376 P.3d 604, 608-09 (Cal. 2016); Varian Med. Sys., Inc. v. Delfino, 106 P.3d 958, 966-67 (Cal. 2005); Anna North, *Harvey Weinstein's Trial Reveals the Trauma of Testifying*, VOX (Feb. 26, 2020, 10:30 AM), https://perma.cc/LMF5-T6JG.

[169] *Baral*, 376 P.3d at 608.

[170] Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002).

[171] *Id.* at 708. What constitutes a "public issue" is usually defined by the respective anti-SLAPP state statute. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(e) (West 2020).

[172] *See* Comstock v. Aber, 212 Cal. App. 4th 931 (Ct. App. 2012) (establishing that in a sexual harassment case, communications to police or other communications that are preparatory to or in anticipation of commencing official proceedings are protected by the anti-SLAPP statute). Reports to law enforcement, the hospital, and the defendant's employment in order to initiate a report against a co-worker were all statements made in an official proceeding authorized by law and thus were all considered protected speech. *Id.*

[173] Cavin v. Abbott, 545 S.W.3d 47, 60-65 (Tex. Ct. App. 2017) (establishing that subjects of mental illness or domestic abuse plainly fall within the ordinary meaning of "health" or "safety" and it is clear that such "health" and "safety" under the TCPA includes that of private parties embroiled in an otherwise private dispute, including domestic violence). One couple's communication regarding the domestic violence that their daughter was allegedly experiencing was "communication made in connection with" the above subjects that, as a matter of law, were protected under the "exercise of the right of free speech" according to the TCPA definition. *Id.*

[174] Baral v. Schnitt, 376 P.3d 604, 608 (Cal. 2016); *Navellier*, 52 P.3d at 708.

the merits with minimal evidence, since anti-SLAPP statutes provide for a stay or a highly truncated version of discovery.[175] An anti-SLAPP defense can thus "hamstring a plaintiff's case," particularly when the plaintiff is a public figure, as public figures must prove actual malice, which is incredibly difficult to establish without discovery.[176] Facially, the plaintiff must put forth more than a mere claim that what the defendant alleges is false: there must be some specific denial of the truth of the victim's statements. A plaintiff has to demonstrate that their claim is both legally and factually sufficient to sustain a favorable judgement.[177] However, the plaintiff "need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP."[178] The court will grant the anti-SLAPP motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish support for the claim, without weighing the credibility or comparing probative strength of this evidence.[179]

The benefit of an anti-SLAPP defense is that, as long the survivor can argue their statements were a matter of public interest, the burden is on the plaintiff to establish a prima facie case for defamation, requiring more than a mere allegation of a false statement.[180] Where defendants have access to anti-SLAPP statutes, they may be used as a first line of defense.[181]

B. Anti-SLAPP Outcomes

Recent widely publicized cases may provide useful guidance to those who are considering alleging abuse or harassment outside of the litigation context and to prepare for potential defamation claims. Anti-SLAPP defenses are one such remedy, as courts have been acknowledging on a more frequent basis that allegations of intimate partner violence, sexual assault, and harassment should be recognized as protected speech as matters of public interest within the context of anti-SLAPP litigation.[182] Furthermore, an anti-SLAPP defense requires plaintiffs to establish that their allegations are likely to succeed on the merits, requiring specificity about

---

[175] SMOLLA, RIGHTS AND LIABILITIES, *supra* note 69, § 6:98.

[176] *Id.*

[177] Grenier v. Taylor, 234 Cal. App. 4th 471, 480 (Ct. App. 2015) (citing *Navellier*, 52 P.3d at 708).

[178] *Id.*

[179] Wilson v. Parker, Covert & Chidester, 50 P.3d 733, 739-40 (Cal. 2002).

[180] *See supra* note 171.

[181] *See* Comstock v. Aber, 212 Cal. App. 4th 931 (Ct. App. 2012); Bensussen v. Tadros, No. BC682869, 2018 WL 2390162 (Cal. Super. Ct. Mar. 8, 2018); Palmieri v. Osborn, No. BC681889, 2018 Cal. Super. LEXIS 3068 (Super. Ct. Feb. 23, 2018).

[182] *See Bensussen*, 2018 WL 2390162, at *1.

the plaintiff's version of events at an early stage of litigation.[183] As many ongoing cases continue, their outcomes will begin to reveal new glosses on longstanding defamation elements in a culture where sexual harassment and abuse claims are rising.[184]

The following analysis discusses the outcomes of defamation claims filed against survivors of abuse to illustrate the risks of defamation claims arising from the #MeToo movement and whether there are any additional protections available to survivors resulting from evolving case law.

In California, DJ and producer William Bensussen sued two women who alleged he had drugged and raped them.[185] Both women responded with motions to strike and an anti-SLAPP defense.[186] While the defamation case survived a motion to strike, the California court found that "violence against women" satisfies the public interest prong of an anti-SLAPP defense, further establishing this defense as an option for California survivors.[187] The court noted that "violence against women is of pressing public concern" and that the "boundaries of a public issue" involve statements that concern a person or entity in the public eye, conduct that could directly affect a large number of people beyond the direct participants, or a topic of widespread public interest.[188] Allegations of sexual assault and violence against women satisfy these guiding principles for the anti-SLAPP defense's public interest test: they are an issue that involves more than mere curiosity and a matter of concern to a substantial number of people—there is some degree of closeness between the challenged statements and the asserted public interest, and the focus of the speaker's conduct is the public interest and "not a mere effort for more ammunition for another round of private controversy."[189] This expands the possibilities for defamation defenses and establishes that intimate partner violence, sexual assault, and harassment should, as a bright-line rule, be considered matters of public interest. Therefore, when a survivor is establishing an anti-SLAPP defense, their case should not require much more than indicating the existence of some form of violence against

---

[183] CAL. CIV. PROC. CODE § 425.16(b)(2)-(3) (West 2020).

[184] Binkley, *supra* note 4; MORGAN & TRUMAN, *supra* note 9, at 5-7; U.S. Equal Emp't Opportunity Comm'n, *supra* note 9.

[185] *See Bensussen*, 2018 WL 2390162, at *1, *4.

[186] *Id.* at *3-6. Medina's motion to strike was granted on the grounds of consent in defamation law: Bensussen encouraged her to tell the truth to the media; therefore: "Plaintiff [could] not invite Medina to make public comment and then when she [did] so . . . be upset with the content of her comment [and] sue her for libel." *Id.* at *5.

[187] *Id.* at *6.

[188] *Id.* (quoting Rivero v. Am. Fed'n of State, Cty., & Mun. Emps., AFL-CIO, 105 Cal. App. 4th 913, 924 (Ct. App. 2003)).

[189] *Id.*

women, which would then shift the burden to the plaintiff to establish their prima facie case.

This is exactly what happened in *Bensussen*: after the court decided that the defendants made a threshold showing that the challenged cause of action arose from a protected activity, the burden then shifted to Bensussen in the second stage of the anti-SLAPP defense, which required him to demonstrate a likelihood of success on the merits of the case. The court concluded that the survivor-defendants' claim about being drugged and raped by the plaintiff was a provably false assertion of fact that was sufficiently challenged by the plaintiff's evidence and permitted the case to proceed to the next stage.[190] The plaintiff submitted evidence of witnesses who were present when he bought drinks for the defendants.[191] The witnesses stated they did not observe or hear anything that indicated the plaintiff put drugs in their drinks, nor did they witness the women behaving in a manner which indicated they had been drugged or were not consenting to sexual intercourse.[192] Ultimately, the court determined that proof of actual malice was not yet needed at the anti-SLAPP stage and that the plaintiff had established merit for his claim.[193] The plaintiff has since dropped his lawsuit against one defendant after they both issued public statements in which Tadros acknowledged that, although she was sexually assaulted, she did not know who sexually assaulted her.[194]

However, in some jurisdictions, imprecise rebuttals to defendants' allegations typically do not satisfy the anti-SLAPP standard of "likely to succeed on the merits." Specifically, the Texas anti-SLAPP legislation requires that in a defamation case there must be "pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff" to resist a TCPA motion to dismiss.[195] Clear and specific evidence, as required under the TCPA, must be "unambiguous, sure, or free from doubt" and "explicit or relating a particular named thing."[196] Consequently, a Texas Court of Appeals has found that a plaintiff-politician's pleadings did not include sufficient evidence when they merely stated that the defendant had made "false and defamatory claims that [the plaintiff] committed sexual assault" and that the defendant's "statements were false because [the

---

[190] *Id.* at *8.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] Matthew Strauss, *The Gaslamp Killer Drops Lawsuit Against Rape Accuser, Issues Joint Statement with Accuser*, PITCHFORK (July 30, 2019), https://perma.cc/YSX5-Y7X3.

[195] *In re* Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).

[196] *Lipsky*, 460 S.W.3d at 590; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005 (West 2019).

plaintiff] never engaged in such behavior."[197] The court explicitly stated that the pleadings contained "no evidence . . . that [the survivor's] press release statement was both false and made with knowledge of, or reckless disregard for, its falsity," satisfying neither the falsity standard nor the much higher actual malice standard required for public figures.[198]

And, as discussed above, when former boyfriend and bandmate Ethan Kath sued Margaret Osborn for her allegations that he had sexually, physically, and emotionally abused her, the reviewing California court dismissed Kath's defamation claim through an anti-SLAPP countersuit, finding that Kath's evidence was inadmissible because it was conclusory and entirely procedurally defective.[199] California courts preclude plaintiffs' declarations show a probability of prevailing on the merits when they are made without "foundation or personal knowledge, or . . . are argumentative, speculative, impermissible opinion, hearsay, or conclusory,"[200] which precisely describes Kath's pleadings. However, while Kath's unauthorized declarations and evidence of Osborn's affections were insufficient to show a probability of prevailing on the merits of the claim, the United States District Court for the Southern District of California has held in other circumstances that a declaration expressly contradicting facts put forth by the defendant does have minimal merit.[201] Even where the declaration is self-serving, "the Court does not weigh the evidence or assess the credibility of Plaintiff's declaration and merely determines whether there is sufficient evidence for a jury to decide in Plaintiff's favor."[202] Consequently, the court denied a defendant-victim's motion to strike when the plaintiff denied his ex-girlfriend's claims that he abused and sexually assaulted her because "evidence to prove personal knowledge may consist of the witness's own testimony."[203] This line of cases demonstrates that jurisdictions differ in their approach to evaluating evidence put forth to show a probability of prevailing on the merits for the element of falsity, which should be considered when determining if an anti-SLAPP defense is appropriate.

---

[197] Vander-Plas v. May, No. 07-15-00454-CV, 2016 WL 5851913, at *2 (Tex. App. 2016).

[198] *Id.* at *6.

[199] *See* Palmieri v. Osborn, No. BC681889, 2018 Cal. Super. LEXIS 3068, at *9-10 (Super. Ct. Feb. 23, 2018).

[200] *Id.* at *10.

[201] *Id.*; Guzman v. Finch, No. 19CV412-MMA (MDD), 2019 WL 1877184, at *8 (S.D. Cal. Apr. 26, 2019).

[202] *Guzman*, 2019 WL 1877184, at *8.

[203] *Id.* (quoting FED. R. EVID. 602).

CONCLUSION

This Note gathers strategies that can support survivors when they choose to speak out about their abuse, as well as further information about how survivors can tell their stories with the least litigious consequences. The cases discussed above illustrate various courts' decision-making processes and how the nature of these cases shapes or changes their rulings on defamation claims. Jurisdictions that offer broad anti-SLAPP defenses provide a possible additional layer of defense for survivors who seek to conclude a defamation case as quickly as possible. Furthermore, current high-profile cases continue to evolve the defamation defense case law. For example, pop star Kesha's anti-SLAPP defense case has yet to be resolved.[204] This leaves open the possibility of an anti-SLAPP judgment or a trial, which could provide monumental insight into applicability of an anti-SLAPP defense or a judgment on the merits of a defamation case. The #MeToo movement alone will not provide complete freedom for survivors to speak out about their abuse, but any reduction of the risk and negative impact of defamation claims will provide greater space for survivors to speak their truth.

[204] *See* Gottwald v. Sebert, 172 A.D.3d 445 (N.Y. App. Div. 2019).