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# 280 Characters to § 230 Immunity: Protecting Individual Sexual Assault Allegations on Twitter from Defamation Liability

Elizabeth Profaci

# 280 CHARACTERS TO § 230 IMMUNITY: PROTECTING INDIVIDUAL SEXUAL ASSAULT ALLEGATIONS ON TWITTER FROM DEFAMATION LIABILITY

> *This is a platform for all women who want to come forward with their experiences anonymously. Please share this account and spread the word. We need accountability and the best way to get that is to get as many of our stories out there. #metoo*[1]


## ABSTRACT

One in four female undergraduate students has been sexually assaulted. These students are three times more likely to experience sexual violence than any other group. Frustrated with the Title IX process on their campuses and the lack of discipline for their assailants, these students are unlikely to report their assault. Instead, they quietly tell their friends and other students, and in some cases, anonymously share their stories online. But instead of receiving support, these survivors are often faced with lawsuits. Accused assailants are using, or threatening to use, defamation lawsuits in an attempt to silence survivors who speak out, even when they do so anonymously. These defamation suits have high costs, both financial and emotional, that many survivors cannot bear; many survivors will stop speaking out about their experiences as a result. However, § 230 of the Communications Decency Act and the public controversy doctrine limit defamation liability for sexual assault allegations made online that could shield survivors brave enough to come forward.




1. UF Survivors (@SurvivorsUf), TWITTER (June 30, 2020, 9:50 AM), https://twitter.com/SurvivorsUf/status/1277962837600632832.

## INTRODUCTION

During the summer of 2020, new Twitter accounts appeared, anonymously publishing allegations of sexual assault at universities across the country.[2] There were accounts publishing allegations at the University of Michigan, University of California Los Angeles,[3] University of Virginia,[4] University of Florida,[5] Rutgers University,[6] and many other schools.

The purpose of these Twitter accounts was to provide a platform for survivors (of sexual assault) to share their stories and to critique their respective universities' handling of sexual assault on campus.[7] Two of these Twitter accounts, UVA Exposed (@Exposed_UVA) and UF Survivors (@SurvivorsUf), officially shared statements asking their university administration to better address sexual assault on their campuses.[8] In particular, UVA Exposed released a list of demands demanding that UVA's administration create "immediate, structural, and transformative change of the University of Virginia's policies and resource allocation for sexual violence, sexual harassment, and intimate-partner violence prevention and support services."[9] After the account emerged, the petition gained over a thousand signatures

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2. *See, e.g.*, Jasmin Lee & Varsha Vedapudi, *Twitter Account Posts Anonymous Allegations of Sexual Assault at the University*, MICH. DAILY (June 3, 2020), https://www.michigandaily.com/section/news/twitter-account-about-sexual-assault-%E2%80%98u%E2%80%99-goes-viral [https://perma.cc/QT3R-M9EE].

3. *Id.*

4. Brielle Entzminger, *UVA Sexual Assault Advocacy Groups Push for Change After Twitter Account Spurs Controversy*, C-VILLE (July 1, 2020, 2:00 AM), https://www.c-ville.com/uva-sexual-assault-advocacy-groups-push-for-change-after-twitter-account-spurs-controversy [https://perma.cc/66MB-5XTZ].

5. Melissa Hernandez, *Naming Names: Twitter Accounts That Graphically Describe Sexual Assaults Emerging On College Campuses*, WUFT (Aug. 20, 2020), https://www.wuft.org/news/2020/08/20/naming-names-twitter-accounts-that-graphically-describe-sexual-assaults-emerging-on-college-campuses [https://perma.cc/4JSN-WWGY].

6. *Twitter Accounts Post Sexual Assault Accusations, Rutgers Holds Open Forum*, DAILY TARGUM (June 26, 2020, 6:35 PM), https://www.dailytargum.com/article/2020/06/twitter-accounts-post-sexual-assault-accusations-rutgers-holds-open-forum [https://perma.cc/W427-85CU].

7. Maryann Xue, *U.VA. Survivors Demand the University Commit to Stopping Sexual Violence on Grounds*, CAVALIER DAILY (June 22, 2020), https://www.cavalierdaily.com/article/2020/06/u-va-survivors-demand-the-university-commit-to-stopping-sexual-violence-on-grounds [https://perma.cc/C3N6-CQM6].

8. *See* UVA Survivor Demands, https://docs.google.com/document/d/196dLEgoaz0_n4lX1K4O3-Nv81Bwb0KxF5GLggR9pbKE/edit [https://perma.cc/W2ZB-5YLT] (last visited Dec. 6, 2021); UF Survivors Official Statement, https://docs.google.com/document/d/1-0KNbCDF3X5h7OW1Y4lIP7Qi-UZWvS-bxkZpif9jAwI/edit?usp=sharing [https://perma.cc/522H-TL6E] (last visited Dec. 6, 2021).

9. Xue, *supra* note 7; *see also* UVA Survivor Demands, *supra* note 8.

in a matter of days.[10] Similarly, UF Survivors shared an official statement, asking the community to listen to survivors and asking the university to take steps to address "the pervasiveness of rape and sexual assault at the University of Florida."[11]

The accounts sparked online conversation about rape culture on college campuses and administrators' handling of Title IX processes.[12] Many Twitter users expressed support for the accounts and praised them for sharing the stories of survivors.[13] Other users questioned the veracity of the accounts and worried about the consequences the tweets would have for the accused.[14] Many replies warned that the accounts would be liable for defamation.[15] In fact, much of the conversation around the accounts has focused on defamation.[16]

Defamation suits based on online allegations of sexual misconduct and assault are not a new phenomenon.[17] Different courts have addressed liability differently, but the U.S. District Court for the Eastern District of New York's reasoning in *Elliott v. Donegan* should apply to Twitter accounts like UVA Exposed and UF Survivors.[18] Elliott filed suit against Donegan, alleging she published accusations in a list online "as relayed to her by another person"; Donegan argued the allegations met the requirements for § 230 immunity.[19] The court held that the applicability of § 230 will turn on whether Donegan contributed to the defamatory meaning of the allegations.[20]

This case left the door open to allow § 230 to apply to an online list publishing the names of individuals accused of sexual assault and harassment.[21] While the case was at the motion to dismiss stage, the Court explained that if the defendant could show that she did

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10. Xue, *supra* note 7 (reporting only 170 signatures on Monday, and over 1,700 by Friday).

11. UF Survivors Official Statement, *supra* note 8.

12. Xue, *supra* note 7.

13. *See, e.g.*, *cackles in tagalog* (@islesofwaikiki), TWITTER (June 21, 2020, 6:21 PM), https://twitter.com/islesofwaikiki/status/1274829890768875520 [https://perma.cc/A2VN-7KHW].

14. *See, e.g.*, Vincent Morrone Author (@Vince524), TWITTER (June 22, 2020, 9:15 PM), https://twitter.com/Vince524/status/1275235878865076225 [https://perma.cc/C3WB-WCQZ].

15. *See, e.g.*, Jason Watson (@JasonWa08833334), Twitter (June 18, 2020, 5:50 PM), https://twitter.com/JasonWa08833334/status/1273734863661694978 [https://perma.cc/42R2-WAHH].

16. Hernandez, *supra* note 5; Entzminger *supra* note 4; *see, e.g.*, Kevin Martingayle (@KMartingayle), TWITTER (June 16, 2020, 9:30 PM), https://twitter.com/KMartingayle/status/1273065543294205953 [https://perma.cc/4GHM-XARY].

17. *See infra* Part III.

18. *See* Elliott v. Donegan, 469 F. Supp. 3d 40, 59–60 (E.D.N.Y. 2020).

19. *Id.* at 57.

20. *Id.* at 60.

21. *Id.* at 57.

not "materially contribute to [the accusations'] defamatory meaning, and did not change the meaning and purpose of the content," she would be shielded by § 230.[22]

Like the list at issue in *Elliott*, these Twitter accounts are publishing accusations relayed to them by another person.[23] If the accounts have not "materially contribute[d] to their allegedly defamatory meaning, and [have] not change[d] the meaning and purpose of the content," the accounts are not subject to liability for defamation under § 230.[24]

This Note addresses the defamation liability for Twitter accounts like UVA Exposed and UF Survivors. Part I explores the online discussion of sexual assault and harassment at colleges and universities. Part II discusses the legal landscape of defamation suits based on allegations of sexual assault and harassment. Part III analyzes the applicability of limitations to defamation liability, particularly § 230 of the Communications Decency Act and the public controversy doctrine, to the Twitter accounts and concludes that § 230 should apply and limit the accounts' liability.

## I. ONLINE DISCUSSION OF SEXUAL ASSAULT AT COLLEGES & UNIVERSITIES

College students have been vocal about the prevalence of sexual violence on their campuses since the 1970s.[25] In 1991, Katie Koestner, a freshman at the College of William & Mary, spoke out about her sexual assault.[26] Koestner has been recognized as the first woman to speak up about the prevalence of date rape on college campuses, and her advocacy led to the creation of the Take Back the Night Foundation.[27] Take Back the Night has worked with college campuses across the United States since 2001 to raise awareness about sexual violence and provide a platform for survivors to speak out.[28]

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22. *Id.*

23. *Compare id.*, *with* UVA Survivor Demands, *supra* note 8, *and* UF Survivors Official Statement, *supra* note 8.

24. *See Donegan*, 469 F. Supp. 3d at 57.

25. *About Take Back the Night Foundation*, TAKE BACK THE NIGHT FOUND., https://takebackthenight.org/about-us [https://perma.cc/A66H-A7TT] (last visited Dec. 6, 2021).

26. Laura LaFay, *Student's Date-Rape Complaint Jolts William and Mary*, WASH. POST (Apr. 7, 1991), https://www.washingtonpost.com/archive/local/1991/04/07/students-date-rape-complaint-jolts-william-and-mary/f0f9511f-f108-458d-abf6-a4d35efcc925 [https://perma.cc/26ZR-DDKK].

27. *TBTN History*, TAKE BACK THE NIGHT FOUND., https://takebackthenight.org/history [https://perma.cc/6X67-UPHQ] (last visited Dec. 6, 2021).

28. *Id.*; *see also Take Back the Night*, STANFORD SARA, https://sara.stanford.edu/TBTN [https://perma.cc/H2ZE-A8SK] (last visited Dec. 6, 2021).

With the emergence of new forms of communication, college students have continued to speak out.[29] In particular, students have been very vocal on social media about the sexual assault and harassment they faced on their campuses,[30] even before the Me Too movement began.[31] For example, in May 2016, an anonymous Twitter account, @RapedAtSpelman, posted a series of tweets detailing a gang rape at Spelman College.[32] At the same time, "#StandWithAlicia," was trending with students at Marshall University in response to the university's decision to reinstate a student who had sexually assaulted another student.[33] A month earlier at Kenyon College, students shared an essay on Facebook that criticized the college for its failure to punish a student after he raped another student, who was under the influence of alcohol and her prescription medication.[34]

It is unsurprising students turn to outlets familiar to them—Facebook, Twitter, and other social media platforms—to express their frustration with their college administrations, as sexual violence on college campuses is "pervasive."[35] The Rape, Abuse, & Incest National Network (RAINN), reports that "13% of all students experience rape

29. *Take Back the Night*, *supra* note 28.

30. Jake New, *Taking Sexual Assault to Twitter*, INSIDE HIGHER ED (May 13, 2016), https://www.insidehighered.com/news/2016/05/13/students-turn-twitter-facebook-sexual-assault-complaints [https://perma.cc/K45B-R745].

31. Tarana Burke began the Me Too movement in the mid-2000s. Julianne McShane, *It's been four years since #MeToo went global. Tarana Burke wants to stay 'laser focused' on healing*, THE LILY (Oct. 21, 2021), https://www.thelily.com/its-been-four-years-since-metoo-went-global-tarana-burke-wants-to-stay-laser-focused-on-healing/ [https://perma.cc/LS8X-4A7B]. The movement became global when Alyssa Milano tweeted: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet." Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976 [https://perma.cc/AYC4-A6TA]. Initially, Burke, Milano and others hoped the #MeToo movement would raise awareness about the prevalence of sexual harassment and misconduct and amplify "silenced voices." *See* Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 UNIV. CHI. LEGAL F. 371, 371 (2019). However, the movement has now become associated with the high costs of speaking out against sexual violence. *See* Kendra Doty, *"Girl Riot, Not Gonna Be Quiet"—Riot Grrrl, #MeToo, & the Possibility of Blowing the Whistle on Sexual Harassment*, 31 HASTINGS WOMEN'S L.J. 41, 42–45 (2020); Jessica A. Clarke, *The Rules of #MeToo*, 2019 UNIV. CHI. LEGAL F. 37, 38 (2019). Survivors who post their stories of sexual assault and harassment can face serious consequences. *See* discussion *infra* Section III.B.

32. New, *supra* note 30. The account, @RapedAtSpelman, was suspended from Twitter for violating Twitter rules. *See* @RapedAtSpelman, TWITTER, https://twitter.com/rapedatspelman. *Inside Higher Ed* posted images of the tweets. *See* New, *supra* note 30.

33. *#StandWithAlicia*, TWITTER, https://twitter.com/search?q=%23standwithalicia%20marshall&src=recent_search_click [https://perma.cc/QPS2-QED8] (last visited Dec. 6, 2021); *see* New, *supra* note 30.

34. New, *supra* note 30.

35. *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/K6AF-6HBS] (last visited Dec. 6, 2021).

or sexual assault through physical force, violence, or incapacitation."[36] Over 26% of female undergraduate students "experience rape or sexual assault through physical force, violence, or incapacitation."[37] Female college students are three times more likely to experience sexual violence.[38]

However, many students never report their sexual assault to the campus authorities.[39] The Bureau of Justice Statistics' National Crime Victimization Survey found that between 1995 and 2013, "only one in five undergraduate women" who were raped or sexually assaulted contacted the police.[40] Even fewer report their sexual assault to campus authorities.[41]

The reasons students do not report their sexual assaults to campus authorities vary, but many students do not report because they do not expect their complaint to be successful.[42] It is unlikely that a Title IX procedure will result in a serious punishment for the perpetrator.[43] Many students do not wish to go through the emotional strain of the process and deal with a grueling Title IX process only for their assailant to remain on campus at the end of the proceedings.[44] Therefore, many students do not report their sexual assaults to their schools, but many student survivors will share their stories through informal methods.[45] They tell their friends, and, in some cases, they speak out online, either on their own accounts or by anonymously sharing with other accounts.[46]

However, these students face the high costs of speaking out.[47] Survivors who post their stories of sexual assault and harassment can face serious consequences.[48] They may need to move to avoid violence, they may face overwhelming publicity, and "becoming known as a survivor can take its toll."[49] For some women, that toll is the financial cost and emotional burden associated with a defamation suit.[50]

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36. *Id.*
37. *Id.*
38. *Id.*
39. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1160 (2019).
40. *Id.* (citing SOFI SINOZICH & LYNN LANGSTON, BUREAU OF JUSTICE STATISTICS, US DEP'T JUST., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 1, 5 (2014)); *see also Campus Sexual Violence: Statistics*, *supra* note 35.
41. *See* Tuerkheimer, *supra* note 39, at 1160.
42. *See id.* at 1160–61; *see also Campus Sexual Violence: Statistics*, *supra* note 35.
43. *See* Tuerkheimer, *supra* note 39, at 1163.
44. *See id.*
45. *See id.*
46. *See id.* at 1165.
47. *See* Doty, *supra* note 31, at 45; Clarke, *supra* note 31, at 42–43.
48. Doty, *supra* note 31, at 42.
49. *Id.*
50. *See id.*; *see also* discussion, *infra* Section III.B.

## II. LEGAL LANDSCAPE

Defamation suits based on allegations of sexual misconduct and a university's handling of complaints of sexual assault are not a new phenomenon.[51] For centuries, men have been wary of false accusations and that fear has "implicitly condone[d] the idea of a defamation suit against a rape victim."[52] Civil litigation has been used as a strategy to silence survivors speaking up about their assault for decades.[53]

### *A. Defamation Suits & the Traditional Media: "A Rape on Campus"*

Traditional media outlets have faced defamation lawsuits in the past for publishing allegations of sexual assault.[54] One of the most notorious recent lawsuits stemmed from false allegations in an article published by *Rolling Stone*.[55]

"A Rape on Campus" was published by *Rolling Stone* in November 2014.[56] The article detailed the brutal gang rape of "Jackie" at a party at Phi Kappa Psi fraternity at the University of Virginia.[57] The article criticized the University of Virginia's handling of sexual assault on campus and specifically called out Associate Dean of Students Nicole Eramo for poorly handling the allegations and for discouraging the student from sharing her story or from filing a complaint.[58] Almost immediately, other news outlets published articles questioning the veracity of the *Rolling Stone* article, highlighting discrepancies in the story.[59] *Rolling Stone* added an editor's note to the online version,

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51. *See* Clarke, *supra* note 31, at 65–66; Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885, 928 n.196 (2019).

52. Eric T. Cooperstein, *Protecting Rape Victims from Civil Suits by Their Attackers*, 8 L. & INEQUAL. 279, 285 (1989).

53. Alyssa R. Leader, Note, *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, 446 (2019).

54. *See, e.g.*, Eriq Gardner, *Rolling Stone Settles Last Remaining Lawsuit Over UVA Rape Story*, HOLLYWOOD REP. (Dec. 21, 2017, 7:05 AM), https://www.hollywoodreporter.com/thr-esq/rolling-stone-settles-last-remaining-lawsuit-uva-rape-story-1069880 [https://perma.cc/7WDW-F3QW].

55. Daniel B. Yeager, *The Temptations of Scapegoating*, 56 AM. CRIM. L. REV. 1735, 1741 (2019).

56. *Id.*

57. Elias v. Rolling Stone, LLC, 872 F.3d 97, 109 (2d Cir. 2017).

58. Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 878 (W.D. Va. 2016).

59. T. Rees Shapiro, *U-Va. Students Challenge Rolling Stone Account of Alleged Sexual Assault*, WASH. POST (Dec. 10, 2014), https://www.washingtonpost.com/local/education/u-va-students-challenge-rolling-stone-account-of-attack/2014/12/10/ef345e42-7fcb-11e4-81fd-8c4814dfa9d7_story.html?utm_term=.ff2e6affa039 [https://perma.cc/H8JD-AXKQ]; *see* T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/local/education/u-va-frater

stating that the discrepancies in the article had been uncovered and the magazine had concluded that its "trust in her was misplaced."[60] The magazine retracted the article on April 5, 2015, after a report from the Columbia University Graduate School of Journalism concluded the article was a "journalistic failure."[61] Even with the retraction, the reputations of the Phi Kappa Psi members and Eramo had been damaged; both filed defamation suits.[62]

In *Eramo v. Rolling Stone*, the jury found that Sabrina Erdely, the author of the article, acted with reckless disregard for the truth when she published the article, but the jury concluded that the magazine's staff was not complicit in the reporting flaws.[63] The judge determined that Eramo was a "limited-purposes public figure," as she had "injected herself" into the public controversy surrounding the University of Virginia's response to sexual assault allegations, and "had attempted to impact the outcome of the controversy" when she appeared in the local media.[64] As a limited-purposes public figure, Eramo had to prove by clear and convincing evidence that the defendants acted with actual malice.[65] Because there was not enough evidence that the author or the magazine's staff knew that Jackie's story was false when the article was published, Eramo focused on the reckless disregard prong of the actual malice standard.[66] The judge instructed the jury that when the defendant has "a high degree of awareness of the probable falsity" or has "entertained serious doubts as to the truth of the publication," reckless disregard exists.[67] The jury found that the author acted with reckless disregard for the truth when she wrote the article and placed most of the blame on Erdely, rather than the magazine, which the jury found not liable.[68]

In *Elias v. Rolling Stone*, the Court of Appeals for the Second Circuit held that the article contained defamatory statements "of and

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nity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html [https://perma.cc/DFQ4-ESKG].

60. W. Wat Hopkins, *Defamation, Actual Malice and Online Republication: Lessons Learned from* Eramo v. Rolling Stone et al., 17 APPALACHIAN J.L. 127, 134 (2018).

61. *Id.* at 135–36.

62. *See Eramo*, 209 F. Supp. 3d at 862; *Elias*, 872 F.3d at 97.

63. Hopkins, *supra* note 60, at 140.

64. *Id.* at 138.

65. *Eramo*, 209 F. Supp. 3d at 869.

66. Hopkins, *supra* note 60, at 138.

67. *Id.*

68. *Id.* at 141. Republication was also at issue in *Eramo v. Rolling Stone* because the magazine republished the article when it added the editor's note to the article stating that they were aware some of the statements in the article may be false. *Id.* Republication is a complicated issue and is not directly relevant to the analysis of § 230 as applied to sexual assault allegations that are the focus of this Note.

concerning" all members of Phi Kappa Psi fraternity.[69] The fraternity showed that "a reader could plausibly conclude that many or all fraternity members participated in alleged gang rape as an initiation ritual and all members knowingly turned a blind eye to the brutal crimes."[70] The fraternity enjoyed a prominent position in the university community and showed that its members had been "identified and harassed" because of their membership in the fraternity in connection to the article, which entitled them to small group defamation consideration.[71] The case was remanded to the district court and the magazine ultimately settled it for 1.65 million dollars.[72]

### *B. #MeToo Defamation Suits*

With the advent of the #MeToo movement,[73] defamation suits have been used as a deterrent to prevent public allegations of sexual assault and harassment.[74] While the defendant who publishes allegations of sexual misconduct ought to prevail if the allegations are true, the threats of lawsuits are a powerful deterrent.[75] Many sexual misconduct survivors cannot afford the mental and financial burdens of defending a defamation suit, especially given the uncertainty surrounding litigation costs for these suits.[76] Following the #MeToo movement, there have been a large amount of highly publicized, as well as some less publicized, defamation suits based on allegations of sexual harassment and sexual assault.[77]

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69. Elias v. Rolling Stone, LLC, 872 F.3d 97, 110 (2d Cir 2017).

70. *Id.* at 109.

71. *Id.* at 110.

72. *See* Sydney Ember, *Rolling Stone to Pay $1.65 Million to Fraternity Over Discredited Rape Story*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/business/media/rape-uva-rolling-stone-frat.html [https://perma.cc/2A87-3RL8].

73. Alyssa Milano, *supra* note 31.

74. *See* Tuerkheimer, *supra* note 39, at 1189–90.

75. *Id.*

76. *Id.* at 1190. Tuerkheimer's article explores the reasons many survivors have for choosing to turn to unofficial reporting mechanisms, like social media, rather than formal complaints of sexual misconduct, that provide some explanation for why students have chosen to report the name of their assailants to twitter accounts like UF Survivors and UVA Exposed, rather than their schools' Title IX offices or police. *See id.* at 1191–92.

77. *See, e.g.*, Claudia Rosenbaum, *Crystal Castles Singer Ethan Kath Sues Alice Glass Over Rape & Abuse Claims*, BUZZFEED NEWS (Nov. 3, 2017, 9:42 PM), https://www.buzzfeednews.com/article/claudiarosenbaum/crystal-castles-singer-ethan-kath-sues-alice-glass-over#.bf5zrDzXk [https://perma.cc/4YUE-SAK5]; Randall Roberts, *Electronic Producer and DJ William 'The Gaslamp Killer' Bensussen Files Defamation Lawsuit Against Accusers*, L.A. TIMES (Nov. 14, 2017, 2:13 PM), https://www.latimes.com/entertainment/la-et-entertainment-news-updates-november-2017-htmlstory.html#electronic-producer-and-dj-william-the-gaslamp-killer-bensussen-files-defamation-lawsuit-against-accusers [https://perma.cc/6F7Y-9HCP]; Madison Pauly, *She Said, He Sued: How Libel Law Is*

In some cases, the survivor files a suit against the alleged wrongdoer, as defamation suits "provide one of the few ways to address the additional reputational injuries that women often sustain when they accuse a high-profile harasser."[78] These suits are often used when the statute of limitations for the alleged sexual misconduct has expired.[79] For example, in 2017, two women sued President Donald Trump for comments he made that the two women had lied when they spoke out against the then-President's sexual misconduct.[80] Another woman sued former Senate candidate Roy Moore after he accused her of making "politically motivated" false statements that he had sexually abused her when she was a child.[81] In 2019, eight women reached a settlement with Bill Cosby's insurance company, after filing suits against Cosby for disparaging comments his representatives made after the women accused him of sexual assault.[82]

More commonly, the accused wrongdoer sues the accuser after they post their allegations.[83] For example, actor Johnny Depp has filed a defamation suit against his ex-wife, Amber Heard, based on her allegations of domestic abuse.[84] Writer Stephen Elliott filed a defamation suit against Moira Donegan, who created a list of men in the media who had been accused of sexual misconduct, which included Elliott.[85]

Beyond these well-publicized cases involving celebrities and politicians, there are many low-profile cases against survivors who share their stories about sexual assault and harassment.[86] Prior to the #MeToo movement, three out of four defamation lawsuits were "brought by male college students and faculty accused of sexual misconduct."[87] Since 2017, when the #MeToo movement began, more and more lawsuits have been filed; the Time's Up Legal Defense Fund reports that nearly 20% of its cases have been defamation suits against accusers.[88] Defamation suits connected with allegations of

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*Being Turned Against Me Too Accusers*, MOTHER JONES (Mar./Apr. 2020), https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault [https://perma.cc/7YTG-JGJN].

78. Williams et al., *supra* note 31, at 390.

79. *Id.*

80. Julia Jacobs, *#MeToo Cases' New Legal Battleground: Defamation Lawsuits*, N.Y. TIMES (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html [https://perma.cc/5LDN-T39G].

81. *Id.*

82. *Id.*

83. *See id.*

84. *Id.*

85. *Id.*

86. Pauly, *supra* note 77.

87. *Id.*

88. *Id.*

sexual misconduct are becoming more common, especially in an attempt "to silence people from coming forward."[89] These suits have a chilling effect on survivors' willingness to speak out.[90]

In some states, there are anti-SLAPP statutes that prevent these kinds of suits from being filed.[91] SLAPP suits, or strategic lawsuits against public participation, have been used even before the #MeToo movement to silence accusers and to prevent them from speaking out against sexual misconduct.[92] Defending these suits is "financially burdensome and time consuming."[93] In states with anti-SLAPP statutes, the court will consider whether the speech is protected under the statute and whether the plaintiff can show a probability that they will prevail on their claim if the speech is protected.[94] While some states like Texas and California allow their anti-SLAPP statutes to apply to allegations of sexual misconduct,[95] not all states' anti-SLAPP statutes include protections or privileges for allegations of sexual misconduct.[96] Furthermore, it is unclear how anti-SLAPP laws apply to statements posted on social media, as many anti-SLAPP statutes only apply when a formal report has been filed.[97]

If an anti-SLAPP statute does not apply, or in a state without one, the defendant survivors may have to pay large amounts in damages for speaking out about the sexual misconduct they experienced if a jury finds their statements were defamatory.[98] For example, Colonel David Riggins filed a defamation suit against a blogger after she alleged that he raped her while they were cadets at West Point.[99] In 2017, a jury awarded him 8.4 million dollars in damages.[100] In another case, three student athletes at Liberty University claimed

89. *Id.*

90. *Id.*

91. *See* Leader, *supra* note 53, at 442–43; *see also* Mike Rogoway, *Federal Appeals Panel, Citing Oregon's Anti-SLAPP Law, Tosses Out Lawsuit Against Rape Accuser*, OR. LIVE/THE OREGONIAN (updated Jan. 9, 2019), https://www.oregonlive.com/silicon-forest/2017/01/federal_appeals_panel_citing_o.html [https://perma.cc/8VMR-ZMUG].

92. Leader, *supra* note 53, at 446–47.

93. *Id.* at 448.

94. *Id.* at 452.

95. Tyler Kingkade, *As More College Students Are Saying "Me Too," Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017, 11:26 AM), https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing [https://perma.cc/8UH8-5M5H].

96. *See* Leader, *supra* note 53, at 456–58.

97. Kingkade, *supra* note 95.

98. *See* Tom Jackman, *Jury Orders Blogger to Pay $8.4 Million to Ex-Army Colonel She Accused of Rape*, WASH. POST (Aug. 11, 2017, 12:44 PM), https://www.washingtonpost.com/news/true-crime/wp/2017/08/11/jury-orders-blogger-to-pay-8-4-million-to-ex-army-colonel-she-accused-of-rape [https://perma.cc/8X3G-JPA8].

99. *Id.*

100. *Id.*

150 million dollars in damages in their complaints against a student who had accused them of rape.[101] While not every case has damages in the millions, the possibility of being ordered to pay such a large amount in damages if their allegations are found to be defamatory acts as a deterrent against survivors who may otherwise wish to speak out.

### *C. Student Survivor Defamation Suits*

Students had been speaking out against sexual assault and harassment on college campuses before the #MeToo movement took off.[102] However, the use of defamation lawsuits against these students has become more prevalent in recent years.[103] Students who are found to have violated a school's sexual assault policy are suing their schools "almost reflexive[ly]," when such a practice used to be rare.[104] In some cases, actually filing a defamation suit against a student is unnecessary, as the "mere threat of a defamation suit is enough to deter a student from going ahead with a sexual assault claim."[105] Such threats are used as a legal strategy to encourage student survivors to withdraw their complaints, even if there is evidence to support their claim.[106]

Accused students rely on these defamation suits to protect their reputations, as they claim they are "too often victims of overzealous school disciplinary panels."[107] These students point to the aftermath of cases like the Phi Kappa Psi fraternity brothers at the University of Virginia and the lacrosse players at Duke University as examples of how accusations of sexual assault can "ruin a young man's life."[108] In some cases, the survivor withdraws her complaint and the school can close the case, have the parties sign a nondisclosure agreement, and allow the accused student to transfer to another institution.[109] In other cases, the parties settle or the case is dismissed; regardless, the student survivor still must "retain an attorney, pay that attorney, and endure months or even longer of aggressive court practice."[110]

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101. Kingkade, *supra* note 95.
102. *See id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. Kingkade, *supra* note 95.
108. Behre, *supra* note 51, at 930–31.
109. Kingkade, *supra* note 95.
110. *Id.*

## III. LIMITS ON TWITTER ACCOUNTS' DEFAMATION LIABILITY

To successfully sue for defamation, a plaintiff must show "publication . . . of a defamatory statement . . . 'of and concerning' the plaintiff . . . that is false[] . . . published with the requisite degree of fault . . . and . . . damage to the plaintiff's reputation."[111] However, the First Amendment limits defamation claims in some instances.[112] For example, if a statement is made about a public figure, the plaintiff must prove that the statement was made with actual malice.[113] There are also statutes that can limit a defendant's liability for defamation. One such statute is § 230 of the Communications Decency Act ("§ 230"); if the defendant is an internet service provider or a user of an interactive computer service and published information provided by a third party, they are immune from defamation liability.[114] In other instances, when a statement relates to a matter of public concern, which includes conduct of government and public officials, public health and safety, and criminality and criminal justice, the defendant is not liable for defamation unless they acted with actual malice.[115]

### *A. Section 230 of the Communications Decency Act*

Section 230 of the Communications Decency Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[116] Since its passage in 1996, courts have interpreted § 230 broadly.[117] For example, in *Blumenthal v. Drudge*, the U.S. District Court for the District of Columbia held that a website publishing a defamatory gossip column was entitled to immunity under § 230.[118] The Court explained that "Congress has made a . . . policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making

111. Matthew E. Kelley & Steven D. Zansberg, *140 Characters of Defamation: The Developing Law of Social Media Libel*, 18 J. INTERNET L. 1, 8 (2014).

112. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

113. Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 869 (W.D. Va. 2016).

114. 47 U.S.C. § 230(c)(1); *see also* Julia Hsia, Note, *Twitter Trouble: The Communications Decency Act in Inaction*, 2017 COLUM. BUS. L. REV. 399, 406 (2017).

115. Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971).

116. 47 U.S.C. § 230(c)(1).

117. Ryan Gerdes, Note, *Scaling Back § 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act's Service Provider Immunity Playbook*, 60 DRAKE L. REV. 653, 662 (2012).

118. Blumenthal v. Drudge, 992 F. Supp. 44, 51–53 (D.D.C. 1998).

available content prepared by others."[119] In *Batzel v. Smith*, the Ninth Circuit held that § 230 would protect a website that posts unverified information without investigating its legitimacy, as long as the "author of allegedly defamatory information . . . intended that the information be distributed on the Internet."[120]

However, other courts have narrowed their applications of § 230.[121] In both *Fernando Valley v. Roommates.com* and *FTC v. Accusearch, Inc.*, the Ninth and Tenth Circuits, respectively, held that § 230 does not apply if the internet service provider "requires or encourages third parties to post infringing material."[122] At issue in *Roommates.com* was the website's requirement that users disclose their sexual orientation, which the Fair Housing Council argued violated the Fair Housing Act.[123] The Ninth Circuit explained that the website required users to engage in unlawful conduct and made "aggressive use of it in conducting its business."[124] In *Accusearch*, the website paid investigators to obtain phone records, which the website knew were obtained illegally, and the Tenth Circuit held that § 230 does not apply when the website is "intend[ed] to be overwhelmingly filled with some identifiable illegal conduct."[125]

Despite the holdings in *Roommates.com* and *Accusearch*, § 230 continues to protect internet service providers that function as a publisher, even if the provider is publishing defamatory content.[126] Section 230 clearly applies to websites like Twitter and Reddit; the websites themselves are immune from liability for defamatory content posted by users.[127] However, § 230 only applies to individual users when they are acting as "the publisher or speaker of information provided by another information content provider."[128] If a user is not publishing or reposting information provided by another user, but instead is acting on their own, they are not entitled to § 230 immunity.[129]

In a 2020 case, *Elliott v. Donegan*, the U.S. District Court for the Eastern District of New York addressed the issue of when a user is acting as a publisher of information provided by another user and

119. *Id.* at 52.
120. Batzel v. Smith, 333 F.3d 1018, 1037–38 (9th Cir. 2003).
121. Gerdes, *supra* note 117, at 664.
122. *Id.* at 666.
123. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161–62 (9th Cir. 2008).
124. *Id.* at 1172.
125. FTC v. Accusearch, Inc., 570 F.3d 1187, 1199 (10th Cir. 2009).
126. *See* Hsia, *supra* note 114, at 417–19.
127. *Id.* at 417–20.
128. 47 U.S.C. § 230(c)(1).
129. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 175 (2d Cir. 2016).

when a user is acting on their own.[130] In this case, the plaintiff, Stephen Elliott, sued Moira Donegan and thirty anonymous women for defamation after his name was published in a Google spreadsheet, "'Shitty Media Men' (the 'List')."[131] Elliott was named in the List, which alleged misconduct of rape and sexual harassment; the entry was later edited to include "coercion [and] unsolicited invitations to his apartment."[132] In his complaint, Elliott alleged, among other things, that Donegan and some of the anonymous women outlined the entry about him in red, to signal that several women had accused him of sexual violence.[133]

Donegan is the alleged creator of the List.[134] The List's purpose was to "'encourag[e] women to anonymously publish allegations of sexual misconduct by men' in the media sector."[135] The complaint alleged that the list encouraged women "to publish allegations of misconduct, whether or not they had personal knowledge of the conduct or evidence to corroborate the allegations" and that Donegan and the other women, "actively edited, removed, organized, published, highlighted, and added to the list."[136] The List was circulated to women working in media via email and other electronic communications.[137]

The court denied Donegan's motion to dismiss, as the applicability of § 230 was unclear at that stage of the litigation.[138] While Elliott's allegation that Donegan "published the allegedly defamatory accusations in the List as relayed to her by another person" seems to meet the requirements of § 230 immunity, the court held that its applicability of § 230 immunity would turn on "whether [Donegan] materially contributed to the allegedly defamatory meaning," which is "a key fact not known to the Court."[139]

Even though the court could not determine whether § 230 provided immunity to Donegan at the motion to dismiss stage, the court discussed its applicability to the case at hand.[140] The court explained that an individual "is responsible for the development of information when [she] engages in an act beyond the normal functions of a publisher . . . that changes the meaning and purpose of the content."[141]

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130. Elliott v. Donegan, 469 F. Supp. 3d 40, 56–57 (E.D.N.Y. 2020).
131. *Id.* at 47.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* (alteration in original).
136. *Elliott*, 469 F. Supp. 3d 40, at 47.
137. *Id.*
138. *Id.* at 61.
139. *Id.* at 57.
140. *Id.* at 57–58.
141. *Id.* at 57 (quoting Ascentive, LLC v. Opinion Corp., 842 F. Supp. 2d 450, 474 (E.D.N.Y. 2011)) (alteration in original).

The court distinguished this from providing "neutral assistance," where the individual uses "tools and functionality that are available equally" to all users.[142] The court also explained that a defendant would lose immunity under § 230 if they "'specifically encouraged' unlawful content."[143] Even if Donegan did not develop the information in the List, the court explained that if she included information "that was not provided to [her] for use on the Internet, she would not qualify for § 230 protection."[144]

In its ruling, the court addressed Elliott's allegation that the disclaimer at the top of the List, which identified it "as 'only a collection of allegations and rumors' that should be taken 'with a grain of salt,'" encouraged users to post rumors, which "specifically encouraged unlawful content."[145] Applying the Ninth Circuit's holding in *Roommates.com*, the court held that acknowledging the possibility that someone could "enter[] defamatory content into the List" did not "constitute specific encouragement of unlawful conduct."[146] The fact that Donegan included a disclaimer did not suggest that she asked users to submit defamatory statements or other unlawful content.[147]

The court explained that the key issue in determining whether Donegan was entitled to § 230 immunity was whether she "materially contribut[ed] to [the] alleged unlawfulness" of the allegations in the List.[148] The court explained that "visually aggregating or classifying user content" is not development or creation of content, and neither is "implementation of categorization features."[149] The court rejected Elliott's argument that categorizing and condensing multiple rape allegations as "accused of physical sexual violence by multiple women" constituted a material alteration.[150]

The issue the court identified in *Elliott*, whether the defendant "materially contribut[ed] to [the] alleged unlawfulness" of the allegations, will apply to the UVA Exposed and UF Survivors in the event that either account faces a defamation claim.[151] Many of the posts on both accounts are screen-captured images of direct messages (which contain the allegations) sent to the accounts.[152] The

142. *Elliott*, 469 F. Supp. 3d at 57 (quoting Herrick v. Grindr, LLC, 306 F. Supp. 3d 570, 589 (S.D.N.Y. 2018)).
143. *Id.* (quoting FTC v. LeadClick Media, LLC, 838 F.3d 158, 178 (2d Cir. 2016)).
144. *Id.* at 58.
145. *Id.*
146. *Id.* at 59.
147. *Id.*
148. *Elliott*, 469 F. Supp. 3d at 60.
149. *Id.*
150. *Id.*
151. *See id.*
152. *See, e.g.*, UVA Exposed (@ExposedUVA), TWITTER (June 16, 2020, 6:59 PM), https://twitter.com/ExposedUva/status/1273027515913768961.

screen-captured images seem to demonstrate that the accounts did not materially contribute to the unlawfulness of the content, when posted without additional comments.[153]

However, the accounts usually do not post the screen-captured message by itself.[154] The accounts typically include a trigger warning to accompany the screen-captured message, to caution users that the message in the image contains sensitive content.[155] Sometimes, particularly on the UF Survivors account, the tweets include hashtags with the screen-captured message, so that the tweet will show up in a search; generally, these hashtags are: #metoo, #BelieveSurvivors, and #UF.[156] Other times, the accounts add comments to accompany the screen-captured message.[157] These comments generally convey disgust with the alleged perpetrator and disappointment with the situation.[158]

The trigger warnings, hashtags, and comments posted with the screen-captured images of the messages to the accounts raise issues about the applicability of § 230. While the images of the messages are presumably unaltered and the accounts would likely be afforded § 230 immunity for the images posted on their own, the accompanying text in the tweet may be considered a material contribution in some instances.[159]

It seems unlikely that the hashtags alone will be considered a material contribution. Hashtags are typically used as a tool to filter tweets and to classify them by topic.[160] As seen in *Elliott*, "visually aggregating or classifying user content" is not development or creation of content, and neither is the "implementation of categorization features."[161] Here, it is clear the hashtags are a categorization

153. *See Elliott*, 469 F. Supp. 3d at 60.

154. *See, e.g.*, UVA Exposed (@ExposedUVA), TWITTER (June 18, 2020, 5:10 PM), https://twitter.com/ExposedUva/status/1273724814637903873 (including "TW: Rape").

155. *See, e.g.*, *id.*

156. *See, e.g.*, UF Survivors (@SurvivorsUF), TWITTER (July 5, 2020, 10:15 PM), https://twitter.com/SurvivorsUf/status/1279962258697850880.

157. *See, e.g.*, UVA Exposed (@ExposedUVA), TWITTER (June 16, 2020, 5:47 PM), https://twitter.com/ExposedUva/status/1273009421229199362.

158. *See, e.g.*, UVA Exposed (@ExposedUVA), TWITTER (June 18, 2020, 5:03 PM), https://twitter.com/ExposedUva/status/1273723107228946435 (stating "[h]e . . . must be avoided and known by all on Grounds.").

159. *See* Elliott v. Donegan, 469 F. Supp. 3d 40, 60 (E.D.N.Y. 2020).

160. *See* Hayley Dorney, *How to Create and Use Hashtags*, TWITTER BUS., https://business.twitter.com/en/blog/how-to-create-and-use-hashtags.html [https://perma.cc/M2WG-CBWV] (last visited Dec. 6, 2021); *see also* Uloop *How Hashtags Evolved and Changed the Way We Communicate*, HUFF POST (May 4, 2015), https://www.huffpost.com/entry/how-hashtags-evolved-and-_b_6795646 [https://perma.cc/TB5U-BAAX] ("hashtag quickly evolved from its primary function to being a way for people to provide social commentary, impart sarcasm, and other narratives on their social media posts.").

161. *Elliott*, 469 F. Supp. 3d at 60.

feature and a way to classify content, and the fact that they were included with the screen-captured messages likely will not prevent the accounts from claiming § 230 immunity when hashtags are the only accompanying text.[162]

The trigger warnings will likely be considered a categorization feature, rather than a material contribution. The purpose of the trigger warnings is to provide a warning to viewers that the post includes content related to trauma.[163] The trigger warning does not provide commentary; instead, it merely highlights the fact that the screen-captured message contains descriptions or references to rape, sexual violence, or physical abuse, for example.[164]

The comments accompanying the screen-captured messages, however, may prevent the court from applying § 230 immunity to particular tweets. Some comments are similar to the comments in *Elliott*, that the Court held were not a material alteration, as they merely condense multiple allegations.[165] Other comments go beyond merely condensing multiple allegations, as they provide more detail. Consider this tweet from UVA Exposed included with a particular allegation, "This is 1/3 submissions I have read so far that ALL share similar experiences of abuse at the hands of [John Doe]. I do not have explicit permission to share the others at this time, but his predatory behavior is well documented."[166]

Comments like this seem to toe the line of categorization and condensing multiple allegations. Whether they would be afforded § 230 immunity will likely depend on a particular court's interpretation of the statute.[167]

Other comments are likely outside the protection of § 230. For example, this comment accompanying screen-captured messages from UVA Exposed, "One of the most reported names to me has been [John Doe]. He is clearly a predatory [sic] and must be avoided and known by all on Grounds," likely is a material contribution.[168] Although it

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162. *See id.*

163. *See* Olga Khazan, *The Real Problem with Trigger Warnings*, THE ATLANTIC (Mar. 28, 2019), https://www.theatlantic.com/health/archive/2019/03/do-trigger-warnings-work/585871 [https://perma.cc/N5JN-NTUC].

164. *See, e.g.*, UVA Exposed, *supra* note 152.

165. *See Elliott*, 469 F. Supp. 3d at 60; *see, e.g.*, UVA Exposed (@ExposedUVA), TWITTER (June 16, 2020, 12:58 PM), https://twitter.com/ExposedUva/status/1272936625698484229 (posting "He has far and away been the most reported name.").

166. UVA Exposed (@ExposedUVA), TWITTER (June 16, 2020, 11:33 PM), https://twitter.com/ExposedUva/status/1273096455402766337.

167. *Cf. Elliott*, 469 F. Supp. 3d at 60.

168. UVA Exposed, *supra* note 158. "Grounds" refers to the University of Virginia's main campus. *See* Office of the Dean of Students, *Students & Traditions*, UNIV. VA., https://odos.virginia.edu/students-traditions [https://perma.cc/L2WC-W4SW] (last visited Dec. 6, 2021).

does categorize and condense allegations, it also goes beyond that to add that the alleged perpetrator is a predator, which a court would likely consider a contribution.[169]

On the other hand, there are some comments that go beyond categorization and condensing multiple allegations that could be afforded § 230 immunity, particularly on the UF Survivors account. Many screen-captured messages on that account include comments of support for the particular survivor.[170] For example, one tweet containing a screen-captured message of an allegation includes this comment: "This was not your fault. You were violated and assaulted by someone you trusted. You are strong, brave, resilient, and we are here to support you."[171] While the comment certainly is a material contribution, the contribution is not to the alleged unlawfulness of the tweet, which is the key consideration for § 230 immunity.[172]

While UF Survivors posts almost all of the allegations shared with the account as screen-captured images, UVA Exposed posts a mix of screen-captured images and text.[173] The screen-captured images easily support a finding that the account did not materially contribute to the contents in the message and its allegations, whereas posts of the text alone will likely require the account to show the original message and prove that they did not materially contribute to the allegations.[174] It may be more difficult for the account to successfully show they did not materially contribute, although the issue is similar to the issue Donegan faces in *Elliott*, and the final judgment of that case may be instructive.[175]

### *B. Public Controversy and Concern Doctrine*

When a statement relates to a matter of public concern, the defendant will not be held liable for defamation unless they "acted with actual malice."[176] Lower court cases since *Dun & Bradstreet v. Greenmoss Builders* have considered the conduct of government and public officials, public health and safety, and criminality and criminal

169. *See Elliott*, 469 F. Supp. 3d at 60.

170. *See, e.g.*, UF Survivors (@SurvivorsUF), TWITTER (July 1, 2020, 3:57 PM), https://twitter.com/SurvivorsUf/status/1278417554021769217.

171. *Id.*

172. *See Elliott*, 469 F. Supp. 3d at 60.

173. *Compare* UF Survivors (@SurvivorsUF), TWITTER, https://twitter.com/SurvivorsUf, *with* UVA Exposed (@ExposedUVA), TWITTER, https://twitter.com/ExposedUva.

174. *See Elliott*, 469 F. Supp. 3d at 60.

175. *See id.* at 58–61.

176. Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971).

justice, to be matters of public concern.[177] The courts consider four factors when determining whether the subject of particular speech is of public concern.[178] First, the court considers the forum of the defamatory speech.[179] Second, the court considers the "status of the plaintiff"; speech about a public figure or official has been held to be "inherently a matter of public concern."[180] Third, the court looks at whether the speech is about governmental or political processes.[181] Fourth, and finally, the court considers the defendant's motives; if the defendant appears to have published the speech for self-interested reasons, the court is more likely to hold that the speech does not involve a matter of public concern.[182]

A recent case out of the Texas Supreme Court, *Brady v. Klentzman*, applied these factors to a case involving an article published alleging the son of the deputy sheriff drove under the influence and "used his father's connections to skirt the charges filed against him."[183] Brady sued Klentzman, the journalist, and the newspaper, the West Fort Bend Star (the media defendants) for libel, alleging "the article was a malicious attempt to portray Wade Brady as a criminal and someone who used his father's connections to skirt the charges filed against him," and that the journalist "ignored the truth."[184] The court held that even if some of the details were false, the article addressed a matter of public concern and required the plaintiff to prove actual malice, which Brady failed to do.[185]

In reaching its holding, the court explained that a matter of public concern is speech "relating to any matter of political, social, or other concern to the community," that is "of general interest and of value and concern to the public," as "determined by [the expression's] content, form, and context . . . as revealed by the whole record."[186] Even if some of the details are not a matter of public concern, if there is a "logical nexus" between the details "and the general subject matter," then the details "are reasonably included as a matter of public concern."[187] The court explained that even if the speech is

177. Robert E. Drechsel, *Defining "Public Concern" in Defamation Cases Since* Dun & Bradstreet v. Greenmoss Builders, 43 FED. COMM. L.J., 1, 12–13 (1990).
178. *Id.* at 14–18.
179. *Id.* at 14.
180. *Id.* at 16.
181. *Id.* at 17.
182. *Id.* at 18.
183. Brady v. Klentzman, 515 S.W.3d 878, 882 (Tex. 2017).
184. *Id.*
185. *Id.* at 885.
186. *Id.* at 884.
187. *Id.* at 885.

about a private individual, if the speech is about a matter of public concern, the First Amendment requires that the private individual must prove actual malice.[188] Actual malice requires a showing of "knowledge of falsity or reckless disregard for the truth."[189]

If the UVA Exposed and UF Survivor accounts were sued for defamation, it is possible that the plaintiffs may be required to prove actual malice as the topic of sexual assault on college campuses may rise to the level of public concern.[190] Sexual assault and a school's handling of cases is "a subject of general interest and of value and concern to the public,"[191] as students, prospective students, parents, and community members have an interest in knowing the prevalence of crime at their schools.

Additionally, there is some precedent to support holding that the topic of the Twitter accounts—sexual assault on college campuses—is a matter of public concern. In *Elliott*, the court held that the topic of the List was a matter of public concern, as it was "centered on issues of sexual assault, sexual harassment, and consent in the workplace."[192] The court explained that it defined the controversy broadly, beyond the specific statements in the List, to fit with the public conversation of the #MeToo movement as "[t]he List was part of broader discussions regarding sexual assault, sexual harassment, and consent in workplaces across the country."[193] However, the court did not require the plaintiff to prove actual malice, as the "[p]laintiff's degree of involvement in a controversy surrounding sexual assault, sexual harassment and consent in the workplace, if any, is *de minimis*."[194]

*Elliott* seems to signal that even if sexual assault on college campuses is a matter of public concern, individuals identified in UVA Exposed and UF Survivors' tweets will not need to show actual malice, given that their involvement in the public controversy would likely be *de minimis*.[195] However, it seems likely that if the universities or university officials filed suit against the accounts' owners, they would need to show actual malice as they would be sufficiently involved in the controversy to warrant the higher burden.[196] Given

188. *See id.* at 881 (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986)).
189. *Brady*, 515 S.W.3d at 883.
190. *See id.* at 884.
191. *See id.*
192. Elliott v. Donegan, 469 F. Supp. 3d 40, 52 (E.D.N.Y. 2020).
193. *Id.* at 53.
194. *Id.* at 54.
195. *See id.*
196. *See id.* at 53.

this, relying on the subject matter of the accounts seems to be a risky defense for the UVA Exposed and UF Survivor accounts if sued for defamation.

Despite this risk, the public concern defense should be raised in these defamation suits. As this Note has explained, sexual assault is very prevalent on college campuses, yet students rarely report it to their college administrations. It is clear that the tweets these accounts post are "of general interest and of value and concern to the public."[197] Until sexual assault is taken more seriously, it is imperative that these accounts, working to raise awareness and highlight their schools' failure to help student survivors, are protected against liability for sharing students' stories.

## CONCLUSION

As more students use anonymous Twitter accounts to share their stories of sexual assault, it is likely that the conversation surrounding the accounts will remain focused on defamation liability.[198] This focus on defamation liability detracts from the important conversation these accounts are trying to have about college rape culture and the way administrators have failed to adequately address the prevalence of sexual assault on their campuses.[199] The focus on holding student survivors liable for speaking out ignores the actual issues.

Without protection against liability, these accounts likely will continue to disappear after they receive threats of a lawsuit. Those whose lives have been unaffected by sexual violence will go on to forget about how widespread sexual assault on campus is until another, more disturbing story of sexual assault or a more egregious mishandling of a Title IX case resurfaces months later. Then, more survivors will come forward to confirm how common it is for college students to be sexually assaulted. Once again, the conversation will shift from sexual assault to defamation liability against those survivors. Without protections, this cycle will continue.

Section 230 of the Communications Decency Act can be applied to accounts anonymously posting allegations sent to them.[200] The analysis in Part III of this Note explains that § 230 immunity can

197. Brady v. Klentzman, 515 S.W.3d 878, 884 (Tex. 2017).

198. Hernandez, *supra* note 5; Entzminger *supra* note 4; *see, e.g.*, Kevin Martingayle (@KMartingayle), TWITTER (June 16, 2020, 9:30 PM), https://twitter.com/KMartingayle/status/1273065543294205953 [https://perma.cc/5Q4V-KKAD].

199. *See* Xue, *supra* note 7.

200. *See Elliott*, 469 F. Supp. 3d at 55.

apply to these accounts—they do not seem to "materially contribut[e] to [the] alleged unlawfulness" of the underlying allegations,"[201] rather, they act like a message board for survivors to share their stories.[202]

Even if § 230 immunity does not apply to these types of Twitter accounts, the courts can determine that the issues the accounts discuss—rape culture on college campuses and administrators' inaction—are issues of public concern. One in five women will be sexually assaulted during her lifetime[203]—an issue that affects twenty percent of the population is surely "of general interest and of value and concern to the public."[204] If courts are willing to find that issues affecting only one locality are a matter of public concern,[205] then surely, they can find that this national problem is a public concern.

Until sexual assault allegations made online are protected against defamation liability in some capacity, the defamation issue will remain the focus. Without protections against liability, the conversations we need to have about sexual assault and reform cannot be had properly.

If we fail to have these important conversations, more and more women will continue to face sexual violence. If we do not address the rape culture that is so rampant on college campuses, more and more college students will continue to face sexual violence. If we do not hold college administrators accountable for their inadequate response to sexual assault on their campuses, perpetrators will continue to sexually assault other students free from fear of discipline. The sexual violence will continue if we allow those willing to speak out to become silenced.

ELIZABETH PROFACI*

201. *Id.* at 60.

202. *See* Hsia, *supra* note 114, at 417–18.

203. *Sexual Violence is Preventable*, CTR. DISEASE CONTROL & PREVENT. (Dec. 16, 2020), https://www.cdc.gov/injury/features/sexual-violence/index.html [https://perma.cc/8UT6-MHSS].

204. Brady v. Klentzman, 515 S.W.3d 878, 884 (Tex. 2017).

205. *See id.* at 884.

* Elizabeth is a 2022 JD Candidate at William & Mary Law School and has a BA in History and Government from the University of Virginia. This Note is dedicated to student survivors of sexual assault—those who have shared their stories and those who have not. The Author thanks her parents, Mary and Chris, for their endless support and guidance. The Author also thanks Cassie Ardern, Eric Bremer, and Brent Reutter, without whom this Note would not have been possible.