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Fighting back: Is defamation law a double-edged sword for #MeToo victims?

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Abstract

During the past half-century, countless women have been victims of sexual harassment, groping, and rape. When the #MeToo Movement gained momentum in October 2017, women who had victimized began to speak out. If women who were victims of sexual predators had not originally reported being raped but came for-ward as part of the #MeToo movement two or three decades later and the perpetrators denied it (in essence, accusing the victims of lying), their only legal recourse has been to sue the sexual predators for defamation. The law of defamation is a double-edged sword, however, because if victims use social media platforms to "name and shame" the men who raped them, the perpetrators have also sued their alleged victims for libel. This discussion examines the effectiveness of turning to defamation law as a means of redressing grievances in #MeToo cases, and also applies critical legal theory to these cases. In other words, if there is pervasive structural inequity in the legal system, meaning that perpetrators are often wealthy and powerful men who can easily afford attorneys' fees, can victims still prevail in court, or can wealthy and powerful perpetrators buy their victims' silence with non-disclosure agreements?

Keywords

#MeToo movement; defamation law; non- disclosure agreements; sexual harassment

Introduction

Ernest Boyer[1] suggests that there are four means by which research can contribute to our field of knowledge: (1) discovery, (2) integration, (3) application, and (4) pedagogy. This discussion will focus on (2) integration and (4) pedagogy: specifically, we will integrate critical legal theory with the #MeToo movement. We will integrate case law involving non-disclosure agreements (NDAs) and defamation suits by victims who have traditionally had far less power than the perpetrators who sexually harassed, groped, or raped them. We will also integrate case law involving alleged perpetrators who have sued their victims for defamation when the victims attempted to "name and shame" them.

With regard to pedagogy, the purpose of this discussion is to provide students who are learning about #MeToo lawsuits and the First Amendment with a kind of "one-stop shop" to learn about how defamation law functions as the proverbial double-edged sword. In other words, victims can sue for defamation when perpetrators call them liars, and perpetrators can sue for defamation when victims have not attempted to file

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formal charges for sexual harassment, groping, or rape. In this "one-stop shop," the cases covered in greater depth are those in which a new state law (Ashley Judd's suit against Harvey Weinstein) or an unexpected twist from the U.S. Department of Justice (E. Jean Carroll's suit against Donald Trump) may possibly affect the outcome of the litigation.

We will consider these defamation cases using the lens of critical legal theory, which holds that the existing legal order is "radically unjust" and "contributes to the legitimization of an oppressive social order."[2] In other words, critical legal theorists would hold that our legal system supports a power dynamic that favors those who are privileged and powerful over those who are underprivileged. We have known for decades that women have hesitated to report sexual harassment for the fear of losing their jobs; women have also hesitated to report rape because of the social stigma and our society's tendency to blame the victim. The perpetrators in these cases are wealthy and powerful; with the exception of Taylor Swift, the victims in these cases had far less power than the perpetrators.

Critical legal theory addresses power inequities and structural inequality; it would predict that our legal system would favor the perpetrators. Indeed, many of the victims in these cases never reported being raped because they feared that the legal system was weighted in favor of the rapists such as Bill Cosby and Harvey Weinstein.

Legal scholar Shaina Weisbrot explains that our

> criminal legal system is a daunting avenue to pursue, since reporting abuse often involves a rigorous process with a low rate of success. 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.[3]

The statute of limitations for reporting rape varies according to state law; 16 states have no statute of limitations on reporting rape, but the other 34 states have statutes of limitations ranging from three to 30 years.[4] Some states have extended their statutes of limitations in response to the #MeToo movement. For example, California had a six-year statute of limitations on this crime until 2017, when the state legislature changed it to no time limit.[5]

Background of the #MeToo movement

In 2006, social activist Tarana Burke coined the term "Me Too" to help women who had been victims of sexual harassment, groping or rape to "break the silence" and come forward with their stories in order to let other victims know that they were not alone. The term "Me Too" did not come into widespread use, however, until *New York Times* journalists Jodi Kantor and Megan Twohey,[6] and *New Yorker* journalist Ronan Farrow published articles about film executive Harvey Weinstein's "casting couch" in October 2017.[7] Soon afterwards, actress Alyssa Milano sent out a Tweet asking those who had experienced sexual violence to reply to her with the words MeToo. "Within 20 minutes, she received 10,000 replies on Twitter, and within the first 24 hours the viral #MeToo hashtag appeared on Facebook 12 million times."[8] Thus, the #MeToo movement "went viral" on social media.

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Precursors to the #MeToo movement

Even before Ronan Farrow's October 2017 news story about Harvey Weinstein sparked the #MeToo movement, a number of women reported that they had been victims of sexual harassment, sex trafficking or rape by wealthy and powerful men. For example, in 2014, several women came forward to accuse Bill Cosby; eventually, 60 different women reported that Bill Cosby had drugged and raped them. In 2015 Virginia Giuffre reported that Jeffrey Epstein had forced her to have sex with him and other men when she was 17 years old. In July 2016 Gretchen Carlson filed suit against Roger Ailes for sexual harassment, and in September or October 2016, 19 women accused Donald Trump of groping them. A few of these "harbingers" of the #MeToo movement are discussed below.

Virginia Giuffre v. Ghislaine Maxwell

In 2015 Virginia Giuffre named Ghislaine Maxwell as the sex trafficker who recruited Giuffre to have sex with Jeffrey Epstein (and allegedly with the United Kingdom's Prince Andrew) when she was 17 years old. Maxwell dismissed Giuffre's accusation as "obvious lies," at which point Giuffre filed suit against Maxwell for defamation. After a federal district court judge held that the case could proceed to trial in 2016,[9] Maxwell reached an out-of-court settlement in which she paid Giuffre an undisclosed sum. (Maxwell is currently in prison awaiting a November 2021 trial on sex trafficking charges.)

Gretchen Carlson v. Roger Ailes

In July 2016 Gretchen Carlson sued the late Fox News Director Roger Ailes for sexual harassment, claiming that after she refused to have sex with him, he had sabotaged her career. After Fox News did not renew her contract, Carlson charged Ailes with violating New York City's Human Rights Law.[10] Carlson had secretly recorded Roger Ailes when he told her that Fox News would have been more likely to promote her if she had entered into a sexual relationship with him. He said: "I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better."[11] In her complaint, Carlson charged that Ailes retaliated against her after she rebuffed his advances, creating a hostile work environment and sabotaging her career.

Soon afterwards, nine other women at Fox News came forward and echoed Carlson's allegations, despite Ailes' vehement denials. Ailes commented: "This defamatory lawsuit is not only offensive, it is wholly without merit and will be defended vigorously."[12] Two weeks after Carlson made her accusations public, however, Roger Ailes stepped down from Fox News with an exit package worth more than $40 million. Two months after Carlson filed her complaint, Fox News paid her $20 million in September 2016. Carlson's suit against Ailes became moot after Ailes died from complications after a fall in May 2017. Thus, although Ailes had referred to Carlson's suit as "defamatory," he did not actually sue her for defamation.

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Hollywood's response to the #MeToo movement

In response to the #MeToo movement, the California legislature amended its Civil Code 51.9 (on sexual harassment) to include Hollywood movie directors and producers. This amendment led the U.S. Court of Appeals for the Ninth Circuit's decision to reinstate Ashley Judd's sexual harassment claim against Harvey Weinstein, discussed below.

Ashley Judd v. Harvey Weinstein

Following Ronan Farrow's October 2017 news story in *The New Yorker* about how Miramax movie producer Harvey Weinstein had sexually harassed and sometimes raped more than 80 aspiring actresses who were hoping for roles in Miramax films,[13] one of the first women to come forward was actress Ashley Judd. Judd told Farrow that in 1996 when she was 20 years old, Weinstein had invited her to a breakfast meeting at the Peninsula Beverly Hills Hotel. He had her sent up to his hotel room, where he wore a bathrobe and asked her to give him a massage. Judd resisted his advances and managed to escape from the hotel room, but she was visibly shaken when her father met her in the hotel lobby right after she had escaped from Weinstein. She immediately told her father and later her mother Naomi Judd about Weinstein's aggressive behavior.

It was not until December 2017 that Judd learned from Peter Jackson that he had originally wanted to cast Judd and actress Mira Sorvino in major roles in his *Lord of the Rings* trilogy, but Weinstein had warned him off. In an interview with the entertainment web site *Stuff* in New Zealand, Jackson said:

> I recall Miramax telling us that [Judd and Sorvino] were a nightmare to work with and we should avoid them at all costs. This was probably in 1998. At the time, we had no reason to question what these guys were telling us – but in hindsight, I realize that this was very likely the Miramax smear campaign in full swing. I now suspect we were fed false information about both [Judd and Sorvino] – and as a direct result, their names were removed from our casting list.[14]

Ashley Judd had never known why Peter Jackson did not cast her in *The Lord of the Rings* until she saw his comments in December 2017, but when she realized that Weinstein had tried to blacklist her, she filed suit against Weinstein for defamation, sexual harassment, and violating California's unfair competition law.[15] Judd is facing an uphill battle because actors are in a sense "independent contractors" rather than "employees." As one observer explained, "It's hard enough for workers to fight back against harassment in conventional workplace settings. But for independent contractors harassed by people who don't have an official working relationship with them, the process is even more difficult."[16]

Weinstein's attorneys filed a motion to dismiss Judd's claim, arguing that she could not sue him for defamation because the statute of limitations in California requires that plaintiffs must file their suits within one year after the defamation occurs, whereas Judd was filing her complaint 20 years after the defamation had occurred.[17] His attorneys further argued that Judd's claims of sexual harassment and unfair competition "wholly lack merit."[18] In 2018, federal district court Judge Philip Gutierrez dismissed Judd's sexual harassment claim under the California Civil Code 51.9 (this statute codifies

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a woman's right to work free of unwanted sexual advances), explaining that the statute covers only employees but not job applicants, as Judd had been. Judge Gutierrez allowed Judd's defamation claim to proceed, however.

Judd appealed to the U.S. Court of Appeals for the Ninth Circuit, asking the court to re-instate her claim of sexual harassment on the grounds that on January 1, 2019 the California legislature had amended Civil Code 51.9 to include the words "director or producer" as a result of the #MeToo movement. In other words, the amended statute was directed at Hollywood's "casting couch." The Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA) filed amicus briefs on Judd's behalf, arguing that "relationships with one or more of [Hollywood's] gatekeepers often is critical for an actor to access the opportunities to compete for the most coveted roles."[19] The Ninth Circuit heard oral arguments on Judd's appeal in May 2020. In July 2020 the Ninth Circuit reversed, finding that the federal district court had erred in dismissing Judd's sexual harassment claim under the California Civil Code 51.9. The appellate court judges concluded that Section 51.9 did indeed cover "an inherent power imbalance wherein Weinstein was uniquely situated to exercise coercion or leverage over Judd by virtue of his professional position and influence as a top producer in Hollywood."[20] Since the Ninth Circuit re-instated Judd's sexual harassment claim and upheld her claim for defamation, the case is pending. The Weinstein Company filed for bankruptcy in 2018. In January 2021 a bankruptcy court ruling set aside $17 million to be divided among 40 of Weinstein's 80 victims who had voted to accept the terms of an out-of-court settlement, but Judd's defamation suit against Weinstein is not part of this settlement.[21]

Critical legal theorists may find encouragement in the fact that the California legislature has at least attempted to acknowledge the existence of Hollywood's "casting couch" and the structural inequality of aspiring actors having the legal status of independent contractors, which had made it impossible to file suit against an "employer" when the actors have not yet been employed.

Silencing victims who had signed non-disclosure agreements

Viewing #MeToo cases through the lens of critical legal theory, we can see that one of the most glaring ways in which our legal system favors those with wealth and power is to allow perpetrators to "pay victims off," provided that they sign non-disclosure agreements (NDAs). One problem that Ronan Farrow encountered in interviewing Harvey Weinstein's victims was that some of them had sign non-disclosure agreements (NDAs), meaning that they could not speak about Weinstein's assaults for fear of violating a contract they had signed guaranteeing their silence.

A woman who signs a non-disclosure agreement in effect waives her First Amendment rights because courts tend to rule that contract law takes precedence over one's freedom of speech if one willingly enters into the contract by signing it. In cases involving ex-CIA agents, the U.S. Supreme Court has upheld contract law with almost no mention of the agent's First Amendment rights; the precedent set in these cases would apply when victims sign NDAs in sexual harassment cases as well.[22]

In addition to Harvey Weinstein, Bill O'Reilly, Bill Cosby and the late Jeffrey Epstein[23] all succeeded in getting their victims to sign non-disclosure agreements. Critical legal theory would hold that contract law favors rich and powerful men who can silence their

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victims by paying them "hush money." For example, in 2010, international soccer star Cristiano Ronaldo paid $375,000 to model Kathryn Mayorga after she accused him of raping her in a Las Vegas hotel room; she had signed an NDA that required arbitration, but has since claimed that she was "emotionally fragile" when she signed the NDA, and is now suing Ronaldo for £56 million in damages.[24] Contract law also favors rich and powerful perpetrators because the women who sign NDAs cannot warn future victims of the perpetrators' behavior.

Victims of Bill O'Reilly who signed non-disclosure agreements

Bill O'Reilly hosted *The O'Reilly Factor* on the Fox News Channel from 1997 to 2017. During his 20-year reign, several women accused O'Reilly of sexual harassment or worse. For example, in 2002 Bill O'Reilly stormed into the newsroom and screamed at Rachel Bernstein in front of her co-workers. She left Fox News shortly thereafter following a settlement for an undisclosed sum after she signed a non-disclosure agreement (NDA).

In 2004 O'Reilly began telephoning news producer Andrea Mackris during the night, asking her for phone sex and describing his fantasies about having sex with her in the shower. Mackris left Fox News, but when O'Reilly learned that she intended to sue him for sexual harassment, he and Fox News filed a pre-emptive suit against Mackris in which they accused her of trying to extort $60 million from them (O'Reilly soon dropped this lawsuit). O'Reilly also threatened Mackris, saying he would make any woman who complained about his behavior "pay so dearly that she'll wish she'd never been born."[25] Fox News hired private investigator Bo Dietl to dig up personal information on Mackris with the goal of portraying her as a promiscuous woman who was trying to extort money from O'Reilly. After Mackris sued O'Reilly for sexual harassment, however, he paid her about $9 million with the stipulation that Mackris had to sign a non-disclosure agreement (NDA) and relinquish her recordings of his midnight calls asking for phone sex. In addition to relinquishing the recordings, the non-disclosure agreement required Mackris to lie, even in legal proceedings or under oath; if any of the evidence became public, Mackris was supposed to say that it was "counterfeit" or consisted of "forgeries."[26]

Mackris had retained attorney Benedict Morelli, but while Morelli was negotiating the settlement for Mackris, he changed sides and agreed to become O'Reilly's attorney.[27] Mackris never worked in television news again; she suffered from post-traumatic stress disorder (PTSD) following her dispute with O'Reilly and spent years seeing a therapist.[28]

Like Andrea Mackris, Rebecca Gomez Diamond signed an NDA after recording harassing phone calls from O'Reilly. Juliet Huddy received a $1.6 million settlement, and Laurie Dhue received $1 million but Huddy and Dhue did not sign non-disclosure agreements.

In January 2017 Lis Wiehl, a Fox Network News analyst, charged O'Reilly with forcing her into a non-consensual sexual relationship. After O'Reilly paid her $32 million from his own pocket in a settlement, Wiehl signed a sworn affidavit "renouncing all allegations" against O'Reilly.[29] Wiehl also agreed to the destruction of all text messages, photos, and other communication between herself and O'Reilly. Juliet Huddy and Lis Wiehl thus received payments from Bill O'Reilly, but they have not sued him for defamation.

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After the *New York Times* published an article in April 2017 about how Fox News had paid millions of dollars to several women, O'Reilly accused the women of breaching their non-disclosure orders but also accused them of being "liars, extortionists and political hit-women." His verbal attacks on the women continued from April until October 2017. Rachel Bernstein sued O'Reilly for defamation, charging that O'Reilly's attacks had caused her such severe emotional distress that she could not sleep, needed anti-anxiety medication, and had sought counseling to treat depression, anxiety and insomnia.[30] A few months later, Mackris and Diamond joined Bernstein's lawsuit as co-plaintiffs.

In 2019 federal district court Judge Deborah Batts dismissed the case, however, explaining that when O'Reilly used the terms "extortionate" or "no good," these were colloquial phrases but did not specifically accuse Bernstein of any crimes and thus did not constitute defamation *per se*.[31] Bernstein, Mackris, and Diamond thus lost their defamation case against O'Reilly.

Like Bernstein, Mackris, and Diamond, Laurie Dhue also sued O'Reilly for defamation after he called Dhue and the other women liars and extortionists.[32] In October 2018, however, Judge Deborah Batts ruled that Dhue's lawsuit against O'Reilly would have to go to arbitration in order to determine whether or not Dhue could bring her case against O'Reilly to trial[33]; thus, Dhue's case is pending.

Critical legal theorists would point to the fact that our legal system provided Bill O'Reilly with several advantages over the women who accused him of sexual harassment: (1) his attorneys persuaded all of them except for Juliet Huddy and Laurie Dhue to sign non-disclosure agreements, and (2) because Fox News was paying him $25 million per year,[34] O'Reilly could afford to sue Andrea Mackris for extortion, in contrast with Mackris and his other victims, who would have had limited resources to retain attorneys.

Victim of Bill Cosby who signed a non-disclosure agreement

In January 2004, Temple University's women's basketball manager Andrea Constand went to Bill Cosby's home in suburban Philadelphia to ask his advice about her career. Cosby gave her "blue pills" that rendered her unconscious. She awoke seven hours later to find that Cosby had taken off her clothes and sexually assaulted her. Constand did not at first report Cosby's sexual assault, but a year later, in January 2005, she filed a police report in Durham, Ontario (she is a Canadian citizen). The police in Durham forwarded her complaint to the Philadelphia police, but Montgomery County District Attorney Bruce Castor described Constand's case as "weak," and declined to file any charges against Cosby. Cosby and his agents immediately contacted producers of the television program *Celebrity Justice*, accusing Constand of trying to extort money from Cosby with her accusations. Cosby also gave an interview to *The National Enquirer* in which he repeated the accusation that Constand was guilty of a "shake-down;" he emphasized the point that he was an easy target because he was a celebrity.

Hitting a wall in her attempt to press criminal charges against Cosby, Constand then filed a civil suit against him; she charged Cosby with assault and battery, intentional infliction of emotional distress, defamation and false light invasion of privacy.[35] In 2006, Cosby and Constand reached an out-of-court settlement in which he paid her $3.38 million, but Constand signed a non-disclosure agreement (NDA), so the amount

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of money was confidential, at least for the time being. After Constand reported that Cosby had raped her in 2004, prosecutors had 12 years in which to file charges against Cosby before the statute of limitations expired in Pennsylvania in 2016.

In 2015 Kevin Steele defeated Bruce Castor in an election and became Montgomery County's District Attorney. When Steele suggested that he would re-open Constand's criminal case against Bill Cosby, Castor argued that he had declined to file charges against Cosby because he questioned Constand's credibility. Constand sued Castor for defamation after he implied to the press that she was a liar.[36] Castor filed a counter-suit against Constand, accusing her of causing him to lose the election when Castor ran against Steele for District Attorney.[37] Constand's defamation suit was scheduled to go to trial in April 2019, but she and Castor reached an out-of-court settlement in February 2019; the terms of the settlement were not disclosed.[38] (In January 2021 Donald Trump hired Bruce Castor as part of his defense team for his impeachment trial in the U.S. Senate.)

In December 2015, just weeks before the 12-year statute of limitations would have expired on January 15, 2016,[39] Kevin Steele re-opened Constand's criminal case against Cosby and the case went to trial. An employee of the court reporting service Kaplan, Leaman & Wolfe may have inadvertently released a copy of the 2006 settlement agreement to the media, at which point the general public learned that Cosby had paid Constand $3.38 million in 2005. Cosby was infuriated, and immediately filed suit against Constand and *National Enquirer* owner American Media; he demanded that Constand return the $3.38 million. Cosby argued that by cooperating with the police in the new investigation, Constand had breached the NDA she had signed. Federal district court Judge Eduardo Robreno dismissed Cosby's lawsuit, however. Judge Robreno explained that if the nondisclosure agreement Constand had signed prevented her from sharing information about a crime with law enforcement, the NDA would be "unenforceable."[40]

Bill Cosby's first criminal trial ended with a hung jury in June 2017 and the judge declared a mistrial. In April 2018, however, a second jury found Bill Cosby guilty of aggravated indecent assault after he drugged and raped Constand; he served part of a three-year prison sentence.[41] Cosby was released from prison in July 2021, however, when the Pennsylvania Supreme Court overturned his conviction because former District Attorney Bruce Castor had issued a news release in 2005 stating that he would not charge Cosby for raping Constand. Even though there was no formal non-prosecution agreement, the state Supreme Court held that Castor's statement in the news release was binding; thus Cosby has walked free.[42]

Before Cosby was (temporarily) convicted of rape, however, he implied that all 60 of the women who accused him of drugging and raping them were lying,[43] and 14 of these women (including Constand) sued Cosby for defamation. For example, after spending $80,000 in legal fees, Kristina Ruehli withdrew her suit against Cosby.[44] Renita Hill filed a defamation suit against Cosby, but a Pennsylvania court dismissed her case.[45]

Like Kristina Ruehli and Renita Hill, Katherine McKee reported that Bill Cosby had forcibly raped her in 1974 when she was on tour with Sammy Davis Jr. (she was Davis' girlfriend). Cosby and his legal representatives portrayed her as a liar, and McKee sued Cosby for defamation. A federal district court in Massachusetts dismissed her suit, however, and the U.S. Court of Appeals for the First Circuit affirmed the lower court's decision, holding that McKee is a public figure. McKee appealed to the U.S. Supreme Court, arguing that "a victim of sexual assault who raises her voice and says `me, too'

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does not by that action alone surrender her rights under the First Amendment as a private figure." McKee asked the U.S. Supreme Court to revisit the Gertz distinction between public figures and private persons, but the High Court declined to hear her case.[46] Critical legal theorists might argue that by designating McKee a public figure despite the fact that her name is not a household word, the appellate court tipped the scales in Cosby's favor: a public figure must prove malice, whereas private figures merely have to prove negligence in order to prevail in a defamation suit.

Although Ruehli, Hill and McKee did not prevail in their defamation claims, this did not discourage Janice Dickinson,[47] Tamara Green, Barbara Bowman, Angela Leslie, Therese Serignese, Joan Tarshis, Linda Traitz, Louisa Moritz, Chloe Goins and Judy Huth, all of whom sued Cosby for defamation in later cases.

Louisa Moritz passed away in January 2019, but after Cosby was (temporarily) convicted of drugging and raping Andrea Constand, Cosby's insurance company the American International Group (AIG) reached an out-of-court settlement with Green, Bowman, Leslie, Serignese, Tarshis, Traitz, Goins and Huth in April 2019.[48] Cosby was furious, and his spokespersons tweeted that he had not agreed to AIG's settlement, posting hashtags such as:

#BillCosbyDeniedSettlement

#AIGSettlesWithoutBillCosbyConsent

#BillCosbyWillNotPayADime.[49]

As a matter of practice, however, insurance companies do not necessarily need a client's permission to settle a case.[50] Although an out-of-court settlement does not result in a published legal decision, meaning that no precedent is set, we can no doubt view these settlements as tacit victories for 10 of the 60 women that Cosby had drugged and raped.

In contrast, critical legal theorists could argue that the legal system favored Cosby over Andrea Constand in her attempt to charge Cosby with rape. Not only did former District Attorney Bruce Castor refuse to file criminal charges against Cosby, but his 2005 news release saying that he would *never* charge Cosby in the future was upheld as legally binding by the Pennsylvania Supreme Court, resulting in Cosby's "get-out-of-jail-free" decision in July 2021. It is a disturbing example of our legal system favoring a rich and powerful perpetrator over the only victim who attempted to speak out.

Pending cases against former president Donald Trump

Two women, Summer Zervos and E. Jean Carroll have pending defamation suits against former President Donald Trump. The Department of Justice under President Joe Biden has filed a brief in Trump's defense, as is discussed below.

Summer Zervos v. Donald Trump

In October 2016, an *Access Hollywood* video surfaced in which Billy Bush listened as Donald Trump boasted in vulgar and graphic terms about kissing, groping and trying to have sex with women; the conversation was caught on a hot microphone. Viewers could

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hear Trump say: "I just start kissing them . . . .Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. Grab them by the p – y. You can do anything."[51] Within days after the video aired on national television, 19 women had accused Donald Trump of groping them.

One of them was Summer Zervos, the owner of a family diner in Huntington Beach, California. Zervos said that when she had appeared on *The Apprentice* in 2007, Trump had ambushed her and "without her consent, kissed her on her mouth repeatedly, touched her breast and pressed his genitals up against her."[52] After Zervos came forward in October 2016, Trump categorically denied her account. During the 2016 campaign, Trump posted a statement on his web site refuting Zervos' charges: "To be clear, I never met [Zervos] at a hotel, or greeted her inappropriately."[53] Trump referred to Zervos' account as "100% fabricated and made-up charges," "totally false," "totally phony stories," "made-up stories and lies," and totally made-up nonsense." Trump said: "Every woman lied when they came forward to hurt my campaign – total fabrication. The events never happened."[54]

After Trump called her a liar, Zervos filed a lawsuit against Trump for defamation. In her complaint, she stated that Trump's lies had subjected her to "threats of violence, economic harm and reputational damage."[55] Zervos explained that after Trump called her a liar, her restaurant lost customers, and she "suffered at least $2,914 in such financial losses."[56]

Trump's attorney Marc Kasowitz filed a motion to dismiss Zervos' complaint, arguing that as a sitting President, Trump should have immunity, but a judge in New York ruled in 2018 that the case could proceed. Trump appealed, and in January 2020, an appellate court in New York froze the proceedings for as long as Trump was still President.[57] In March 2021 the State Court of Appeals (the highest court in New York) held that since Trump was no longer President, Zervos' case could proceed; thus, it is pending.[58]

E. Jean Carroll v. Donald Trump

In June 2019 *Elle* magazine columnist E. Jean Carroll published a book in which she wrote that in 1995 or 1996 at Bergdorf Goodman in Manhattan, Donald Trump threw her up against the wall of a dressing room which caused her to hit her head on the wall, and raped her. When her account became public, Trump denied Carroll's allegations, saying that he had never met her. Carroll then provided reporters with a photo of herself and Trump at a party in 1987. On June 22, 2019, Trump not only called Carroll a liar; he added that she had made false accusations of rape against other men in addition to him.[59]

Because Trump had called her a liar, Carroll filed suit against him for defamation in November 2019. Although Trump's attorneys argued that the New York courts had no jurisdiction because Trump did not live in New York, State Supreme Court Justice Doris Ling-Cohan declined to dismiss the case. In January 2020 Carroll's attorneys requested a DNA sample from Trump. Carroll had been wearing a black coat-dress when Trump raped her; she had kept it but had not worn it, except for a photo-shoot when *New York Magazine* published a story with her account of Trump's assault.

Trump's attorneys again argued that as a sitting President, he was immune from any lawsuits while in office. In July 2020 however, the U.S. Supreme Court handed down its decision in *Trump v. Vance*, in which the High Court held that New York County District

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Attorney Cyrus Vance's attempt to subpoena Trump's tax records could proceed; in other words, a sitting President does not have absolute immunity from a state criminal investigation.[60] Relying on this decision, New York State Supreme Court Justice Verna Saunders held that likewise, Trump should not have immunity from civil suits; thus, in August 2020, she held that Carroll's suit could proceed. She acknowledged Summer Zervos' defamation suit, explaining that the *Vance* case addressed the same question: " . . . whether the Supremacy Clause of the Constitution bars a state court from exercising jurisdiction over a sitting President of the United States during his term. No, it does not."[61]

In September 2020, in response to Trump's request, then-Attorney General William Barr intervened on Trump's behalf, and the Department of Justice removed *Carroll v. Trump* to a federal district court and filed a motion to substitute the United States (in place of Trump) as the defendant. Barr attempted to shield Trump from liability, citing the Federal Tort Claims Act, a law designed to protect federal employees against litigation stemming from the performance of their duties. Barr claimed that Trump was immune from suit because he denied Carroll's accusation while in his official role as President. Barr added that Trump's denial of Carroll's rape accusation was an official act because Trump was addressing "matters relating to his fitness for office." Referring to Carroll's lawsuit as a "little tempest," Barr further explained that it was routine to substitute the government as the defendant in lawsuits against federal officials. Barr's statement stretches the truth: the Department of Justice has used the Federal Tort Claims Act to shield members of Congress from defamation claims, but the Justice Department "has rarely, if ever, used it to grant immunity to a President."[62] Carroll's attorneys objected, noting that Barr's "highly irregular maneuver prompted widespread condemnation from public officials and legal experts – in part because it forced the American people to pay for Trump's legal defense in a suit about his private sexual misconduct."[63]

Carroll's attorneys Roberta Kaplan and Joshua Matz immediately asked a judge to bar Barr from intervening, arguing that "Only in a world gone mad could it somehow be presidential, not personal, for Trump to slander a woman whom he had sexually assaulted."[64]

Carroll herself objected to Barr's intervention on Trump's behalf, commenting: "When I spoke out about what Donald Trump did to me in a department store dressing room, I was speaking out against an individual. When Donald Trump called me a liar and denied that he had ever met me, he was not speaking on behalf of the United States."[65] Kaplan and Matz also argued that New York State law, not federal law, should apply in Carroll's defamation suit.

In October 2020, federal district court judge Lewis Kaplan ruled against Barr's attempt to have the Department of Justice step in and defend Trump. Judge Kaplan held instead that Carroll could sue Trump personally for defamation. In June 2021, however, the Department of Justice under President Joe Biden filed a brief in Donald Trump's defense, arguing that his statement denying that he had raped Carroll was made as part of his official duties as President. If a court accepts this argument, then Carroll's case could be dismissed,[66] but at present it is still pending.

Critical legal theorists could argue that the legal system is heavily weighted in favor of the wealthy and powerful former President. Despite the fact that E. Jean Carroll has accused him of rape, it may be that Trump can rely on the U.S. Department of Justice to

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defend him because he denied raping Carroll while he was a sitting President (in contrast to his denial of groping Summer Zervos while he was still a candidate). If the U.S. Department Justice steps into the role of defending former Presidents, this gives them a huge advantage over any private citizen attempting to sue them.

Perpetrators as plaintiffs in defamation suits

In the cases discussed above, some of the perpetrators such as Bill O'Reilly and Bill Cosby not only insisted that their most of their victims sign NDAs in order to receive financial settlements, but they also filed counter-suits when their victims sued them for defamation. Critical legal theorists would argue that one of the most glaring ways in which our legal system favors rich and powerful perpetrators is that they can afford attorneys' fees, either to defend themselves or to counter-attack, whereas their victims, with lower salaries and without celebrity status, are less likely to be able to afford attorneys' fees. Another legal tactic that perpetrators have used, if not to require NDAs, is to sue their victims for defamation in "pre-emptive strikes."

Alleged perpetrators' defamation suits settled out of court

In some cases when perpetrators have sued their victims for defamation, both parties have reached an out-of-court settlement. For example, when actress Melanie Kohler posted on Facebook the statement that Hollywood movie director Brett Ratner had raped her, he sued her for defamation, although he later reached an out-of-court settlement with Kohler in which no money changed hands.[67] In a similar case, in October 2017, marketing strategist Chelsea Tadros posted on Twitter that hip-hop music producer William Bensussen, whose stage name is "the Gaslamp Killer," had drugged and raped her at a party at the Standard Hotel in Los Angeles in 2013. Bensussen filed a $5 million defamation suit against Tadros,[68] but they later reached an out-of-court settlement in which no money changed hands.[69]

In a high-profile case, Cornell Haynes, whose stage name is Nelly, sued Monique Greene for defamation after she accused him of raping her on his tour bus.[70] She reported it, but after prosecutors decided not to charge Haynes with rape, Haynes filed a defamation suit against Greene in 2018. The case was ultimately dismissed; a lawyer for Haynes reported that no money had changed hands, whereas Greene's lawyer Karen Koehler hinted that Greene might have signed a non-disclosure agreement (NDA) and could not discuss the case.[71]

Alleged perpetrators' defamation suits still pending

In contrast to Brett Ratner, William Bensussen and Nelly, who reached out-of-court settlements, there are several cases that are not yet resolved. For example, pop singer Kesha Sebert, known as "Kesha," accused her former manager Lukasz Gottwald, known as "Dr. Luke," of drugging and raping her. Gottwald sued Kesha for defamation; her lawyers have raised an anti-SLAPP defense[72] on the grounds that violence against women is a matter of public concern.[73] The case is expected to go to trial in October 2021.

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Another case in which a perpetrator sued his victim is that of *Matthew Landan v. Westley Moore*. In 2013 in Louisville, Kentucky, a woman who identified herself as Westley Moore (not her real name) met Haymarket Whiskey Bar owner Matthew Landan on FetLife, a social networking site. Landan tied her up and raped her in his apartment, but because she was terrified that Landan could blackball her from her job in the food and beverage industry, she decided not to report the rape to the police. In 2017 she posted a photo of Landan on Facebook with the caption, "Matthew Landan is a rapist." Shortly afterwards, several other women contacted her and said that Landan had raped them as well.[74] Landan denied the allegations and in November 2017, he filed a defamation suit against Westley Moore and another woman [Jane Doe] who said that Landan had drugged her drink. Landan's attorney issued a subpoena in which he requested information about any mental health treatment that Moore had sought.[75] In November 2018, Westley Moore filed a counter-suit in which she argued that Landan was harassing her in an in an attempt to intimidate and silence her. Currently, both cases are pending.

Another high-profile case in Alabama began when Roy Moore was running against Doug Jones for the U.S. Senate in November 2017. Leigh Corfman and eight other women accused Moore of sexual misconduct; in Corfman's case it had occurred when Moore was an assistant district attorney and Corfman was 14 years old.[76] Moore issued a written statement accusing Corfman and the other eight women of lying.[77] After losing to Doug Jones, Moore and his Campaign Committee instigated an army of trolls to attack Corfman, accusing her of being a Satanist, leftist whore.[78] Corfman sued Moore for defamation.[79] Three months later, Moore filed a counter-claim in which he sued Corfman for defamation; he denied all accusations of sexual misconduct and argued that Corfman's suit was frivolous. In his counter-claim, Moore described Corfman "as a deeply troubled child whose behavior was so intolerable and uncontrollable that her mother felt it necessary to transfer custody of her to her father when she was 14."[80] A trial date has been set for November 1, 2021.

More recently, when lobbyist Pamela Lopez accused former California Assemblyman Matthew Dababneh of sexual misconduct in 2017, he sued her for defamation; the case is currently pending.[81]

The cases involving Brett Ratner, Nelly, Dr. Luke, Matthew Landan, Roy Moore and Matthew Dababneh, in which alleged perpetrators sued their victims for defamation, demonstrate the risks that victims take when attempting to "name and shame" the rapists. Critical legal theorists would argue that perpetrators with wealth and power can launch a "pre-emptive strike" in which they sue for defamation, whereas the victims may seldom have the financial resources to defend themselves.

Alleged perpetrators who were undergraduates

The Rape, Abuse and Incest National Network (RAINN) reports that 26.4% (one in four) of undergraduate women are rape victims during their four years on campus.[82] In the high-profile and low-profile cases discussed here, the alleged rapists sued their victims for defamation after the victims reported being raped.

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Jameis Winston v. Erica Kinsman

Florida State University (FSU) freshman Erica Kinsman went to the Tallahassee Police Department in January 2013 to report that football star Jameis Winston had raped her a few weeks before, on December 7, 2012. Despite the fact that a witness had videotaped Winston raping Kinsman, the police made no effort to locate the video, and two months later when a detective wrote his first report, the video had disappeared.[83] Winston argued that the sex was consensual. A *New York Times* investigation "found that the police and the university did little to determine what had happened," but when Kinsman filed a Title IX lawsuit against Florida State, charging that FSU officials had shown "indifference to a student's report of a sexual assault," the university, without acknowledging liability, paid her $950,000 to settle the case.[84] When Kinsman filed a civil suit against Winston for sexual battery, Winston filed a counter-claim against her for defamation and demanded a jury trial.[85] Before the case went to trial, however, Winston and Kinsman reached an out-of-court settlement, the terms of which were confidential.

Lang Her v. Yee Xiong

In another case involving undergraduates, Yee Xiong immediately reported that her classmate Lang Her had raped her at the University of California at Davis. The case resulted in two hung juries; before a third trial, Lang Her pled guilty to "assault by means of force likely to produce great bodily injury" (but not to rape). A judge sentenced him to one year in the Yolo County Jail; the judge also ordered him to register as a sex offender.

Xiong's sister Ger Xiong had posted photos of Lang Her on Facebook with the message "Rapists destroy lives. Rapists hurt all of us, not just their victims … We will not be silenced. We will fight for justice against Lang Her, who is a rapist."[86] After her sister Ger posted this message, Yee Xiong shared it. In response to the posts on Facebook, Her filed a defamation suit against Yee Xiong, demanding $4 million in damages because the two hung juries had not convicted him, and he had not technically pled guilty to rape. Commenting on Her's defamation suit, legal scholar Leah Slyder has observed that this tactic of suing a rape victim for defamation

> … has been used both as a harassment technique to coerce the victim into withdrawing the criminal charges and as a method to obtain admissible evidence about the survivor's sexual history. Under civil discovery rules, the rape complainant becomes the defendant in the civil case and is subject to depositions, interrogatories, and other discovery. The criminal defendant can engage in discovery to obtain the types of information on the rape survivor's prior sexual history that is not admissible under the rape shield statute. A defendant may do this as an attempt to obtain information against her so that he can try to convince the judge that its probative value outweighs its prejudicial effect so that the evidence can be brought into the criminal trial to discredit her.[87]

After Her sued her for defamation, Xiong turned to the law firm Orrick, Herrington & Sutcliffe whose attorneys represented her pro bono; they won a judgment from the Yuba County Superior Court dismissing Her's defamation suit.

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Following dismissal of the defamation suit, Orrick, Herrington & Sutcliffe continued to represent Xiong in her civil suit against Her.[88] In her suit, Xiong asked for damages to cover her medical expenses from injury that resulted when Her raped her. The case went to trial, and the jury awarded Xiong the entire $152,400 that she had asked for.[89]

More recently, "Jane Doe" reported that Tulane University football player Leonard Davis had raped her. After an investigation, Tulane administrators expelled Davis, at which point he sued "Jane Doe" for defamation.[90] The case is pending.

Alleged perpetrators who lost in court

Like Yee Xiong, singers Margaret Osborn and Taylor Swift were sued for defamation and won, suggesting that judges and juries do not always side with alleged perpetrators who sue their victims.

Alice Glass v. Ethan Kath

Canadian singer Margaret Osborn, whose stage name is Alice Glass, was the lead singer for the electronic music band Crystal Castles. In October 2017 she posted a statement on her web site accusing Crystal Castles' co-founder Claudio Palmieri, whose stage name is Ethan Kath, of sexual and physical assault that had begun when she was 15 years old and lasted for nine years. Palmieri filed suit against Osborn for defamation,[91] but a judge dismissed his suit and awarded Osborn nearly $21,000 in attorneys' fees.[92]

David Mueller v. Taylor Swift

On June 2, 2013, on-air KYGO radio host David Mueller attended a backstage "meet-and -greet" gathering before Taylor Swift's concert in Denver, Colorado that evening. Taylor Swift asked Mueller if he and his girlfriend would like to pose with her for a photo. Swift later testified that

> right as the moment came for us to pose for the photo, [Mueller] took his hand and put it up my dress and grabbed onto my ass cheek, and no matter how much I scooted over it was still there. It was not an accident; it was completely intentional . . . .[93]

Swift immediately reported Mueller's groping her to her mother Andrea Swift, who then reported it to Frank Bell from Swift's radio management group. Frank Bell immediately met with KYGO Vice President Robert Call, who conducted an investigation and terminated Mueller two days later.

Mueller denied that he had groped Taylor Swift, and in May 2015 he filed suit against Taylor Swift, her mother Andrea Swift, and Frank Bell for slander. Because the statute of limitations to file a suit for slander is one year in Colorado, and nearly two years had elapsed before Mueller had been terminated for groping Taylor Swift, the federal district court for Colorado granted summary judgment for Swift, holding that Mueller's suit was "time-barred."[94]

Taylor Swift filed a counter-claim for a symbolic $1, accusing Mueller of assault and battery. Because most media reports had not explained that Mueller had sued Swift first, Swift became a victim of vicious cyberharassment. Swift later wrote: "I spent two years

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reading headlines referring to it as 'The Taylor Swift Butt Grab Case' with Internet trolls making a joke about what happened to me. There was an audible gasp in the courtroom when I was named as the defendant."[95]

The case went to trial in August 2017. After deliberating for four hours, the jury returned a unanimous verdict for Taylor Swift (Mueller never paid her the symbolic $1). In the weekend following the trial, the Rape, Abuse and Incest National Network (RAINN) reported a 35% increase in calls to its national hotline. RAINN's president Scott Berkowitz, commented that Swift's case was "a great demonstration to other victims that there is strength in coming forward and pursing justice."[96] Several months later, *Time* magazine featured Swift as a "Person of the Year," along with other women who had spoken out in the #Me-too movement.

Discussion

Critical legal theorists have expressed skepticism about the extent to which the #MeToo movement, while bringing public awareness to a pervasive problem, will actually effect change in our legal system. For example, legal scholar Caitlin Mininger cautions that "until widespread systemic change to the way sexual harassment claims are treated in the courts is possible, it's unclear what the #MeToo movement's legacy can be."[97]

Women have hesitated to report sexual harassment and rape for decades because the legal system has often failed them. Their fear stems from the

> systematic oppression that survivors are already facing when it comes to reporting. Even without the threat of being hit with a defamation lawsuit, survivors already face a myriad of hurdles when it comes to reporting their assault, including victim blaming, stigmatization, and officials not taking their accusations seriously, among others. Overall, the threat of a defamation lawsuit acts to silence survivors from coming forward.[98]

Law professor Deborah Tuerkheimer points to the "woeful inadequacies of formal mechanisms for addressing sexual assault and harassment – inadequacies that prompt women to relay their abuse through back channels."[99] Tuerkheimer explains that long before the Internet existed, women created "whisper networks" and other "unofficial reporting channels in a world where official systems for redressing sexual misconduct are largely ineffectual," but the problem is that "whisper networks sacrifice the pursuit of offender accountability."[100] Tuerkheimer points to "the reality that formal complaint processes are often stacked against the [victim of sexual harassment or assault]."[101]

There is of course the obvious problem that there are rarely if ever any witnesses to sexual harassment, groping or rape other than the perpetrator and the victim, resulting in the classic "he said; she said" conundrum. Legal scholar Pooja Bhaskar examines #MeToo defamation cases through the fact-opinion dichotomy of *Milkovich*[102]; he concludes that "alleged assailants' claims that their alleged victims lied constitute implicit assertions of eyewitness testimony about a factual matter."[103] In other words, juries should decide whether or not victims' allegations are true or false.

Although the #MeToo movement sparked testimony from hundreds of women who used many different platforms to report sexual harassment, groping or rape, legal scholar Chelsey Whynot observes that alleged perpetrators have turned to retaliatory defamation suits, which are

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> meant to scare survivors into silence, and they are quite effective to that end. Individuals accused of sexual misconduct are using defamation suits as a way to put pressure on an accuser to make her go away … .Worse yet, defamation cases are being used as bullying tactic by law firms and individuals who wish to silence a MeToo survivor.[104]

Whynot emphasizes the point that "#MeToo victims do not have sufficient protections from defamation lawsuits by their abusers."[105] She suggests that one solution would be for all 50 states to adopt legislation similar to California Bill No. 2770,[106] which took effect in 2019; the law would protect employees from defamation suits when they report sexual harassment or misconduct in good faith (without malice).[107]

Non-disclosure agreements

When the #MeToo movement gained momentum in 2017, some of Harvey Weinstein's victims may have wanted to speak with Ronan Farrow, but declined because Weinstein's lawyers had gotten them to sign non-disclosure agreements (NDAs). In addition to Harvey Weinstein, Bill O'Reilly's lawyers had persuaded Rachel Bernstein, Andrea Mackris and Rebecca Gomez Diamond to sign NDAs, and Bill Cosby's lawyers persuaded Andrea Constand to sign an NDA after Constand had filed a civil suit against Cosby and he had paid her $3.38 million in "hush money."

Commenting on NDAs, journalist David von Drehle comments:

> Should multimillionaires be allowed to silence their accusers with cash? This scandal of secrecy points to a creeping rot in the American justice system. Too many cases involving potential felonies are resolved through civil settlements that include ironclad NDAs. Once the money changes hands, witnesses can no longer testify to crimes; indeed, penalties for telling the truth after a settlement often run to the millions of dollars – ruinous for most crime victims. It's a short step removed from silencing witnesses with cement shoes. It is a classic case of rich man's justice … .Add [to this] the fact that wealthy predators often target victims in financial need.[108]

Legal scholar Brittany Scott observes that those who sign a nondisclosure agreement are in effect waiving their First Amendment rights. They may not realize that the person demanding the signature is enforcing a

> contract of silence prohibiting speech … . The courts are making value judgments when they balance enforcement of contracts against waiving one's First Amendment rights. In choosing to enforce these waivers, the courts signal a preference for enforcing contracts over protecting First Amendment rights.[109]

Critical legal theorists would observe that nondisclosure agreements favor the wealthy and powerful perpetrators because their attorneys have learned to insist upon arbitration, rather than open court, as the required venue for resolving disputes. This puts the less wealthy, less powerful victims of sexual harassment or assault at a disadvantage because the press and public do not have access to an arbitration hearing; it occurs behind closed doors. In other words, victims who waive their First Amendment rights are also waiving their Sixth Amendment right to a fair trial in open court.

Law professors Lesley Wexler, Jennifer K. Robbennolt and Colleen Murphy explain that the organization Time's Up has raised awareness about how employers maintain a "cone of silence" when victims sign NDAs.[110] In response to pressure from Time's Up,

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the National Conference of State Legislatures reported that legislators in 16 states have introduced bills to limit private employers' use of NDAs in sexual harassment cases.[111] Journalist David von Drehle also urges legislators to "outlaw the silencing of witnesses through NDAs. Non-disclosure agreements have their place in civil matters, but not to mask evidence of crimes."[112]

Are perpetrators "weaponizing" defamation law?

Critical legal theorists would argue that defending oneself in a defamation suit is so costly that being sued in itself can be a form of harassment or an attempt to silence the speaker. For example, after Kristina Ruehli reported that Bill Cosby had drugged and raped her in 1965 and Cosby called her a liar, Ruehli spent more than $80,000 in legal fees during her defamation suit against Cosby, but ultimately dropped the suit.[113] Law professor Deborah Tuerkheimer explains that if victims make unofficial allegations of sexual harassment or rape, perpetrators have managed to "weaponize" defamation law:

> Most sexual misconduct victims cannot afford the financial cost of defending a lawsuit, even apart from the psychic toll this effort exacts. Moreover, the confused state of defamation law means that litigation costs in this area are . . . uncertain . . . The defamation claim targets the very engine of #MeToo—unofficial reporting channels.[114]

Tuerkheimer explains that the legal system can be punishing for victims who have named their abusers on Internet platforms as part of the #MeToo movement:

> In an ironic twist, a survivor who [had avoided] formal reporting channels may ultimately find herself in a courtroom, telling her story under the most formal conditions possible, having expended enormous resources along the way in exclusive service of beating back a claim that she lied about her abuse. With defamation law looming in the background, no survivor could be faulted for deciding to forsake unofficial reporting altogether and simply keep silent about her abuse.[115]

Anti-SLAPP suits

Some state legislatures have passed anti-SLAPP statutes; SLAPP stands for "strategic lawsuits against public participation." States had originally written anti-SLAPP laws to help citizen activists defend themselves against frivolous defamation suits by powerful corporations, but judges in some cases have accepted the idea that anti-SLAPP laws could apply in #MeToo cases because violence against women is a matter of public importance. Like defamation law in general, however, anti-SLAPP statutes are a double-edged sword in the sense that both perpetrator-defendants and victim-defendants have relied on anti-SLAPP laws to argue that the case against them should be dismissed.

Legal scholars Chelsey Whynot and Shaina Weisbrot both analyze defamation suits in which attorneys have attempted to rely on anti-SLAPP statutes; Whynot emphasizes the point that anti-SLAPP statutes "help to ensure that survivors of sexual misconduct do not become victims of the legal system that is meant to protect them."[116] For example, Kesha Sebert, Margaret Osborn (known as Alice Glass) and Chelsea Tadros relied on anti-SLAPP defenses. Weisbrot explains that anti-SLAPP statutes

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> expand the possibilities for defamation defenses and establish that intimate partner violence, sexual assault, and harassment should, as a bright-line rule, be considered matters of public interest. Therefore, when survivors are establishing an anti-SLAPP defense, their cases should not require much more than indicating the existence of some form of violence against women.[117]

The problem is that anti-SLAPP statutes, like defamation law in general, can be a double-edged sword; in other words, when victims sue the perpetrators for defamation, the perpetrator defendants have also turned to anti-SLAPP defenses. An example of this occurred after Janice Dickinson reported that Bill Cosby had drugged and raped her in 1982. Cosby called her a liar, and Dickinson sued Cosby for defamation. But Cosby filed a motion under California's anti-SLAPP statute, arguing that Dickinson's lawsuit was frivolous and was an attack on his freedom of speech. Although Dickinson's attorneys were ultimately able to overcome Cosby's anti-SLAPP motion (and Cosby's insurance company AIG reached an out-of-court settlement with her), Dickinson's case was in litigation for four years.[118] In other words, Cosby's attorneys relied on California's anti-SLAPP statute as a stalling tactic in order to draw out the litigation with the hope that Dickinson would drop her lawsuit.

In terms of the larger picture, only three victims have actually won court decisions. Yee Xiong won $152,400 to cover her medical expenses after Lang Her raped her, Margaret Osborn ("Alice Glass") won $21,000 in attorneys' fees after a judge dismissed Claudio Palmieri's ("Ethan Kath's") defamation case against her, and a jury awarded Taylor Swift $1 in damages from David Mueller (although he has never paid it). In nearly all of the other cases considered here, the victims reached out-of-court settlements with the perpetrators, or the cases are pending. Because so few of these cases have ended with published court decisions, it is difficult to predict the outcome of the cases that are still pending.

If we look at the victims' motives, however, it is too simplistic to assume that the victims are merely seeking damages for their pain and suffering. In suing the perpetrators for defamation, the victims were clearly willing to revisit a traumatic incident of sexual harassment, groping or assault in order to set the record straight, and to warn future potential victims. Because the alleged perpetrators have often sued their victims for defamation, however, it is clear that the law of defamation is indeed a double-edged sword.

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