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**TIME’S NOT UP YET:  
HOW THE THREAT OF DEFAMATION  
WEAKENS NEW YORK’S ADULT SURVIVORS ACT**

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## INTRODUCTION

In the spring of 2022, social media exploded with hashtags and clips of testimony from the year’s hottest celebrity trial—*Depp v. Heard*.<sup>1</sup> The jury found that Amber Heard defamed her ex-husband, beloved actor Johnny Depp, in her 2018 Washington Post opinion piece.<sup>2</sup> They awarded Depp fifteen million dollars in damages and Heard with a mere two million.<sup>3</sup> Some observers lamented the jury’s verdict as a stunning blow to the #MeToo movement and both domestic violence and sexual assault survivors.<sup>4</sup> “[T]he court of social media” seemed to declare Depp the premature winner of the case, prompting one expert to suggest that Depp’s widespread public support was due to the “worry that the Me Too movement didn’t represent male victims as much as it did female victims.”<sup>5</sup> Others opined that the verdict “is as much as to say that anyone who says the phrase ‘I was abused’ can be sued as a liar, and is highly likely to have a chilling effect on other victims of domestic violence who might want to step forward.”<sup>6</sup> In her op-ed, Heard invoked the #MeToo movement, calling to support women who share their experiences with sexual and domestic violence.<sup>7</sup> She paid the price for speaking out.<sup>8</sup> Was this the beginning of the end of the #MeToo movement?

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<sup>1</sup> 102 Va. Cir. 324 (2019) (No. CL-2019-0002911); Kalhan Rosenblatt, *Social Media Flooded with Johnny Depp Support Amid Defamation Case Against Amber Heard*, NBC NEWS (Apr. 22, 2022, 12:21 PM), <https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-social-media-defamation-tiktok-case-rcna25430> (“Some TikTokers will give play-by-plays of the day in court, recounting the latest testimony or evidence presented. Others suggest unproven conspiracy theories . . .”).

<sup>2</sup> See Judgment Order at 2, *Depp v. Heard*, 102 Va. Cir. 324 (2019) (No. CL-2019-0002911); Amber Heard, Opinion, *I Spoke Up Against Sexual Violence — And Faced Our Culture’s Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018, 5:58 PM), [https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36\\_story.html](https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html).

<sup>3</sup> Judgment Order, *supra* note 2, at 2; Holly Honderich, *Amber Heard Settles Defamation Case Against Johnny Depp*, BBC (Dec. 19, 2022), <https://www.bbc.com/news/world-us-canada-64031252>.

<sup>4</sup> See Anne Marie Tomchak, *Amber Heard Has Called Out the ‘Unfair’ Role of Social Media in the Defamation Case—Here’s How Algorithms Shaped Our Views During The Trial*, GLAMOUR, (June 13, 2022), <https://perma.cc/HG6J-7BE8> (“When large numbers of people are seeking to discredit or mock a woman talking about her experience of alleged abuse so publicly, concerns survivors may have about not being believed will be amplified . . .”).

<sup>5</sup> Rosenblatt, *supra* note 1.

<sup>6</sup> Constance Grady, *The Me Too Backlash is Here*, VOX (June 2, 2022, 12:50 PM), <https://perma.cc/XE9E-YY6B>.

<sup>7</sup> See Heard, *supra* note 2. (“I want to ensure that women who come forward to talk about violence receive more support.”).

<sup>8</sup> Heard was ordered to pay Depp fifteen million of dollars, but later settled, agreeing to pay one million. See Judgment Order, *supra* note 2, at 2; Honderich, *supra* note 3. She was also widely ridiculed and villainized on social media—#AmberTurd and #MePoo even trended on Twitter. See Michelle Goldberg, Opinion, *Amber Heard and the Death of*

The hashtag MeToo originally went viral in October 2017 in response to reports of Harvey Weinstein's widespread sexual abuse.<sup>9</sup> The movement highlighted the prevalence of sexual assault and harassment, particularly in the workplace, and exposed how powerful men silenced survivors to keep sexual assault claims out of the press and courts.<sup>10</sup> What began as a viral hashtag soon developed into real-world consequences when credible allegations of workplace sexual assault and harassment ousted several men across various industries from their powerful positions.<sup>11</sup> In the absence of laws that adequately protected sexual assault survivors, public accusations, rather than formal legal claims, became "one of #MeToo's distinctive features . . ."<sup>12</sup> Indeed, repercussions for abusers frequently came from the public and employers rather than the judicial system.<sup>13</sup> This prompted feminist legal scholar Aya Gruber to opine: "Raging against sexual harm has become the preferred weapon of those attacking heterogenous power differentials."<sup>14</sup>

However, America's pervasive rape culture led #MeToo survivors to be "treated with skepticism and even hostility, while perpetrators [were] shown empathy and imbued with credibility . . ."<sup>15</sup> It can often take "three to four

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#MeToo, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/05/18/opinion/amber-heard-metoo.html>.

<sup>9</sup> See Carrie N. Baker, *#MeToo Five Years Later*, MS. MAG. (Oct. 27, 2022), <https://msmagazine.com/2022/10/27/me-too-five-years-sexual-harassment-assault/>. Tarana Burke, a Black woman, originally created the Me Too movement several years earlier. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> (explaining how actress Alyssa Milano used Burke's "me too" language to amplify sexual assault survivors' voices resulting in October 2017's viral #MeToo movement); see also Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), [https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) ("If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.").

<sup>10</sup> See Baker, *supra* note 9 ("Wealthy abusers like Weinstein bought their victim's silence with nondisclosure clauses in settlements."); Annalisa Quinn, *In 'Catch And Kill,' Ronan Farrow Offers a Damning Portrait of a Conflicted NBC*, NPR (Oct. 11, 2019, 12:15 PM), <https://perma.cc/K3SQ-8A63> (in a review of Farrow's book, Quinn writes that "institutions can find strength in legacy, reputation and numbers or use their substantial power to diffuse guilt and protect the powerful.").

<sup>11</sup> See Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> (noting men who lose their powerful jobs over #MeToo allegations include Les Moonves, President, Chairman, and Chief Executive of CBS, Al Franken, former US Senator representing Minnesota, and Kevin Spacey, *House of Cards* actor).

<sup>12</sup> Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 45 (2019).

<sup>13</sup> JoAnne Sweeney, *The #MeToo Movement in Comparative Perspective*, 29 AM. UNIV. J. GENDER, SOC. POL'Y & L. 33, 48 (2020).

<sup>14</sup> Aya Gruber, *Sex Wars as Proxy Wars*, 6 CRITICAL ANALYSIS L. 102, 102 (2019).

<sup>15</sup> See Christina Pazzanese, *How Rape Culture Shapes Whether a Survivor is Believed*, HARV. GAZETTE (Aug. 25, 2020), <https://perma.cc/89QK-XTRQ>. Rape culture is a set of social attitudes that normalize and/or minimize the harm of sexual assault, resulting in victims often being "disbelieved or blamed." See Gruber, *supra* note 14; Susanne Schwarz et

women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That ma[kes] a woman, for credibility purposes, one quarter of a person.”<sup>16</sup> As the #MeToo movement gained momentum, there was almost an immediate backlash from men and women alike as they worried men were being wrongly accused of sexual misconduct.<sup>17</sup> It became apparent that the abuser’s “personal and political” value and reputation outweighed the accuser’s value and reputation.<sup>18</sup>

Because rape culture created a set of social attitudes where survivors are met with skepticism or outright disbelief, an unintended consequence of public #MeToo allegations has been powerful men bringing defamation suits to defend their tarnished reputation.<sup>19</sup> Many lawyers have “seen a spike in defamation lawsuits in recent years” as abusers have retaliated against #MeToo victims for speaking out.<sup>20</sup> Thus, while #MeToo thrust the open-secret of widespread sexual assault into the spotlight, those accused of sexual misconduct capitalized on abuser-sympathetic cultural attitudes and used defamation lawsuits to “scare survivors into silence.”<sup>21</sup> The filing of frivolous defamation lawsuits is intended “to prevent people from speaking out about matters of public interest.”<sup>22</sup> These lawsuits are known as SLAPP (“Strategic Lawsuits Against Public Participation”).<sup>23</sup> As of September 2023, thirty-four jurisdictions in the United States passed anti-SLAPP laws to protect victims against “punitive suits”

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al., (*Sex*) *Crime and Punishment in the #MeToo Era: How the Public Views Rape*, 44 POL. BEHAV. 75, 75 (2020).

<sup>16</sup> Catharine MacKinnon, *Where #MeToo Came From, and Where It’s Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>.

<sup>17</sup> See Sweeney, *supra* note 13, at 44–45.

<sup>18</sup> See MacKinnon, *supra* note 16 (“Even when she was believed, nothing he did to her mattered so much as what would be done to him if his actions were taken seriously. His value, personal and political, outweighed hers. His career, his reputation, his mental and emotional serenity, his family—all his assets counted. Hers did not.”).

<sup>19</sup> See Madison Pauly, *She Said, He Sued*, MOTHER JONES, <https://perma.cc/6H7R-7VRZ>; Pazzanese, *supra* note 15; see also Complaint at 1–5, *Depp v. Heard*, 102 Va. Cir. 324 (2019) (No. CL-20190002911).

<sup>20</sup> See Bruce Johnson, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, ACLU (Jan. 22, 2018), <https://perma.cc/YRU2-KC2S> (“The #MeToo movement has drawn an outpouring of testimony by the victims of sexual harassment and sexual abuse. In response, there has been a surge in retaliatory defamation lawsuits by their abusers. Many lawyers say they’ve seen a spike in defamation lawsuits in recent years. And in the past two months, I have received more than a half-dozen calls from women who were threatened for telling their stories.”); Haley Forrestal & Christina Zuba, *What Sexual Assault Survivors Should Know About Defamation*, CHI. ALL. AGAINST SEXUAL EXPLOITATION (June 7, 2022), <https://perma.cc/865H-3A55> (“Perpetrators sometimes use defamation lawsuits as a tool to further harm victims.”).

<sup>21</sup> See Chelsey N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 TUL. L. REV. 1, 3 (2020); Schwarz et al., *supra* note 15, at 78 (“[W]e identify four key, measurable features of rape culture: victim blaming, empathizing with perpetrators, assuming the victim’s consent, and questioning the victim’s credibility.”).

<sup>22</sup> Pauly, *supra* note 19.

<sup>23</sup> *Id.*

brought to silence them.<sup>24</sup> While anti-SLAPP laws protect all speakers from retaliatory defamation suits, they are “particularly applicable” to sexual assault survivors who are “chilled from free exercise of their First Amendment rights when their reports are met with responsive defamation lawsuits.”<sup>25</sup> Without anti-SLAPP protections, “survivors may feel coerced into settling” when faced with a retaliatory defamation claim.<sup>26</sup>

In addition to Johnny Depp’s highly publicized defamation victory, music producer Dr. Luke won a defamation suit in New York County Court against music artist Kesha, who privately accused him of rape.<sup>27</sup> If people with money and resources like Heard and Kesha are held liable for defaming their accused abuser, is anyone immune from countersuit? How does the threat of being sued for defamation impact the success of remedial legislation designed to make it easier for victims to sue their abusers in the wake of #MeToo?

Recently, New York enacted two laws allowing victims of sexual abuse to bring a civil suit, even if the statute of limitations on their claim previously expired.<sup>28</sup> In 2019, New York passed the Child Victims Act (“CVA”), establishing a one-year window where adult survivors of child sexual abuse were permitted to file civil actions.<sup>29</sup> The CVA “open[s] the doors of justice to the thousands of survivors of child sexual abuse in New York State . . . .”<sup>30</sup> “[F]our months into [the CVA’s] revival window, over 1,300 civil suits [were] filed against alleged abusers, on behalf of at least 1,700 survivors.”<sup>31</sup> Ultimately, over 10,000 cases were filed during the CVA’s revival window.<sup>32</sup>

Three years later, in 2022, New York passed the Adult Survivors Act (“ASA”), which “create[d] a one-year window for the revival of otherwise time-barred civil claims arising out of sexual offenses committed against people who were 18 or

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<sup>24</sup> See *id.*; Dan Greenberg & David Keating, *Anti-SLAPP Statutes: A Report Card*, INST. FOR FREE SPEECH (Nov. 21, 2023), <https://perma.cc/4LYW-7238>.

<sup>25</sup> See Whynot, *supra* note 21, at 23; Greenberg & Keating, *supra* note 24.

<sup>26</sup> See Pauly, *supra* note 19.

<sup>27</sup> See Judgment Order, *supra* note 2, at 2; Decision and Order on Motion at 9, *Gottwald v. Sebert*, 63 N.Y.S.3d 818 (N.Y. Sup. Ct. 2020) (No. 653118/2014); Gene Maddaus, *Dr. Luke Scores Big Victory in Ongoing Defamation Battle with Kesha*, VARIETY (Feb. 6, 2020, 5:17 PM), <https://variety.com/2020/biz/news/dr-luke-kesha-ruling-defamation-1203495957/>.

<sup>28</sup> See Child Victims Act, N.Y. C.P.L.R. 214-g (MCKINNEY 2019); Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022).

<sup>29</sup> Child Victims Act, N.Y. C.P.L.R. 214-g (MCKINNEY 2019); S.B. S2440, 2019-2020 Legis. Sess. (N.Y. 2020). The window was later extended an additional year to give survivors more time to file. S.B. S7082, 2019-2020 Legis. Sess. (N.Y. 2020). Child victims were permitted to file pursuant to the CVA from August 14, 2019 until August 14, 2021. Press Release, Anna M. Kaplan, Senator, N.Y. Senate, Sen. Kaplan Applauds Child Victims Act Extension, Urges Survivors to Seek Justice (Aug. 3, 2020), <https://web.archive.org/web/20230607134848/https://www.nysenate.gov/newsroom/press-releases/anna-m-kaplan/senator-kaplan-applauds-child-victims-act-extension-urges>.

<sup>30</sup> S2440 Sponsor Memo, Child Victims Act, S.B. S2440, 2019-2020 Legis. Sess. (N.Y. 2019).

<sup>31</sup> S7082 Sponsor Memo, S.B. S7082, 2019-2020 Legis. Sess. (N.Y. 2020).

<sup>32</sup> *Statute of Limitations Reform Serves the Public Interest: A Preliminary Report on the New York Child Victims Act*, CHILD USA 4 (Aug. 23, 2021), <https://perma.cc/QCQ6-572G>.

older at the time of the conduct.”<sup>33</sup> Under the Act, adult survivors may file a civil claim relating to a sexual offense between November 24, 2022 and November 24, 2023, regardless of when their assault occurred.<sup>34</sup> The ASA's sponsor memo stated: “[t]hose who have had justice denied them [sic] as a result of New York's formerly insufficient statutes of limitations should be given the opportunity to seek civil redress against their abuser or their abuser's enablers in a court of law.”<sup>35</sup> While the New York legislature passed the ASA to allow survivors to bring cases previously barred by earlier statutes of limitations, survivors still face several obstacles in bringing their cases.<sup>36</sup>

Throughout this Note, I will argue that defamation suits threaten to silence survivors, frustrating the ASA's goal of enabling survivor voices to be heard while holding abusers accountable.<sup>37</sup> Part II discusses defamation as defined and interpreted in New York, explains how both alleged abusers and survivors bring defamation claims to defend their reputations, and analyzes New York's anti-SLAPP laws.<sup>38</sup> Part III discusses how New York can mitigate the threat of defamation to enable adult survivors suing under the ASA to bring their claims and publicly share their stories without subjecting themselves to defamation liability.<sup>39</sup> Ultimately, Part III suggests New York can protect ASA plaintiffs by enacting shield laws, creating a defamation per se exemption for ASA claims, and strengthening anti-SLAPP statutes.<sup>40</sup>

## I. LEGAL BACKGROUND

New York's defamation laws have enabled abusers to effectively silence their victims.<sup>41</sup> Part A begins to untangle how abusers weaponize defamation and

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<sup>33</sup> S66A Sponsor Memo, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022); see Adult Survivors Act, N.Y. C.P.L.R. 214-j (McKINNEY 2022).

<sup>34</sup> See *id.*; Roberta Kaplan, et al., *N.Y. Adult Survivors Act Renews Claims for Sexual Assault Survivors*, BLOOMBERG LAW, (June 21, 2022), [https://www.bloomberglaw.com/bloomberglawnews/us-lawweek/X6H90R3S000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-lawweek/X6H90R3S000000?bna_news_filter=us-law-week#jcite).

<sup>35</sup> S66A Sponsor Memo, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022).

<sup>36</sup> For example, adult survivor Gary Greenberg explained that many survivors could not get counsel if their abuser has no money. Natasha Vaughn-Holdridge, *Survivors Renew Call to Amend Child Victims Act*, HUDSON VALLEY 360 (Feb. 24, 2022), [https://www.hudsonvalley360.com/news/nystate/survivors-renew-call-to-amend-child-victims-act/article\\_5699c174-3320-5b80-b054-28fdbe1739e9.html](https://www.hudsonvalley360.com/news/nystate/survivors-renew-call-to-amend-child-victims-act/article_5699c174-3320-5b80-b054-28fdbe1739e9.html). Adult survivors of childhood sexual abuse worry the ASA will present similar obstacles to adult survivors seeking to bring suit. *Id.*

<sup>37</sup> See Press Release, Kathy Hochul, Governor, N.Y., Governor Hochul Signs Adult Survivors Act (May 24, 2022), <https://perma.cc/3J99-4PKV> (quoting Governor Hochul: “Today, we take an important step in empowering survivors across New York to use their voices and hold their abusers accountable.”); S66A Sponsor Memo, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022).

<sup>38</sup> See discussion *infra* Part II.

<sup>39</sup> See discussion *infra* Part III.

<sup>40</sup> See discussion *infra* Part III.

<sup>41</sup> See discussion *infra* Part II.

defines defamation in New York state. Part B then discusses how sexual assault survivors and perpetrators in New York both use defamation to protect against reputational harm. Lastly, Part C surveys New York's current anti-SLAPP laws that are designed to guard against retaliatory defamation lawsuits.

#### A. *Defamation in New York*

Defamation is broadly defined as the making of “false written or oral statement[s]” to a third person that “damages another's reputation.”<sup>42</sup> Defamation includes both libel and slander, which are false written statements and false spoken statements, respectively.<sup>43</sup> In New York, defamation is: (1) a false statement that tends to expose a person to public contempt; (2) published to a third party without the person's privilege or authorization; (3) either causing harm or constituting defamation per se.<sup>44</sup> While public figures bringing defamation claims must show the alleged defamer acted with actual malice to prevail, private actors do not need to show this.<sup>45</sup> To sufficiently claim defamation, a private plaintiff must identify: (1) the “particular words” that allegedly constitute defamation; (2) who made the statement; (3) when and where the statement was made; and (4) to whom it was made.<sup>46</sup> Because a claim cannot be defamatory if it is true, truth is an absolute defense and a question of fact for the jury to decide.<sup>47</sup> However, statements made “in the course of litigation,”

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<sup>42</sup> *Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>43</sup> See *Goldman v. Reddington*, 417 F. Supp. 3d 163, 171 (E.D.N.Y. 2019); *Libel*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Slander*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>44</sup> See *Elias v. Rolling Stone, LLC*, 872 F.3d 97, 104 (2d Cir. 2017) (citing *Stepanov v. Dow Jones & Co.*, 987 N.Y.S.2d 37, 41 (N.Y. App. Div. 2014)). (applying New York law). Defamation per se is a statement that is “defamatory in and of itself and is not capable of an innocent meaning.” *Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019). Each prong of defamation is discussed *infra* pages 190–93.

<sup>45</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); *Shulman v. Hunderfund*, 905 N.E.2d 1159, 1161 (N.Y. 2009) (applying *Sullivan*'s actual malice standard).

<sup>46</sup> See N.Y. C.P.L.R. 3016(a) (MCKINNEY 2022) (“In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.”); *Nowak v. EGW Home Care, Inc.*, 82 F.Supp.2d 101, 113 (W.D.N.Y. 2000) (dismissing complaint because of plaintiff's failure to allege the particular defamatory words); *Curti v. Girocredit Bank*, No. 93 Civ. 1782 (PKL), 1994 WL 48835, at \*3 (S.D.N.Y. Feb. 14, 1994) (dismissing complaint for lack of details regarding the circumstances of the alleged defamatory statement); *Reeves v. Continental Equities Corp.*, 767 F. Supp. 469, 473 (S.D.N.Y. 1991) (dismissing complaint for failure to identify details regarding who made and heard the alleged defamatory statements).

<sup>47</sup> See *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 (2d Cir. 1986) (“Under New York law . . . [truth] is an absolute unqualified defense to a civil defamation action.”) (internal citations omitted) (jury found statement was false and therefore libelous); *Gottwald v. Sebert*, No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at \*12 (N.Y. Sup. Ct. Feb. 6, 2020) (“If the jury ultimately finds that the statements Kesha and her agents made are not false, she cannot be liable for defamation under any circumstances . . .”).

including statements in affidavits and complaints, “are privileged and cannot form the basis of a defamation claim.”<sup>48</sup>

### 1. False Statement

A defamation plaintiff must show that the statement about them is false by identifying “*how* the defendant’s statement is false” and “plead[ing] facts that . . . would allow a reasonable person to consider the statement false.”<sup>49</sup> Because a statement must be false to be actionable, the alleged defamatory words must be a statement that can be found factually true or false.<sup>50</sup> Opinions are not actionable because they cannot be proven true or false.<sup>51</sup> Thus, to evaluate a defamation claim, New York courts must determine, as a threshold matter of law, whether a statement is fact or opinion.<sup>52</sup>

To determine if a statement is a fact or opinion, the court considers “what the average person hearing or reading the communication would take [the statement] to mean.”<sup>53</sup> Some factors courts may consider in making this determination include:

- (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.<sup>54</sup>

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<sup>48</sup> See *Front, Inc. v. Khalil*, 28 N.E.3d 15, 18 (N.Y. 2015) (“[I]t is well settled that statements made in the course of litigation are entitled to absolute privilege . . . .”); *Tacopina v. O’Keefe*, 675 Fed. App’x. 7, 8 (2d Cir. 2016) (statements made in an affidavit filed in court are privileged and cannot form the basis for a defamation claim).

<sup>49</sup> See *Goldman v. Reddington*, 417 F.Supp.3d 163, 171–72 (E.D.N.Y. 2019) (emphasis added); *Harding v. Dorilton Capital Advisors, LLC*, 635 F. Supp.3d 286, 306 (S.D.N.Y. 2022) (“To establish defamation under New York state law, a plaintiff must prove . . . [an] applicable level of fault on the part of the speaker . . . .”).

<sup>50</sup> See *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1167 (N.Y. 1993) (“Since falsity is a necessary element of a defamation cause of action and only ‘facts’ are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action . . . .”) (internal quotes omitted); see also *Gottwald v. Sebert*, 148 N.Y.S.2d 37, 47 (N.Y. App. Div. 2021) (finding Kesha’s statements that Dr. Luke drugged and raped her were actionable statements, not opinions, because “they can be found to be factual as a matter of law.”).

<sup>51</sup> *Steinhilber v. Alphonse*, 501 N.E.2d 550, 552 (N.Y. 1986) (“[E]xpression of pure opinion is not actionable.”).

<sup>52</sup> See *id.* at 552–53.

<sup>53</sup> *Davis v. Boenheim*, 2 N.E.2d 999, 1004 (N.Y. 2014) (quoting *Steinhilber*, 501 N.E.2d at 553) (reversing a motion to dismiss defamation claims regarding accusations of sexual misconduct).

<sup>54</sup> *Id.* at 1005 (quoting *Mann v. Abel*, 885 N.E.2d 884, 885–86 (N.Y. 2008)).

Further, minor inaccuracies are insufficient to support a finding of a false statement.<sup>55</sup> As such, if the statement at issue is found “substantially true,” a plaintiff’s defamation claim will fail.<sup>56</sup>

Some opinions must receive further analysis. Mixed opinions are actionable but pure opinions are not.<sup>57</sup> Mixed opinions are opinions that either: (1) imply they are “based on facts which justify the opinion but are unknown to those reading or hearing it . . .” or (2) are accompanied by false or “gross distortion or misrepresentation” of facts.<sup>58</sup> On the other hand, a pure opinion is “a statement of opinion which either is accompanied by . . . facts upon which it is based, or . . . does not imply that it is based upon undisclosed facts” and is not actionable.<sup>59</sup>

Plaintiffs may also sue under a theory of defamation by implication, which does not require an expressly defamatory statement.<sup>60</sup> Rather, “[d]efamation by implication is premised . . . on false suggestions, impressions and implications arising from otherwise truthful statements.”<sup>61</sup> Further, defamatory statements need not name the defamed individual directly—it is sufficient that a “plaintiff can make out that [they] are the person” the statement is about.<sup>62</sup> In proving that the alleged defamatory statement is about the plaintiff, the plaintiff must show that it is “reasonable to conclude” that the words refer to them.<sup>63</sup> If the plaintiff relies on extrinsic facts, she must prove those extrinsic facts were known by those who read or heard the statement.<sup>64</sup>

## 2. Published to a Third Party

The second prong, publication to a third party, is more straightforward. A defamatory statement does not become actionable until it is read or heard by a

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<sup>55</sup> *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (“Minor inaccuracies do not amount to falsity.”).

<sup>56</sup> *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 291 (2d Cir. 1986) (dismissing plaintiff’s defamation claim because, in part, the “statement as issue was substantially true . . .”).

<sup>57</sup> *Davis*, 22 N.E.2d at 1004 (quoting *Steinhilber*, 501 N.E.2d at 552–53).

<sup>58</sup> *Id.* (quoting *Steinhilber*, 501 N.E.2d at 553) (internal quotations omitted); *Silsdorf v. Levine*, 449 N.E.2d 716, 719–721 (N.Y. 1983) (finding opinions may be defamatory if plaintiff can prove the falsity of the opinion and “convince the triers of fact that that the factual disparities would affect the conclusions drawn by the average reader . . .”).

<sup>59</sup> *Davis*, 22 N.E.2d at 1004. (quoting *Steinhilber*, 501 N.E.2d at 553).

<sup>60</sup> *See Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825, 829 (N.Y. 1995).

<sup>61</sup> *Id.* at 829–31 (finding plaintiff’s claim not one of defamation by implication because it need not be “stretched and extrapolated by subjective interpretations in order to find any possible falsity.”) (internal quotes omitted).

<sup>62</sup> *Elias v. Rolling Stone, LLC*, 872 F.3d 97, 105 (2d Cir. 2017) (quoting *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980)) (finding that an ultimately false gang rape story published in *Rolling Stone* magazine was sufficiently “of and concerning” plaintiffs bringing suit even when their names were not explicated mentioned because the facts in the article sufficiently identified them as the alleged gang rapists).

<sup>63</sup> *Id.* (quoting *Chicheria v. Cleary*, 616 N.Y.S.2d 647, 648 (N.Y. App. Div. 1994)).

<sup>64</sup> *Id.* (quoting *Chicheria*, 616 N.Y.S.2d at 648).

third party.<sup>65</sup> Publication or communication to even one person other than the defamed is sufficient.<sup>66</sup> The original speaker is not, however, responsible for the repetition of their statement if the repetition was done without the original speaker's "authority or request by others over whom he has no control."<sup>67</sup> This creates a limitation on the speaker's liability.<sup>68</sup>

### 3. Causing Harm or Constituting Defamation Per Se

Defamation causes harm if it injures the defamed individual's reputation.<sup>69</sup> However, New York law recognizes four categories of defamation per se in which damage is presumed and need not be proven.<sup>70</sup> Statements: (1) tending to injure a person's business or profession; (2) accusing someone of having a "loathsome disease;" (3) imputing "unchastity to a woman;" or (4) accusing someone of a serious crime, such as rape, theft, or bribery, constitute defamation per se.<sup>71</sup> A crime is considered serious under defamation law if it is: (1) punishable by imprisonment, or (2) "regarded by public opinion as involving moral turpitude."<sup>72</sup> However, a statement of someone's criminality may not be actionable if the reasonable reader or listener would regard the statement as a "mere hypothesis."<sup>73</sup> In this situation, it is up to the court to consider "the communication as a whole" to determine if a reasonable listener or reader would consider the statement "an assertion of provable fact."<sup>74</sup>

Defamation per se does not reach accusations of petty crime, such as traffic violations, because such accusations would do little, if any, harm to a person's

<sup>65</sup> See *id.* at 104 (quoting *Stepanov v. Dow Jones & Co.*, 987 N.Y.S.2d 37, 41–42 (N.Y. App. Div. 2014)).

<sup>66</sup> *Lentlie v. Egan*, 462 N.E.2d 1185, 1186 (N.Y. 1984) ("[T]he law of defamation requires but one communication to a single person . . .") (citing *Ostrowe v. Lee*, 175 N.E. 505, 505 (N.Y. 1931)).

<sup>67</sup> *Geraci v. Probst*, 938 N.E.2d 336, 342–43 (N.Y. 2010) (quoting *Schoepflin v. Coffey*, 56 N.E.2d 502, 504 (N.Y. 1900)) (finding defendant was not liable for the publication of a letter he wrote in a newspaper where: (1) there was no evidence he induced the paper to print his letter; (2) the paper did not contact him regarding the story; and, (3) he had no control over its publication).

<sup>68</sup> See *Schoepflin*, 56 N.E.2d at 504; *Gottwald v. Sebert*, 148 N.Y.S.3d 37, 46 (N.Y. App. Div. 2021).

<sup>69</sup> *Jacob v. Lorenz*, 626 F. Supp. 3d 672, 686 (S.D.N.Y. 2022) (applying New York law).

<sup>70</sup> *Lieberman v. Gelstein*, 605 N.E.2d 344, 347–48 (N.Y. 1992).

<sup>71</sup> See *Stern v. Cosby*, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009) (applying New York law) (quoting *Lieberman*, 605 N.E.2d at 347–48); *Goldman v. Reddington*, 417 F. Supp. 3d 163, 173 (E.D.N.Y. 2019) (applying New York law to find "[r]ape is a sufficiently 'serious' crime to support a claim for defamation *per se.*"); *Sheindelin v. Brady*, 597 F. Supp. 3d 607, 637 (S.D.N.Y. 2009) (applying New York law to find the accusation that defendant stole \$1.7 million dollars imputes a serious crime, constituting defamation per se) (denied reconsideration Sept. 25, 2009); *Lieberman*, 605 N.E.2d at 348 (holding "the statement '[t]here is a cop on the take from Lieberman' charges a serious crime-bribery.>").

<sup>72</sup> *Solstein v. Mirra*, 488 F. Supp. 3d 86, 102 (S.D.N.Y. 2019) (applying New York law) (quoting *Conti v. Doe*, No. 17-CV-9268, 2019 WL 952281, at \*7 (S.D.N.Y. Feb. 27, 2019)).

<sup>73</sup> *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1169 (N.Y. 1993).

<sup>74</sup> *Id.*

reputation.<sup>75</sup> Further, determining whether a statement is defamatory per se depends on the defamed's community and current public opinion, "among other factors."<sup>76</sup> Thus, what constitutes defamation per se can "evolve from one generation to the next" and findings of defamation per se are not strictly limited to the above-mentioned categories.<sup>77</sup> Lastly, whether a statement constitutes defamation per se is a question of law.<sup>78</sup>

### B. *Defamation in Sexual Assault Cases*

Defamation is a tool both abusers and survivors can use to protect their reputations.<sup>79</sup> Section B(i) explores how those accused of sexual misconduct can use defamation to silence their victims, while section B(ii) briefly explores the interplay between defamation and false accusations. Lastly, section B(iii) explores how victims can use defamation to defend against accusations that they are lying about their assault.

#### 1. Defamation as a Tool for Alleged Abusers

*Depp v. Heard* will not be the last celebrity case in which an alleged abuser accuses their purported victim of defamation in response to sexual assault allegations.<sup>80</sup> In *Gottwald v. Sebert*, music producer Dr. Luke sued singer Kesha in New York County Court for defamation on the same day Kesha accused him of rape in a separate California lawsuit.<sup>81</sup> Kesha ultimately withdrew from the California action and counterclaimed sexual assault and battery in New York.<sup>82</sup> In the New York case, Dr. Luke claimed that Kesha defamed him when she texted Lady Gaga that he raped both her and Katy Perry.<sup>83</sup> While Kesha's statements that Dr. Luke raped her were questions of fact for the jury that could not be resolved on summary judgment, New York County Court found that

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<sup>75</sup> *Liberman*, 605 N.E.2d at 348.

<sup>76</sup> *Stern*, 645 F.Supp.2d. at 273 (quoting *Mencher v. Chesley*, 75 N.E.2d 257, 259 (N.Y. 1947)).

<sup>77</sup> *Id.* at 273–74, 288–90 (applying New York law to find accusations of homosexuality do not constitute defamation per se because, in part, of the lack of "widespread disapproval of homosexuality in New York.>").

<sup>78</sup> *Moraes v. White*, 571 F. Supp. 3d 77, 95 (S.D.N.Y. 2021) (applying New York law).

<sup>79</sup> See *Depp v. Heard*, 102 Va. Cir. 324, 324 (2019); *Gottwald v. Sebert*, 148 N.Y.S.3d 37, 37 (N.Y. App. Div. 2021) (defamation cases alleged abusers brought against their victims); see also *Davis v. Boenheim*, 22 N.E.3d 999 (N.Y. 2014); *Giuffre v. Maxwell*, 165 F. Supp. 3d 147 (S.D.N.Y. 2016) (defamation cases victims brought against their alleged abusers).

<sup>80</sup> *Depp*, 102 Va. Cir. at 324.

<sup>81</sup> No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at \*7–8 (N.Y. Sup. Ct. Feb. 6, 2020); Katie Shepard, *Kesha Defamed Her Producer in a Text Message to Lady Gaga, Judge Rules*, WASH. POST (Feb. 7, 2020, 6:35 AM), <https://www.washingtonpost.com/nation/2020/02/07/kesha-luke-defamation>.

<sup>82</sup> See Answer and Counterclaim at 31, *Gottwald v. Sebert*, 2020 N.Y. Misc. LEXIS 564 (N.Y. Sup. Ct. Nov. 18, 2014) (No. 653118/2014), NYSCEF Doc. No. 252; *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at \*7–8.

<sup>83</sup> See Shepard, *supra* note 81.

Kesha's statement that Dr. Luke raped Katy Perry was defamatory.<sup>84</sup> Because publication to one person is sufficient to support a defamation claim, her statement could constitute defamation even though the text was only sent to one person.<sup>85</sup> The Court found Kesha's text defamatory as a matter of law because Katy Perry testified in her deposition that Dr. Luke did not rape her, Kesha presented no evidence to the contrary, and accusations of rape constitute defamation per se.<sup>86</sup> Not only did Dr. Luke succeed on his defamation claim, Kesha's sexual assault counterclaims were dismissed because they were time-barred and the Court lacked subject matter jurisdiction.<sup>87</sup>

Here, even a famous white woman with considerable resources could not prevail on a defamation claim brought by her alleged abuser, a powerful man in her industry.<sup>88</sup> *Gottwald v. Sebert* demonstrates how defamation can silence survivors.<sup>89</sup> Some of the risks assault survivors face when bringing a defamation suit include: reliving the trauma of the assault throughout the litigation process, risking being subjected to retaliation, potentially facing their abuser in court and taking on serious financial burdens—not to mention the psychological trauma and emotional suffering of being disbelieved.<sup>90</sup> Because of these risks, “there is no question that defamation suits are being used to mute survivors.”<sup>91</sup> Thus, without defamation protections, the same fate is likely for ASA plaintiffs.

Even alleged abusers who lack Dr. Luke and Johnny Depp's notoriety have weaponized defamation suits when accused of rape.<sup>92</sup> In *Goldman v. Reddington*, a male college student sued his accuser, arguing she “embarked on a campaign of defamation in a systematic process of publicly and falsely

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<sup>84</sup> *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at \*6, \*9, \*21–22 (finding Kesha's statement defamatory per se, in part, because Katy Perry denied the rape in a deposition).

<sup>85</sup> *See id.* at \*24; Sweeney, *supra* note 13, at 51.

<sup>86</sup> *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at \*23, \*29–30. The lower court's finding was upheld on appeal. *Gottwald v. Sebert*, 148 N.Y.S.3d 37, 47 (N.Y. App. Div. 2021) (“Kesha's text message to Lady Gaga, that Gottwald had raped another singer, was defamatory per se.”) (citation omitted).

<sup>87</sup> *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at \*9.

<sup>88</sup> White, privileged voices have dominated the #MeToo conversation and been the most likely to be believed, leading to the exclusion of women of color and LGBT folks. *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. F. 105, 107 (2018); Sweeney, *supra* note 13, at 50–51.

<sup>89</sup> *See* Sweeney, *supra* note 13, at 50–52 (“Kesha's case shows the risks of accusing an alleged harasser.”).

<sup>90</sup> *See id.* at 51; Pauly, *supra* note 19, at 3 (“[T]he threat of being sued, and the expense of mounting a legal defense, has deterred many survivors who seek to speak out—not to mention the stress of rehashing traumatic events in court.”); *see also* Forrestal & Zuba, *supra* note 20, at 2 (“Survivors involved in a defamation battle may even be asked invasive questions under oath about what happened by attorneys representing their perpetrators, which can resurface painful memories and further traumatize them. There is also the financial cost of legal defense and payment of damages if the plaintiff wins the case.”); MacKinnon, *supra* note 16, at 4 (“Many survivors realistically judged reporting to be pointless or worse, predictably producing retaliation.”).

<sup>91</sup> Whynot, *supra* note 21, at 14.

<sup>92</sup> *See* *Goldman v. Reddington*, 417 F. Supp. 3d 163, 163 (E.D.N.Y. 2019).

branding him a rapist.”<sup>93</sup> Her public accusations on social media and to their university resulted in his expulsion.<sup>94</sup> The Eastern District of New York found his defamation claim was well-pled and allowed the lawsuit to move forward.<sup>95</sup>

## 2. Defamation and False Accusations

Some alleged abusers bring defamation suits because they were falsely accused.<sup>96</sup> Unfortunately, researchers estimate that between two and eight percent of sexual assault accusations are false.<sup>97</sup> In *Elias v. Rolling Stone, LLC*, prominent members of the Phi Kappa Psi fraternity at the University of Virginia sued *Rolling Stone* magazine after it published a false story alleging that a gang rape occurred at their fraternity.<sup>98</sup> Because the men suing were recognizable from the story, despite not being explicitly named, the Court found that their complaint was sufficient to begin formal defamation proceedings.<sup>99</sup> *Elias* demonstrates that defamation lawsuits can function as designed—to protect reputations against false allegations.<sup>100</sup> The legitimacy of some defamation claims involving false accusations of sexual misconduct, even if infrequent, remains an uncomfortable fact that feminist advocates must grapple with.

## 3. Defamation as a Tool for Survivors

However, alleged abusers do not exclusively bring defamation lawsuits. Survivors of sexual assault have also filed defamation claims when their alleged abusers have publicly denied their sexual assault allegations.<sup>101</sup> Victims argue public denials of their accusations that either explicitly or implicitly accuse them of lying are defamatory because the denials both damage their reputation and are false.<sup>102</sup> These public denials are actionable because the jury decides whether

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<sup>93</sup> *Id.* at 169 (citation omitted) (internal quotation marks omitted).

<sup>94</sup> *Id.* at 168.

<sup>95</sup> *Id.* at 170. The matter is currently stayed pending the Second Circuit’s decision in *Coleman v. Grand*, 523 F. Supp. 3d 244 (E.D.N.Y. 2021). Status Report Order, *Goldman v. Reddington*, No. 1:18-cv-03662 (E.D.N.Y. Feb. 6, 2024).

<sup>96</sup> See *Elias v. Rolling Stone, LLC*, 872 F.3d 97, 105 (2d Cir. 2017) (discussed *infra* Section I.B.3.).

<sup>97</sup> *False Reporting*, NAT. SEXUAL VIOLENCE RES. CTR. 2–3, <https://perma.cc/YBU4-AK7P>.

<sup>98</sup> 872 F.3d at 97, 103–04 (“Jackie . . . had fabricated the account of gang rape and its aftermath . . . Plaintiffs commenced this action . . . claiming defamation for the statements made in the online and print editions” and on a podcast).

<sup>99</sup> *Id.* at 105 (finding that two plaintiffs showed that the defamatory statements were “of and concerning” them and that “the complaint plausibly alleged that all Plaintiffs were defamed as members of Phi Kappa Psi under a theory of small group defamation.”).

<sup>100</sup> See *id.* at 104 (defining defamation under New York law); Megan Moshayed, *Defamation by Docudrama: Protecting Reputations from Derogatory Speculation*, U. CHI. LEGAL F. 331, 337 (1993) (“Defamation law attempts to protect individuals from speakers who harm their reputations by alleging significant and negative false facts about them.”).

<sup>101</sup> See, e.g., *Giuffre v. Maxwell*, 165 F. Supp. 3d 147 (S.D.N.Y. 2016); *Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020); *Davis v. Boenheim*, 22 N.E.3d 999 (N.Y. 2014).

<sup>102</sup> See *Giuffre*, 165 F. Supp. 3d at 150; *Davis*, 22 N.E.3d at 1002–03.

the sexual assault occurred.<sup>103</sup> Thus, if a jury finds that the alleged sexual assault occurred, then the accusation that the survivor is lying would be a false statement damaging the survivor's reputation and is, therefore, defamatory.<sup>104</sup>

For example, E. Jean Carroll sued former President Trump in the Southern District of New York "minutes after the Adult Survivors Act took effect" for both battery (when he raped her) and for defamation (when he denied her accusations).<sup>105</sup> Carroll first publicly alleged that Trump raped her in her book in 2019.<sup>106</sup> Carroll claimed Trump's Truth Social post calling her accusations are "a complete con job" and accusing her of "not telling the truth," defamed her.<sup>107</sup> The jury awarded Carroll 83.3 million dollars in compensatory and punitive damages.<sup>108</sup> Here, defamation became a weapon for the survivor, not for the abuser.<sup>109</sup>

Private citizens lacking notoriety may also be sued for defamation if they claim a purported victim of sexual assault is lying. In *Davis v. Boenheim*, two men sued Syracuse University basketball coach, James Boenheim, for statements made in response to their allegations that the team's associate head coach, Bernie Fine, molested them as children.<sup>110</sup> In statements to the media, Boenheim said that the plaintiffs were liars, motivated by financial gain, and claimed that he had never "seen or suspected anything."<sup>111</sup> Plaintiffs alleged that Boenheim saw Davis, as a pre-teen, lying on Fine's bed during the 1987 Final Four.<sup>112</sup> The New York Court

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<sup>103</sup> See *Gottwald v. Sebert*, No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at \*12 (N.Y. Sup. Ct. Feb. 6, 2020) ("If the jury ultimately finds that statements Kesha and her agents made are not false, she cannot be liable for defamation under any circumstances . . .").

<sup>104</sup> See *id.*

<sup>105</sup> Jennifer Hassan & Andrea Salcedo, *Writer E. Jean Carroll Sues Trump Under New N.Y. Sexual Assault Law*, WASH. POST (Nov. 25, 2022, 10:49 AM), <https://www.washingtonpost.com/nation/2022/11/25/e-jean-carroll-sues-donald-trump-rape/>. Because the ASA created a window for civil actions relating to sexual offenses, Carroll could bring both her battery and defamation claims under the ASA. See *Adult Survivors Act*, N.Y. C.P.L.R. 214-j (McKINNEY 2022); Dan Berman, *Trial in One of E. Jean Carroll's Rape Defamation Cases Against Trump is Delayed*, CNN (Mar. 20, 2023, 5:52 PM), <https://perma.cc/K745-8URQ> ("Carroll brought that lawsuit against Trump last November, after New York passed the Adult Survivors Act, which allows adults alleging sexual assault to bring civil claims years after the attack.").

<sup>106</sup> See Hassan & Salcedo, *supra* note 105.

<sup>107</sup> Complaint at 10–11, *Carroll v. Trump*, 650 F. Supp. 3d 213 (S.D.N.Y. 2023) (22-cv-10016). Truth Social is a social media app that the Trump Media and Technology Group created. See Brian X. Chen, *Truth Social Review: Trump's Uncensored Social App Is Incomplete*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/technology/personaltech/truth-social-review-trump.html>.

<sup>108</sup> Ximena Bustillo, *Jury Orders Trump to Pay \$83 million for Defaming Columnist E. Jean Carroll*, NPR (Jan. 26, 2024, 7:37 PM), <https://perma.cc/2692-BH7K>.

<sup>109</sup> See *Giuffre v. Maxwell*, 165 F. Supp. 3d 147 (S.D.N.Y. 2016); *Carroll*, 650 F. Supp. 3d at 213 (S.D.N.Y. 2023).

<sup>110</sup> 22 N.E.3d 999, 1000 (N.Y. 2014). Unfortunately, rape cases involving male survivors are often "significantly less believed" than cases involving female survivors. Pazzanese, *supra* note 15 (citing Schwarz et al., *supra* note 15).

<sup>111</sup> *Davis*, 22 N.E.2d at 1002.

<sup>112</sup> *Id.* at 1001.

of Appeals found the men's complaint sufficiently pleaded defamation because Boenheim's statements were easily understood by the public, capable of being proven true or false, and the broader circumstances of the statements signaled that Boenheim was stating facts, not giving his opinion.<sup>113</sup> Ultimately, the case was settled before going to trial for an undisclosed amount.<sup>114</sup> Overall, both survivors and abusers turn to defamation to defend their reputations as the consequences of sexual assault allegations play out.

### C. *New York's Anti-SLAPP Laws*

New York's anti-SLAPP statutes, which strengthen protection for defamation defendants, apply to "legal actions 'involving public petition and participation.'"<sup>115</sup> These legal actions were narrowly defined to only apply to "plaintiffs seeking public permits, zoning changes, or other entitlements from a government body."<sup>116</sup> But, in November 2020, former Governor Cuomo signed legislation expanding New York's anti-SLAPP statutes by "covering speech (or other First Amendment conduct) related to an issue of public interest."<sup>117</sup> The legislature clarified that issues of "public interest sh[ould] be construed broadly."<sup>118</sup> However, a "purely private matter" would not qualify for anti-SLAPP protections even under a broad construction of public interest.<sup>119</sup> These amendments apply retroactively to pending litigation.<sup>120</sup> Senator Brad Hoylman-Sigal, a sponsor of the legislation, explained: "This legislation would protect the First Amendment rights of New Yorkers and prevent the rich and powerful from abusing our legal system to silence their critics."<sup>121</sup>

Because public interest is broadly constructed, the legal community expects that the statutes will reach "political and social discussions."<sup>122</sup> Under New York common law, matters of public concern have "generally included 'matter[s] of political, social or other concern to the community.'"<sup>123</sup> Courts have found that political elections, "improper business practices," and accusations of sexual

<sup>113</sup> *Id.* at 1001, 1007.

<sup>114</sup> *Syracuse, Jim Boenheim Settle Slander Lawsuit Brought by Former Basketball Boys*, ESPN (Aug. 6, 2015, 5:30 PM), <https://perma.cc/CR9E-GMAZ>.

<sup>115</sup> *New York*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/anti-slapp-guide/new-york/>; see N.Y. CIV. RIGHTS LAW § 70-a (McKINNEY 2020).

<sup>116</sup> REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

<sup>117</sup> See Press Release, Brad Hoylman-Sigal, Senator, N.Y. Senate, Free Speech 'SLAPP's Back: Governor Signs Hoylman/Weinstein Legislation To Crack Down on Meritless Lawsuits Used to Silence Critics (Nov. 10, 2022) [hereinafter Hoylman-Sigal, Free Speech 'SLAPP's Back], <https://perma.cc/NNR4-P7PT?type=image>.

<sup>118</sup> N.Y. CIV. RIGHTS LAW § 76-a(d) (McKINNEY 2020).

<sup>119</sup> See *id.*; REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

<sup>120</sup> *Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21, 29 (S.D.N.Y. 2020) (applying New York law).

<sup>121</sup> See Press Release, Hoylman-Sigal, Free Speech 'SLAPP's Back, *supra* note 117.

<sup>122</sup> Theresa M. House, *New York's New and Improved Anti-SLAPP Law Effective Immediately*, ARNOLD & PORTER (Nov. 17, 2020), <https://perma.cc/9HVU-L3DE>.

<sup>123</sup> *Lindberg v. Dow Jones & Co.*, No. 20-cv-8231, 2021 WL 3605621, at \*8 (S.D.N.Y. Aug. 11, 2021) (quoting *Abbott v. Harris Publ'ns, Inc.*, No. 97-cv-7648, 2000 WL 913953, at \*7 (S.D.N.Y. July 7, 2000)).

misconduct all constitute matters of public interest.<sup>124</sup> In fact, the Eastern District of New York, applying state law, found that a November 2017 letter alleging sexual misconduct was sent “against the backdrop” of the #MeToo movement and that allegations of “sexual impropriety and power dynamics in the music industry, as in others, were indisputably an issue of public interest.”<sup>125</sup> Thankfully, because of the 2020 amendments, New York’s anti-SLAPP laws can be interpreted to apply to defamation defendants in sexual assault cases if the case is one of public interest.<sup>126</sup> But, ASA plaintiffs may be vulnerable to abusers arguing that New York’s anti-SLAPP laws do not apply because the litigation is a private matter, rather than one of public interest.<sup>127</sup>

Further, the amended law requires courts “to consider anti-SLAPP motions to dismiss based on the pleadings and ‘supporting and opposing affidavits . . . .’”<sup>128</sup> If a defamation defendant files an anti-SLAPP motion to dismiss, then the court must stay all proceedings pending a ruling on the motion.<sup>129</sup> At the subsequent anti-SLAPP motion hearing, the defamation plaintiff must show by clear and convincing evidence that “the defendant made the statement knowing it was false or ‘with reckless disregard’ as to whether it was false.”<sup>130</sup> Thus, New York effectively codified the *New York Times v. Sullivan* actual malice standard and applied it to both private and public figures for lawsuits “involving matters of public interest.”<sup>131</sup>

New York’s new anti-SLAPP laws also require the awarding of attorney’s fees if the court grants a motion to dismiss.<sup>132</sup> Additional compensatory and punitive damages may be recovered upon the defendant showing the litigation was “for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech . . . .”<sup>133</sup> In 2021, Senator Hoylman-Sigal proposed an additional bill clarifying that the expanded anti-SLAPP laws apply retroactively to cases pending at the time of its passage, but his proposed amendments have not made it out of committee.<sup>134</sup>

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<sup>124</sup> *Khalil v. Fox Corp.*, 630 F. Supp. 3d 568, 584 (S.D.N.Y. 2022) (applying New York law) (finding the 2020 presidential election was “clearly a matter of public interest . . . .”); *Lindberg*, 2021 WL 3605621, at \*8 (applying New York law) (finding improper business practices a matter of public interest); *Coleman v. Grand*, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021) (applying New York law).

<sup>125</sup> *Coleman*, 523 F. Supp. 3d at 259.

<sup>126</sup> See N.Y. CIV. RIGHTS LAW § 76-a (McKINNEY 2020).

<sup>127</sup> See N.Y. CIV. RIGHTS LAW § 70-a (McKINNEY 2020).

<sup>128</sup> See *Letter to Clients and Friends: Recent Developments in New York’s Amended Anti-SLAPP Law*, GIBSON DUNN 1 (June 1, 2022), <https://perma.cc/T24F-NXKY> (quoting S.B. S52A, 2019-2020 Legis. Sess. (N.Y. 2019)).

<sup>129</sup> See *id.*

<sup>130</sup> REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115 (quoting N.Y. CIV. RIGHTS LAW § 76-a(2) (McKINNEY 2020)).

<sup>131</sup> *Id.*

<sup>132</sup> See GIBSON DUNN, *supra* note 128.

<sup>133</sup> N.Y. CIV. RIGHTS LAW § 70-a (McKINNEY 2020).

<sup>134</sup> See GIBSON DUNN, *supra* note 128; S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2021).

## II. DISCUSSION

#MeToo sexual assault accusations are actionable under defamation law.<sup>135</sup> A false sexual assault accusation can constitute defamation per se because it imputes serious criminal behavior.<sup>136</sup> Yet, the Adult Survivors Act in its current form does not exempt survivors from defamation liability.<sup>137</sup> As such, adult survivors suing under the Act may unintentionally subject themselves to defamation lawsuits. Because the ASA provides a civil remedy for sexual assault survivors, ASA plaintiffs may be more likely to sue wealthy individuals and institutions who can pay damages as restitution for their harm and suffering.<sup>138</sup> Because the ASA created employer liability, more companies and institutions are expected to be sued during the ASA lookback window than the CVA window.<sup>139</sup> Legal observers expect numerous cases will be brought against employers, holding them liable for an employee's sexual misconduct at work.<sup>140</sup> Thus, because those same individuals and institutions that have the resources to pay damages also have the power and ability to countersue, I suspect there will be an increase in retaliatory defamation claims against survivors as they file their sexual assault claims during the ASA's revival window.

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<sup>135</sup> See *Gottwald v. Sebert*, No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at \*24–25 (N.Y. Sup. Ct. Feb. 6, 2020); *Stern v. Cosby*, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009) (holding a statement accusing someone of a serious crime constitutes defamation per se under New York law).

<sup>136</sup> See RESTATEMENT (SECOND) OF TORTS § 571 cmt. g (AM. L. INST. 1977); *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at \*11.

<sup>137</sup> N.Y. Adult Survivors Act, N.Y. C.P.L.R. 214-j (McKINNEY 2022).

<sup>138</sup> See Edward Helmore, *Flood of Sexual Abuse Lawsuits Expected in New York as New Law Takes Effect*, GUARDIAN (Dec. 4, 2022, 5:00 AM), <https://perma.cc/F2UX-DYJA> (“Some legal experts think the money issue could come to prominence as the floodgates open. ‘The only question now is does the lawyer think the client is telling the truth and does the defendant have any money . . . .’”); see also Vaughn-Holdridge, *supra* note 36 (discussing how lawyers refused to take on Child Victims Act plaintiffs if their abuser did not have money to pay damages). While many survivors may want to sue individuals or institutions who cannot compensate them for their harm, these victims will likely struggle to find counsel. See *id.*

<sup>139</sup> *Employers Will Likely Face New Litigation Challenges As New York Passes ‘Adult Survivors Act’*, FISHER PHILLIPS (June 8, 2022), <https://perma.cc/K7HA-NZ45?type=image> (“The ASA allows employees to initiate civil lawsuits against not only the alleged abuser, but also the companies that employed them under a vicarious liability or negligence standard, for example . . . .”); see Adult Survivors Act, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022). During the CVA revival window, institutions like Boy Scouts of America, the Catholic church, and several universities faced numerous lawsuits. Sean Leahman, et. al., *Child Abuse Survivors Wait for Justice, Healing as CVA Deadline Passes with Nearly 10k Lawsuits Filed*, DEMOCRAT & CHRON. (Aug. 13, 2021, 5:02 AM), <https://perma.cc/5C5G-6Q4W>.

<sup>140</sup> Ashely Cullins, *As New York Suspends Time Constraints on Sexual Abuse Claims, a Wave of Lawsuits Arrive in Courts*, HOLLYWOOD REP. (Jan. 13, 2023, 4:03 PM), <https://perma.cc/C92U-8HXD> (“What’s unique about the ASA, and how it will be different from the CVA, is there will be a lot of cases against employers who will have liability as a result of managers and senior-level people . . . .”) (internal quotation marks omitted).

The ASA leaves sexual assault victims vulnerable to legal attack, with potentially dire financial and reputational consequences.<sup>141</sup> The New York legislature can protect ASA litigants from defamation liability by enacting shield laws, defamation per se exemptions, and stronger anti-SLAPP legislation. Employing these legal strategies will help the state reach the ASA's goal of "empowering survivors across New York to use their voices and hold their abusers accountable . . . and creat[ing] an environment that makes survivors feel safe."<sup>142</sup> Until the New York legislature enacts defamation protections, New Yorkers will struggle to legally hold their abusers accountable because the looming threat of defamation may silence them.

### A. *Shield Laws*

The first way to protect survivors from defamation liability is to amend the ASA to shield ASA plaintiffs from defamation suits. Shield laws protect specific groups of people from certain legal outcomes or rules that would otherwise apply to them.<sup>143</sup> There are shield laws for journalists, abortion providers, and rape victims.<sup>144</sup> Many of these shield laws already exist in New York and were passed as recently as 2022.<sup>145</sup> For example, New York passed several laws to shield New York abortion providers from criminal liability for performing abortions on residents from anti-abortion states.<sup>146</sup> Further, New York has had a rape shield law since 1975, protecting victims from the introduction of evidence regarding their sexual history in criminal court proceedings.<sup>147</sup> New York also has one of

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<sup>141</sup> See Goldberg, *supra* note 8 (opinion piece describing Heard as enduring "industrial-scale bullying" that has "sullied her name."); Forrestal & Zuba, *supra* note 20 ("Defending against a defamation case can be costly, and not just financially.").

<sup>142</sup> See Press Release, Kathy Hochul, *supra* note 37; N.Y. Adult Survivors Act, N.Y. C.P.L.R. 214-j (McKINNEY 2022).

<sup>143</sup> See *Shield Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining shield law as a law that protects certain classes of people, specifically referencing shield laws for reporters and rape victims); *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://perma.cc/VY6Q-6XAZ> ("Interstate shield laws protect abortion providers and helpers in states where abortion is protected and accessible from civil and criminal consequences stemming from abortion care provided to an out-of-state resident.").

<sup>144</sup> See *Shield Law*, *supra* note 143; *After Roe Fell: Abortion Laws by State*, *supra* note 143.

<sup>145</sup> See N.Y. CRIM. PROC. LAW § 60.42 (McKINNEY 2024) (New York rape shield statute); N.Y. CIV. RIGHTS LAW § 79-h (McKINNEY 2024) (New York shield law for reporters); S.B. S9077A, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9080B, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9079B, 2021-2022 Legis. Sess. (N.Y. 2022) (abortion-related shield laws passed in 2022).

<sup>146</sup> *New York*, CTR. FOR REPROD. RTS., <https://perma.cc/S4DV-EKSB> (citing S.B. S9077A, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9080B, 2021-2022 Legis. Reg. Sess. (N.Y. 2022); S.B. S9079B, 2021-2022 Legis. Sess. (N.Y. 2022)).

<sup>147</sup> See N.Y. CRIM. PROC. LAW § 60.42 (McKINNEY 2024) (New York rape shield statute); Robert A. Barker & Vincent C. Alexander, § 4:66. *New York*, in NEW YORK PRACTICE SERIES—EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS (2023), Westlaw (database updated Nov. 2023) (discussing New York's rape shield).

the strongest shield laws for journalists in the country.<sup>148</sup> In passing this shield law, the legislature created for reporters “an absolute privilege from being forced to reveal information obtained or received in confidential source.”<sup>149</sup>

Clearly, the state legislature has the authority and power to enact a shield law to protect distinct groups of people from particular legal consequences.<sup>150</sup> While opponents to this shield law could argue it is a content-based regulation of speech, violating the First Amendment, proponents could counter that New York has a compelling interest in empowering survivors of sexual assault to hold their abusers accountable, and that the shield law is narrowly tailored to meet that objective.<sup>151</sup> Therefore, I see no reason why the New York legislature could not pass a shield law specifically to protect ASA litigants from defamation liability.<sup>152</sup> Because both the Child Victims Act and Adult Survivors Act were passed in the last four years, and Governor Hochul enthusiastically supported the legislation, New York should have the political willpower and ability to amend the ASA.<sup>153</sup> Presumably the sponsors of the ASA, Senator Brad Hoylman-Sigal and Assemblymember Linda Rosenthal, would be open to improving their legislation.<sup>154</sup>

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<sup>148</sup> See Barry A. Bohre, *The Reporters’s Privilege in New York: A Protected Class*, in *NEW DEVELOPMENTS IN EVIDENTIARY LAW IN NEW YORK: LEADING LAWYERS ON UNDERSTANDING RECENT CASES AND TRENDS IN EVIDENTIARY LAW* (2014), Westlaw 2014 WL 2344831, at \*3 (“The Shield Law is interpreted to provide expansive protection to reporters from being compelled to reveal information in any action, proceeding or hearing. It has been recognized as ‘the strongest in the nation . . . .’”).

<sup>149</sup> *Id.* at \*4.

<sup>150</sup> See N.Y. CONST. art. III, § 1 (West, Westlaw current through 2024) (“The legislative power of this state shall be vested in the senate and assembly.”); N.Y. CIV. RIGHTS LAW § 79-h (MCKINNEY 2022) (New York shield law for reporters).

<sup>151</sup> See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”); U.S. CONST. amend. XIV, § 1 (incorporating the Bill of Rights to the states); *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.* 502 U.S. 105, 118 (1991) (requiring a New York content-based regulation of speech to be narrowly tailored to a compelling government interest to comply with the First Amendment). Proponents could also advance Justice Frankfurter’s argument that the courts should be deferential to legislative regulation of speech. *Dennis v. U.S.*, 341 U.S., 494, 551 (Frankfurter, J., concurring) (advocating for deferring to Congressional determinations of constitutionality by asking: “Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice?”).

<sup>152</sup> See N.Y. CONST. art. III, § 1 (West, Westlaw current through Nov. 2023 amendments); see also S.B. S9077A, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9080B, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9079B, 2021-2022 Legis. Sess. (N.Y. 2022) (various shield laws protecting New Yorkers from out-of-state legal proceedings relating to abortion care).

<sup>153</sup> See Child Victims Act, N.Y. C.P.L.R. 214-g (MCKINNEY 2019); N.Y. Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022); see also Michelle L. Price, *Kathy Hochul Wins Governor’s Race in New York*, PBS (Nov. 9, 2022, 1:08 AM), <https://perma.cc/7243-Q23R>; Press Release, Kathy Hochul, *supra* note 37.

<sup>154</sup> See Press Release, Hoylman-Sigal, Senator, N.Y. Senate, NY Senate Passes Adult Survivors Act Sponsored by Senator Hoylman (June 3, 2021), <https://perma.cc/BZ7V-CFWB?type=image> (identifying Senator Hoylman-Sigal and Assembly Member Linda B. Rosenthal as the sponsors of the Adult Survivor Act).

Below, I propose a shield law for ASA plaintiffs, bearing in mind the rights and interests of both parties and balancing the “competing social interests” of protecting one person’s reputation and another’s First Amendment free speech rights.<sup>155</sup> My suggested language protects those bringing truthful sexual assault claims from bad faith defamation claims or attempts by powerful people or institutions to silence them. Importantly, my suggested language specifically targets out of court statements because statements made in a complaint and other formal court documents cannot constitute a basis for a defamation claim.<sup>156</sup> My proposed shield law also preserves ASA plaintiffs’ ability to sue abusers who publicly accuse them of lying by only shielding ASA plaintiffs from defamation liability.

Further, those wrongly accused of sexual assault will still have an avenue to sue an ASA plaintiff for defamation by meeting the requirements in section (c).<sup>157</sup> While I believe that an overwhelming majority, if not all, ASA claims will be truthful, I drafted section (c) to preserve the defamation cause of action for those wrongly accused. Section (c) creates additional procedures before an ASA defendant can counterclaim defamation. These additional procedures along with a heightened standard of review preserve a wrongly accused ASA defendant’s ability to sue, while protecting ASA plaintiffs from retaliatory, meritless claims.

Therefore, I suggest that the New York legislature amend the ASA to adopt the following language:

An Act to amend the civil practice laws and rules, in relation to claims brought during the one-year lookback window established by the Adult Survivors Act. The civil practice laws and rules are amended by adding the section below to the Adult Survivors Act as follows:

- (a) Definitions. As used in this section, the following definitions apply:
- a. “Adult Survivors Act plaintiff[s]”: One who files a claim during the one-year lookback window pursuant to the provisions of the Adult Survivors Act.
  - b. “Defamation”: Includes all statutory and common law understandings of defamation in New York

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<sup>155</sup> See LOUIS R. FRUMER ET AL., 11 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 46.01, LEXIS (database updated Feb. 2023) (“[T]he law of defamation balances two competing societal interests: protecting the individual’s reputation and encouraging free and open communication. Although defamation is primarily governed by state law, the First Amendment’s safeguards of freedom of speech and press limit state law.”).

<sup>156</sup> See *Front, Inc. v. Khalil*, 28 N.E.3d 15, 18 (N.Y. 2015) (“[I]t is well settled that statements made in the course of litigation are entitled to absolute privilege . . .”).

<sup>157</sup> Researchers believe between two and ten percent of sexual assault accusations are false. NAT’L SEXUAL VIOLENCE RES. CTR., *supra* note 97.

state.

- (b) Exemption for Adult Survivors Act plaintiffs from defamation liability: Adult Survivors Act plaintiffs who sufficiently plea pursuant to common law, statutory requirements, New York Civil Practice Laws & Rules, and any and all other applicable rules, shall not be subject to defamation liability for their underlying claims. Adult Survivors Act plaintiffs who publicly share the allegations in their filed complaint will be exempt from all statutory and common law defamation liability. An Adult Survivors Act litigant may not be sued for defamation for any other claims arising from the same underlying event alleged in the complaint, even if the litigant makes additionally or varying claims not directly alleged in the filed complaint. A defendant in an Adult Survivors Act litigation may not sue the plaintiff for any public comments directly relating to their underlying sexual assault claim under a theory of defamation.<sup>158</sup>
- (c) An Adult Survivors Act defendant may move to file a defamation counterclaim pursuant to their procedures below. An Adult Survivors Act defendant must include an affidavit stating that he or she believes the plaintiff's claims are untrue, frivolous, and/or brought in bad faith. The Adult Survivors Act defendant's affidavit must be supported by evidence. The Adult Survivors Act defendant may submit additional affidavits by other persons with first-hand knowledge of the incident, documentary, and/or physical evidence. If a judge finds by a preponderance of the evidence that the underlying Adult Survivors Act claim is untrue, frivolous or brought in bad faith, he or she may grant the Adult Survivors Act defendant's motion. Once the Adult Survivors Act defendant's motion is granted the counterclaim may move forward and the Adult Survivors Act plaintiff may be susceptible to defamation liability. Defamation claims brought by Adult Survivors Act defendants are subject to the statute of limitations.

Defamation law is designed to hold others accountable for purposeful, false reputational harm.<sup>159</sup> Thus, the ASA shield law should be narrow enough to

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<sup>158</sup> I drafted this language to enable survivors to publicly share their stories. Because statements made in court proceedings are not actionable, I wanted to ensure that survivors can speak publicly about their sexual assault without subjecting themselves to a retaliatory defamation suit. *See Front, Inc.*, 28 N.E.3d at 18.

<sup>159</sup> *See Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019); FRUMER ET AL., *supra* note 155 ("The law of defamation protects an individual's interest in reputation, that is, the

protect ASA plaintiffs from punitive defamation suits, while protecting those wrongfully accused and preserving an ASA plaintiff's ability to sue their abuser for defamation. While New York could pass a shield law without section (c), my proposed language acknowledges defamation law's nuances and complexities, while creating greater protections for ASA plaintiffs. Overall, if New York wishes to ensure that survivors' voices are heard and abusers are held accountable, the legislature should enact a shield law similar to the one above to protect ASA plaintiffs from defamation liability.

#### B. *Defamation per se exemption*

If legislators are hesitant to completely shield ASA plaintiffs from defamation liability, they could instead pass a shield law that only protects ASA plaintiffs from defamation per se liability. Defamation per se presumes the alleged defamatory statement harmed the plaintiff's reputation and does not require the plaintiff to prove it.<sup>160</sup> Because accusations of sexual assault impute criminal conduct, they constitute defamation per se under New York common law.<sup>161</sup>

By exempting ASA survivors from defamation per se liability, the New York legislature can limit the threat of defamation by making it more difficult for an ASA defendant to be sued for defamation. If ASA plaintiffs were protected from defamation per se liability, then ASA defendants would be required to show how the accusation harmed their reputation.<sup>162</sup> By taking a defamation per se claim off the table, the exemption may temper the impulses of wealthy individuals and/or institutions to retaliate by filing a defamation suit. While creating a defamation per se exemption for ASA plaintiffs will not eliminate the threat of defamation entirely, it will increase ASA defendants' burden by requiring them to prove reputational injury to successfully plea defamation.<sup>163</sup> Implementing a defamation per se exemption would also increase the cost of suing because attorneys will have one more element to prove. Thus, such an exemption would make it marginally more difficult for accused abusers to weaponize defamation.

While exempting ASA plaintiffs from defamation per se liability may appear to do little to protect survivors from being sued, it could potentially have a positive impact. For example, Johnny Depp and Dr. Luke both raised defamation

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interest in one's good name."); see also BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 35:41 (2d ed.), Westlaw (database updated May 2023) ("Damage to one's reputation is the essence and gravamen of an action for defamation: It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander.") (internal quotations omitted).

<sup>160</sup> *Lieberman v. Gelstein*, 605 N.E.2d 344, 347–48 (N.Y. 1992).

<sup>161</sup> See *Stern v. Cosby*, 645 F.Supp.2d. 258, 273 (S.D.N.Y. 2009) (applying New York law).

<sup>162</sup> See *Lieberman*, 605 N.E.2d at 347–48 (explaining that slander per se, a form of defamation, "presumes that [reputational] damages will result, and they did not be alleged or proven.").

<sup>163</sup> See *Stern*, 645 F.Supp.2d. at 272 (defining defamation in New York as requiring "injury to plaintiff" except "where a statement is so egregious that it is presumed to cause serious harm, the statement is defamatory per se – and plaintiff need not prove special damages . . .").

per se arguments in their defamation lawsuits against Amber Heard and Kesha.<sup>164</sup> Dr. Luke succeeded in winning his defamation per se claim on summary judgment, while a jury returned a verdict in favor of Johnny Depp on all three of his defamation counts.<sup>165</sup> Further, defamation per se is not a tool only available to the wealthy and famous. *Goldman v. Reddington* was an action between private citizens without fame or notoriety in which the plaintiff raised a defamation per se argument because the defendant had accused him of rape.<sup>166</sup> All this to say, both famous and unknown abusers use defamation per se lawsuits to retaliate against their victims.

Below, is a proposed amendment to the ASA, removing defamation per se liability for ASA plaintiffs:

An Act to amend the civil practice laws and rules, in relation to claims brought during the one-year lookback window established by the Adult Survivors Act. The civil practice laws and rules are amended by adding the section below to the Adult Survivors Act as follows:

- (a) Definitions. As used in this section, the following definitions apply:
- a. “Adult Survivors Act plaintiff[s]”: One who files a claim during the one-year lookback window pursuant to the provisions of the Adult Survivors Act.
  - b. “Defamation”: Includes all statutory and common law understandings of defamation in New York state.
- (b) Exemption for Adult Survivors Act plaintiffs from defamation per se liability: Adult Survivors Act plaintiffs who sufficiently plea pursuant to common law, statutory requirements, New York Civil Practice Laws & Rules, and any and all other applicable rules, shall not be subject to defamation per se liability for any statements directly related to their underlying claims. An Adult Survivors Act

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<sup>164</sup> See Complaint, *supra* note 19, at 23, 26, 28 (“Ms. Heard’s false statements are defamation per se because they impute Mr. Depp the commission of a crime . . . .”); *Gottwald v. Sebert*, 148 N.Y.S.3d 37, 42 (N.Y. App. Div. 2021) (“[P]laintiffs moved for partial summary judgment arguing that: (1) Kesha’s text to Lady Gaga was defamation per se . . . .”).

<sup>165</sup> Decision and Order on Motion, *supra* note 27, at 31–32 (“Kesha made a false statement to Lady Gaga about Gottwald that was defamatory per se . . . .”); Judgment Order, *supra* note 2, at 2 (“[T]he jury returned a verdict in favor of Mr. Depp on all three remaining defamation counts . . . .”). It is unclear if the jury found Ms. Heard’s statements defamatory per se, or if they found her statements harmed Mr. Depp’s reputation. Regardless, Mr. Depp’s lawsuit was successful. See *id.*

<sup>166</sup> See *Goldman v. Reddington*, 417 F.Supp.3d 163, 173 (E.D.N.Y. 2019) (“[T]he complaint plausibly alleges defamation per se.”).

litigant may not be sued under a theory of defamation per se for any other claims arising from the same underlying event alleged in the complaint, even if the litigant makes additional or varying claims not directly alleged in the filed complaint. A defendant in an Adult Survivors Act litigation may not sue the plaintiff for any public comments made relating to the litigation under a theory of defamation per se.

Because defamation per se is frequently alleged in defamation suits litigating accusations of sexual misconduct, the ASA should attempt to limit its impact on survivors by exempting ASA plaintiffs from defamation per se liability. Doing so will make it marginally more difficult for an ASA defendant to prove their defamation claim without completely preventing them from bringing the cause of action. Removing defamation per se liability will not prevent ASA defendants who believe they are wrongfully accused from suing—it would simply require them to prove reputational harm. Thus, this exemption would help mitigate the threat of defamation, reduce ASA defendants' impulse to frivolously sue for defamation, and help protect survivor voices.

### C. Stronger Anti-SLAPP Laws

New York's anti-SLAPP statutes are designed to protect defendants in legal actions involving "public petition and participation."<sup>167</sup> By increasing plaintiff's burden of proof and creating special procedures to enable defamation defendants to challenge the merits of the case, New York makes it more difficult for powerful people to silence critics by improperly weaponizing defamation.<sup>168</sup> SLAPP defendants can recover attorney fees and damages if they show the plaintiff sued to harass or intimidate them.<sup>169</sup>

Because accusations of sexual assault, especially those involving men in positions of power, can be construed to be an issue of public interest, scholars believe that strong anti-SLAPP litigation can protect "defamation defendants in sexual assault cases."<sup>170</sup> Anti-SLAPP statutes may help survivors access legal counsel because they can recover attorney fees for litigating the predatory defamation claim and "nip[ ] costly litigation in the bud . . ."<sup>171</sup> Further, strong anti-SLAPP laws can help survivors dismiss the defamation claim quickly, limiting the trauma of reliving their sexual assault.<sup>172</sup> Therefore, New York can

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<sup>167</sup> See N.Y. CIV. RIGHTS LAW § 70-a (McKINNEY 2022); REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

<sup>168</sup> See N.Y. CIV. RIGHTS LAW § 70-a (McKINNEY 2022); REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

<sup>169</sup> See N.Y. CIV. RIGHTS LAW § 70-a (McKINNEY 2022); REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

<sup>170</sup> Whynot, *supra* note 21, at 25.

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* ("It also allows defamation defendants to have suits against them dismissed swiftly, so they can move on from these traumatizing events."); Forrester & Zuba, *supra* note

mitigate the threat of defamation for ASA plaintiffs by amending its anti-SLAPP laws to explicitly state that civil claims made during the ASA's one-year lookback window constitute "an issue of public interest," triggering anti-SLAPP protections.<sup>173</sup> Including this explicit language would mitigate the risk of ASA survivors becoming defamation defendants and shield them from the emotional and financial burden of defending themselves in a defamation suit.<sup>174</sup>

Additionally, New York can mitigate the threat of defamation for ASA plaintiffs by passing Senator Hoylman-Sigal's bill, S.B. S9239, that further amends New York's current anti-SLAPP laws.<sup>175</sup> Specifically, the suggested amendment to paragraph (d) of § 76-a would greatly aid ASA plaintiffs turned defamation defendants.<sup>176</sup> This section would broaden the definition of "public interest" to include: "any subject relating to any matter of political, social, or other concern to the community; or . . . any subject that is of legitimate news interest; that is, a subject of general interest and of value and concern to the public."<sup>177</sup> This broad language would help protect ASA plaintiffs and others filing sexual assault claims because allegations of sexual assault, especially accusations branded as #MeToo allegations, are typically a matter of political and/or social concern to the community and are a legitimate news interest.

Further, adopting the language "subject of general interest . . . to the public" can also help protect ASA plaintiffs suing wealthy, powerful people or institutions because the public would likely be interested and/or concerned in the outcome of the litigation.<sup>178</sup> A pertinent example is E. Jean Carroll's suit against former President Trump.<sup>179</sup> If, theoretically, Trump were to sue Carroll for defamation in retaliation for her rape allegations, she would be able to bring an anti-SLAPP motion to dismiss.<sup>180</sup> Her motion would be protected by New York's anti-SLAPP laws because it would be a matter of both political and general interest to the public.<sup>181</sup> Thus, by amending § 76-a, New York's anti-

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20 ("Defending against a defamation claim can be costly, and not just financially. It can be a form of extended abuse as it drags through the legal system . . . Survivors involved in a defamation battle may even be asked invasive questions under oath about what happened by attorneys representing their perpetrators, which can resurface painful memories and further traumatize them.").

<sup>173</sup> See N.Y. CIV. RIGHTS LAW § 76-a(a)(1) ("An 'action involving public petition and participation' is a claim based upon: (1) any communication . . . in connection with an issue of public interest.").

<sup>174</sup> See Forrester & Zuba, *supra* note 20 (describing the negative impact defamation litigation can have on sexual assault survivors' emotional and financial wellbeing).

<sup>175</sup> See *Senate Bill S9239*, 2021-2022 Legis. Sess. (N.Y. 2022); N.Y. CIV. RIGHTS LAW §§ 70-a, 71, 76-a, (MCKINNEY 2022).

<sup>176</sup> See S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Discussed *supra* part II.B.

<sup>180</sup> See N.Y. C.P.L.R. 3211(g)(2) (MCKINNEY 2022) (outlining proceedings for a motion to dismiss in cases "involving public petition and participation.").

<sup>181</sup> See *id.*; N.Y. CIV. RIGHTS LAW § 76-a(a)(1) (MCKINNEY 2022).

SLAPP laws would apply to ASA plaintiffs and limit retaliatory defamation lawsuits against sexual assault survivors.<sup>182</sup>

However, because defamation is a tool wielded by both survivors and abusers, some may wonder if New York's anti-SLAPP laws could negatively impact Carroll's ability to sue Trump for defamation if he accuses her of lying about the rape. While Trump could file a motion to dismiss Carroll's defamation claims under a theory that the action involves "public petition and participation," as long as Carroll shows her lawsuit has "a substantial basis in fact and law," her case will not be dismissed.<sup>183</sup> Thus, the success of New York's new anti-SLAPP laws may largely depend on how courts interpret this substantial basis standard in the context of sexual assault cases.<sup>184</sup>

To avoid court interpretation of the substantial basis standard that would weaken a sexual assault survivor's ability to sue their abusers, New York should adopt Senator Hoylman-Sigal's proposed amendment that defines substantial bias and explicitly adopts it as the pleading standard in sexual assault defamation suits.<sup>185</sup> The bill clearly defines substantial bias as: "A heightened pleading burden, greater than that of plausibility, cognizability, [sic] or reasonableness and requiring a demonstration of a probability in prevailing on the claim."<sup>186</sup> Adopting this definition would mean defamation plaintiffs must demonstrate that they can likely prove their claim.<sup>187</sup> Research suggests New York state courts would essentially "demand to be presented with a factual backdrop supported by persuasive evidence" when applying this standard at an anti-SLAPP motion hearing.<sup>188</sup> Adopting this definition of the substantial basis standard would increase the risk of suing an ASA plaintiff for defamation by making it more

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<sup>182</sup> See N.Y. CIV. RIGHTS LAW §§ 76-a, (McKINNEY 2022); S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022).

<sup>183</sup> See S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022); see also REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

<sup>184</sup> See Daniel Novack & Christina Lee, *What is a "Substantial Basis" under New York's Anti-SLAPP Law?*, N.Y. L. J. 3 (Nov. 17, 2020), <https://www.law.com/newyorklawjournal/2020/11/17/what-is-a-substantial-basis-under-new-yorks-anti-slap-law/?slreturn=20240321133557> ("On Nov. 10, 2020, New York enacted legislation intended to strengthen free speech protections by modifying its nearly 30-year-old Anti-SLAPP law. But the vitality of these new protections will depend heavily on how courts interpret a key concept in the statute—whether a plaintiff's case has a 'substantial basis.'"); see also N.Y. CIV. RIGHTS LAW § 70-a.

<sup>185</sup> S.B. S9239, 2021-2022 Leg. Sess. (N.Y. 2022).

<sup>186</sup> S.B. S9239 § 76-a (e), 2021-2022 Legis. Sess. (N.Y. 2022). Here, substantial basis refers to the basis of the defamation lawsuit. REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115 ("A defendant may file a motion to dismiss demonstrating that the legal action involves "public petition and participation," and then the burden shifts to the plaintiff to show that the lawsuit "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.") (citing N.Y. C.P.L.R. 3211(g)(1) (McKINNEY 2022)).

<sup>187</sup> Cf. N.Y. C.P.L.R. 3013 (McKINNEY 2022).

<sup>188</sup> See Novack & Lee, *supra* note 184, at 5 (arguing New York state courts already demand to be presented with factual evidence at the anti-SLAPP motion to dismiss hearing).

difficult to survive a motion to dismiss and proceed to discovery.<sup>189</sup> Further, as long as sexual assault survivors' defamation lawsuits are based on facts, and courts consider the legislative intent of New York's amended anti-SLAPP statutes—"protecting New Yorkers' free speech from vindictive bullies"—their defamation suits should not be dismissed pursuant to New York's strengthened anti-SLAPP laws.<sup>190</sup> Therefore, sexual assault survivors, including Carroll, could still sue their abusers for defamation and should not be negatively impacted by Senator Hoylman-Sigal's proposed amendment defining substantial basis as a heightened pleading standard.<sup>191</sup>

The last proposed amendment that would strengthen protections for ASA plaintiffs is Senator Hoylman-Sigal's suggestion that the anti-SLAPP statutes apply retroactively "to actions and proceedings pending or filed on or after such effective date."<sup>192</sup> If this bill were passed, all ASA plaintiffs would benefit from anti-SLAPP protections because the laws would apply to pending proceedings.<sup>193</sup> Interestingly, Kesha, the sexual assault survivor and defamation defendant discussed earlier in this Note, is currently trying to raise this issue to the New York Court of Appeals.<sup>194</sup> Senator Hoylman-Sigal even moved to submit an amicus brief asserting it was the legislature's intention for the law to have a retroactive effect.<sup>195</sup> Although this Note focuses on protecting ASA plaintiffs specifically from defamation, clearly, the strengthening of New York's anti-SLAPP statutes would have the effect of increasing protections for all sexual assault survivors seeking justice. Strengthening New York's anti-SLAPP laws would help create a legal system that protects survivors, rather than leaving them vulnerable to further trauma, humiliation, and stress.<sup>196</sup>

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<sup>189</sup> See REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115 ("The updated law makes it easier for a defendant to obtain dismissal of a SLAPP suit.").

<sup>190</sup> See Press Release, Hoylman-Sigal, Free Speech 'SLAPP's Back, *supra* note 117 (illustrating a legislative intent to hold the wealthy and powerful accountable for abusing the legal system).

<sup>191</sup> See S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022).

<sup>192</sup> *Id.*

<sup>193</sup> See *id.*; Kaplan et al., *supra* note 34.

<sup>194</sup> See GIBSON DUNN, *supra* note 128.

<sup>195</sup> *Id.* Unfortunately, his motion to file an amici brief was denied. *Gottwald v. Sebert*, No. 2023-43, 2023 WL 2576855 (N.Y. Mar. 21, 2023).

<sup>196</sup> See Whynot, *supra* note 21, at 25 ("Most importantly, these [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."); Forrestal & Zuba, *supra* note 20 ("Perpetrators sometimes use defamation lawsuits as a tool to further harm victims. Defending against a defamation claim can be costly, and not just financially. It can be a form of extended abuse as it drags through the legal system. Lawsuits take up time and energy. They require the defendant's attention and often cause stress. Survivors involved in a defamation battle may even be asked invasive questions under oath about what happened by attorneys representing their perpetrators, which can resurface painful memories and further traumatize them.").

## CONCLUSION

Adult survivors of sexual assault are vulnerable to defamation counterclaims if they bring suit under New York's Adult Survivors Act. As American society grapples with the implications and consequences of the #MeToo movement, courts and legislators are scrambling to make tangible legal changes to address the civil and criminal issues arising from widespread sexual misconduct. The Adult Survivors Act shows New York recognizes how the previous statute of limitations effectively silenced survivors by forcing them to bring claims within too narrow of a window. Because politicians lauded this Act as a victory for survivors' rights and appear to be amenable to helping survivors, I believe the legislature would be open to strengthening the ASA to enable more survivor voices to be heard. Unfortunately, so long as the threat of defamation looms, adult survivors will be discouraged from speaking out. Thus, if New York were to exempt ASA plaintiffs from defamation per se liability or pass a shield law completely protecting ASA plaintiffs from defamation liability, while simultaneously strengthening the state's anti-SLAPP laws, New York could help ensure those who wish to bring sexual assault claims are given their rightful day in court. Once survivors are protected from defamation lawsuits, we will finally be able to say to abusers: time's up.