

The Silent Woman: How Defamation Precedents may Push Women not to Report.

Ashlee Glaser

University of Nebraska at Kearney

Introduction.

“95% of college women do not report their rape victimization to the police. It is also important to remember that only 8% to 10% of community (not restricted to college) women’s rapes are reported to the police,” (Belknap, 2010). Over the past half a decade, movements that encourage women to come forward with their experiences and stories of sexual assault that they have been forced to endure have popped up all over the world. Celebrities and every day citizens really brought forth and pushed forward this movement of people opening up and speaking their truth. The idea behind the Me Too movement, Times Up, and similar coalitions, were to break the culture of acceptance and force the public to stop ignoring the well-known abusers in society. However, these advances have become stagnant in various instances. In specific cases involving the accusation of sexual assault by all-purpose public figures, women are being forced to think twice about going public with their claims. There are several examples of cases where women have had their reputations damaged in the public sphere by powerful men who turn around and make a variety of statements claiming the women lying, that they are only accusing them of these actions for money and fame, and a number of other damning statements.

The sexual assault survivors are meant to have legal protections, so they are not fully silenced by potential reputational damage and attacks from the public for coming forth. Libel law is meant to protect an individual’s reputation. If a person gathers that their reputation has been damaged, this law allows them to file a claim against the responsible party, asking for damages and to restore their reputation (Ross, et. al., 2019). In a variety of the public accusations, women have filed suits against their assaulter for the sexual misconduct and defamation suits for attacks on the women’s character. In cases where the statute of limitation has passed for them to sue for the sexual misconduct, they sometimes only have a defamation suit to pursue. Defamation

describes a parties' false communications about another person that damages that person's reputation or brings him or her into disrepute. In defamation cases there are certain elements that the plaintiff must prove. One element is to prove the defamatory nature of the content that was the cause of the suit (Ross, et. al., 2019).

The plaintiff's case in a defamation suit changes when it comes to public figures. Although many of these women are not typically public officials, they are voluntarily putting themselves into the spotlight by coming forth and telling their stories about a well-known figure and therefore, are bringing themselves into a public controversy. Here in lies the problem with the law as it stands for sexual assault survivors. As these women come forward and bring defamation suits against their assaulters, they then become known as limited-purpose public figures.

"A person may be deemed to be a public figure if he or she receives such fame and notoriety as to become a public figure in all circumstances. Alternatively, a person may become a "limited purpose" public figure by voluntarily injecting himself into a controversy. General purpose public figures must always establish actual (*New York Times*) malice to prevail in a defamation action," (Siprut, 2011).

Public figures are believed to have an easier avenue to media and therefore an easier way to correct any damage to their reputation. Because of this and precedents that were set by previous court decisions, public figures must prove that fault on the part of the defendant was at the level of actual malice, which would mean proving that the statement was false or made with reckless disregard for the truth (Ross, et. al., 2019).

These laws are forcing women to continue to endure attacks on their character with hardly any chance of reparation from the responsible party, have an adverse effect on the steps

that the previously mentioned movements are taking. Through the examination of various cases, it is clear that the half a century old, Actual Malice standards of proof for libel suits made by sexual assault victims who speak up and tell their stories, are outdated and should be revised to protect victims and promote the continuance of women coming forward with their stories.

Background.

Many women have more than one reason that they do not come forward to tell their stories of sexual assault, rape, and harassment. One of the reasons is that the attacks that women will endure are typically well-known to most people. “[...] the media frequently portray date rape complainants as “lying, vindictive shrews” and date rape defendants as “folk heroes—innocent boys tragically charged by vindictive women” (Gruber, 2009, p. 598). This significant adherence to rape myths by the public, media, jurors, and the criminal legal system makes it practically impossible to unravel the highly layered “truth” about false rape allegations, and poses real, negative impacts for victims, who are all too often assumed to be making false reports,” (Belknap, 2010). It is clearly not uncommon for the character of these women to be questioned and then broken down. Then you factor in the cases of powerful men and the coverage is that much more intense on these women.

One of the most recognized cases of a woman whose reputation was completely tarnished through media coverage and having her name thrown into the spotlight is that of Monica Lewinsky. A former intern of the White House during the Clinton administration, Lewinsky is known for having had an affair with former President Bill Clinton. Lewinsky then had to endure a very public impeachment trial on Clinton along with various public attacks on her character. Clinton was questioned over and over on whether or not he had “inappropriate sexual contact”

with Lewinsky, (Statements, 1998). While this relationship was consensual, the fact of the matter is that Lewinsky's reputation was completely tarnished from this incident. This goes to show what a public attack on one's character can do. Lewinsky is known all over the world and it took a very long time for her to regain some positive notoriety. This is important to recognize when it comes to what sexual assault victims will endure when they come forth with their accusations and is a part of why these laws should be reexamined.

Silencing Limited-Purpose Public Figures.

The now infamous, Bill Cosby, may have been one of the most substantial recent examples of how defamation laws are silencing women. Cosby is now serving up to ten years in prison after around 60 women came forward with their sexual assault allegations against him. For some, the statute of limitation had passed for these women to file suit for the assaults, but they could claim defamation of their character for Cosby's statements regarding the women's accusations.

During this period, seven women filed defamation suits against Cosby for branding them liars after they came forward with their accusations and endured public attacks on their character. Cosby denied all charges and fought the claims in the suit. The plaintiffs all settled out of court. No specific information regarding the details of the settlements were released, however, it is public knowledge that Cosby's insurance company, American International Group (A.I.G.), is who the plaintiffs made the settlements with and that Cosby maintains his innocence in the case and made claims to pursue countersuits against all of the women still, (Bowley, 2019).

It is likely that if Cosby's insurance group had not settled out of court, that the defamation suits would have been dropped as these women now have a higher burden of proof as

limited-purpose public figures. If the women were allowed to sue for defamation as private figures, they “would only have to prove that the defendant acted negligently in making false statements about her, i.e. by not exercising reasonable care to determine if the statements were false,” (Due, 2017).

Since the McKee case, some of the other defamation cases against Cosby have been decided in favor of the women and some still in Cosby’s favor. This means that, not only do these women have a greater burden of proof; there is also a lack of consistency with how these cases are decided, despite similar circumstances for most of these women.

Another case that has recently been filed is, *Carroll v. Trump* (2019). In Carroll’s case, her allegations put her directly into a major public controversy as she is suing the current President of the United States.

A lawsuit filed Monday in New York Supreme Court accuses Trump of making a "series of false and defamatory statements" by denying the incident, saying he had never met Carroll and suggesting that her accusation was politically and financially motivated. "Trump knew these statements were false; at a bare minimum, he acted with reckless disregard for their truth or falsity. Trump had recognized Carroll on sight at Bergdorf Goodman," the complaint states, referring to the store where Carroll says the attack took place in a dressing room sometime between the fall of 1995 and spring 1996. "He knew who she was when he raped her, and he knew who she was in 2019," it adds. "After he lied about attacking her, he surrounded that central lie with a swarm of related lies in an effort to explain why she would invent an accusation of rape. To do so, he smeared her integrity, honesty and dignity — all in the national press." (Dwyer, 2019)

Carroll believes that she has the ability to win the suit because of the claims that the defendant knowingly made false statements regarding her reputation and knowledge of knowing her; but by filing this suit, Carroll is now enduring attacks from the public along with members of the White House. Carroll will have to prove that Trump acted with reckless disregard for the

truth or falsity, as she claims he did, all while undergoing very public attacks on her reputation. Although Carroll is a columnist who normally would not be considered a public figure, she is deemed a limited-purpose public figure due to the circumstances of Trump's power and does not receive the ability to fight the attacks on her character without meeting this more extreme standard of proof.

Silencing Public Figures.

There should also be consideration of a precedent to protect women who are already considered public figures by their careers or status in society. When it comes to sexual assault allegations, it is often that the men being accused are in much greater positions of power than the women themselves are.

In one case, *McKee v. Cosby (2017)*, Kathrine McKee, who had accused Cosby of rape during a 2014 interview with the New York Daily News, filed suit against Cosby when an allegedly confidential letter that was produced by Cosby's attorney in defense of Cosby was leaked and spread through news outlets all over the world. "McKee alleges that the rapid and widespread dissemination of the statements contained in the Letter defamed her, causing harm to her reputation nationally within "days, weeks or even months," (*McKee v. Cosby 2017*).

McKee has been an actress for decades and was a guest star on *The Cosby Show* at one point in time. Because of her notoriety, she is considered a public figure and the actual malice level of proof then falls upon her in a defamation case. "In July 2016, McKee filed an amended complaint in which she asserted twenty-four defamation counts pertaining to various portions of the Singer Letter. Cosby moved to dismiss McKee's amended complaint for failure to state a claim. In February 2017, the district court granted Cosby's motion," the court said, "[...] the

‘gist’ of the Letter was the author’s opinion that McKee lacked credibility and that the Daily News improperly ignored or failed to investigate publicly available information undermining her rape allegations,” (*McKee v. Cosby 2017*).

The ruling from the court created even more of a reason for women to not come forward with their allegations.

The appellate judge determined that McKee had failed to meet that burden. In affirming the lower court's decision to dismiss McKee's defamation case against Cosby, the court ruled that most of the statements made in Singer's letter constituted his opinion, which was not actionable under defamation law, and to the extent the statements in the letter were not considered opinion, McKee, as a limited purpose public figure, had failed to meet that higher actual malice standard required of public figures. (Due, 2017).

These standards create a culture of fear around women sharing their stories regarding rape and sexual harassment. Another well-known defamation lawsuit is that of Ashley Judd and Harvey Weinstein. Judd claimed that in the mid-to-late 90s, Judd met with Weinstein at a hotel in Beverly Hills for a breakfast meeting that he had invited her to. Judd had hoped the meeting would lead her to landing some big roles in feature films; however, it turned out to not be a meeting and was rather a chance for Weinstein to harass her sexually. According to Judd, when she arrived at the hotel, Weinstein awaited her in a bathrobe, asked to give her a massage, and asked her to watch him take a shower. Because of a California statute, the sexual assault portion of Judd’s suit against Weinstein was dropped, however, Judd was allowed to continue to pursue a defamation suit against Weinstein.

Despite "serious discussions to play a major role in the Lord of the Rings trilogy," court documents state, Judd wasn't cast in the film. Judd says she didn't learn of a possible reason until 2017, when Jackson said in an interview that Weinstein had told him Judd was "a nightmare to work with" who should be avoided "at all costs."

The judge said Judd had "adequately stated a claim for defamation, intentional interference with prospective economic advantage, and violation of the [Unfair Competition Law]," based on her allegation that Weinstein retaliated against her, (Chappel, 2019).

Even with this judge allowing Judd to pursue her claims of defamation, the courts will still have to consider actual malice on the part of Weinstein and Judd will have to prove all standards for this. Even with this scenario, Judd may not be able to meet that burden of proof. This case of defamation may seem fairly clear and obvious; yet, it becomes very difficult for public figures to meet that standard of proof. Other public figures may opt to keep their reputation intact and not endure the public beating of their reputation.

Other Cases Supporting a Need for Change.

While these laws are most specifically hazardous to women coming forth with their stories of sexual assault, there are further cases where this public figure standing within the law needs to change.

In *Biro v. Conde Nast*, a plaintiff in the business of authenticating art sued The New Yorker and several republishers over an article about the legitimacy of his authentication methods. A limited-purpose public figure (is) required to prove actual malice, the plaintiff alleged that the New Yorker defendants "either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and

nonetheless published them" and that they "acted with actual malice, or in reckless disregard of the truth, or both." (6)

The plaintiff further alleged that the New Yorker defendants (1) failed to "investigate and determine the validity" of the allegedly defamatory statements; (2) relied on anonymous and biased sources; and (3) "ignore[d] the many other works of art which plaintiff has worked with over the years, as well as his many satisfied clients." (7) With regard to the republishers, the plaintiff alleged that they acted with actual malice "in that [they] knew or should have known" that many of the statements of fact in the Article "were false" and that they "published [the statements] ... notwithstanding that knowledge." In addition, he alleged that certain republishers either failed to remove or retract the article or published it notwithstanding pending litigation. (8)

Affirming the district court, the Second Circuit held such allegations were insufficient under the pleading standard set forth in Rule 8, which requires a complaint to contain "enough facts to state a claim to relief that is plausible on its face." (9) In so holding, the Second Circuit fell in line with decisions from the First, (10) Fourth, (11) and Seventh Circuits (12) and rejected the plaintiff's argument that Fed. R. Civ. P. 9(b) allows malice "to be alleged generally," holding that whatever the language of Rule 9(b), Rule 8's plausibility standard applies to pleading intent. (13) The Second Circuit also disagreed with the plaintiff's argument that it is "impossible" without discovery to plead facts demonstrating that a claim of actual malice is plausible. (14), (Mandell, et. al., 2017).

Even in such a case as is made in *Biro v. Conde Nast*, the burden of proof was too great despite all of the evidence that was laid out for the court.

In one case, an athlete that was not known by most sports fans sued the commissioner of the National Football League for defamation when the commissioner made claims that Vilma had created a "bounty program" that would pay Vilma's teammates for injuring players on the opposing teams. Vilma was suspended for the season and his reputation suffered with the official league, his fans, and advertisers. "Many people have never heard of Jonathan Vilma. The name may escape even the average sports fan. So how did the court conclude that Vilma was a public

figure? What analysis determined Vilma's public figure status? The answer, oddly enough, is that there was no analysis, none apparent in the court's opinion anyway. Apparently, under Court precedent, the answer was clear and obvious,” (Poorman, 2013) the courts said that Vilma had the burden of showing that the statements were made with Actual Malice (*Vilma v. Goodell, 2013*). The NFL already held a great amount of power over Vilma, yet they had much of the upper hand in this defamation case.

One major factor of all of these cases also has to do with online harassment. “A woman who is aggressively sexually harassed while walking in a public place can turn to the police. A woman who is sexually harassed on the job can turn to the Equal Employment Opportunity Commission or hire a lawyer and file suit. Neither of these women may ultimately receive justice, but there are at least government actors who are charged with offering assistance to women in these situations. When sexual harassment occurs on the Internet, however, they are on their own, as far as government actors are concerned, especially if the identities of the harassers are unknown,” (Bartow, 2009) Online harassment has been a major factor in almost every mentioned case above. It is yet another factor that should be considered when courts make the burden of proof that much more difficult in defamation cases.

Conclusion.

It is not incredibly rare that a woman is sexually harassed, attacked, or raped by a person who is known as a public official. Often times, men in positions of power will take advantage of those who do not have the same amount of power as them. Yet, many of these crimes still go unreported. Although there has been a major push for women to come forward and show that there is power in numbers, most will likely endure a major public attack on their characters.

From Bill Cosby to Harvey Weinstein to Donald Trump, women have come forward with accusations of sexual assault and been torn down by these powerful men and others all over the world. Many will never see reparations for the assault let alone receiving damages for the attacks on their character.

If a woman who is traditionally a private citizen comes forward with allegations against a powerful public figure, they then are required to prove more than if the man were not in their position of authority. These men are then given even more power to attack these women than they had before thanks to these laws. Even in the cases of women who are also public figures, the burden of proof that is required for these defamation cases is outrageous as these women are enduring attacks from various sectors and it is unlikely that they will be able to repair their reputations easily.

An examination of other defamation cases outside of the scope of sexual assault allegations also shows that there is need for an even further look into what should be required for proof in defamation cases and how public officials should differ in certain cases. The landmark case of *New York Times Co. v. Sullivan (1964)*, set the precedent of public figures needing to show actual malice. In this case, various African-American groups were fighting for civil rights and were not receiving a lot of reporting on their battles. The New York Times did, however, report on this. Leaders of this movement purchased a full page Advertorial making claims of illegal acts and wrongdoings by the Alabama police commissioner. The commissioner sued and at first won, but the U.S. Supreme Court reversed the decision of earlier courts and said that media defendants did not have enough protections from libel suits and awarding the plaintiff too easily could cut off the flow of information that is necessary in our society, (*New York Times Co. v. Sullivan, 1964*) While the decision for this case is entirely valid and completely accurate for

our democracy to stay intact, this case was decided in 1964 and it is now half a century later, so it is justifiable to say that there are various other circumstances that have changed in society and our laws should be reexamined when it comes to specific circumstances such as sexual assault and the standard of public officials burden of proof.

The courts should begin with a look into the limited-purpose public figure portion of libel laws and see what needs to change to protect victims from having their reputations destroyed. It is a good starting point and then progression can come from there.

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