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When Speech Isn't Free: Legal Barriers and Consequences of Reporting Sexual Violence

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ABSTRACT:

Incidents of sexual violence continue to be a serious problem for society. Likewise, acts of sexual violence impose severe consequences for survivors. The consequences initially begin at the onset of the survivor's journey to psychological recovery following the traumatic sexual assault. The consequences take on a unique set of characteristics when the survivor attempts to use the justice system to confront the perpetrator who committed the offense. These characteristics can transform an adversarial process into an isolated battle for the survivor. In the worst cases, the justice system empowers individuals who wish to silence survivors with free speech restrictions instead of empowering survivors of sexual violence.

When confronting an alleged perpetrator of sexual violence, survivors may have to contend with free speech restrictions that can come from school officials, police officers, and perpetrators. These restrictions can force survivors into situations where they have no choice but to cheer for their perpetrator because of their position as a cheerleader. These restrictions may result in the false imprisonment of survivors if police officers believe they have fabricated the elements of their interaction with the alleged perpetrator. These restrictions may result in alleged perpetrators maliciously using defamation laws to restrict the free speech of survivors. At each level, these restrictions can silence survivors of sexual violence and contribute to the lack of sexual assault reporting.

The legal issues found within these restrictions lead to a discussion that attempts to resolve the malicious and unjustifiable resources that individuals may use to restrict survivors of sexual violence. These resources include constitutional law, criminal law, and civil law. First, the use of free speech restrictions in schools must be inextricably linked to a legitimate pedagogical reason. Next, law enforcement agencies holding the responsibility of investigating acts of sexual violence must employ investigative methods that are conducive to an environment that is supportive of survivors. Lastly, alleged perpetrators attempting to bring a defamation action against a survivor must be held accountable if they attempt to coerce a survivor into mediating a claim by disclosing personal information about them. Above all, free speech restrictions must be clearly justified to subvert its tendency to silence survivors of sexual violence.

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Kevin M. Fleming

I. INTRODUCTION

Survivors[1] of sexual violence face an arduous journey after being subjected to sexual violence. During this journey, survivors have to contend with the trauma of the sexual assault while struggling to reclaim their life in a society that may disapprove of their actions prior to and during the assault. In the worst of these cases, the disapproval can lead to a high level of scrutiny that may result in legal consequences for survivors. The high level of scrutiny can come from school officials, investigating police officers, courts, and perpetrators of sexual violence. As a result of that scrutiny, survivors can have their free speech restricted by school officials, suffer arrest from police officers, incarceration by judges, and defamation claims from individuals they allege to have sexually assaulted them. At each level, these legal consequences have a tendency to *chill* the free speech of survivors, which ultimately silences their freedom to speak out against their attacker.

Beyond the chilling effect, these restrictions can come at a time when a survivor is trying to recover from physical and psychological consequences of the sexual assault. As a result of these restrictions, survivors could potentially experience a series of adverse situations when confronting their assailant in the justice system. Furthermore, these situations are a consequence of the misuse of constitutional law, criminal law, and civil law. The misuse of these laws can be attributed to a justice system that inadequately prepares school officials, police officers, defense attorneys, prosecutors, and judges who are responsible for resolving these types of offenses. For example, this insufficient preparation can result in overbearing police officers, overzealous

[1] The term "Survivor" is used to represent all victims of sexual violence throughout this paper.

defense attorneys, and prosecutors who fail to convict the alleged perpetrator.[2] When these failures occur, the recovery process for a survivor can be impeded by the legal consequences of reporting sexual violence.

In the end, this note argues that the justice system contains three areas of law that actively and passively contributes to failures in reporting acts of sexual violence. For example, school officials can use constitutional law to restrict a student's free speech, law enforcement officers can use criminal law to punish citizens, and alleged perpetrators can use the civil justice systems to bring defamation claims against citizens. The use of these laws ultimately impacts survivors of sexual violence by subjecting them to free speech restrictions, tort liability, and in the worst cases, incarceration. This all occurs without providing survivors with the right to freely confront the individual they allege to be the one who perpetrated sexual violence against them. Above all, survivors of sexual violence will not be able to seek the necessary treatment to appropriately cope with the assault if they cannot discuss the act of sexual violence. (Part I and II)

The first area of law begins with constitutional law and occurs in institutions of education. Instances of sexual violence have a unique impact on survivors while they are in an educational environment. In these particular cases, the act of sexual violence may not occur under the authority of school officials, but the subsequent consequence of the sexual assault affects the survivor once they return to school activities. Once a survivor returns to an educational environment, they may find their right to confront the alleged perpetrator restricted by school officials. Although the First Amendment protects against certain restrictions, school officials are allowed to obstruct the free speech of a survivor if it invokes a *substantial disruption* to the school's work. Although school officials retain the right to restrict certain student acts,

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[2] David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System,* 87 J. CRIM. L & CRIMINOLOGY 1194, 1195 (1997).

they must only restrict them if there is an actual disruption to a pedagogical activity. Likewise, school officials should formulate a structured plan that empowers survivors once they return to an educational environment. Following this method would increase the likelihood of survivors reporting the offense, curb the cycle of sexual violence, and contribute to a healthy recovery for the survivor (Part III).

Although survivors may have their speech restricted through the use of constitutional law, they can have their liberty revoked through the use of criminal law. Survivors of sexual violence can be met with hostility when they decide to report the offense to the police.[3] The basis for this hostility is rooted in myths related to the characteristics of the sexual assault. Moreover, these myths may influence the investigating officer's treatment of the survivor as well as the survivor's account of the offense. If the investigating officer believes the survivor has fabricated the offense, they retain the authority to arrest and charge the survivor with falsely reporting a crime. Although this is a necessary practice, this method is overly used in sexual assault investigations, which can erode public trust and severely damage and silence survivors. Law enforcement agencies have minimized these damaging situations by applying investigative policies that support survivors of sexual violence. In addition, applying these investigative guidelines will reduce the amount of unnecessary trauma survivors are subjected to during investigative interviews. Above all, employing these guidelines across police departments would increase public trust and a survivor's willingness to report the offense to law enforcement (Part IV).

While survivors can have their speech restricted through the use of constitutional law and their liberty revoked through criminal law, they can also be held liable for their allegations

[3] Anderson, *supra* note 7, at 932 (Anderson underscores the idea that the police may persuade the victim to withdraw the complaint by highlighting the likelihood of a grueling cross-examination from the defense and an unsuccessful trial).

through defamation claims. When survivors of sexual violence become defendants in defamation claims, several issues arise. The first issue is a result of the limited resources survivors have to establish an adequate defense. Next, complainants can overtly use defamation claims as a means to intimidate, control, and coerce the survivor into recanting their allegations. Furthermore, if the survivor has the necessary resources to wage an adequate defense, they are unable to protect their sexual history from disclosure. Lastly, survivors of sexual violence are often unable to hold the complainant to a higher burden of proof because courts find them to be private plaintiffs as opposed to public officials. Therefore, survivors of sexual violence need increased protection and adequate defenses when defending their allegation of sexual violence in a defamation case (Part V).

The malicious and unjustified use of constitutional law, criminal law, and civil law can discourage survivors from reporting sexual violence. The failure to report these acts can impede the recovery of a survivor and ultimately empower perpetrators of sexual violence by failing to hold them accountable. To reduce these damaging situations, society must redefine the way it responds to survivors of sexual violence. First, school officials must redefine a *substantial disruption* and create plans that empower survivors once they return to the educational environment. Next, police departments should educate law enforcement officers regarding the dynamics of sexual violence, they must adopt policies that empower survivors through the investigative process, and if the individual is believed to have fabricated an allegation of sexual violence, the department should use alternatives to prosecution like restorative justice. Lastly, defendants in defamation cases should be shielded from having their privacy arbitrarily exposed and complainants should be held to a higher burden of proof if they have been previously convicted of a crime of moral turpitude. Implementing these legal changes can ultimately

contribute to the recovery of a survivor by giving them the opportunity to discuss the act of sexual violence without consequences (Part VI).

II. THE IMPACT OF SEXUAL VIOLENCE AND THE FAILURE TO REPORT

Acts of sexual violence continues to be serious criminal, public health, economic, and social issue for survivors and their supporters. This continues to be a critical issue because recent information suggests that 17.6% of adult women experiencing a completed or attempted sexual assault during their lifetime.[4] Equally important, the impact of sexual violence does not stop after the assault because survivors experience physical and emotional injuries that have long-standing consequences.[5] These long-standing consequences regularly come in the form of a psychological injury.[6] This psychological injury is commonly defined as *Rape Trauma Syndrome*, which is a culmination of a survivor's experience of extreme grief, anger, drowsiness or exhaustion, physical symptoms, nightmares, phobias, and general emotional retreat.[7] While dealing with the physical and emotional consequences of the sexual assault, survivors often return to the scene of the crime, fell little emotion, and refuse or are hesitant to press charges against the alleged perpetrator.[8] While survivors deal with these substantial physical and emotional issues, they may also face legal consequences that are deeply rooted in *rape myths.*

While survivors battle the physical and emotion pain associated with sexual violence, they also have to contend with a society that has embraced myths surrounding sexual violence.

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[4] Marjorie R. Sable, Fran Danis, Denise L. Mauzy, & Sarah K. Gallagher, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. C. HEALTH 157-162 (2006).
[5] Sarah M. Guerette & Sandra Caron, *Assessing the Impact of Acquaintance Rape: Interviews with Women Who Are Victims/Survivors of Sexual Assault While in College,* 22 J. C. STUD. PSYCOL. 31, 32 (2007).
[6] Michelle J. Anderson, *Women do not Report the Violence they Suffer: Violence Against Women and the State Action Doctrine,* 46 VILL. L. REV. 907, 922 (2001).
[7] *Id.*
[8] *Id.*

Sexual assault myths can work to cloud a survivor's judgment and perception of institutional reactions to the sexual assault they experienced. These reactions can lead survivors to the conclusion that they will not be taken seriously, may become the target for blame, and may face wrath from the abuser, family, or friends if they report the offense.[9] These thoughts are a result of stereotypes related to sexual violence, which hold that the suspect must be a stranger, a weapon and violence must have occurred, the survivor must have been hysterical and immediately reported the event, there must be signs of physical injury, the survivor must not have exercised bad judgment at the time of the assault, the survivor has never reported a sexual assault in the past, and the suspect was described as sick, crazy, or deranged, not respectable, credible, or likeable.[10] These stereotypes influence failures in reporting because the justice system can be skeptical of the survivor if the characteristics of their victimization do not fit into the aforementioned narrow framework.

Beyond these problems, survivors can find themselves blamed for the sexual assault because they somehow failed to recognize the predatory behavior of the assailant. This shift of blame can influence the survivor's decision to cooperate with the investigation or report future acts of sexual violence in the future.[11] Above all, this issue of reporting contributes to the percentage of survivors who do not report crimes against them, a number that is already estimated to be between 64% and 96%.[12] Further, only 2% of all violence against women is

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[9] Rosemary Gartner & Ross Macmillan, *The Effect of Victim-Offender Relationship on Reporting Crimes of Violence Against Women,* 37 CAN. J. CRIMINOLOGY 393 (1995).
[10] Kimberly A. Lonsway, Joanne Archambault, & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 43 MAR PROSC10 (2009).
[11] Kathleen Waits, *Battered Women and their Children: Lessons from one Woman's Story,* 35 HOUS. L. REV. 29, 91 (1998).
[12] David Lisak, Lori Gardinier, Sarah C. Nicksa, & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, Violence Against Women, 16(12) 1318-1334, 1331 (2010).

reported on college campuses.[13] Some of the reported reasons for not reporting sexual violence include the breach of their privacy, loss of possessions and social status, increased financial obligations, increases in family tension and stress, and the possibility of retaliatory violence.[14] Despite these issues, survivors of sexual violence can often feel powerless about their situation and misperceive that the offense is their fault.[15] Imposing the type of restrictions that have been recently imposed on survivors does not increase the likelihood that they will discuss acts of sexual violence in order to obtain treatment or justice. This lack of reporting reinforces the behavior of perpetrators of sexual violence by allowing them to commit these acts without detection or intervention. Most notable, is the fact that failures in reporting can result in additional acts of sexual violence.

If a survivor decides to report an act of sexual violence, the justice system can respond in a way that can disrupt their ability to properly cope with the trauma associated with sexual violence. This response can occur through three areas of law. First, school officials can use the constitution to restrict the free speech of survivors in institutions of education. Second, law enforcement officers can use criminal law to punish survivors if they suspect that they have fabricated the allegation of sexual violence. Third, alleged perpetrators can use defamation laws to recover damages if they contend that the survivor has subjected them to false speech. When these laws are abused and inappropriately used, they can damage and silence true survivors of sexual violence.

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[13] Martie Thompson, Dylan Sitterle, George Clay, & Jeffrey Kingree, *Reasons for Not Reporting Victimizations to the Police: Do they vary for Physical and Sexual Incidents*, 55 J. AM. COLL. HEALTH 277-282 (2007).

[14] Caroline Akers & Catherine Kaukinen, *The Police Reporting Behavior of Intimate Partner Violence Victims,* 24 J. FAM. VIOLENCE 159 (2009)

[15] Mary Oschwald, Mary Ann Curry, Rosemary B. Hughes, Anne Arthur, & Laurie E. Powers, *Law enforcement's Response to Crime Reporting by People with Disabilities,* 12 POLICE PRAC. & RES. 527 (2011).

III. SCHOOLS, STUDENT SPEECH, AND SURVIVORS OF SEXUAL VIOLENCE

The Landscape of Free Speech in Schools

Legal issues involving free speech saturate schools and universities, leading to academic discussions surrounding the justification for restricting students' speech. The landscape of free speech has changed since the Supreme Court affirmed the notion that schools should be institutions that teach students to be freethinking-citizens of a democracy.[16] Moreover, content-based speech regulations of student speech essentially represent thought control and official censorship, which is exactly what the First Amendment prohibits.[17] Despite these declarations, the government routinely imposes speech restrictions within the rules and curriculum of public schools and universities, in laws and policies affecting government-employee speech, in government speech subsidies, in radio and television regulations, in commercial speech regulations, and anti-harassment laws.[18] In each of these areas, the government tends to silence individuals who need their voices heard.

At the center of these discussions occurring in schools is the delicate balance between a student's right to free speech and the school's ability to control its own message while achieving its educational goals inside and beyond the classroom.[19] The schools ability to control its message is difficult to balance with the student's right to express their feelings during school-sponsored events. This is particularly complicated because students are restricted the most while

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[16] Rebecca L. Zeidel, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities,* 53 B.C.L. REV. 303, 306 (2012) (Discussing the Supreme Court's finding in *Tinker v. Des Moines Ind. Cmty. Sch. Dist.,* 393 U.S. 503 (1969)).
[17] John Fee, *Speech Discrimination,* 85 B.U.L. REV. 1103, 1104 (2005).
[18] *Id.* at 1106.
[19] Zeidel, *supra* note 13, at 306. (Discussing the distinction between a student's ability to assert their ideas inside and outside of the classroom. Zeidel notes that speech is mostly restricted inside the classroom and not as strictly restricted when students are speaking as individuals conveying their own message).

under the supervision of school officials. Nevertheless, students are entitled to freely express their views if officials do not have valid reasons for regulating their speech.[20]

Although this is the case, school officials and courts regulate the speech of students for several reasons. For example, school officials can restrict student speech for a legitimate pedagogical reason,[21] if the speech is vulgar or obscene,[22] or if the speech advocates illegal activity.[23] In either case, school officials bear the burden of proving the constitutionality of their actions when restricting speech.[24] Still, there are arguments noting that these rules allow viewpoint-discrimination,[25] force a reduction in speech rights for students participating in extracurricular activities,[26] and have ultimately reduced freedom of expression inside the classroom.[27] Of all of these arguments, the heart of the tension lies between forecasting disruption in the school and allowing students to express themselves.

Survivors of Sexual Violence, Forecasting Disruption, Extracurricular Activities, and Free Speech Scrutiny in Schools

The problems associated with disruption in schools and survivors of sexual violence recently took on a unique set of circumstances in a small Texas community. In October 2008, H.S, a student and member of the cheerleading squad at a Texas high school, was sexually

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[20] *Tinker v. Des Moines Ind. Cmty. Sch. Dist.,* 393 U.S. 503, 511 (1969) see discussion *infra* Part II. c.
[21] *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 273 (1988) see discussion *infra* Part II. c.
[22] *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 685 (1986) see discussion *infra* Part II. c.
[23] *Morse v. Frederick,* 551 U.S. 393, 410 (2007) see discussion *infra* Part II. c.
[24] *U.S. v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 804 (2000).
[25] John E. Taylor, *Tinker and Viewpoint Discrimination,* 77 UMKC L. REV. 569, 575 (2009) (Discussing the notion that *Tinker's* substantial disruption test allows schools to restrict speech based on its message)
[26] Zeidel, *supra* note 13*,* at 342-343. (Discussing the impact that *Bethel,* 478 U.S. 675, *Morse,* 551 U.S. 393, and *Tinker,* 393 U.S. 503 have on student speech during extracurricular activities and its likeness towards restricting student Fourth Amendment rights, and its contradictory impact on the educational goals of extracurricular activities and public schools).
[27] Louis P. Nappen, *School Safety v. Free Speech: The Seesawing Tolerance Standards for Student's Sexual and Violent Expressions,* 9 TEX. J. C.L. & C.R. 93, 96 (2003) (Discussing cases relying on material and substantial disruption to restrict free speech in schools after *Tinker*).

assaulted by two classmates at a private party. The two suspects were arrested and charged with criminal sexual assault. They were both removed from regular classes and extracurricular activities, but allowed to return after a grand jury declined to indict them on the charges.

In February 2009, H.S., as a cheerleader, refused to cheer for one of her attackers as he shot free throws during a basketball game. H.S. refused by folding her arms or sitting on the sideline without disturbing or disrupting the event. After H.S.' refusal to cheer, school officials directed H.S. to cheer for her attacker or leave the game. H.S. decided to leave and she was removed from the cheerleading squad. After leaving the game, H.S. was officially removed from the cheerleading squad, but allowed to return the following school year.[28]

H.S. subsequently brought an action against the school district and officials directly involved in her removal from the cheerleading squad. However, the Eastern District court in Texas dismissed her case for failure to state a claim conveying factual allegations that supported the elements of the asserted causes of action.[29] H.S. was allowed to amend the complaint, and noted that the school district disparately favored her attackers, denied her equal protection under the law because of her gender, her sexual assault report, and her protest of her attackers.[30] Again, the district court dismissed the case noting that the complaint alleged no facts that supported a finding that H.S. was denied her Constitutional rights.[31] The 5th Circuit Court of Appeals affirmed the lower court's judgment and H.S. appealed. After another review, the 5th Circuit Court of Appeals found that H.S.' First Amendment claim was not frivolous, therefore, she would not be held liable for filing a frivolous lawsuit. H.S. appealed again to the Texas Supreme

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[28] *Doe v. Silsbee Ind. Sch. Dist.,* No. 10-40319, 2011 WL 4056739, at *423 (5th Cir. Sept. 12, 2011).
[29] *Id.*
[30] *Id.* at 424.
[31] *Id.*

Court, but *certiorari* was not granted.[32] The court's finding that a survivor must cheer for her attacker is a dubious proposition rooted in the idea that students participating in school-sponsored events are afforded less protection than other students.

In this instance, the restriction of student speech occurred during a school-sponsored extracurricular activity, which is not necessarily unique to athletic teams. In contrast, these activities may also include newspapers, performance groups, cheerleading squads, clubs, and student government.[33] Although these events are not subject to the same control as events taking place in the classroom, they do involve significant school resources including facilities and instruction, and they also serve educational goals.[34] For this reason, courts treat extracurricular student speech as curriculum-like, school-sponsored speech, or individual speech under *Tinker*.[35] Because of this, students engaging in extracurricular activities are often given less protection than students who decide not to engage in them.[36] This is a result of the voluntary nature of extracurricular activities, which allows schools to create policies imposing sanctions on those requesting to participate.[37] In contrast, independent and unsponsored student speech can also serve as a disruption to the school's mission.[38]

The elements outlining an act of disruption arose from *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*,[39] which is a case that resulted from a group of students who wore black armbands to

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[32] *Id.* at 428.
[33] Zeidel, *supra* note 13, at 307.
[34] *Id.*
[35] *Id*. at 306.
[36] Diane Heckman, *Does Being a Student-Athlete Mean Having to Say You're Sorry: First Amendment Freedom of Speech, Apologies and Interscholastic Athletic Programs,* 293 ED. LAW REP. 549, (2013) (Discussing the increase in restrictions and requirements for student athletes as opposed to requirements for non-athletic students).
[37] Zeidel, *supra* note 13, at 306.
[38] George R. Wright, *Tinker and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L REV. 107 (2008).
[39] *Tinker,* 393 U.S. 503.

school as a symbol of their protest of the Vietnam war.[40] At the time, students were prohibited from wearing such armbands and school officials suspended them to prevent a disturbance. Lower courts agreed with the school officials, however, the Supreme Court disagreed. In coming to that decision, the court found that there was no evidence that would have led school officials to the conclusion that the armbands would result in a substantial disruption of the school's work.[41] This was the case because the students simply wore the armbands, a few students made hostile remarks to the children wearing the armbands, but there were no threats or acts of violence. Notwithstanding this landmark case, courts have continued to support the restriction of students' free speech rights.[42]

Recently, courts have dismissed the free speech of students and upheld restrictions in light of the special characteristics found in the school environment.[43] These courts have articulated the finding that school officials are not obligated to tolerate student speech that undermines the school's basic educational mission.[44] In contrast, individual student speech that is clearly the student's personal message is less likely to be restricted because the school would be exercising a strict viewpoint restriction if they were to suppress one thought while subscribing to another.[45]

There are a number of situations when school officials need to prohibit expression, however, the problem arises when they restrict speech without laying a foundation related to the disruption the speech is causing. Moreover, school officials cannot restrict speech simply

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[40] *Id.*
[41] *Id.* at 514.
[42] *Id.*
[43] See e.g. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), *Morse v. Frederick,* 551 U.S. 393 (2007).
[44] Zeidel, *supra* note 13, at 306.
[45] *Id.*

because they fear a disturbance could result from allowing certain viewpoints.[46] This notion holds to the finding that if there is cause to restrict student speech because it is a substantial disruption, school officials must show that the restriction was more than a desire to avoid the discomfort and unpleasantness associated with an unpopular view.[47] This particular act would have to materially and substantially interfere with discipline and the operation of the school.[48]

According to *Tinker,* if school officials want courts to uphold their restriction, they must develop a solid factual foundation showing the substantial disruption and material interference drawn from the student's speech.[49] Moreover, the court in *Doe* held that the school district had no duty to promote the student's message by allowing her to cheer or not cheer as she saw fit.[50] Although this is a clear assertion, some courts have held that individuals viewing certain types of student speech could easily conclude that school officials had not endorsed the speech.[51] Nonetheless, the regulation of free speech in schools is aimed to protect youth from speech that is obscene, criminal, or used to facilitate crimes against children.[52]

Although these are significant issues to regulate in schools, courts need to impose a higher level of review if school officials continue to impose regulations on the speech of students. Current information reveals that 35% of cases are strictly reviewed based on the type of

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[46] *Tinker,* 505-14.
[47] Ronald D. Wenkart, *Disruptive Student Speech and the First Amendment: How disruptive does it have to be?*, 236 ED. LAW REP. 551, 553 (2008) (discussing the importance of distinguishing between disruption and discomfort).
[48] *Id.*
[49] *Id.* at 569.
[50] *Doe v. Silsbee Ind. Sch. Dist.,* No. 09-41075, 2010 WL 3736233, at *855 (5th Cir. Sept. 16, 2010).
[51] *Dean v. Utica Community Schools,* 345 F. Supp. 2d 799 (Mich. 2004).
[52] Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 449 (2000).

speech it impacts.[53] The majority includes regulations on the electoral process, protest, commercial speech, and non-obscene but sexually explicit speech.[54] Likewise, contribution limitations receive less protection than expenditure limitations in campaign finance laws, commercial speech receives less protection than noncommercial speech, and expressive conduct receives less protection than pure speech.[55] The form of regulation also disturbs the degree of scrutiny the restriction is subject to. For example, content-based regulation receives greater scrutiny than content-neutral laws, injunctions receive greater scrutiny than laws of general applicability, and public forum restrictions receive greater scrutiny than nonpublic forum restrictions.[56]

The level of scrutiny can be attributed to the interpretation of the First Amendment, which does not require the government to be indifferent toward the communicative effects of speech, the expression of private viewpoints, or the marketplace of ideas.[57] Moreover, the application of strict scrutiny does not demand that every restricted statement have a provable and identifiable harmful consequence because no restriction would pass the test.[58] Nevertheless, the forecast of disruption standard allows the restriction of speech by keeping students from speaking critically about a school program, even if it is a discussion among students outside of the activity.[59] This allows school officials to punish students solely because they are questioning

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[53] Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers are Created Equal,* 10 FLA. COASTAL L. REV. 421, 445(2009).
[54] *Id.* at 446.
[55] *Id.*
[56] *Id.* at 447.
[57] Fee, *supra* note 14*,* at 1106.
[58] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny,* 144 U. PA. L. REV. 2417 (1996).
[59] Zeidel, *supra* note 13*,* at 336.

authority or refusing to follow direction.[60] This issue compels any student volunteering in an extracurricular event to forfeit their right to free speech.[61] In each case, forcing a student to forfeit their right to free speech because it conflicts with other viewpoints will continue to *chill* the speech of individuals that need to tell their story to recover.

Redefining Free Speech Restrictions and Empowering Survivors in Schools

School officials and courts have interpreted a number of situations and decided to restrict the free speech of students for a legitimate academic reason. Admittedly, there are legitimate reasons for restricting student speech, but the legitimate academic reason for forcing H.S. to cheer for her alleged attacker is based upon the notion that cheerleaders should first and foremost support athletes. This thought is contrary to H.S.'s idea of supporting herself as a survivor. Instead of affirming the latter and asserting the value of a survivor's speech, courts use the legal precedent from free speech cases where speech was restricted for being lewd or obscene,[62] for reasons related to privacy,[63] or speech advocating illegal activity.[64] In the case of H.S., there was nothing lewd or obscene about her speech, her speech did not violate the privacy of the perpetrator, her speech was not disruptive, and it did not advocate illegal activity.

In taking a closer look at the case involving H.S., the 5th Circuit Court of Appeals stated that H.S.'s decision not to cheer for her alleged attackers was protected speech because it was particularized a symbolic expression of her disapproval of her attacker's behavior.[65] However, the court ultimately concluded that H.S.'s speech would substantially interfere with the work of

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[60] *Id.*
[61] *Id.*
[62] *Bethel,* 478 U.S. at 685.
[63] *Hazelwood,* 484 U.S. at 273.
[64] *Morse,* 551 U.S. at 410.
[65] *Doe,* 2011 WL 4056739, at *427.

the school,[66] and the school had no duty to promote H.S.'s speech because she was acting as a cheerleader under the direction of the school.[67] Lastly, the court noted that although "these arguments did not win the day, it was error to conclude that H.S.'s First Amendment claim was 'so lacking in arguable merit as to be groundless or without foundation.'"[68] The court consequently remanded the case for recalculation of attorney's fees.

To address the issue surrounding a disruption, courts must redefine the guidelines for identifying a substantial disruption and school-sponsored speech in schools. In these cases, a fact-intensive analysis would reduce the likelihood of schools punishing or suppressing extracurricular student speech.[69] When applying the facts involving H.S., it is noteworthy that her silent protest was not a disruption to the basketball game because the record does not show that her speech was lewd or indecent.

In contrast with *Doe,* the court found that the defendant in *Bethel v. Fraser* exhibited lewd and indecent speech that was unrelated to any political viewpoint.[70] In this particular case, the defendant, who was a high school student at the time, delivered a speech nominating a fellow student for elective office at the school. The speech was given at a voluntary assembly that was held during school hours as part of a school-sponsored educational program. The assembly was comprised of approximately 600 students and many of them were 14-year-olds.[71]

Prior to giving the speech, the defendant discussed the content with several teachers and two of them advised him that it was inappropriate and should not be given. Despite this, the student delivered the speech and referred to his candidate in "terms of an elaborate, graphic, and

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[66] *Id.* (Citing to *Tinker*).
[67] *Id.* (Citing to *Hazelwood*).
[68] *Id.*
[69] Zeidel, *supra* note 13, at 333-334. (Discussing *Dean v. Utica Cmty. Sch.,* 345 F. Supp. 2d. 799 (E.D. Mich. 2004) and *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270 (1988)).
[70] *Bethel,* 478 U.S. 675.
[71] *Id*.

explicit sexual metaphor."[72] As a result, some of the students hooted and yelled during the speech, some of the students simulated sexual activities that were alluded to in the speech, and others appeared to be confused and embarrassed. The principal of the school suspended the student for two days and the court held that the school district acted within its permissible authority.[73]

With this conclusion, the court asserted that the First Amendment does not prevent school officials from determining how vulgar and lewd speech, such as Fraser's speech, would undermine the school's basic educational mission.[74] Lastly, the court noted that vulgar speech and lewd conduct are entirely inconsistent with the values of public school education, therefore, the First Amendment does not protect this type of speech.[75]

In highlighting a distinction with this case, H.S.'s involvement as a cheerleader did not have a significant impact on the viewers of her speech. The issue of a significant impact is noted in the dissenting opinion of *Hazelwood v. Kuhlmeier*, where Justice Brennan articulated that student speech "is more likely to disrupt a curricular function when it arises in the context of a curricular activity…thus, under *Tinker*, the school may constitutionally punish the budding political orator if he the disrupts calculus class but not if he holds his tongue for the cafeteria."[76]

In *Hazelwood*,[77] several high school students were members of a Journalism II class and they published an article describing three students' experience with pregnancy and another article discussing the impact of divorce on students of the school. Prior to the articles being

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[72] *Id.* at 676.
[73] *Id.* at 686.
[74] *Id.*
[75] *Id.*
[76] *Hazelwood,* 484 U.S. at 283. (Dissenting opinion by Justice Brennan, Justice Marshall, and Justice Blackmun articulating that *Tinker* would have led to a conclusion that would have allowed student speech in this case).
[77] *Id.* at 263.

published, the principal reviewed the articles and refused to allow them for several reasons. First, the principle noted that the writers of the articles were unable to completely keep the identity of the students confidential. Next, the principal thought that the content of the article was inappropriate for some younger students because it contained references to sexual activity and birth control. Lastly, the principal was concerned about a story that was critical of a student's parents and he believed the parents should respond to the remarks or consent to their publication.[78]

In this case, the court looked to each of the principal's arguments and analyzed them. In doing this, the court found that the students of the school would have easily identified the pregnant students through an easy process of deduction.[79] Likewise, the court noted that the stories would infringe upon the privacy interests of the students' boyfriends and parents because they were discussed, but they were not given the opportunity to consent to the publication or respond to it.[80] Lastly, the court found that the stories did not contain graphic accounts of sexual activity, however, the subjects of the articles did comment on their sexual history and the non-use of birth control.[81] This led the court to the conclusion that the principal was reasonable in foreseeing that the discussion was inappropriate for many of the 14-year-old students and their younger brothers and sisters.[82] As a result, the court found that the principal acted within his power by objecting to the publishing of those stories, thus, there was no violation of the First Amendment.[83]

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[78] *Id.*
[79] *Id.* at 274 (1988).
[80] *Id.*
[81] *Id.*
[82] *Id.* at 274-275.
[83] *Id.* at 276.

Unlike *Hazelwood*, the defendant in *Doe* did not violate several of the elements that led the court to the conclusion that the student's speech was not protected. First, Doe's speech did not convey content that was inappropriate for younger students that were present because it did not feature any communication containing substance. Although the record reflects the idea that the audience would have been aware of the reason for her protest, Doe did not verbally convey details of the assault or exhibit any behavior mocking the subject of her protest. Instead, Doe quietly folded her arms or sat by the cheerleading sponsor.[84]

Next, the privacy of her attacker was an issue of concern because H.S. only protested when he was the subject of cheers.[85] Nevertheless, this is easily resolved because the subject of her protest had already been identified in news publications, police reports, and court proceedings.[86] Therefore, this matter had already entered the public arena and individuals who were present would have been aware of the relationship between Doe and the subject.[87] This awareness would alleviate concerns for the privacy of the subject because he had no privacy at that point.

Based on the defense's argument in *Doe*, it is important to note that school officials are concerned about their status as a supporter of a student's particular speech.[88] Although school officials retain the authority to compel against and discipline students for acts that are immoral, however, if H.S.'s speech was not immoral and if her viewpoint would have coincided with the viewpoint of school officials, she would have been allowed to continue her protest. This form of viewpoint discrimination is what the First Amendment prohibits.[89] Similarly, the school officials

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[84] *Doe,* 2011 WL 4056739, at *424.
[85] *Id.*
[86] Amy Collins & Blair Ortmann, *Silsbee football players free on bond in cheerleader rape case*, BEAUMONT ENTERPRISE, Oct. 21, 2008, http://www.beaumontenterprise.com/news/article/Silsbee-football-players-free-on-bond-in-769612.pdf.
[87] *Doe,* 2011 WL 4056739, at *428.
[88] *Id.* at *427.
[89] Fee, *supra* note 14*,* at 1124. (Citing *Texas v. Johnson,* 491 U.S. 397, 414 (1989)).

restricting her speech had little to no involvement in cheerleading or the game as they held positions of greater responsibility than cheerleading or coaching.[90]

Even if the court found that the student's speech did not deserve free speech protection, their harsh ultimatum that the survivor "cheer when others cheered or to go home"[91] speaks to their disapproval of her actions and their inability to resolve conflict in a sensitive manner. Instead of following this blueprint, school officials should engage students in dialogue to come to a conclusion that accommodates the needs of survivors of sexual violence while ultimately fulfilling the needs of the school.

The idea that the needs of the school should coincide with the needs of the student should be the cornerstone of the educational environment. In applying this notion to the needs of a survivor of sexual violence, schools should assist the survivor in properly coping with the trauma associated with sexual violence. In the case of H.S., her therapist suggested that she continue her routine to help deal with the trauma and that included cheerleading.[92] Beyond this particular instance, clinicians should encourage students and their families to work with schools to devise suitable forms of expression and schools should be open to such cooperation.[93] Without this compromise, survivors in these situations can experience *avoidance coping*, which is associated with post-traumatic stress disorder symptoms.[94] Failing to assist survivors in coping with these situations by restricting their free speech, for unsupportable reasons, ultimately contributes to failures in reporting and survivor silencing.

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[90] *Doe,* 2010 WL 3736233, at *852 (Richard Bain, Jr. held the position of Silsbee Independent School District Superintendent, Gaye Lokey held the position of Principal, and Sissy McInnis held the position of Cheerleading Sponsor).
[91] *Id.* at *853.
[92] Marc W. Pearce & Stacie Keller, *Mandatory Cheers for an Accused Rapist,* 42 J. SOC. ISS. 20, 20-21 (2011).
[93] *Id.*
[94] *Id.*

IV. FALSE REPORTING AND THE LAW ENFORCEMENT RESPONSE

Laws Addressing False Reports of Criminal Activity and Police Misconduct

Although constitutional restrictions on survivor speech can reduce reporting of sexual violence, false reporting of crimes and police misconduct is also a critical issue worthy of society's attention. When addressing false reports, issues arise because these laws can be abused by hostile and overzealous police officers lacking the appropriate training to understand the dynamics of sexual violence. Furthermore, a democracy is rooted in a citizen's right to voice their concerns about governmental action without being impeded by criminal laws.[95] Overall, allowing an extension of governmental power that criminalizes reporting a crime can erode the public trust by enforcing the belief that police officers can arrest a citizen if they believe they are falsely reporting a crime and police misconduct.

Although there is value in curbing false reports, it can have an adverse impact on survivors of sexual violence. For example, statutes that criminalize speech conveying police misconduct can suppress legitimate and truthful criticism of police officers out of fear of unwarranted prosecution.[96] Lastly, citizens with knowledge of police misconduct may fear disbelief on the part of investigating officers and may lack the necessary resources to prove their assertions in court.[97]

The criminalization of falsely reporting a crime is based upon the idea that people report crimes that never happened for illegitimate reasons. Although there has been little research in this area, it has been noted that individuals falsely report crime for several reasons. The most frequently stated reasons for falsely reporting sexual violence includes providing an alibi,

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[95] *Chaker,* 428 F.3d at 1227.
[96] *Crawley,* 819 N.W.2d at 122. (Justice Stras, Justice Anderson, Justice Paul H., and Justice JJ. Meyer dissenting)
[97] *Id.* (Quoting *Sullivan,* 376 U.S. at 279).

obtaining financial gain, protection from the consequences of other behavior, seeking revenge, or obtaining sympathy and attention.[98] The most common reasons for falsely reporting crimes like stalking include obtaining financial gain, rage and retaliation, delusions, severe mental disorders, hypersensitivity after past victimization, and gratification from victim status.[99]

In addition to malicious reporting, allegations of sexual violence may come in non-malicious ways. For example, individuals with a medical condition may genuinely believe they have been subjected to sexual violence, but the offense never occurred and they did not make it for a malicious purpose.[100] Likewise, a complainant may have suspected that they were sexually assaulted while asleep or intoxicated, but a sexual assault examination revealed that a sexual assault did not occur.[101] Despite these specific instances of false reporting, these reasons can be applied to other offenses that are falsely reported.[102]

Because there are several reasons why people falsely report crimes, several states have enacted laws that prohibit and criminalize it. These laws embody the idea that a citizen commits a crime when they knowingly convey false statements of fact.[103] The State of Minnesota defines false reporting as:

> Whoever informs a law enforcement officer that a crime has been committed or otherwise provides information to an on-duty peace officer, knowing that the person is a peace officer, regarding the conduct of others, knowing that it is false and intending that the officer shall act in reliance upon it, is guilty of a misdemeanor. A person who is convicted a second or subsequent time under this section is guilty of a gross misdemeanor.[104]

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[98] James J. McNamara, Sean McDonald & Jennifer M. Lawrence, *Characteristics of False Allegation Adult Crimes,* 57 J. FORENSIC SCI. 643, 643 (2012).
[99] *Id.*
[100] Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 130 (2006).
[101] *Id.*
[102] McNamara, *supra* note 101, at 643.
[103] *State v. Crawley,* 819 N.W.2d 94, 96 (Minn. 2012).
[104] MINN. STAT. § 609.505, subd. 1 (2013).

Although the State of Minnesota categorizes false reporting as a misdemeanor for first time offenders, other states have categorized false reporting as a felony. For example, Arkansas,[105] California,[106] Connecticut,[107] Illinois,[108] Indiana,[109] Michigan,[110] New Jersey,[111] New York,[112] Ohio,[113] Pennsylvania,[114] Tennessee,[115] and Wyoming[116] have made making a false report a felony. Other states have followed the Minnesota frame and made false reporting a misdemeanor or gross misdemeanor.

Regardless of the penalty, false reporting statutes essentially offer justice for the infliction of defamatory falsehoods and the avoidable diversion of criminal justice resources.[117] This is undoubtedly an important issue because false reports misappropriate valuable criminal justice resources and have the potential to result in the incarceration of innocent individuals. The initial diversion of criminal justice resources imposes an unnecessary burden to police departments, social services, healthcare facilities, prosecutors, defense attorneys, judges, juries, and society.

Although these laws work to deter and hold individuals accountable for falsely reporting crime, these laws create a series of issues for survivors of sexual violence. First, the defendants in these offenses are swept into the criminal justice process as a complainant, but quickly turned into a suspect if they do not fit the description of a typical complainant. Next, these laws

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[105] ARK. CODE § 5-54-122 (2013).
[106] CAL. PENAL CODE § 148.3 (2013).
[107] CONN. GEN. STAT. § 53a-180 (2013).
[108] 720 ILL. COMP. STAT. 5/26-1 (2013).
[109] IND. CODE. § 35-44-2-2 (2013).
[110] MICH. COMP. LAWS § 750.411a (2013).
[111] N.J. STAT. § 2C: 28-4 (2013).
[112] N.Y. PENAL LAW § 240.55 (2013).
[113] OHIO REV. CODE § 2917.32 (2013).
[114] 18 PA. CONST. STAT. § 4906 (2013).
[115] TENN. CODE § 39-16-502 (2013).
[116] WYO. STAT. § 6-5-210 (2013).
[117] *Crawley,* 819 N.W.2d at 111-112.

criminalize statements made by a survivor of sexual violence after they have suffered a traumatic event. Likewise, laws that allow police officials to prosecute citizens for filing a complaint against an officer have a tendency to deter a citizen's willingness to file a complaint that is lacking concrete evidence.[118] Lastly, these laws are narrowly tailored to protect a certain class of individuals while excluding others.

Myths Contributing to Arrests for False Reports of Sexual Violence

While there is cause to suspect that crimes are falsely reported, many factors may contribute to the myths surrounding sexual violence. These myths can lead to false arrests and malicious prosecution. One myth is the perception of sexual violence from men's rights activists who sensationalize statistics and news reports related to false reporting of sexual violence. For example, the blog, *Men's Rights*, asserts that false rape claims are the result of society's instilled feminist ideology.[119] Moreover, the blog cites a statistic from a former Colorado prosecutor, who claimed that as many as 45% of sexual assault claims made in Denver could potentially be false.[120] Although these statistics clearly assert that false accusations occur, they do not take into account the number of sexual assaults that are not reported. More importantly, claims like these may deter additional survivors from reporting the offense and cloud the judgment of the officers tasked with investigating these crimes.[121]

In another study, researchers reviewed 2,059 sexual assault cases and found that 7% of the allegations were in fact false reports.[122] During the research, the participating law enforcement agencies were given ongoing training and support regarding the consistent

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[118] *Chaker v. Crogan,* 428 F.3d 1215, 1222 (9th Cir. 2005).
[119] *Id.* at 917.
[120] *Id.*
[121] *Id.*
[122] *Id.*

definitions of false reports.[123] Several studies echo the aforementioned findings and note that 1-11% of sexual assault allegations are false.[124] However, some researchers continue to contend that false reports cannot be measured due to the bias and internalization of myths surrounding sexual violence.[125]

Sexual assault myths are commonly a result of stereotypes of rape that indicate the following elements are generally true in crimes of sexual violence. These stereotypes include the requirement that the suspect must be a stranger, a weapon and violence must have occurred, the survivor must have been hysterical and immediately reported the event, there must be signs of physical injury, the survivor must not have exercised bad judgment at the time of the assault, the survivor has never reported a sexual assault in the past, and the suspect was described as sick, crazy, or deranged, not respectable, credible, or likeable.[126]

Myths and stereotypes can also lead to police hostility. Police hostility towards survivors can be attributed to the belief that survivors either fabricate allegations of sexual violence from a consensual sexual encounter or they caused it by their own behavior.[127] Consequently, false arrest and malicious prosecution can be an issue for survivors of sexual violence who have already undergone a very traumatic event.[128] The last thing they need is a hostile police officer with a desire to use false reporting laws as a method of punishing a survivor. Furthermore, survivors also have to contend with the reality that a trial would likely focus on their behavior

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[123] *Id.*
[124] *Id.* at 12.
[125] *Id.*
[126] *Id.* at 13.
[127] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault,* 84 B.U.L. REV. 945, 946 (2004).
[128] John Williams, *False Arrest, Malicious Prosecution, and Abuse of Process in § 1983 Litigation,* 20 TOURO L. REV. 705, 718-719 (2004).

instead of the perpetrator or the officer.[129] Likewise, it has been articulated that women's behavior seems inherently to be subject to scrutiny and judgment.[130] However, rape shield laws withhold defense attorneys and alleged perpetrators from scrutinizing the survivor's past sexual behavior at trial.[131] If this were to be extended to police officers tasked with investigating these offenses, it would ultimately contribute to a decrease in arrests for false reporting of sexual violence. This would occur because the judgment of officers would not be overshadowed by the previous actions of the survivor.

Although these are issues worthy of attention, the criminalization of reporting crime or police misconduct has consequences when it is incorrectly used by police officers. For example, there are a number of offenses that can be falsely reported and these offenses fall outside of police misconduct and sexual violence. During a review of false reports, researchers found that these crimes can include abduction, physical assault, attempted murder, threats, arson, extortion, and carjacking.[132] Nevertheless, of all crimes falsely reported in the study, false allegations featuring an element of sexual violence made up 59.1% of the 30 false report prosecutions studied.[133] Although this number is high, the researchers asserted that there is a need for additional research in this area to explore and compare the nature of false reports.[134]

Studies like these, combined with the use of false reporting statutes can make it appear that survivors are fabricating a high rate of instances of sexual violence. This can lead police officers and society to the conclusion that there is a significant amount of false allegations of sexual violence when it is not the case. This belief can influence the behavior of officers when

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[129] Ann Althouse, *The Lying Woman, The Devious Prostitute, and other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 922 (1994).
[130] *Id.*
[131] *Id*. at 915.
[132] McNamara, *supra* note 101*,* at 645.
[133] *Id.*
[134] *Id.* at 646.

they are tasked with investigating these types of offenses and contribute to their skepticism of the survivor's statement. Likewise, society can exhibit an adverse response to survivors if they believe their allegations are false, which can lead survivors to the belief that they contributed to the offense. These issues collectively silence survivors by deterring them from reporting victimization out of fear of malicious prosecution and false imprisonment.

When reviewing the presence of sexual violence and survivor rights, one cannot ignore the presence of rape myths. The myths are based upon the assumption that alleged survivors of sexual violence falsely report offenses for nefarious reasons. In a study from 1994, occurring over a nine-year time period, researchers found that 41% of 109 reported sexual assaults were deemed to be false at a Midwest police agency. Although these reports were deemed to be false the detectives made the determination without a substantive review by the researcher or anyone else.[135] Moreover, the police department in question had the practice of offering polygraphs to survivors bringing allegations of sexual assault, which has been mostly outlawed because of its intimidating impact on survivors.[136] Above all, sensationalizing false reports of sexual violence leads to situations where police officers and society may assume that most reporters of sexual violence are falsely reporting crimes for malicious reasons.

Testing the Constitutionality of Falsely Reporting Police Misconduct Laws

The reduction of false reports is an issue worth resolving, but this has also influenced the need to reduce false reports that target police officers. The State of Minnesota is one of only a few states that have embraced this notion and prohibited falsely reporting police misconduct.

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[135] Lonsway, *supra* note 11.
[136] *Id.* at 11.

The aim of these laws is to criminalize false speech that is critical of a police officer's conduct while enforcing laws. Falsely reporting police misconduct is defined in the state of Minnesota as:

> Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer…has committed an act of police misconduct, knowing that the information is false, is guilty of a crime and may be sentenced as follows: (1) up to the maximum provided for a misdemeanor if the false information does not allege a criminal act; or (2) up to the maximum provided for a gross misdemeanor if the false information alleges a criminal act.[137]

Statutes criminalizing falsely reporting police misconduct are subject to broader analysis by courts than falsely reporting any other offense. This is the case because these laws attempt to reduce the amount of unethical citizens who "maliciously file false allegations of misconduct against officers in an effort to punish them for simply doing their jobs."[138] Also, when citizens make false complaints of police officer misconduct, they cause valuable resources to be expended investigating false claims as opposed to valid claims.[139] Lastly, these false complaints can result in unwarranted penalties being imposed on an officer who was simply doing his or her job.[140]

Despite these issues, only a few states have enacted laws that prohibit falsely reporting police officer misconduct. Outside of Minnesota, Wisconsin[141] and California[142] are the only other states that have prohibited falsely reporting police misconduct. However, California found their version of this law to be unconstitutional because it "holds citizens accountable for their

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[137] MINN. STAT. § 609.505, subd. 2 (2013).
[138] *San Diego Police Officers Assn. v. San Diego Police Dep't*, 76 Cal. App. 4th 19, 23 (1999).
[139] *Chaker,* 428 F.3d at 1225.
[140] *Id.* at 1226.
[141] WIS. STAT. § 946.66 (2013).
[142] CAL. PENAL CODE § 148.6 (2013)

knowing falsehoods, while leaving unregulated the knowingly false speech of a peace officer or witness."[143] That decision was based on the idea that these laws are viewpoint and content-based restrictions discriminating against a certain class of anti-government speech while protecting pro-government speech.[144] Said another way, statutes criminalizing false reports of police misconduct hold citizen's accountable for their false complaints, but these statutes fail to regulate any other false speech that is in support a police officer.[145] Above all, these laws hold citizens accountable for falsehoods, while leaving falsehoods made by police officers and witnesses of the misconduct unregulated.[146] Courts have doubted the rationality of these laws because they are under-inclusive in their regulation of certain speech.[147] For example, these statutes do not protect against accusations involving firefighters, paramedics, teachers, elected officials, or anyone else.[148]

There are issues related to these types of laws because they allow the state to punish a number of individuals while allowing the speech of others.[149] The Minnesota Supreme Court recently tested the constitutionality of such a statute and narrowly constructed it to make it constitutional.[150] The test was a result of *State v. Crawley,* which is a case involving the conviction of Melisa Crawley for filing a false police report. The case occurred after she informed a police officer that another officer had forged her signature on a medical release form. When the officer went to investigate, he located a witness who reported that she saw Crawley sign the release. Crawley was subsequently charged with falsely reporting police misconduct and

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[143] *Chaker,* 428 F.3d at 1226.
[144] *Id*.
[145] *Id.*
[146] *Id.*
[147] *Id.* at 1227.
[148] *Id*. at 1222.
[149] *Crawley,* 819 N.W.2d at 98.
[150] *Id.* at 108.

falsely reporting a crime. Crawley attempted to have the charges dismissed by articulating that the statute was unconstitutional because it was a form of viewpoint discrimination because it criminalized false speech that is critical of a police officer, but allowed false speech that is supportive of a police officer.[151] The Winona County District Court disagreed, and Crawley was found guilty of both counts during a jury trial.[152]

The constitutional issue is notable because statutes criminalizing false reports of police misconduct have been applied to survivors of sexual violence.[153] For example, this law was applied after an individual reported that she had been sexually assaulted by two Minneapolis police officers.[154] An internal-affairs investigation followed, and the survivor reported that she was handcuffed and sexually penetrated by one of the officers while the other held her down. Conversely, evidence noted that the officer's DNA did not match DNA recovered from the survivor. Furthermore, GPS records showed that the officer's squad car was not at the location the survivor reported during the investigation. As a result, the individual was charged and subsequently convicted of falsely reporting police misconduct.[155] Although the law worked in this instance, there is still the possibility that individuals will not report acts of police misconduct out of fear of prosecution. Additionally, these false reporting laws give officers a sense of incivility when they are exerting their authority over citizens. Lastly, this incivility can lead to police hostility, which can erode public trust and silence victims of police misconduct in addition to survivors of sexual violence that comes from police officers.

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[151] *Id.* at 98.
[152] *Id.*
[153] *State v. Farkarlun,* No. A09-2092, 2013 WL 399193 (Minn. Ct. App. Feb. 4, 2013).
[154] *Id.* at *1.
[155] *Id. at* *2.

Reducing Police Hostility and Arrests for False Reports of Sexual Violence through Adequate Training

The police response to acts of sexual violence can begin with unjustified hostility from some officers. This hostility has a great impact on the liberty of survivors. An officer of the Cincinnati Police Department recently exhibited this behavior on January 19, 2014. Prior to the incident, Jane Doe alleged that she was sexually assaulted by a cab driver after she departed a downtown nightclub. Following the sexual assault, Doe was pulled out of the vehicle by the rapist and slammed down on the ground, causing her to hit her head and go in and out of consciousness. A witness saw the survivor and notified the Cincinnati Police. The witness then allowed Doe to rest in her vehicle while they waited for an officer to arrive.[156]

Once Officer Adrienne Brown arrived, she quickly commanded that Doe "get the fuck out of the car" and grabbed a phone from Doe's hand as she attempted to contact her family.[157] Officer Brown placed Doe in the back seat of her police cruiser and drove toward the hospital, but decided to arrest Doe because she had trouble getting information from her. Officer Brown subsequently charged Doe with resisting arrest and disorderly conduct while intoxicated. Officer Brown's acts in this instance must be addressed through the use of a victim advocate who could help prevent this type of behavior because it tends to subjects a survivor to a second instance of victimization.[158] Lastly, officers should adopt the idea that survivors are being truthful until they have evidence to suggest otherwise. While this can be a difficult practice to implement, it must be done to reduce unjustified false reporting arrests and additional trauma to survivors.

Once charged with falsely reporting sexual violence, survivors have attempted to assert that their statements regarding the assault were coerced or involuntary given during the investigative

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[156] Complaint at ¶ 12, 15, *Doe v. Brown,* No. 1:2014cv00081 (Ohio S. Dist. Ct., Jan. 27, 2014.)
[157] *Id.* at ¶ 20-21.
[158] Rebecca Campbell, *Rape Survivors' Experience With the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 30, 30-31 (2006).

interview.[159] To determine if a statement was involuntary or coerced, courts examine the totality of the circumstances and its influence on the survivor at the time of the statement.[160] Courts base the totality of the circumstances on the survivor's "age, maturity, intelligence, education, experience and ability to comprehend; the lack of or adequacy of warnings; the length and legality of the detention; the nature of the interrogation; and whether the defendant was deprived of physical needs or denied access to friends."[161] Nevertheless, police interrogations can lead to survivors deciding that they no longer want to cooperate with the investigation, but at the point, it is too late.

One of the worst instances of a police interrogation resulting in an arrest of a survivor occurred on July 14, 2004. In this case, a cashier at a convenience store was sexually assaulted and robbed at gunpoint by a serial sex offender. She immediately reported the offense, underwent a sexual assault exam, and gave detailed and consistent statements to law enforcement and hospital staff. However, the lead investigator assigned to the case believed that she falsely reported the offense to cover up her own theft of the money from the convenience store. The detective ultimately launched an investigation and arrested the survivor for falsely reporting a crime and other offenses.[162]

As a result, the survivor spent five days in jail, but the charges were dropped after the serial rapist who assaulted her was captured and confessed to the offense.[163] In this case, the court took all inferences in favor of the plaintiff and concluded that the evidence in the case was not sufficient enough to "warrant a prudent man in believing that the suspect had committed an

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[159] *Farkarlun,* No. A09-2092, 2013 WL 399193, at *4.
[160] *State v. Blom*, 682 N.W.2d 578, 614 (Minn. 2004).
[161] *Id.* at 614.
[162] *Reedy v. Evanson,* 615 F.3d 197, 204 (3rd Cir. 2010).
[163] *Id.*

offense."[164] This judgment is based upon the principles of the probable cause standard, which indicates that probable cause is met when the "terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense."[165] This finding should lead investigators of sexual violence to the conclusion that they must invest their time in a thorough investigation of the sexual assault as opposed to an investigation of the survivor.

When determining that a sexual assault report is false, research suggests that a final judgment must be based upon a thorough, evidence-based investigation that concludes that the sexual assault was not attempted or completed.[166] This notion is consistent with the FBI Uniform Crime Report's method for clearing cases.[167] Herein lies a problem because many agencies categorize their reports as false without any evidence to support that the offense did not occur or the survivor lied about the incident.[168] In attempting to resolve this issue, the International Association of Chiefs of Police has provided a model for investigating sexual assault cases and determining if they are false. The report notes that:

> The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. This determination can be made only after a thorough investigation. This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated. The determination that a report is false must be supported by evidence that the assault did not happen.[169]

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[164] *Id.* at 223. (Discussing *Wright v. City of Phila.,* 409 F.3d 595, 602 (3rd Cir. 2005).
[165] *Gerstein v. Pugh,* 420 U.S. 103, 111 (1975). (Discussing *Beck v. Ohio*, 379 U.S. 89, 91 (1964). See also *Henry v. United States*, 361 U.S. 98 (1959), and *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949)).
[166] *Id.* at 15.
[167] *Id.*
[168] *Id.*
[169] Lisak, *supra* note 3, at 1319. (Discussing the International Association of Chiefs of Police 2005 report on investigating and clearing sexual assault cases).

Despite this, investigators use several issues regarding the survivor's account of the assault to inappropriately conclude that the survivor has fabricated the event. These issues involve delayed reports, inconsistencies in the survivor's statement, survivors deciding not to cooperate with investigators, the survivor concealing criminal behavior, and intoxication on the part of the survivor.[170]

Several police departments have reduced the rate of false reports of sexual assault in their jurisdiction. These police departments have utilized specialized sexual assault analysis units and female police officers for investigative interviews.[171] These changes reduced the number of false reports to 2%, which coincides with the rate of false reports for other violent crimes.[172] Lastly, the determination that a report is false should be based on a significant number of indicators. These indicators correspond with and contradict the myths surrounding sexual violence, but they do not substitute the survivor's account of the incident. The indicators include the presence of a perpetrator that is an acquaintance who is not identified by name, a survivor asserting that they physically resisted throughout the assault, and the assault only involving penile-vaginal penetration.[173]

Likewise, there are indicators related to the survivor that include an increase in the survivor's problems surrounding life and personal relationships, a documented history of mental or emotional problems, or a copycat of a high-profile crime.[174] Although these cases are a reality, police officers should exercise care when acting on suspicion of a false report because they could impose irreversible damage on a survivor that was sexually assaulted. If the report is deemed to

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[170] *Id.*
[171] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault,* 84 B.U.L REV. 984-985(2004).
[172] *Id.* at 984-985.
[173] Lonsway, *supra* note 11, at 20.
[174] *Id.*

be false, investigators and prosecutors should consult with other stakeholders like victim advocates, mental health professionals, and child advocates. Lastly, the consequences of the false report should be assessed to determine if there were significant consequences for a wrongfully accused subject or if substantial resources were extinguished investigating the allegations.[175] After doing all of these things, an officer should make a decision as to the need to arrest and file charges against a survivor.

When dealing with these types of crimes, police departments could reduce the damage they impose on survivors by training their law enforcement officers to properly deal with allegations of sexual violence. In 2003, Congress passed the Prison Rape Elimination act to reduce sexual violence in prisons. The standards of the act hold that training correctional staff in a manner that ensures that they "understand and appreciate the significance of prison rape and the necessity of its eradication" can reduce sexual violence in prisons.[176] While the Prison Rape Elimination Act acknowledges the need to train correctional staff to reduce sexual violence in prison, the Minnesota Board of Peace Officer Standards and Training Administrator's Manual makes no mention of training police officers to ensure that they understand the dynamics of sexual violence.[177]

Furthermore, the 2013-2014 Minnesota Bureau of Criminal Apprehension Criminal Justice Training and Education course catalog contains no courses for investigating acts of criminal sexual conduct.[178] These failures in adequate training and oversight can contribute to police hostility and the inappropriate understanding and investigation of crimes involving acts of

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[175] *Id.* at 22.
[176] Prison Rape Elimination Act of 2003, 42 U.S.C. § 15606 (2003).
[177] Minnesota Board of Peace Officer Standards and Training Law Enforcement Administrator's Manual: In-Service Training Policy and Reporting (2011).
[178] 2013-2014 Minnesota Bureau of Criminal Apprehension Criminal Justice Training and Education course catalog (2013).

sexual violence. To address this issue, the Violence Against Women Act has provided funds for training law enforcement officers, however, law enforcement officers and administrators need to use these resources to develop training programs for understanding sexual violence.[179] Development of these training programs could reduce police hostility, empower survivors throughout the investigative process, and reduce the number of false arrests for reporting sexual violence.

V. DEFAMATION CLAIMS AND SEXUAL VIOLENCE

Resolving False Allegations with Defamation Claims

While survivors can have their free speech restricted by constitutional law and their liberty revoked by criminal law, in some cases alleged perpetrators can pursue defamation claims against a survivor. In these cases, defamation laws work to offer some retribution for individuals who have had their reputation damaged by speech they allege to be false. [180] Although defamation lawsuits can offer retribution, they do not result in an immediate punishment for survivors who have fabricated an allegation of sexual violence, and alleged perpetrators have a difficult time clearing their name.[181] Nevertheless, individuals who are the subject of false allegations of sexual assault rightfully bring these claims against their accuser and they recover damages in some cases.[182] The basis for defamation claims for false allegations of sexual assault can certainly be understood following the defamation claim against Tawana Brawley.[183]

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[179] Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13701 (2013).
[180] *New York Times Co. v. Sullivan,* 376 U.S. 254, 267 (1964).
[181] Reesa Miles, *Defamation is More than just a Tort: A New Constitutional Standard for Internet Student Speech,* 357 Bringham Young University Education & Law Journal 393, 357 (2013).
[182] See e.g. *Pagones v. Maddox,* 295 A.D.2d 489 (N.Y. App. Div. 2d Dep't 2002) and *Steed v. St. Paul's United Methodist Church*, 728 So.2d 931 (La. Ct. App. 1999),
[183] Claire Steinman, *Defamation and False Rape Claims: Policies, Attitudes, and Suggested Reform in the United States and the United Kingdom,* 19 CARDOZO J.L. & GENDER 907, 908 (2013) (discussing

Cases that are fabricated and severely damage the reputation of innocent individuals are a perfect example of the need for defamation laws. In cases of sexual assault, survivors found to have falsely reported allegations of sexual violence should certainly be punished and individuals who are subjected to these false allegations should be vindicated. However, the problem arises when survivors of sexual violence have their case judged by their actions leading up to the assault rather than the harm they experienced.[184] Likewise, the fear of punishment could further prevent survivors who have truly been sexually assaulted from coming forward.[185] Above all, defamation cases will continue to silence survivors if courts disregard their account of the offense, if the perpetrators are allowed to exploit their privacy, and if the burden of proof isn't increased.

Survivors of Sexual Violence and Defamation Laws

Survivors of sexual violence are at a severe disadvantage because defamation laws easily apply to sexual assault allegations. First, defamation claims involving sexual violence often receive consideration in the courts because they are allegations involving crimes of moral turpitude. [186] Next, defamation is based upon the distinction between opinion and statements that are based on fact.[187] This distinction holds that opinions are protected, but statements based on fact are not.[188] In addition, statements of fact are based on *rhetorical hyperbole*, which is a method that considers the context of the statement and the receiver's interpretation of its

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Pagones v. Maddox, 295 A.D.2d 489 (N.Y. App. Div. 2d Dep't 2002), which is an instance of false reporting of sexual violence being resolved through a claim for defamation.

[184] Francis X. Shen, *How we Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform,* 22 COLUM. J. GENDER & L. 1, 34 (2011).

[185] *Id.*

[186] *Norris v. Hathaway,* 5 Neb.App. 544, 549 (1997).

[187] *Id.*

[188] *Id.*

meaning.[189] However, the *rhetorical hyperbole* test is not being used in all states, as some only determine what a reasonable reader would assume from reading the statement.[190] Lastly, a complete allegation of sexual violence would be based upon the factual statements of the sexual assault complainant, which essentially makes these claims easy to interpret. Nonetheless, most defamation cases involving sexual assault allegations never make it to court because the plaintiff fails to show damages.[191]

The failure to show damages is the theme of *Lee v. Pennington.*[192] The case occurred in 1999, after George Lee III was arrested on two counts of aggravated rape and one count of forcible rape. Several television news stations aired segments related to the arrest, and the Time-Picayune published an article about the arrest the next day, and Lee argued that it characterized him as a serial rapist. Shortly after, Lee filed a defamation petition against several city officials and media outlets claiming damages for defamation and other violations. However, Lee's petition did not survive because the court found that the publication and broadcasting of the story was a matter of public record that Lee was found guilty of.[193] Furthermore, malice could not be established because publishers reserve the right to publish articles and air newscasts to inform the public.[194] Lastly, Lee failed to support his claim of injury with credible evidence, therefore, the court found his defamation claim to be solely without merit.[195] The failure to support

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[189] *Id.*
[190] *Id.* (discussing the reasonable reader test).
[191] *Id.* at 919.
[192] *Lee v. Pennington,* 830 So.2d 1037, 1040 (Fourth Cir. 2002).
[193] *Id.* at 1045.
[194] *Id.*
[195] *Id.*

defamation claims by plaintiffs is a common occurrence in these matters; nonetheless, survivors often find few resources when defending their allegations in a defamation case.[196]

Complainants in defamation cases have also contended that the survivor subjected them to the intentional infliction of emotional distress by falsely alleging that the complainant sexually assaulted them.[197] In these cases, the court holds that the plaintiff must assert and prove four elements to establish that the defendant subjected them to intentional emotional distress. Those elements include "(1) extreme and outrageous conduct; (2) the intentional or reckless nature of such conduct; (3) a causal relationship between the conduct and the resulting injury; and (4) severe emotional distress."[198]

Courts have found that several instances of false accusations do not rise to a level high enough to warrant a claim for the intentional infliction of emotional distress.[199] Courts have noted that the intentional infliction of emotional distress must be based upon outrageous conduct.[200] However, the free speech clause of the First Amendment can be used as a defense to combat the defamation claim.[201] Nevertheless, the notion of outrageous conduct must also be linked to speech that is conveyed against a private person that can be deemed true or false. Furthermore, the inclination of outrageousness has been compared to the elements of the fighting words doctrine.

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[196] Steinman, *supra* note 188, at 919.
[197] *Routh v. University of Rochester,* No. 11-CV-6606 CJS, 2013 WL 5943926, *2 (N.Y. Civ. Ct. Nov. 5, 2013).
[198] *Id.* (Citing *Mitchell v. Giambruno,* 35 A.D.3d 1040, 1041, 826 N.Y.S.2d 788, 789 (3rd Dept.2006)).
[199] *Id.* (Noting that false accusations of criminal conduct generally do not rise to the level of extreme and outrageous conduct necessary to support an intentional infliction of emotional distress claim. Citing *James v. DeGrandis,* 138 F. Supp. 2d 402 (W.D.N.Y. 2001) and *La Duke v. Lyons,* 250 A.D.2d 969, 673 N.Y.S.2d 240 (Third Dept. 1998), and *Rivers v. Towers, Perrin, Forster & Crosby, Inc.,* Civil Action No. CV–07–5441 (DGT)(RML), 2009 WL 817852 at *8 (E.D.N.Y. Mar. 27, 2009)).
[200] *Snyder v. Phelps,* 131 S.Ct. 1207, 1214 (2011). (Citing *Harris v. Jones*, 281 Md. 560, 565–566 (1977)).
[201] *Id.* (Citing *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50–51 (1988)).

Malicious Use of Defamation Laws in Sexual Violence Cases

Another issue related to defamation is the possibility of the accused bringing an action against the survivor while criminal proceedings are pending.[202] When this occurs, the survivor has to deal with the defamation proceedings while the sexual assault investigation is ongoing. This could further disrupt the psychological recovery of the survivor and drive them to the point where they wish they never reported the offense in the first place. In the worst cases, alleged perpetrators of sexual assault will use defamation claims to intimidate and threaten the survivor.[203]

This problem is demonstrated by defamation claims where an alleged perpetrator may attempt to exploit the sexuality of a survivor by offering it as evidence.[204] Furthermore, an alleged perpetrator may use defamation as a means to coerce a survivor into mediating the defamation claim or recanting their sexual assault allegation during the sexual assault investigation.[205] Several of these issues are underscored by *Routh v. University of Rochester*.[206] In this case, Dylan Routh brought an action against the University of Rochester and his ex-girlfriend after she claimed that he sexually assaulted her several times while they were both enrolled at the university.

The case began after Routh told the survivor he was no longer interested in engaging in sexual contact with her. A few days later, the survivor filed a complaint and a five-page written statement against Routh alleging that he sexually assaulted her by strangulation, rape, and forcible imprisonment. The next day, Routh was suspended from the university and directed to

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[202] Steinman, *supra* note 188*,* at 923.
[203] *Id.* at 929.
[204] *Routh,* No. 11-CV-6606 CJS, 2013 WL 5943926, at *11.
[205] *Id.* at *12.
[206] *Id.* at *2.

leave campus. During the investigation, it was determined that Routh and the survivor engaged in a sexual relationship between September 2008 and September 2011 and some of the sexual acts involved binding, gagging, whipping, and burning of the survivor.

Prior to September of 2010, all of the sexual activity was categorized as consensual, but the survivor alleged that the sexual activity following that time was not consensual.[207] In addition to the complaint she filed with the university, the survivor also filed complaints against Routh with the Monroe County Family Court and the Monroe County District Attorney's Office. However, the survivor withdrew the Family Court Complaint and a Monroe County Grand Jury declined to bring criminal charges because of a lack of evidence. [208]

In the case of *Routh,* he rightfully brought his claim for defamation, but the problem arose when he attempted to coerce the survivor into an agreement to mediate the claim. The act in question occurred on March 18, 2012, when Routh sent the survivor and her attorney an e-mail stating:

> I am writing to inform you that I will shortly be filing a motion to amend my complaint against your clients to plead with more specificity. My original pleading was vague, primarily at the urging of my mother who wishes to avoid embarrassment for all parties. However, because you have complained about the lack of specificity on various charges, I will be getting very specific. In reviewing my records to allege specificity, I found the following Facebook message communications which occurred between myself and Sarah Hulbert 2010[.]
>
> [Routh then sets forth the sexually explicit text, mentioned earlier, verbatim].
>
> I will be making these messages public in my amended complaint. I am not asking you to consent to the filing of the amended complaint, I assume you will oppose. However, because I had not previously made you aware of the existence of these messages, I

[207] *Id.*
[208] *Id.* at 10-11.

> am writing at the urging of my mother to give you one last chance to agree to mediate these issues before going public.
>
> Sarah Hulbert libeled and slandered me when she claimed I undertook any sexual activity against her consent. The University has discriminated against me and violated its contractual obligations to treat me fairly. I would simply pursue my rights in every appropriate forum, but I am being urged to suggest mediate one last time by my mother, in spite of your ridiculous attacks against her.
>
> So I am giving you that opportunity. If I do not hear that you agree to mediation of all issues by the noon [sic] (pacific time) on Thursday, I will move forward with the filing of the amended complaint and making these messages public.
> Sincerely, Dylan Routh.[209]

With this act, Routh crosses an important boundary by attempting to coerce the survivor into mediating the defamation claim. Furthermore, Routh's attempt to exploit the survivor's sexuality by revealing a sexually graphic message, for a malicious purpose is exactly what *Rape Shield* laws prohibit.[210] These types of acts create unnecessary damage to survivors and alleged perpetrators should not be allowed to use this type of information for malicious purposes.

Rape shield laws could help protect survivors from this type of act by ensuring that their private lives are not subject to intensive public scrutiny. This protection works as a catalyst for encouraging survivors to report their victimization, to testify in the subsequent trial, while also ensuring that defendants retain the opportunity to present an adequate defense.[211] Nevertheless, some rape shield laws preserve loopholes that allow juries to hear evidence of the survivor's

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[209] *Routh v. University of Rochester,* No. 11-CV-6606 CJS, 2013 WL 5943926, *12 (N.Y. Civ. Ct. Nov. 5, 2013).
[210] Fed. R. Evid. 412. Sex-Offense Cases: The Victim (2013).
[211] Sarah C. Ayres, *Expanding Rape Shield Laws: Breaking Through Prejudice for Better Protection of Battered Women*, 19 CARDOZO J.L. & GENDER 821, 826 (2013). (Discussing the notion that rape shield laws protect against embarrassment for victims while safeguarding the constitutional rights of the defendant).

character and habits.[212] Despite this, individuals like Routh try to exploit the loopholes in these laws. In an attempt to resolve this issue, the survivor's attorney sent Routh the following statement:

> The threats contained in you[r] March 21, 2012 letter, to the effect that you will make public certain alleged sexual communications between yourself and our client, Ms. Hulbert, if she does not agree to participate in mediation, constitutes the crime of coercion under New York and quite possibly, federal laws. We intend on filing a criminal complaint as a result.
> We also intend on supplementing our various motions to apprise the court of this threat, and to broaden our motion for sanctions to include a claim against you. We will further supplement our motion to broaden the claim against your mother because, as you wrote, she encouraged and conspired with you to send the offending letter.
>
> You[r] letter threat is outrageous and among the most offensive litigation tactics that I have seen. There is no place for this conduct in the Courts, and we shall seek redress.[213]

Indeed, there is no place for threats and coercion in law, particularly when the case involves a survivor of sexual violence. Of course there is value in zealous legal representation, however, defendants in all cases should be free from having their past exploited without a reasonable reason for doing so.

As a result of this notion, courts have been empowered to impose sanctions for malicious use of a defendant's past and they should if it isn't proven to be zealous legal representation.[214] Moreover, the court may not impose sanctions if there is some merit to the information that the plaintiff intends to offer as evidence.[215] In this case, the court failed to sanction Routh even though he specifically threatened to file the amended complaint if they did not agree to

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[212] Bryden, *supra* note 1, at 1287.
[213] *Routh,* No. 11-CV-6606 CJS, 2013 WL 5943926, at *12.
[214] Fed. R. Civ. P. 11 (2013).
[215] *Id.*

mediation. In reaching that decision, the court reasoned that the nature of the claim required a discussion of both party's sexual activity. Therefore the information Routh intended to make public would be relevant and the motion for sanctions was denied.[216]

Although the nature of defamation cases and allegations of sexual violence have a foundation based on the sexual activity of the plaintiff and the defendant, there is no need to silence survivors by failing to protect their past from malicious disclosure. Likewise, the court's inability to sanction an alleged perpetrator for intending to exploit a survivor's past is a malicious act that should result in severe sanctions, regardless of the relative value of the information. Failure to do so will continue to contribute to unreported acts of sexual violence, which will continue to silence survivors and disrupt their journey to recovery.

The Issue Between Public and Private Plaintiffs

While there may be a privacy issue in defamation cases, there may also be an issue between two private citizens that has additionally become a matter of public concern. When a case involves a matter of public concern, plaintiff's can recover a greater amount if the defendant is found liable.[217] However, distinguishing between a private and a public matter is difficult to discern for some courts because cases involving sexual assault can be thought of as a private matter.[218] In contrast, if the court finds the plaintiff to be a private person, the negligence standard will be applied.[219] In these cases, the court looks to the elements of the claim to discover if certain elements were met. These elements include a "(1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party, (3) fault

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[216] *Routh,* No. 11-CV-6606 CJS, 2013 WL 5943926, at *25.
[217] Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category,* 65 MO. L. REV. 597, 630 (2000).
[218] *Id.*
[219] *Id.*

amounting to at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod)."[220]

Public figures or private persons can bring claims for defamation. If a public figure brings a claim for defamation, the public figure must prove malice to recover damages.[221] This is the case because some courts have found that "false statements of fact are particularly valueless, they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.[222] However, false statements of fact are thought of as inevitable in free debate and imposing liability upon a publisher would have an undoubted chilling effect on speech related to public figures.[223]

Defendants in defamation cases attempt to assert that their statements were a matter of public concern, which would offer greater First Amendment protection to their statements. This would occur because the burden of proof would increase from a preponderance of the evidence to clear and convincing evidence.[224] Although defendants assert this notion, courts have interpreted allegations of sexual violence to be matters "that are purely private in nature."[225] Although an instance of sexual violence is a matter of private concern, that privacy remains with the alleged survivor as opposed to the alleged perpetrator. Nevertheless, courts have noted that

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[220] *Id*. at 1.
[221] Steinman, *supra* note 188*,* at 912.
[222] *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 52 (1988).
[223] *Id.*
[224] *Williams v. Cont'l Airlines, Inc.,* 943 P.2d 10, 17 (Colo. Ct. App. 1996).
[225] *Id.* (Citing *Lewis v. McGraw–Hill Broadcasting Co.,* 832 P.2d 1118 (Colo. Ct. App. 1992)).

the "boundaries of public concern cannot be readily defined, but must be determined on a case-by-case basis."[226]

If courts were to embrace the notion that committing a crime of moral turpitude makes a person a public official they would find that predatory offender community notification laws would support the practice. Take for example the state of Minnesota's predatory offender registration laws.[227] These laws hold the idea that a person must register as a predatory offender if they are charged or convicted of a crime of sexual violence. At that point, the person's status as a predatory offender has become a matter of public concern, for safety reasons, also making them a public official. Courts have been in opposition to the notion of alleged perpetrators being public officials by stating that:

> Defamatory statements were made by private non-media defendants about a private plaintiff. These statements did not automatically become matters of public, as opposed to private, concern simply because plaintiff is a pilot for a commercial airline. There is no claim or evidence that plaintiff is an unsafe or less skilled pilot because he allegedly raped or attempted to rape women during off-duty hours. Nor does the evidence support the conclusion that members of the flying public are in danger of being sexually assaulted by plaintiff.[228]

The Court's finding on this matter is interesting because individuals who are suspects in cases involving sexual violence impose a significant threat to society. As evident by the facts of *Reedy*

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[226] *Id.*

[227] MINN. STAT. § 243.166, subd. 1b. (2013). (A person shall register under this section if: (1) the person was charged with or petitioned for a felony violation of or attempt to violate, or aiding, abetting, or conspiracy to commit, any of the following, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances…(iii) criminal sexual conduct).

[228] *Williams v. Cont'l Airlines, Inc.,* 943 P.2d 10, 18 (Colo. Ct. App. 1996). (The court asserted, "We conclude, therefore, that the defamatory statements here involved matters of private, not public, concern. *See Ramirez v. Rogers,* 540 A.2d 475 (Me.1988) (statement by private non-media defendant that gymnastic school operator was under investigation for child abuse not a matter of public concern); *Snodgrass v. Headco Industries, Inc.,* 640 S.W.2d 147 (Mo.App.1982) (jury properly instructed on qualified privilege defense in slander action based on statement that plaintiff had, among other things, raped a co-worker).")

v. Evanson, perpetrators of sexual violence often commit similar acts after committing one sexual offense.[229]

On one hand, perpetrators of sexual violence may continue to commit acts of sexual violence, therefore, citizens need to be notified of their behavior, which makes the alleged perpetrator's behavior a matter of public concern and the alleged perpetrator a public figure. On the other hand, individuals who are the subject of false speech, specifically false allegations of sexual violence, are at a severe disadvantage because they are likely to gain the reputation of an actual perpetrator of sexual violence. This makes it difficult to navigate the continuum between public and private figures. Still, it is notable that courts have found alleged perpetrators of sexual violence to be limited-purpose public figures. For example, the Bay Circuit Court in Michigan found the defamation complainant to be a limited-purpose public figure.[230] In these types of cases, finding the complainant to be a public figure will increase the burden of proof and protect survivors of sexual violence from arbitrary defamation claims.

VI. CLOSING

The impact of sexual violence can result in a number of damaging physical and psychological injuries to survivors. These injuries are long-standing and the journey to recovery can be very difficult if survivors do not have the freedom to discuss the offense, peacefully protest their attacker, retain their liberty, and be free from the unjustified disclosure of their privacy. Failing to address these issues through the interpretation of constitutional law, criminal

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[229] *Reedy,* 615 F.3d at 209 (2010). ("Reedy's criminal trial was scheduled to begin on September 19, 2005. On August 22, 2005, Wilbur Brown was apprehended while he was assaulting a female convenience store clerk in Brookville, Pennsylvania. Brown subsequently confessed to both the attack on Reedy and the Landmark attack. On September 1, 2005, the Butler County District Attorney dropped all charges against Reedy.")

[230] *Glowicki v. Swanson,* No. 256574, 2006 WL 626234, at *1 (Mich. Ct. App. March 14, 2006).

law, and civil law will continue to contribute to the low number of sexual assault reports and the lack of healthy recovery for survivors.

In resolving these issues, schools attempting to impose constitutional free speech restrictions of survivors should formulate plans to reduce damaging interactions between survivors and alleged perpetrators if they both continue to attend classes and extracurricular activities. Furthermore, courts should interpret the recent legal precedent coming out of schools, which indicates that student speech should be restricted if it is disruptive, advocates illegal activity, is lewd or obscene, or it violates the privacy of other citizens. If these elements are present, then the speech should be restricted, however, if the student's speech reflects the elements of *Doe v. Silsbee,* the court should allow the speech.

When resolving the application of criminal law to survivors, the investigative process should be modified to empower survivors. For example, an increase in the use of victim advocates during the sexual assault investigation could help empower survivors of sexual violence throughout their battle in the justice system. Likewise, implementing training programs for law enforcement officers could reduce police hostility and reduce the number of arbitrary arrests for false reports of sexual violence and police misconduct. These changes could help dispel myths related to sexual violence, increase reporting, and lead to a healthy recovery for survivors who report the offense to law enforcement.

Lastly, the alleged perpetrator's malicious use of civil laws like defamation is a unique issue in crimes of sexual violence. These issues can be resolved by protecting the privacy of survivors from malicious disclosure through *Rape Shield* laws. Furthermore, if courts were to find previous perpetrators of sexual violence as public figures, it would increase the burden of proof in defamation cases and protect survivors from arbitrary defamation claims. These two

resolutions could minimize the damage done to true survivors of sexual violence while they are defending themselves in claim for defamation.