

DEFAMATION AND FALSE RAPE CLAIMS: POLICIES, ATTITUDES, AND SUGGESTED REFORM IN THE UNITED STATES AND THE UNITED KINGDOM

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INTRODUCTION

In November 1987, a fifteen-year-old African American teenager named Tawana Brawley, a high school cheerleader,¹ stepped off a school bus and disappeared.² Four days later she was discovered wrapped in a garbage bag outside of Poughkeepsie, New York.³ Her hair had been cut off and she was covered in feces.⁴ “Nigger” and “KKK” had been scrawled on her body.⁵ Brawley claimed that six white men had taken her into a forest, where they raped and sodomized her;⁶ she also stated that one of the men was a police officer.⁷ The accusations quickly caused public outrage, leading Governor Mario Cuomo to name a special prosecutor to investigate the case.⁸ Many celebrities rapidly made public demonstrations of support for Tawana’s case. Bill Cosby and *Essence* magazine offered a \$25,000 reward for any information on the attackers;⁹ Mike Tyson gave her his own Rolex and promised her a \$50,000 college scholarship.¹⁰ Her case was publicized nationally and held the public’s interest for months.

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¹ John J. Goldman, *Rape-Defamation Case Rubs New Salt in Old Wounds*, L.A. TIMES (Nov. 18, 1997), <http://articles.latimes.com/1997/nov/18/news/mn-55156>.

² Ralph Blumenthal, *Questions and Answers in the Brawley Inquiry*, N.Y. TIMES (Feb. 24, 1988), <http://www.nytimes.com/1988/02/24/nyregion/questions-and-answers-in-the-brawley-inquiry.html?ref=tawanabrawley>.

³ Esther Iverem, *Bias Cases Fuel Anger of Blacks*, N.Y. TIMES (Dec. 14, 1987), <http://www.nytimes.com/1987/12/14/nyregion/bias-cases-fuel-anger-of-blacks.html?ref=tawanabrawley>.

⁴ *Id.*

⁵ James Barron, *Girl’s Lawyers Agree to Assist Attack Inquiry*, N.Y. TIMES (Feb. 12, 1988), <http://www.nytimes.com/1988/02/12/nyregion/girl-s-lawyers-agree-to-assist-attack-inquiry.html?ref=tawanabrawley>.

⁶ Iverem, *supra* note 3.

⁷ Goldman, *supra* note 1.

⁸ *Id.*

⁹ Barron, *supra* note 5.

¹⁰ Larry McShane, *After a Decade, the Tawana Brawley Case Goes to Court*, L.A. TIMES (Nov. 9,

Ms. Brawley's closest supporters included her team of attorneys—Alton H. Maddox Jr. and C. Vernon Mason—and Reverend Al Sharpton, who all stood by her side throughout the media frenzy caused by her case.¹¹ This team claimed that one of her attackers was Steven Pagonos, an assistant district attorney in Dutchess County, New York, where Tawana was found.¹² This allegation caused a public uproar, yet, just months later, a grand jury ruled that Tawana Brawley had fabricated the entire story, perhaps in an attempt to evade punishment for staying out late one night.¹³ The grand jury found that there was no physical evidence of an attack on Brawley's person; indeed, a neighbor even testified that she had seen Brawley sneak into the garbage bag herself and lie down.¹⁴ Additionally, the grand jury concluded that Brawley's shocking appearance when she was found—and her visible injuries—could easily have been self-inflicted.¹⁵

Steven Pagonos was cleared, and he took what was then an unprecedented step: he sued Brawley, Sharpton, and Brawley's attorneys for defamation.¹⁶ It was not until ten years later that the case went to trial, with Pagonos requesting \$395 million in damages.¹⁷ In 1998, Pagonos was awarded a total of \$345,000 from Sharpton, Maddox, and Mason.¹⁸ In addition, he was awarded \$180,000 in punitive damages from Brawley herself.¹⁹ However, Sharpton claimed that this was a victory for the defense, since the award was much lower than what Pagonos had originally sought.²⁰

Since the Tawana Brawley case first exploded in the media in the late 1980s, defamation claims for false rape allegations have become more common.²¹ While scandals over false rape allegations have been seen on college campuses in recent

1997), <http://articles.latimes.com/1997/nov/09/news/mn-51928>.

¹¹ *Id.*

¹² Goldman, *supra* note 1.

¹³ *Id.*

¹⁴ Pagonos v. Maddox, 295 A.D.2d 489 (N.Y. App. Div. 2d Dep't 2002).

¹⁵ *Id.*

¹⁶ William Glaberson, *Plaintiff is Awarded \$345,000 in Brawley Defamation Case*, N.Y. TIMES (July 30, 1998), <http://www.nytimes.com/1998/07/30/nyregion/plaintiff-is-awarded-345000-in-brawley-defamation-case.html?src=pm>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Pagonos, 295 A.D.2d 489.

²⁰ Jason Blair, *Sharpton Claims Victory, and Vows to Appeal Defamation Verdict*, N.Y. TIMES (July 31, 1998), available at <http://www.nytimes.com/1998/07/31/nyregion/sharpton-claims-victory-and-vows-to-appeal-defamation-verdict.html?src=pm>.

²¹ The following claims were brought in the United States after the Tawana Brawley scandal, and will be discussed *infra* in Part II: Arledge v. Hendricks, 715 So.2d 135 (La. App. 1998); Norris v. Hathaway, 561 N.W.2d 583 (Neb. App. 1997); Steed v. St. Paul's United Methodist Church, 728 So.2d 931 (La. App. 1990); Rosenboom v. Vanek, 451 N.W.2d 520 (Mich. App. 1989). See also Laurence Roy Stains, *Best and Worst Campuses for Men*, MEN'S HEALTH, Sept. 2000, available at ProQuest, Doc. ID 56864220; Mark Nickel, All Parties in Lack Case Agree to Settlement Ending Legal Proceedings, BROWN UNIVERSITY NEWS BUREAU (December 31, 1997), http://brown.edu/Administration/News_Bureau/1997-98/97-063.html.

years,²² they are certainly not limited to the college context. Indeed, this phenomenon is not limited to the United States; defamation suits involving false rape claims are even more common in the United Kingdom.²³

While both of these nations face defamation claims over rape allegations, the law and policies behind each country's method of determining whether a claim has merit, and potential liability, are very different. Strict libel laws in the United States prevent many frivolous cases from reaching court.²⁴ However, defamation law in the United Kingdom is famously liberal.²⁵ London is known as the libel capital of the world, which has resulted in "libel tourism": using arguments based on the global distribution of media in today's world, non-British plaintiffs are able to sue for defamation in the United Kingdom, where they have a greater likelihood of winning their cases.²⁶ By putting the burden of proof on the defendant, courts in the United Kingdom have made it easier to succeed with defamation claims.²⁷ When the defendants in defamation cases are found liable, these courts also treat them very harshly by imposing fines and jail sentences. While the courts take these claims seriously, there are cases in which these accusations are unfounded. In those situations, such harsh penalties are undeserved. Women found to have falsified rape claims should certainly be punished—and innocent accused men vindicated—but the fear of such punishment could prevent women who have truly been raped from stepping forward.²⁸

This Note will argue that the troubling and conflicting treatment and prevalence of defamation suits over false rape claims in the United States and United Kingdom should be resolved by following the policies used in the United States for determining liability, while allowing for the harsh fines and jail sentences used to punish false accusers in the United Kingdom.²⁹ Part I will compare

²² The most publicized case on a college campus in recent years was the Duke lacrosse scandal of 2006, where three lacrosse players were accused of raping and kidnapping an exotic dancer. All charges were dropped when no credible evidence was discovered. While no defamation claim was made in the Duke case, these false accusations made national headlines for months. See Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES (Apr. 11, 2007), <http://www.nytimes.com/2007/04/12/us/12duke.html?ref=dukelacrossesexualassaultcase>.

²³ For a discussion of false rape-defamation claims in the United Kingdom, see *infra* Part II.

²⁴ For a discussion of defamation law in the United States, see *infra* Part I.

²⁵ Eric Pfanner, *A Fight to Protect Americans from British Libel Law*, N.Y. TIMES (May 24, 2009), <http://www.nytimes.com/2009/05/25/business/media/25libel.html>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Eric T. Cooperstein, *Protecting Rape Victims from Civil Suits by Their Attackers*, 8 LAW & INEQUALITY 279, 280 (1989).

²⁹ This Note addresses only rape claims that are definitively proven false. Many allegations of rape are not clearly resolved or resolvable. They occupy a zone of ambiguity, where the victim may claim that she never consented while the alleged attacker truly believed that the act was consensual. In *Lack v. Klein and Brown University*, discussed *infra* Part II, an ambiguous situation of this kind arose. See Laurence Roy Stains, *Best and Worst Campuses for Men*, MEN'S HEALTH, Sept. 2000, available at ProQuest, Doc. ID 56864220; Mark Nickel, All Parties in Lack Case Agree to Settlement Ending Legal Proceedings, BROWN UNIVERSITY NEWS BUREAU (December 31, 1997), http://brown.edu/Administration/News_Bureau/1997-98/97-063.html.

defamation law in the United States and the United Kingdom, illustrating the policies that have led to divergent results in defamation suits over rape accusations. Part II will explore defamation in false rape cases in both the United States and the United Kingdom, comparing how differing policies have led to drastically different outcomes. In Part III, this Note argues that the optimal policy for defamation suits involving false rape allegations is to follow United States defamation law, while maintaining the strict sentencing used in courts in the United Kingdom.

I. DEFAMATION LAW IN THE UNITED STATES AND THE UNITED KINGDOM

While defamation law in the United States and the United Kingdom were once very similar,³⁰ today there are key differences that make it much easier to sue for defamation in Great Britain. In the United Kingdom, plaintiffs who bring defamation suits are immediately at an advantage: the statements at issue are essentially assumed to be false unless proven true.³¹ In addition, defendants in British defamation suits generally must pay their attorneys regardless of the outcome, while plaintiffs usually have “no win, no fee” agreements.³² Therefore, defendants not only face the likely chance that they will lose the case, but they must also accept a heavy financial burden. The high risks for defendants in defamation cases in the United Kingdom lead many cases to settle before they get to court.³³

While defamation law in the United Kingdom has provided greater ease for bringing defamation claims over rape accusations, British courts have taken a much stricter approach to these cases than their American counterparts. Women found liable face harsh fines and even jail sentences. These results are nearly unheard of in the United States.³⁴ However, in both nations, women have expressed their concern that allowing defamation claims for rape allegations, “before criminal

In a small study conducted by professors in the United Kingdom, male college students acknowledged that they understand women can refuse sex in many ways besides a verbal refusal: through body language, shortness, or abruptness of conversation. See Rachel O’Byrne, Susan Hanson & Mark Rapley, “If a Girl Doesn’t Say ‘No’...”: *Young Men, Rape and Claims of ‘Insufficient Knowledge’*, 18 J. COMMUNITY & APPLIED SOC. PSYCHOL. 168, 178 (2008). However, while young men might hear sexual refusals—even if they do not include the word ‘no’—“when the morally troublesome issue of *accountability* for rape arises, a rather different picture emerges.” *Id.* at 187. This makes it difficult to determine what each party believed at the time. This may often be most troublesome in cases of date rape. Indeed, the study found that “young men are more likely than young women to report attempts to actively and coercively shape sexual encounters according to their wishes, *especially* when anxious or unsure.” *Id.* at 188. With such varied reactions between men and women, it is no wonder that rape allegations are often ambiguous. However, these ambiguous claims do not create a strong basis for defamation suits. *Id.* Instead, it is those cases that are easily proven false that often lead to defamation claims, and it is these cases that will be addressed in this Note.

³⁰ ANDREW T. KENYON, DEFAMATION: COMPARATIVE LAW AND PRACTICE 240 (2006).

³¹ Pfanner, *supra* note 25.

³² *Id.*

³³ *Id.*

³⁴ Of all the American cases discussed *infra* Part II, only the Tawana Brawley case resulted in a harsh penalty.

liability has been assessed, could upset the delicate balance of power among criminals, citizens, and law enforcement.”³⁵ Indeed, there is a concern that the possibility of a defamation claim could prevent a victim from reporting that she was raped.³⁶

Yet before 1964, defamation law in the United States and United Kingdom shared many characteristics.³⁷ At common law, a plaintiff could make a prima facie case by proving that an allegedly false statement was published, that it was defamatory, and that it was about the plaintiff; no injury to reputation was required.³⁸ However, with the decision in *New York Times v. Sullivan*³⁹ in 1964, the American jurisprudence broke with English libel law by abandoning this strict liability standard and discarding the idea that damages could be assumed.⁴⁰

A. United States Defamation Law, Past and Present

In the seminal case of *New York Times v. Sullivan*, the head of the police department in Montgomery, Alabama claimed that he was defamed in an advertisement run in *The New York Times*, which described actions the Montgomery police had taken against civil rights protestors; however, the advertisement never mentioned the plaintiff by name.⁴¹ The United States Supreme Court noted that the plaintiff was a public official, and held that

the constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves that the statement was made with “actual malice”*—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁴²

Since *Sullivan*, public officials have struggled to bring successful defamation claims.⁴³

However, the actual malice rule was expanded in *Curtis Publishing Co. v. Butts*⁴⁴ to include all public figures who are “involved in issues in which the public has a justified and important interest.”⁴⁵ After *Curtis*, any public figure—from the President to a movie star or local politician—is subject to the *Sullivan* rule,

³⁵ Cooperstein, *supra* note 28.

³⁶ *Id.* at 281.

³⁷ KENYON, *supra* note 30.

³⁸ Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL’Y 415, 421 (2008).

³⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴⁰ James Penzi, *Libel Actions in England, a Game of Truth or Dare? Considering the Recent Upjohn Cases and the Consequences of “Speaking Out”*, 10 TEMP. INT’L & COMP. L.J. 211, 215 (1996).

⁴¹ *Sullivan*, 376 U.S. at 257-58.

⁴² *Id.* at 279 (emphasis added).

⁴³ Youm, *supra* note 38, at 418.

⁴⁴ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1975).

⁴⁵ *Id.* at 134.

requiring proof that the supposedly defamatory statement was made with knowledge that the statement was false, or with reckless disregard for its falsity.⁴⁶ This has created a much higher standard, making it difficult for all public figures to successfully bring defamation claims.

The Supreme Court expanded on its public figure holding in *Gertz v. Robert Welch, Inc.*,⁴⁷ when it concluded that, if the plaintiff is a public figure, the actual malice standard will be used, and if the plaintiff is a private person, another standard will be used.⁴⁸ Indeed, states are allowed to use various standards in defamation cases involving private plaintiffs.⁴⁹ Many states have chosen to use a negligence standard—if the plaintiff can prove that the defendant made the statement negligently, the defendant will be found liable.⁵⁰ To meet the negligence standard, a private plaintiff suing the media needs to establish that the allegation was false and that the media was at fault for publishing the statement. That fault must reach at least the standard of negligence, if not gross negligence.⁵¹

Aside from the actual malice rule, the most important concept in American defamation law is the distinction between opinion and statements that are based on fact. In *Milkovich v. Lorain Journal Co.*,⁵² the United States Supreme Court held that an opinion is protected as a matter of constitutional law, and therefore a separate category of protection is unnecessary. Since an opinion cannot be proven false, it cannot be the basis for a defamation action.⁵³ Therefore, defamation can only be found when the statement at issue is based on fact—not opinion. Indeed, the Court went on to note that the “dispositive question . . . [is] whether a reasonable fact finder could conclude that the statements” imply an assertion of fact.⁵⁴ If the statements are clearly hyperbole, and therefore not based on fact, there can be no basis for a claim in defamation.⁵⁵ In *Gross v. New York Times*, the New York Court of Appeals provided an example of such a hyperbolic statement:

[T]he assertion that “John is a thief” could well be treated as an expression of opinion or rhetorical hyperbole where it is accompanied by other statements, such as “John stole my heart,” that, taken in context, convey to

⁴⁶ *Sullivan*, 376 U.S. at 279.

⁴⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973).

⁴⁸ *Id.* at n.27.

⁴⁹ *Id.* at 348 (“[A]ccommodation of the competing values at stake in defamation suits by private individuals allows States to impose liability . . . on a less demanding showing than that required by *New York Times*.”).

⁵⁰ KENYON, *supra* note 30, at 245.

⁵¹ *Id.* at 246.

⁵² *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990) (involving a high school wrestling coach who sued for libel when a newspaper article claimed he had lied under oath during an investigation of an incident that took place at a wrestling match).

⁵³ Youm, *supra* note 38, at 429.

⁵⁴ *Milkovich*, 497 U.S. at 21.

⁵⁵ *Id.*

the reasonable reader that something other than an objective fact is being asserted.⁵⁶

Since the assertion in this example is more than a simple statement of fact, there can be no defamatory connotation. However, states differ on how they test the defamatory meaning of a statement. Some states hold that the context of the statement must be examined,⁵⁷ while others consider what an ordinary reader would assume from reading the statement—this is known as the reasonable reader test.⁵⁸ If the context of the statement would imply a defamatory meaning, or if an ordinary reader would naturally infer a defamatory meaning from the statement, the suit will be successful.

Generally, the common law test for defamation claims subscribes to the following considerations: first, a plaintiff cannot bring a defamation suit unless the statement at issue was based on fact, not opinion.⁵⁹ The court will test the defamatory meaning of a statement based on the method used in that state, whether by looking at the context of the statement⁶⁰ or by using the reasonable reader test.⁶¹ If a defamatory meaning is possible, the suit can continue. If the plaintiff is a public figure, he must prove actual malice to win his case; if he is a private person, many states used a negligence standard.⁶²

B. *United Kingdom Defamation Law, Past and Present*

For Americans who want to avoid the strict requirements of *New York Times v. Sullivan* and its progeny, the United Kingdom—and specifically London—is the optimal place to bring a defamation claim.⁶³ Since British courts assume that

⁵⁶ *Gross v. New York Times Co.*, 623 N.E.2d 1163, 1169 (N.Y. 1993).

⁵⁷ *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 60 (2d Cir. 1980) (“The initial question is whether the article is ‘reasonably susceptible of a defamatory connotation’ . . . so as to warrant its submission to a jury to determine if in fact the defamatory connotation was conveyed . . . The allegedly defamatory passages must be considered in the context of the entire article and the words taken as they are commonly understood.”).

⁵⁸ *James v. Gannett Co.*, 353 N.E.2d 834, 838 (N.Y. 1976) (explaining that the court “must decide whether there is a reasonable basis for drawing the defamatory conclusion”). Then, “[i]f the contested statements are reasonably susceptible of a defamatory connotation . . . it becomes the jury’s function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader.” The court stated that “[i]n analyzing the words in order to ascertain whether a question of fact exists for resolution upon trial, the court will not pick out and isolate particular phrases but will consider the publication as a whole.” *Id.*

⁵⁹ *Milkovich*, 497 U.S. at 3.

⁶⁰ *Cianci*, 639 F.2d at 60.

⁶¹ *James*, 353 N.E.2d at 838.

⁶² *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1973) (“[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard for liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual.”). The Court opted for this approach because it “recognize[d] the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation[.]” *Id.*; *see also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); KENYON, *supra* note 30, at 246 (claiming that when private plaintiffs sue the media, they “will need to establish that the published defamatory allegations are false and that the media was at fault in publishing them”).

⁶³ Youm, *supra* note 38, at 429.

defamatory statements are false, this places the burden on the defendant to prove that his or her statements were true.⁶⁴ British courts also that the plaintiff has suffered damage due to the allegedly defamatory statements.⁶⁵ These daunting requirements lead many cases to settle before trial.⁶⁶

To make a prima facie case for defamation in the United Kingdom, at common law the plaintiff merely must show that the defendant “voluntarily communicated to a third party (‘published’) a defamatory statement referring directly or indirectly to the plaintiff.”⁶⁷ The statements will be considered defamatory if they “tend to lower a person in the estimation of right thinking members of society.”⁶⁸ While these requirements make it much easier for plaintiffs in the United Kingdom to bring successful defamation actions than in the United States, the two systems do share some similarities. In both countries, whether a statement holds a defamatory meaning can be decided based on the reasonable reader test.⁶⁹ In addition, due to the subjectivity of opinions, British courts—like their American counterparts—have not allowed them to be considered defamatory statements.⁷⁰

Unlike the United States, the United Kingdom does not have a public figure defense.⁷¹ However, in recent years new protections for the media have been added. In *Reynolds v. Times Newspapers*,⁷² the court endorsed freedom of the press by creating a ten-factor qualified privilege test for responsible journalism on matters of public concern.⁷³ While the changes made in *Reynolds* increased protection for the press, they did not come close to the protections afforded by the actual malice doctrine in the United States in *Sullivan*. However, in 2006, the House of Lords again expanded protections for matters of public concern when it

⁶⁴ *Id.* at 430.

⁶⁵ PETER F. CARTER-RUCK, *LIBEL AND SLANDER* 50 (1973).

⁶⁶ See Pfanner, *supra* note 25.

⁶⁷ Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law*, 49 *FED. COMM. L.J.* 621, 624 (1996-97).

⁶⁸ CARTER-RUCK, *supra* note 65, at 53.

⁶⁹ PAUL MITCHELL, *THE MAKING OF THE MODERN LAW OF DEFAMATION* 38 (2005).

⁷⁰ KENYON, *supra* note 30, at 71.

⁷¹ Vick & Macpherson, *supra* note 67, at 649.

⁷² *Reynolds v. Times Newspapers*, [1998] 3 *All E.R.* 961 (C.A.).

⁷³ Youm, *supra* note 38, at 421. Those factors are: (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The status of the information. The allegation may have already been the subject of an investigation. (5) The steps taken to verify the information. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary. (8) Whether the article contained the gist of the claimant's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication including the timing. *Id.*

handed down its decision in *Jameel v. Wall Street Journal Europe*.⁷⁴ In that case, the court held that “responsible news reporting on a matter of public interest should be protected against libel litigation.”⁷⁵ This holding brought British defamation law much closer in line with American libel jurisprudence and bolstered the *Reynolds* holding.

While *Reynolds* and *Jameel* may have limited the ability to bring a defamation suit on matters of public concern, bringing a suit in the United Kingdom is still preferable for many since that country allows very high damage awards: they commonly surpass £50,000,⁷⁶ and some have even reached £1 million.⁷⁷ Juries determine damage awards in the United Kingdom, and traditionally they have been required to guess what sum would “compensate the claimant for injured feelings and harm to reputation using their own common sense.”⁷⁸ Since it is difficult to quantify damages, it is no wonder that juries left on their own have come back with extremely high damage awards. The first award to surpass £1 million was in *Youssouf v. Metro-Goldwyn-Mayer Pictures, Ltd.* in 1936.⁷⁹ The plaintiff in *Youssouf* was portrayed in a Hollywood film as having been raped by Rasputin.⁸⁰ While later courts were shocked by this amount, the Court of Appeal at that time “did not feel that it could intervene” with the jury’s decision.⁸¹ Indeed, *Youssouf* represented the “high water mark” of judicial deference to jury-determined damage awards—starting in 1990, juries were no longer free to award any sum that they chose.⁸²

Although these judicially-created measures helped to liberalize British libel law, for many years the legislature stayed silent on the matter of defamation. It was not until 1996 that a new Defamation Act was created—the first piece of major libel legislation passed in fifty years.⁸³ This Act attempted to strengthen defenses to defamation, and it also created new procedural reforms meant to “simplify defamation lawsuits, encourage early settlement of less serious claims, and curb the escalating cost of libel litigation.”⁸⁴

Recently, Parliament has expressed additional concern for the defamation policies that have led to high rates of libel tourism in Britain, as well as high damage awards. A Draft Defamation Bill (“Bill”) introduced in Parliament in

⁷⁴ *Jameel v. Wall Street Journal Europe*, [2006] U.K.H.L. 44.

⁷⁵ Youm, *supra* note 38, at 416-17.

⁷⁶ See *Pounds to Dollars*, EXCHANGE RATES (Feb. 2, 2012), <http://www.exchangerates.org.uk/Pounds-to-Dollars-currency-conversion-page.html> (approximately \$1.58 to £1).

⁷⁷ Vick & Macpherson, *supra* note 67, at 627.

⁷⁸ MITCHELL, *supra* note 69, at 55.

⁷⁹ *Id.* at 38.

⁸⁰ *Id.* at 55.

⁸¹ *Id.* at 38.

⁸² *Id.* at 56.

⁸³ Vick & Macpherson, *supra* note 67, at 622 (noting that the prior Defamation Act was passed in 1952).

⁸⁴ *Id.* at 624.

March 2011 proposed to protect comments on issues of public interest,⁸⁵ as well as to require a showing of actual damage. Currently, plaintiffs must only show that the allegedly defamatory statements would “lower the reputation of the claimant in the estimation of right-thinking members of society.”⁸⁶ Requiring such a showing would make it much more difficult to succeed with a defamation suit in the United Kingdom.

The Bill was proposed due to the fear that Britain’s defamation law is crushing freedom of speech,⁸⁷ and would lead to many changes in how defamation cases are handled. The report issued by the Committee for the Draft Defamation Bill in October 2011 supported the Bill,⁸⁸ yet found its efforts modest: in some ways, it does not “strike a fair balance between the protection of reputation and freedom of speech.”⁸⁹ However, the Bill would create a “higher threshold of seriousness for libel claims to progress,” and it would reduce the cost of libel claims by encouraging mediation and arbitration before going to court, which the Committee encouraged.⁹⁰ The Committee also endorsed the Bill’s efforts to limit trial by jury, and suggested that the final Bill should set out the circumstances in which a judge may call for a jury trial.⁹¹ This change, if implemented, could lower damage awards in defamation cases, and it might even lower the success rate of defamation cases in general, curbing the rate of libel tourism. If these measures are instituted, there could be significant changes in British defamation law.

Currently, plaintiffs who bring defamation suits in the United Kingdom remain at an advantage. A plaintiff must only show that a defamatory statement was communicated to a third party, and that this statement referred to the plaintiff.⁹² However, *Reynolds* and *Jameel* have increased protections for statements on matters of public concern, and the Defamation Act of 1996 and the current Draft Defamation Bill have created additional restrictions on libel suits.⁹³

⁸⁵ JOINT COMMITTEE ON THE DRAFT DEFAMATION BILL, FIRST REPORT, 2010-12, H.L. 203, H.C. 930-I (U.K.) [hereinafter DRAFT DEFAMATION BILL].

⁸⁶ *Id.* at 8.

⁸⁷ *Libel Law Shake-Up Proposals by Ken Clarke*, BBC NEWS: UK POLITICS, <http://www.bbc.co.uk/news/uk-politics-12749302> (Mar. 15, 2011).

⁸⁸ In the United Kingdom, a Draft Bill is created for consultation by selected committees before it is formally introduced to Parliament. Once consultation has taken place, the Bill is introduced into Parliament, either through the House of Commons or the House of Lords. The Bill must go through three separate readings in each House, as well as a report stage and a committee stage. Once each House has considered the other’s amendments, and once an agreement has been reached, the Bill can receive a Royal Assent and become an Act of Parliament. See *Making Laws*, PARLIAMENT, available at <http://www.parliament.uk/about/how/laws/> (last visited Mar. 24, 2013).

⁸⁹ DRAFT DEFAMATION BILL, *supra* note 85.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Vick & Macpherson, *supra* note 67, at 624.

⁹³ DRAFT DEFAMATION BILL, *supra* note 85.

If all of these restrictions are implemented, fewer cases will reach court and there will be lower damage awards.⁹⁴

As defamation law stands in the United Kingdom now, it is not difficult for a plaintiff to bring a claim for defamation after he has been accused of rape. Indeed, as will be discussed *infra* Part II, these claims are not uncommon in the United Kingdom, while in the United States—where stricter defamation laws have been implemented—these claims reach court less often and result in significantly lower damages. However, in both nations there is a risk that these false allegations, which some believe to be very common,⁹⁵ are in fact not false at all.

II. FALSE RAPE CLAIMS AND DEFAMATION

Groups advocating for men's rights in both the United States and the United Kingdom assert that false rape claims are very common.⁹⁶ One United Kingdom magazine claims that a Home Office research study in 1999 showed that at least twenty-five percent of the total reported allegations were either false or suspect.⁹⁷ *Men's Rights*, an American blog, claims that feminist ideology has been inculcated into society and has led to false rape claims.⁹⁸ This blog quotes a statistic from a former Colorado prosecutor, who claimed that up to forty-five percent of rape claims made in Denver could be false.⁹⁹ In the early 1990s, a study was conducted in a metropolitan Midwestern area to discover just how common false rape allegations really were.¹⁰⁰ Over the course of nine years, "41% of the total disposed of rape cases were officially declared false . . . by the complainant's admission that no rape had occurred."¹⁰¹ According to the study, falsely claiming rape served three main functions: either the women needed an alibi (often due to a suspected pregnancy), wanted to gain revenge, or were trying to seek attention and sympathy.¹⁰² Similar results were found in the police records from two large Midwestern universities.¹⁰³ While this research indicates that about sixty percent of rape claims are not false, the high rate of false rape claims may make the true victims afraid to report that they have been raped. Women in both the United States and the United Kingdom may fear that they will somehow fall into that forty percent and be held liable for their claims against their abusers.¹⁰⁴

⁹⁴ *Id.*

⁹⁵ *See infra* Part II.

⁹⁶ David Yarwood, *False Allegations in Rape Cases*, MANKIND, Oct. 2007, at 23, available at ProQuest, Doc. ID 1487681851.

⁹⁷ *Id.*

⁹⁸ *False Accusations of Rape*, MEN'S RIGHTS ONLINE (edited Jan. 4, 2011), <http://www.mens-rights.net/law/falseaccusations/rape.htm>.

⁹⁹ *Id.*

¹⁰⁰ Eugene J. Kanin, Ph.D., *False Rape Allegations*, 23 ARCHIVES OF SEXUAL BEHAVIOR 81 (1994).

¹⁰¹ *Id.* at 84.

¹⁰² *Id.* at 85.

¹⁰³ *Id.* at 90.

¹⁰⁴ *Id.* at 84.

A. False Rape and Defamation in the United States

In the United States, few defamation claims over allegations of sexual abuse have reached court.¹⁰⁵ Those that have often do not involve direct accusations of rape.¹⁰⁶ Although the Tawana Brawley case provides the most high profile example of a defamation case over a rape allegation in the United States, many Americans do not even know that Brawley's lies led to a defamation suit.¹⁰⁷ Suing for defamation after a false accusation of rape simply has not become commonplace in the United States, despite fears raised in the 1980s.¹⁰⁸ The defamation cases discussed below were heard in United States courts, yet most were either dismissed on procedural grounds or did not involve specific accusations of rape.

1. False Rape-Defamation Cases in American Courts

i. Unsuccessful Defamation Cases

Out of all the defamation cases over false rape allegations to reach American courts, only a handful have held in favor of the plaintiff.¹⁰⁹ These plaintiffs have had to contend with the requirements of defamation law in the United States. First, *Arledge v. Hendricks* reached the Court of Appeal of Louisiana in 1998.¹¹⁰ In this case, Joseph Arledge's ex-wife Janet and her new husband, Ronald Hendricks, filed for custody and child support for Arledge's daughter, with Janet claiming that Arledge had repeatedly raped the child.¹¹¹ If the couple succeeded in their case, Arledge would face a mandatory life sentence.¹¹² Arledge denied the charge and attempted to sue the lawyer who made this claim on behalf of Janet and Ronald Hendricks, but the court held that there was no cause of action.¹¹³ To sue the attorney, Arledge had to show that he had intentionally defamed him; otherwise, it

¹⁰⁵ Cooperstein, *supra* note 28.

¹⁰⁶ See *Norris v. Hathaway*, 561 N.W.2d 583 (Neb. Ct. App. 1997); *Steed v. St. Paul's United Methodist Church*, 728 So.2d 931 (La. Ct. App. 1999).

¹⁰⁷ See Glaberson, *supra* note 16 (noting that by the time the defamation suit was decided ten years after the initial media frenzy, interest in the case had died down).

¹⁰⁸ See Cooperstein, *supra* note 28.

¹⁰⁹ Although unusual, some women have had to face harsh repercussions when they admitted to making a false claim of rape in the United States. In September 2011, Heidi Jones, a New York TV meteorologist, admitted to making up claims that she had been raped in Central Park. After police had spent hours on the case, Jones admitted that she had made up the allegations due to workplace stress. If she had been convicted at trial, she would have faced up to two years in jail. Instead, she was sentenced to 350 hours of community service—one hour of service for every hour police wasted on her case. While this case did not involve a defamation claim, since Jones never accused a specific person of the crime, it is important to note that she was still punished by the court system for her lies. See David K. Li, *Guilty: The Girl Who Cried Rape*, N.Y. POST (Sept. 15, 2011), available at http://www.nypost.com/p/news/local/manhattan/guilty_the_girl_who_cried_rape_T63iVq26oIDdSc6ZewdY8I.

¹¹⁰ *Arledge v. Hendricks*, 715 So.2d 135 (La. Ct. App. 1998).

¹¹¹ *Id.* at 137.

¹¹² *Id.*

¹¹³ *Id.* at 141.

is presumed that the attorney is “simply the instrument through which the client invokes judicial determination.”¹¹⁴ Since *Arledge* could not prove any intentional defamation, the Court of Appeal upheld the lower court’s determination of no cause of action.¹¹⁵

Arledge is different from the typical defamation suit over a rape allegation where a man files a defamation suit against a woman who has accused him of rape. However, it does demonstrate that, without a showing of damages, a defamation suit will not be successful in the United States.¹¹⁶ This requirement prevents many suits from moving forward. As the United Kingdom does not have a similar requirement, an increased number of defamation suits are likely to reach court and resolve in favor of the plaintiff in that country.¹¹⁷ *Arledge* illustrates how strict the requirements for United States defamation cases are in comparison to the requirements in the United Kingdom,¹¹⁸ and how important it is to comply with these requirements.¹¹⁹

Like *Arledge*, *Norris v. Hathaway*¹²⁰ also failed on technical grounds, again showing the importance of fulfilling the strict requirements for a defamation action. In *Norris*, the two parties worked together for the United States Postal Service in Omaha, Nebraska.¹²¹ After *Norris* reported that the *Hathaway* had made a mistake in her work, and that *Hathaway*’s boyfriend—also an employee—had threatened another worker, *Hathaway* claimed that *Norris* had sexually abused her by grabbing and touching her.¹²² *Norris* responded by filing a complaint for defamation and false light.¹²³ His complaint was dismissed because he failed to show damages.¹²⁴ The Court of Appeals of Nebraska noted that, for a successful defamation claim, *Norris* would have had to show “(1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence . . . and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”¹²⁵ *Norris* failed to show how he was damaged. If he had, he might have been able to make a successful case, since it appears that *Hathaway* may have been motivated by vengeance due to *Norris*’ treatment of her boyfriend.¹²⁶ If this case had arisen in the United Kingdom, *Norris* might have been successful, since plaintiffs in British

¹¹⁴ *Id.* at 139.

¹¹⁵ *Id.* at 141.

¹¹⁶ *Arledge*, 715 So.2d at 141.

¹¹⁷ CARTER-RUCK, *supra* note 65.

¹¹⁸ Discussed *infra* Part I.B. and *supra* Part II.B.

¹¹⁹ *Arledge*, 715 So.2d at 141.

¹²⁰ *Norris v. Hathaway*, 561 N.W.2d 583 (Neb. Ct. App. 1997).

¹²¹ *Id.* at 584.

¹²² *Id.*

¹²³ *Id.* at 585.

¹²⁴ *Id.*

¹²⁵ *Id.* at 585 (citing 50 Am.Jur.2d *Libel and Slander* § 21 (1995)).

¹²⁶ *Norris*, 561 N.W.2d at 584.

defamation suits are not required to show damages to move their cases forward.¹²⁷ Indeed, under British law, Norris would simply have needed to prove that a defamatory statement was made to a third party, and that this statement involved him.¹²⁸

ii. Successful Defamation Cases

Unlike the *Arlidge* and *Norris* cases, damages were successfully pleaded in *Steed v. St. Paul's United Methodist Church*¹²⁹—one of the few cases in the United States resulting in a positive outcome for the plaintiff.¹³⁰ However, it is important to note that this case did not involve an accusation of rape, but simply sexual harassment. Steed was the choir director at St. Paul's United Methodist Church. Shortly after she started working there, she claimed that Reverend Simmons began to hug, kiss, and grab her.¹³¹ Steed reported these incidents to the Pastor-Parish Relations Committee, and after an investigation the Committee concluded that there was no basis for the allegations.¹³² However, Steed was eventually fired.¹³³ After she was fired, Steed brought a suit against Simmons and the church because she believed she had been wrongfully terminated, and she allowed herself to be interviewed on television.¹³⁴ Reverend Simmons then brought a defamation case against Steed due to the comments she made in the televised interview.¹³⁵ Simmons had to be transferred to another parish to get away from the scandal, so the court easily found that his reputation had been damaged.¹³⁶ The jury awarded Simmons \$90,000 in damages, and Steed appealed.¹³⁷ The Court of Appeal of Louisiana held that “[a]n award of damages in a defamation case is left to the great discretion of the jury and should not be disturbed absent a showing of manifest error.”¹³⁸ Here, the court held that it was not erroneous to award Simmons \$90,000.¹³⁹ Due to the publicity the case received through Steed's television interview, and since Reverend Simmons had to be transferred to another parish after his reputation was damaged, it was not difficult for the court to find that all requirements for a defamation suit had been met.¹⁴⁰

¹²⁷ CARTER-RUCK, *supra* note 65.

¹²⁸ See Vick & Macpherson, *supra* note 67, at 624.

¹²⁹ *Steed v. St. Paul's United Methodist Church*, 728 So.2d 931 (La. Ct. App. 1999).

¹³⁰ *Id.*

¹³¹ *Id.* at 936.

¹³² *Id.* at 937.

¹³³ *Id.* at 936.

¹³⁴ *Steed*, 728 So.2d at 937.

¹³⁵ *Id.*

¹³⁶ *Id.* at 940.

¹³⁷ *Id.* at 935.

¹³⁸ *Id.* at 942.

¹³⁹ *Steed*, 728 So.2d at 942.

¹⁴⁰ *Id.*

Again, if this case had occurred in the United Kingdom, Reverend Simmons would not have needed to prove how he was damaged.¹⁴¹ Given that Steed discussed Reverend Simmons and the alleged events on television, he would probably have met the requirements of United Kingdom law even absent a showing of damages. Therefore, Steed most likely would have been found liable and faced a much larger penalty for her actions. Ninety thousand dollars is a smaller award for damages than is usually seen in British defamation cases.¹⁴²

iii. False Rape Claims on College Campuses

While rape claims occur throughout society and in a variety of situations, they frequently arise in the college context. Indeed, the regularity of rape claims on college campuses has led to many disputes, including false accusations and defamation suits, as described herein. Rape claims have become an unfortunate part of college culture in the United States, one that both women and men seem to have accepted as a norm in today's society. This level of cynicism has increased over time, and today some men have developed a fear of making a false move and being accused of rape. In fact, in 2000, *Men's Health* published an article called "Best and Worst Campuses for Men," which warned prospective male students about the colleges with the strictest sexual harassment policies and largest contingents of fervent feminists.¹⁴³ The fears underlying this article, while perhaps somewhat unfounded, have developed from false rape cases from the 1980s and 1990s.

One of the most publicized false rape-defamation claims to come from a college campus occurred in 1996. Two students at Brown University, Sara Klein and Adam Lack, spent the night together, and six weeks later Sara Klein filed a complaint at Brown, claiming that Adam Lack had raped her.¹⁴⁴ The university's disciplinary committee found Lack guilty of sexual misconduct, since it was unclear whether Klein had been "drunk and vulnerable" on the night in question.¹⁴⁵ Lack's photograph first appeared in a student newspaper, and then, as reports began to appear in national publications, interest grew.¹⁴⁶ Eventually, the story was broadcast on the television show *20/20*.¹⁴⁷ Lack sued Klein for defamation and Brown for negligence, breach of contract, and discrimination. Two years later the case settled, and Klein admitted that Lack "may not have been aware she was drunk

¹⁴¹ CARTER-RUCK, *supra* note 65.

¹⁴² Vick & Macpherson, *supra* note 67, at 627.

¹⁴³ Laurence Roy Stains, *Best and Worst Campuses for Men*, MEN'S HEALTH, Sept. 2000, available at ProQuest, Doc. ID 56864220.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Mark Nickel, *All Parties in Lack Case Agree to Settlement Ending Legal Proceedings*, THE BROWN UNIVERSITY NEWS BUREAU (Dec. 31, 1997), http://brown.edu/Administration/News_Bureau/1997-98/97-063.html.

¹⁴⁷ *Id.*

at the time.”¹⁴⁸ Cases such as this one have led many men to fear rape allegations in the college setting.¹⁴⁹ Settlement of defamation cases over false rape claims, as in *Lack v. Klein* and *Brown University*, may help to reduce publicity on such cases, which in turn may contribute to the fact that defamation is not as popular a remedy in the United States for rape allegations as it is in the United Kingdom.¹⁵⁰

Two rape allegations were made on college campuses in Michigan in 1987, and in both cases, the accused brought a defamation claim against the alleged victim. In the first case, criminal charges were filed against a University of Michigan graduate for raping a senior at a fraternity house.¹⁵¹ Before the trial began, the defendant filed a civil suit against the student for more than \$10,000, claiming defamation, intentional infliction of emotional distress, and abuse of legal process.¹⁵² The judge stayed discovery in the civil suit, and the defendant was then found not guilty of criminal sexual conduct.¹⁵³ The civil suit later settled.¹⁵⁴

In the same year, Ann Elizabeth Vanek, also a student at the University of Michigan, claimed that she had been assaulted by Thomas Rosenboom.¹⁵⁵ Rosenboom responded by filing a complaint alleging slander and intentional infliction of emotional distress.¹⁵⁶ Rosenboom’s criminal charges were dismissed and later Vanek’s motion for summary disposition in the civil case was granted¹⁵⁷ due to insufficient evidence.¹⁵⁸ Even though this civil case was decided in favor of the accuser, these cases raised the fear that there was a “dangerous correlation between the suits and unsuccessful criminal prosecutions.”¹⁵⁹ Whether the civil suits affected the outcome in the criminal cases is immaterial: “the significance rests on the impact potential civil suits may have on rape victims contemplating initiating criminal complaints.”¹⁶⁰ Women with legitimate claims should not be afraid to step forward for fear that their attacker will file a civil suit against them. Indeed, after the two Michigan cases, “[a]t least one rape counselor reported that the civil suits caused women to hesitate in filing criminal complaints.”¹⁶¹

The fear that civil suits for defamation will negatively affect criminal rape cases is a valid one. While the knowledge that the accused has filed a defamation

¹⁴⁸ Stains, *supra* note 143.

¹⁴⁹ *Id.*

¹⁵⁰ Discussed *infra* Part I.B. and *supra* Part II.B.

¹⁵¹ Catherine L. Kello, *Rape Shield Laws—is it Time for Reinforcement?*, 21 U.MICH. J. L. REFORM 317, 322 (1987).

¹⁵² Cooperstein, *supra* note 28, at 280.

¹⁵³ Kello, *supra* note 151, at 324.

¹⁵⁴ Cooperstein, *supra* note 28, at 280 n.7.

¹⁵⁵ *Rosenboom v. Vanek*, 451 N.W.2d 520, 521 (Mich. Ct. App. 1989).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 522.

¹⁵⁸ Kello, *supra* note 151, at 325.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 326.

¹⁶¹ *Id.*

suit may have an effect on the criminal prosecution, it is impossible to gauge what the effect would be.¹⁶² Both parties have a right to justice, but the fact that defamation suits exist should not prevent the criminal prosecution from going forward fairly. Yet divergent groups throughout the United States have raised troubling points that may be difficult to resolve in a manner that is fair to both the accuser and the accused.¹⁶³

B. False Rape and Defamation in the United Kingdom

More cases over rape allegations have reached courts in the United Kingdom than in the United States, and more of these cases have held for the men involved.¹⁶⁴ It is not uncommon for false accusers to face harsh fines or jail time.¹⁶⁵ In fact, these cases have also garnered much more publicity than similar cases in the American media.¹⁶⁶ However, some of these cases have settled before reaching trial, as in the United States.¹⁶⁷ These include the Neil Hamilton case, which may be the most publicized false rape-defamation case in Britain.

1. Hamilton v. Milroy-Sloan: Public Figures and Wide Media Attention

The case of Neil Hamilton, a well-known former Tory MP,¹⁶⁸ caught the attention of the British public as defamation cases over rape accusations had done before.¹⁶⁹ In 2000, Nadine Milroy-Sloan, a single, unemployed mother of four with no assets, claimed that she went onto a sex chat room online and met a man named “Lehaney” and a woman whom she believed to be Mrs. Hamilton.¹⁷⁰ Milroy-Sloan met Lehaney, supposedly the Hamiltons’ chauffeur,¹⁷¹ in person and then went back to his apartment.¹⁷² She claimed she was raped by Lehaney while others—including the Hamiltons—watched and “participated in sexual assaults” on her person.¹⁷³ Milroy-Sloan claimed that she recognized the Hamiltons from

¹⁶² *Id.* at 325.

¹⁶³ *See infra* Part II.A.

¹⁶⁴ *See infra* Part II.B.1-3.

¹⁶⁵ *Id.*

¹⁶⁶ Reputable British media sources such as *The Guardian*, *The Daily Mail*, and *The Independent* have reported on false rape-defamation cases in recent years. *See infra* Part II.B.1-3.

¹⁶⁷ In 2007, David Brown was accused of rape after attending a party. He brought a libel suit against his accuser, which was the first of its kind in Northern Ireland. The allegations were withdrawn after an agreement was reached between the parties. As part of this agreement, the accuser promised not to bring a rape claim against Brown, and there was no admission of liability. *See Agreement Reached in Rape Defamation Case*, UTV NEWS (June 10, 2009), <http://www.u.tv/News/Agreement-reached-in-rape-defamation-case/60a5f2a5-bc6b-4bc6-b5ea-306b3236ad9b>.

¹⁶⁸ A member of Parliament’s Conservative party. *See MPs, Lords, & Offices*, PARLIAMENT, available at <http://www.parliament.uk/mps-lords-and-offices/mps/>.

¹⁶⁹ *Max Clifford Pays Out to Hamiltons Over Sex Slurs*, DAILY MAIL ONLINE (Feb. 2, 2005), <http://www.dailymail.co.uk/news/article-336349/Max-Clifford-pays-Hamiltons-sex-slurs.html>.

¹⁷⁰ *Hamilton v. Milroy-Sloan*, No. HQ01X03583, 2001 WL 34008539 (Queen’s Bench 2001).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

media photographs.¹⁷⁴ The Hamiltons denied their involvement and chose to tell the press about the allegations; Milroy-Sloan and her mother both gave interviews to *News of the World* for hefty sums.¹⁷⁵ Eventually, the Hamiltons were not charged because they had an alibi,¹⁷⁶ and they brought defamation claims against both Milroy-Sloan and her well-known publicist, Max Clifford.¹⁷⁷ It was discovered that Milroy-Sloan had approached Clifford before the alleged rape, asking for advice on selling a story to the tabloids and asking how much she would make from this story.¹⁷⁸ Milroy-Sloan later came back to Clifford and told him that she had been raped, at which point he told her to report this to the police.¹⁷⁹ The Hamiltons claimed that Clifford had defamed them through television interviews and statements made in the newspapers at the time of the scandal.¹⁸⁰

Milroy-Sloan was convicted at the Central Criminal Court and sentenced to three years in prison for her false allegations.¹⁸¹ Clifford claimed that he was not liable for defamation because he was merely repeating allegations of rape made by Milroy-Sloan, but the Queen's Bench¹⁸² held that, by saying in a television interview that he believed the allegations, Clifford was essentially making a defamatory remark.¹⁸³ Although Clifford did not face a jail sentence, he did pay an undisclosed sum to the Hamiltons.¹⁸⁴ While Neil Hamilton and his wife were successful here, this case illustrates what a calculated effort some women may make to bring a false rape claim against a well-known personality. This type of case—when public figures are involved, and when the attention of the mainstream media may scare true victims from coming forward—are the most troubling. While women like Nadine Milroy-Sloan should face punishment for their actions, stricter defamation laws are needed to protect the rights of true victims, while also allowing the wrongly accused to seek justice.

¹⁷⁴ *Id.*

¹⁷⁵ *Hamilton*, 2001 WL 34008539.

¹⁷⁶ Witnesses affirmed that the Hamiltons were at a party at Claridge's at the time the alleged rape took place. *Id.*

¹⁷⁷ *Id.*; *Hamilton v. Clifford*, [2004] EWHC 1542 (QB).

¹⁷⁸ *Id.*; see also *Hamilton v. Clifford*, No. HQ02XO02199, 2004 QB LEXIS (Queens Bench 2004).

¹⁷⁹ *Clifford*, 2004 QB LEXIS.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² One of the three divisions of the High Court in the United Kingdom. The Queen's Bench mainly hears claims for damages involving breach of contract, property disputes, negligence, nonpayment of debt, and libel and slander. See *Courts: Queen's Bench*, JUSTICE (Jan. 23, 2012), available at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/queens-bench/index.htm>.

¹⁸³ *Clifford*, 2004 QB LEXIS.

¹⁸⁴ See *Max Clifford*, *supra* note 169.

2. Money Damages and Jail Sentences in the United Kingdom: Less Necessary with Stricter Defamation Law

In 2000, Lynn Walker claimed that her colleague, Martin Garfoot, had raped her in their office.¹⁸⁵ However, she did not bring a claim against him until ten months after the supposed attack took place.¹⁸⁶ Garfoot asserted that he had bickered with Walker before she brought the claim.¹⁸⁷ He also claimed that the allegation had damaged his reputation, and the jury agreed with him.¹⁸⁸ Walker was ordered to pay Garfoot £400,000 in damages for a false rape allegation, as well as £150,000 for the cost of the defamation suit he brought against her.¹⁸⁹ Garfoot was permitted to receive such a large award without even proving that he had been damaged.

While Walker certainly should have faced penalties for making up such a serious accusation, allowing Garfoot to receive a large sum of money, without having to prove that Walker's accusation had damaged him in any way, punishes her excessively. Under United States defamation law, with its stricter, more reasonable standards, Walker would not be subject to such a fine without Garfoot first proving damages.¹⁹⁰ Indeed, in the United States, Garfoot's case may have suffered the same fate as *Norris v. Hathaway*—a case that failed due to an inability to fulfill the strict requirements for a defamation suit¹⁹¹—unless he was able to prove damages.¹⁹²

Although some women must pay large damage awards for false rape claims, others, like Nadine Milroy-Sloan, receive jail sentences when their claims have proven false. For example, when Sally Henderson claimed that her husband, Richard Cooke, had repeatedly raped her during their marriage, the United Kingdom court found her guilty of perverting the course of justice and sent her to jail.¹⁹³ Henderson had made the same claims years ago against another partner.¹⁹⁴ This penalty is dramatically different from the damage award that Lynn Walker was ordered to pay—while it may be difficult to raise a large sum of money to pay damages, serving time in jail has a moral connotation that will follow the false accuser for the rest of her life.

¹⁸⁵ Ian Herbert, *False Rape Claim Costs Woman Half a Million Pounds*, THE INDEPENDENT (Feb. 8, 2000), <http://www.independent.co.uk/news/uk/crime/false-rape-claim-costs-woman-half-a-million-pounds-706423.html>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Penzi, *supra* note 40.

¹⁹¹ *Norris v. Hathaway*, 561 N.W.2d 583 (Neb. Ct. App. 1997).

¹⁹² See Penzi, *supra* note 40.

¹⁹³ Steven Morris, *Judge Jails 'Wicked Liar' Who Falsely Claimed Ex-Husband Had Raped Her*, THE GUARDIAN (Nov. 3, 2006), <http://www.guardian.co.uk/uk/2006/nov/04/ukcrime.stevenmorris>.

¹⁹⁴ *Id.*

A jail sentence was also imposed on Jennifer Day in 2009 when she was found to have falsified a rape claim.¹⁹⁵ Day accused Andrew Saxby, who she had met on an online dating site, of rape after they had a fight.¹⁹⁶ However, a neighbor witnessed the fight and supported Saxby's version of the events; when Day's version was challenged, she confessed that she had made up the rape claim.¹⁹⁷ She was convicted of perverting the course of justice and sentenced to two years in jail.¹⁹⁸ Mr. Justice Henriques of the Court of Appeal noted that "[f]alse complaints of rape necessarily impact upon the minds of jurors trying rape cases. Every time a defendant stands trial for rape, defence counsel necessarily point[s] out to the jury that false allegations are made. Allegations such as this drive yet another nail into the conviction rate."¹⁹⁹

It is difficult to balance the needs of real victims with those of the falsely accused. However, the repercussions when falsely accused men are punished are unwarranted and severe. Raman Kumar and Baldev Singh were falsely accused of rape, and both men lost their jobs and spent time in jail before the lie was discovered.²⁰⁰ The woman who accused them was ordered to pay them almost £700,000 in compensation in 2006, and subsequently faced bankruptcy.²⁰¹ Deputy High Court Judge McKenna suggested that she had made the rape accusation to prevent her family from finding out that she was having an affair.²⁰² When an accusation of rape is proven false, and when the accused men have been so clearly damaged, enforcing a harsh punishment on the accuser is the best way to discourage other women from making false claims. Even though this could prevent some genuine victims from coming forward,²⁰³ the rights of falsely accused men must be protected.

It is challenging to balance the interests of both parties in defamation cases over rape allegations, and risks must be taken to assure that overall, true victims and the falsely accused will be protected. Yet the possibility that a true victim could be punished for a "false" accusation is chilling. In 2009, Layla Ibrahim reported that she had been raped while walking home late at night.²⁰⁴ At first the

¹⁹⁵ Tom Whitehead, *Prison 'Inevitable' for False Rape Claims*, THE TELEGRAPH (Oct. 30, 2009), <http://www.telegraph.co.uk/news/uknews/law-and-order/6468036/Prison-inevitable-for-false-rape-claims.html>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Stephen Wright, *'Cold Blooded Liar' Who Cried Rape Twice Must Pay Her Victims £700,000...But She STILL Can't Be Named*, DAILY MAIL ONLINE (Dec. 29, 2006), <http://www.dailymail.co.uk/news/article-425464/Cold-blooded-liar-cried-rape-twice-pay-victims-700-000--STILL-named.html>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Cooperstein, *supra* note 28.

²⁰⁴ Simon Hattenstone & Afua Hirsch, *Layla's Story: Jailed After Reporting a Sexual Assault*, THE GUARDIAN (Aug. 12, 2011, 6:02 PM), <http://www.guardian.co.uk/law/2011/aug/12/layla-jailed-after>

police seemed sympathetic to her story, but slowly their attitude changed and they became suspicious of Ibrahim herself.²⁰⁵ The police claimed that Layla's behavior was inconsistent and that all of her supposed injuries could have been self-inflicted.²⁰⁶ The police warned Ibrahim to drop her case, but she refused; she was charged with "perverting the course of justice" and sentenced to three years in prison.²⁰⁷ However, evidence such as pubic hair had been destroyed in a police lab, and Ibrahim's description of her attacker matched the description of a man in the neighborhood who had recently attacked other women.²⁰⁸

While there is no evidence to definitively prove whether Ibrahim was telling the truth,²⁰⁹ the police reaction—and the evidence that would have supported her claim—is disturbing. This case recalls the Tawana Brawley case in the United States, where a grand jury decided that Brawley's injuries were self-inflicted.²¹⁰ Perhaps the police involved in the Ibrahim investigation had faced too many false rape claims in the past, or perhaps they had simply been exposed to the media coverage in other cases and then saw a false rape claim where there may not have been one. Either way, these cases are not simple or clear-cut, and no assumptions should be made without strong evidence.

III. THE OPTIMAL POLICY: UNITED STATES DEFAMATION LAW WITH THE UNITED KINGDOM'S PUNISHMENT STRUCTURE

To effectively handle defamation claims over rape accusations, American defamation law should be followed, while implementing the harsh fines and jail sentences used in courts in the United Kingdom. This is the optimal policy for serving the needs of both parties, and it will allow for fair and just punishment of women who make false claims. Although valid concerns have been raised over the impact defamation suits over rape claims may have on genuine rape victims, the needs of both parties must be considered. The stricter requirements for defamation claims in the United States provide additional protection against frivolous claims. Defamation law in the United Kingdom is far too liberal and must be reformed, as the writers of the Draft Defamation Bill, and the Joint Committee on the Draft Defamation Bill, have suggested.²¹¹ Due to its plaintiff-friendly system, men who bring claims are at an advantage from the beginning, making it more likely that their suits will be successful.²¹² In this respect, American defamation law is preferable—requiring the plaintiff to prove that the statement at issue is false

reporting-sexual-assault.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *Pagones v. Maddox*, 295 A.D.2d 489 (N.Y. App. Div. 2d Dep't 2002).

²¹¹ DRAFT DEFAMATION BILL, *supra* note 85.

²¹² *Vick & Macpherson*, *supra* note 67, at 624.

provides an additional level of security and protection for possibly innocent defendants.²¹³ In addition, coupling United States defamation law with the harsh punishment structure used in the United Kingdom provides protection for falsely accused men and effectively balances the needs of both parties. Nevertheless, it is difficult to discuss false rape claims through the lens of defamation, as society's natural sympathy is focused on the victim.²¹⁴ It cannot be denied that a rape charge is harmful for the accused, yet the chilling effect of these claims should not prevent the truth from coming out.

A. Concerns and Reactions to False Rape-Defamation Claims

Many women in the United States view the recent proliferation of these defamation suits with trepidation. Some fear that if defamation suits over rape accusations are allowed to continue unmonitored, they "will serve as a new, forcible deterrent to women who wish to file criminal complaints of sexual assault or rape."²¹⁵ Some fear that these suits will lower the importance of rape shield laws—which limit the inquiry into the rape victim's past sexual conduct—since rape shield protection does not apply to civil suits.²¹⁶ Civil suits may even hurt the goals of rape reform legislation, which are to increase "the number of rape reports and successful prosecutions, improv[e] the treatment of rape victims, [and] achiev[e] comparable legal treatment for rape as that given to other crimes of violence."²¹⁷ While these women raise valid concerns, it is also troubling that many men are falsely accused of rape and must face the consequences of such an allegation, from having a damaged reputation to perhaps losing a job or the trust of loved ones.²¹⁸

Women's groups in the United Kingdom have also expressed their concerns. After learning of the Henderson jail sentence in 2006, a spokeswoman for the British organization Women Against Rape stated that she was "concerned at a trend of women being prosecuted . . . after making allegations of rape[.] . . . We think there is a concerted witchhunt at the moment. It's a new trend which will stop women from coming forward and making rape complaints."²¹⁹ Margaret Gardener, from the False Allegations Support Organisation, added that "[t]he worst thing about this case is it could put genuine rape victims off coming forward."²²⁰ However, Gardener showed sympathy for men who are falsely accused; she explained that "[m]any men who ring us [the organization] are suicidal. They have

²¹³ See Pfanner, *supra* note 25.

²¹⁴ See Cooperstein, *supra* note 28.

²¹⁵ *Id.* at 284.

²¹⁶ Kello, *supra* note 151, at 317.

²¹⁷ *Id.* at 326.

²¹⁸ See Morris, *supra* note 193.

²¹⁹ *Id.*

²²⁰ *Id.*

to try and get their lives back together. They will have had no help and probably faced some media coverage. Some lose their families, their jobs.”²²¹ While many women’s groups abhor the treatment imposed on women who make false claims, it is clear that others understand the tough circumstances the male victims of false rape accusations must face.

However, cases like that of Layla Ibrahim have led some organizations to speak out. In *The Guardian*’s article on Ibrahim from August 2011, Women Against Rape stated that they

know of thirty women jailed for so-called false allegations of rape in the past twelve months[.] . . . It is a galling diversion for women to be jailed when the vast majority of rapists are not[.] . . . The prosecution of women and the disproportionate media coverage they get are putting rape victims off reporting and leaving all of us more vulnerable to attack.²²²

While it is certainly true that some women fabricate allegations of rape for a variety of reasons, it is disturbing to think that women who are telling the truth—perhaps like Layla Ibrahim—are also jailed under the pretense of making a false rape claim. Indeed, it is also true that the harsh punishments women receive for making false claims get media attention.²²³ This is especially true when a well-known politician like Neil Hamilton is involved. However, the attention that the media pays to these cases might also have a positive impact. Some women may be prevented from coming forward with false claims out of the fear that they too will be caught.

B. The Benefits of United States Defamation Law

Using United States defamation law in defamation cases over rape allegations effectively balances the needs of innocent victims and falsely accused men. United States defamation law provides extra protection to the defendants in libel suits due to the fact that the burden of proof is put on the plaintiff.²²⁴ If a man accused of rape is going to bring a claim against the supposed victim, intuitively he should—as the party making the allegation—have the burden of proof.²²⁵ When such a serious issue as rape is involved, the plaintiff should not be put at such an unfair advantage, especially since there is a legitimate fear that actual rapists will use defamation suits to intimidate and threaten their victims.²²⁶ Allowing defamation suits for supposedly false rape allegations may prevent women from coming forward, but the rights of both parties must be considered.²²⁷ Falsely accused men who are seeking justice deserve to bring their claims. The risk that some women

²²¹ *Id.*

²²² See Hattenstone & Hirsch, *supra* note 204.

²²³ *Id.*

²²⁴ Pfanner, *supra* note 25.

²²⁵ Vick & Macpherson, *supra* note 67, at 624.

²²⁶ Cooperstein, *supra* note 28, at 281.

²²⁷ *Id.*

may become afraid to claim rape is a risk that must be taken in order to effectively balance the needs and rights of both parties.²²⁸

A further advantage provided by the stricter requirements of United States defamation law is the actual malice standard required for public figure plaintiffs²²⁹—which would have applied in a celebrity case like Neil Hamilton's—and the negligence standard most commonly required for private plaintiffs.²³⁰ Requiring specific standards to test the veracity of a defamatory statement provides the court with more control in determining whether the statement at issue is truly defamatory. Indeed, in the United Kingdom, statements are considered defamatory simply if they “tend to lower a person in the estimation of right thinking members of society.”²³¹ Such a standard is hardly difficult to meet, since many statements—even insults or exaggerations—could possibly lower a person in public estimation, especially when an accusation of rape is at issue.

In addition, the courts of the United States are divided between those that use the reasonable reader test to determine whether there is a defamatory meaning in the statement at issue,²³² and those that look at the context of the statement.²³³ Courts in the United Kingdom only follow the more limited reasonable reader test.²³⁴ The best method to determine the defamatory meaning of the statement is to look at the context of the statement. Courts must be mindful “that the question is not merely ‘What does this mean?’ but ‘Ought the defendant to be responsible for the meaning?’”²³⁵ Indeed, “interpretation and policy cannot be neatly separated, in the way that the reasonable reader test implies.”²³⁶

No showing of damage is required to make a successful libel claim in the United Kingdom.²³⁷ Indeed, a plaintiff can establish a claim in defamation “merely by showing that a defendant voluntarily communicated to a third party (‘published’) a defamatory statement referring directly or indirectly to the plaintiff.”²³⁸ Without this showing—which is required in the United States²³⁹—plaintiffs are more likely to bring successful claims. This showing is necessary in order to prove to the judge and the jury that the allegedly defamatory statement has truly harmed the plaintiff. Such a requirement also helps to hinder the success of frivolous claims. If British plaintiffs are required to show actual damages, as the

²²⁸ Kello, *supra* note 151, at 326.

²²⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

²³⁰ *See supra* note 62.

²³¹ CARTER-RUCK, *supra* note 65, at 53.

²³² *James v. Gannett Co.*, 353 N.E.2d 834, 838 (N.Y. 1976).

²³³ *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 60 (2nd Cir. 1980).

²³⁴ MITCHELL, *supra* note 69, at 38.

²³⁵ *Id.* at 51.

²³⁶ *Id.*

²³⁷ CARTER-RUCK, *supra* note 65.

²³⁸ *Vick & Macpherson*, *supra* note 67, at 624.

²³⁹ Penzi, *supra* note 40, at 215.

Draft Defamation Bill suggests, fewer libel cases would be seen in that country, since the plaintiffs would bear a much higher burden of proof.²⁴⁰ This may help to prevent actual rapists from bringing successful defamation claims in order to intimidate their victims, and it could also prevent false accusers from progressing with their fabricated claims.

C. Balancing Competing Interests with the United Kingdom's Punishment Structure

By using United States defamation practices to determine the validity of false rape-defamation suits, only the penalties are left to be determined. No standard penalty has developed for defamation claims over rape accusations in the United States, whereas harsh punishments are often imposed in the United Kingdom.²⁴¹ The limited punishment doled out in the United States is not enough to deter women from making false rape claims.²⁴² While the best method for handling these defamation suits is to use current American legal standards for determining liability, American courts should adopt the punishment scheme used in the United Kingdom. Although instituting such a system does create the risk of preventing some women from coming forward to report legitimate rapes,²⁴³ again, the needs of both parties must be considered. Falsely accused men deserve to feel that their reputations and liberty will be protected, and the best way to do this is to create a system of punishment—imposed only *after* the wrongfully accused meets the strict legal standards of defamation—that is likely to discourage women from bringing false rape claims. While perhaps damages should not reach the astonishingly high level that they did in *Youssouf v. Metro-Goldwyn-Mayer Pictures, Ltd.*,²⁴⁴ a significant financial penalty, or a jail sentence, would be severe enough punishments to prevent some women from making false rape accusations. Although such a scheme runs the risk that some true victims will refrain from coming forward, providing a stricter system for handling defamation cases also bolsters the protection for true victims who are afraid that their rapists will succeed in bringing defamation claims against them.

While it is difficult to balance the interests of both parties in defamation claims over rape allegations since these parties have such divergent interests, the best policy is to follow defamation law as practiced in the United States, where stricter standards are used, damages must be shown, and the statement is examined within its context to determine whether it has a defamatory meaning. In addition, the harsh penalties used in the United Kingdom should be imposed, as these will best discourage false claims from being made.

²⁴⁰ DRAFT DEFAMATION BILL, *supra* note 85.

²⁴¹ Vick & Macpherson, *supra* note 67, at 627.

²⁴² Steed v. St. Paul's United Methodist Church, 728 So.2d 931 (La. App. 1990).

²⁴³ See Hattenstone & Hirsch, *supra* note 204; see also Morris, *supra* note 193.

²⁴⁴ MITCHELL, *supra* note 69, at 38.

CONCLUSION

Defamation suits brought for false allegations of rape have only recently become common,²⁴⁵ and are still a little-known remedy for innocent men who are wrongly accused. While these suits have been filed in both the United States and the United Kingdom, differing defamation laws have led to divergent results. Strict defamation requirements in the United States make it harder to bring claims,²⁴⁶ whereas in the United Kingdom, where all defamatory statements are assumed to be false unless proven true, no damages are required to be shown.²⁴⁷ This liberal policy makes defamation claims much easier to bring in the United Kingdom, often resulting in a favorable outcome for the plaintiff.

While it is certainly important to provide falsely accused men with a means of restoring their reputations, true victims of rape must also be considered. There is a common fear in both countries that these defamation suits will prevent real victims from coming forward, out of fear that their attackers will file defamation claims against them.²⁴⁸ The risk of punishment is great in the United Kingdom, where women are often jailed or penalized with large fines.²⁴⁹ In order to best balance the needs of both parties, following the policies and standards used in the United States for defamation claims over rape allegations would be ideal, while allowing for the harsh fines and jail sentences common in the United Kingdom for women who are deemed liable. Instituting such a system would not eliminate the risk that false accusations will be made, or that some women will be prevented from coming forward—totally eradicating this disturbing reality is impossible. Yet by combining tactics used in the United States and the United Kingdom, an improved system can be established, where the rights of the falsely accused and the true victims will both be better protected.

²⁴⁵ See *supra* Part II.

²⁴⁶ See Penzi, *supra* note 40, at 215.

²⁴⁷ Youm, *supra* note 38, at 430.

²⁴⁸ See Kello, *supra* note 151, at 326; see also Hattenstone & Afua Hirsch, *supra* note 204; Morris, *supra* note 193.

²⁴⁹ See *supra* Part II.B.