Fordham Urban Law Journal

Volume 50
Number 4 *Local Government Structure through a Legal Lens: Conversations of Law and Local Governance*

Article 10

2023

Reporting Sexual Assault: What Privileges Should Exist in Defamation Suits Stemming from a Police Report?

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REPORTING SEXUAL ASSAULT: WHAT PRIVILEGES SHOULD EXIST IN DEFAMATION SUITS STEMMING FROM A POLICE REPORT?

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Nothing in this Comment is intended to comment on the merits of any ongoing litigation nor the guilt of any parties involved.

INTRODUCTION

Five years ago, #MeToo was used over 19 million times on social media platforms in one year, allowing survivors to share millions of stories of the sexual assault and harassment they endured.[1] Through that movement, over 200 high profile figures were exposed for their alleged commission of unwanted sexual acts,[2] and the movement became the driving force behind a national reckoning with the acknowledgement and punishment of these crimes.[3]

Despite the general change in beliefs, this movement was met by a rise in retaliatory defamation cases by alleged abusers, accusing the victims of being opportunistic liars.[4] Harvey Weinstein threatened a suit against the *New York Times* in the wake of their exposé, and author Stephen Elliott filed a defamation suit over his inclusion on a "Shitty Media Men" spreadsheet.[5] Even former President Donald J. Trump tweeted to his audience of nearly 60 million followers that now-

1. *See* Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ [https://perma.cc/J3DE-Q9VG]; Anna Brown, *More than Twice as Many Americans Support than Oppose the #MeToo Movement*, PEW RSCH. CTR. (Sept. 29, 2022), https://www.pewresearch.org/social-trends/2022/09/29/more-than-twice-as-many-americans-support-than-oppose-the-metoo-movement/ [https://perma.cc/QCN6-T5FT].

2. *See* Ashley Fetters Maloy & Paul Farhi, *Five Years On, What Happened to the Men of #MeToo?*, WASH. POST (Oct. 16, 2022, 3:16 PM), https://www.washingtonpost.com/lifestyle/2022/10/16/metoo-men-what-happened/ [https://perma.cc/L24P-X4LY].

3. *See* Ross Toback, *Prosecutor Accused of Sex Crimes Gets off with Misdemeanor Charges*, N.Y. POST (July 19, 2017, 7:09 PM), https://nypost.com/2017/07/19/prosecuter-accused-of-sex-crimes-gets-off-with-misdemeanor-charges/ [https://perma.cc/6M7X-QVJ6].

4. *See* JENNIFER BECKER, KYRA BATTÉ & CASSIE WALTER, LEGAL MOMENTUM, A GUIDE TO DEFAMATION FOR SURVIVORS OF SEXUAL ASSAULT OR HARASSMENT 13 (2022), https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment [https://perma.cc/6T8T-E4W8].

5. *Id.*

Justice Brett Kavanaugh should sue his accusers — who emerged during his confirmation hearings — for libel.[6]

This harsh reality tracks with national reporting statistics: 81% of women and 43% of men report experiencing some sort of sexual harassment or assault in their lifetime,[7] yet rape is still the most under-reported crime.[8] Historically, victims have chosen not to report their assaults for many reasons, including financial consequences, guilt, fear of discrepancies in their stories, and public shame.[9] Now, liability resulting from highly visible defamation suits may be another. Specifically, suits for defamation — generally defined as "a statement that tends to injure a person's reputation, exposing him or her to public hatred, contempt, or ridicule"[10] — can deter people from reporting crimes for fear of facing subsequent litigation that can retraumatize individuals.[11]

Recently, New York courts have passed on the opportunity to resolve a case that could have encouraged victims of sexual assault to report their crimes. In *Sagaille v. Carrega*, a man accused of sexually assaulting a woman used her original police report from the incident as the basis of his defamation claim against her.[12] In New York, this is a legitimate cause of action, as police reports are only given a qualified privilege in defamation suits, unlike the absolute privilege provided to

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6. Kevin Fitzpatrick, *Trump Urges Kavanaugh to Sue for "Libel" over Renewed Sexual Assault Allegations*, VANITY FAIR (Sept. 15, 2019), https://www.vanityfair.com/news/2019/09/brett-kavanaugh-sexual-assault-donald-trump [https://perma.cc/XJN9-LFWK]; *see also* Eliza Reman, *Trump Leaned into Twitter in 2019, Tweeting Twice the Number of Times as He Did in 2018*, BUS. INSIDER (Jan. 2, 2020, 5:29 PM), https://www.businessinsider.com/trump-tweeted-twice-as-many-times-in-2019-2020-1 [https://perma.cc/Y7VT-N3F8].

7. U.C. SAN DIEGO CTR. GENDER EQUITY & HEALTH, MEASURING #METOO: A NATIONAL STUDY ON SEXUAL HARASSMENT & ASSAULT 10 (2019).

8. NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [https://perma.cc/93RC-DK4B].

9. Shaila Dewan, *Why Women Can Take Years to Come Forward with Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html [https://perma.cc/YXY9-9MQS].

10. 50 AM. JUR. 2D *Libel & Slander* § 3 (2022). The Restatement Second of Torts defines defamation to include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

11. *See, e.g.*, Maybell Romero, *Ruined*, 111 GEO. L.J. 237, 269 (2022).

12. *See* Sagaille v. Carrega, 143 N.Y.S.3d 36, 38 (App. Div. 2021) [hereinafter *Sagaille II*].

later elements of the investigatory process.[13] While the court dismissed his claim for reasons discussed later in this Comment, the dismissal highlighted a serious issue within our current justice system that urgently needs resolution.

This Comment explores the current protections against defamation suits available to people who choose to take the brave step to report a sexual crime to the police. Part I provides a brief overview of defamation law and delves into the *Sagaille* case to provide a contemporary illustration of the problematic contours of the qualified privilege for police reports, as applied to defamation claims against sexual assault victims.[14] Part II broadly surveys the differing state policies presently in force and the courts' reasoning behind invoking such privileges.[15] Part III then provides public policy arguments supporting a need for a heightened privilege in New York and concludes by offering a resolution — the adoption of a limited-scope, absolute privilege for all statements made by victims in police reports.[16]

I. *SAGAILLE V. CARREGA* AND THE CURRENT PRIVILEGE PARADIGM

This Part introduces the case at the center of this Comment and explores how the principal issue for the court — the application of absolute or qualified privilege — has the power to prevent people from reporting sexual assaults.

A. *Sagaille v. Carrega*

In *Sagaille v. Carrega*, the First Department heard arguments over whether an absolute privilege should be extended to police reports in sexual assault cases.[17] The case came about after Carrega, a reporter, met Sagaille, a former assistant district attorney in the sex crimes unit of the Brooklyn District Attorney's Office, at a baby shower of a mutual friend.[18] The day after the shower, Carrega reported that

13. *See id.* at 39.

14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See Sagaille II*, 143 N.Y.S.3d at 36; Memorandum of Law in Further Support of Motion by Defendants Christina Carrega and Daily News, L.P. to Dismiss Verified Amended Complaint, Sagaille v. Carrega, 2019 WL 4492748 (N.Y. Sup. Sept. 9, 2019) (No. 154010/2018).

18. *Sagaille II*, 143 N.Y.S.3d at 38.

Sagaille sexually assaulted her while she was driving him home.[19] She alleged that he grabbed her face, tried to kiss her, and touched her body without her consent.[20] Sagaille was originally arrested on a first degree felony sex crime charge, but was later arraigned in Brooklyn Supreme Court on two misdemeanor counts of forcible touching and third degree sexual abuse.[21]

At trial, the victim testified to Sagaille "grabb[ing] [her] face" and "put[ting] his tongue in [her] mouth," while the defense attorney argued that the charges were unwarranted.[22] He told jurors that "with a manufactured case, you can ruin someone's life."[23] Sagaille then took the stand and stated that everything was completely consensual.[24] At one point during the trial, Sagaille's father was reprimanded by the presiding judge for threatening the victim by making a gesture to the throat as she testified.[25] The case embodied the unfortunate and harsh realities of what it is like for a person to fight back against their alleged assaulter in court — a case of "he said, she said." After sixty hours of deliberation,[26] the trial was adjourned because the jury could not reach a unanimous verdict.[27]

Shortly before the criminal trial started, Sagaille filed an action against Carrega and her employer, the *Daily Mail*, asserting claims for

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19. *Id.*

20. *Id.* at 39.

21. *See* Toback, *supra* note 3; *see also* Sagaille v. Carrega, No. 154010/2018, 2019 WL 4259674, at *3 (N.Y. Sup. Sept. 9, 2019) [hereinafter *Sagaille I*].

22. Andrew Keshner, *Ex-Brooklyn DA Groped and Forcibly Kissed Woman, Prosecutors Say*, SUN SENTINEL (June 5, 2018, 12:10 AM), https://www.sun-sentinel.com/ny-metro-brooklyn-da-sex-abuse-trial-20180604-story.html [https://perma.cc/TPX3-C5RN].

23. *Id.*

24. *See* Elizabeth Rosner, *Ex-Prosecutor Accused of Sex Crime Says Encounter Was Consensual*, N.Y. POST (June 5, 2018), https://nypost.com/2018/06/05/ex-prosecutor-accused-of-sex-crime-says-encounter-was-consensual/ [https://perma.cc/2VJP-VQBU] ("I asked to kiss her, she smiled at me and I leaned to my left and kissed her twice on the lips.").

25. *See* Elizabeth Rosner, *Judge Slams Dad of Ex-Prosecutor Accused of Sex Crime for Intimidating Accuser*, N.Y. POST (June 4, 2018), https://nypost.com/2018/06/04/judge-slams-dad-of-ex-prosecutor-accused-of-sex-crime-for-intimidating-accuser/ [https://perma.cc/YU9Q-XHTM]

26. *See* Rebecca Liebson, *Mistrial Declared in Former Prosecutor's Sex Assault Case*, N.Y. POST (June 13, 2018), https://nypost.com/2018/06/13/mistrial-declared-in-former-prosecutors-sex-assault-case/ [https://perma.cc/G74Y-943A].

27. *See Sagaille II*, 143 N.Y.S.3d 36, 39 (App. Div. 2021).

libel per se, defamation, injurious falsehood,[28] and prima facie tort,[29] and alleging that she had lied to the police about the assault.[30] The basis of the plaintiff's claim was the police report that Carrega filed after the alleged assault, as no suit can be sustained from the statements at trial.[31] The plaintiff further alleged that the defendant acted with actual malice, reporting the assault for the purpose of "further[ing] her career by creating a false sex crimes story against an assistant district attorney whose job it was to prosecute sex crimes."[32] Judge Kahn granted the *Daily Mail*'s motion to dismiss, but denied the dismissal of claims against Carrega.[33]

Carrega argued that the case against her should be dismissed as she was entitled to an absolute privilege for her statements to the police. First, she argued that an absolute privilege should be invoked to protect her police report as it would better keep with the public policy of encouraging victims of sex crimes to come forward.[34] In the alternative, Carrega argued that, if the statements within the police report were only afforded the qualified privilege, the plaintiff's claims still failed because he did not sufficiently plead "the existence of malice by either 'ill will' or 'knowing or reckless disregard of a statement's falsity'" to overcome the privilege.[35]

The lower court rejected plaintiff's arguments that she was protected by an absolute privilege.[36] While the court noted the tension between society's interest in crime reporting and the aggrieved party's right to protect his reputation, the case was too dissimilar from other situations where the courts had adopted an absolute immunity.[37] Carrega was

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28. Injurious falsehood is "a statement that injures a person only by leading other persons into action that is detrimental, as compared to a statement injuring a party's reputation, which would fall into the classification of libel or slander." A person commits this when they utter a false and misleading statement with the intent to harm another or "done recklessly and without regard to its consequences, and a reasonably prudent person would or should anticipate that damage to another will naturally flow therefrom." 43 N.Y. JUR. 2D *Defamation & Privacy* § 5 (2023).

29. Prima facie tort is an "infliction of intentional harms, resulting in damage, without excuse or justification, by an act or series of acts that would otherwise be lawful." 72 N.Y. JUR. 2D *Interference* § 2 (2023).

30. *Sagaille I*, No. 154010/2018, 2019 WL 4259674, at *3 (N.Y. Sup. Sept. 9, 2019).

31. *See* SACK, *infra* note 50, at § 8.2.1.

32. *Sagaille II*, 143 N.Y.S.3d at 39.

33. Sagaille v. Carrega, No. 154010/2018, slip op. at 10 (N.Y. Sup. Ct. Sept. 29, 2019).

34. *Sagaille I*, 2019 WL 4259674, at *5.

35. *Id.*

36. *Id.* at *10.

37. *Id.* at *6–7; *see also infra* Part II.A.

not legally required to file her report, and the accused was not protected against unwarranted injury to his reputation.[38] Since Carrega did not make her statements in an official capacity as a government employee nor in a judicial or quasi-judicial hearing, the court would not adopt an absolute privilege.[39]

Instead, the trial court found that the statements made to the police were protected only by a qualified privilege, but the plaintiff's allegations were sufficient to overcome it because actual malice could be inferred from the accusations of "reprehensible criminal conduct."[40] In his complaint, Sagaille set forth Carrega's motivation for filing the report, and because malice refers to the speaker's motivations in making the statement, the "radi[c]ally divergent versions of the underlying salient facts . . . present[ed] credibility issues best left to the trier of fact."[41] There could be no dispute that if the statements to the police were false, a jury could find that they were made with the sole intention of harming the plaintiff, and thus the motion to dismiss was denied.[42]

The First Department reversed the lower court's decision and found that Plaintiff's statements were protected by qualified privilege.[43] It held that the lower court inferred actual malice from the "'reprehensible' nature of the allegedly false accusations" without citing authority to do so.[44] The plaintiff failed to allege actual malice as defendant's statements were not "excessive or 'vituperative,'" but rather they constituted a "straightforward" and "restrained" recitation of the events.[45] Further, the allegation that this statement was a lie to further Carrega's career was lacking in basis and entirely speculative.[46] Conjecture alone is insufficient to meet the standard.[47] Having failed to plead sufficient facts, the court dismissed the complaint.[48]

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38. *Id.* at *7.
39. *Id.*
40. *Sagaille I*, 2019 WL 4259674, at *7.
41. *Id.*
42. *Id.*
43. *Sagaille II*, 143 N.Y.S.3d 36, 43 (App. Div. 2021).
44. *Id.* at 39.
45. *Id.* at 40.
46. *Id.*
47. *Id.*
48. *Id.*

B. Review and Analysis

Sagaille v. Carrega puts pressure on the traditional paradigm of privileges in defamation suits. The facts of this case present issues that are both endemic to defamation suits arising from sexual assault allegations and uniquely challenging to resolve given the current limitations on privileges. While the court appears to be sympathetic to supporting victims, the current legal landscape in New York belies these appearances.

Defendants facing defamation suits can dismiss the claims by asserting that they are protected by a privilege.[49] There are two types of privileges available for defendants facing defamation claims: absolute and qualified. Absolute privileges are those that absolve the speaker of any liability based on the status of the speaker.[50] This privilege covers those who, in speaking, are discharging a public function that arises from their duties to their office or in their participation in government.[51] Regardless of the language used, the intent of the speaker, or the falsity of their statement, no defamation suit can arise from the communications.[52]

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49. *See* N.Y. JUR. 2D *Defamation & Privacy* § 118. Defendants also have a number of other defenses available to them. Truth is always a defense in these types of defamation cases, but, depending on the burden of proof, may be difficult to establish. Often, the plaintiff-perpetrator must only put forward some evidence of a statement of fact by the defendant-victim that can be proven false. *See* Shaina Weisbrot, Note, *The Impact of the #MeToo Movement on Defamation Claims Against Survivors*, 23 CUNY L. REV. 332, 345 (2020). While this can be quite unfair to the victim, the defense does luckily allow for some "minor inaccuracies" — falsity is not proven if the victim's statements are generally accurate. *Id.* at 346. Another defense falls under a fact-versus-opinion distinction, detailing that claims must be secured in provable facts rather than pure opinions. *See* RESTATEMENT (SECOND) OF TORTS § 566 (AM. L. INST. 1977).

State courts generally acknowledge the concept of "mixed opinion," where the statement in question implies "that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person [being discussed]." Steinhilber v. Alphonse, 501 N.E.2d 550, 553 (N.Y. 1986). This is a troubling issue for survivors who publicly speak out against their abuser, characterizing their abuser as a rapist and suggesting facts that the public is unaware of. *See* Weisbrot, *supra* at 346–47. However, in high profile sexual assault cases, courts have held that an allegation of abuse is provable as true or false, and thus not privy to this defense. *See, e.g.*, Giuffre v. Maxwell, 165 F. Supp. 3d 147, 156 (S.D.N.Y. 2016) (finding defendant's intent to assert an affirmative privilege insufficient justification for dismissal because defendant had knowledge of falsity.).

50. *See* ROBERT SACK, SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS § 8:1 (5th ed. 2017).

51. N.Y. JUR. 2D *Defamation & Privacy* § 118. Survivors who testify at a trial, for example, will not have their statements later become the basis of a defamation action against them, as the privilege is meant to encourage candor by all parties. *See* SACK, *supra* note 50, at § 8:2.1.D.

52. *See* SACK, *supra* note 50, at § 8.2.

Qualified privileges, meanwhile, do not look at the status of the speaker, but rather the occasion on which the statement is made.[53] Any individual may invoke qualified privilege regardless of their status as a public official or private citizen. The qualified privilege provides protection to the speaker so long as the statement is made in good faith and for proper motives.[54] It is not simply a "license to defame" — someone who publishes a statement with the intent to injure another or who publishes a statement to persons who do not need to receive the communications abuse the privilege and thus forfeit it.[55] In fact, judges are the sole actors responsible for determining when a qualified privilege is applicable.[56] While the First Restatement of Torts suggests categories of communications appropriate for this privilege, judges must balance the defendant's interest in their reputation with society's need for free speech and "certain beneficial communications" before determining whether to extend the privilege to another form of communication.[57]

While the dismissal in *Sagaille* was the "right result," vis-à-vis a desirable policy outcome in favor of supporting sexual assault victims, the case puts pressure on the privilege paradigm because it arrives at the right outcome for the wrong reason.

In New York, courts have considered police reports to be a "sufficiently important" statement, made in the interest of the speaker and to a person whose knowledge of the matter will protect the interest.[58] Since sexual assault victims have a lawful interest in their own bodily security, the victim need only believe that their interest has been affected when they report the crime to police.[59] New York has long recognized an absolute privilege for judicial proceedings, but it has yet to extend that privilege to the reporting phase of the

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53. *Id.* at § 9:1.

54. *Id.*

55. *Id.* at § 9.3.

56. *Id.* at § 9.2.

57. *Id.* at § 9.2. The first *Restatement of Torts* identified five instances where defamatory communications would be considered privileged: "[1] when the speaker seeks to protect the speaker's own interest; [2] the interest of the recipient of the communication or a third person; [3] an interest the speaker holds in common with others; [4] the interest of a member of the speaker's immediate family; [5] or of the immediate family of the recipient or of a third person; and the interest of the public in general." *See id.*

58. *See id.*

59. *See* RESTATEMENT (SECOND) OF TORTS § 594 cmts. f, h (AM. L. INST. 1977).

investigation[60] — despite the fact that compelling public interests are at stake.[61]

The First Department's reversal further complicates this paradigm. The First Department reversed the lower court's decision on the grounds that only a qualified privilege applies in defamation cases based on statements made in police reports, yet, under New York law, that can be overcome by either common-law malice or a showing of reckless or knowing falsehood.[62] In practice, this would require a plaintiff to show either personal ill will or spite from the defendant or that the defendant made the relevant statement knowing it was false or with reckless disregard to its falsity.[63] "Reckless disregard as to falsity" is rarely an issue for victims-turned-defendants, as they are speaking to their own lived experience,[64] but the common law defines actual malice as "evidence of ill will or hatred that, alone, is insufficient to show liability for defamation in most courts."[65] Since motive, hatred, or ill will is considered in an assessment of malice in New York, an accusation that defendants fabricated the abuse claim, motivated purely by hatred or spite, would defeat the privilege.[66] Here, by Sagaille accusing Carrega of lying, he sufficiently pled that she told a knowing falsehood, and thus was motivated by ill-will, defeating the qualified privilege normally applicable to police reports. Thus, the

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60. *See, e.g.*, Allan & Allan Arts v. Rosenblum, 615 N.Y.S.2d 410, 414 (App. Div. 1994) (extending an absolute privilege to prcoeedings before the zoning board because they were "quasi-judicial in nature"). Though the New York Court of Appeals has not extended this privilege to the reporting phase, this privilege is read broadly to include the "preliminary or investigative stages of the process." *See* Rosenberg v. MetLife, Inc., 866 N.E.2d 439, 443–44 (N.Y. 2007) (affording an absolute privilege where a Uniform Termination Notice for Securities Industry Registration form was filled out per company policy because one of the company's main responsibilites was investigation into suspected Security and Exchange Commission (SEC) violations, the form was compulsory, the form was part of the National Association of Securities Dealers' (NASD) quasi-judicial process, and public interest supported this interpretation).

61. *See Rosenberg*, 866 N.E.2d at 443 (N.Y. 2007) (noting that "the absolute privilege can extend to preliminary or investigative stages of the process, particularly where compelling public interests are at stake").

62. *See* Foster v. Churchill, 665 N.E.2d 153, 157–58 (N.Y. 1996) ("The defense of qualified privilege will be defeated by demonstrating a defendant spoke with malice . . . . Moreover, the conditional or qualified privilege is inapplicable where the motivation for making such statements was spite or ill will (common-law malice) or where the " 'statements [were] made with [a] high degree of awareness of their probable falsity' (constitutional malice).") (internal citations omitted).

63. *See infra* Section II.A.

64. *See* Weisbrot, *supra* note 49, at 342.

65. *See id.* at 341.

66. *See id.* at 342.

issue of whether she defamed him is now simply a matter of fact for the jury to decide.

The court's legal reasoning, however, is not without precedent. Over the years, many appellate divisions, and the New York Court of Appeals in some cases, have taken issue with the sufficiency of the plaintiff's pleadings in defamation cases. For example, in *Sborgi v. Green*, the New York Supreme Court held that "suspicion, surmise and accusation are not enough to infer malice."[67] The statements in question were not beyond what was necessary for communication or "so vituperative" as to warrant an inference of malice.[68] Again, in *Liberman v. Gelstein*, the New York Court of Appeals held that plaintiffs must provide sufficient evidence to permit the conclusion that the defendant acted with a high degree of awareness as to the falsity of their statements.[69]

Judge Smith dissented in *Liberman* for many of the same reasons at issue in *Sagaille*. He noted that the issues of fact missing to determine the malice standard needed to be resolved by further discovery or determination by the trier of fact.[70] While the plaintiff always has the burden of proving malice alone was the cause of publication, the plaintiff presented a basis for that conclusion and should have been afforded the opportunity to present the evidence to a jury.[71]

The dismissive rationale of *Sagaille* and its contemporaries does exist sporadically throughout case law, but New York courts have never specifically noted that there is a higher pleading standard required to defeat a claim of qualified privilege. The question remains, however, should there be?

II. SURVEYING THE STATES: PRIVILEGES AVAILABLE TO VICTIMS

Given that defamation is a state law cause of action, the privileges afforded to complaints made to the police vary from state to state but are quite informative in deciding how best to resolve New York's current legal landscape. While the majority of states attach a qualified privilege to these statements, some states afford absolute immunity to any initial reports.

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67. 722 N.Y.S.2d 14, 15 (Sup. Ct. 2001).
68. *See id.*
69. *See* Liberman v. Gelstein, 605 N.E.2d 344, 350 (N.Y. 1992).
70. *See id.* at 352 (Smith, J., dissenting).
71. *See id.*

A. The Majority Rule: Qualified Privilege

A significant majority of states, including New York, Florida, Louisiana, Maryland, Missouri, West Virginia, and Rhode Island, hold that only a qualified privilege applies to statements made to the police.[72] It is an affirmative defense that must be pled in the defendant's answer.[73] The claim of privilege is defeated if the plaintiff is able to prove malice,[74] which under the common law generally comprises any wrongful motivation, including spite, ill will, hatred, or the intent to inflict harm.[75] In *New York Times v. Sullivan*, however, the Supreme Court established an "actual malice" standard for certain cases governed by the First Amendment.[76] Actual malice is found when the defendant had knowledge that the statement was false or spoke with reckless disregard to its falsity.[77] After *Sullivan*, malice has assumed a dual meaning, and many states find the standard satisfied when either the common law standard or "actual malice" standard is met.[78]

Some states that recognize the qualified privilege require a more intensive showing that the speaker is motivated solely by ill will.[79] While allegations without specifics are generally insufficient, extrinsic evidence is typically brought in to plead sufficiently the defendant's hostile feelings.[80]

Courts generally cite to the same reasoning when adopting this qualified privilege. First, courts hold that a qualified privilege, rather

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72. *See Sagaille II*, 143 N.Y.S.3d 36 (App. Div. 2021); Fridovich v. Fridovich, 573 So.2d 65 (Fla. Dist. Ct. App. 1990); Kennedy v. Sheriff of East Baton Rouge, 935 So.2d 669 (La. 2006); Caldor, Inc. v. Bowden, 625 A.2d 959 (Md. 1993); Thurston v. Ballinger, 884 S.W.2d 22 (Mo. Ct. App. 1994); Zsigray v. Langman, 842 S.E.2d 716 (W. Va. 2020); Powers v. Carvalho, 368 A.2d 1242 (R.I. 1977).

73. *See* SACK, *supra* note 50, at § 9:6.

74. *Id.* at § 9:3:1.

75. *Id.*

76. 376 U.S. 254, 279–80 (1964).

77. *See id.*

78. *See, e.g.*, Liberman v. Gelstein, 605 N.E.2d 344, 350 (N.Y. 1992) ("[T]here is insufficient evidence of malice under the common-law definition. A jury could undoubtedly find that, at the time [the defendant] discussed his bribery suspicions with Kohler, [defendant] harbored ill will toward [plaintiff]. In this context, however, spite or ill will refers not to defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements . . . If the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant *also* despised plaintiff. Thus, a triable issue is raised only if a jury could reasonably conclude that 'malice was the one and only cause for the publication.'").

79. *See, e.g.*, *id.*

80. *See* SACK, *supra* note 50, at § 9:3.1.

than an absolute privilege, is "sufficiently protective of [those] wishing to report events concerning crime and balances society's interest in detecting and prosecuting crime with a defendant's interest not to be falsely accused."[81] While law enforcement channels would "quickly close" if the user was subject to liability,[82] there is no benefit to society when those who make intentionally defamatory statements to the police are immune from suit.[83] Defaming someone's reputation can have irreparable consequences.[84]

Courts have also held that the burden of proof for establishing a case under a qualified privilege would deter most frivolous suits.[85] Litigation is expensive, and because of the high costs, only the claims worth bringing would likely be brought against victims.

Some states also argue that initial statements to the police are the beginning of judicial proceedings and are therefore absolutely privileged. The majority of states, however, reject this argument, because the initial conversations are so far removed from the remainder of the proceedings that they cannot be considered trial preparations.[86] Further, the absolute privilege — which emerged through common law — is grounded in practical considerations: the litigants "must be free to risk impugning the reputations of others, in order to discharge public duties and protect individual rights."[87] While judicial proceedings entail several formal, procedural elements to

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81. Fridovich v. Fridovich, 573 So.2d 65, 70 (Fla. Dist. Ct. App. 1990) (holding the defendant's statements to investigating authorities prior to the filing of criminal charges against plaintiff for the murder of his father were absolutely privileged).

82. Richmond v. Nodland, 552 N.W.2d 586, 589 (N.D. 1996) (holding a qualified privilege was sufficiently protective where the defendant reported and named a potential "prowler" to the police).

83. *See* Fridovich v. Fridovich, 598 So.2d 65, 69 (Fla. 1992) (holding a qualified privilege struck the proper balance between the rights of the individual and the public interest of a "free and full disclosure of facts" when a brother falsely accused his sibling of murdering their father).

84. *See, e.g.*, Caldor, Inc. v. Bowden, 625 A.2d 959, 969 (Md. 1993) (applying only a qualified privilege to a police report accusing plaintiff of theft in order to remedy "malicious destruction" of one's reputation).

85. *See Fridovich*, 598 So.2d at 69.

86. *See* Gallo v. Barile, 935 A.2d 103, 111 (Conn. 2007) (applying only a qualified privilege to a police report detailing a breach of the peace after weighing whether the public interest was sufficiently advanced by considering the report part of the judicial process).

87. DeLong v. Yu Enters., Inc., 47 P.3d 8, 11 (Or. 2002) (applying a qualified privilege to a police report where an employer detailed missing money and property during plaintiff's tenure).

exercise control over the potential harm that arises from an absolute privilege, there is no equivalent when it comes to reporting crimes.[88]

In light of "the potentially disastrous consequences that may befall the victim of a false accusation of criminal wrongdoing," courts are simply unwilling to afford absolute immunity to such statements.[89]

B. The Minority Rule: Absolute Immunity

A minority of states currently employ absolute immunity for any statements made to police. Meaning that, regardless of malice, the statement itself cannot form an action for defamation. Currently, Arizona, Pennsylvania, California, Georgia, Illinois, Michigan, and New Hampshire are among the states recognizing this privilege.[90] While each state has its own specific defamation laws, the reasons for adopting this privilege largely remain similar.

Absolute immunity is meant to protect "those situations where the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a defendant's motives."[91] The mere possibility of a retaliatory defamation claim would have a chilling effect and would discourage free and unencumbered reporting to law enforcement authorities.[92] The criminal justice system "could not reliably have practical law enforcement if crime victims, or those with knowledge of crimes, were forced to risk a lawsuit upon reporting what they know or what they suffered."[93]

Courts that adopt this view have taken a range of different stances as to when the declarant's absolute immunity begins. Many consider the complaint to the police to be the first step of a judicial proceeding,

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88. *See* Geyer v. Faiella, 652 A.2d 1245, 1247 (N.J. Super. Ct. App. Div. 1995) (rejecting an absolute privilege for a police report regarding alleged death threats because it lacks many of the hallmarks of a traditional absolute judicial privilege).

89. *Gallo*, 935 A.2d at 111.

90. *See* Ledvina v. Cerasani, 146 P.3d 70 (Ariz. 2006); Pawlowski v. Smorto, 588 A.2d 36 (Pa. Super. Ct. 1991); Hagberg v. Cal. Fed. Bank, 81 P.3d 244 (Cal. 2004); Renton v. Watson, 739 S.E.2d 19 (Ga. Ct. App. 2013); Belluomini v. Zaryczny, 7 N.E.3d 1 (Ill. App. Ct. 2014); Eddington v. Torrez, 874 N.W.2d 394 (Mich. Ct. App. 2015); McGranahan v. Dahar, 408 A.2d 121 (N.H. 1979).

91. *Ledvina*, 146 P.3d at 72 (applying an absolute privilege to a police report detailing a property crime as formal and informal complaints to the police are the initial steps of a judicial proceeding).

92. *See id.* at 75.

93. *Eddington*, 874 N.W.2d at 397 (applying an absolute privilege to all police reports, including those made maliciously, where plaintiff was accused of stealing gasoline to the police).

which is already given absolute immunity to defamation claims.[94] They draw on the Second Restatement of Torts to make this point; section 587 describes the privilege as applied to parties to judicial proceedings as: "a party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding."[95] The comment to this portion of the Restatement goes on to say that the privilege applies "as well as to information given and informal complaints made to a prosecuting attorney or other proper officer preliminary to a proposed criminal prosecution whether or not the information is followed by a formal complaint or affidavit."[96] From the text, it is evident that a "judicial proceeding" should be interpreted broadly and can begin before the filing of any formal complaint. Because the court process is multi-layered, some states have gone as far as to identify six powers that indicate the body conducting the proceeding is quasi-judicial and thus subject to the immunity.[97]

Importantly for this case, courts have also upheld an absolute immunity for reports to police because reliance on qualified immunity could potentially permit criminal defendants to harass and intimidate victims and keep them from testifying in court.[98] It is routinely noted that "the importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual."[99]

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94. *See Pawlowski*, 588 A.2d at 40 (applying an absolute privilege to a police report alleging perjury).

95. RESTATEMENT (SECOND) OF TORTS § 587 (AM. L. INST. 1977).

96. *Id.* at § 587 cmt. b.

97. *See* Belluomini v. Zaryczny, 7 N.E.3d 1, 8 (Ill. App. Ct. 2014) ("(1) [T]he power to exercise judgment and discretion; (2) the power to hear and determine or to ascertain facts and decide; (3) the power to make binding orders and judgments; (4) the power to affect the personal or property rights of private persons; (5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and (6) the power to enforce decisions or impose penalties."); *see also* Khan v. Yale Univ., 511 F. Supp. 3d. 213, 221 (D. Conn. 2021) (applying an absolute privilege to a student's report detailing their sexual assault to the university's disciplinary board given its quasi-judicial nature).

98. Ledvina v. Cerasani, 146 P.3d 70, 74 (Ariz. 2006) (affording an absolute privilege to the police report accusing plaintiff of slashing car tires, which ultimately led to her arrest).

99. *Id.* at 75 (citing King v. Borges, 104 Cal. Rptr. 414, 418 (Ct. App. 1972)).

While these statements can of course be false or maliciously motivated, so too can statements made by a party who consults with his attorney prior to instituting a civil action — yet those persons still enjoy an absolute privilege.[100] There is no guarantee that only guilty persons will be accused and arrested,[101] but safeguards are put in place to protect against this. Many states have laws making false reports illegal and a reporter-turned-witness will later be subject to perjury charges if they lied.[102] States also have actions for malicious prosecution for wronged defendants. Malicious prosecution is a civil tort, providing a remedy for "unjustifiable lawsuits" where the plaintiff "brings a groundless suit and has an improper motive for bringing it."[103] Generally, the plaintiff's burden is quite high and the elements of malicious prosecution are difficult to establish, as courts recognize the competing public interest in reporting crime and the defendant's legitimate desire to protect his reputation.[104] Regardless of the legal hurdles in place, however, false reports are simply not made with complete impunity as some fear.

Finally, some states have amended their constitutions in the hope of protecting victims' rights. For example, in Arizona, the adoption of the Victim's Bill of Rights was intended to ensure crime victims were free of intimidation, harassment, or abuse through the criminal justice process.[105] By adopting anything less than an absolute privilege, the states would be acting contrary to these victim protection laws.

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100. *See* Pawlowski v. Smorto, 588 A.2d 36, 42 (Pa. Super. Ct. 1991) (affording an absolute privilege where defendants had gone to the state prosecutors and police to report that plaintiff had perjured himself).

101. *See* McGranahan v. Dahar, 408 A.2d 121, 128 (N.H. 1979) (holding that public policy and procedural safeguards support the adoption of an absolute privilege).

102. *See, e.g.*, *Ledvina*, 146 P.3d at 76; Eddington v. Torrez, 874 N.W.2d 394, 397 (Mich. Ct. App. 2015).

103. 52 AM. JUR. 2D *Malicious Prosecution* § 1 (2022).

104. *See id.* at §§ 5, 7 (stating the general elements of malicious prosecution to be: "(1) the commencement or continuation of original judicial proceedings; (2) such former proceedings must have been by, or at the instance of, the defendant; (3) the termination of such proceedings in the plaintiff's favor . . . ; (4) malice in instituting the proceedings; (5) lack of probable cause for the proceedings; and (6) the suffering of injury or damages as a result of the prosecution or proceeding").

105. *Ledvina*, 146 P.3d at 75.

III. NEW YORK SHOULD ADOPT A LIMITED-SCOPE, ABSOLUTE PRIVILEGE

This Part describes a potential solution to resolve the tension involved with the application of privilege to defamation cases involving sexual assault.

A. Adopting a Limited-Scope, Absolute Privilege

Ideally, an absolute privilege would be afforded to *all* communications detailing a sexual crime. Giving victims a voice is a virtuous state interest, but there are too many practical realities that push back against this adoption. Instead, New York should adopt a limited-scope, absolute privilege for all reports made to the police.

An absolute privilege would best meet today's emerging policy needs.[106] It would allow victims to seek help without fear of retaliation and better support the functionality of our crime reporting systems. With increased reporting, it is likely that more predators would be caught, and justice could be sought for more victims. Adopting this complete immunity would not be a novel concept within the state either. Currently, New York's social service laws regarding mandatory reporting of suspected child abuse provides immunity for those persons required to report, in good faith, any suspicion of maltreatment.[107] While precedent often disfavors absolute immunity for most actors, sometimes public policy requires it.

The critiques of this adoption are well documented — because other types of crimes tend to have greater rates of false reporting,[108] many will likely balance the interests in favor of retaining some possibility of a claim. Further, with the widespread effects of "cancel culture,"[109] many courts will desire to limit the privilege to preserve claims for those who feel wronged and can establish actual malice. There is no question that being wrongly accused in the public eye of any crime, and especially of sexual crimes, is enough to destroy a reputation — but, on

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106. *See infra* Section III.B.

107. *See* N.Y. SOC. SERV. § 419 (McKinney 2022).

108. *See* Francie Diep, *What the Research Says About (The Very Rare Phenomenon of) False Sexual Assault Allegations*, PAC. STANDARD (Sept. 26, 2018), https://psmag.com/news/what-the-research-says-about-the-very-rare-phenomenon-of-false-sexual-assault-allegations [https://perma.cc/R82L-KNK3].

109. *See* Emily A. Vogels et al., *Americans and "Cancel Culture": Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/ [https://perma.cc/KBZ3-F2ML].

balance, is that reality *really* greater than the public safety that depends on functional government reporting systems? Likely not.

B. Policy Reasons in favor of a Limited-Scope Privilege

Before addressing how an absolute privilege can realistically be instituted, it is crucial to understand why it should be.

1. Applying a Limited-Scope, Absolute Privilege Will Encourage People to Report Sexual Assaults

The first and most obvious benefit of implementing an absolute privilege is based in policy: sexual assault is underreported, and the crime affects more people than one may realize. Nearly 98% of sexual assault perpetrators will not be convicted.[110] The majority of sexual assaults go unreported, despite the fact that an American is sexually assaulted every 68 seconds.[111] Twenty percent of victims cited a fear of "retaliation" as their primary reason for not reporting, among a plethora of other legitimate fears.[112] This is perhaps because 80% of all rapes are committed by someone known to the victim.[113]

After #MeToo surfaced this issue to the national spotlight, New York State specifically made strides to protect victims of sexual assault. In New York City, the NYPD started "The Call is Yours" campaign, aiming to improve the reporting of sex crimes and the investigations once the crime is reported.[114] The campaign noted that survivors are often "victimized twice": once by their attackers, and then again by the shame and fear that often accompanies reporting the crime to the police.[115] More recently, New York passed the New York Adult Survivors Act, amending the statute of limitations for civil actions related to certain sexual offenses.[116] The law created a one-year period

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110. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/K24K-PGV2] (last visited Nov. 19, 2022).

111. *About Sexual Assault*, RAINN, https://www.rainn.org/about-sexual-assault [https://perma.cc/X9FV-ZFY3] (last visited Nov. 19, 2022).

112. *The Criminal Justice System: Statistics*, *supra* note 110.

113. *Perpetrators of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/perpetrators-sexual-violence [https://perma.cc/3CQ6-XWHK] (last visited Nov. 19, 2022).

114. *See NYPD Launches Campaign to Encourage Sex Crime Reporting*, N.Y. POLICE DEP'T (April 6, 2018), https://www.nyc.gov/site/nypd/news/pr0406/nypd-launches-campaign-encourage-sex-crime-reporting#/0 [https://perma.cc/P9R4-M6JM].

115. *See id.*

116. *See* Roberta Kaplan et al., *N.Y. Adult Survivors Act Renews Claims for Sexual Assault Survivors*, BLOOMBERG L. (June 21, 2022), https://news.bloomberglaw.com/us-

for persons to bring an action, regardless of when the alleged offense occurred, and officially acknowledges, at a state level, the reality that many survivors take decades to come forward about abuse.[117] New York has proven it is serious about change, and amending the privilege standard would be wholly consistent with this mission.

The fear of a time-consuming, expensive, and public defamation lawsuit would also undoubtedly deter more people from reporting their crimes to the police. So often, sexual assaults become a game of "he said, she said." This reality is only further heightened for people of color, who are often disbelieved, blamed, and painted as "aggressive" and "promiscuous" due to their race.[118] By allowing a low pleading bar for defamation claims based on police reports, an already difficult process will only become further complicated. Making victims relive the worst moments of their lives only further victimizes them. If ever there were "public interests . . . at stake" worthy of receiving a heightened privilege, this would certainly fit the bill.[119]

2. Adopting a Limited-Scope, Absolute Privilege Will Not Increase Incidents of False Reporting

Critics of adopting an absolute privilege consistently cite inaccurate arguments about the risk of "false accusations" should a heightened privilege be adopted, but that should have no bearing on New York's decision making. Less than 1% of reported rapes are false allegations.[120] Further, these false accusations are often caught early in the judicial process because those engaging in this behavior often have a pattern of fabrication or criminal fraud.[121] According to the National Registry of Exonerations, there were only 52 cases between 1989 and 2018 where men convicted of sexual assault were exonerated because

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law-week/n-y-adult-survivors-act-renews-claims-for-sexual-assault-survivors [https://perma.cc/U87R-8BQ8].

117. *See id.*

118. *See* Joel R. Anderson et al., *Revisiting the Jezebel Stereotype: The Impact of Target Race on Sexual Objectification*, 42 PSYCH. WOMEN Q. 399, 463 (2018).

119. *See* Rosenberg v. MetLife, Inc., 866 N.E.2d 439, 443 (N.Y. 2007).

120. Katie Heaney, *Almost No One Is Falsely Accused of Rape*, CUT (Oct. 5, 2018), https://www.thecut.com/article/false-rape-accusations.html [https://perma.cc/M9KB-PLLH]. The commonly cited figure of 5% paints an incomplete picture because it comes from a study done on college students where an estimated 95% do not report their assaults to the police. An estimated 8 to 10% of women are thought to report their rapes to the police, meaning 90% of rapes go unreported. That 5% figure originally cited only applies to 10% of rapes, making the false allegation figure closer to 0.5%. *Id.*

121. *See* Diep, *supra* note 108.

they were falsely accused.[122] This is shockingly low compared to the 790 cases in which people were exonerated for murder during that time.[123] The fear of false reporting is inflated given the data, but it is a pervasive trope that continues to victimize survivors.

3. Protecting Procedural Safeguards for Victims of Domestic Violence Requires a Heightened Privilege

There are also procedural realities that weigh in favor of heightening the current standards. A criminal court order of protection is issued as a condition of a defendant's release or bail in a criminal case.[124] It is meant to protect a person from another abusing, harassing, threatening, or intimidating them.[125] In order to obtain one, a victim must file a police report detailing the crime committed.[126] Even family court orders of protection highly recommend reporting and attaching said police report to the victim's petition for an order of protection.[127] And it is for a good reason: these orders of protection have statistically proven to be effective. In a recent study, having a permanent protection order in effect was associated with an 80% reduction in police-reported physical violence.[128] Further, those who had reported intimate partner violence and received an order of protection were less likely than those without the protection orders to be physically abused.[129] If the initial police report can later be used against the victim in a defamation suit, however, it will inevitably dissuade many victims from reporting and thus prohibit them from receiving the protection they need and should have from their abusers.

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122. *See id.*

123. *See id.*

124. *Obtaining An Order of Protection*, N.Y. STATE UNIFIED CT. SYS., https://www.nycourts.gov/faq/orderofprotection.shtml [https://perma.cc/Z7PS-FPFW] (last visited Nov. 19, 2022).

125. *Resources & Services: Orders of Protection*, N.Y. POLICE DEP'T, https://www.nyc.gov/site/nypd/services/victim-services/resources-services-orders-protection.page [https://perma.cc/99HZ-S4Y2] (last visited Nov. 19, 2022).

126. *Obtaining An Order of Protection*, *supra* note 124.

127. *See Resources & Services: Orders of Protection*, *supra* note 125; *see also Domestic Violence (Family Offense): Frequently Asked Questions*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/COURTS/nyc/family/faqs_domesticviolence.shtml#op1 [https://perma.cc/3MJS-862Q] (last visited Apr. 13, 2023).

128. *See* Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY & L. 376, 381 (2010).

129. *See id.*

4. The Law is Already Adopting a Limited-Scope, Absolute Privilege for College Campus Reporting for Public Policy Reasons

Lastly, change is justified by analogy to other similar areas in the law. Namely, there has been an intense upheaval in Title IX claims on university campuses and the defamation suits that follow. In 2015, pre-#MeToo, 60% of Title IX related lawsuits were brought by those accused of sexual misconduct,[130] and this number has grown to over 72%.[131] Defamation suits are being filed as a tactical move to purposefully threaten victims into silence, with the hopes of the abuser retaining their status at the university.[132] Not only does this have a chilling effect on already low-reporting statistics,[133] but it can be procedurally exploitative. If the victim reneged on their complaint to avoid being sued, universities often request that all parties sign a nondisclosure agreement, effectively cleaning the slate of the abuser.[134]

Courts have reacted by beginning to adopt either absolute or qualified privileges for the complaints to university police and the statements made during the Title IX investigation and proceedings. The states that have afforded an absolute privilege to reports and proceedings note that "[p]ublic policy demands this result."[135] Not only would a lack of privilege have a chilling effect on reporting, but, absent

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130. Ivie Guobadia & Emily Haigh, *Title IX and Defamation: An Emerging Challenge Facing Higher-Education Institutions*, LITTLER (Jan. 5, 2018), https://www.littler.com/publication-press/publication/title-ix-and-defamation-emerging-challenge-facing-higher-education, [perma.cc/KZL5-JFD5].

131. Chelsey N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 TULANE L. REV. ONLINE 1, 18 (2020).

132. *See id.*; *see also* Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 5, 2017, 11:26 AM), https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing [perma.cc/L4FL-TXFK] (detailing a student's public accusation on social media, a subsequent defamation suit filed by her abuser, and then a public retraction statement and dropped defamation suit).

133. *See Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/7TKA-SWGA] (last visited Nov. 20, 2022) (noting that college women are twice as likely to be sexually assaulted than robbed, but only 20% of student victims report when the crime occurs).

134. *See* Whynot, *supra* note 131, at 20.

135. *See* Razavi v. Sch. of the Art Inst. of Chi., 122 N.E.3d 361, 364 (Ill. App. Ct. 2018) (holding that a female student's statements to safety authorities and disciplinary boards following an assault were absolutely privileged for public policy reasons); *see also* Khan v. Yale Univ., 511 F. Supp. 3d 213, 225–26 (D. Conn. 2021); Doe v. Univ. of Dayton, 766 F. App'x 275, 290 (6th Cir. 2019) (noting the different privileges available for those who report to campus authorities and those who seek comfort from their friends).

a report, the perpetrator goes without any sort of punishment.[136] The absence of an unfettered report also interferes with the school's duty to investigate and opens the university to tort liability and financial risks.[137] The existence of expulsion for false reports is more than enough to protect the competing interests at stake, similar to arguments of criminal consequences for false reporters to the police.[138] Courts that have afforded only a qualified privilege, however, remain cautious about false reports and the damaging impact an allegation of sexual misconduct can have, both on one's reputation and one's standing as a student.[139] For these reasons, many think that a qualified privilege strikes the right balance.

If courts recognize the policy interests at stake and are willing to afford protection for non-governmental proceedings, it only makes sense to extend a heightened protection for reports to the police.

C. Responding to Critiques: Potential Limitations on the Limited-Scope, Absolute Privilege

Two limitations on the adoption of an absolute privilege will likely appease even the most adamant critics. First, the proposed absolute privilege will be limited in scope to communications given in a police report. If the victim chooses to take to a public forum or divulge the communication to another person, the privilege would not attach to that language. Based on patterns from states that have already adopted the privilege, it is impractical to expect our police reporting system to work properly if people can later be sued for their statements.[140] Much of the public condemnation that comes from being accused comes from the public speech on the matter to the internet at large.[141] False reporting happens rarely,[142] so absolutely protecting these reports is unlikely to injure the public in a major way. It is much easier to take to a keyboard with an accusation than to report a crime to the police.[143] This privilege would only protect the latter.

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136. *See Razavi*, 122 N.E.3d at 365.

137. *See id.*

138. *See id.*

139. *See, e.g.*, Doe v. Roe, 295 F. Supp. 3d 664, 676 (E.D. Va. 2018) (applying a qualified immunity to victim's statements made at university disciplinary proceeding given the proceeding lacked due process and the accusation's devastating effects on the accused).

140. *See supra* notes 91–93.

141. *See, e.g.*, Maloy & Farhi, *supra* note 2.

142. *See* Heaney, *supra* note 120 and accompanying text.

143. *See* Darcy Costello & Bailey Loosemore, *Sexual Assault Victims Are Seeking Justice on Social Media. Experts Warn It's Not Bulletproof*, COURIER J. (Dec. 14, 2017),

Second, New York already has an action for malicious prosecution to protect against this kind of false reporting. To prevail on a malicious prosecution claim in New York, the plaintiff must establish four elements: (1) the initiation of a criminal proceeding by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) lack of probable cause; and (4) malice.[144] Much like the need for unfettered access to police reporting, courts have demanded stringent requirements in these cases "to effectuate the strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit."[145] Successful malicious prosecution cases will establish that the defendant "affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition."[146] Because the alleged victim needs to do more than "merely report a crime" and cooperate with the police,[147] this potential claim strikes the right protective balance. The deterrence function of the qualified privilege is no longer necessary, as malicious prosecution is available for those exact "victims" that skeptics fear — the ones who insist the police arrest and prosecute a plaintiff based on false evidence.

Malicious prosecution suits are not without their own critics. First, to oppose a victim's prima facie showing that the record given was not false, the alleged-assailant-turned-plaintiff must point to evidence that

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https://www.courier-journal.com/story/news/local/2017/12/14/sexual-assault-victims-social-media-justice-experts-warn-defamation-risks/908955001/ [https://perma.cc/RG5E-K5PQ] (noting how, while reporting the case requires being questioned about "every small detail of their lives," survivors can use social media "as a new way to get results").

144. Smith-Hunter v. Harvey, 734 N.E.2d 750, 752 (N.Y. 2000) (addressing an issue with the second element of a malicious prosecution claim where a lawfirm accused an arestee of trespass but the charge was later dismissed on statutory speedy trial grounds).

145. Curiano v. Suozzi, 469 N.E.2d 1324, 1328 (N.Y. 1984) (rejecting plaintiffs' cause of action for prima facie tort and instructing plaintiffs to instead wait for the outcome of the dispute at issue and pursue a cause of action for malicious prosecution).

146. Mesiti v. Wegman, 763 N.Y.S.2d 67, 69–70 (App. Div. 2003) (internal citations omitted) (holding evidence sufficient to sustain a claim for malicious prosecution where plaintiff established at trial that there was no probable cause and the defendant "played an active role in the prosecution" by giving advice and encouragement to authorities).

147. *See* Moorhouse v. Standard, N.Y., 997 N.Y.S.2d 127, 132 (App. Div. 2014) (internal citations omitted) (affirming the dismissal of a malicious proseuction claim where the evidence in record did not support that defendant encouraged police, she directed police or prosecutors to arrest and prosecute, or that she initiated the criminal proceeding).

it was.[148] They cannot rely solely on their testimony to the contrary because courts "should not discard common . . . knowledge."[149] Although "generally credibility determinations are left to the trier of the facts, where testimony is physically impossible [or] contrary to experience, it has no evidentiary value."[150] To subject a victim to this kind of suit, the now-plaintiff should be prepared to raise more than an allegation that "they are lying" if they hope to win. While this may seem like a hurdle, it is not unfamiliar to the courts, as victims must testify in this manner all the time.

Another critique of malicious prosecution functioning as a balancing protection will likely come from the current bar to sufficiently plead actual malice. In practice, a successful malicious prosecution claim requires more than a naked assertion that the defendant acted with animus.[151] New York law states that "malice does not have to be actual spite or hatred, but means only 'that the defendant must have commenced the criminal proceeding due to a wrong or improper motive, something other than a desire to see justice served.'"[152] Knowingly filing a false report is strong evidence of this malicious intent.[153] With the current qualified privilege in place, it appears New York courts have already subjected the question of malice to a heightened standard — this is no different from what courts are already doing.

An application of this new standard to *Sagaille* highlights the third and final critique of this approach. To successfully plead a claim for malicious prosecution, the proceeding at issue needs to terminate in the now-plaintiff's favor.[154] To satisfy this element, any final termination of a criminal prosecution, "such that the criminal charges may not be brought again," qualifies.[155] The termination does not need to demonstrate innocence but must show that there can be no further

148. *See id.* at 133.

149. *See id.* (quoting Loughlin v. City of N.Y., 587 N.Y.S.2d 732, 733 (App. Div. 1992)).

150. *Id.* (quoting Espinal v. Trezechahn 1065 Ave. of the Am., LLC, 942 N.Y.S.2d 519, 521 (App. Div. 2012)).

151. Merrill v. Copeland, No. 319-CV-01240, 2020 WL 3545556, at *6 (N.D.N.Y. June 30, 2020) (denying a motion to dismiss a claim for malicious prosecution where the complaint alleged the defendant made multiple false reports in her supporting deposition and did not report that plaintiff had pleaded with defendant to help as she was being sexually assaulted).

152. Lowth v. Town of Cheektowaga, 82 F.3d 563, 573 (2d. Cir. 1996) (citing Nardelli v. Stamberg, 377 N.E.2d 975, 976 (N.Y. 1978)).

153. *See* Allen v. City of N.Y., 480 F. Supp. 2d 689, 717 (S.D.N.Y. 2007).

154. *See* 59 N.Y. JUR. 2D *False Imprisonment* § 68 (2022).

155. *Id.*

prosecution of the alleged offense.[156] While New York courts have never addressed whether a mistrial constitutes a favorable result for the plaintiff, a hung jury does not meet the standard in the federal action for malicious prosecution under 42 U.S.C. Section 1983.[157] Furthermore, since prosecutors can still retry the defendant and continue the case, the termination of the proceeding was not decided on the merits.[158]

Since Sagaille's criminal case ended in mistrial for lack of unanimous verdict,[159] he could not bring this claim against Carrega, regardless of whether he established the other elements of the claim. This will likely pose an issue for many. About 10% of cases end in mistrial, and six percent of those mistrials are caused by hung juries.[160] While this statistically does not pose a major threat to justice, the issue is very topical, with several #MeToo celebrity trials ending in mistrial in recent years.[161] Compared to the current abysmal rates of reporting, however, some rebalancing is needed to reach a truly just result. If this absolute privilege is adopted, 94% percent of the trials in the United States still will retain this protection for the wrongfully accused, while still empowering and protecting victims.

Adopting this new standard will prevent abusers from initiating defamation actions to intimidate and silence. With a heightened privilege, the chilling effect on police reports will hopefully be

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156. *See id.*

157. *See, e.g.*, Singleton v. City of N.Y., 632 F.2d 185, 195 (2d Cir. 1980) ("A prosecution based on probable cause which results in a hung jury, as was the case here, does not deprive the defendant of civil rights within the meaning of [§] 1983. Without proof that the criminal prosecution based on probable cause was terminated in defendant's favor no federal claim exists. To hold otherwise would permit a defendant to relitigate the issue . . . posing the prospect of harassment, waste and endless litigation, contrary to principles of federalism.").

158. *See, e.g.*, Richardson v. United States, 468 U.S. 317, 326 (1984) ("[W]e reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree.").

159. *Sagaille II*, 143 N.Y.S.3d 36, 39 (App. Div. 2021).

160. *See generally* PAULA L. HANNAFORD-AGOR ET AL., NAT'L INST. JUST., HUNG JURIES: ARE THEY A PROBLEM? (2002).

161. *See, e.g.*, Michael Levenson, *Judge Declares Mistrial in Danny Masterson Rape Case*, N.Y. TIMES (Nov. 30, 2022), https://www.nytimes.com/2022/11/30/arts/television/danny-masterson-rape-case-mistrial.html [https://perma.cc/8UMU-B42F]; Graham Bowley, Richard Pérez-Peña & Jon Hurdle, *Bill Cosby's Sexual Assault Case Ends in a Mistrial*, N.Y. TIMES (June 17, 2017), https://www.nytimes.com/2017/06/17/arts/television/bill-cosby-trial-day-11.html [https://perma.cc/AV9C-UXVA].

diminished, with victims finally being assured that groundless claims cannot be brought against them.

CONCLUSION

Between city-wide campaigns and court dicta, it is obvious that reducing occurrences of sexual assaults and fostering victim reporting are two vital government priorities in New York.[162] Institutional change is not so straightforward, however, and will require creativity to identify a realistic solution.

Without substantive change to the current privileges, New York effectively allows every survivor of sexual assault to become a victim once again when they are sued by an allegedly defamed plaintiff. By adopting the absolute privilege, victims can rest assured that reporting these crimes to the police is the right thing to do. With these changes, New York can make strides towards eradicating the stigma around sexual assault, getting more victims to come forward, and ideally reducing the number of people who suffer silently.

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162. *See, e.g.*, N.Y. STATE DEP'T OF HEALTH, SEXUAL VIOLENCE PREVENTION PLAN: PREVENTING SEXUAL VIOLENCE IN NEW YORK STATE 2009–2017 (2018), https://wiki.preventconnect.org/wp-content/uploads/2018/08/NY-State-SVP-Plan.pdf [https://perma.cc/3BTB-9B8B].