

A PRIVILEGE TO SPEAK WITHOUT FEAR: DEFAMATION CLAIMS IN HIGHER EDUCATION

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Abstract

Defamation law has drawn renewed attention in recent years within higher education. Defamation claims test core principles of academic freedom, including the right to state unpopular opinions, even those that might offend the listener or reader. These claims also test the limits of colleges and universities' authority and discretion, in both informal and formal settings, to make judgments about the competence and qualifications of their faculty, staff, and students; evaluate whether those community members have engaged in research or academic misconduct; and determine if they have violated a policy, contract, or code of conduct. Depending on state law, and the institution type, such judgments may be absolutely shielded from a defamation lawsuit. More often, courts will grant decision-makers significant latitude to make these statements, subject to a qualified privilege that can only be overcome through evidence of actual malice or, depending on state legal precedent, common law malice.

In most academic settings, without some allegations about the speaker or writer's disregard for the truth or retaliatory motivations, assertions of actual or common law malice will rarely overcome qualified privilege. Increasingly, the exception arises from sexual misconduct investigations and adjudications. By claiming they were wrongly accused, students and faculty have overcome privilege on the ground that making a false accusation constitutes actual or common law malice. These determinations put the parties in the position of relitigating the merits of a matter ordinarily reserved for the institution. This article urges expansion of privilege for sexual misconduct proceedings to promote full disclosure without fear of retaliatory litigation.

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INTRODUCTION

Defamation claims highlight the extraordinary tensions in higher education today between academic freedom and the duty not to harm others with that freedom. Faculty, administrators, and students have all brought campus disputes to court, seeking to vindicate their reputations from accusations and findings of incompetence, academic and research misconduct, and sexual harassment and violence. Defamation claims may also arise from a negative tenure review, a failing grade, a poor reference, or offensive comments posted in university-affiliated publications and websites.¹ Still, over decades, academia has carved a significant zone of legal privilege around these internal affairs. Only in the exceptional case, where a declarant's disregard for the truth is plain to see, will a defamation claim be actionable.

Yet some of the most vulnerable members of the college and university community do not share this privilege not to fear when they speak out. Studies of sexual and interpersonal violence on college campuses have found a prevalence ranging between twenty and twenty-five percent for undergraduate women and about seven percent for undergraduate men.² And the number of incidents actually reported remains far lower than the prevalence of this violence, with fear of retaliation playing a significant part in the choice not to come forward.³ Students who report sexual harassment and violence have been sued or threatened with suit by the accused for defamation, often putting their names and details of the incidents into public view and forcing the accusers to defend themselves in state and federal court.⁴ "This is one of the greatest challenges survivors will face," notes one commenter, "because it requires the survivor to publicly present the details of their traumatic experience to prove their own truthfulness, when there is often minimal evidence of the violence other than the survivor's own testimony."⁵

1 Case law analyzing these scenarios will follow throughout the article. Please note that this article does not distinguish between "libel" and "slander" case law, but groups all of these cases under the framework of defamation. Furthermore, in using the broad language of "speech" rights, all forms of communication are included, verbal, nonverbal, or otherwise. When discussing parties to a sexual misconduct process, the article will generally use the term "complainant" to refer to the reporting party and "respondent" to the accused person in conformance with the terms used in the federal Title IX regulations. 34 C.F.R. § 160.30(a) (2020).

2 Joseph Storch & Andrea Stagg, *Missoula: Jon Krakauer's Story of College Sexual Violence That Is Both Complex and Entirely Common*, 42 J.C. & U.L. 451, 474 (2016); David Cantor et al., Westat, *Report on the Association of American Universities Campus Climate Survey on Sexual Assault and Sexual Misconduct* (rev. Jan. 17, 2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf); Christopher Krebs et al., *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUST. STAT. 75 (Jan. 2016), <https://perma.cc/V7D4-BGXL>; Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000 to 2015*, 19 TRAUMA, VIOLENCE, & ABUSE 76 (2016), <https://doi.org/10.1177/1524838016631129>.

3 Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 329 (2017).

4 *Id.* at 314.

5 Shaina Weisbrot, *The Impact of the #MeToo Movement on Defamation Claims Against Survivors*, 23 CUNY L. REV. 332, 339 (2020).

Even as the threat of defamation liability hovers over these campus adjudications, the judicial reasoning perpetuating the status quo appears increasingly out-of-step with developments in case law and regulation. Until recently, courts have treated campus investigations and adjudications of sexual misconduct differently than “quasi-judicial” and judicial proceedings, declining to extend an “absolute privilege” that would shield statements made in those cases from defamation liability. They reasoned that campus proceedings would not necessarily have the due process guarantees, such as the right to question witnesses, available in a typical administrative hearing.⁶ But courts have begun reconsidering the balance at hand, identifying that without privilege, parties and witnesses will fear retaliation from making reports and giving statements within those processes.⁷ Moreover, the heightened level of due process afforded to parties within those proceedings under the developing case law and state and federal regulations limits the risk that the parties will not have a fair hearing on the merits on campus.⁸ After reaching the end of a rigorous campus investigation, students should not have to put on their case again in open court in defense of a defamation lawsuit, possibly without their college or university’s support.

To unpack these tensions, and build a route for greater equity, this article focuses on state and federal case law from the past twenty years involving students, faculty, and staff who have brought defamation claims against institutions of higher education and individual members of the college and university community.⁹

This article begins, in Part I, by analyzing the elements of a defamation complaint, with a focus on several key issues within the higher education context arising from the substantive question of what makes a statement defamatory as a matter of law. Neither truthful statements, nor statements of opinion, are generally actionable, but many cases end up somewhere in the middle, making an understanding of the subtext of the statement as critical as the text itself.

Next, in Part II, the article examines several threshold issues in evaluating defamation complaints. Then, in Parts III and IV, the article looks at how immunity, absolute privilege, and qualified privilege shape defamation claims in higher education, including where the analysis varies between public and private institutions and the impact of state tort claims acts on defamation lawsuits. The article will then address absolute and qualified privilege in a variety of typical higher education scenarios and their limitations.

Finally, in Part V, this article closely examines an emerging flashpoint in this area of law: the intersection of defamation law and nonacademic misconduct claims, particularly those arising from Title IX sexual misconduct charges against

6 See *infra* Part V.B.2.

7 See *infra* V.B.1.

8 See *infra* Part V.A.

9 In highlighting the most recent case law, this article builds on fundamental research by Francine Tilewick Bazluke & ROBERT C. CLOTHIER FOR THE NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS (NACUA). See FRANCINE Tilewick Bazluke and Robert C. Clothier, DEFAMATION ISSUES IN HIGHER EDUCATION (2004).

students, faculty, and staff. As these processes become more regulated and take on the procedural trappings of a courtroom, statements made within them are beginning to secure greater privilege. This article urges the expansion of absolute privilege in campus-based sexual misconduct investigations and adjudications and encourages institutions to take affirmative steps to address the impact of defamation claims, both threatened and realized, on their campus Title IX process.

I. Defamation Defined

Defamation claims are meant to protect the subject of a written or verbal statement from reputational harm.¹⁰ “Libel” generally refers to recorded defamation, while “slander” is spoken.¹¹ Though the components of defamation vary by state, they generally involve a similar analysis:

- Did the speaker or writer make a false statement of fact about another person?
- Was that statement made to a third party?
- Was the publisher at fault, either through negligence or a higher standard?
- Did the publication harm the defamed person’s reputation?¹²

Where a plaintiff can establish these elements, the speaker or writer may assert that they had a privilege to make the statement. The plaintiff then has the burden to establish that the speaker or writer abused that privilege.¹³ The issue of privilege is central to understanding the intersection of defamation law and Title IX misconduct complaints and will be the focus of Parts IV and V.

A. False Statement

Defamation claims rest on the allegation of a false statement made about another person. As a result, if statement is true, its declarant cannot be liable for defamation, even if sharing that statement causes harm.¹⁴ At the same time, to be actionable, the statement must communicate an assertion of fact, rather than purely an opinion; it has to be capable of being proven false.¹⁵

The U.S. Supreme Court has declined to create “an artificial dichotomy between ‘opinion’ and fact,” and, in practice, opinion and fact will be hard to untangle in

10 50 AM. JUR. 2D LIBEL AND SLANDER § 2 (2021).

11 128 AM. JUR. *Trials* 1 (originally published in 2013).

12 RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

13 BAZLUKE & CLOTHIER, *supra* note 9, at 1.

14 *E.g.*, *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991); *Averett v. Hardy*, No. 3:19-CV-116-DJH-RSE, 2020 WL 1033543, at *9 (W.D. Ky. Mar. 3, 2020) (university administrators’ statements that a student accused the defamation-plaintiff of sexual assault was truthful, as it accurately related the accusation, and therefore was not actionable as the basis for a defamation claim).

15 *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 16 (1990).

many defamation claims arising from academic life.¹⁶ A defamatory statement is not protected if it will “imply an assertion of false objective fact.”¹⁷ In other words, cases will rise and fall on subtext: a message within a statement that listeners or readers would understand to have a defamatory meaning, even if the statement itself is, on its face, an opinion.¹⁸

A perennial example of a mixed fact-and-opinion claim is where faculty signal that another professor or a student is “incompetent.” Generally, such evaluations are considered opinions, and “the qualified privilege of employment-related communications often dovetails with the absolute privileges of truth and opinion.”¹⁹ Yet, depending on the context, a statement that a professional is “incompetent” could be defamatory if it implies that the person making the statement knows facts undisclosed to the listener that led them to that opinion.²⁰

The case law on statements regarding competence ranges. In one case, a professor’s communication to students that their former advisor, who resigned following a poor performance review, was “incompetent” was potentially defamatory; it was not simply an opinion, because the communication, which followed the professor’s resignation, implied facts not disclosed to the students.²¹ By contrast, a statement that an employee was discharged because they were “incompetent” was held to be nonactionable because it was “too vague” to be anything other than opinion.²² While courts tend to follow this distinction—“that the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law”—

16 Id. at 19.

17 Kern v. Univ. of S. Cal., No. B173959, 2005 WL 3539792, at *6 (Cal. Ct. App. Dec. 28, 2005) (internal quotation marks omitted).

18 For example, New York courts outline a four-factor test for determining if a statement is fact or opinion:

1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.

Donofrio-Ferrezza v. Nier, No. 04 CIV. 1162 (PKC), 2005 WL 2312477, at *6 (S.D.N.Y. Sept. 21, 2005), *aff’d*, 178 F. App’x 74 (2d Cir. 2006) (internal quotation marks omitted).

19 Id. at *7. *On qualified privilege in the employment context, see infra Part IV.B.*

20 Gill v. Hughes, 227 Cal. App. 3d 1299, 1309 (Cal. Ct. App. 1991) (statement that plaintiff was an “incompetent surgeon and needs more training” was defamatory because it implied “a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false,” and the plaintiff also faced an evidentiary hearing about his surgical technique and judgment).

21 Kantz v. Univ. of the Virgin Is., No. CV 2008-0047 (WAL), 2016 WL 2997115, at *22 (D.V.I. May 19, 2016).

22 Roberts v. Columbia Coll. Chic., 102 F. Supp. 3d 994, 1007 (N.D. Ill. 2015), *aff’d*, 821 F.3d 855 (7th Cir. 2016).

critics note that vague statements may simply “encourage the listener to infer underlying, verifiable facts.”²³

Regardless, it is firmly within the bounds of academic life for faculty to reach an opinion about a colleague or student’s professional competence based on their collection of “verifiable assertions of fact”: those opinions are “purely subjective assertions” rooted in facts.²⁴ A faculty member who has a responsibility to judge another faculty member’s fitness may state their opinion about that faculty member’s competence and ability to handle situations based on their experience observing their work.²⁵ Faculty may express their belief that a colleague has failed to live up to the institution’s code of professional ethics or that a researcher has engaged in falsification of data and other forms of research misconduct.²⁶ A faculty member may also share with other faculty in a department that a student should be terminated from a doctoral program on public safety grounds; this was judged an opinion based on facts already known to the colleagues who received this information.²⁷

Likewise, a critique is not a declaration of incompetence. “Criticism of the work of scholars is generally commonplace and acceptable in academic circles.”²⁸ Academic audiences recognize the “subjective character” of a critique and will “discount them accordingly.”²⁹ Statements that may appear defamatory in isolation—like that a faculty member is “unqualified” to undertake a research project—fall within the acceptable boundaries of academic criticism, and those that hear the criticism will not give the statements defamatory meaning.³⁰ Similarly, a written critique of a graduate student’s preliminary examination was not actionable, as it contained numerous statements not capable of being proven or disproven: that the exam lacked “sufficient rationale,” was “not clear,” and was “impractical,” “conceptually flawed” and “illogical.”³¹

23 Seitz-Partridge v. Loyola Univ. of Chi., 2013 IL App (1st) 113409, ¶ 29, 987 N.E.2d 34 (Ill. Ct. App. 2013) (internal quotation marks omitted); John B. O’Keefe, *Occupational Reputation, Opinion, and the Law of Defamation in Virginia*, 5 APPALACHIAN J.L. 35, 40 (2006) (contending that listeners will engage in “reverse-deductive” reasoning when they hear “general and conclusory statements” and “assume both the existence and truth of supportive facts.”).

24 Hadlock v. Tex. Christian Univ., No. 2-07-290-CV, 2009 WL 485669, at *5 (Tex. App. Ct. Feb. 26, 2009).

25 Owen v. Liberty Univ., No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *13 (W.D. Va. Apr. 13, 2020).

26 *Hadlock*, 2009 WL 485669, at *4; *Croce v. Sanders*, 459 F. Supp. 3d 997, 1023 (S.D. Ohio 2020), *aff’d*, No. 20-3577, 2021 WL 387489 (6th Cir. Feb. 3, 2021) (applying Ohio law, holding that expressions of opinion are generally accorded absolute immunity from liability under the First Amendment).

27 *Mehta v. Fairleigh Dickinson Univ.*, 530 F. App’x 191, 198 (3d Cir. 2013).

28 *Fikes v. Furst*, 81 P.3d 545, 551 (N.M. 2003).

29 *Freyd v. Whitfield*, 972 F. Supp. 940, 946 (D. Md. 1997).

30 *Fikes*, 81 P.3d at 550–51.

31 *Seitz-Partridge v. Loyola Univ. of Chi.*, 2013 IL App (1st) 113409, ¶ 30, 987 N.E.2d 34 (Ill. Ct. App. 2013) (internal quotation marks omitted); *See also Nigro v. Va. Commonwealth Univ./Med. Coll. of Va.*, 492 F. App’x 347, 356 (4th Cir. 2012) (program director’s statements regarding resident’s lack of progress and apparent lack of interest in rotations were opinion statements about performance incapable of being proven false).

Similarly, in the context of faculty performance reviews, statements regarding a faculty member's lack of professionalism may fall squarely within the realm of opinion: "What is considered rude or unprofessional differs from person to person."³² Statements in a disciplinary letter that a faculty member spoke "disparagingly," had a "meltdown," a "temper tantrum," or did not "properly contribute" to the university's mission were opinion.³³ The same for disclosing that a faculty member had received several complaints from students about unprofessional behavior; these complaints need not reflect the professor's lack of professional competence, but could simply reflect that the professor's approach to teaching did not "mesh" with the university's philosophy.³⁴ Commentary that a professor was "disgruntled" or "angry" likewise would reflect an opinion about his motivations or character, rather than a statement of objective and disprovable fact.³⁵

Furthermore, certain statements and conduct, even if "false, abusive, unpleasant, or objectionable to the plaintiff," will not be defamatory in context.³⁶ For instance, satirical remarks and jokes, even if painful to hear or read, would not be defamatory if a reasonable person would not interpret them to be truthful.³⁷ Hostile gestures, such as slamming a door on a colleague, are not, on their face, defamatory.³⁸

But "rhetorical name calling" may move into the realm of actionable statements where the accusations "convey an air of truth" suggestive of "unknown facts": an assertion that someone is a "liar" may simply lead a reasonable listener to believe the insult was hyperbole, or it may let them believe that undisclosed facts show the defamation plaintiff committed perjury.³⁹ In one example, a federal district court in Connecticut denied a university's motion for summary judgment on a defamation claim where a university dean allegedly stated at an open forum that a

32 *Green v. Trinity Int'l Univ.*, 344 Ill. App. 3d 1079, 1093, 801 N.E.2d 1208, 1220 (Ill. Ct. App. 2003).

33 *Dragulescu v. Va. Union Univ.*, 223 F. Supp. 3d 499, 510 (E.D. Va. 2016) (internal quotation marks omitted).

34 *Green*, 344 Ill. App. 3d at 1094.

35 *Hascall v. Duquesne Univ. of the Holy Spirit*, No. CV 14-1489 (CB), 2016 WL 3521971, at *2 (W.D. Pa. June 28, 2016) (university's statement to a newspaper that a faculty member filed a lawsuit following her tenure denial because she was "disgruntled" reflected an opinion about her motives and so was nonactionable opinion); *McReady v. O'Malley*, 804 F. Supp. 2d 427, 442 (D. Md. 2011), *aff'd*, 468 F. App'x 391 (4th Cir. 2012) (public university official's statements that she perceived professor as an "angry workplace guy" who was "rabid with bitterness" were opinion statements based on personal beliefs, not objective facts).

36 *Sansing v. Garcia*, No. 13-08-00211-CV, 2009 WL 3385247, at *5 (Tex. App. Ct. Oct. 22, 2009) (internal quotation marks omitted).

37 *Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998) (article calling university official "Director of Butt Licking" was "rhetorical hyperbole" that "cannot reasonably be understood as stating an actual fact" about her job title, conduct, or commitment of crime of moral turpitude); *Walko v. Kean Coll. of New Jersey*, 235 N.J. Super. 139, 148, 561 A.2d 680, 684 (N.J. Law. Div. 1988) ("spooof" edition of college newspaper stating that college official could be reached at "Whoreline" for "good telephone sex" could not reasonably be understood as factual statement).

38 *Hadlock v. Tex. Christian Univ.*, No. 2-07-290-CV, 2009 WL 485669, at *5 (Tex. App. Ct. Feb. 26, 2009).

39 *McNamee v. Clemens*, 762 F. Supp. 2d 584, 602 (E.D.N.Y. 2011).

sexual assault complainant had not suffered “legal rape,” which the complainant contended was a statement “implying that she was lying about the incident.”⁴⁰

Courts have also shielded statements that a person is “racist” as nonactionable opinion not conveying a factual assertion.⁴¹ In a recent example, the chancellor of a private university in New York’s description of videos of a fraternity’s “roast” for prospective members as “racist, anti-semitic, homophobic, sexist, and hostile to people with disabilities” was held nonactionable under New York law, as it conveyed the chancellor’s opinion about the videos, rather than a factual assertion about what they depicted.⁴²

But an accusation of racism may become actionable where it could be construed to mean that the defamation plaintiff “was acting in a racist manner” in performing their duties, which would harm their reputation and be tantamount to misconduct in office.⁴³ Ultimately, the analysis will be contextual, resting on the common understanding of the readers or listeners to whom the statements were addressed.⁴⁴

Courts may also examine the surrounding context to determine if a purportedly false statement actually was defamatory.⁴⁵ Virginia courts have determined that even “technically false” statements may not be defamatory if they would not actually “deter third persons from associating or dealing” with the plaintiff or make them “appear odious, infamous, or ridiculous.”⁴⁶ Even where a potentially

40 Kelly v. Yale Univ., No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *5 (D. Conn. Mar. 26, 2003) (denying summary judgment on defamation claim regarding whether dean’s statement was false, defamatory, or a statement of fact).

41 Cummings v. City of New York, No. 19-CV-7723 (CM) (OTW), 2020 WL 882335, at *20 (S.D.N.Y. Feb. 24, 2020). See also Garrard v. Charleston Cty. Sch. Dist., 429 S.C. 170, 200, 838 (S.C. Ct. App. 2019) (opinion article stating that coach was removed amid allegations that his players “behaved like racist douchebags” and the coach “condoned” a “racist ritual” were opinions not actionable under South Carolina law); Stevens v. Tillman, 855 F.2d 394, 402 (7th Cir. 1988) (parent-teacher organization president’s statement calling school principal “racist” was opinion not actionable under Illinois law).

42 Doe #1 v. Syracuse Univ., 468 F. Supp. 3d 489, 512 (N.D.N.Y. 2020).

43 MacElree v. Phila. Newspapers, Inc., 544 Pa. 117, 126 (Pa. 1996). See also David A. Elder, “Hostile Environment” Charges and the ABA/aals Accreditation/Membership Imbroglio, *Post-Modernism’s “No Country for Old Men”: Why Defamed Law Professors Should “Not Go Gentle into That Good Night,”* 6 RUTGERS J.L. & PUB. POL’Y 434, 468–69 (2009) (“In light of the severe penalties imposable by educational institutions for such egregious misconduct, the potential for civil liability, possible professional sanction by the bar, and the extraordinary societal opprobrium, if not ostracism that such charges entail, it is difficult to imagine any modern court concluding that a law professor is not defamed by ‘pervasive hostile environment’ charges imputed to him or her.”).

44 Klayman v. Segal, 783 A.2d 607, 616 (D.C. 2001).

45 Hannoum v. Simon’s Rock Coll. of Bard, No. CV 06-30064 (KPN), 2008 WL 11409146, at *2 (D. Mass. May 7, 2008) (while some faculty members appeared to have made false statements about nonrenewed faculty member, no evidence that defendants or the college communicated those statements or were vicariously liable for them).

46 Nigro v. Va. Commonwealth Univ./Med. Coll. of Va., 492 F. App’x 347, 356 (4th Cir. 2012) (program director’s statement that resident “failed” rotation, “while technically false, would not deter third persons from associating or dealing with resident or make her appear odious, infamous, or ridiculous”).

defamatory statement is published, if it remains within a narrow and intended audience, it may not actually result in defamation; a small audience of reviewers of a faculty member's teaching ability, for example, is trained to assess faculty merit, so that "this audience would not as likely be affected by any derogatory inference in the letters as might the public at large."⁴⁷ The published statement, in other words, was not defamatory because the plaintiff's reputation was not actually harmed.

Finally, courts may consider investigative determinations to be opinion and therefore not actionable. In *Doe v. Stonehill College*, a federal district court in Massachusetts held that the recommendation of campus investigators that a student "more likely than not" committed sexual assault was opinion where this determination followed an investigation and was based on "disclosed, non-defamatory facts" within the evidentiary file.⁴⁸ The investigators' finding was based on their evaluation of the gathered evidence and interviews; having provided the factual basis underlying their conclusions, the investigators offered an opinion rather than assertion of disprovable fact.⁴⁹

But other courts have found that statements of fact incorporated within an investigative report could be disproven and therefore would be actionable in a defamation complaint. In one example, *Heineke v. Santa Clara University*, a campus investigation of faculty-on-student sexual assault produced a report containing the complainant's statements about a faculty member's misconduct, which the respondent wholly contested.⁵⁰ While the court considered that the report contained "a range of opinions," it found that the report "characterized [complainant's] allegations as facts and explicitly based its opinions on its finding that [complainant's] allegations were credible."⁵¹ These assertions were enough to meet the element of demonstrating a false statement of fact, particularly as the university "explicitly adopted the findings of the investigation."⁵²

Likewise, statements regarding a conduct board's findings may also meet the

47 *Constantino v. Univ. of Pittsburgh*, 201 PA Super. 4, ¶ 17, 766 A.2d 1265, 1270 (Pa. Super. 2001).

48 No. CV 20-10468 (LTS), 2021 WL 706228, at *16 (D. Mass. Feb. 23, 2021) (declining to reach the issue of privilege because plaintiff had not established false statement element of defamation claim). Notably, this decision appears to stem from a "single-investigator" model of adjudication, where the investigators reached a determination of responsibility without submission of the evidence to a separate hearing body. This practice would violate present Title IX regulations for "sexual harassment" falling within Title IX's regulatory scope. See 34 C.F.R. § 106.45(b) (2020). On the liability of investigators for defamation, see also *Mills v. Iowa*, 924 F. Supp. 2d 1016, 1031 (S.D. Iowa 2013) (special counsel hired to review university's response to sexual assault incident were not liable for defamatory statements simply by recounting facts and opinions that witnesses communicated to them and reaching conclusion that response was "consistent with a culture of a lack of transparency"; investigators' finding was opinion protected by First Amendment).

49 *Doe v. Stonehill Coll.*, 2021 WL 706228, at *16. The *Stonehill* court distinguished the instant matter from cases where the publisher makes a statement that appears to be opinion but implies the existence of undisclosed facts, relying on Massachusetts precedent holding that an opinion is not actionable where it is based on disclosed or assumed nondefamatory facts. *E.g.*, *Piccone v. Bartels*, 785 F.3d 766, 774 (1st Cir. 2015).

50 No. 17-CV-05285 (LHK), 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017).

51 *Id.*

52 *Id.*

falsity element where the plaintiff alleges that they did not commit the violation for which they were found responsible, and the underlying proceeding was erroneous. For instance, in *Wells v. Xavier University*, the university found a student-athlete responsible for sexual assault, expelled him, and then issued a statement that he had been found responsible and expelled “for a serious violation of the Code of Student Conduct” which, according to the plaintiff, “everyone knew” concerned an alleged sexual assault.⁵³ While the court found the case to be a “close call,” it concluded that this statement could support a libel claim because the proceeding itself was allegedly “invalid” owing to a variety of alleged due process issues, including the student’s denial of access to an attorney, inability to cross-examine his accuser, inability to access character witnesses on equal terms with his accuser, and the hearing board’s lack of training in handling sexual misconduct cases.⁵⁴ Strengthening the libel claim was the student’s position that he was a “scapegoat” for the university as it responded to investigations from the U.S. Department of Education’s Office for Civil Rights for its prior mishandling of sexual assault cases and that the county prosecutor reached out to campus officials to communicate his doubts about the accusations.⁵⁵

B. Publication

The second defamation element, publication, refers broadly to the intentional or negligent sharing of a defamatory statement to at least one other person.⁵⁶ People who then reshare the defamatory statement with others, like a campus newspaper publisher, could be liable for “re-publication” under the theory that the republisher has adopted the statement, making them equally liable for damages as the original speaker or writer.⁵⁷

While establishing publication is typically straightforward, complexities arise in the minority of jurisdictions that apply the “intracorporate communications no-publication” rule, which imputes a lack of publication to statements made within an enterprise; statements made by one employee to another in the course of their employment would not be considered published, because the institution is effectively communicating with itself.⁵⁸

53 7 F. Supp. 3d 746, 750 (S.D. Ohio 2014).

54 *Id.*

55 *Id.*, at 747. Effectively, both the defamation claim in *Wells* and the accompanying Title IX “erroneous outcome” claim rested on similar factual allegations of a flawed decision-making process combined with a context suggesting that the accused student’s gender was decisive in the outcome. *Id.* at 751.

56 RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 1977).

57 *Id.* § 578.

58 *Newell v. JDS Holdings, L.L.C.*, 834 N.W.2d 463, 471 (Iowa Ct. App. 2013) (citing cases); Doris DelTosto Brogan, *Reviving the Intracorporate Communications No-Publication Rule: A Strategy to Encourage Effective Investigation of Internal Misconduct*, 71 BAYLOR L. REV. 620 (2019) (reviewing conflict among jurisdictions about validity of the no-publication rule, and noting its continued application in Alabama, Missouri, Oklahoma, Tennessee, and Washington State). *The no-publication intracorporate communications doctrine is a distinct defense from the qualified privilege, but courts may conflate them.* See also Anthony W. Kraus, *Absolute Protection for Intracorporate Personnel Communications Under Defamation Law: A Philosophical Reappraisal of the Nonpublication Doctrine*, 25 U. Mem. L. Rev. 155 (1994).

Another minority rule to consider, depending on jurisdiction, is “compelled self-publication,” wherein a defamation suit against a former employer can satisfy the publication element because its former employee (who is the person being defamed) is forced to tell a prospective employer about issues with their past job performance or the reasons they were dismissed from employment.⁵⁹ Under such circumstances, some state courts may apply a “foreseeability” exception to the publication rule, even where the statements are not disclosed to an identifiable third person; if the defamatory statements remain in a personnel file, and it is likely that the employee will have to explain the statements to subsequent employers who investigate their background, then it will be considered published for purposes of satisfying this element.⁶⁰

C. Fault

Along with establishing the falsity of the statement and its publication to a third party, a defamation plaintiff must also allege the requisite degree of fault on the maker of the statement.

For public officials and public figures, the U.S. Supreme Court requires proof by clear and convincing evidence of “actual malice” in making the statement.⁶¹ But it is a different story with “private” persons; the U.S. Supreme Court has since distinguished the “reduced constitutional value of speech involving no matters of public concern” and therefore has permitted courts to award presumed and punitive damages without a showing of “actual malice.”⁶² State courts typically only require a showing of negligence in cases involving “private” plaintiffs.⁶³

What is “actual malice”? In *New York Times Co. v. Sullivan*, the Court held that a public official could not recover damages from a defamatory statement about his official conduct unless the official proved “actual malice,” meaning that the statement was made with the knowledge that it was false or with reckless disregard of whether it was false.⁶⁴ “Actual malice” does not require proof that the speaker or writer harbored any particular animus toward the defamed person but focuses only on the speaker or writer’s attitude toward the truth in making the statement.⁶⁵ The U.S. Supreme Court has subsequently extended this fault requirement more

59 *Lewis v. Equitable Life Assur. Soc’y of the U.S.*, 389 N.W.2d 876, 886 (Minn. 1986). The Connecticut Supreme Court, reviewing the state of the law in 2004, concluded that most jurisdictions have either not recognized compelled self-publication or expressly rejected it. *Cweklinsky v. Mobil Chem. Co.*, 267 Conn. 210, 219, 837 A.2d 759, 765 (Conn. 2004).

60 *Heineke v. Santa Clara Univ.*, No. 17-CV-05285 (LHK), 2017 WL 6026248, at *13 (N.D. Cal. Dec. 5, 2017) (finding foreseeable publication in evidence collected in faculty sexual misconduct investigation and saved in a personnel file).

61 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

62 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

63 *E.g.*, *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pennsylvania*, 592 Pa. 66, 84, (Pa. 2007); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

64 376 U.S. 254.

65 *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991).

broadly to “public figures,” who may be either general-purpose public figures or limited-purpose public figures (who are only public figures for a limited set of issues surrounding a public issue).⁶⁶

Courts have considered a variety of university officials and community members to be “public officials” or “public figures” who cannot recover without showing “actual malice” in the making of the statement regarding that plaintiff’s official conduct.⁶⁷ No “bright line” rule exists here:

Persons held to be “public officials,” for example, include a vice president of external affairs, university purchasing agent, police official, law professor and vice chancellor for research, and state college director of financial aid. “Public figures” have included protestors, a college, an institute, a research scientist, coaches, law school dean, college dean, vice president of external affairs, state college accounting professor, a group of junior college professors, a state university athletic director, and a former college football player; but not a former head community college basketball coach, assistant basketball coach, behavioral scientist, department chair or certain university professors.⁶⁸

Given this diversity of opinion, it may be difficult to predict if a defendant is a public figure, with courts often drawing distinctions according to the individual’s “access to the media” (and consequent ability to respond publicly to accusations) and “assumption of risk” in engaging in public life.⁶⁹

D. Proof of Harm and Damages

The last element in a defamation claim is proof of reputational harm and damages. A web of state law rules overlay whether a plaintiff’s damages will be presumed from the statement itself or whether the plaintiff will have to prove “special damages” stemming from the statement.⁷⁰

Initially, consider the plaintiff’s status as a public official or figure; as described above, reputation harm and damages are not presumed in cases involving public officials and figures, who must prove “actual malice” by clear and convincing evidence to recover damages.⁷¹

In turn, proof of harm in cases involving “private” figures may hinge on whether they involve statements that are defamatory *per quod*, meaning that they require extrinsic facts to explain what made them defamatory, or defamatory *per*

66 Gertz, 418 U.S. at 351.

67 *Who Is a ‘Public Figure’ for Purposes of a Defamation Action*, 19 A.L.R.5th 1 (originally published in 1994) (noting university officials falling within this category).

68 *Bazluke and Clothier*, supra note 9, at 7–8.

69 *Id.* at 7.

70 For an overview of state laws regarding damages, see 128 AM. JUR. TRIALS 1, *Litigating Defamation Claims* § 12 (originally published in 2013).

71 *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 16 (1990).

se, meaning “obviously and naturally harmful to a person.”⁷² Where a statement falls within the categorical definitions of defamatory *per se*, the plaintiff does not need to allege damages, as the remark is considered actionable without regard to harm.⁷³ Put another way, there is no need to prove a “context indicating malice” for a statement that is *per se* defamatory.⁷⁴ There is no situation where the words could possibly have an “innocent” meaning.⁷⁵

As with the public figure analysis, it can be challenging to determine which statements are defamatory *per se* under state law. Accusations that a faculty or student committed sexual misconduct will generally fall into this category, as they implicate a criminal or moral offense.⁷⁶ Statements that a person engaged in racial discrimination may also be defamatory *per se*.⁷⁷ Less certain are statements that an individual committed a civil wrong, like claiming the plaintiff entered a contract without authorization, which would not be a criminal offense or an attack on one’s moral standing.⁷⁸

Case law also varies about what statements tend to harm a person in their profession to the point that they constitute defamation *per se*. Most states consider attacks on a person’s professional competence to fall within that category.⁷⁹ But a minority of states, including Michigan, specifically exclude “disparagement of one’s profession” under this framework, yet retain crimes of moral turpitude as a *per se* ground.⁸⁰ Accusations of academic or research misconduct may also be

72 Kyung Hye Yano v. City Colls. of Chi., No. 08 CV 4492, 2013 WL 842644, at *6 (N.D. Ill. Mar. 6, 2013), *aff’d sub nom.* Kyung Hye Yano v. El-Maazawi, 651 F. App’x 543 (7th Cir. 2016) (applying Illinois law).

73 Kantz v. Univ. of the Virgin Is., No. CV 2008-0047 (WAL), 2016 WL 2997115, at *22 (D.V.I. May 19, 2016).

74 Harstad v. Whiteman, 338 S.W.3d 804, 810 (Ky. Ct. App. 2011). As will be discussed *infra* Part IV.B, while the law presumes malice where a statement is defamatory *per se*, if the statement is subject to a qualified privilege, the statement “is relieved of that presumption and the burden is on the plaintiff to prove actual malice.” *Id.*

75 Woods v. Capital Univ., 2009-Ohio-5672, ¶ 29, 2009 WL 3465827 (10th Dist. 2009).

76 Fox v. Parker, 98 S.W.3d 713, 726 (Tex. App. Ct. 2003) (statements by student who testified against a professor in a sexual harassment hearing were defamatory *per se*).

77 Goodwin v. Kennedy, 347 S.C. 30, 38, 552 S.E.2d 319, 324 (S.C. Ct. App. 2001) (statement that assistant principal disciplined students in a racially discriminatory way was defamatory *per se*).

78 Nehls v. Hillsdale Coll., 65 F. App’x 984, 990 (6th Cir. 2003) (college officials’ statement to journalists that a student was expelled for entering a contract without authorization was not actionable as defamation *per se*). Michigan law requires allegations of a crime of moral turpitude for the statement to be actionable, making, for example, a claim of intellectual property theft outside the definition of defamation *per se* because it is not a crime and would not subject the accused to “an infamous punishment.” Daneshvar v. Kipke, 266 F. Supp. 3d 1031, 1058 (E.D. Mich. 2017), *aff’d*, 749 F. App’x 986 (Fed. Cir. 2018).

79 E.g., Wilson v. New York, No. 15-CV-23 (CBA) (VMS), 2018 WL 1466770, at *4 (E.D.N.Y. Mar. 26, 2018); Seitz-Partridge v. Loyola Univ. of Chi., 2013 IL App (1st) 113409, ¶ 36, 987 N.E.2d 34 (Ill. Ct. App. 2013); Owen v. Liberty Univ., No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *11 (W.D. Va. Apr. 13, 2020); Kantz v. Univ. of the Virgin Is., No. CV 2008-0047 (WAL), 2016 WL 2997115, at *21 (D.V.I. May 19, 2016).

80 Daneshvar, 266 F. Supp. 3d at 1058.

considered defamatory *per se*, given their grave impact on an academic or student's professional career.⁸¹ Yet a faculty member's evaluation of a student's professional competence based on coursework and tests is likely not defamatory *per se*, "as one critical purpose of evaluating and grading students is to *specifically determine* which students are fit for the practice."⁸²

Now that we have discussed the *prima facie* elements of a defamation claim, we will cover some threshold issues in litigation and then review immunity laws and "absolute" and "qualified" privileges.

II. Threshold Issues in Litigation

When a college or university is served with a complaint containing defamation claims, several issues may be considered before engaging with elements of the claim itself. These may include indemnification, statute of limitations, and jurisdiction.

A. Indemnification

Defamation claims often name both the institutional defendant and specific employees or students who made the defamatory statements. While employees are generally indemnified for discretionary acts taken during their employment, intentional torts may fall outside the scope of coverage. Moreover, where an employee acts against their employer's interest by committing an intentional tort, their interests may not align as codefendants, raising ethical concerns when the employee is represented by institutional counsel.

These ethical issues may be more acute when both students and employees are named as codefendants such as in a Title IX lawsuit arising from student discipline. For example, public institutions and public employees are often entitled to state tort claim law protections (see Part III), while student defendants generally are not, leaving the codefendants in very different positions when evaluating the strength of the complaint and interest in settlement.⁸³

Courts may evaluate the defamation claims against specific employees before inquiring into the institution's liability; as Virginia courts hold, defamation claims

81 *Castelino v. Rose-Hulman Inst. of Tech.*, No. 2:17-CV-139 (WTL) (MJD), 2019 WL 367623, at *16 (S.D. Ind. Jan. 30, 2019), *appeal dismissed*, No. 19-1719, 2019 WL 5212232 (7th Cir. May 20, 2019) (in dictum).

82 *Zwick v. Regents of the Univ. of Mich.*, No. CV 06-12639 (MOB), 2008 WL 11356797, at *2 (E.D. Mich. June 9, 2008) (emphasis in original). *See also* *Hodge v. Coll. of S. Maryland*, 121 F. Supp. 3d 486, 504 (D. Md. 2015) (receipt of unwanted grade on a transcript was not defamatory, as it was unlikely that any grade could "engender hate or ridicule" and no harm shown because student was accepted for transfer to another institution); *Kyung Hye Yano v. City Colls. of Chi.*, No. 08 CV 4492, 2013 WL 842644, at *6 (N.D. Ill. Mar. 6, 2013), *aff'd sub nom.* *Kyung Hye Yano v. El-Maazawi*, 651 F. App'x 543 (7th Cir. 2016) (a full-time student is "by definition not engaged in a trade, profession, or business" and therefore statements regarding student performance would not fall within defamation *per se* definition of a statement regarding a person's professional competence).

83 *E.g.*, *Ali v. Univ. of Louisville*, No. 3:17-CV-00638 (RGJ), 2019 WL 539098, at *9 (W.D. Ky. Feb. 11, 2019) (dismissing claims against officials on sovereign immunity grounds, while remanding claims against student to state court).

against the institutional employer are “derivative” of any claims against individual faculty acting in their official capacity.⁸⁴ But if the employee is acting outside the scope of employment, the court may dismiss the defamation claims against the employer, even should the claims stand against the individual employee. As a result, an individual’s liability may also depend on how narrowly state law and judicial precedent construes the concept of scope of employment, as discussed in Part III.

B. Statute of Limitations

Often, defamation claims are dismissed in the pleading stage based on the age of the statement itself. Statutes of limitations for defamation claims are generally short (often one year from publication) under most state laws, and will be even more curtailed for public institutions subject to notice of claim requirements.⁸⁵ Moreover, under the “single publication rule,” the clock on defamation claims will not restart every time the allegedly false statement is republished; counsel may expect issues of fact to arise regarding when the act of publication occurred (i.e., at intake of the misconduct report versus in the final determination). But if the statement was made in the campus proceeding, and then repeated a year later to different parties, the statute of limitations might restart.⁸⁶

C. Supplemental Jurisdiction

Where the case is filed in federal court, counsel may also consider their legal strategy for addressing state-based tort claims, such as defamation, which are attached to a federal civil rights and discrimination complaint. If the federal claims appear unlikely to survive scrutiny through the pleadings phase, then counsel may anticipate that the court will decline to exercise jurisdiction over the remaining state-law claims.⁸⁷ In turn, counsel may seek to dismiss the federal claims, and have the suit dismissed from federal court, before answering the state-law defamation claims and entering into the potentially prolonged discovery and fact-finding process necessitated by fact-specific defenses and rebuttals inherent in a defamation case.

84 Owen v. Liberty Univ., No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *16 (W.D. Va. Apr. 13, 2020); Dragulescu v. Va. Union Univ., 223 F. Supp. 3d 499, 509 (E.D. Va. 2016)

85 Unknown Party v. Ariz. Bd. of Regents, No. CV-18-01623 (PHX) (DWL), 2019 WL 7282027, at *17 (D. Ariz. Dec. 27, 2019) (defamation claim against public university subject to 180-day notice of claim had to be filed within 180 days after defamatory statements made within the proceeding; as such, only timely statement *within* notice of claim period was the final decision itself finding him responsible). See also Harrick v. Bd. of Regents of the Univ. Sys. of Ga., No. 1:04-CV-0541 (RWS), 2005 WL 8154395, at *5 (N.D. Ga. Aug. 1, 2005) (defamation claims dismissed where plaintiff failed to file a timely notice of claim under Georgia Tort Claims Act).

86 Schaumleffel v. Muskingum Univ., No. 2:17-CV-463 (GCS), 2018 WL 1173043, at *7 (S.D. Ohio Mar. 6, 2018).

87 E.g., Seals v. Miss., 998 F. Supp. 2d 509, 526 (N.D. Miss. 2014); Ali, 2019 WL 539098, at *9; Roe v. St. John’s Univ., No. 19-CV-4694 (PKC) (RER), 2021 WL 1224895, at *23 (E.D.N.Y. Mar. 31, 2021) (declining to exercise supplemental jurisdiction over state law defamation claims brought against student-complainant as co-defendant).

D. Ministerial Exception

Finally, some academic defamation claims arise from disputes within religious orders about a faculty, staff, or students' false understanding or application of doctrine. Courts roundly hold that they simply lack competence to handle such disputes as a matter of law and will dismiss them under the ministerial exception.⁸⁸

III. Immunity for Public Officials and Employees

Counsel representing public colleges and universities and any individually named members of the college or university community should determine if the defamation allegations arise from actions taken within the scope of employment. State tort claims acts and judicial precedent may shield government entities from liability for discretionary actions taken by public officers and employees acting within the scope of their duties.

A. Immunity for Statements Made Within Scope of Employment

The scope of state sovereign immunity will vary by jurisdiction, and not all state colleges and universities will have immunity to the same extent as other state entities. And even where state law waives sovereign immunity for tort claims, it may restrict recovery for intentional torts, which are generally considered outside the scope of employment. Some state tort claims acts specifically prohibit claims arising from libel or slander.⁸⁹ Where those torts are not specifically named in the statute, but state law otherwise prohibits lawsuits against the state based on intentional torts, courts have identified defamation as an intentional tort for which the state has not waived sovereign immunity.⁹⁰

As such, courts have held that if an employee is required, as a part of their official duties, to give statements in an administrative grievance process, then state law may absolutely shield them from civil liability from defamation.⁹¹ For example, a faculty member at a public college serving as a witness during a faculty disciplinary grievance was considered a public official under Florida law and therefore absolutely immune from suit.⁹² Likewise, university officials required to give public statements about the outcome of a faculty disciplinary case were immune from a defamation action under Indiana's Tort Claims Act.⁹³

University officials engaged in performance reviews of faculty may also enjoy

88 *Sumner v. Simpson Univ.*, 27 Cal. App. 5th 577, 596 (Cal. Ct. App. 2018).

89 ALASKA STAT. § 09.50.250 (2021); GA. CODE ANN. § 50-21-24 (West 2021); MISS. CODE ANN. § 11-46-5(2) (West 2021).

90 *Leatherwood v. Prairie View A & M Univ.*, No. 01-02-01334-CV, 2004 WL 253275, at *3 (Tex. App. Ct. Feb. 12, 2004), *applying* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (2021).

91 *delPino Allen v. Santelises*, 271 So. 3d 1112, 1116 (Fla. Dist. Ct. App. 2019), *reh'g denied* (Mar. 22, 2019), *review denied sub nom.* *Allen v. Santelises*, No. SC19-496, 2019 WL 2428454 (Fla. June 11, 2019).

92 *Id.* at 1116, *applying* FLA. STAT. ANN § 1004.65 (West 2021).

93 *Bull v. Bd. of Trustees of Ball State Univ.*, No. 1:10-CV-00878 (JMS), 2012 WL 1564061, at *9 (S.D. Ind. May 2, 2012), *applying* Ind. Code Ann. § 34-13-3-3(6)-(7) (West 2021).

immunity.⁹⁴ A Mississippi professor was absolutely immune from a defamation suit under that state's Tort Claims Act, as she was acting in the scope of her duties when making employment decisions about a faculty member. Even if she exercised poor judgment in that discretionary function, she remained absolutely immune.⁹⁵ A faculty supervisor was likewise immunized from a Texas defamation lawsuit arising from statements made in a faculty meeting as this conduct occurred within the scope of employment.⁹⁶ Pennsylvania courts similarly find that public university faculty are acting within their scope of employment in reviewing tenure candidates; as such, even if "personal animosity" drove the evaluation's outcome, the faculty were protected by sovereign immunity from a defamation claim arising from the review.⁹⁷

While some state laws will bar recovery against the state or public university for defamatory statements made within an appropriate employment context regardless of fault, not all states will extend this immunity to individual employees. For example, Florida has not waived sovereign immunity for "intentional or malicious torts" committed by state employees, making a state university immune from a defamation suit based on an "intentionally malicious" evaluation of an instructor.⁹⁸ But a similar claim rooted in bad faith could be brought against that public employee individually.⁹⁹ By contrast, Georgia shields both the state entity and its employees from tort liability for actions taken within their official duties "without regard to their intent or malice"; as such, comments made by a faculty member during a tenure revocation process were immunized, as the allegedly defamatory statements about a professor's private behavior and domestic abuse were made in the course of the faculty member's official duties.¹⁰⁰

B. Malice and the Immunity Analysis

In states without such blanket protections, however, statute and judicial precedent may limit a state actor's immunity where the statement is made with

94 *White v. Trew*, 366 N.C. 360, 364, 736 S.E.2d 166, 169 (N.C. 2013) (holding that North Carolina Tort Claims Act bars claims for intentional torts, which would include libel, making a suit against a faculty member for a performance review in their official capacity barred by sovereign immunity; in dictum, holding that even if the faculty member were sued in their personal capacity, the suit would be barred for public policy reasons).

95 *DePree v. Saunders*, No. 207-CV-185 (KS) (MTP), 2008 WL 4457796, at *9 (S.D. Miss. Sept. 30, 2008), *aff'd*, 588 F.3d 282 (5th Cir. 2009).

96 *Wetherbe v. Laverie*, No. 07-17-00306-CV, 2019 WL 3756911, at *3 (Tex. App. Ct. Aug. 8, 2019) (noting that "[t]he scope-of-employment inquiry under section 101.106(f) is not concerned with the reasons motivating the complained-of conduct but whether the conduct fell within the general scope of the employee's employment.")

97 *Kull v. Guisse*, 81 A.3d 148, 158 (Pa. Commw. Ct. 2013).

98 *Beaulieu v. Bd. of Trustees of Univ. of W. Fla.*, No. 3:07 CV-30 (RV) (EMT), 2007 WL 2900332, at *4 (N.D. Fla. Oct. 2, 2007).

99 Fla. Stat. Ann. § 768.28(9)(a) (West 2021) (public officers and employees may be held personally liable in tort for actions taken within the scope of employment when acting "in bad faith or with malicious purpose").

100 *Brown v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:14-CV-0365 (LMM) (LTW), 2015 WL 12591794, at *4 (N.D. Ga. Jan. 12, 2015), report and recommendation adopted, No. 1:14-CV-0365 (LMM) (LTW), 2015 WL 12600344 (N.D. Ga. Feb. 3, 2015).

malicious intent.¹⁰¹ For example, Ohio law extends “personal immunity” to state employees acting in the scope of their employment and without “malicious purpose, in bad faith, or in a wanton or reckless manner”; under this statute, a faculty member who drafted a negative recommendation for a student was immunized from liability because there was no evidence that the faculty wrote the letter in bad faith.¹⁰²

But where the declarant is acting *outside* the scope of their employment, immunity would not apply. So, under Arizona’s Tort Claims Act, a faculty member who wrote comments to a newspaper article posted on the Internet that allegedly defamed a former faculty member would not necessarily have immunity, as that posting was not within the scope of employment.¹⁰³

And where the state tort claims act makes an exception for malicious conduct, courts may decline to apply immunity for defamatory remarks allegedly made with improper intent. Compare two Maryland cases applying the state’s Tort Claims Act. In one, faculty members who exchanged e-mails about a professor’s hostile behavior and insubordination enjoyed statutory immunity because any remarks they made in those e-mails were within the scope of their employment.¹⁰⁴ But in another, a faculty member’s e-mail to various university officials about a student’s alleged misappropriation of funds from a prelaw organization, which the faculty member admitted she did not think the student actually committed, would not be shielded by Maryland’s Tort Claims Act immunity.¹⁰⁵

The difference was context. In the latter case, the court identified that the faculty member and accused student had “at the very least, an unusual student-professor relationship” that included the professor asking the student for two loans, discussing her personal life and sexual history with him, leaving “lewd” messages on his voicemail, and wanting sex from him—conduct that led the student to resign from the organization.¹⁰⁶ While the professor’s issuance of the accusatory e-mail, standing alone, would not be outside the scope of employment, even if it violated university policy, the surrounding circumstances, including that the professor was subject to a disciplinary grievance for her conduct toward the student, pointed to an improper motive other than an interest in correcting financial issues.¹⁰⁷ Ultimately, a jury awarded the student \$50,000 in compensatory

101 Slack v. Stream, 988 So. 2d 516, 530 (Ala. 2008) (state-agency immunity not applied where professor acted beyond authority as department chair to disseminate plaintiff’s letter of reprimand for plagiarism to various institutions, and chair stated in phone call “that he was going to see to it that [plaintiff] never worked in academia again”).

102 Ostasz v. Med. Coll. of Ohio, 114 Ohio App.3d 391 (10th Dist. 1996), *applying* OHIO REV. CODE § 9.86 (2021).

103 Rodriguez v. Serna, No. 1:17-CV-01147 (WJ) (LF), 2019 WL 2340958, at *10 (D.N.M. June 3, 2019).

104 McReady v. O’Malley, 804 F. Supp. 2d 427, 444 (D. Md. 2011), *aff’d*, 468 F. App’x 391 (4th Cir. 2012) (applying MD. CODE ANN., CTS. & JUDIC. PROC. § 5-522(b) (West 2021)).

105 Brown v. Brockett, No. CIV. JFM-11-240, 2012 WL 1552783, at *5-6 (D. Md. Apr. 27, 2012).

106 *Id.* at *5, 1.

107 *Id.* at *5.

damages and \$150,000 in punitive damages, which the court lowered to \$20,000 in compensatory damages and \$20,000 in punitive damages because the student “suffered virtually no damage.”¹⁰⁸

Similarly, where the statutory immunity is limited to statements made in good faith, courts may find a waiver of immunity. So, allegedly bad faith omissions within a faculty review committee were sufficient to overcome immunity provided under Washington State law.¹⁰⁹ Likewise, even where the Utah Governmental Immunity Act barred libel and slander suits for negligent acts or omissions, a faculty advisor would not be immune from injuries stemming from “fraud or willful misconduct” in statements about a doctoral student’s purported research misconduct where those statements resulted from a serious conflict of interest.¹¹⁰ According to the complaint, the advisor recommended that the student use a device for recording seizure information in mice that the advisor had a financial and scientific stake in promoting; when the student found negative results from using that device, the advisor told her to revise her results, removed her from his laboratory, and informed the dissertation committee that she falsified data, resulting in her dismissal.¹¹¹

IV. Privilege

Where state sovereign immunity does not otherwise bar a defamation claim for statements made within the scope of employment, the statements may still be privileged from suit under the doctrines of absolute or qualified privilege.

A. Absolute Privilege

Traditionally, statements made in judicial and “quasi-judicial” proceedings, like administrative hearings, enjoy “absolute” privilege from liability to encourage open reporting.¹¹² As will be discussed in Part IV.B, most campus decision-making does not enjoy such encompassing privilege from liability. Still, in what appears

108 Specifically, the student was unharmed because he was accepted to law school and could not suffer any reasonable fear that he would not be admitted to the bar from the incident, as the university investigated the incident and issued a written finding that he was not responsible for misappropriating organizational funds. *Brown v. Brockett*, No. CIV. JFM-11-240, 2013 WL 8705901, at *1 (D. Md. Sept. 12, 2013), *aff’d*, 585 F. App’x 133 (4th Cir. 2014).

109 *Davidson v. Glenny*, 14 Wash. App. 2d 370, 386, 470 P.3d 549, 559 (Wash. Ct. App. 2020). Washington law confers civil immunity upon “[e]mployees, agents, or students of institutions of higher education serving on peer review committees which recommend or decide on appointment, reappointment, tenure, promotion, merit raises, dismissal, or other disciplinary measures for employees of the institution” so long as their performance on the committee was in good faith. The same provision also shields “[i]ndividuals who provide written or oral statements in support of or against a person reviewed ... if their statements are made in good faith.” WASH. REV. CODE ANN. § 28B.10.648 (West 2021).

110 *Rossi v. Univ. of Utah*, No. 2:15-CV-00767, 2016 WL 3570620, at *7 (D. Utah June 24, 2016).

111 *Id.* at *4.

112 *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983). Note that allegedly defamatory statements made during litigation would similarly enjoy absolute privilege, even if they desc]ribed statements that would enjoy a lesser privilege if uttered in a nonjudicial campus forum. *Hascall v. Duquesne Univ. of the Holy Spirit*, No. CV 14-1489 (CB), 2016 WL 3521971, at *2 (W.D. Pa. June 28, 2016).

to signal an emerging trend, judicial precedent in several states has declared some college and university grievance processes to be quasi-judicial proceedings entitled to absolute privilege.¹¹³

For one, some state appellate courts have declared statements made within campus sexual misconduct proceedings, including Title IX investigations and adjudications, to be covered under the absolute privilege. In 2008, Indiana's Supreme Court applied absolute privilege to the complaints of two public university students of sexual harassment against a professor.¹¹⁴ But this precedent remains limited to student-reported misconduct; in 2011, Indiana's intermediate appellate court stopped short of applying absolute privilege to sexual harassment complaints brought by faculty members against fellow faculty, reasoning that a qualified privilege adequately protects the interests of an employee bringing a complaint.¹¹⁵

Illinois appellate courts have also moved in the direction of widening absolute privilege for reports of sexual misconduct. In the 2016 and 2018 *Razavi* decisions, the Illinois Appellate Court, First District, applied absolute privilege to a complainant's statements to campus security and college officials at a private college made during the initiation, investigation, and adjudication of a campus sexual assault complaint.¹¹⁶

Along with sexual misconduct investigations and hearings, courts have held in a scattering of decisions that statements made within certain research misconduct proceedings may be subject to absolute privilege. In a decision later affirmed by the New York Appellate Division, First Department, a New York trial court applied absolute privilege to a private college's faculty advisory committee, a research misconduct board that it considered a quasi-judicial proceeding.¹¹⁷ Underlying the court's determination was evidence that the misconduct board was requested by the plaintiff, allowed for the submission of evidence and cross-examination, and provided for review of its outcomes through petition to the state trial courts.¹¹⁸

113 The developing state of the law regarding privilege in reporting sexual harassment and sexual violence will be discussed in detail *infra* Part V.

114 Hartman v. Keri, 883 N.E.2d 774, 778 (Ind. 2008).

115 Haegert v. McMullan, 953 N.E.2d 1223, 1231 (Ind. Ct. App. 2011).

116 Razavi v. Walkuski, 2016 IL App (1st) 151435, ¶ 11, 55 N.E.3d 252, 255 (Ill. Ct. App. 2016) ("absolute privilege extends to statements made by alleged campus crime victims to campus security"); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), case dismissed sub nom. *Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019) (complainant's statements made in a campus adjudication of sexual violence were absolutely privileged); See also *Murauskas v. Rosa*, 2019 IL App (1st) 190480-U, ¶ 28, 2019 WL 6050008 (Ill. Ct. App. 2019) (employee's statements made to university law enforcement requesting an investigation of her complaint against a police sergeant for sexual harassment and retaliation were absolutely privileged from defamation lawsuit).

117 *Constantine v. Teachers Coll.*, 29 Misc. 3d 1214(A), 918 N.Y.S.2d 397 (Sup. Ct. 2010), *aff'd*, 93 A.D.3d 493, 940 N.Y.S.2d 75 (N.Y. App. Div. 2012).

118 *Id.* But see *Tacka v. Georgetown Univ.*, 193 F. Supp. 2d 43, 52 (D.D.C. 2001) (applying qualified privilege where department chair allegedly published accusations of plagiarism to tenure committee, but stating in dictum that absolute privilege might be appropriately applied where plaintiffs explicitly consent to a disclosure, such as by voluntarily submitting their work to a research integrity committee charged with evaluating plagiarism); *Hengjun Chao v. Mount Sinai Hosp.*, 476 F.

A federal district court applying New Jersey law also extended absolute privilege to a public university's academic misconduct proceedings.¹¹⁹ It found that its due process guarantees, including notice of charges and hearing and a two-day inquiry attended by a court reporter that included cross-examination of adverse witnesses, were sufficient to establish the hearing as a "quasi-judicial" process.¹²⁰

But absent some clear statute or precedent, courts have often declined to extend absolute privilege to colleges and university investigations on their own authority, particularly at private universities. As Justice Samuel Alito, then sitting on the Third Circuit Court of Appeals, wrote of an attempt to extend absolute privilege to a private university's discrimination grievance process in Pennsylvania, "the present case involves an entirely private grievance procedure. No state or federal statute authorized it, and no public officials presided over it. Nor was it the product of a collective bargaining agreement."¹²¹ The lack of public oversight, due process guarantees, and judicial precedent suggesting its applicability in a private setting was determinative. Similarly, California courts have declined to apply the state's litigation privilege under California Code section 47(b) for judicial or quasi-judicial proceedings to a private university's internal sexual harassment investigations because they were not a government proceeding subject to mandamus review.¹²²

As will be discussed in Part V, the distinction between absolute and qualified privilege ends up having critical ramifications in sexual misconduct proceedings brought under Title IX of the Education Amendments of 1972. In turn, as colleges and universities increasingly converge on rigorous due process requirements for these cases, courts may prove willing to extend absolute privilege to statements made within a campus sexual harassment proceeding.

B. Qualified Privilege

While courts have generally declined to grant postsecondary institutions and members of the college and university community absolute privilege from defamation claims, they more often afford a "qualified," "conditional," or "common interest" privilege to communications among people who have some interest or duty in sharing that information amongst themselves. When this type of privilege attaches, the defamation plaintiff's fault requirement generally raises from negligence to "actual malice," although in some jurisdictions, common law malice (consideration of the speaker or writer's ill intent) may also form a separate ground for overcoming qualified or conditional privilege.

App'x 892, 895 (2d Cir. 2012) ("common interest" qualified privilege applied to research misconduct proceeding).

119 *Le v. Univ. of Med. & Dentistry*, No. CIV.A. 08-991 (SRC), 2009 WL 1209233, at *6 (D.N.J. May 4, 2009), *aff'd sub nom.* *Phat Van Le v. Univ. of Med. & Dentistry of N.J.*, 379 F. App'x 171 (3d Cir. 2010).

120 *Id.*

121 *Overall v. Univ. of Pa.*, 412 F.3d 492, 498 (3d Cir. 2005).

122 *Heineke v. Santa Clara Univ.*, No. 17-CV-05285 (LHK), 2017 WL 6026248, at *12 (N.D. Cal. Dec. 5, 2017).

As discussed above, “actual malice” means that the statement was made with the knowledge it was false or with reckless disregard of the truth.¹²³ Some states courts also permit plaintiffs to assert a common law theory of malice, which is that “spite or ill will” was “the one and only cause for the publication” of the statement.¹²⁴ Simply put, “[a]ctual malice focuses on the defendant’s attitude towards the truth, whereas common law malice focuses on a defendant’s attitude towards the plaintiff.”¹²⁵ Where state courts recognize both types of malice, plausibly alleging either type of malice suffices to overcome qualified privilege.¹²⁶

A broad range of campus situations may fall within the qualified privilege:

- Communications among members of a faculty search committee.¹²⁷
- Communications among interested parties about a faculty member’s fitness for duty examination.¹²⁸
- Departmental communications about faculty members’ performance and suitability for rehiring or tenure.¹²⁹
- Department chair’s annual faculty performance evaluations.¹³⁰

123 *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 845 (N.D. Ill. 2015).

124 *Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011).

125 *DeMary v. Latrobe Printing & Pub. Co.*, 2000 PA Super 339, ¶ 13, 762 A.2d 758, 764 (Pa. Super. Ct. 2000).

126 *Aslin v. Univ. of Rochester*, No. 6:17-CV-06847 (LJV), 2019 WL 4112130, at *20 (W.D.N.Y. Aug. 28, 2019).

127 *Pratt v. Univ. of Cincinnati*, 2018-Ohio-2162, ¶ 18, 2018 WL 2715377, at *3 (10th Dist. 2018) (qualified interest privilege applied, and no actual malice shown in faculty discussion).

128 *Kao v. Univ. of San Francisco*, 229 Cal. App. 4th 437, 453 (Cal. Ct. App. 2014) (state law “qualified common interest privilege” applied, and no “malice” shown in faculty or institution’s reporting).

129 *Oller v. Roussel*, No. CIV.A. 11-02207 (RTH), 2014 WL 4204834, at *5 (W.D. La. Aug. 22, 2014), *aff’d*, 609 F. App’x 770 (5th Cir. 2015) (applying conditional privilege and finding no showing “the defendants knew the matter to be false or acted in reckless disregard as to its truth or falsity”); *Saha v. Ohio State Univ.*, 2011-Ohio-3824, ¶ 66, 2011 WL 3359704 (10th Dist. 2011) (applying qualified privilege and finding insufficient allegations of “actual malice”); *Donofrio-Ferrezza v. Nier*, No. 04 CIV. 1162 (PKC), 2005 WL 2312477, at *1 (S.D.N.Y. Sept. 21, 2005), *aff’d*, 178 F. App’x 74 (2d Cir. 2006) (applying qualified privilege and finding insufficient allegations of actual or common law malice); *Larimore v. Blaylock*, 528 S.E.2d 119, 121 (Va. 2000) (applying qualified privilege, and rejecting theory of absolute “intra-corporate immunity”). Note that Missouri law applies an “intra-corporate” privilege to communications made as part of an institution’s evaluative process, as long as the comments are received by an “officer” responsible for making performance determinations, under the theory that communications made within an organization are not published to a third-party. *Rice v. St. Louis Univ.*, No. 4:19-CV-03166 (SEP), 2020 WL 3000431, at *6 (E.D. Mo. June 4, 2020). On the intra-corporate communications “no publication” rule, *see Brogan, supra* note 58.

130 *Mbarika v. Bd. of Sup’rs of La. State Univ.*, 992 So. 2d 551, 565 (La. App. 1 Cir. 2008), *writ denied sub nom. Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 1019 (La. 2008) (applying conditional privilege and finding support in the record that statements were made in “good faith” because the reviewer “had a reasonable basis for believing them to be true”).

- Communications among interested faculty members regarding a student's academic progress.¹³¹
- Faculty research misconduct proceedings.<?>
- Faculty member's reporting of a student's plagiarism to appropriate authorities.<?>
- Faculty member's statements to a student academic integrity proceeding.<?>
- Faculty or administrator's statements to other faculty members about an employee's sexual misconduct with a student.<?>
- Faculty or administrator's statements to appropriate officials asking them to investigate a physical assault.<?>
- Faculty or administrator's statements used within a faculty disciplinary proceeding.<?>

131 *Lipsky v. Gonzalez*, 39 Misc. 3d 1202(A), 969 N.Y.S.2d 804 (N.Y. Sup. Ct. 2013) (applying common interest privilege and finding insufficient allegations of actual malice); *Leitner v. Liberty Univ., Inc.*, No. 6:19-CV-00029 (NKM), 2020 WL 7128972, at *12 (W.D. Va. Dec. 4, 2020) (applying qualified privilege and finding insufficient allegations of "malice").

132 *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 78, 987 N.E.2d 864, 884 (Ill. Ct. App. 2013) (applying qualified privilege and finding sufficient allegations that statements were made with "malice or a reckless disregard for their truth" to overcome dismissal); *Hengjun Chao v. Mount Sinai Hosp.*, 476 F. App'x 892, 895 (2d Cir. 2012) (applying common interest privilege and finding insufficient allegations of common law or actual malice); *Cf. Constantine v. Teachers Coll.*, 29 Misc. 3d 1214(A), 918 N.Y.S.2d 397 (Sup. Ct. 2010), *aff'd*, 93 A.D.3d 493, 940 N.Y.S.2d 75 (N.Y. App. Div. 2012) (applying absolute privilege under New York law to research misconduct proceeding).

133 *Beauchene v. Miss. Coll.*, 986 F. Supp. 2d 755, 767 (S.D. Miss. 2013) (qualified privilege applied because it was faculty and dean's "duty to report, investigate and impose discipline for the violations. Universities have the highest obligation to ferret out such conduct because when an academic institution confers a degree, it is certifying to other academic institutions, the private and public sector and the world at large that a student has met the academic standards of the institution." Statement was made "without malice and in good faith.").

134 *Castelino v. Rose-Hulman Inst. of Tech.*, No. 2:17-CV-139 (WTL) (MJD), 2019 WL 367623, at *17 (S.D. Ind. Jan. 30, 2019), *appeal dismissed*, No. 19-1719, 2019 WL 5212232 (7th Cir. May 20, 2019) (applying qualified privilege and finding insufficient allegations that the "letter was written and published without belief or grounds for belief in its truth.").

135 *Harstad v. Whiteman*, 338 S.W.3d 804, 811 (Ky. Ct. App. 2011). (applying qualified privilege and finding insufficient evidence to create a genuine issue of material fact concerning the existence of actual malice).

136 *Izadifar v. Loyola Univ.*, No. 03 C 2550, 2005 WL 1563170, at *6 (N.D. Ill. June 7, 2005) (Qualified privilege "is accorded to statements made by an employer in attempting to investigate and correct misconduct on behalf of its employees" and its abuse was not shown through evidence of "a direct intention to injure her or a reckless disregard of her rights" such as through "the failure to engage in a proper pre-publication investigation of the truth of a statement.").

137 *Owen v. Liberty Univ.*, No. 6:19-CV-00007 (NKM), 2020 WL 1856798, at *13 (W.D. Va. Apr. 13, 2020). (applying qualified privilege and finding insufficient allegations of "actual, common-law malice"); *Fischer v. Kent State Univ.*, 2015-Ohio-3569, ¶ 26, 41 N.E.3d 840, 846 (10th Dist. 2015)

- Hearing board's discussion of statements made by accusers who did not appear to testify at a faculty disciplinary proceeding.¹³⁸
- Statements made within an investigation of student sexual misconduct¹³⁹ (which, in some jurisdictions, will also be afforded absolute privilege¹⁴⁰).
- Faculty or administrator's statements used within a student disciplinary proceeding.¹⁴¹
- Public statements that a student was found responsible and sanctioned for committing sexual violence.<?>
- Public statements regarding a faculty or staff member's dismissal for sexual misconduct.<?>

(applying qualified privilege and finding insufficient allegations of actual malice).

138 *Guarino v. MGH Inst. of Health Professions, Inc.*, No. 1784CV0055 (BLS), 2019 WL 1141308, at *13 (Mass. Super. Jan. 16, 2019) (hearing board had conditional privilege to discuss these statements, and no malice was shown, as there was no evidence that faculty presenting statements would know if they were false; no evidence the statements were disseminated beyond the hearing board; and no evidence that they recklessly conveyed those allegations).

139 *Childers v. Fla. Gulf Coast Univ. Bd. of Trustees*, No. 2:15-CV-722 (FTM) (MRM), 2017 WL 1196575, at *6 (M.D. Fla. Mar. 31, 2017) (applying conditional privilege and finding insufficient allegations of "express malice," meaning "ill will, hostility and an evil intention to defame and injure"); *Doe v. Erskine Coll.*, No. CIV.A. 8:04-23001 (RBH), 2006 WL 1473853, at *15 (D.S.C. May 25, 2006) (applying qualified privilege and finding no evidence that administrator's statements made in connection with hearing "inaccurately or falsely recounted" the substance of her communications with complainant or that her actions were "malicious or reckless").

140 *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom. Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019) ("Absolute privilege in this context encourages victims to report crimes and misconduct promptly without fear of explicating the facts and circumstances surrounding any attack as the investigation unfolds.").

141 *Wertz v. Allen*, 721 S.E.2d 122, 126 (Ga. Ct. App. 2011), *adopted*, Ga. Super. Jan. 11, 2012 (applying conditional privilege and finding insufficient allegations of actual or express malice).

142 *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 226–27 (D. Mass. 2017) (statements within e-mail notification about unnamed respondent were "objectively true": that a hearing was held, that respondent was found in violation, and that he was expelled based on that finding; no implication that other, defamatory facts existed in the statement); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 44 (D. Me. 2005) (conditional privilege applied and no evidence that statements about respondents by dean to a local newspaper or by university's attorney to the NCAA were made knowing they were false, in reckless disregard of their truth or falsity, or made with ill will or spite). *But see Mallory v. Ohio Univ.*, 2001-Ohio-8762 (10th Dist. 2001) (campus administrator's statement to newspaper that student who had been expelled for sexual assault, but was not convicted at a criminal trial, "definitely committed a sexual battery" was not protected by qualified privilege because it was unnecessary to protect the university's interest and exceeded the scope of the interest to be upheld; the administrator could have explained her position and the university's position "without slandering plaintiff.").

143 *Naca v. Macalester Coll.*, No. 16-CV-3263 (PJS) (BRT), 2017 WL 4122601, at *3 (D. Minn. Sept. 18, 2017) (college president's statement to college newspaper that professor was terminated based on serious Title IX violation following a student's accusation was subject to qualified privilege and that privilege was not abused; his motive was appropriate, and the comments "succinctly, accurately, and in a non-inflammatory manner summarized the college's position").

- A “crime alert” issued pursuant to the Clery Act, 20 U.S.C. section 1092(f).¹⁴⁴
- Public safety warnings to avoid contact with a faculty member who had been barred from campus following an arrest.¹⁴⁵
- Notation of a disciplinary expulsion on a student transcript.¹⁴⁶
- Communication among colleges or universities regarding a student’s disciplinary history.¹⁴⁷
- Communications between a postsecondary institution and an accreditation or licensing board.¹⁴⁸

These cases suggest a general unwillingness among courts to second-guess the intentions of faculty and staff sharing information as part of their institutional responsibilities, including as members of faculty or student review committees and disciplinary bodies. The exceptional cases will usually involve allegations of retaliation or false accusations underlying the defamatory statement. Retaliation is usually the distinguishing element where malice can be shown. As such, in the higher education context, successful assertions of actual malice often arise from purported backlash against faculty or staff for speaking out, whether in support of controversial political views or in defense of those accused of misconduct.¹⁴⁹ Actual

144 *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 33 (1st Cir. 2007) (qualified privilege applied to “crime alert” that contained a respondent’s name and fraternity affiliation, and no malice, ill will, or spite shown where campus counsel had a “reasonable” belief that this information was necessary to preventing future incidents and retaliation).

145 *Collins v. Univ. of N.H.*, 746 F. Supp. 2d 358, 374 (D.N.H. 2010), *aff’d*, 664 F.3d 8 (1st Cir. 2011) (conditional privilege applied and no evidence in the record of actual malice). *Cf. Williams v. Mass. Coll. of Pharmacy & Allied Health Scis.*, No. CIV.A. 12-10313-DJC, 2013 WL 1308621, at *7 (D. Mass. Mar. 31, 2013) (common interest privilege may not extend to photograph of plaintiff posted by an “unidentified faculty member” in plain view of any passerby in the campus security office).

146 *Amherst Coll.*, 238 F. Supp. 3d at , 227. The court noted, without deciding, that the transcript notation likely would also not satisfy the publication element of a defamation claim, as Massachusetts state courts do not recognize “self-publication” as an alternative route for establishing publication, and “[c]olleges prepare and disseminate academic transcripts in connection with their core educational functions and Massachusetts courts have recognized that a person may possess a conditional privilege to publish defamatory material if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest.” *Id.* at 227 n.7 (internal quotation marks omitted). On “self-publication,” see *Lewis Lewis v. Equitable Life Assur. Soc’y of the U.S.*, 389 N.W.2d 876, 886 (Minn. 1986).

147 *Oirya v. Brigham Young Univ.*, No. 2:16-CV-01121-BSJ, 2020 WL 110280, at *8 (D. Utah Jan. 9, 2020), *aff’d*, No. 20-4052, 2021 WL 1904863 (10th Cir. May 12, 2021) (“It is simply a question of sharing disciplinary files school-to-school, as permitted by law. This kind of candor must be permitted or universities will have to remain silent even when a transferring student may pose a danger.”).

148 *Eiland v. Blagburn*, No. 305-CV-459 (WKW), 2007 WL 2926863, at *13 (M.D. Ala. Oct. 5, 2007) (applying Alabama law regarding disclosures to a “Wellness Committee,” holding that reporter “made a conditionally privileged communication, which by definition is not defamation” under Alabama Code section 34-29-111(f)).

149 E.g., *Porter v. Sergeant*, No. CV 5:19-455 (KKC), 2020 WL 4495465 (E.D. Ky. Aug. 4, 2020). On potential defamation claims arising from “hostile environment” charges against faculty, see generally *Elder*, *supra* note 43.

malice assertions have also overcome qualified privilege where plaintiffs allege retaliation for complaining about misconduct by faculty and staff.¹⁵⁰

In a recent example, a federal district court in Kentucky allowed a professor's defamation claim against his employer to proceed despite the college's assertion of qualified privilege, holding that statements made in e-mails regarding the professor were sufficient to allege actual malice.¹⁵¹ There, the professor, Porter, had served as faculty advisor to a fellow faculty member, Messer, who was found responsible for creating a hostile work environment. Porter, upset about the college's "extreme political correctness," subsequently distributed a survey to the student body and faculty to assess "attitudes about academic freedom, freedom of speech, and hostile work environments under civil rights law." A college dean allegedly demanded that the professor pull the survey and apologize, and charges of incompetence were brought to a faculty status committee, which resulted in Porter's suspension. Nevertheless, the student government association gave Porter an award. In reaction, Porter alleged that a fellow professor, Sergent (named as a codefendant in the defamation lawsuit) e-mailed the student government association to disparage Porter's fitness for the award. Porter asserted that Sergent knew the statements in the e-mail were false, and the publication was done in retaliation for Porter's representation of Messer; Sergent's spouse was one of the professors who accused Messer of discrimination. Porter also claimed that Sergent published the defamatory e-mail in retaliation for the survey. Although Sergent had a qualified privilege to send the e-mail, these allegations were enough to demonstrate actual malice.

Tied in with retaliation-focused arguments are assertions of actual or common law malice rooted in allegedly false accusations. In several recent cases, respondents in campus sexual misconduct investigations have successfully overcome qualified privilege in suits against their accusers by asserting that those complainants were untruthful in bringing the complaint.¹⁵² This article now turns to a close examination of these cases.

150 E.g., *Aslin v. Univ. of Rochester*, No. 6:17-CV-06847 (LJV), 2019 WL 4112130, at *20 (W.D.N.Y. Aug. 28, 2019).

151 The facts in this paragraph are those pleaded in *Porter*, 2020 WL 4495465.

152 See *Heineke v. Santa Clara Univ.*, No. 17-CV-05285 (LHK), 2017 WL 6026248, at *14 (N.D. Cal. Dec. 5, 2017) (faculty sexual harassment investigation; student-accuser's knowledge of the falsity of her allegations was sufficient to overcome privilege under both common law and actual malice standards); *Doe v. Roe*, 295 F. Supp. 3d 664, 677 (E.D. Va. 2018) (student sexual misconduct investigation; applying "qualified immunity" and finding sufficient allegations that student "had no good faith reason for reporting a sexual assault and that instead, she was motivated by personal spite or ill will"); *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *9 (N.D. Ohio Feb. 13, 2018) (student sexual misconduct investigation; establishing false accusations by clear and convincing evidence would show actual malice sufficient to overcome qualified privilege); *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *14 (W.D. Va. Aug. 3, 2017) (student sexual misconduct investigation; false accusations sufficient to plausibly show "actual, common-law malice" meaning "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made"); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 213-14 (W.D.N.Y. 2013) (student sexual misconduct investigation; establishing false accusation would defeat "common interest" privilege under actual and common law malice standards).

V. Defamation and Campus Sexual Misconduct Claims

Perhaps the most contested aspect of defamation law in academic life surrounds statements made within sexual misconduct proceedings.¹⁵³ The final section of this article will closely examine the rapid changes in this area of law, including a reshaping of the nature of legal privilege in sexual misconduct proceedings.

A. *The Intersection of Title IX and Defamation Law*

In a growing trend, courts across the country have heard defamation cases brought by individuals accused of sexual misconduct (“respondents”) against those that brought forth the accusation (“complainants”), along with the college or university itself and faculty and staff involved in the investigation and adjudication.¹⁵⁴

These cases test several structural issues within proceedings governed by Title IX of the Educational Amendments of 1972. In May 2020, the U.S. Department of Education issued final regulations (“Title IX Final Rules”) governing how both public and private educational institutions respond to “sexual harassment,” including sexual violence.¹⁵⁵ Among their most controversial provisions, the Title IX Final Rules mandate that offenses falling within its scope (including crimes of sexual violence defined in the 2013 Violence Against Women Act amendments to the Clery Act¹⁵⁶) be investigated and adjudicated according to a grievance process that includes live cross-examination by advisors for the complainant and respondent.¹⁵⁷

No hearsay exceptions appear to apply within this forum; if a party or witness gives a statement to investigators, parties, or witnesses before hearing, they *must* submit to cross-examination at a live hearing to be questioned about that statement.¹⁵⁸ Otherwise, the statement cannot be considered in the decision-maker’s

153 Some sexual misconduct allegations will be brought under an institution’s Title IX process, while others, if falling outside the institution’s Title IX jurisdiction, may constitute policy violations adjudicated according to a code of conduct or handbook. 34 C.F.R. § 106.45 (b)(3)(i) (2020) (institution may apply code of conduct to adjudicate complaints falling outside Title IX education program or activity or outside United States). This distinction may be relevant to whether a court will apply absolute or qualified privilege depending on the procedures applied in the investigation and adjudication.

154 *E.g.*, *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom.* *Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019); *Doe v. Univ. of Dayton*, No. 3:17-CV-134, 2018 WL 1393894, at *3 (S.D. Ohio Mar. 20, 2018), *aff’d*, 766 F. App’x 275 (6th Cir. 2019). Witnesses have also been subject to defamation suit by the accused individual. *E.g.*, *Lozier v. Quincy Univ. Corp.*, No. 18-CV-3077, 2021 WL 981278, at *1 (C.D. Ill. Mar. 16, 2021) (student-athlete who gave testimony in ongoing sexual misconduct investigation of coach sued for defamation). Notably, courts have considered, and rejected, the theory that Title IX preempts state defamation law claims. *Coll. of Wooster*, 2018 WL 838630, at *8.

155 85 Fed. Reg. 30026 (May 19, 2020).

156 34 C.F.R. § 668.46 (2015).

157 34 C.F.R. § 106.45(b) (2020).

158 See 34 C.F.R. § 106.45(b)(6)(i) (“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”).

determination regarding responsibility.¹⁵⁹ In an effort to maintain an “education” process free of “complicated rules of evidence, the Department has mandated due process protections exceeding those even present in civil and criminal trials.¹⁶⁰ Courts applying defamation law may grapple with whether these heightened protections merit application of absolute privilege for statements made within the Title IX process.

Also potentially at issue in defamation suits is Title IX’s prohibition against retaliation. Title IX has long been interpreted to require colleges and universities to protect students from retaliation for exercising rights under the statute, including when they participate in a disciplinary process. The challenge of protecting students from retaliation heightens when parties introduce defamation claims. Parties may seek to protect their reputations through the threat, or actual filing, of state-law defamation claims during or after the campus process. Parties or fact witnesses may recant their statements or avoid participating in the campus process, knowing that they might have to defend themselves in courtroom litigation, which could expose their identities and traumatic experiences.

In turn, Title IX disciplinary cases are pushing courts to reconsider the line between judicial and nonjudicial proceedings. As discussed in Part IV, the absolute privilege for statements made in judicial proceedings is usually not available for statements made in a conduct proceeding; such statements are afforded a more limited qualified privilege. But as campus proceedings increasingly acquire the formalities of a judicial process, including cross-examination, the absolute privilege may expand.

This trend is likely to continue, even if the Title IX Final Rules are modified or rescinded.¹⁶¹ Courts evaluating sexual misconduct adjudications have elevated the standards of due process or fair process in these proceedings, for example, by expecting access to adversarial questioning, either indirectly through a decision-maker or through direct cross-examination of the witness by the parties or their representatives, as a minimal requirement.¹⁶²

159 In the Preamble to the Title IX Final Rules, the U.S. Department of Education wrote that it “believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements. If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process.” 85 Fed. Reg. at 30347.

160 *Id.*

161 In April 2021, the U.S. Department of Education’s Office for Civil Rights announced it will issue a notice of proposed rulemaking to amend the Title IX regulations under Executive Order 14021. *See* U.S. Dep’t of Educ., Office for Civil Rights, Letter to Students, Educators, and other Stakeholders re Executive Order 14021 (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

162 While federal circuit courts of appeal remain split about whether sexual misconduct proceedings must include live cross-examination by the parties or their representatives, most have concluded that “some” form of questioning among the parties is a due process minimum, such as by questions posed to parties and witnesses through a hearing panel. *Compare* *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020) (“fair process” at private university would require “the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses’ credibility

Ultimately, the outcome of this judicial boundary-making may have a significant impact on the future of Title IX and the risks that campus community members take when they seek a formal resolution of a sexual misconduct complaint. The treatment of statements made in misconduct complaints and any resulting proceedings as entitled to absolute privilege promotes a college or university's ability to conduct an effective investigatory and hearing procedure, encouraging the free and open disclosure of information related to an accusation and ensuring that parties and witnesses can come forward without fear of legal retaliation. Some courts continue to apply qualified privilege in these cases, reasoning that "because a plaintiff bears the burden proving the privilege was lost or abused, there is a presumption that the reports of victims of sexual assault are truthful."¹⁶³ But that presumption may require prolonged, expensive, and traumatic litigation to vindicate; securing absolute privilege may mean the difference between the early dismissal of vexatious claims, and a long discovery process, and even trial, on the truth of the underlying misconduct allegations.

B. Absolute and Qualified Privilege in Sexual Misconduct Proceedings

1. Cases Extending Absolute Privilege

Beginning with the Indiana Supreme Court in 2008, courts in Connecticut, Illinois, and Indiana have published decisions extending absolute privilege to campus sexual misconduct proceedings involving student complainants.¹⁶⁴ Pennsylvania courts have also applied absolute privilege in certain private and public university conduct proceedings but not in a consistent way.¹⁶⁵ And Ohio

through some method of cross-examination") and *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (due process would require some form of live cross-examination in "credibility" cases) *with Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 68 (1st Cir. 2019) (indirect questioning through hearing panel satisfactory for "critical administrative decisions" such as expulsion); *Doe v. Colgate Univ.*, 760 F. App'x 22, 33 (2d Cir. 2019) (indirect questioning through hearing panel and use of hearsay evidence was not violative of Title IX); *Doe v. Loh*, No. CV PX-16-3314, 2018 WL 1535495, at *7 (D. Md. Mar. 29, 2018), *aff'd*, 767 Fed. App'x 489 (4th Cir. 2019) (due process in sexual misconduct adjudication did not require cross-examination); *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020) (due process satisfied by "some" opportunity to question, such as through a hearing panel, but direct cross-examination not necessary); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) (holding that hearing body's failure to question complainant or provide respondent with opportunity to review evidence or submit impeachment evidence was due process violation, and declining to address if due process required live cross-examination); *Doe v. Univ. of Arkansas—Fayetteville*, 974 F.3d 858, 867 (8th Cir. 2020) (indirect questioning through panel was not a due process violation); and, *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (adversarial questioning not a due process requirement in academic dishonesty hearing). California state appellate courts also require some form of cross-examination "directly or indirectly, at a hearing in which the witnesses appear in person or by other means" in campus sexual misconduct investigations involving "credibility." *Doe v. Allee*, 30 Cal. App. 5th 1036, 1069 (Cal. Ct. App. 2019).

163 *Doe v. Roe*, 295 F. Supp. 3d 664, 677 (E.D. Va. 2018).

164 *Hartman v. Keri*, 883 N.E.2d 774, 778 (Ind. 2008); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 36, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom. Razavi v. Sch. of Art Inst. of Chi.*, 124 N.E.3d 475 (Ill. 2019); *Khan v. Yale Univ.*, No. 3:19-CV-01966 (KAD), 2021 WL 66458, at *8 (D. Conn. Jan. 7, 2021).

165 The Pennsylvania Supreme Court has held that absolute privilege would *not* apply to a

courts have extended absolute privilege where the conduct proceeding “requires notice, a hearing, and provides the student with an opportunity to present evidence.”¹⁶⁶

In 2008, Indiana’s Supreme Court applied absolute privilege to the complaints of two public university students of sexual harassment against a professor that were filed under the university’s antiharassment policy and processed through the appropriate institutional office.¹⁶⁷ The court drew on public policy grounds for extending absolute privilege to sexual misconduct proceedings, reasoning that “Protecting their complaints with anything less than an absolute privilege could chill some legitimate complaints for fear of retaliatory litigation.”¹⁶⁸

Then, in *Razavi v. School of the Art Institute of Chicago*, the Appellate Court of Illinois, First District, held that a student’s statements to college officials at a private college made during the initiation, investigation, and adjudication of a campus sexual assault complaint were absolutely privileged against a defamation action.¹⁶⁹ The court reasoned that the campus code of conduct, which encouraged victims to report sexual assault to police or university officials, was based on the federal Campus SaVE Act (enacted into law through the Clery Act amendments to the 2013 reauthorization of the Violence Against Women Act), and permitted those university officials to investigate the violation and question anyone, including the victim and accused. As the university was “legally required” to investigate the report under federal law, any statements made during that investigation were absolutely privileged.

In 2019, the Sixth Circuit Court of Appeals, applying Ohio law, held that a Title IX complainant’s “statements made in preparation for and during the disciplinary hearing are entitled to absolute immunity.”¹⁷⁰ But the court engaged in little

former student’s allegations of sexual misconduct against a teacher where that student does not intend to initiate a judicial or quasi-judicial proceeding against the teacher. *Schanne v. Addis*, 632 Pa. 545, 562 (Pa. 2015) The court expressly declined to reach the issue of whether absolute privilege would apply for statements made in furtherance of a quasi-judicial proceeding. *Id.* at 560 n.7. For cases applying (or declining to apply) absolute privilege in the postsecondary disciplinary context, compare *Harris v. Saint Joseph’s University*, No. CIV.A. 13-3937, 2014 WL 1910242, at *9 (E.D. Pa. May 13, 2014) (government involvement is necessary to make a private university’s disciplinary procedures quasi-judicial and therefore eligible for absolute privilege), with *Fogel v. University of the Arts*, No. CV 18-5137, 2019 WL 1384577, at *11 (E.D. Pa. Mar. 27, 2019) (at private university, holding that complainant’s statements to Title IX officials initiating investigation of faculty member were absolutely privileged), and *Dempsey v. Bucknell University*, No. 4:11-CV-1679, 2012 WL 1569826, at *15 (M.D. Pa. May 3, 2012) (holding that a statement made *outside* a private university’s disciplinary proceeding was not covered under the absolute privilege afforded to judicial proceedings).

166 *Savoy v. Univ. of Akron*, 15 N.E.3d 430, 435 n.3 (Ohio Ct. App. 2014).

167 *Hartman*, 883 N.E.2d at 778.

168 *Id.*

169 2018 IL App (1st) 171409, at ¶ 29 This decision was preceded by a 2016 opinion holding that a student complainant’s reports to campus security about sexual violence were absolutely privileged. *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶ 11, 55 N.E.3d 252, 255 (Ill. Ct. App. 2016).

170 *Doe v. Univ. of Dayton*, 766 F. App’x 275, 290 (6th Cir. 2019) (citing *Savoy*, 15 N.E.3d at 435 n.3). See also *Schaumleffel v. Muskingum Univ.*, No. 2:17-CV-463 (GCS), 2018 WL 1173043, at *86 (S.D. Ohio Mar. 6, 2018). (in dictum, holding that conduct proceeding was quasi-judicial under *Savoy*). A 2018 decision by a federal court of the Northern District of Ohio, however, did not find that

discussion about the policy balance underlying this immunity, as the defamation-plaintiff (the respondent in the underlying Title IX case) did not dispute that absolute immunity applied.¹⁷¹ The Sixth Circuit did carve out a distinction for statements made outside the proceeding to friends and roommates about the assault, and held that only qualified privilege would apply to statements that did not have a “reasonable relation” to the disciplinary proceedings.¹⁷²

More recently, in *Khan v. Yale University*, a federal district court in Connecticut, considering state judicial precedent and the reasoning from *Razavi*, applied “absolute immunity” to statements made within a private university’s sexual misconduct proceeding, determining that the same policy grounds supporting immunity in an ordinary judicial process to encourage testimony without fear of defamation suits “applies equally in the circumstances presented here—an alleged sexual assault or sexual harassment victim testifying before a university fact-finding body at a proceeding convened pursuant to Title IX or comparable state statute.”¹⁷³

While the *Khan* court wrote that it was “reluctant” to modify Connecticut’s law regarding absolute immunity, particularly when addressing a private university’s grievance process, it found support for extending privilege in state court precedent declaring a private university’s judicial board procedures to be quasi-judicial, and state appellate court pronouncements that the absolute immunity analysis should not rest solely on the public-private distinction.¹⁷⁴ The court noted that the private university’s misconduct proceeding “was one authorized by federal law” that applied equally to private and public institutions, and the plaintiff (a student-respondent) could identify “no substantive difference” between the Title IX proceedings held at a public or private university that would justify applying absolute immunity only in public institutions.¹⁷⁵

Savoy would absolutely privilege statements made in a private university’s conduct proceedings. *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *8 (N.D. Ohio Feb. 13, 2018) (finding it “unlikely” that Ohio Supreme Court would extend absolute immunity to statements made in private university disciplinary proceedings).

171 *Univ. of Dayton*, 766 F. App’x at 290. Notably, the Sixth Circuit Court of Appeals requires a higher level of due process for conduct proceedings held at public colleges and universities than demanded by other circuit courts of appeal, including “some form of cross-examination” in the case “when the university’s determination turns on the credibility of the accuser, the accused, or witnesses.” *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). Consequently, even without the present Title IX mandates imposed under the final rule, conduct proceedings held at public institutions under Sixth Circuit precedent would likely satisfy the expectations of a “quasi-judicial” hearing. See discussion *supra* note 162.

172 *Univ. of Dayton*, 766 F. App’x at 290. For further discussion of privilege for statements made outside the investigation and hearing, see *infra* Part V.B.3.

173 No. 3:19-CV-01966 (KAD), 2021 WL 66458, at *8 (D. Conn. Jan. 7, 2021).

174 *Id.* at *7–8, citing *Rom v. Fairfield University*, No. CV020391512S, 2006 WL 390448, at *5 (Conn. Super. Ct. Jan. 30, 2006) (holding that private university’s judicial hearing board was quasi-judicial but declining to extend absolute privilege to statements made in that proceeding) and *Preston v. O’Rourke*, 74 Conn. App. 301, 313–14 (Conn. App. Ct. 2002) (holding that labor arbitration was quasi-judicial proceeding entitled to absolute immunity, and declining to draw distinction “between purely private labor arbitration and the actions of public administrative officers or bodies”). The *Khan* court, of course, did not follow the Superior Court’s decision in *Rom* to apply only qualified immunity to a quasi-judicial proceeding, and applied absolute immunity. *Id.* at *7 n.11.

175 *Id.* at *8. The *Khan* court also noted that the private university was bound by state law

As these cases suggest, the central policy question driving the analysis is whether the campus process is sufficiently “judicial” in nature to allow the respondent to dispute the accuracy of any statements. If it is not, courts reason, then a defamation claim may be appropriate to clear the accused student’s name.

2. Cases Maintaining Qualified Privilege

In turn, courts have offered two theories about why the campus disciplinary process is not “quasi-judicial,” meaning that witnesses would only have qualified privilege in their statements.

One theory is that, at least for private institutions, there is no governmental involvement in the disciplinary process. Courts reason that without this oversight the proceedings may lack due process safeguards that would attach in a state-supervised administrative hearing.¹⁷⁶

For example, in *Bose v. Bea*, the Sixth Circuit Court of Appeals, applying Tennessee law, held that the absolute privilege did not apply to allegedly defamatory statements made about a student accused of honor code violations by a faculty member in a private college’s campus disciplinary proceeding.¹⁷⁷ Even though the process contained certain “procedural safeguards,” the court reasoned that Tennessee law did not intend to “cloak” a private entity with the privilege, but only judicial or quasi-judicial proceedings held by public entities. Therefore, a disciplinary proceeding held at a private college would not enjoy that privilege without a clear signal from the legislature. Both the Third Circuit and Fifth Circuit Courts of Appeals have also applied this governmental involvement theory to defamation claims arising from campus disciplinary proceedings.¹⁷⁸

It is unclear whether the Title IX Final Rules will moot the governmental involvement analysis; as the reasoning in *Razavi* and *Khan* suggests, the expansive scope of the regulations may collapse any meaningful public-private distinction should courts view the Final Rules as establishing government-mandated procedural safeguards for both public and private institutions handling the types of misconduct and locations falling within Title IX’s scope.¹⁷⁹

mandating a series of due process protections for both private and public postsecondary institutions hearing sexual misconduct proceedings. See CONN. GEN. STAT. § 10a-55m (b)(6) (2021).

176 *Bose v. Bea*, 947 F.3d 983, 996 (6th Cir. 2020); *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *7 (N.D. Ohio Feb. 13, 2018) (“existence of governmental presence is a common thread” under Ohio law of absolute immunity and other jurisdictions).

177 947 F.3d at 996.

178 See *Cuba v. Pylant*, 814 F.3d 701, 716 (5th Cir. 2016) (applying Texas law, holding that Southern Methodist University, “a private institution that does not have any law enforcement or law interpreting authority,” cannot hold quasi-judicial proceedings, and therefore statements made by complainant were not shielded by absolute immunity); *Overall v. Univ. of Pa.*, 412 F.3d 492, 497–98 (3d Cir. 2005) (holding private institution’s proceedings were not quasi-judicial, so no absolute immunity, as Pennsylvania law requires governmental involvement in the proceeding; policy reasons include that private proceedings may lack “basic procedural safeguards”).

179 See generally 85 Fed. Reg. 30026 (May 19, 2020); *Razavi v. Sch. of the Art Inst. of Chi.*, 2018 IL App (1st) 171409, ¶ 24, 122 N.E.3d 361, 374 (Ill. Ct. App. 2018), *case dismissed sub nom.* *Razavi v. Sch.*

A related approach focuses less on formal state involvement but on the specific due process protections applied to the parties. Effectively, the more trial-like the proceedings, the more likely that absolute privilege will apply.

For instance, a federal district court of the Eastern District of Virginia held that a private university's disciplinary process did not have sufficient guarantees of due process, so it was not "quasi-judicial" so as to allow a complainant to claim "absolute immunity" from a respondent's defamation claim; instead, the court applied "qualified immunity" to the students' statements in the Title IX proceeding, and denied a motion to dismiss based on allegations that the complainant's statements were driven by malice.¹⁸⁰ As examples of insufficient due process, the court noted the respondent's inability to have an in-person hearing, to present exculpatory or documentary evidence, to call witnesses, or to cross-examine his accuser.¹⁸¹

Likewise, courts that otherwise might extend absolute privilege under state law have declined to do so where the statements are not in furtherance of the investigation itself. For example, a report made to a private university's Title IX office was absolutely privileged under Pennsylvania law, but statements about that misconduct made *before* the report, to attendees at a conference, were not.¹⁸² And if a statement was made in a disciplinary proceeding, and then repeated *a year later* to different parties, then it might not be protected, even if shielded by Ohio's absolute privilege during the proceeding itself.¹⁸³

The takeaway is that due process for the respondent and absolute privilege for the reporting party are mutually reinforcing: as institutions increasingly converge on similar standards of due process in cases arising from sexual and interpersonal violence, we may see more courts apply absolute privilege for statements made within those proceedings.

3. *Privilege for Statements Made Outside the Proceeding*

Even where a court recognizes absolute privilege within the Title IX or conduct

of Art Inst. of Chi., 124 N.E.3d 475 (Ill. 2019) (statements made in private university's investigation and adjudication of sexual misconduct proceeding "were made as part of communications required by law"); *Khan*, 2021 WL 66458, at *8 ("the fact that Title IX applies equally to private and public institutions would tend to undermine such a claim" that public and private institutions should be subject to different standards of privilege).

180 *Doe v. Roe*, 295 F. Supp. 3d 664, 675 (E.D. Va. 2018). Other cases from courts within the Fourth Circuit include *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *13 (W.D. Va. Aug. 3, 2017) (holding that a private institution's Title IX grievance process was not a "legal proceeding" suited for a claim of malicious abuse of the legal process under Virginia law, and assuming without deciding that defamation claim arising from allegedly false accusation was subject to qualified privilege); and *Doe v. Erskine Coll.*, No. CIV.A. 8:04-23001 (RBH), 2006 WL 1473853, at *15 (D.S.C. May 25, 2006) (assuming, without deciding, that qualified privilege attached to private college's Title IX disciplinary proceeding under South Carolina law).

181 *Doe v. Roe*, 295 F. Supp. 3d at 674-75 (noting that "it is questionable" whether a private university's grievance process could ever be considered "quasi-judicial").

182 *Fogel v. Univ. of the Arts*, No. CV 18-5137, 2019 WL 1384577, at *11 (E.D. Pa. Mar. 27, 2019).

183 *Schaumleffel v. Muskingum Univ.*, No. 2:17-CV-463 (GCS), 2018 WL 1173043, at *7 (S.D. Ohio Mar. 6, 2018).

proceeding, it may not apply this privilege to statements made outside of it. Rather than extend absolute privilege, courts may apply qualified privilege to statements made by a complainant to a small circle of friends and colleagues about the underlying sexual misconduct.

In a decision later affirmed by the Sixth Circuit Court of Appeals, a federal judge in Ohio reasoned that it was not “in the public interest” to subject a reporting party to a defamation claim when “speaking privately about their experiences” with a roommate or close friend, particularly where the respondent had admitted to much of the misconduct.¹⁸⁴ Dismissal was appropriate on qualified privilege grounds, “even in the absence of certainty with regard to good faith” to facilitate the ability of victims of sexual assault to speak privately about their experience or seek necessary medical treatment or counseling.¹⁸⁵

The Sixth Circuit affirmed that qualified privilege provided the appropriate level of protection for these conversations, considering that “[p]rivate statements to friends are not the type of utterances commonly thought of as giving rise to defamation claims.”¹⁸⁶ The court acknowledged “the risk that victims of sexual assault could be dissuaded from sharing their experiences—and so from seeking support, justice, and treatment—by looming defamation suits.”¹⁸⁷ But it declined to extend absolute immunity to private conversations and affirmed the lower court’s application of qualified privilege, holding that a complainant’s statements made outside the disciplinary proceeding to friends and roommates about the assault did not have a “reasonable relation” to the disciplinary proceedings to encompass them under absolute immunity.¹⁸⁸

184 *Doe v. Univ. of Dayton*, No. 3:17-CV-134, 2018 WL 1393894, at *5 (S.D. Ohio Mar. 20, 2018), *aff’d*, 766 F. App’x 275 (6th Cir. 2019) (“It cannot be that when someone is involved in sexual activity, which arguably turns into unwanted sexual contact, discussing this with a roommate or close friend would open them to a defamation claim. It cannot be in the public interest that when a student brings a claim of sexual assault in a proper college disciplinary proceeding and has *her claim vindicated*, she becomes a ripe target for a retaliatory defamation lawsuit.”).

185 *Id.* See also *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 758–59 (D. Md. 2015) (recognizing Maryland’s “conditional privilege” and noting, in dictum, that statements were likely privileged because “probably made in furtherance of her legitimate interest in personal safety and the safety of those closest to her.” These statements were not made “to a broad public forum such as the school newspaper or a social media network” but to “close friends and family” who were “rightly understood” to be part of her support system). But see *Schaumleffel*, 2018 WL 1173043, at *9. (a complainant’s statements “made to her friends immediately prior to her traveling to a hospital to have a rape kit taken and receive the ‘morning after’ pill” were not shielded by absolute or qualified privilege) and *Doe v. Washington Univ.*, No. 16SL-CC04392 (Cir. Ct., St. Louis Cty., Sept. 25, 2017) (unreported) (allowing defamation claims against complainant to overcome dismissal, without consideration of absolute or qualified privilege, based on text messages sent to a friend saying plaintiff had raped her). For a link to the *Washington University* opinion and further discussion, see Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 5, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [<https://perma.cc/3BLX-F55E>].

186 *Univ. of Dayton*, 766 F. App’x at 290.

187 *Id.*

188 *Id.*

While qualified privilege may apply to statements made to a small circle of friends in connection with the proceeding, it is unlikely to extend more broadly to statements made in public and on social media.¹⁸⁹ Indeed, even where a respondent is found in violation of campus policy, the complainant may risk defamation liability by identifying that respondent as a “rapist” through social media and other public communications.¹⁹⁰

In *Goldman v. Reddington*, a federal district court for the Eastern District of New York held that a complainant could potentially be sued for defamation *per se* under New York law for posting social media posts and text messages describing the respondent as a “violent rapist,” “rapist,” and “monster,” and sending disparaging messages to an employer. The respondent was previously expelled by a private university for sexual assault of the complainant, but criminal charges had been dropped. The complainant allegedly “published numerous statements, viewed by hundreds or thousands of people,” accusing the respondent of rape; if that accusation was untrue, the complainant could be liable for defamation because rape is a sufficiently “serious” crime to support a defamation *per se* claim.¹⁹¹

Notably, the *Goldman* court did not consider the campus’ finding of responsibility to be enough to establish “truth” and dismissed the complaint on the ground that the plaintiff had not pleaded the existence of a false statement of fact: the allegation that the county district attorney found no corroborating evidence or physical evidence of “any sexual contact,” consensual or nonconsensual, created an issue of fact about the truthfulness of the allegations sufficient to overcome a motion to dismiss the defamation *per se* claim. Because the parties were “worlds apart” in their positions on the facts, the court allowed the case to go forward.¹⁹²

4. Privilege and False Reports

As described in Part IV.B, qualified privilege will be overcome where the defamation plaintiff plausibly asserts the statements were made with “actual malice” or, in some states, “common law malice,” which considers the speaker or writer’s ill intent, rather than their regard for the truth.¹⁹³ In several published

189 For a broader discussion of defamation claims arising from survivors sharing stories in public forums including the Internet, rather than in civil or criminal litigation, see Weisbrot, *supra* note 5. See also *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 367 (S.D.N.Y. 2016) (dismissing Title IX claim brought by student against university after he was publicly identified as a “rapist” by his accuser, and noting, in dictum, that the defamation tort provides a remedy for “a student who is the victim of sexually charged slander”).

190 *Goldman v. Reddington*, 417 F. Supp. 3d 163, 169, 173 (E.D.N.Y. 2019).

191 *Id.*

192 *Id.* The facts alleged suggest that the finding of responsibility was made through a “single-investigator” model: The Title IX investigator “concluded that Goldman had violated the Student Code of Conduct, and he was expelled.” *Id.* at 168. But the court did not discuss what level of privilege would apply to statements made through such a process where the investigator also reaches the determination of responsibility. The issue of absolute or qualified privilege within the campus investigation was not decided in the *Goldman* case, perhaps because the allegedly defamatory statements were not made within the investigation, but only afterward in a public forum.

193 *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 718 (N.Y. 2015).

decisions, defamation plaintiffs who claim to have been falsely accused of sexual misconduct in campus disciplinary proceedings have overcome privilege this way.¹⁹⁴ A false accusation of a serious crime is defamatory; in turn, a claim that the complainant falsely accused the plaintiff of sexual assault may result in a court allowing the case to proceed forward.

In one example, a federal district court in Virginia allowed a respondent to proceed on a defamation claim against a complainant based on the allegation that the complainant made false accusations to punish him and other members of the football team.¹⁹⁵ The respondent also alleged that the complainant specifically asked university officials whether she should say she was raped before making the accusations. Under these allegations, the court declined to dismiss the defamation claim.¹⁹⁶

C. Other Protections for Parties and Witnesses

At the state level, lawmakers have expanded certain protections for parties and witnesses from defamation lawsuits. For example, campus disciplinary proceedings (at least those arising at public institutions) may be covered under Anti-SLAPP (“Strategic Lawsuit Against Public Participation”) legislation, which would provide students with an expedited procedure for dismissing vexatious claims and the potential for recovery of attorney’s fees, costs, and sanctions. California and Texas courts, in fact, have allowed reporting parties to apply their Anti-SLAPP statutes against defamation claims arising from the reporting of sexual misconduct at public universities.¹⁹⁷

Another approach, adopted by New York under its 2015 “Enough is Enough” campus sexual assault response and prevention law, is to reduce the risk of retaliation by making the confidentiality of student information the default in any

194 *Doe v. Coll. of Wooster*, No. 5:16-CV-979, 2018 WL 838630, at *9 (N.D. Ohio Feb. 13, 2018); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 213–14 (W.D.N.Y. 2013). *But see Doe v. Univ. of Dayton*, 766 F. App’x 275, 290 (6th Cir. 2019) (legal conclusions dressed as factual allegations cannot be the basis for a showing of malice sufficient to overcome a motion to dismiss a defamation claim).

195 *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *14 (W.D. Va. Aug. 3, 2017).

196 For other examples, see the cases cited supra note 152.

197 *Vander-Plas v. May*, No. 07-15-00454-CV, 2016 WL 5851913, at *1 (Tex. App. Ct. Oct. 4, 2016), reh’g denied Tex. App. Ct. Nov. 14, 2016, and review denied Tex. Feb. 24, 2017; *Laker v. Bd. of Trustees of Cal. State Univ.*, 32 Cal. App. 5th 745, 765 (Cal. Ct. App. 2019) (internal investigations by schools into claims of sexual and racial discrimination qualify as “official proceedings authorized by law” that receive the protections of the anti-SLAPP statute); *Doe v. Roe*, No. G057780, 2021 WL 118820, at *1 (Cal. Ct. App. Jan. 13, 2021) (statements to campus police and to university administrators at public university charged with investigating sexual misconduct fell within petitioning activity protected by the anti-SLAPP statute). See Alyssa R. Leader, *A “SLAPP” in the Face of Free Speech: Protecting Survivors’ Rights to Speak Up in the “Me Too” Era*, 17 FIRST AMEND. L. REV. 441 (2019). Scholars have also proposed expansion of federal and state whistleblower protections “to protect individuals who publicly disclose, either to their employer’s internal corporate HR department, their college or university’s Title IX office, or to the public, that they have experienced sexual violence.” Kendra Doty, *“Girl Riot, Not Gonna Be Quiet” — Riot Grrrl, #MeToo, and the Possibility of Blowing the Whistle on Sexual Harassment*, 31 HASTINGS WOMEN’S L.J. 41, 65 (2020).

legal “proceeding” arising from campus discipline.¹⁹⁸ In building such protections, however, lawmakers should be careful to include defamation actions within the “proceedings” covered under the confidentiality law.¹⁹⁹

State court judges and lawmakers may also consider revisiting the intracorporate communications no-publication rule, which has been raised as an alternative to the qualified privilege for shielding statements made within a campus sexual assault grievance process. As Doris DelTosto Brogan writes, even if a defendant is entitled to invoke the privilege, they must expose themselves to the hazards of a trial: “Too risky for the entity, and even more daunting for the individual within the organization.”²⁰⁰ By covering statements made within the investigation and adjudication under the no-publication rule, the defamation plaintiff cannot use them to plead a prima facie case because there is no publication; as a result, parties and witnesses may be less afraid of retaliation and concern they will not be believed.²⁰¹

Ultimately, the strongest defense colleges and universities can offer to parties and witnesses from defamation lawsuits is an investigation and hearing that provides the respondent a meaningful opportunity to be heard. Due process and absolute privilege go hand in hand. As institutions adopt heightened due process or fair process protections in compliance with federal and state regulations, courts may correspondingly expand absolute privilege to the reporting parties and witnesses to those proceedings. This approach should benefit all parties, balancing the right of witnesses to be free of retaliation and fear of litigation, with a single, but full and meaningful, opportunity to be heard.

D. Antiretaliation Policies

Finally, postsecondary institutions should consider whether their existing antiretaliation policies protect parties and witnesses from potential defamation liability. Antiretaliation protections have been part of the Department of Education’s Title IX guidance for decades and have been expanded and clarified under the 2020 Title IX Final Rule.²⁰² Various forms of potentially retaliatory conduct could

198 New York Education Law section 6448 shields personally identifying information from disclosure “in any proceeding brought against an institution which seeks to vacate or modify a finding that a student was responsible for violating an institution’s rules” regarding a sexual misconduct violation. In comparison, Federal Rule of Civil Procedure 10(a) requires that “[t]he title of the complaint must name all parties.” Parties must specifically request (and, in cases involving student-on-student sexual misconduct, are usually granted) anonymity.

199 While most would interpret it as within the spirit of the law, New York Education Law section 6448 does not specifically prevent the naming of parties in court proceedings not seeking to vacate or modify a finding of responsibility.

200 Brogan, *supra* note 58, at 651.

201 *Id.* at 664–65. Brogan describes this rule as a kind of necessary legal fiction by which “there is no publication as defined in defamation law.” On balance, liability is foreclosed “because the important social interest of empowering organizations to discover and address internal wrongdoing outweighs the interest in providing a means to protect reputation.” *Id.* at 666.

202 U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE 17, 20 (2001); U.S. Dep’t of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 42–43 (Apr. 29, 2014);

foster defamation claims. Foreseeable examples include respondents or their advisors threatening complainants or witnesses with defamation lawsuits for any statements made during any investigation or adjudication process in advance of their participation. Likewise, reporting parties or their peers may “name and shame” those accused of harassment and violence publicly outside of the process. And, all sides may threaten to, or actually, release confidential information obtained through the investigatory or hearing process.

Considering these possibilities, a student may decide they do not want to face the risk of exposure, if not legal liability, through their involvement, and a campus cannot compel participation without violating Title IX’s antiretaliation prohibition. But an institution can address these fears by developing clear and consistent policies for handling retaliation within its Title IX process.

From the start of the process, parties and witnesses should be informed of their right to be free from intimidation, threats, or coercion from anyone, including the institution, “because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under Title IX.²⁰³ Within this broad prohibition, campuses may define specific examples of these rights, and the parties’ responsibilities toward one another, in their Title IX policies. Because retaliation policies must be applied equally to the parties, any examples used to educate students should be balanced to reflect potential misconduct by both respondents and complainants.

In these discussions, parties and witnesses can be alerted to applicable retaliation policies, and the broader risks present from disseminating confidential and private information. For instance, while these conversations may be difficult, students may benefit from guidance on their potential legal exposure from “unofficial reporting.”²⁰⁴ Institutional policy may cover certain behavior in this sphere through retaliation provisions, likewise addressed in section 106.71 of the Title IX Final Rule. But respondents may be able to bring a private cause of action for defamation against such posters, be they parties, witnesses, or friends, independent of any college process. As described above, such civil proceedings are generally outside the scope of college jurisdiction or responsibility, but students participating from all sides may benefit from education (ideally before the content is posted) for parties to understand the ramifications of such actions.

Plainly, a campus cannot impose a blanket prohibition on the threat or actual filing of defamation litigation—that would chill First Amendment rights protected under the Final Rule²⁰⁵—but the campus can make clear that such threats or

34 C.F.R. § 106.71 (2020).

203 34 C.F.R. § 106.71(a).

204 Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo ERA*, 2019 U. Chi. Legal F. 273, 297 (2019) (“In an ironic twist, a survivor who eschewed formal reporting channels may ultimately find herself in a courtroom, telling her story under the most formal conditions possible, having expended enormous resources along the way in exclusive service of beating back a claim that she lied about her abuse.”).

205 34 C.F.R. § 106.6(d) (2020).

filings could be grounds for conduct charges if they tend to show an intention to intimidate a party or witness seeking to participate in the process.²⁰⁶ Likewise, a campus would not be engaging in retaliation if it brought conduct charges against a student for making a “materially false statement in bad faith” during the grievance proceeding.²⁰⁷ But the simple fact that a student was found not responsible would not, on its own, be sufficient to conclude that any party made a materially false statement in bad faith.²⁰⁸

Another issue to address from the start is confidentiality, which is guaranteed under Title IX, subject to the various exceptions described in the Final Rule.²⁰⁹ An institution can set reasonable rules applied to all parties regarding the protection of confidentiality, including asking parties and advisors not to disclose any relevant information directly related to the allegations obtained through the investigatory process.²¹⁰

The parties’ advisors may also be notified regarding the scope of their responsibilities, including the antiretaliation rules, when they enter the process. Advisors can be advised that, even if they are attorneys, no duty of “zealous advocacy” is inferred or enforced within their role in this context, and the institution’s grievance procedure prohibits the treatment of parties and witnesses “in an abusive, intimidating, or disrespectful manner.”²¹¹ The Department of Education allows campuses to enforce rules of decorum regarding advisor behavior, including through the removal of advisors from their role.²¹²

Advisors who are attorneys may also be notified that the institution expects advisors to understand their ethical obligations under the American Bar

206 85 Fed. Reg. 30026, 30296 n.1161 (May 19, 2020) (noting that “abuse of speech unprotected by the First Amendment, when such speech amounts to intimidation, threats, or coercion for the purpose of chilling exercise of a person’s Title IX rights, is prohibited retaliation.”).

207 34 C.F.R. § 106.71(b)(2).

208 85 Fed. Reg. at 30537.

209 34 C.F.R. § 106.71(a).

210 In the Preamble to the Title IX Final Rules, the Department of Education indicates that the parties, advisors, and the institution may enter an agreement not to discuss information that does not consist of the allegations under investigation, including evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation, or the investigative report summarizing relevant evidence sent to the parties and their advisors. 85 Fed. Reg. at 30295. Any such agreements should be entered voluntarily, and parties cannot be compelled to enter them as a condition of receiving the evidence gathered or investigative report. Whether such agreements, in turn, would amount to “prior restraint” when imposed by a state institution remains an open question; as the Sixth Circuit Court of Appeals has recently written, it cannot identify “any cases holding that a non-disclosure agreement alone (as opposed to an injunction enforcing one) amounts to a prior restraint.” *Ostergren v. Frick*, No. 20-1285, 2021 WL 1307433, at *6 (6th Cir. Apr. 8, 2021). An agreement entered voluntarily (that is, without “a *unilateral* command”) is more likely to survive constitutional scrutiny. *Id.*

211 85 Fed. Reg. at 30319.

212 *Id.* at 30320.

Association's Model Rule of Professional Conduct 2.1, which states that attorneys, in giving advice, "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."²¹³ Such considerations would include a responsibility not to use the conduct or legal process to advance vexatious claims and litigation but more broadly would promote the institution's educational mission and the goals of the grievance process of ensuring equal access to education without discrimination on the basis of sex.

In sum, institutions of higher education should take affirmative steps to address the impact of defamation claims, both threatened and realized, on their campus Title IX process. They must balance the rights of accused persons to clear their name and participate in a fair and equitable process while ensuring that no party or witness suffers retaliation for giving testimony or evidence in the investigation or hearing. Such strategies include the adoption of rigorous due process standards to bolster the "quasi-judicial" nature of the campus proceeding; the implementation of clear retaliation policies and confidentiality expectations; and education on the scope of these policies for parties, witnesses, and advisors of choice.

VI. Conclusion

This article has explored several decades of case law surrounding defamation claims brought against colleges, universities, and members of their communities, and come to two major conclusions. The first is that the various privileges and immunities afforded to postsecondary institutions, whether through state tort claim immunity acts or common law privileges, have largely taken the sting out of the defamation tort within the higher education context. Some of these make the declarant absolutely shielded from liability, and others place a hard burden on plaintiffs to show actual malice in the making of the statement.

The second point, however, is that the current state of the law insufficiently protects the interests of participants in sexual misconduct investigations and adjudications regulated by Title IX and other federal and state laws. This article has proposed that statements made within those processes should be treated the same as those made within other "quasi-judicial" and judicial proceedings and be shielded from defamation suit. The rationale, as adopted in courts in Connecticut, Indiana, Illinois, Ohio, and Pennsylvania, is that without this privilege, participants will justifiably fear retaliation from making reports and giving statements within those processes. Moreover, the heightened level of due process afforded to parties within those proceedings mitigates the risk that the parties will not have a fair hearing on the merits on campus. Courts should not require a student to put on their case again in open court, possibly without their institution's support, after undergoing the rigors of a campus investigation.

213 ABA Model Rule of Prof. Conduct 2.1: Advisor, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/.