THE UNIVERSITY OF VIRGINIA, ROLLING STONE MAGAZINE AND DEFAMATION LAW

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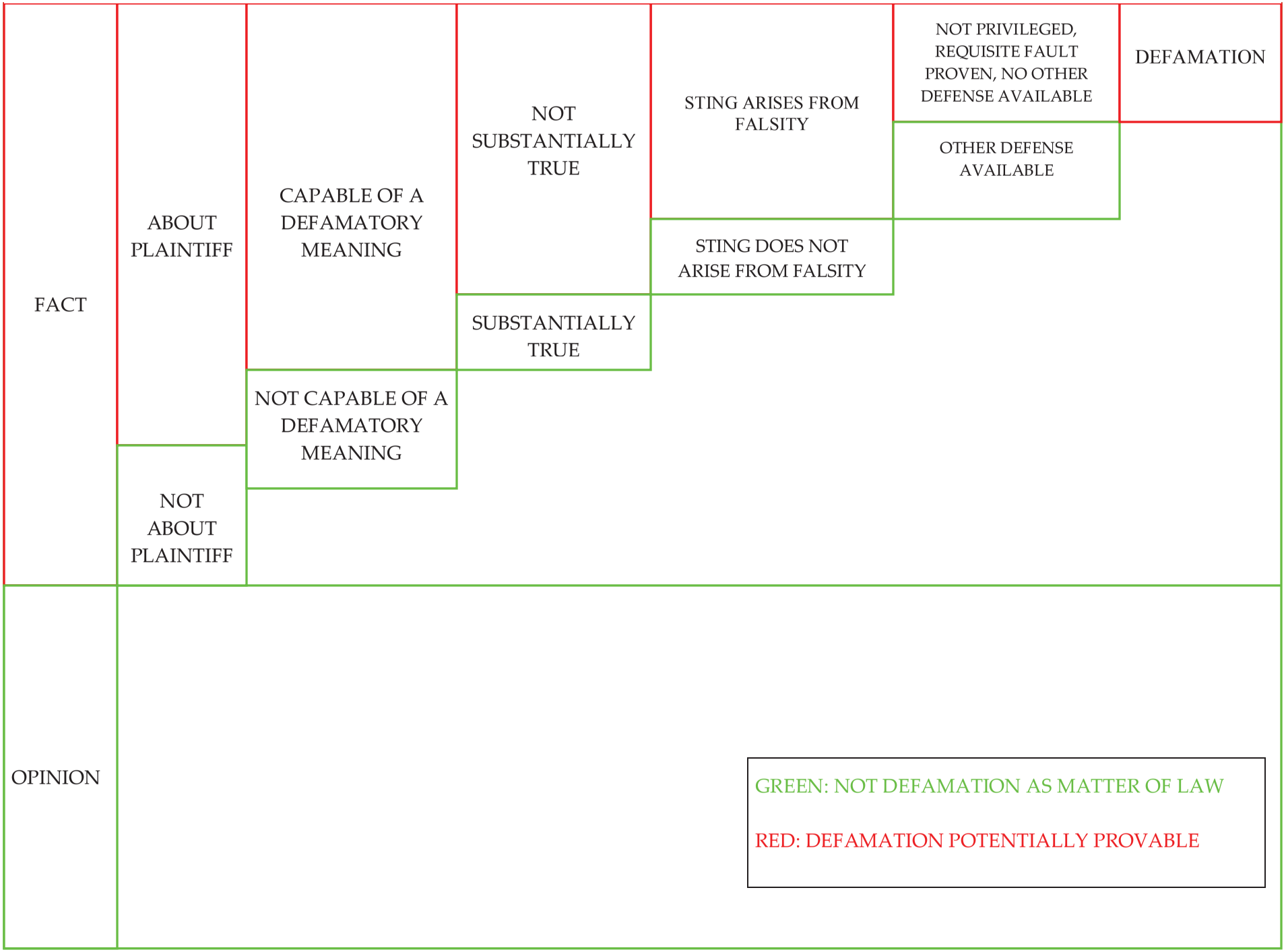

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OVERVIEW

The three lawsuits filed as a result of Rolling Stone's publication of the article *A Rape on Campus* and the lawsuits that could have been filed illustrate the goals and policies of defamation law, the constitutional restraints that have become so important a part of that jurisprudence, and the practical problems presented to judges in dealing with these types of cases. The article and the method for vetting the article plainly deviated from any acceptable journalistic standards. The article created a firestorm, and it would be impossible to say that reputations were not severely impacted.

Some would say these cases test the ability of modern defamation law to meet its intended purposes. This discussion is premature until the cases are resolved. But, the cases filed and the cases that could have been filed allow a discussion of virtually every aspect of modern defamation law as it addresses commentary concerning issues of public importance. What follows is an outline of the law. What will be discussed is how the law has been applied and can be applied in the context of this article.

ELEMENTS OF A DEFAMATION SUIT

Individual defamation actions are premised upon the right to protect "the essential dignity and worth of every human being." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). Historically, written defamation was termed "libel" while spoken defamation was referred to as "slander." Libel evolved from the common law courts while slander arose from the ecclesiastical courts. In Virginia, any distinction between libel and slander has been eliminated, and both are subject to the same rules.

In Virginia, the elements of defamation are (1) publication of (2) an actionable statement with (3) the required intent. The statement must be "of and concerning" the plaintiff, and it must be a false statement of fact. The Supreme Court's use of the term "intent" is a shorthand for the applicable standard of fault which is either negligence for a private figure or actual malice for a public official or public figure or to support an award of presumed damages for a claim involving speech of public concern.

I. PUBLICATION

"Publication" can include any means of disseminating or broadcasting a statement to the public, including newspapers, the Internet, radio and TV, or even putting up fliers. A publication can be made to a single person or the entire world.

A. Necessity of a Third Party

While the breadth or scope of the publication may impact other elements of

a defamation case (e.g., damages), the publication element is satisfied as long as the allegedly false and defamatory statement is made to any third party. Because a third party is required to establish a cause of action for defamation, communications that occur only between two people are not sufficient to sustain a cause of action by one of the participants against the other. For example, a heated conversation between two people, even if filled with lies, will not create a cause of action for either against the other unless a third party is present. Similarly, a letter written by one person to another person, which is not copied to any third party, would not create a cause of action for defamation. However, such a conversation or letter could create a basis for an action under Section 8.01-45 of the Code of Virginia (the "insulting words statute"). An action made under 8.01-45 is very similar to a cause of action for defamation except that proof of publication is not required.

Certain intra-corporate communications arising in the employment context will not support a defamation claim. See, e.g., Montgomery Ward & Co. v. Nance, 165 Va. 363, 379 (1935); Thalhimer Bros. v. Shaw, 156 Va. 863, 871 (1931). The Supreme Court of Virginia, however, has drastically limited this exception. See Larimore v. Blaylock, 259 Va. 568, 574-75 (2000) (holding that any qualified privilege that may arise in an employment context would not apply if the statements were communicated to persons "who have no duty or interest in the

subject matter, even if those third parties are fellow employees.").

B. Republication

In Virginia, "each publication by a speaker of a defamatory statement is a separate tort and, indeed, generally each subsequent republication by the original publisher of such a statement are separate torts." WJLA-TV v. Levin, 264 Va. 140, 153 (2002). Thus, a speaker generally can be held liable for each time he repeats, rephrases, or restates the allegedly defamatory material. In addition, the original speaker can be liable for a third party's "republication" of a defamatory statement that the speaker has authorized or which arises as the "natural and probable consequence" of the original defamation. See, e.g., Weaver v. Beneficial Fin. Co., 199 Va. 196, 199-200 (1957).

II. ACTIONABLE STATEMENTS

To be actionable, the statement must be both false and defamatory. Although often confused, there is a difference between the terms "false" and "defamatory," both of which must exist to have an actionable claim.

A. False Statements of Fact

1. Truth and Falsity

In order to satisfy the second element of a defamation claim, the allegedly defamatory material must contain a false statement of fact. A true statement that does not convey any false implications cannot support a claim for defamation, no matter how harmful to the subject of the statement. Although truth was formerly

considered to be an affirmative defense to be proven by the defendant, the law now requires the plaintiff to prove falsity as an element of his or her case. Hepps v. Phila. Newspapers, Inc., 475 U.S. 1134 (1986) and Gazette, Inc. v. Harris, 229 Va. 1, 15 (1985).

It is not necessary to prove the literal truth of every defamatory statement. A libel defendant may defend on the ground that a statement is substantially true even if it has literal mistakes. In determining whether defamatory statements are true or false, "It is not necessary to prove the literal truth of the statements made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially' true." Saleeby v. Free Press, Inc., 197 Va. 761, 763 (1956). "If the gist or 'sting' of a statement is substantially true, 'minor inaccuracies will not give rise to a defamation claim.'" AIDS Counseling & Testing Ctrs. v. Group W Television, Inc., 903 F.2d 1000, 1004 (4th Cir. 1990). "The falsity of a statement and the defamatory 'sting' of the publication must coincide." Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993). See Jordan v. Kollman, 269 Va. 569, 576 (2005) ("slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially' true"). On the other hand, in a case involving defamation by implication, the literal truth of the statement is not dispositive if, in

context, the statement conveys a defamatory meaning. Pendleton v. Newsome, 290 Va. 162 (2015).

2. Opinion

Statements of opinion are not actionable, because opinions are not objectively true or false. Thus, speech which does not contain a provably false factual claim cannot form the basis of a defamation action. Statements that depend on the speaker's viewpoint are usually classified as expressions of opinion, although attempting to cloak a statement as an opinion (e.g., saying, "In my opinion…."), will not necessarily protect the speaker.

In determining whether a statement is one of fact or opinion, a court cannot isolate the statement, but rather must consider in the context of the entire communication. See Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 48 (2009). Additionally, statements of fact that support a non-actionable opinion may themselves be defamatory. See, e.g., Am. Commc'ns Network, Inc. v. Williams, 264 Va. 336, 341 (2002).

3. Rhetorical Hyperbole

Statements which no reasonable person would think were true likewise will not support a defamation claim. See, e.g., Yeagle v. Collegiate Times, 255 Va. 293 (1998) (holding that the caption "Director of Butt Licking" under a photograph of a college administrator was nonactionable rhetorical hyperbole); Jenkins v.

Snyder, No. 00CV2150, 2001 WL 755818, at *2, *5-6 (E.D. Va. Feb. 6, 2001) (dismissing a claim against Redskins owner Dan Snyder for stating that the team's groundskeepers were "trying to kill someone with their crappy fields").

In Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 268 (1974) the United States Supreme Court reversed a judgment in favor of union members who were identified as scabs in a union newsletter. The newsletter included Jack London's essay on scabs which included the statement, "[A] SCAB is a traitor to his God, his country, his family and his class." The court held that in the context of a labor dispute, these statements were rhetorical hyperbole and could not be read literally to be the predicate for an award of damages.

B. Defamation by Implication

1. General Rule

While the law of defamation generally requires a false statement of fact, courts universally have recognized some form of defamation by implication or inference, where admittedly true facts nonetheless create a false implication or inference. As the Supreme Court of Virginia has held, "a defamatory charge need not be made in direct terms; rather it may be made 'by inference, implication[,] or insinuation.'… However, the meaning of the alleged defamatory charge 'cannot, by innuendo, be extended beyond its ordinary and common acceptation.'" Perk v. Vector Res. Grp., Ltd., 253 Va. 310, 316 (1997) (internal citation omitted).

Additionally, some courts require proof that the speaker knew or intended the defamatory inference, if the underlying statements are true. See, e.g., Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092-93 (4th Cir. 1993) ("The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference."). But, the Supreme Court of Virginia has expressly rejected this rule holding that "[s]uch a holding would immunize one who intentionally defames another by a careful choice of words to ensure that they state no falsehoods if read out of context but convey a defamatory innuendo in the circumstances in which they were uttered." Pendleton v. Newsome, 290 Va. 162, 174 (2015). It is difficult, however, to justify a finding that a publisher possessed actual malice without proof that the false defamatory meaning was intended.

2. Role of the Court

The trial court has the responsibility to determine in the first instance whether the statements about which a plaintiff complains are capable of conveying the defamatory meaning alleged by the plaintiff. See Webb v. Virginian-Pilot Media Cos., 287 Va. 84, 90 (2014) ("Ensuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court."). In Webb, the Court did not change the standard for

establishing such implications. How broadly the lower courts will interpret this opinion remains to be seen.

C. Defamatory Meaning

1. Definition of Defamatory Meaning

In order to be actionable, a statement must be both false and defamatory, i.e., it must have the requisite "sting" to support the claim. A number of formulations attempting to define the meaning of "defamatory" have been articulated. The *Restatement (Second) of Torts* states that, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him." Id. at Section 559 (1977). Two early Virginia Supreme Court decisions addressed the issue with different standards. In Moseley v. Moss, 47 Va. (6 Gratt.) 534 (1850), the court stated:

> Words spoken that are merely vituperative, or insulting, or imputing only disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or the want of delicacy, refinement or good breeding, are not regarded by the common law as sufficiently substantial to be treated as injuries calling for redress in damages.

Id. at 538. In Moss v. Harwood, 102 Va. 386 (1904), the Court held that, "[i]f the words employed in a libel tend to injure the defendant in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, they are actionable, although not imputing an indictable offense." Id. at 391. The Supreme Court of Virginia recently confirmed these standards in Schaecher v. Bouffault,

290 Va. 83, 92 (2015) ("[D]efamatory language, "tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous.").

In order to recover, falsity and defamatory meaning must overlap. In other words, a plaintiff can recover only if the false statement about which he complains is also defamatory.

2. Defamation Per Se

The common law of slander held that certain false statements were considered to be defamatory *per se*, and these have been carried over into the law of defamation. These statements fall into one of four categories: (1) statements imputing the commission of a crime involving moral turpitude; (2) statements imputing infection with a contagious disease; (3) statements imputing unfitness to perform, or lack of integrity in the performance of, the duties of a job or office; and (4) statements necessarily prejudicing a person in his or her profession or trade. Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 714 (2006). A defamation *per se* plaintiff is entitled to recover presumed damages even without proof of any actual damage. However, because of the significant public policy issues and constitutional concerns associated with presumed damages, even a private plaintiff must prove actual malice to recover presumed damages arising

from a statement involving a matter of public concern. See WJLA-TV v. Levin, 264 Va. 140, 155 (2002).

D. Role of the Court and Jury

Before a claim for defamation is submitted to a jury, the court must determine whether the allegedly defamatory statement is capable of a defamatory meaning. See Perk v. Vector Res. Grp., Ltd., 253 Va. 310, 316-17 (1997). If a court determines that a statement is capable of a defamatory meaning, the jury must decide whether readers or listeners would reasonably have interpreted the communication as having the defamatory meaning alleged.

E. A Statement Must be "Of and Concerning" the Plaintiff

In order to recover for defamation, the plaintiff must prove that the allegedly defamatory statement was "of and concerning" him or her. See New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964). In order to show that a statement is "of and concerning" a plaintiff, it is not required that the plaintiff be referred to by name. It is sufficient if the plaintiff may be identified as the subject of the communication from the context of the statement. Gazette, Inc. v. Harris, 229 Va. 1, 37-38 (1985).

Special rules apply with respect to communications about groups. As a general rule, members of a defamed group can pursue a defamation action only if the group has so few members that the defamation necessarily applies to each

member. The Supreme Court of Virginia, however, has held that the law does not permit a government employee to rely on the "small group theory" to satisfy the of and concerning test, because it would amount to an impermissible "libel of government" claim. See Dean v. Dearing, 263 Va. 485, 489 (2002) (holding that a police officer could not rely on the small group theory in an action against the mayor, who had accused the town's police force of "corruption, dishonesty, and felonious conduct").

III. REQUIRED INTENT

A. Public Officials

1. The Actual Malice Standard

The intent a plaintiff must prove in a defamation action depends on whether the plaintiff is a public or private figure. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court held that public officials must prove that the defendant acted with "actual malice" in order to recover in a defamation case. In order to establish that a defamatory statement was made with actual malice, a plaintiff must show that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80.

Reckless disregard of whether a statement was false is different from the ordinary tort measure of recklessness. In the context of defamation, reckless disregard means, "[t]here must be sufficient evidence to permit the conclusion that

the defendant in fact entertained serious doubts as to the truth of his publication [and] that the defendant actually had a high degree of awareness of probable falsity." Jordan v. Kollman, 269 Va. 569, 580 (2005) (internal citation omitted). Although sometimes mistakenly confused with common law malice, proof of ill will or spite, by itself, will not establish actual malice. See Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666 n.7 (1989) (noting that actual malice "has nothing to do with bad motive or ill will"). Under the law of Virginia, actual malice must be proven by clear and convincing evidence. Jordan, 269 Va. at 576.

Commonplace inaccuracies likewise will not establish actual malice. See Shenandoah Publ'g House v. Gunter, 245 Va. 320 (1993). Similarly, unless a speaker is aware of facts or circumstances that cast doubt on the truth of what is about to be published, the failure to investigate further will not establish actual malice. See St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, *or would have investigated before publishing*. There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.") (emphasis added); Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974) ("[M]ere proof of a

failure to investigate, without more, cannot establish reckless disregard for the truth."); Jackson v. Hartig, 274 Va. 219, 229-30 (2007) ("[A] media defendant in a defamation claim subject to the New York Times standard cannot be said to have acted with actual malice on account of its failure to investigate the accuracy of an allegedly defamatory statement before publishing it unless the defendant first 'had a high degree of awareness of [its] probable falsity.'"); Gunter, 245 Va. at 324-35 ("[T]he evidence must establish that the defendant had a high degree of awareness of probable falsity. Unless the defendant had such an awareness, its failure to investigate before publishing is not sufficient to establish a reckless disregard for the truth.").

While many factors that would support a finding of negligence will not, by themselves, establish actual malice, those factors often may be considered as part of the evidence tending to show that the publisher acted with actual malice. In other words, while actual malice is ultimately a subjective standard, evidence of objective unreasonableness, bias, ill will or other factors may be probative. See generally Rodney A. Smolla, The Law of Defamation § 3:43 (2d ed. 1999 & Supp. 2016). Additionally, proof that a publisher deliberately ignored known sources of information that cast doubt on the veracity of a statement or relied on biased and untrustworthy sources may be introduced to establish actual malice. See id. §§ 3:51, 3:59.

2. Public Official Status

The determination of a plaintiff's status as a public official or public figure is an issue of law for resolution by the court. Fleming v. Moore, 221 Va. 884 (1981), later appeal sub nom. Gazette, Inc. v. Harris, 229 Va. 1 (1985); Rosenblatt v. Baer, 383 U.S. 75, 88 (1966).

Neither the Supreme Court of the United States nor the Supreme Court of Virginia has established a bright line rule for determining whether a plaintiff is a public official for purposes of defamation law. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 283, n.23 (1964) (declining to say "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included"). In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court again declined to provide "precise lines" for public official status but held "that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Id. at 85. The Court further stated that, "a position in government [that] has such apparent[1] importance that the public has an independent interest in the

[1] As this language indicates, it is sufficient that the position in question have either the actual or apparent responsibility for governmental affairs. See also Baumback v. Am. Broad. Cos., No. 97-2316, 1998 WL 536358, at *3 (4th Cir. Aug. 13, 1998) ("[W]e begin with the general rule that 'the "public official" designation applies at the very least to those among the hierarchy of

qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees…." Id. at 86.

There is little question that elected officials, agency heads, judges, and other top officials are considered public officials, and most courts and commentators agree that the term is broad and expansive. See, e.g., Robert D. Sack, Sack on Defamation § 5.2.1 at 5-6 (4th ed. 2010 & Supp. 2016) ("This much is clear: Although not every public employee is a public official, the term is broad."); id. at 5-7 ("The public official category is by no means limited to upper echelons of government. All important government employees are subject to discussion by the people who employ them and by others who would comment on their behavior.").[2]

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government employees who *have, or appear to the public to have*, substantial responsibility for or control over the conduct of governmental affairs.' … Thus our application of the 'public official' designation turns on whether Baumback had substantial responsibility – actual or apparent – for the administration of governmental matters.") (internal citation omitted).

[2] See, e.g., Peterson v. County of Dakota, Minn., 479 F.3d 555 (8th Cir. 2007) (social worker); Smith v. Danielczyk, 928 A.2d 795 (Md. 2007) (police officer); Beeton v. District of Columbia, 779 A.2d 918 (D.C. 2001) (correctional officer); Davis v. Borskey, 660 So. 2d 17 (La. 1995) (university purchasing agent); Ferguson v. Union City Daily Messenger, Inc., 845 S.W.2d 162 (Tenn. 1992) (county purchasing agent); Kahn v. Bower, 284 Cal. Rptr. 244 (Ct. App. 1991) (social worker); Villarreal v. Harte-Hanks Commc'ns, Inc., 787 S.W.2d 131 (Tex. App. 1990) (welfare agent); Guzzardo v. Adams, 411 So. 2d 1148 (La. Ct. App. 1982) (personnel coordinator); Gray v. Udevitz, 656 F.2d 588 (10th Cir. 1981) (policeman); Hodges v. Okla. Journal Publ'g Co., 617 P.2d 191 (Okla. 1980) (license tag agent); Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107 (7th Cir. 1977) (tax assessor); Grzelak v. Calumet Publ'g Co., 543 F.2d 579 (7th Cir. 1975) (secretary to city public works director); Fopay v. Noveroske, 334 N.E. 2d 79 (Ill. App. Ct. 1975) (x-ray technician); Coursey v. Greater Niles Twp. Publ'g Corp., 239 N.E.2d 837 (Ill. 1968) (patrolman); Kruteck v. Schimmel, 278 N.Y.S.2d 25 (App. Div. 1967) (public utility auditor); Press, Inc. v. Verran, 569 S.W.2d 435 (Tenn. 1978) (junior social

Nevertheless, courts often reach differing conclusions about the public official status of lower ranking positions such as teachers, mid-level managers, police officers, etc. See generally Danny R. Veilleux, Who is a "Public Official" for Purposes of Defamation Law, 44 A.L.R. 5th 193 (1996).

The Supreme Court of Virginia has analyzed this issue infrequently. In Richmond Newspapers Inc. v. Lipscomb, 234 Va. 277 (1987), the court held that a teacher who had a limited role as an acting department head was not a public official where the defamatory statements related solely to her work as a teacher. In other cases, the court has applied the actual malice standard to a variety of public officials, without directly addressing the issue. See, e.g., Jordan v. Kollman, 269 Va. 569 (2005) (mayor); Dean v. Dearing, 263 Va. 485 (2002) (police officer). Lower court decisions have resolved the issue based on the nature of the position at issue and the public's interest in the performance of the person's job. See, e.g., Sharpe v. Landmark Commc'ns, Inc., At Law No.: CL08-1664, 4 Cir. CL081664 (Va. Cir. Ct. Apr. 6, 2009) (CaseFinder) (holding that a public information officer on a Navy ship was a public official); Carroll v. Jones, 74 Va. Cir. 466 (Portsmouth 2008) (holding that a civilian "Director of Contracting" in charge of awarding government contracts was a public official).

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worker); Clawson v. Longview Publ'g Co., 589 P.2d 1223 (Wash. 1979) (administrator of county motor pool).

B. Public Figures

In order to ensure that free speech is not chilled, the United States Supreme Court has also extended the actual malice standard to public figures. Certain individuals who have gained substantial notoriety or fame are deemed to be "all purpose" public figures and are subject to the actual malice standard in any defamation case. In certain situations, a private figure may be deemed a "limited purpose" public figure if he has inserted himself into a public controversy. In order to determine whether a plaintiff is a limited purpose public figure, courts consider several factors including (1) the plaintiff's access to the media; (2) the extent to which the plaintiff voluntarily entered a public controversy; (3) whether the plaintiff attempted to influence the controversy's outcome; (4) whether the controversy predated the defamatory communication; and (5) whether the plaintiff was still a public figure at the time of the communication. See Hatfill v. New York Times Co., 532 F.3d 312, 319 (4th Cir. 2008). It is possible to be an involuntary limited purpose public figure if a person is so inextricably connected to the controversy that he or she must be a part of the discussion. The circumstances under which a court will find a plaintiff to be an involuntary limited purpose public figure are rare.

One court has observed that "[d]efining public figures is much like trying to nail a jelly fish to the wall." Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440,

443 (S.D. Ga. 1976). The analysis is even more difficult in dealing with business entities than with individuals in light of the fact that the vast majority of business entities engage in extensive advertising. Courts have reacted in different ways to the prominence of a business in assessing whether it is a public figure. In Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976), the court found that the media should be provided greater protection from corporate plaintiffs than from individuals in an article involving the entertainment of public officials for the purpose of influencing the expenditure of public funds. In that context, the court held that, because this was a legitimate public controversy, the corporation was a public figure for the purposes of the issues discussed. In Steaks Unlimited Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980), the court held that the corporate plaintiff was a public figure for the purposes of discussion of an alleged "controversy" resulting from its large-scale advertising campaign where a local television station had charged that the advertising contained misrepresentations.

It seems clear, however, that advertising itself does not automatically make a corporation a public figure. In Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989), the court held that a bank was not a public figure because its promotional activities were not linked to the specific subject of the defamation. However, in Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc.,

738 F. Supp. 1499 (D.S.C. 1989), the court held an electronic store to be a public figure because of its extensive advertising. In National Life Insurance Co. v. Phillips Publishing, Inc., 793 F. Supp. 627 (D. Md. 1992), the court held that a corporation was a public figure because the subject of its advertising was the same as the subject of its defamation suit.

Some courts have refused to apply the public figure status to defamation involving purely commercial speech. For example, in U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3d Cir. 1990), the court held that a health insurance company was not a public figure in a lawsuit alleging defamation by a competitor's advertisement. The court's rationale was that the plaintiff's prominence did not authorize a competitor's falsehoods in advertisements.

Many courts refuse to make any distinction between natural persons and business entities. In Trans World Accounts Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977), the court held that there was no distinction between natural persons and business entities. The court in that case concluded that the plaintiff was a public figure in regard to a defamation claim related to a published series of Federal Trade Commission reports alleging wrongful debt collection practices. The court specifically noted, "the distinction between corporations and individuals is one without a difference." Id. at 819.

Bruno & Stillman Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir.

1980) applied a particularized analysis to the individual plaintiff. That case involved newspaper articles alleging that a manufacturer sold defective boats. The court reasoned that while commercial conduct could give rise to public figure status, the plaintiff in that case was only a "successful manufacturer-merchant." On the other hand, in Bose Corp. v. Consumers Union of US, Inc., 508 F. Supp. 1249 (D. Mass. 1981), rev'd, 692 F.2d 189 (1st Cir. 1982) and aff'd, 466 U.S. 485 (1984), the court reasoned that a consumer's interest in getting correct product information outweighed the manufacturer's interest in its commercial reputation. The court noted and held that the corporation was a limited purpose public figure.

C. Private Plaintiffs

In most cases, a private plaintiff who is neither a public official nor a public figure must show only negligence to recover in defamation. However, a private plaintiff seeking presumed damages must prove actual malice if the allegedly defamatory statement involves a matter of public concern. See WJLA-TV v. Levin, 264 Va. 140, 155 (2002). When the falsehood does not involve a matter of public concern, presumed damages may be recoverable without a showing of actual malice.

IV. PRIVILEGES AND IMMUNITY

By statute and under the common law, defendants who would otherwise be liable for defamatory statements may be able to claim either an absolute or

qualified privilege to avoid liability.

A. Absolute Privilege

The common law recognizes three general categories of communications which are absolutely privileged: judicial proceedings, proceedings of legislative bodies, and communications by military and naval officers. Story v. Norfolk-Portsmouth Newspapers, Inc., 202 Va. 588, 590 (1961). "[T]he maker of an absolutely privileged communication is accorded complete immunity from liability even though the communication is made maliciously and with knowledge that it is false." Lindeman v. Lesnick, 268 Va. 532, 537 (2004).

The most frequently litigated absolute privilege concerns statements made in connection with judicial proceedings. It is clear that litigants and witnesses can provide information and testify without the fear of being sued. The power to prosecute a witness for perjury is generally regarded as a sufficient deterrent to justify the privilege. Thus, as long as a pleading or statement made during a judicial proceeding is relevant to that proceeding, it is absolutely privileged. See Penick v. Ratcliffe, 149 Va. 618 (1927). This protection has been extended to statements made in affidavits, depositions, and even pre-litigation communications where litigation is likely to ensue. See Darnell v. Davis, 190 Va. 701, 707 (1950); Mansfield v. Bernabei, 284 Va. 116 (2012) (draft complaint circulated prior to litigation); Donohoe Constr. Co. v. Mt. Vernon Assocs., 235 Va. 531 (1988)

(affidavit to support a mechanic's lien); Watt v. McKelvie, 219 Va. 645, 651 (1978) (protecting third party statements republished by another during a deposition).

Courts have extended the privilege to a variety of "quasi-judicial" proceedings. In order to qualify as a quasi-judicial proceeding, courts generally require that the proceeding be governed by rules of evidence, be supervised by a judge or magistrate, or have other characteristics similar to a judicial proceeding (e.g., the power to issue subpoenas or punish a litigant for perjury). See, e.g. Elder v. Holland, 208 Va. 15, 22 (1967) (holding that a communication made by a witness at a hearing before the Superintendent of the State Police was not entitled to an absolute privilege because the safeguards that surround a judicial proceeding were not present).

Very few cases in Virginia have dealt with the absolute privilege for legislative proceedings and statements made by military officers. As with the absolute privilege for judicial proceedings, the privileges for legislative proceedings and for military officers are situational, and would not apply outside of the narrow context in which they arise. See, e.g., Isle of Wight Cty. v. Nogiec, 281 Va. 140 (2011) (holding that the absolute privilege for legislative proceedings only applies when the legislative body is acting in its legislative capacity, not in its supervisory or administrative capacity).

B. Qualified Privilege

The law recognizes certain qualified privileges by statute and under the common law.

1. Statutory Qualified Privileges

Examples of qualified privileges established by statute include the following:

- School personnel's reports of student alcohol or drug abuse as long as they act "in good faith with reasonable cause and without malice." Va. Code § 8.01-47.
- Immunity for civil claims of business conspiracy and tortious interference based solely on statements made at public hearings of local governing bodies unless made with actual malice. Va. Code § 8.01-223.2.
- Information given to the Judicial Inquiry Review Commission, unless motivated by "actual malice." Va. Code § 17.1-914.
- Repetition by a radio or television station of a third party's statements, unless the station "failed to exercise due care." Va. Code § 8.01-49.
- Disclosure of information to an insurance institution, unless the information is false and given with "malice or willful intent to injure any person." Va. Code § 38.2-618.
- Statements made in Virginia State Bar disciplinary investigations of lawyers unless "it is shown that such statements were false and were made willfully and maliciously." Va. Code § 54.1-3908.
- Statements made by retail merchants relating to alleged shoplifting, as long as the merchant has "probable cause." Va. Code § 8.01-226.9.

One of the most important statutory qualified privileges relates to the

statements made by a former employer about a former employee's professional conduct and the reasons for separation or job performance. Va. Code § 8.01-46.1. This statutory protection arose because employees would often call or have a representative call a former employer to find out what the employer was saying about the employee and then file a defamation action based on the reported information. This statute protects the former employer unless the employer was acting in bad faith. Id.

2. Qualified Privileges at Common Law

Under the common law, communications, made in good faith, on a subject matter in which the person communicating has an interest, or owes a duty, legal, moral, or social, is qualifiedly privileged if made to a person having a corresponding interest or duty. Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 153 (1985). This standard is intentionally broad and covers a wide variety of defamatory statements.

If the qualified privilege applies, and has not been abused, a defendant will not be subject to liability. The list of factors that can amount to abuse, however, is extensive and largely undermines the efficacy of the privilege. The Supreme Court of Virginia has identified any number of acts that would amount to abuse of the privilege including the following: (1) unnecessarily wide publicity; (2) use of intemperate or disproportionate language; (3) common law malice (i.e., spite or ill

will); and (4) constitutional actual malice. See Cashion v. Smith, 286 Va. 327, 338-39 (2013).

As a general rule, the trial court decides as a matter of law whether the circumstances give rise to a qualified privilege, while the jury determines whether the privilege has been abused. See Fuste v. Riverside Health Care Ass'n, 265 Va. 127 (2003).

C. The Communications Decency Act

The Communications Decency Act of 1996 prevents plaintiffs from holding interactive websites liable for the third-party comments people post on them. So if a company or an individual wants to sue for online libel, it has to find the individual responsible for the original content. See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (holding that the act immunized a consumer review website from a defamation claim filed by a car dealership based on negative comments posted on the site by third parties). The CDA immunity rule is intended to foster robust debate online, but it has the practical effect of making it very difficult to sue for online libel. Finding the individual who posted a negative consumer review (as in the case above), or repeated a scandalous rumor, is much harder than finding the website's operator. This is why the General Assembly amended the statute of limitations for defamation actions to provide time to locate the actual publisher of the statement.

V. STATUTE OF LIMITATIONS

A. Limitations Period and Accrual

The statute of limitations for all defamation actions, regardless of label, is one year. Va. Code § 8.01-247.1; Jordan v. Shands, 255 Va. 492, 497-98 (1998); Bowers v. City of Richmond, 79 Va. Cir. 168, 170 (Richmond 2009); Cominelli v. Rector & Visitors of Univ. of Va., 589 F. Supp. 2d. 706, 718 (W.D. Va. 2008), aff'd, 362 F. App'x 359 (4th Cir. 2010).

The General Assembly amended Section 8.01-247.1 effective July 1, 2015 to toll the running of the statute for statements "published anonymously or under a false identity on the Internet until the identity of the publisher is discovered or, by the exercise of due diligence, reasonably should have been discovered." In these cases, the publisher and the internet service provider are often the only people who know the name of the publisher or have the ability to determine that name. In Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 289 Va. 426 (2015), the Supreme Court of Virginia held that a defamed party in Virginia does not have the right to issue a subpoena in the Commonwealth to a non-resident internet service provider to obtain the name of the publisher. Internet service providers such as Yelp vigorously resist providing the names of those who contribute to their sites and some states protect the identity of anonymous sources. An argument can be made that no amount of due diligence would allow the defamed party to learn the

source's name, and it is theoretically possible that if the publisher's name were discovered years after the publication, a defamation cause of action could be brought.

A cause of action for libel and slander accrues at the time of publication. See Jordan, 255 Va. at 498 ("Any cause of action that the plaintiff may have had for defamation against any of the defendants accrued on June 21, 1995, which is the date she alleges in her motion for judgment that the defamatory acts occurred"); Bass v. E.I. Dupont De Nemours & Co., 28 F. App'x 201, 206-07 (4th Cir. 2002) ("The limitations period for defamation in Virginia is one year. Va. Code § 8.01-247.1. The defamatory letter was published on August 10, 1998; this lawsuit was filed on August 7, 2000, almost a full year after the limitations period had run. Bass seeks to avoid the consequences of the statutory limitations period by arguing that we should apply a discovery rule. The Virginia General Assembly has declined to adopt a discovery rule in defamation actions"); Cominelli, 589 F. Supp. 2d at 718 ("Because the allegedly defamatory email was sent on June 11, 2007, Plaintiff's defamation claim was barred under the statute of limitations as of June 11, 2008").

B. Single Publication Rule

In order to address a publication in a mass media form (e.g., a book, a magazine, a newspaper, etc.), where a defamatory statement may be read on the

date of publication or years later by a different third party seeing it for the first time, the law developed the single publication rule, which treats the publication as a single occurrence on the date of the first publication for purposes of determining the statute of limitations. See Morrissey v. William Morrow & Co., 739 F.2d 962 (4th Cir. 1984). Although not universally adopted, almost every court to address the issue has applied the single publication rule to statements made over the internet as well. See, e.g., Roberts v. McAfee, Inc., 660 F.3d 1156, 1167 (9th Cir. 2011); Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137, 143 (5th Cir. 2007); Van Buskirk v. New York Times Co., 325 F.3d 87, 89 (2d Cir. 2003); Lane v. Strang Commc'ns Co., 297 F. Supp. 2d 897, 899 (N.D. Miss. 2003); Mitan v. Davis, 243 F. Supp. 2d 719, 724 (W.D. Ky. 2003);; Firth v. State, 775 N.E.2d 463 (N.Y. 2002); but see Swafford v. Memphis Individual Practice Ass'n, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn. Ct. App. June 2, 1998) (holding that each publication from a web-based data bank of information gave rise to a separate cause of action for defamation). The application of the rule is critical for publishers of mass media who otherwise would be subject to defamation claims far beyond the expiration of the original statute of limitations.

Campus Rape
Sabrina Rubin Erdely

This past February, Yale's Sigma Phi Epsilon fraternity house allowed itself to be the locale of an infamous campus ritual: The annual "dominatrix" party of a secret society called the Women In Power Society (WIPS). As rumor holds, attendees dress in BDSM gear, porn is projected on the walls, and hot freshman boys serve drinks—an only slightly outsized version of the hormone-charged, booze-soaked revelry that marks a typical college weekend. But by the end of the night, two female students would later report, they had been raped at the Sig Ep house by a fellow student—yet another aspect of college life that has become entirely typical. One in five college women are the victims of sex assault, a DOJ statistic that has gone unchanged for a decade. Awareness programs about consent haven't gained much traction in the vast sexual grey area on college campuses, where macho frat culture and "sex-positive" third-wave feminists find themselves on a collision course against the backdrop of an anything-goes party atmosphere, and where administrations have been criticized for turning a blind eye. The resulting environment is one in which only 12% of rapes are reported, and emboldened boys mock the very idea of consent, as when in 2010 Delta Kappa Epsilon pledges at Yale marched the quad chanting "No means yes! Yes means anal!"

Universities are now in crisis over sexual harassment and assault, because with the help of student activists known as the Title IX Network, the Department of Education's Office of Civil Rights has initiated investigations against a dozen elite schools—including Yale, Dartmouth, UVA, Berkeley, Princeton and Harvard Law—prompted by allegations that institutional indifference towards such complaints has created a hostile environment for women. "Yale deliberately shields those who commit rape from the consequences," said Hannah Zeavin, one of 16 plaintiffs in the Yale case, alleging that among bad behaviors the administration has ignored was a campuswide email ranking 53 freshmen according to "how many beers it would take to have sex with them." Much is at stake: If found in violation of Title IX, the universities will lose hundreds of millions in federal dollars (Yale alone receives over $500 million annually). In addition, in January, President Obama announced the creation of a White House task force focused on campus sexual assault. But thus far, federal scrutiny hasn't changed much. At Dartmouth last month, a student wrote a lengthy "rape guide" on a campus message board: graphic, step-by-step instructions on how to force a freshman "whore" into sex.

I'd like to examine sexual assault on college campuses: The various ways colleges have resisted involvement, and (as was recently revealed at Occidental College) juke their stats to make their campuses appear safer than they are; how they may now be scrambling to clamp down (or sidestep liability); and especially how that dynamic is translating into daily social life and hookup culture. As the story's main thread I'll focus on a sexual assault case on one particularly fraught

campus—possibly at Yale, though the field is wide—following it as it makes its way through university procedure to its resolution, or lack thereof.

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Rolling Stone

A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA

Photo: Illustration by John Ritter

Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began

■ By Sabrina Rubin Erdely | November 19, 2014

From Rugby Road to Vinegar Hill, we're gonna get drunk tonight
The faculty's afraid of us, they know we're in the right
So fill up your cups, your loving cups, as full as full can be
As long as love and liquor last, we'll drink to the U of V
—"Rugby Road," traditional University of Virginia fight song

Sipping from a plastic cup, Jackie grimaced, then discreetly spilled her spiked punch onto the sludgy fraternity-house floor. The University of Virginia freshman wasn't a drinker, but she didn't want to seem like a goody-goody at her very first frat party – and she especially wanted to impress her date, the handsome Phi Kappa Psi brother who'd brought her here. Jackie was sober but giddy with discovery as she looked around the room crammed with rowdy strangers guzzling beer and dancing to loud music. She smiled at her date, whom we'll call Drew, a good-looking junior – or in UVA parlance, a third-year – and he smiled enticingly back.

RELATED

The Campus Rate Epidemic

"Want to go upstairs, where it's quieter?" Drew shouted into her ear, and Jackie's heart quickened. She took his hand as he threaded them out of the crowded room and up a staircase.

Four weeks into UVA's 2012 school year, 18-year-old Jackie was crushing it at college. A chatty, straight-A achiever from a rural Virginia town, she'd initially been intimidated by UVA's aura of preppy success, where throngs of toned, tanned and overwhelmingly blond students fanned across a landscape of neoclassical brick buildings, hurrying to classes, clubs, sports, internships, part-time jobs, volunteer work and parties; Jackie's orientation leader had warned her that UVA students' schedules were so packed that "no one has time to date – people just hook up." But despite her reservations, Jackie had flung herself into campus life, attending events, joining clubs, making friends and, now, being asked on an actual date. She and Drew had met while working lifeguard shifts together at the university pool, and Jackie had been floored by Drew's invitation to dinner, followed by a "date function" at his fraternity, Phi Kappa Psi. The "upper tier" frat had a reputation of tremendous wealth, and its imposingly large house overlooked a vast manicured field, giving "Phi Psi" the undisputed best real estate along UVA's

fraternity row known as Rugby Road.

Phi Kappa Psi House

Jackie had taken three hours getting ready, straightening her long, dark, wavy hair. She'd congratulated herself on her choice of a tasteful red dress with a high neckline. Now, climbing the frat-house stairs with Drew, Jackie felt excited. Drew ushered Jackie into a bedroom, shutting the door behind them. The room was pitch-black inside. Jackie blindly turned toward Drew, uttering his name. At that same moment, she says, she detected movement in the room – and felt someone bump into her. Jackie began to scream.

"Shut *up*," she heard a man's voice say as a body barreled into her, tripping her backward and sending them both crashing through a low glass table. There was a heavy person on top of her, spreading open her thighs, and another person kneeling on her hair, hands pinning down her arms, sharp shards digging into her back, and excited male voices rising all around her. When yet another hand clamped over her mouth, Jackie bit it, and the hand became a fist that punched her in the face. The men surrounding her began to laugh. For a hopeful moment Jackie wondered if this wasn't some collegiate prank. Perhaps at any second someone would flick on the lights and they'd return to the party.

"Grab its motherfucking leg," she heard a voice say. And that's when Jackie knew she was going to be raped.

She remembers every moment of the next three hours of agony, during which, she says, seven men took turns raping her, while two more – her date, Drew, and another man – gave instruction and encouragement. She remembers how the spectators swigged beers, and how they called each other nicknames like Armpit and Blanket. She remembers the men's heft and their sour reek of alcohol mixed with the pungency of marijuana. Most of all, Jackie remembers the pain and the pounding that went on and on.

As the last man sank onto her, Jackie was startled to recognize him: He attended her tiny anthropology discussion group. He looked like he was going to cry or puke as he told the crowd he couldn't get it up. "Pussy!" the other men jeered. "What, she's not hot enough for you?" Then they egged him on: "Don't you want to be a brother?" "We all had to do it, so you do, too." Someone handed her classmate a beer bottle. Jackie stared at the young man, silently begging him not to go through with it. And as he shoved the bottle into her, Jackie fell into a stupor, mentally untethering from the brutal tableau, her mind leaving behind the bleeding body under assault on the floor.

When Jackie came to, she was alone. It was after 3 a.m. She painfully rose from the floor and ran shoeless from the room. She emerged to discover the Phi Psi party still surreally under way, but if anyone noticed the barefoot, disheveled girl hurrying down a side staircase, face beaten, dress spattered with blood, they said nothing. Disoriented, Jackie burst out a side door, realized she was lost, and dialed a friend, screaming, "Something bad happened. I need you to come and find me!" Minutes later, her three best friends on campus – two boys and a girl (whose names are changed) – arrived to find Jackie on a nearby street corner, shaking. "What did they do to you? What did they make you do?" Jackie recalls her friend Randall demanding. Jackie shook her head and began to cry. The group looked at one another in a panic. They all knew about Jackie's date; the Phi Kappa Psi house loomed behind them. "We have to get her to the hospital," Randall said.

Their other two friends, however, weren't convinced. "Is that such a good idea?" she recalls Cindy asking. "Her reputation will be *shot* for the next four years." Andy seconded the opinion, adding that since he and Randall both planned to rush fraternities, they ought to think this through. The three friends launched into a heated discussion about the social price of reporting Jackie's rape, while Jackie stood beside them, mute in her bloody dress, wishing only to go back to her dorm room and fall into a deep, forgetful sleep. Detached, Jackie listened as Cindy prevailed over the group: "She's gonna be the girl who cried 'rape,' and we'll never be allowed into any frat party again."

Two years later, Jackie, now a third-year, is worried about what might happen to her once this article comes out. Greek life is huge at UVA, with nearly one-third of undergrads belonging to a fraternity or sorority, so Jackie fears the backlash could be big – a "shitshow" predicted by her now-former friend Randall, who, citing his loyalty to his own frat, declined to be interviewed. But her concerns go beyond taking on her alleged assailants and their fraternity. Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago. On this deeply loyal campus, even some of Jackie's closest friends see her going public as tantamount to betrayal.

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Confessions of an Ivy League Frat Boy: Inside Dartmouth's

"One of my roommates said, 'Do you want to be responsible for something that's gonna paint UVA in a bad light?' " says Jackie, poking at a vegan burger at a restaurant on the Corner, UVA's popular retail strip. "But I said, 'UVA has

flown under the radar for so long, *someone* has to say something about it, or else it's gonna be this system that keeps perpetuating!'" Jackie frowns. "My friend just said, 'You have to remember where your loyalty lies.'"

From reading headlines today, one might think colleges have suddenly become hotbeds of protest by celebrated anti-rape activists. But like most colleges across America, genteel University of Virginia has no radical feminist culture seeking to upend the patriarchy. There are no red-tape-wearing protests like at Harvard, no "sex-positive" clubs promoting the female orgasm like at Yale, no mattress-hauling performance artists like at Columbia, and certainly no SlutWalks. UVA isn't an edgy or progressive campus by any stretch. The pinnacle of its polite activism is its annual Take Back the Night vigil, which on this campus of 21,000 students attracts an audience of less than 500 souls. But the dearth of attention isn't because rape doesn't happen in Charlottesville. It's because at UVA, rapes are kept quiet, both by students - who brush off sexual assaults as regrettable but inevitable casualties of their cherished party culture – and by an administration that critics say is less concerned with protecting students than it is with protecting its own reputation from scandal. Some UVA women, so sickened by the university's culture of hidden sexual violence, have taken to calling it "UVrApe."

"University of Virginia thinks they're above the law," says UVA grad and victims-rights advocate Liz Seccuro. "They go to such lengths to protect themselves. There's a national conversation about sexual assault, but nothing at UVA is changing."

Liz Seccuro with her husband, Mike in front of the Charlottesville District Court in Charlottesville, Va., Thursday, March 15th, 2007. (Photo: Steve Helber/AP)

S. Daniel Carter, who as former director of public policy for the advocacy group Clery Center for Security on Campus is a national expert on college safety, points out that UVA's sexual assault problems are not much worse than other schools; if anything, he says, the depressing reality is that UVA's situation is likely the norm. Decades of awareness programming haven't budged the prevalence of campus rape: One in five women is sexually assaulted in college, though only about 12 percent report it to police. Spurred by a wave of activism, the Obama administration has stepped up pressure on colleges, announcing Title IX investigations of 86 schools suspected of denying students their equal right to education by inadequately handling sexual-violence complaints; if found in violation, each school runs the risk of financial penalties, including the nuclear option (which has never been deployed) of having its federal funding revoked.

The University of Virginia is one of the 86 schools now under federal investigation, but it has more reason to worry than most of its peers. Because, unlike most schools under scrutiny, where complaints are at issue, UVA is one of only 12 schools under a sweeping investigation known as "compliance review": a proactive probe launched by the Department of Education's Office of Civil Rights itself, triggered by concerns about deep-rooted issues. "They are targeted efforts to go after very serious concerns," says Office of Civil Rights assistant secretary Catherine Lhamon. "We don't open compliance reviews unless we have something that we think merits it."

UVA says it has been complying fully with the investigation. But Carter notes that UVA and other elite schools tend not to respond well to criticism and sanctify tradition above all else. "That's common to more prestigious institutions," Carter says.

Prestige is at the core of UVA's identity. Although a public school, its grounds of red-brick, white-columned buildings designed by founder Thomas Jefferson radiate old-money privilege, footnoted by the graffiti of UVA's many secret societies, whose insignias are neatly painted everywhere. At $10,000 a year, in-state tuition is a quarter the cost of the Ivies, but UVA tends to attract affluent students, and through aggressive fundraising boasts an endowment of $5 billion, on par with Cornell. "Wealthy parents are the norm," says former UVA dean John Foubert. On top of all that, UVA enjoys a reputation as one of the best schools in the country, not to mention a campus so brimming with fun that in 2012 – the year of Jackie's rape – *Playboy* crowned it the nation's number-one party school. Students hold themselves up to that standard: studious by day, wild by night. "The most impressive person at UVA is the person who gets straight A's *and* goes to all the parties," explains fourth-year student Brian Head. Partying traditions fuse the decorum of the Southern aristocracy with binge drinking: At Cavalier football tailgates, the dress code is "girls in pearls, guys in ties" while students guzzle handles of vodka. Not for nothing is a UVA student nicknamed a Wahoo, as undergrads like to explain; though derived from a long-ago yell from Cavalier fans, a wahoo is also a fish that can drink twice its own body weight.

University of Virginia campus (Photo: Lance King/Getty)

Wahoos are enthralled to be at UVA and can't wait to tell you the reasons why, beginning, surprisingly, with Thomas Jefferson, whose lore is so powerfully woven into everyday UVA life that you practically expect to glimpse the man still walking the grounds in his waistcoat and pantaloons. Nearly every student I interviewed found a way to mention "TJ," speaking with zeal about their founding father's vision for an "academical village" in the idyllic setting of the Blue Ridge Mountains. They burble about UVA's honor code, a solemn pledge not to lie, cheat or steal; students are expected to snitch on violators, who are expelled. UVA's emphasis on honor is so pronounced that since 1998, 183 people have been expelled for honor-code violations such as cheating on exams. And yet paradoxically, not a single student at UVA has ever been expelled for sexual assault.

"Think about it," says Susan Russell, whose UVA daughter's sexual-assault report helped trigger a previous federal investigation. "In what world do you get kicked out for cheating, but if you rape someone, you can stay?"

Attorney Wendy Murphy, who has filed Title IX complaints and lawsuits against schools including UVA, argues that in matters of sexual violence, Ivy League and Division I schools' fixation with prestige is their downfall. "These schools love to pretend they protect the children as if they were their own, but that's not true: They're interested in money," Murphy says. "In these situations, the one who gets the most protection is either a wealthy kid, a legacy kid or an athlete. The more privileged he is, the more likely the woman has to die before he's held accountable." Indeed, UVA is the same campus where the volatile relationship of lacrosse star George Huguely V and his girlfriend Yeardley Love was seen as unremarkable – his jealous rages, fanned by over-the-top drinking – until the 2010 day he kicked open her door and beat her to death.

UVA president Teresa Sullivan denies the administration sweeps sexual assault under the rug. "If we're trying to hide the issue, we're not doing a very good job of it," she says, noting that this past February UVA hosted the first-ever sexual-assault summit for college administrators. It's true that recently, while under close government scrutiny, the school has made some encouraging changes, including designating most UVA authority figures as mandatory reporters of sexual assault and teaming up with student activists to create a bystander-intervention campaign. Students praise UVA's deans as caring folks who answer late-night calls from victims and even make emergency-room visits.

University of Virginia President Teresa Sullivan (Photo: AP)

And yet the UVA public-relations team seemed unenthused about this article, canceling my interview with the head of UVA's Sexual Misconduct Board, and forbidding other administrators from cooperating; even students seemed infected by their anxiety about how members of the administration might appear. And when President Sullivan was at last made available for an interview, her most frequently invoked answer to my specific questions about sexual-assault handling at UVA – while two other UVA staffers sat in on the recorded call – was "I don't know."

All you girls from Mary Washington
and RMWC, never let a Cavalier an inch above your knee.
He'll take you to his fraternity house and fill you full of beer.
And soon you'll be the mother of a bastard Cavalier!
"Rugby Road"

Two weeks after Jackie's rape, she ran into Drew during her lifeguard shift at the UVA pool. "Hey, Jackie," Drew said, startling her. "Are you ignoring me?" She'd switched her shift in the hopes of never seeing him again. Since the Phi Kappa Psi party, she'd barely left her dorm room, fearful of glimpsing one of her attackers. Jackie stared at Drew, unable to speak. "I wanted to thank you for the other night," Drew said. "I had a great time."

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New Video: Kira Isabella Tackles Date Rape

Jackie left her shift early, saying she wasn't feeling well. Then she walked back to her dorm and crawled under the covers. She didn't go to classes for the rest of the week, and soon quit her lifeguarding job – the first time she could remember quitting anything. She would never again return to the Anthropology course she shared with one of her assailants. She was constantly on the edge of panic, plagued by flashbacks – and disgusted by her own naiveté. She obsessed over what easy prey she'd been, as the attention-starved freshman who for weeks drank up Drew's flirtations. "I still grapple with 'Did I do something that could have been construed as that's what I wanted?' " she says.

Before Jackie left for college, her parents – a Vietnam vet and retired military contractor, and a stay-at-home mom – had lectured her about avoiding the perils of the social scene, stressing the importance of her studies, since Jackie hoped to get into medical school. Jackie had a strained relationship with her father, in whose eyes she'd never felt good enough, and always responded by exceeding expectations – honor roll, swim team, first-chair violin – becoming

the role model for her two younger brothers. Jackie had been looking forward to college as an escape – a place to, even, defy her parents' wishes and go to a frat party. "And I guess they were right," she says bitterly.

She was having an especially difficult time figuring out how to process that awful night, because her small social circle seemed so underwhelmed. For the first month of school, Jackie had latched onto a crew of lighthearted social strivers, and her pals were now impatient for Jackie to rejoin the merriment. "You're still upset about that?" Andy asked one Friday night when Jackie was crying. Cindy, a self-declared hookup queen, said she didn't see why Jackie was so bent out of shape. "Why didn't you have fun with it?" Cindy asked. "A bunch of hot Phi Psi guys?" One of Jackie's friends told her, unconcerned, "Andy said you had a bad experience at a frat, and you've been a baby ever since."

"

"SOME OF MY HALLMATES WERE SKEPTICAL," SAYS ONE SURVIVOR OF RAPE. "THEY WERE SILENT AND AVOIDED ME AFTERWARDS. IT MADE ME DOUBT MYSELF."

That reaction of dismissal, downgrading and doubt is a common theme UVA rape survivors hear, including from women. "Some of my hallmates were skeptical," recalls recent grad Emily Renda, who says that weeks into her first year she was raped after a party. "They were silent and avoided me afterwards. It made me doubt myself." Other students encounter more overt hostility, as when a first-year student confided her assault to a friend. "She said she thought I was just looking for attention," says the undergrad. Shrugging off a rape or pointing fingers at the victim can be a self-protective maneuver for women, a form of wishful thinking to reassure themselves *they* could never be so vulnerable to violence. For men, skepticism is a form of self-protection too. For much of their lives, they've looked forward to the hedonistic fun of college, bearing every expectation of booze and no-strings sex. A rape heralds the uncomfortable idea that all that harmless mayhem may not be so harmless after all. Easier, then, to assume the girl is lying, even though studies indicate that false rape reports account for, at most, eight percent of reports.

Emily Renda (Photo: Courtesy of Emily Renda)

And so at UVA, where social status is paramount, outing oneself as a rape victim can be a form of social suicide. "I don't know many people who are engrossed in the party scene and have spoken out about their sexual assaults," says third-year student Sara Surface. After all, no one climbs the social ladder only to cast themselves back down. Emily

Renda, for one, quickly figured out that few classmates were sympathetic to her plight, and instead channeled her despair into hard partying. "My drinking didn't stand out," says Renda, who often ended her nights passed out on a bathroom floor. "It does make you wonder how many others are doing what I did: drinking to self-medicate."

By the middle of her first semester, Jackie's alarm would ring and ring in her dorm room until one of her five suitemates would pad down the hall to turn it off. Jackie would barely stir in her bed. "That was when we realized she was even there," remembers suitemate Rachel Soltis. "At the beginning of the year, she seemed like a normal, happy girl, always with friends. Then her door was closed all the time. We just figured she was out." Long since abandoned by her original crew, Jackie had slept through half a semester's worth of classes and had bought a length of rope with which to hang herself. Instead, as the semester crawled to an end, she called her mother. "Come and get me," Jackie told her, crying. "I need your help."

The first weeks of freshman year are when students are most vulnerable to sexual assault. Spend a Friday night in mid-September walking along Rugby Road at UVA, and you can begin to see why. Hundreds of women in crop tops and men in khaki shorts stagger between handsome fraternity houses, against a call-and-response soundtrack of "Whoo!" and breaking glass. "Do you know where Delta Sig is?" a girl slurs, sloshed. Behind her, one of her dozen or so friends stumbles into the street, sending a beer bottle shattering. ("Whoo!" calls a far-away voice.)

"These are all first-years," narrates one of my small group of upperclasswomen guides. We walk the curving length of tree-lined Rugby Road as they explain the scene. The women rattle off which one is known as the "roofie frat," where supposedly four girls have been drugged and raped, and at which house a friend had a recent "bad experience," the Wahoo euphemism for sexual assault. Studies have shown that fraternity men are three times as likely to commit rape, and a spate of recent high-profile cases illustrates the dangers that can lurk at frat parties, like a University of Wisconsin-Milwaukee frat accused of using color-coded hand stamps as a signal to roofie their guests, and this fall's suspension of Brown University's chapter of Phi Kappa Psi – of all fraternities – after a partygoer tested positive for the date-rape drug GHB. Presumably, the UVA freshmen wobbling around us are oblivious to any specific hazards along Rugby Road; having just arrived on campus, they can hardly tell one fraternity from another. As we pass another frat house, one of my guides offers, "I know a girl who got assaulted there."

Phi Kappa Psi House

"I do too!" says her friend in mock-excitement. "That makes two! Yay!"

Frats are often the sole option for an underage drinker looking to party, since bars are off-limits, sororities are dry and first-year students don't get many invites to apartment soirees. Instead, the kids crowd the walkways of the big, anonymous frat houses, vying for entry. "Hot girls who are drunk always get in – it's a good idea to act drunker than you really are," says third-year Alexandria Pinkleton, expertly clad in the UVA-after-dark uniform of a midriff-baring sleeveless top and shorts. "Also? You have to seem very innocent and vulnerable. That's why they love first-year girls."

Once successfully inside the frat house, women play the role of grateful guests in unfamiliar territory where men control the variables. In dark, loud basements, girls accept drinks, are pulled onto dance floors to be ground and

groped and, later, often having lost sight of their friends, led into bathrooms or up the stairs for privacy. Most of that hooking up is consensual. But against that backdrop, as psychologist David Lisak discovered, lurk undetected predators. Lisak's 2002 groundbreaking study of more than 1,800 college men found that roughly nine out of 10 rapes are committed by serial offenders, who are responsible for an astonishing average of six rapes each. None of the offenders in Lisak's study had ever been reported. Lisak's findings upended general presumptions about campus sexual assault: It implied that most incidents are not bumbling, he-said-she-said miscommunications, but rather deliberate crimes by serial sex offenders.

In his study, Lisak's subjects described the ways in which they used the camouflage of college as fruitful rape-hunting grounds. They told Lisak they target freshmen for being the most naïve and the least-experienced drinkers. One offender described how his party-hearty friends would help incapacitate his victims: "We always had some kind of punch. . . . We'd make it with a real sweet juice. It was really powerful stuff. The girls wouldn't know what hit them." Presumably, the friends mixing the drinks did so without realizing the offender's plot, just as when they probably high -fived him the next morning, they didn't realize the behavior they'd just endorsed. That's because the serial rapist's behavior can look ordinary at college. "They're not acting in a vacuum," observes Lisak of predators. "They're echoing that message and that culture that's around them: the objectification and degradation of women."

One need only glance around at some recent college hijinks to see spectacular examples of the way the abasement of women has broken through to no-holds-barred misogyny: a Dartmouth student's how-to-rape guide posted online this past January; Yale pledges chanting "No means yes! Yes means anal!" And despite its air of mannered civility, UVA has been in on the naughty fun for at least 70 years with its jolly fight song "Rugby Road," which celebrates the sexual triumphs of UVA fraternity men, named for the very same street where my guides and I are now enveloped in a thickening crowd of wasted first-years. Through the decades, the song has expanded to 35 verses, with the more recent, student-penned stanzas shedding the song's winking tone in favor of something more jarringly explicit:

A hundred Delta Gammas, a thousand AZDs
Ten thousand Pi Phi bitches who get down on their knees
But the ones that we hold true, the ones that we hold dear
Are the ones who stay up late at night, and take it in the rear.

In 2010, "Rugby Road" was banned from football games – despite a petition calling it "an integral part" of UVA culture. But Wahoos fearing the loss of tradition can take heart that "Rugby Road" verses are still performed on campus by UVA's oldest a cappella group, the Virginia Gentlemen.

At the end of her freshman year, Jackie found herself in the Peabody Hall office of Dean Nicole Eramo, head of UVA's Sexual Misconduct Board. This was a big step for Jackie. She still hadn't even managed to tell her own mother exactly what had happened at Phi Kappa Psi. Upon returning to school for her second semester, Jackie had tried to put on a brave face and simply move forward, but instead continued falling apart. Though a psychiatrist had put Jackie on Wellbutrin, she had remained depressed, couldn't concentrate, and spent the semester so frightened and withdrawn that her academic dean finally called her in to discuss why she'd failed three classes. In his office, with her mother beside her, she'd burst into tears, and her mother explained she'd had a "bad experience" at a party. He'd blanched and given Jackie the e-mail for Dean Eramo.

If Dean Eramo was surprised at Jackie's story of gang rape, it didn't show. A short woman with curly dark hair and a no-nonsense demeanor, Eramo surely has among the most difficult jobs at UVA. As the intake person on behalf of the university for all sexual-assault complaints since 2006, it's her job to deal with a parade of sobbing students trekking in and out of her office. (UVA declined to make Eramo available for comment.) A UVA alum herself, Eramo is beloved by survivors, who consider her a friend and confidante – even though, as only a few students are aware, her office isn't a confidential space at all. Each time a new complaint comes through Eramo's office, it activates a review by UVA's Title IX officer, is included in UVA's tally of federally mandated Clery Act crime statistics, and Eramo may, at her discretion, reveal details of her conversation with the student to other administrators. (Jackie was mortified to learn later that Eramo had shared her identity with another UVA administrator.) After all, a dean's foremost priority is the overall safety of the campus.

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JACKIE SAYS WHEN SHE ASKED WHY UVA'S RAPE STATS WERE HARD TO FIND, THE DEAN SAID,

"BECAUSE NOBODY WANTS TO SEND THEIR DAUGHTER TO THE RAPE SCHOOL."

When Jackie finished talking, Eramo comforted her, then calmly laid out her options. If Jackie wished, she could file a criminal complaint with police. Or, if Jackie preferred to keep the matter within the university, she had two choices. She could file a complaint with the school's Sexual Misconduct Board, to be decided in a "formal resolution" with a jury of students and faculty, and a dean as judge. Or Jackie could choose an "informal resolution," in which Jackie could simply face her attackers in Eramo's presence and tell them how she felt; Eramo could then issue a directive to the men, such as suggesting counseling. Eramo presented each option to Jackie neutrally, giving each equal weight. She assured Jackie there was no pressure – whatever happened next was entirely her choice.

Like many schools, UVA has taken to emphasizing that in matters of sexual assault, it caters to victim choice. "If students feel that we are forcing them into a criminal or disciplinary process that they don't want to be part of, frankly, we'd be concerned that we would get fewer reports," says associate VP for student affairs Susan Davis. Which in theory makes sense: Being forced into an unwanted choice is a sensitive point for the victims. But in practice, that utter lack of guidance can be counterproductive to a 19-year-old so traumatized as Jackie was that she was contemplating suicide. Setting aside for a moment the absurdity of a school offering to handle the investigation and adjudication of a felony sex crime – something Title IX requires, but which *no* university on Earth is equipped to do – the sheer menu of choices, paired with the reassurance that any choice is the right one, often has the end result of coddling the victim into doing nothing.

"This is an alarming trend that I'm seeing on campuses," says Laura Dunn of the advocacy group SurvJustice. "Schools are assigning people to victims who are pretending, or even thinking, they're on the victim's side, when they're actually discouraging and silencing them. Advocates who survivors *love* are part of the system that is failing to address sexual violence."

Phi Kappa Psi House (Photo: Illustration by John Ritter)

Absent much guidance, Jackie would eventually wonder how other student victims handled her situation. But when she clicked around on UVA's website, she found no answers. All she found were the UVA police's crime logs, which the university makes available online, but are mostly a list of bike theft, vandalism and public-drunkenness complaints. That's because only a fraction of UVA students who report sex crimes turn to campus police. The rest go to Dean Eramo's office, to Charlottesville police or the county sheriff's office. Yet when RS asked UVA for its statistics, the press office repeatedly referred us to the UVA police crime logs. UVA parent Susan Russell believes that misdirection is deliberate. "When a parent goes to the campus crime log, and they don't see sexual assault, they think the school is

safe," Russell says, adding that her daughter's 2004 sexual assault once appeared in the log mislabeled "Suspicious Circumstances."

Eventually, UVA furnished *Rolling Stone* with some of its most recent tally: In the last academic year, 38 students went to Eramo about a sexual assault, up from about 20 students three years ago. However, of those 38, only nine resulted in "complaints"; the other 29 students evaporated. Of those nine complaints, four resulted in Sexual Misconduct Board hearings. UVA wasn't willing to disclose their outcomes, citing privacy. Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with "best practices" and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean Eramo the same question. She says Eramo answered wryly, "Because nobody wants to send their daughter to the rape school."

For now, however, Jackie left her first meeting with Eramo feeling better for having unburdened herself, and with the dean's assurance that nothing would be done without her say-so. Eramo e-mailed a follow-up note thanking Jackie for sharing, saying, "I could tell that was very difficult for you," and restating that while she respected Jackie's wish not to file a report, she'd be happy to assist "if you decide that you would like to hold these men accountable." In the meantime, having presumably judged there to be no threat to public safety, the UVA administration took no action to warn the campus that an allegation of gang rape had been made against an active fraternity.

All the first-year women are morally uptight.
They'll never do a single thing unless they know it's right.
But then they come to Rugby Road and soon they've seen the light.
And you never know how many men they'll bring home every night.
"Rugby Road"

You can trace UVA's cycle of sexual violence and institutional indifference back at least 30 years – and incredibly, the trail leads back to Phi Psi. In October 1984, Liz Seccuro was a 17-year-old virgin when she went to a party at the frat and was handed a mixed drink. "They called it the house special," she remembers. Things became spotty after Seccuro had a few sips. But etched in pain was a clear memory of a stranger raping her on a bed. She woke up wrapped in a bloody sheet; by rifling through the boy's mail before fleeing, she discovered his name was Will Beebe. Incredibly, 21 years later, Beebe wrote Seccuro a letter, saying he wanted to make amends as part of his 12-step program. Seccuro took the correspondence to Charlottesville police. And in the midst of the 2006 prosecution that followed, where Beebe would eventually plead guilty to aggravated sexual battery, investigators made a startling discovery: That while at Phi Psi that night, Seccuro had been assaulted not by one man, but by three. "I had been gang-raped," says Seccuro, who detailed her ordeal in a 2011 memoir.

William N. Beebe out of the Charlottesville, Va. Juvenile and Domestic Relations Court on Tuesday, Jan. 17th, 2006. (Photo: Brady Wolfe/Daily Progress/AP)

That it took two decades for Seccuro to achieve some justice is even more disgraceful, since she reported her rape to the UVA administration after leaving the Phi Psi house on that 1984 morning. "I went to the dean covered in scabs

and with broken ribs," she remembers. "And he said, 'Do you think it was just regrettable sex?' " Seccuro wanted to call police, but she was incorrectly told Charlottesville police lacked jurisdiction over fraternity houses.

If Seccuro's story of administrative cover-up and apathy sounds outrageous, it's actually in keeping with the stories told by other UVA survivors. After one alumna was abducted from a dark, wooded section of campus and raped in 1993, she says she asked a UVA administrator for better lighting. "They told me it would ruin Jefferson's vision of what the university was supposed to look like," the alum says. "As if Thomas Jefferson even knew about electric lights!" In 2002 and 2004, two female students, including Susan Russell's daughter, were unhappy with their sexual-misconduct hearings, which each felt didn't hold their alleged perpetrators accountable – and each was admonished by UVA administrators to never speak publicly about the proceedings or else they could face expulsion for violating the honor code. For issuing that directive, in 2008 UVA was found in violation of the Clery Act.

"UVA is more egregious than most," says John Foubert, a UVA dean from 1998 to 2002, and founder of the national male sex-assault peer education group One in Four. "I've worked for five or six colleges, and the stuff I saw happen during my time there definitely stands out." For example, Foubert recalls, in one rare case in which the university applied a harsh penalty, an undergrad was suspended after stalking five students. Heated discussion ensued over whether the boy should be allowed back after his suspension. Though the counseling center wanted him to stay gone, Foubert says, the then-dean of students argued in favor of his return, saying, "We can pick our lawsuit from a potential sixth victim, or from him, for denying him access to an education."

The few stories leaking out of UVA's present-day justice system aren't much better. One student, whose Title IX complaint against UVA is currently under investigation by the Office of Civil Rights, said that in December 2011, another student raped her while she was blackout drunk, possibly drugged. As she wrote in a student publication, evidence emerged that the man had previously been accused of drugging others, but the information was rejected as "prejudicial." The Sexual Misconduct Board told the young woman it found her "compelling and believable," but found the man not guilty. "I had never felt so betrayed and let down in my life," wrote the woman. "They said that they believed me. They said that UVA was my home and that it loved me. Yet, how could they believe me and let him go completely unpunished?"

Rolling Stone has discovered that this past spring a UVA first-year student, whom we'll call Stacy, filed a report stating that while vomiting up too much whiskey into a male friend's toilet one night, he groped her, plunged his hands down her sweatpants and then, after carrying her semi-conscious to his bed, digitally penetrated her. When the Charlottesville DA's office declined to file charges, she says, Stacy asked for a hearing with the Sexual Misconduct Board, and was surprised when UVA authority figures tried to talk her out of it. "My counselors, members of the Dean of Students office, everyone said the trial process would be way too hard on me," says Stacy. "They were like, 'You need to focus on your healing.' " Stacy insisted upon moving forward anyway, even when the wealthy family of the accused kicked up a fuss. "They threatened to sue deans individually, they threatened to sue me," she recalls. But Stacy remained stalwart, because she had additional motivation: She'd been shaken to discover two other women with stories of assault by the same man. "One was *days* after mine, at a rush function at his frat house," says Stacy. "So I was like, 'I have to do something before someone else is hurt.' " Her determination redoubled after the Dean of Students office informed her that multiple assaults by a student would be grounds for his expulsion – a mantra that Eramo repeated at a Take Back the Night event in April.

> "JACKIE CAME ACROSS SOMETHING DISTURBING: TWO OTHER YOUNG WOMEN CONFIDED THAT THEY, TOO, HAD BEEN VICTIMS OF PHI KAPPA PSI GANG RAPES.

Bearing her deans' words in mind, at her nine-hour formal hearing in June, Stacy took pains to present not only her own case, but also the other two allegations, submitting witness statements that were allowed in as "pattern evidence." The board pronounced the man guilty for sexual misconduct against Stacy, making him only the 14th guilty person in UVA's history. Stacy was relieved at the verdict. "I was like, 'He's gone!' 'Cause he's a multiple assailant, I'd been told

so many times that that was grounds for expulsion!" So she was stunned when she learned his actual penalty: a one-year suspension. (Citing privacy laws, UVA would not comment on this or any case.)

Turns out, when UVA personnel speak of expulsion for "multiple assaults," they mean multiple complaints that are filed with the Sexual Misconduct Board, and then adjudicated guilty. Under that more precise definition, the two other cases introduced in Stacy's case didn't count toward his penalty. Stacy feels offended by the outcome and misled by the deans. "After two rapes and an assault, to let him back on grounds is an insult to the honor system that UVA brags about," she says. "UVA doesn't want to expel. They were too afraid of getting negative publicity or the pants sued
off them."

She's a helluva twat from Agnes Scott, she'll fuck for 50 cents.
She'll lay her ass upon the grass, her panties on the fence.
You supply the liquor, and she'll supply the lay.
And if you can't get it up, you sunuva bitch, you're not from UVA.
"Rugby Road"

When did it happen to you?" Emily Renda asked Jackie as they sat for coffee at the outdoor Downtown Mall in the fall of 2013.

"September 28th," Jackie whispered.

"October 7th, 2010," Emily responded, not breaking her gaze, and Jackie knew she'd found a friend. As Jackie had begun her second year at UVA, she'd continued struggling. Dean Eramo had connected her with Emily, a fourth-year who'd become active in One Less, a student-run sexual-assault education organization that doubles as a support group. Sitting with Emily, Jackie poured out her story, wiping her eyes with napkins as she confided to Emily that she felt like a broken person. "You're not broken," Emily told her. "*They're* the ones who are fucked up, and what happened to you wasn't your fault." Jackie was flooded with gratitude, desperate to hear those words at last – and from someone who knew. Emily invited her to a meeting of One Less, thus introducing her to UVA's true secret society.

Photo: Illustration by John Ritter; Photo of Nicole Eramo in Illustration by Jenna Truong, Cavalier Daily

In its weekly meetings, the 45-member group would discuss how to foster dialogue on campus. Afterward they'd splinter off and share stories of sexual assault, each tale different and yet very much the same. Many took place on tipsy nights with men who refused to stop; some were of sex while blackout drunk; rarer stories involved violence, though none so extreme as Jackie's. But no matter the circumstances, their peers' reactions were largely the same: Assaults were brushed off, with attackers defended ("He'd never do anything like that"), the victim questioned ("Are you sure?"). After feeling isolated for more than a year, Jackie was astonished at how much she and this sisterhood

had in common, including the fact that a surprising number hadn't pursued any form of complaint. Although many had contacted Dean Eramo, whom they laud as their best advocate and den mother – Jackie repeatedly calls her "an asset to the community" – few ever filed reports with UVA or with police. Instead, basking in the safety of one another's company, the members of One Less applauded the brave few who chose to take action, but mostly affirmed each other's choices not to report, in an echo of their university's approach. So profound was the students' faith in its administration that although they were appalled by Jackie's story, no one voiced questions about UVA's strategy of doing nothing to warn the campus of gang-rape allegations against a fraternity that still held parties and was rushing a new pledge class.

Some of these women are disturbed by the contradiction. "It's easy to cover up a rape at a university if no one is reporting," admits Jackie's friend Alex Pinkleton. And privately, some of Jackie's confidantes were outraged. "The university ignores the problem to make itself look better," says recent grad Rachel Soltis, Jackie's former roommate. "They should have done something in Jackie's case. Me and several other people know exactly who did this to her. But they want to protect even the people who are doing these horrible things."

But no such doubts shadowed the meetings of One Less, which was fine by Jackie. One Less held seminars for student groups on bystander intervention and how to be supportive of survivors. Jackie dove into her new roles as peer adviser and Take Back the Night committee member and began to discover just how wide her secret UVA survivor network was – because the more she shared her story, the more girls sought her out, waylaying her after presentations or after classes, even calling in the middle of the night with a crisis. Jackie has been approached by so many survivors that she wonders whether the one-in-five statistic may not apply in Charlottesville. "I feel like it's one in three at UVA," she says.

But payback for being so public on a campus accustomed to silence was swift. This past spring, in separate incidents, both Emily Renda and Jackie were harassed outside bars on the Corner by men who recognized them from presentations and called them "cunt" and "feminazi bitch." One flung a bottle at Jackie that broke on the side of her face, leaving a blood-red bruise around her eye.

She e-mailed Eramo so they could discuss the attack – and discuss another matter, too, which was troubling Jackie a great deal. Through her ever expanding network, Jackie had come across something deeply disturbing: two other young women who, she says, confided that they, too, had recently been Phi Kappa Psi gang-rape victims.

A bruise still mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS.)

As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror. For months, Jackie had been assuaging her despair by throwing herself into peer education, but there was no denying her helplessness when she thought about Phi Psi, or about her own alleged assailants still walking the grounds. She'd recently been aghast to bump into Drew, who greeted her with friendly nonchalance. "For a whole year, I thought about how he had ruined my life, and how he is the worst human being ever," Jackie says. "And then I saw him and I couldn't say anything."

"You look different," Drew told Jackie while she stared back at him in fear, and he was right: Since arriving at UVA, Jackie had gained 25 pounds from antidepressants and lack of exercise. That interaction would render her too depressed to leave her room for days. Of all her assailants, Drew was the one she wanted to see held accountable – but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood.

Given the swirl of gang-rape allegations Eramo had now heard against one of UVA's oldest and most powerful fraternities – founded in 1853, its distinguished chapter members have included President Woodrow Wilson – the school may have wondered about its responsibilities to the rest of the campus. Experts apprised of the situation by RS agreed that despite the absence of an official report, Jackie's passing along two other allegations should compel the school to take action out of regard for campus safety. "The fact that they already had that first victim, they should have been taking action," says SurvJustice's Laura Dunn. "That school could really be sued."

If the UVA administration was roiled by such concerns, however, it wasn't apparent this past September, as it hosted a trustees meeting. Two full hours had been set aside to discuss campus sexual assault, an amount of time that, as many around the conference table pointed out, underscored the depth of UVA's commitment. Those two hours, however, were devoted entirely to upbeat explanations of UVA's new prevention and response strategies, and to self-

congratulations to UVA for being a "model" among schools in this arena. Only once did the room darken with concern, when a trustee in UVA colors – blue sport coat, orange bow tie – interrupted to ask, "Are we under any federal investigation with regard to sexual assault?"

Dean of students Allen Groves, in a blue suit and orange necktie of his own, swooped in with a smooth answer. He affirmed that while like many of its peers UVA was under investigation, it was merely a "standard compliance review." He mentioned that a student's complaint from the 2010-11 academic year had been folded into that "routine compliance review." Having downplayed the significance of a Title IX compliance review – which is neither routine nor standard – he then elaborated upon the lengths to which UVA has cooperated with the Office of Civil Rights' investigation, his tone and manner so reassuring that the room relaxed.

Told of the meeting, Office of Civil Rights' Catherine Lhamon calls Groves' mischaracterization "deliberate and irresponsible." "Nothing annoys me more than a school not taking seriously their review from the federal government about their civil rights obligations," she says.

Within days of the board meeting, having learned of Rolling Stone's probe into Jackie's story, UVA at last placed Phi Kappa Psi under investigation. Or rather, as President Sullivan carefully answered my question about allegations of gang rape at Phi Psi, "We do have a fraternity under investigation." Phi Kappa Psi national executive director Shawn Collinsworth says that UVA indeed notified him of sexual assault allegations; he immediately dispatched a representative to meet with the chapter. UVA chapter president Stephen Scipione recalls being only told of a vague, anonymous "fourth-hand" allegation of a sexual assault during a party. "We were not told that it was rape, but rather that something of a sexual nature took place," he wrote to RS in an e-mail. Either way, Collinsworth says, given the paucity of information, "we have no evidence to substantiate the alleged assaults."

"*Under investigation,*" President Sullivan insists when I ask her to elaborate on how the university is handling the case. "I don't know how else to spell that out for you." But Jackie may have gotten a glimpse into the extent of the investigation when, in the days following my visit to campus, she was called into Eramo's office, bringing along her friend Alex for moral support. According to both women, Eramo revealed that she'd learned "through the grapevine" that "all the boys involved have graduated." Both girls were mystified. Not only had Jackie just seen one of the boys riding his bike on grounds but, as Alex pointed out, "Doesn't that mean they're admitting something happened?" No warning has yet been issued to the campus.

With a pocketknife and pepper spray tucked into her handbag, and a rape whistle hanging from her key chain, Jackie is prepared for a Friday night at UVA. In a restaurant on the Corner, Jackie sips water through a straw as the first of the night's "Whoo!"s reverberate from the sidewalk outside. "It makes me really depressed, almost," says Jackie with a sad chuckle. "There's always gonna be another Friday night, and another fraternity party, and another girl."

Across the table, Alex sighs. "I know," she says. Bartenders and bouncers all along the Corner are wearing T-shirts advertising the new "Hoos Got Your Back" bystander-intervention campaign, which all seems very hopeful. But this week, the third week of September, has been a difficult one. Charlottesville police received their first sexual-assault report of the academic year; Jackie and Alex were also each approached by someone seeking help about an assault. And as this weekend progresses, things will get far worse at UVA: Two more sexual assaults will be reported to police, and, in every parent's worst fears come true, an 18-year-old student on her way to a party will vanish; her body will be discovered five weeks later.

Suspect Jesse Matthew Jr., a 32-year-old UVA hospital worker, will be charged with Hannah Graham's "abduction with intent to defile," and a chilling portrait will emerge of an alleged predator who got his start, a decade ago, as a campus rapist. Back in 2002, and again in 2003, Matthew was accused of sexual assault at two different Virginia colleges where he was enrolled, but was never prosecuted. In 2005, according to the new police indictment, Matthew sexually assaulted a 26-year-old and tried to kill her. DNA has also reportedly linked Matthew to the 2009 death of Virginia Tech student Morgan Harrington, who disappeared after a Metallica concert in Charlottesville. The grisly dossier of which Matthew has been accused underscores the premise that campus rape should be seen not through the schema of a dubious party foul, but as a violent crime – and that victims should be encouraged to come forward as an act of civic good that could potentially spare future victims.

Jackie is hoping she will get there someday. She badly wants to muster the courage to file criminal charges or even a civil case. But she's paralyzed. "It's like I'm in my own personal prison," she says. "I'm so terrified this is going to be the rest of my life." She still cries a lot, and she has been more frightened than usual to be alone or to walk in the dark. When Jackie talks about her assault, she fixates on the moment before Drew picked her up for their date: "I remember looking at the mirror and putting on mascara and being like, 'I feel really pretty,' " Jackie recalls. "I didn't know it would be the last time I wouldn't see an empty shell of a person."

know it would be the last time I wouldn't see an empty shell of a person.

Jackie tells me of a recurring nightmare she's been having, in which she's watching herself climb those Phi Kappa Psi stairs. She frantically calls to herself to stop, but knows it's too late: That in real life, she's already gone up those stairs and into that terrible room, and things will never be the same. It bothers Jackie to know that Drew and the rest get to walk away as if nothing happened, but that she still walks toward that room every night – and blames herself for it during the day.

"Everything bad in my life now is built around that one bad decision that I made," she says. "All because I went to that stupid party."

Rolling Stone

A Note to Our Readers

By Rolling Stone
December 5, 2014

Last month, *Rolling Stone* published a story entitled A Rape on Campus, which described a brutal gang rape of a woman named Jackie during a party at a University of Virginia fraternity house, the University's failure to respond to this alleged assault – and the school's troubling history of indifference to many other instances of alleged sexual assaults. The story generated worldwide headlines and much soul-searching at UVA. University president Teresa Sullivan promised a full investigation and also to examine the way the school investigates sexual assault allegations.

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Because of the sensitive nature of Jackie's story, we decided to honor her request not to contact the man who she claimed orchestrated the attack on her nor any of the men who she claimed participated in the attack for fear of retaliation against her. In the months Sabrina Rubin Erdely reported the story, Jackie said or did nothing that made her, or *Rolling Stone*'s editors and fact-checkers, question her credibility. Jackie's friends and rape activists on campus strongly supported her account. She had spoken of the assault in campus forums. We reached out to both the local branch and the national leadership of Phi Psi, the fraternity where Jackie said she was attacked. They responded that they couldn't confirm or deny her story but that they had questions about the evidence.

In the face of new information reported by the Washington Post and other news outlets, there now appear to be discrepancies in Jackie's account. The fraternity has issued a formal statement denying the assault and asserting that there was no "date function or formal event" on the night in question. Jackie herself is now unsure if the man she says lured her into the room where the rape occurred, identified in the story as "Drew," was a Phi Psi brother. According to the *Washington Post*, "Drew" actually belongs to a different fraternity and when contacted by the paper, he denied knowing Jackie. Jackie told *Rolling Stone* that after she was assaulted, she ran into "Drew" at a UVA pool where they both worked as lifeguards. In its statement, Phi Psi says none of its members worked at the pool in the fall of 2012. A friend of Jackie's (who we were told would not speak to *Rolling Stone*) told the *Washington Post* that he found Jackie that night a mile from the school's fraternities. She did not appear to be "physically injured at the time" but was shaken. She told him that that she had been forced to have oral sex with a group of men at a fraternity party, but he does not remember her identifying a specific house. Other friends of Jackie's told the *Washington Post* that they now have doubts about her narrative, but Jackie told the *Washington Post* that she firmly stands by the account she gave to Erdely.

We published the article with the firm belief that it was accurate. Given all of these reports, however, we have come to the conclusion that we were mistaken in honoring Jackie's request to not contact the alleged assaulters to get their account. In trying to be sensitive to the unfair shame and humiliation many women feel after a sexual assault, we made a judgment – the kind of judgment reporters and editors make every day. We should have not made this agreement with Jackie and we should have worked harder to convince her that the truth would have been better served by getting the other side of the story. These mistakes are on *Rolling Stone*, not on Jackie. We apologize to anyone who was affected by the story and we will continue to investigate the events of that evening.

Will Dana
Managing Editor

APPENDIX

CHALLENGED STATEMENTS IN THE ARTICLE

Statement #1: "Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began." Compl. ¶¶ 210, 225; Article at RS001070.

Statement #2: "Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago." Compl. ¶¶ 210, 225; Article at RS001072.

Statement #3: "Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'" Compl. ¶¶ 210, 225; Article at RS001077.

Statement #4: "A bruise still mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror. . . . Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it.

Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood." Compl. ¶¶ 210, 225; Article at RS001078.

Statement #5: "Given the swirl of gang-rape allegations Eramo had now heard against one of UVA's oldest and most powerful fraternities . . . the school may have wondered about its responsibilities to the rest of campus. Experts apprised of the situation by RS agreed that despite the absence of an official report, Jackie's passing along two other allegations should compel the school to take action out of regard for campus safety." Compl. ¶¶ 210, 225; Article at RS001078-79.

CHALLENGED STATEMENTS MADE POST-PUBLICATION

Brian Lehrer Show

Statement #6: "[Jackie] was kind of brushed off by her friends and by the administration.... And eventually, when she did report it to the administration, the administration did nothing about, they did nothing with the information. And they even continued to do nothing even when she eventually told them that she had become aware of two other women who were also gang raped at the same fraternity." Compl. ¶ 240, Ex. C.

Slate DoubleX Gabfest

Statement #7: "[Jackie] had eventually kind of mustered up the courage to tell the administration that she had been brutally gang raped, and that the University did nothing with this information and that they continued to do nothing even when she told them that she had become aware of two other women that were also gang raped at that fraternity." Compl. ¶ 255, Ex. D.

Statement #8: "It is incredibly extreme. I mean whether this was perpetrated by a serial rapist who has many victims — I mean it seems like no matter what, this is an incredibly messed up situation. But it was absolutely a violent crime and I think what was really telling was the idea

that — and this really underscores the entire article; is the student body and the administration doesn't really treat rape as a crime, as a violent crime.... Even in this case, right, exactly. Compl. ¶ 255, Ex. D.

Statement #9: "And this is why this case blew my mind, that Jackie's situation blew my mind; that even in a situation that was so extreme and so obviously within the realm of criminal, that they would seek to suppress something like this because that's really what they did. Not only did they not report it to police, but really I feel she was sort of discouraged from moving this forward." Compl. ¶ 255, Ex. D.

Statement #10: "She's particularly afraid of Drew who she's assigned a tremendous amount of power in her own mind.... So I think that the idea of [Jackie] facing him or them down in any way is really just emotionally crippling for her. She's having a hard time facing up to that, and I think that she needs a lot of support if she's going to get to the place where she can actually confront them. When she does actually run into some of her alleged assailants on campus sometimes, she recognizes them all. She can identify them all. When she sees them, just the sight of them, obviously it's a shock but it also tends to send her into a depression. So it just goes to show sort of the emotional toll something like this would take. I just think it would require a great deal of support for her to move forward into any of these options to resolve her case and that's something that's been completely absent. She really hasn't had any of that support from her friends, from the administration, nor from her family." Compl. ¶ 255, Ex. D.

Statement #11: "What I found is that UVA is a place where their culture is one of extreme loyalty, so I guess it shouldn't have surprised me that the community of survivors, they're totally devoted to the University, even as they're not very happy with the way that their cases are handled. They totally buy into the attitude that radiates from the administration that doing nothing is a fine option. You know, if you unburden yourself to the Dean and take care of your own mental health, then that's good enough. They created this support group, which is great for

them and they do activism, they do bystander support seminars, I mean intervention seminars and things like that which is great, but really what they're doing is affirming one another's choices not to report, which is, of course, an echo of their own administration's kind of ethos." Compl. ¶ 255, Ex. D.

December 1 *Washington Post* Story

Statement #12: "As I've already told you, the gang-rape scene that leads the story is the alarming account that Jackie — a person whom I found to be credible — told to me, told her friends, and importantly, what she told the UVA administration, which chose not to act on her allegations in any way — i.e., the overarching point of the article. THAT is the story: the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference." Compl. ¶ 270.

December 2 Press Statement

Statement #13: "The story we published was one woman's account of a sexual assault at a UVA fraternity in October 2012 — and the subsequent ordeal she experienced at the hands of University administrators in her attempts to work her way through the trauma of that evening. The indifference with which her complaint was met was, we discovered, sadly consistent with the experience of many other UVA women who have tried to report such assaults. Through our extensive reporting and fact-checking, we found Jackie to be entirely credible and courageous and we are proud to have given her disturbing story the attention it deserves." Compl. ¶ 285.

Columbia Journalism Review
(http://www.cjr.org/index.php)

Rolling Stone's investigation: 'A failure that was avoidable'

Read: How the authors conducted this report

(http://www.cjr.org/investigation/columbia_journalism_school_rolling_stone.php)

LAST JULY 8, SABRINA RUBIN ERDELY, a writer for *Rolling Stone*, telephoned Emily Renda, a rape survivor working on sexual assault issues as a staff member at the University of Virginia. Erdely said she was searching for a single, emblematic college rape case that would show "what it's like to be on campus now ... where not only is rape so prevalent but also that there's this pervasive culture of sexual harassment/rape culture," according to Erdely's notes of the conversation.

Renda told Erdely that many assaults take place during parties where "the goal is to get everyone blackout drunk." She continued, "There may be a much darker side of this" at some fraternities. "One girl I worked with closely alleged she was gang-raped in the fall, before rush, and the men who perpetrated it were young guys who were not yet members of the fraternity, and she remembers one of them saying to another ... 'C'mon man, don't you want to be a brother?'"

Renda added, "And obviously, maybe her memory of it isn't perfect."

Erdely's notes set down her reply: "I tell her that it's totally plausible."

Renda put the writer in touch with a rising junior at UVA who would soon be known to millions of *Rolling Stone* readers as "Jackie," a shortened version of her true first name. Erdely said later that when she first encountered Jackie, she felt the student "had this stamp of credibility" because a university employee had connected them. Earlier that summer, Renda had even appeared before a Senate committee and had made reference to Jackie's allegations during her testimony - another apparent sign of the case's seriousness.

"I'd definitely be interested in sharing my story," Jackie wrote in an email a few days later.

On July 14, Erdely phoned her. Jackie launched into a vivid account of a monstrous crime. She said, according to Erdely's notes, that in September 2012, early in her freshman year, a third-year student she knew as a fellow lifeguard at the university's

aquatic center had invited her to "my first fraternity party ever." After midnight, her date took her upstairs to a darkened bedroom. "I remember looking at the clock and it was 12:52 when we got into the room," she told Erdely. Her date shut the door behind them. Jackie continued, according to the writer's notes:

> *My eyes were adjusting to the dark. And I said his name and turned around. ... I heard voices and I started to scream and someone pummeled into me and told me to shut up. And that's when I tripped and fell against the coffee table and it smashed underneath me and this other boy, who was throwing his weight on top of me. Then one of them grabbed my shoulders. ... One of them put his hand over my mouth and I bit him - and he straight-up punched me in the face. ... One of them said, 'Grab its motherfucking leg.' As soon as they said it, I knew they were going to rape me.*

The rest of Jackie's account was equally precise and horrifying. The lifeguard coached seven boys as they raped her one by one. Erdely hung up the phone "sickened and shaken," she said. She remembered being "a bit incredulous" about the vividness of some of the details Jackie offered, such as the broken glass from the smashed table. Yet Jackie had been "confident, she was consistent." (Jackie declined to respond to questions for this report. Her lawyer said it "is in her best interest to remain silent at this time." The quotations attributed to Jackie here come from notes Erdely said she typed contemporaneously or from recorded interviews.) [Footnote 1]

Between July and October 2014, Erdely said, she interviewed Jackie seven more times. The writer was based in Philadelphia and had been reporting for *Rolling Stone* since 2008. She specialized in true-crime stories like "The Gangster Princess of Beverly Hills (http://www.rollingstone.com/culture/news/the-gangster-princess-of-beverly-hills-20120831)," about a high-living Korean model and self-styled Samsung heiress accused of transporting 7,000 pounds of marijuana. She had written about pedophile priests and sexual assault in the military. Will Dana, the magazine's managing editor, considered her "a very thorough and persnickety reporter who's able to navigate extremely difficult stories with a lot of different points of view."

Jackie proved to be a challenging source. At times, she did not respond to Erdely's calls, texts and emails. At two points, the reporter feared Jackie might withdraw her cooperation. Also, Jackie refused to provide Erdely the name of the lifeguard who had organized the attack on her. She said she was still afraid of him. That led to tense

exchanges between Erdely and Jackie, but the confrontation ended when *Rolling Stone*'s editors decided to go ahead without knowing the lifeguard's name or verifying his existence. After that concession, Jackie cooperated fully until publication.

It was the worst day of my professional life.

Erdely believed firmly that Jackie's account was reliable. So did her editors and the story's fact-checker, who spent more than four hours on the telephone with Jackie, reviewing every detail of her experience. "She wasn't just answering, 'Yes, yes, yes,' she was correcting me," the checker said. "She was describing the scene for me in a very vivid way. ... I did not have doubt." (*Rolling Stone* requested that the checker not be named because she did not have decision-making authority.)

Rolling Stone published "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" on Nov. 19, 2014. It caused a great sensation. "I was shocked to have a story that was going to go viral in this way," Erdely said. "My phone was ringing off the hook." The online story ultimately attracted more than 2.7 million views, more than any other feature not about a celebrity that the magazine had ever published.

A week after publication, on the day before Thanksgiving, Erdely spoke with Jackie by phone. "She thanked me many times," Erdely said. Jackie seemed "adrenaline-charged ... feeling really good."

Erdely chose this moment to revisit the mystery of the lifeguard who had lured Jackie and overseen her assault. Jackie's unwillingness to name him continued to bother Erdely. Apparently, the man was still dangerous and at large. "This is not going to be published," the writer said, as she recalled. "Can you just tell me?"

Jackie gave Erdely a name. But as the reporter typed, her fingers stopped. Jackie was unsure how to spell the lifeguard's last name. Jackie speculated aloud about possible variations.

"An alarm bell went off in my head," Erdely said. How could Jackie not know the exact name of someone she said had carried out such a terrible crime against her - a man she professed to fear deeply?

Over the next few days, worried about the integrity of her story, the reporter investigated the name Jackie had provided, but she was unable to confirm that he worked at the pool, was a member of the fraternity Jackie had identified or had other connections to Jackie or her description of her assault. She discussed her concerns with her editors. Her work faced new pressures. The writer Richard Bradley had published early if speculative doubts about the plausibility of Jackie's account. Writers at Slate had challenged Erdely's reporting during a podcast interview. She also learned that T. Rees Shapiro, a *Washington Post* reporter, was preparing a story based on interviews at the University of Virginia that would raise serious doubts about *Rolling Stone*'s reporting.

Late on Dec. 4, Jackie texted Erdely, and the writer called back. It was by now after midnight. "We proceeded to have a conversation that led me to have serious doubts," Erdely said.

She telephoned her principal editor on the story, Sean Woods, and said she had now lost confidence in the accuracy of her published description of Jackie's assault. Woods, who had been an editor at *Rolling Stone* since 2004, "was just stunned," he said. He "raced into the office" to help decide what to do next. Later that day, the magazine published an editor's note that effectively retracted *Rolling Stone*'s reporting on Jackie's allegations of gang rape at the University of Virginia. "It was the worst day of my professional life," Woods said.

Failure and Its Consequences

Rolling Stone's repudiation of the main narrative in "A Rape on Campus" is a story of journalistic failure that was avoidable. The failure encompassed reporting, editing, editorial supervision and fact-checking. The magazine set aside or rationalized as unnecessary essential practices of reporting that, if pursued, would likely have led the magazine's editors to reconsider publishing Jackie's narrative so prominently, if at all. The published story glossed over the gaps in the magazine's reporting by using pseudonyms and by failing to state where important information had come from.

In late March, after a four-month investigation, the Charlottesville, Va., police department said that it had "exhausted all investigative leads" and had concluded, "There is no substantive basis to support the account alleged in the *Rolling Stone* article." [Footnote 2]

The story's blowup comes as another shock to journalism's credibility amid head-swiveling change in the media industry. The particulars of *Rolling Stone*'s failure make clear the need for a revitalized consensus in newsrooms old and new about what best journalistic practices entail, at an operating-manual-level of detail.

As at other once-robust print magazines and newspapers, *Rolling Stone*'s editorial staff has shrunk in recent years as print advertising revenue has fallen and shifted online. The magazine's full-time editorial ranks, not including art or photo staff, have contracted by about 25 percent since 2008. Yet *Rolling Stone* continues to invest in professional fact-checkers and to fund time-consuming investigations like Erdely's. The magazine's records and interviews with participants show that the failure of "A Rape on Campus" was not due to a lack of resources. The problem was methodology, compounded by an environment where several journalists with decades of collective experience failed to surface and debate problems about their reporting or to heed the questions they did receive from a fact-checking colleague.

Erdely and her editors had hoped their investigation would sound an alarm about campus sexual assault and would challenge Virginia and other universities to do better. Instead, the magazine's failure may have spread the idea that many women invent rape allegations. (Social scientists analyzing crime records report that the rate of false rape allegations (http://www.icdv.idaho.gov/conference/handouts/False-Allegations.pdf) is 2 to 8 percent.) At the University of Virginia, "It's going to be more difficult now to engage some people ... because they have a preconceived notion that women lie about sexual assault," said Alex Pinkleton, a UVA student and rape survivor who was one of Erdely's sources.

There has been other collateral damage. "It's completely tarnished our reputation," said Stephen Scipione, the chapter president of Phi Kappa Psi, the fraternity Jackie named as the site of her alleged assault. "It's completely destroyed a semester of our lives, specifically mine. It's put us in the worst position possible in our community here, in front of our peers and in the classroom."

The university has also suffered. *Rolling Stone*'s account linked UVA's fraternity culture to a horrendous crime and portrayed the administration as neglectful. Some UVA administrators whose actions in and around Jackie's case were described in the story were depicted unflatteringly and, they say, falsely. Allen W. Groves, the University dean

of students, and Nicole Eramo, an assistant dean of students, separately wrote to the authors of this report that the story's account of their actions was inaccurate. [Footnote 3]

In retrospect, Dana, the managing editor, who has worked at *Rolling Stone* since 1996, said the story's breakdown reflected both an "individual failure" and "procedural failure, an institutional failure. ... Every single person at every level of this thing had opportunities to pull the strings a little harder, to question things a little more deeply, and that was not done."

Rolling Stone Managing Editor Will Dana (left) and Reporter Sabrina Erdely (Twitter and LinkedIn)

Yet the editors and Erdely have concluded that their main fault was to be too accommodating of Jackie because she described herself as the survivor of a terrible sexual assault. Social scientists, psychologists and trauma specialists who support rape survivors have impressed upon journalists the need to respect the autonomy of victims, to avoid re-traumatizing them and to understand that rape survivors are as reliable in their testimony as other crime victims. These insights clearly influenced Erdely, Woods and Dana. "Ultimately, we were too deferential to our rape victim; we honored too many of her requests in our reporting," Woods said. "We should have been much tougher, and in not doing that, we maybe did her a disservice."

Erdely added: "If this story was going to be about Jackie, I can't think of many things that we would have been able to do differently. ... Maybe the discussion should not have been so much about how to accommodate her but should have been about whether she would be in this story at all." Erdely's reporting led her to other, adjudicated cases of rape at the university that could have illustrated her narrative, although none was as shocking and dramatic as Jackie's.

Yet the explanation that *Rolling Stone* failed because it deferred to a victim cannot adequately account for what went wrong. Erdely's reporting records and interviews with participants make clear that the magazine did not pursue important reporting paths even when Jackie had made no request that they refrain. The editors made judgments about attribution, fact-checking and verification that greatly increased their risks of error but had little or nothing to do with protecting Jackie's position.

It would be unfortunate if *Rolling Stone*'s failure were to deter journalists from taking on high-risk investigations of rape in which powerful individuals or institutions may wish to avoid scrutiny but where the facts may be underdeveloped. There is clearly a need for a more considered understanding and debate among journalists and others about the best practices for reporting on rape survivors, as well as on sexual assault allegations that have not been adjudicated. This report will suggest ways forward. It will also seek to clarify, however, why *Rolling Stone*'s failure with "A Rape on Campus" need not have happened, even accounting for the magazine's sensitivity to Jackie's position. That is mainly a story about reporting and editing.

'How Else Do You Suggest I Find It Out?'

By the time *Rolling Stone*'s editors assigned an article on campus sexual assault to Erdely in the spring of 2014, high-profile rape cases at Yale (http://www.huffingtonpost.com/2013/08/01/yale-sexual-assault-punishment_n_3690100.html), Harvard (http://www.motherjones.com/mojo/2014/04/harvard-sexual-assault-victim-letter-crimson), Columbia (http://www.cnn.com/2014/04/25/us/columbia-university-sexual-assault-complaint/), Vanderbilt (http://www.buzzfeed.com/bobbyallyn/an-ugly-rape-case-involving-vanderbilts-football-team-could#.vylQM8BPZ) and Florida State (http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html) had been in the headlines for

months. The Office of Civil Rights at the federal Department of Education was leaning on colleges to reassess and improve their policies. Across the country, college administrators had to adjust to stricter federal oversight as well as to a new generation of student activists, including women who declared openly that they had been raped at school and had not received justice.

There were numerous reports of campus assault that had been mishandled by universities. At Columbia, an aggrieved student dragged a mattress around campus to call attention to her account of assault and injustice. The facts in these cases were sometimes disputed, but they had generated a wave of campus activism. "My original idea," Dana said, was "to look at one of these cases and have the story be more about the process of what happens when an assault is reported and the sort of issues it brings up."

Jackie's story seemed a powerful candidate for such a narrative. Yet once she heard the story, Erdely struggled to decide how much she could independently verify the details Jackie provided without jeopardizing Jackie's cooperation. In the end, the reporter relied heavily on Jackie for help in getting access to corroborating evidence and interviews. Erdely asked Jackie for introductions to friends and family. She asked for text messages to confirm parts of Jackie's account, for records from Jackie's employment at the aquatic center and for health records. She even asked to examine the bloodstained red dress Jackie said she had worn on the night she said she was attacked.

Jackie gave the reporter some help. She provided emails from a pool supervisor as evidence of her employment there. She introduced Erdely to Rachel Soltis, a freshman-year suitemate. Soltis confirmed that in January 2013, four months after the alleged attack, Jackie had told her that she had been gang-raped.

Yet Jackie could also be hard to pin down. Other interviews Jackie said she would facilitate never materialized. "I felt frustrated, but I didn't think she didn't want to produce" corroboration, Erdely said. Eventually, Jackie told Erdely that her mother had thrown away the red dress. She also said that her mother would be willing to talk to Erdely, but the reporter said that when she called and left messages several times, the mother did not respond.

There were a number of ways that Erdely might have reported further, on her own, to verify what Jackie had told her. Jackie told the writer that one of her rapists had been part of a small discussion group in her anthropology class. Erdely might have tried to verify independently that there was such a group and to identify the young man Jackie described. She might have examined Phi Kappa Psi's social media for members she could interview and for evidence of a party on the night Jackie described. Erdely might have looked for students who worked at the aquatic center and sought out clues about the lifeguard Jackie had described. Any one of these and other similar reporting paths might have led to discoveries that would have caused *Rolling Stone* to reconsider its plans. But three failures of reporting effort stand out. They involve basic, even routine journalistic practice - not special investigative effort. And if these reporting pathways had been followed, *Rolling Stone* very likely would have avoided trouble.

Three friends and a 'shit show'

During their first interview, Jackie told Erdely that after she escaped the fraternity where seven men, egged on by her date, had raped her, she called three friends for help.

She described the two young men and one woman - now former friends, she told Erdely - as Ryan, Alex and Kathryn. She gave first names only, according to Erdely's notes. She said they met her in the early hours of Sept. 29, 2012, on the campus grounds. Jackie said she was "crying and crying" at first and that all she could communicate was that "something bad" had happened. She said her friends understood that she had been sexually assaulted. (In interviews for this report, Ryan and Alex said that Jackie told them that she had been forced to perform oral sex on multiple men.) In Jackie's account to Erdely, Ryan urged her to go to the university women's center or a hospital for treatment. But Alex and Kathryn worried that if she reported a rape, their social lives would be affected. "She's going to be the girl who cried 'rape' and we'll never be allowed into any frat party again," Jackie recalled Kathryn saying.

Jackie spoke of Ryan sympathetically, but the scene she painted for *Rolling Stone*'s writer was unflattering to all three former friends. Journalistic practice - and basic fairness - require that if a reporter intends to publish derogatory information about anyone, he or she should seek that person's side of the story.

Erdely said that while visiting UVA, she did ask Alex Pinkleton, a student and assault survivor, for help in identifying or contacting the three. (Pinkleton was not the "Alex" to whom Jackie referred in her account.) But Pinkleton said she would need to ask Jackie

for permission to assist the writer. Erdely did not follow up with her. It should have been possible for Erdely to identify the trio independently. Facebook friend listings might have shown the names. Or, Erdely could have asked other current students, besides Pinkleton, to help.

Instead, Erdely relied on Jackie. On July 29, she asked Jackie for help in speaking to Ryan, "about corroborating that night, just a second voice?" Jackie answered, according to the writer's notes, that while "Ryan may be awkward, I don't understand why he wouldn't." But Jackie did not respond to follow-up messages Erdely left.

On Sept. 11, Erdely traveled to Charlottesville and met Jackie in person for the first time, at a restaurant near the UVA campus. With her digital recorder running, the reporter again asked about speaking to Ryan. "I did talk to Ryan," Jackie disclosed. She said she had bumped into him and had asked if he would be interested in talking to *Rolling Stone*. Jackie went on to quote Ryan's incredulous reaction: "No! ... I'm in a fraternity here, Jackie, I don't want the Greek system to go down, and it seems like that's what you want to happen. ... I don't want to be a part of whatever little shit show you're running."

"Ryan is obviously out," Erdely told Jackie a little later.

Yet Jackie never requested - then or later - that *Rolling Stone* refrain from contacting Ryan, Kathryn or Alex independently. "I wouldn't say it was an obligation" to Jackie, Erdely said later. She worried, instead, that if "I work round Jackie, am I going to drive her from the process?" Jackie could be hard to get hold of, which made Erdely worry that her cooperation remained tentative. Yet Jackie never said that she would withdraw if Erdely sought out Ryan or conducted other independent reporting.

"They were always on my list of people" to track down, Erdely said of the three. However, she grew busy reporting on UVA's response to Jackie's case, she said. She doesn't remember having a distinct conversation about this issue with Woods, her editor. "We just kind of agreed. ... We just gotta leave it alone." Woods, however, recalled more than one conversation with Erdely about this. When Erdely said she had exhausted all the avenues for finding the friends, he said he agreed to let it go.

If Erdely had reached Ryan Duffin - his true name - he would have said that he had never told Jackie that he would not participate in *Rolling Stone*'s "shit show," Duffin said in an interview for this report. The entire conversation with Ryan that Jackie described

to Erdely "never happened," he said. Jackie had never tried to contact him about cooperating with *Rolling Stone*. He hadn't seen Jackie or communicated with her since the previous April, he said.

If Erdely had learned Ryan's account that Jackie had fabricated their conversation, she would have changed course immediately, to research other UVA rape cases free of such contradictions, she said later.

If Erdely had called Kathryn Hendley and Alex Stock - their true names - to check their sides of Jackie's account of Sept. 28 and 29, they would have denied saying any of the words Jackie attributed to them (as Ryan would have as well). They would have described for Erdely a history of communications with Jackie that would have left the reporter with many new questions. For example, the friends said that Jackie told them that her date on Sept. 28 was not a lifeguard but a student in her chemistry class named Haven Monahan. (The Charlottesville police said in March they could not identify a UVA student or any other person named Haven Monahan.) All three friends would have spoken to Erdely, they said, if they had been contacted.

The episode reaffirms a truism of reporting: Checking derogatory information with subjects is a matter of fairness, but it can also produce surprising new facts.

'Can you comment?'

Throughout her reporting, Erdely told Jackie and others that she wanted to publish the name of the fraternity where Jackie said she had been raped. Erdely felt Jackie "was secure" about the name of the fraternity: Phi Kappa Psi.

Last October, as she was finishing her story, Erdely emailed Stephen Scipione, Phi Kappa Psi's local chapter president. "I've become aware of allegations of gang rape that have been made against the UVA chapter of Phi Kappa Psi," Erdely wrote. "Can you comment on those allegations?"

It was a decidedly truncated version of the facts that Erdely believed she had in hand. She did not reveal Jackie's account of the date of the attack. She did not reveal that Jackie said Phi Kappa Psi had hosted a "date function" that night, that prospective pledges were present or that the man who allegedly orchestrated the attack was a Phi Kappa Psi member who was also a lifeguard at the university aquatic center. Jackie had made no request that she refrain from providing such details to the fraternity.

The university's administration had recently informed Phi Kappa Psi that it had received an account of a sexual assault at the fraternity that had reportedly taken place in September 2012. Erdely knew that the fraternity had received a briefing from UVA but did not know its specific contents. In fact, in this briefing, Scipione said in a recent interview, UVA provided a mid-September date as the night of the assault - not Sept. 28. And the briefing did not contain the details that Jackie had provided Erdely. The university said only that according to the account it had received, a freshman woman had been drinking at a party, had gone upstairs and had been forced to have oral sex with multiple men.

On Oct. 15, Scipione replied to Erdely's request for comment. He had learned, he wrote to her by email, "that an individual who remains unidentified had supposedly reported to someone who supposedly reported to the University that during a party there was a sexual assault." He added, "Even though this allegation is fourth hand and there are no details and no named accuser, the leadership and fraternity as a whole have taken this very seriously."

Erdely next telephoned Shawn Collinsworth, then Phi Kappa Psi's national executive director. Collinsworth volunteered a summary of what UVA had passed on to the fraternity's leaders: that there were allegations of "gang rape during Phi Psi parties" and that one assault "took place in September 2012."

Erdely asked him, according to her notes, "Can you comment?"

If Erdely had provided Scipione and Collinsworth the full details she possessed instead of asking simply for "comment," the fraternity might have investigated the facts she presented. After Rolling Stone published, Phi Kappa Psi said it did just that. Scipione said in an interview that a review of the fraternity's social media archives and bank records showed that the fraternity had held no date function or other party on the night Jackie said she was raped. A comparison of fraternity membership rolls with aquatic center employment records showed that it had no members who worked as lifeguards, Scipione added.

Erdely said Scipione had seemed "really vague," so she focused on getting a reply from Collinsworth. "I felt that I gave him a full opportunity to respond," she said. "I felt very strongly that he already knew what the allegations were because they'd been told by UVA." As it turned out, however, the version of the attack provided to Phi Kappa Psi was quite different from and less detailed than the one Jackie had provided to Erdely.

Scipione said that *Rolling Stone* did not provide the detailed information the fraternity required to respond properly to the allegations. "It was complete bullshit," he said. "They weren't telling me what they were going to write about. They weren't telling me any dates or details." Collinsworth said that he was also not provided the details of the attack that ultimately appeared in Rolling Stone.

There are cases where reporters may choose to withhold some details of what they plan to write while seeking verification for fear that the subject might "front run" by rushing out a favorably spun version pre-emptively. There are sophisticated journalistic subjects in politics and business that sometimes burn reporters in this way. Even so, it is risky for a journalist to withhold detailed derogatory information from any subject before publication. Here, there was no apparent need to fear "front-running" by Phi Kappa Psi.

Even if *Rolling Stone* did not trust Phi Kappa Psi's motivations, if it had given the fraternity a chance to review the allegations in detail, the factual discrepancies the fraternity would likely have reported might have led Erdely and her editors to try to verify Jackie's account more thoroughly.

The mystery of "Drew"

In her interviews, Jackie freely used a first name - but no last name - of the lifeguard she said had orchestrated her rape. On Sept. 16, for the first time, Erdely raised the possibility of tracking this man down.

"Any idea what he's up to now?" Erdely asked, according to her notes.

"No, I just know he's graduated. I've blocked him on Facebook," Jackie replied. "One of my friends looked him up - she wanted to see him so she could recognize and kill him," Jackie said, laughing. "I couldn't even look at his Facebook page."

"How would you feel if I reached out to him for a comment?" Erdely asked, the notes record.

"I'm not sure I would be comfortable with that."

That exchange inaugurated a six-week struggle between Erdely and Jackie. For a while, it seemed to Erdely as if the stalemate might lead Jackie to withdraw from cooperation altogether.

On Oct. 20, Erdely asked again for the man's last name. "I'm not going to use his name in the article, but I have to do my due diligence anyway," Erdely told Jackie, according to the writer's notes. "I imagine he's going to say nothing, but it's something I need to do."

"I don't want to give his last name," Jackie replied. "I don't even want to get him involved in this. ... He completely terrifies me. I've never been so scared of a person in my entire life, and I've never wanted to tell anybody his last name. ... I guess part of me was thinking that he'd never even know about the article."

"Of course he's going to know about the article," Erdely said. "He's going to read it. He probably knows about the article already."

Jackie sounded shocked, according to Erdely's notes. "I don't want to be the one to give you the name," Jackie said.

"How else do you suggest I find it out?"

"I guess you could ask Phi Psi for their list," Jackie suggested.

After this conversation, Jackie stopped responding to Erdely's calls and messages. "There was a point in which she disappeared for about two weeks," Erdely said, "and we became very concerned" about Jackie's well-being. "Her behavior seemed consistent with a victim of trauma."

Yet Jackie made no demand that *Rolling Stone* not try to identify the lifeguard independently. She even suggested a way to do so - by checking the fraternity's roster. Nor did she condition her participation in the story on Erdely agreeing not to try to identify the lifeguard.

Ultimately, we were too deferential to our rape victim; we honored too many of her requests in our reporting. We should have been much tougher, and in not doing that, we maybe did her a disservice.

Erdely did try to identify the man on her own. She asked Jackie's friends if they could help. They demurred. She searched online to see if the clues she had would produce a full name. This turned up nothing definitive. "She was very aggressive about contacting" the lifeguard, said Pinkleton, one of the students Erdely asked for assistance.

With the benefit of hindsight, to succeed, Erdely probably would have had to persuade students to access the aquatic center's employment records, to find possible name matches. That might have taken time and luck.

By October's end, with the story scheduled for closing in just two weeks, Jackie was still refusing to answer Erdely's texts and voicemails. Finally, on Nov. 3, after consulting with her editors, Erdely left a message for Jackie proposing to her a "solution" that would allow *Rolling Stone* to avoid contacting the lifeguard after all. The magazine would use a pseudonym; "Drew" was eventually chosen.

After Erdely left this capitulating voicemail, Jackie called back quickly. According to Erdely, she now chatted freely about the lifeguard, still without using his last name. From that point on, through the story's publication, Jackie cooperated.

In December, Jackie told *The Washington Post* in an interview that after several interviews with Erdely, she had asked to be removed from the story, but that Erdely had refused. Jackie told the Post she later agreed to participate on condition that she be allowed to fact-check parts of her story. Erdely said in an interview for this report that she was completely surprised by Jackie's statements to the Post and that Jackie never told her she wanted to withdraw from the story. There is no evidence of such an exchange between Jackie and Erdely in the materials Erdely submitted to *Rolling Stone*.

There was, in fact, an aquatic center lifeguard who had worked at the pool at the same time as Jackie and had the first name she had used freely with Erdely. He was not a member of Phi Kappa Psi, however. The police interviewed him and examined his personal records. They found no evidence to link him to Jackie's assault.

If *Rolling Stone* had located him and heard his response to Jackie's allegations, including the verifiable fact that he did not belong to Phi Kappa Psi, this might have led Erdely to reconsider her focus on that case. In any event, *Rolling Stone* stopped looking for him.

'What Are They Hiding?'

"A Rape on Campus" had ambitions beyond recounting one woman's assault. It was intended as an investigation of how colleges deal with sexual violence. The assignment was timely. The systems colleges have put in place to deal with sexual misconduct have come under intense scrutiny. These systems are works in progress, entangled in changing and sometimes contradictory federal rules that seek at once to keep students safe, hold perpetrators to account and protect every student's privacy.

The legal issues date to 1977, when five female students sued (http://www.leagle.com/decision/1980809631F2d178_1757.xml/ALEXANDER v. YALE UNIVERSITY) Yale University, arguing that they had been sexually harassed. The students invoked Title IX (http://www.titleix.info/Resources/News-Articles/40th-Anniversary-of-Title-IX-The-Next-Generation.aspx) of the Education Amendments of 1972, a federal law that bans gender discrimination in education. They lost their case, but their argument - that sexual harassment and violence on campus threatened women's access to education - prevailed over time. By the mid-1980s, hundreds of colleges had adopted procedures to manage sexual misconduct, from stalking to rape. If universities failed to do so adequately, they could lose federal funding.

In late 2009, the Center for Public Integrity began to publish a series of articles (http://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual Assault on Campus.pdf) that helped inspire even stricter federal guidelines. The articles bared problems with the first generation of campus response: botched investigations by untrained staff members; adjudication processes shrouded in secrecy; and sanctions so lacking that they sometimes allowed rapists, including repeat offenders, to remain on campus while their victims fled school.

The Obama administration took up the cause. It pressured colleges to adopt more rigorous systems, and it required a lower threshold of guilt to convict a student before school tribunals. The new pressure caused confusion, however, and, in some cases, charges of injustice. Last October, a group of Harvard Law School professors wrote that (http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html) its university's revised sexual misconduct policy was "jettisoning balance and fairness in the rush to appease certain federal administrative officials."

Erdely's choice of the University of Virginia as a case study was well timed. The week she visited campus, an 18-year-old UVA sophomore went missing (http://www.washingtonpost.com/local/education/for-hannah-grahams-family-nightmare-leaves-enduring-uncertainty-and-loss/2014/11/14/4849784a-6c2c-11e4-a31c-77759fc1eacc_story.html) and was later found to have been abducted and killed. The university had by then endured a number of highly visible sexual assault cases. The Department of Education's Office of Civil Rights had placed the school, along with 54 others, under a broad compliance review (http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations).

"The overarching point of the article," Erdely wrote in response to questions from *The Washington Post* last December, was not Jackie, but "the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

Erdely saw her reporting about UVA as an examination, she said in an interview for this report, of "the way colleges handle these types of things." Jackie "was just the most dramatic example."

'A chilling effect'

After she heard Jackie's shocking story, Erdely zeroed in on the obligation of universities under federal law to issue timely warnings when there is a "serious or continuing" threat to student safety. Erdely understood from Jackie that eight months after the alleged assault, she had reported to UVA about being gang-raped at the Phi Kappa Psi house on campus grounds, in what appeared to be a hazing ritual. The university, *Rolling Stone* reported in its published story, was remiss in not warning its students about this apparently predatory fraternity.

According to the Charlottesville police, Jackie did meet with assistant dean of students Nicole Eramo on May 20, 2013. During that meeting, Jackie described her assault differently than she did later for Erdely, the police said, declining to provide details. According to members of the UVA community knowledgeable about the case, who asked not to be identified in order to speak about confidential university matters, Jackie recounted to Eramo the same story she had told her friends on the night of Sept. 28: She was forced to have oral sex with several men while at a fraternity party. Jackie did not name the fraternity where the assault occurred or provide names or details about her

attackers, the sources said. No mention was made of hazing. (Citing student privacy and ongoing investigations, the UVA administration, through its communications office, declined to answer questions about the case.)

Over the years, the Department of Education has issued guidelines (http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf) that stress victim confidentiality and autonomy. This means survivors decide whether to report and what assistance they would like. "If she did not identify any individual or Greek organization by name, the university was very, very limited in what it can do," said S. Daniel Carter, a campus safety advocate and director of the nonprofit 32 National Campus Safety Initiative.

As *Rolling Stone* reported, at their May 2013 meeting, Eramo presented Jackie her options: reporting the assault to the police or to the university's Sexual Misconduct Board. The dean also offered counseling and other services. She checked with Jackie in succeeding weeks to see whether she wanted to take action. She introduced Jackie to One Less (https://atuva.student.virginia.edu/organization/oneless), a student group made up of sexual assault survivors and their advocates.

The university did not issue a warning at this point because Jackie did not file a formal complaint and her account did not include the names of assailants or a specific fraternity, according to the UVA sources. It also made no mention of hazing.

I guess maybe I was surprised that nobody said, 'Why haven't you called them?' But nobody did, and I wasn't going to press that issue.

Between that time and April 2014, the university received no further information about Jackie's case, according to the police and UVA sources.

On April 21, 2014, Jackie again met with Eramo, according to the police. She told the dean that she was now coming under pressure for her visible activism on campus with assault prevention groups such as Take Back the Night, according to the UVA sources. Three weeks earlier, she said, she had been hit in the face by a bottle thrown by hecklers outside a Charlottesville bar. She also added a new piece of information to her earlier account of the gang rape she had endured. She named Phi Kappa Psi as the fraternity

where the assault had taken place, the police said later. Moreover, she mentioned to Eramo two other students who she said had been raped at that fraternity. But she did not reveal the names of these women or any details about their assaults.

When there is credible information about multiple acts of sexual violence by the same perpetrator that may put students at risk, Department of Education guidelines indicate the university should take action even when no formal complaint has been filed. The school should also consider whether to issue a public safety warning. Once more, the University of Virginia did not issue a warning. Whether the administration should have done so, given the information it then possessed, is a question under review by the University of Virginia's governing Board of Visitors, aided by fact-finding and analysis by the law firm O'Melveny & Myers. (On March 30, UVA updated its sexual assault policy to include more clearly defined procedures for assessing threats and issuing timely warnings.)

The day after her meeting with the dean, Jackie met with Charlottesville and UVA police in a meeting arranged by Eramo. Jackie reported both the bottle-throwing incident and her assault at the Phi Kappa Psi house. The police later said that she declined to provide details about the gang rape because "[s]he feared retaliation from the fraternity if she followed through with a criminal investigation." The police also said they found significant discrepancies in Jackie's account of the day she said she was struck by the bottle.

That summer, Erdely began interviewing multiple UVA assault survivors. University officials still hoped that Jackie and the two other victims she had mentioned would file formal charges, the UVA sources said. Erdely knew this: On July 14, Emily Renda, who had graduated in May and taken a job in the university's student affairs office, told the reporter that it might be unwise for *Rolling Stone* to name Phi Kappa Psi in its story because "there are two other women who have not come forward fully yet, and we are trying to persuade them to get punitive action against the fraternity." Renda wrote later in an email for this report that she had tried to dissuade the writer "because of due process concerns and the way in which publicly accusing a fraternity might both prevent any future justice, but also infringe on their rights." Renda's warning to Erdely - a notice from a UVA employee that Phi Kappa Psi was under university scrutiny over allegations made by Jackie and two others - added to the impression that UVA regarded Jackie's narrative as reliable.

As it turned out, however, all of the information that the reporter, Renda and UVA possessed about the two other reported victims, in addition to Jackie, came only from Jackie. One of the women filed an anonymous report through the UVA online system - Jackie told Erdely she was there when the student pressed the "send" button - but neither of the women has been heard from since.

'I'm afraid it may look like we're trying to hide something'

In early September, Erdely asked to interview Eramo. The request created a dilemma for UVA. Universities must comply with a scaffold of federal laws (https://epic.org/privacy/student/) that limit what they can make public about their students. The most important of these is the Family Educational Rights and Privacy Act, or FERPA (http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html), which protects student privacy and can make it difficult for university staff members to release records or answer questions about any enrollee.

Eramo was willing to talk if she wasn't asked about specific cases, but about hypothetical situations, as Erdely had cleverly suggested as a way around student privacy limitations.

"Since [Erdely] was referred to me by the students she interviewed, I'm afraid it may look like we are trying to hide something for me not to speak with her," Eramo said in an email to the UVA communications staff, recently released in response to a Freedom of Information Act request.

The communications office endorsed the interview, but Vice President for Student Life Patricia Lampkin vetoed the idea. "This is not reflective of Nicole," she wrote in an email, "but of the issue and how reporters turn the issue." Asked to clarify that statement for this review, Lampkin said she felt that given FERPA restrictions, there was nothing Eramo could say in an interview that would give Erdely "a full and balanced view of the situation."

The distrust was mutual. "I had actually gone to campus thinking that they were going to be very helpful," Erdely said. Now she felt she was being stonewalled. Among other things, she said Jackie and Alex Pinkleton told her that after *Rolling Stone* started asking questions on campus, UVA administrators contacted Phi Kappa Psi for the first time about the allegations of sexual assault at the fraternity house.

To Erdely, UVA looked as if it was in damage control mode. "So I think that instead of being skeptical of Jackie," she said, "I became skeptical of UVA. ... What are they hiding and why are they acting this way?"

It is true that UVA did not get in touch with Phi Kappa Psi until Erdely showed up on campus. University sources offered an explanation. They said that administrators had contemplated suspending the fraternity's charter, but that would mean no university oversight over Phi Kappa Psi. They had also put off contacting the fraternity in the summer in the hope that Jackie and the other alleged victims would file charges. That hadn't happened, so they decided to act, even before Erdely started asking questions, these sources said. (At the time of the writing of this report, the university had released no documentary evidence to support the decision-making sequence these sources described.) In any event, there was reason for Rolling Stone to be skeptical. UVA's history of managing sexual misconduct is checkered, as Erdely illustrated in other cases she reported on.

On Oct. 2, Erdely interviewed UVA President Teresa Sullivan. The reporter asked probing questions that revealed the gap between the number of assault cases that the university reported publicly and the cases that had been brought to the university's attention internally. Erdely described the light sanctions imposed on students found guilty of sexual misconduct. She asked about allegations of gang rapes at Phi Kappa Psi. Sullivan said that a fraternity was under investigation but declined to comment further about specific cases.

Following the recent announcement by the Charlottesville police that they could find no basis for *Rolling Stone*'s account of Jackie's assault, Sullivan issued a statement. "The investigation confirms what federal privacy law prohibited the university from sharing last fall: That the university provided support and care to a student in need, including assistance in reporting potential criminal conduct to law enforcement," she said.

Erdely concluded that UVA had not done enough. "Having presumably judged there to be no threat," she wrote in her published story, UVA "took no action to warn the campus that an allegation of gang rape had been made against an active fraternity." Overall, she wrote, "rapes are kept quiet" at UVA in part because of "an administration that critics say is less concerned with protecting students than it is with protecting its own reputation from scandal."

During the six months she worked on the story, Erdely concentrated her reporting on the perspectives of victims of sexual violence at the University of Virginia and other campuses. She was moved by their experiences and their diverse frustrations. Her access to the perspectives of UVA administrators was much more limited, in part because some of them were not permitted to speak with her but also because Erdely came to see them as obstacles to her reporting.

In the view of some of Erdely's sources, the portrait she created was unfair and mistaken. "The university's response is not, 'We don't care,'" said Pinkleton, Jackie's confidante and a member of One Less. "When I reported my own assault, they immediately started giving me resources."

For her part, Eramo rejects the article's suggestion that UVA places its own reputation above protecting students. In an email provided by her lawyers, the dean wrote that the article falsely attributes to her statements she never made (to Jackie or otherwise) and that it "trivializes the complexities of providing trauma-informed support to survivors and the real difficulties inherent in balancing respect for the wishes of survivors while also providing for the safety of our communities."

"UVA does have plenty of room to grow in regard to prevention and response, as most if not all, colleges do," said Sara Surface, a junior who co-chairs UVA's Sexual Violence Prevention Coalition. She added, "The administrators and staff that work directly with and advocate for survivors are not more interested in the college's reputation over the well-being of its students."

The Editing: 'I Wish Somebody Had Pushed Me Harder'

Sean Woods, Erdely's primary editor, might have prevented the effective retraction of Jackie's account by pressing his writer to close the gaps in her reporting. He started his career in music journalism but had been editing complex reported features at *Rolling Stone* for years. Investigative reporters working on difficult, emotive or contentious stories often have blind spots. It is up to their editors to insist on more phone calls, more travel, more time, until the reporting is complete. Woods did not do enough.

Rolling Stone publisher Jann Wenner said he typically reads about half of the stories in each issue before publication. He read a draft of Erdely's narrative and found Jackie's case "extremely strong, powerful, provocative. ... I thought we had something really

good there." But Wenner leaves the detailed editorial supervision to managing editor Will Dana, who has been at the magazine for almost two decades. Dana might have looked more deeply into the story drafts he read, spotted the reporting gaps and insisted that they be fixed. He did not. "It's on me," Dana said. "I'm responsible."

In hindsight, the most consequential decision *Rolling Stone* made was to accept that Erdely had not contacted the three friends who spoke with Jackie on the night she said she was raped. That was the reporting path, if taken, that would have almost certainly led the magazine's editors to change plans.

Erdely said that as she was preparing to write her first draft, she talked with Woods about the three friends. "Sean advised me that for now we should just put this aside," she said. "He actually suggested that I change their names for now." Woods said that he intended this decision to be temporary, pending further reporting and review.

Erdely used pseudonyms in her first draft: "Randall," "Cindy" and "Andrew." She relied solely on Jackie's information and wrote vividly about how the three friends had reacted after finding Jackie shaken and weeping in the first hours of Sept. 29:

> *The group looked at each other in a panic. They all knew about Jackie's date that evening at Phi Kappa Psi, the house looming behind them. "We have got to get her to the hospital," Randall declared. The other two friends, however, weren't convinced. "Is that such a good idea?" countered Cindy. ... "Her reputation will be shot for the next four years." Andrew seconded the opinion. ... The three friends launched into a heated discussion about the social price of reporting Jackie's rape, while Jackie stood behind them, mute in her bloody dress.*

Erdely inserted a note in her draft, in bold type: "she says - all her POV" - to indicate to her editors that the dialogue had come only from Jackie.

"In retrospect, I wish somebody had pushed me harder" about reaching out to the three for their versions, Erdely said. "I guess maybe I was surprised that nobody said, 'Why haven't you called them?' But nobody did, and I wasn't going to press that issue." Of course, just because an editor does not ask a reporter to check derogatory information with a subject, that does not absolve the reporter of responsibility.

Woods remembered the sequence differently. After he read the first draft, he said, "I asked Sabrina to go reach" the three friends. "She said she couldn't. ... I did repeatedly ask, 'Can we reach these people? Can we?' And I was told no." He accepted this because "I felt we had enough." The documentary evidence provided by *Rolling Stone* sheds no light on whose recollection — Erdely's or Wood's - is correct.

Woods said he ultimately approved pseudonyms because he didn't want to embarrass the three students by having Jackie's account of their self-involved patter out there for all their friends and classmates to see. "I wanted to protect them," he said.

For his part, Dana said he did not recall talking with Woods or Erdely about the three friends at all.

'We need to verify this'

None of the editors discussed with Erdely whether Phi Kappa Psi or UVA, while being asked for "comment," had been given enough detail about Jackie's narrative to point out holes or contradictions. Erdely never raised the subject with her editors.

As to "Drew," the lifeguard, Dana said he was not even aware that *Rolling Stone* did not know the man's full name and had not confirmed his existence. Nor was he told that "we'd made any kind of agreement with Jackie to not try to track this person down."

As noted, there was no such explicit compact between Erdely and Jackie, according to Erdely's records. Jackie requested Erdely not to contact the lifeguard, but there was no agreement.

"Can you call the pool? Can you call the frat? Can you look at yearbooks?" Woods recalled asking Erdely after he read the first draft. "If you've got to go around Jackie, fine, but we need to verify this," meaning Drew's identity. He remembered having this discussion "at least three times."

But when Jackie became unresponsive to Erdely in late October, Woods and Dana gave in. They authorized Erdely to tell Jackie they would stop trying to find the lifeguard. Woods resolved the issue as he had done earlier with the three friends: by using a pseudonym in the story.

'I had a faith'

It is not possible in journalism to reach every source a reporter or editor might wish. A solution is to be transparent with readers about what is known or unknown at the time of publication.

There is a tension in magazine and narrative editing between crafting a readable story - a story that flows - and providing clear attribution of quotations and facts. It can be clunky and disruptive to write "she said" over and over. There should be room in magazine journalism for diverse narrative voicing - if the underlying reporting is solid. But the most egregious failures of transparency in "A Rape on Campus" cannot be chalked up to writing style. They obfuscated important problems with the story's reporting.

- *Rolling Stone*'s editors did not make clear to readers that Erdely and her editors did not know "Drew's" true name, had not talked to him and had been unable to verify that he existed. That was fundamental to readers' understanding. In one draft of the story, Erdely did include a disclosure. She wrote that Jackie "refuses to divulge [Drew's] full name to RS," because she is "gripped by fears she can barely articulate." Woods cut that passage as he was editing. He "debated adding it back in" but "ultimately chose not to."
- Woods allowed the "shit show" quote from "Randall" into the story without making it clear that Erdely had not gotten it from him but from Jackie. "I made that call," Woods said. Not only did this mislead readers about the quote's origins, it also compounded the false impression that Rolling Stone knew who "Randall" was and had sought his and the other friends' side of the story.

The editors invested *Rolling Stone*'s reputation in a single source. "Sabrina's a writer I've worked with for so long, have so much faith in, that I really trusted her judgment in finding Jackie credible," Woods said. "I asked her a lot about that, and she always said she found her completely credible."

Woods and Erdely knew Jackie had spoken about her assault with other activists on campus, with at least one suitemate and to UVA. They could not imagine that Jackie would invent such a story. Woods said he and Erdely "both came to the decision that this person was telling the truth." They saw her as a "whistle blower" who was fighting indifference and inertia at the university.

The problem of confirmation bias - the tendency of people to be trapped by pre-existing assumptions and to select facts that support their own views while overlooking contradictory ones - is a well-established finding of social science. It seems to have been a factor here. Erdely believed the university was obstructing justice. She felt she had been blocked. Like many other universities, UVA had a flawed record of managing sexual assault cases. Jackie's experience seemed to confirm this larger pattern. Her story seemed well established on campus, repeated and accepted.

"If I had been informed ahead of time of one problem or discrepancy with her overall story, we would have acted upon that very aggressively," Dana said. "There were plenty of other stories we could have told in this piece." If anyone had raised doubts about how verifiable Jackie's narrative was, her case could have been summarized "in a paragraph deep in the story."

No such doubts came to his attention, he said. As to the apparent gaps in reporting, attribution and verification that had accumulated in the story's drafts, Dana said, "I had a faith that as it went through the fact-checking that all this was going to be straightened out."

Fact-Checking: 'Above My Pay Grade'

At *Rolling Stone*, every story is assigned to a fact-checker. At newspapers, wire services and in broadcast newsrooms, there is no job description quite like that of a magazine fact-checker. At newspapers, frontline reporters and editors are responsible for stories' accuracy and completeness. Magazine fact-checking departments typically employ younger reporters or college graduates. Their job is to review a writer's story after it has been drafted, to double-check details like dates and physical descriptions. They also look at issues such as attribution and whether story subjects who have been depicted unfavorably have had their say. Typically, checkers will speak with the writer's sources, sometimes including confidential sources, to verify facts within quotations and other details. To be effective, checkers must be empowered to challenge the decisions of writers and editors who may be much more senior and experienced.

In this case, the fact-checker assigned to "A Rape on Campus" had been checking stories as a freelancer for about three years, and had been on staff for one and a half years. She relied heavily on Jackie, as Erdely had done. She said she was "also aware of the fact that UVA believed this story to be true." That was a misunderstanding. What

Rolling Stone knew at the time of publication was that Jackie had given a version of her account to UVA and other student activists. A university employee, Renda, had made reference to that account in congressional testimony. UVA had placed Phi Kappa Psi under scrutiny. None of this meant that the university had reached a conclusion about Jackie's narrative. The checker did not provide the school with the details of Jackie's account to Erdely of her assault at Phi Kappa Psi.

The editors invested Rolling Stone's reputation in a single source.

The checker did try to improve the story's reporting and attribution of quotations concerning the three friends. She marked on a draft that Ryan - "Randall" under pseudonym - had not been interviewed, and that his "shit show" quote had originated with Jackie. "Put this on Jackie?" the checker wrote. "Any way we can confirm with him?" She said she talked about this problem of clarity with Woods and Erdely. "I pushed. ... They came to the conclusion that they were comfortable" with not making it clear to readers that they had never contacted Ryan.

She did not raise her concerns with her boss, Coco McPherson, who heads the checking department. "I have instructed members of my staff to come to me when they have problems or are concerned or feel that they need some muscle," McPherson said. "That did not happen." Asked if there was anything she should have been notified about, McPherson answered: "The obvious answers are the three friends. These decisions not to reach out to these people were made by editors above my pay grade."

McPherson read the final draft. This was a provocative, complex story heavily reliant on a single source. She said later that she had faith in everyone involved and didn't see the need to raise any issues with the editors. She was the department head ultimately responsible for fact-checking.

Natalie Krodel, an in-house lawyer for Wenner Media, conducted a legal review of the story before publication. Krodel had been on staff for several years and typically handled about half of *Rolling Stone*'s pre-publication reviews, sharing the work with general counsel Dana Rosen. [Footnote 4] It is not clear what questions the lawyer may have raised about the draft. Erdely and the editors involved declined to answer questions about the specifics of the legal review, citing instructions from the

magazine's outside counsel, Elizabeth McNamara, a partner at Davis Wright Tremaine. McNamara said *Rolling Stone* would not answer questions about the legal review of "A Rape on Campus" in order to protect attorney-client privilege.

The Editor's Note: 'I Was Pretty Freaked Out'

On Dec. 5, following Erdely's early-morning declaration that she had lost confidence in her sourcing, *Rolling Stone* posted an editor's note on its website that effectively withdrew the magazine's reporting on Jackie's case.

The note was composed and published hastily. The editors had heard that *The Washington Post* intended to publish a story that same day calling the magazine's reporting into question. They had also heard that Phi Kappa Psi would release a statement disputing some of *Rolling Stone*'s account. Dana said there was no time to conduct a "forensic investigation" into the story's issues. He wrote the editor's note "very quickly" and "under a lot of pressure."

He posted it at about noon, under his signature. "In the face of new information, there now appear to be discrepancies in Jackie's account, and we have come to the conclusion that our trust in her was misplaced," it read. That language deflected blame from the magazine to its subject and it attracted yet more criticism. Dana said he rued his initial wording. "I was pretty freaked out," he said. "I regretted using that phrase pretty quickly." Early that evening, he changed course in a series of tweets. "That failure is on us - not on her," he wrote. A revised editor's note, using similar language, appeared the next day.

Yet the final version still strained to defend *Rolling Stone*'s performance. It said that Jackie's friends and student activists at UVA "strongly supported her account." That implied that these friends had direct knowledge of the reported rape. In fact, the students supported Jackie as a survivor, friend and fellow campus reformer. They had heard her story, but they could not independently confirm it.

Looking Forward

For Rolling Stone: An Exceptional Lapse or a Failure of Policy?

The collapse of "A Rape on Campus" does not involve the kinds of fabrication by reporters that have occurred in some other infamous cases of journalistic meltdown. In 2003, *The New York Times* reporter Jayson Blair resigned after editors concluded that he had invented stories from whole cloth. In February, NBC News suspended anchor Brian Williams after he admitted that he told tall tales about his wartime reporting in Iraq. There is no evidence in Erdely's materials or from interviews with her subjects that she invented facts; the problem was that she relied on what Jackie told her without vetting its accuracy.

"It's been an extraordinarily painful and humbling experience," Woods said. "I've learned that even the most trusted and experienced people - including, and maybe especially, myself - can make grave errors in judgment."

Yet *Rolling Stone*'s senior editors are unanimous in the belief that the story's failure does not require them to change their editorial systems. "It's not like I think we need to overhaul our process, and I don't think we need to necessarily institute a lot of new ways of doing things," Dana said. "We just have to do what we've always done and just make sure we don't make this mistake again." Coco McPherson, the fact-checking chief, said, "I one hundred percent do not think that the policies that we have in place failed. I think decisions were made around those because of the subject matter."

Yet better and clearer policies about reporting practices, pseudonyms and attribution might well have prevented the magazine's errors. The checking department should have been more assertive about questioning editorial decisions that the story's checker justifiably doubted. Dana said he was not told of reporting holes like the failure to contact the three friends or the decision to use misleading attributions to obscure that fact.

Stronger policy and clearer staff understanding in at least three areas might have changed the final outcome:

Pseudonyms. Dana, Woods and McPherson said using pseudonyms at *Rolling Stone* is a "case by case" issue that requires no special convening or review. Pseudonyms are inherently undesirable in journalism. They introduce fiction and ask readers to trust that this is the only instance in which a publication is inventing details at its discretion. Their use in this case was a crutch - it allowed the magazine to evade coming to terms with reporting gaps. *Rolling Stone* should consider banning them. If its editors believe

pseudonyms are an indispensable tool for its forms of narrative writing, the magazine should consider using them much more rarely and only after robust discussion about alternatives, with dissent encouraged.

Checking Derogatory Information. Erdely and Woods made the fateful agreement not to check with the three friends. If the fact-checking department had understood that such a practice was unacceptable, the outcome would almost certainly have changed.

Confronting Subjects With Details. When Erdely sought "comment," she missed the opportunity to hear challenging, detailed rebuttals from Phi Kappa Psi before publication. The fact-checker relied only on Erdely's communications with the fraternity and did not independently confirm with Phi Kappa Psi the account *Rolling Stone* intended to publish about Jackie's assault. If both the reporter and checker had understood that by policy they should routinely share specific, derogatory details with the subjects of their reporting, *Rolling Stone* might have veered in a different direction.

For Journalists: Reporting on Campus Rape

Rolling Stone is not the first news organization to be sharply criticized for its reporting on rape. Of all crimes, rape is perhaps the toughest to cover. The common difficulties that reporters confront - including scarce evidence and conflicting accounts - can be magnified in a college setting. Reporting on a case that has not been investigated and adjudicated, as *Rolling Stone* did, can be even more challenging.

There are several areas that require care and should be the subject of continuing deliberation among journalists:

Balancing sensitivity to victims and the demands of verification. Over the years, trauma counselors and survivor support groups have helped journalists understand the shame attached to rape and the powerlessness and self-blame that can overwhelm victims, particularly young ones. Because questioning a victim's account can be traumatic, counselors have cautioned journalists to allow survivors some control over their own stories. This is good advice. Yet it does survivors no good if reporters documenting their cases avoid rigorous practices of verification. That may only subject the victim to greater scrutiny and skepticism.

Problems arise when the terms of the compact between survivor and journalist are not spelled out. Kristen Lombardi, who spent a year and a half reporting the Center for Public Integrity's series on campus sexual assault

(http://www.publicintegrity.org/accountability/education/sexual-assault-campus), said she made it explicit to the women she interviewed that the reporting process required her to obtain documents, collect evidence and talk to as many people involved in the case as possible, including the accused. She prefaced her interviews by assuring the women that she believed in them but that it was in their best interest to make sure there were no questions about the veracity of their accounts. She also allowed victims some control, including determining the time, place and pace of their interviews.

If a woman was not ready for such a process, Lombardi said, she was prepared to walk away.

Corroborating survivor accounts. Walt Bogdanich, a Pulitzer Prize-winning investigative reporter for *The New York Times* who has spent the past two years reporting on campus rape, said he tries to track down every available shred of corroborating evidence - hospital records, 911 calls, text messages or emails that have been sent immediately after the assault. In some cases, it can be possible to obtain video, either from security cameras or from cellphones.

Many assaults take place or begin in semipublic places such as bars, parties or fraternity houses. "Campus sexual violence probably has more witnesses, bystanders, etc. than violence in other contexts," said Elana Newman, a University of Tulsa psychology professor who has advised journalists on trauma. "It might be useful for journalists to think about all the early signals and signs" and people who saw or ignored them early on, she said.

Every rape case has multiple narratives, Newman said. "If there are inconsistencies, explain those inconsistencies." Reporters should also bear in mind that trauma can impair a victim's memory and that this can be a cause of fragmentary and contradictory accounts.

Victims often interact with administrators, counselors and residence hall staff members. "I've always found that the people most willing to talk are these front-line staff," said Lombardi, who said she phoned or visited potential sources at home and talked to them on background because of their concerns about student privacy.

FERPA restrictions are severe, yet the law allows students to access their own school records. Students at public universities can also sign privacy waivers that would allow reporters to obtain their records, including case files and reports.

Moreover, there's a FERPA exception (http://www.ire.org/blog/ire-radio/2014/08/13/audio-ferpa-exception-every-reporter-should-know/): In sexual assault cases that have reached final disposition and a student has been found responsible, campus authorities can release the name of the student, the violation committed and any sanction imposed. (The Student Press Law Center (http://www.splc.org/page/school-transparency) provides good advice on navigating FERPA.)

Holding institutions to account. Given the difficulties, journalists are rarely in a position to prove guilt or innocence in rape. "The real value of what we do as journalists is analyzing the response of the institutions to the accusation," Bogdanich said. This approach can also make it easier to persuade both victims and perpetrators to talk. Lombardi said the women she interviewed were willing to help because the story was about how the system worked or didn't work. The accused, on the other hand, was often open to talking about perceived failings of the adjudication process.

To succeed at such reporting, it is necessary to gain a deep understanding of the tangle of rules and guidelines on campus sexual assault. There's Title IX (http://www.justice.gov/crt/about/cor/coord/titleix.php), the Clery Act (http://knowyourix.org/the-clery-act-in-detail/) and the Violence Against Women Act (http://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf). There are directives (http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf) from the Office of Civil Rights and recommendations (https://www.notalone.gov/assets/report.pdf) from the White House. Congress and state legislatures are proposing new laws.

The responsibilities that universities have in preventing campus sexual assault - and the standards of performance they should be held to - are important matters of public interest. *Rolling Stone* was right to take them on. The pattern of its failure draws a map of how to do better.

Footnotes

1. *Rolling Stone* provided a 405-page record of Erdely's interviews and research notes as well as access to original audio recordings. Erdely turned this record over to Rolling Stone before she or the magazine believed there were any problems with the story. Erdely said she typed notes contemporaneously on a laptop during phone and in-person interviews. In some cases, she taped interviews and meetings and transcribed

them later. We compared transcripts Erdely submitted of her recorded interviews with Jackie with the audio files and found the transcripts to be accurate. Erdely's typed notes of interviews contain her own questions or remarks, sometimes placed in brackets, as well as those of her interview subject. Erdely said that she sometimes typed her own questions or remarks contemporaneously but that other times she typed them after the interview was over, summarizing the questions she had asked or the comments she had made.

2. *Rolling Stone*'s retraction of its reporting about Jackie concerned the story it printed. The retraction cannot be understood as evidence about what actually happened to Jackie on the night of Sept. 28, 2012. If Jackie was attacked and, if so, by whom, cannot be established definitively from the evidence available.

Jackie's phone records from September 2012 would provide strong evidence about what might have befallen her. But the Charlottesville police said the company they asked to produce Jackie's phone records no longer had her records from 2012. After interviewing about 70 people and obtaining access to some university and fraternity records, the Charlottesville police could say only that they found no evidence of the gang rape Rolling Stone described. This finding, said Police Chief Timothy Longo, "doesn't mean that something terrible didn't happen to Jackie" that night.

3. In a letter, Groves objected to *Rolling Stone*'s portrayal of his actions during a University of Virginia Board of Visitors meeting last September. A video of the meeting (https://www.youtube.com/watch?v=Ppd_pX5Zy44) is available on a UVA website. Groves wrote that Erdely "did not disclose the significant details that I had offered into the scope" of a Department of Education compliance review of UVA. Groves's full letter is here (https://drive.google.com/file/d/0B7UAuEqoequKWEMyV1JlUFRqdjA/view?usp=sharing).

In the email sent through her lawyer, Eramo wrote, *Rolling Stone* "made numerous false statements and misleading implications about the manner in which I conducted my job as the Chair of University of Virginia's Sexual Misconduct Board, including allegations about specific student cases. Although the law prohibits me from commenting on those specific cases in order to protect the privacy of the students who I counsel, I can say that the account of my actions in Rolling Stone is false and misleading. The article trivializes the complexities of providing trauma-informed support to survivors and the real difficulties inherent in balancing respect for the wishes of survivors while also

providing for the safety of our communities. As a general matter, I do not — and have never — allowed the possibility of a media story to influence the way I have counseled students or the decisions I have made in my position. And contrary to the quote attributed to me in Rolling Stone, I have never called the University of Virginia "the rape school," nor have I ever suggested — either professionally or privately — that parents would not "want to send their daughter" to UVA. As a UVA alumna, and as someone who has lived in the Charlottesville community for over 20 years, I have a deep and profound love for this University and the students who study here."

4. Last December, Rosen left Wenner Media for ALM Media, where she is general counsel. Rosen said her departure had no connection with "A Rape on Campus" and that she had played no part in reviewing the story before publication. She said she began talking with ALM in September, before Erdely's story was filed, about the position she ultimately accepted.

Sheila Coronel, Steve Coll, and Derek Kravitz wrote this report. Sheila Coronel is Dean of Academic Affairs at the Columbia Journalism School (http://www.journalism.columbia.edu/) and director of the Stabile Center for Investigative Journalism (http://stabilecenter.org/), Steve Coll is the Dean of Columbia Journalism School, and Derek Kravitz is a postgraduate research scholar at Columbia Journalism School.

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Charlottesville Division.

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v.
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|
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MEMORANDUM OPINION

Glen E. Conrad, Chief United States District Judge

*1 Nicole Eramo filed this defamation action against defendants Rolling Stone, LLC ("Rolling Stone"), Sabrina Rubin Erdely, and Wenner Media LLC ("Wenner Media"). The case is presently before the court on plaintiff's motion for partial summary judgment and defendants' motion for summary judgment. For the reasons set forth below, the motions will be granted in part and denied in part.

Factual Background

A grant of summary judgment is appropriate only when "the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." Phoenix Savings and Loan, Inc. v. The Aetna Cas. and Surety Co., 381 F.2d 245, 249 (4th Cir.1967). When faced with cross-motions for summary judgment, the court considers each motion separately and resolves all factual disputes and "any competing, rational inferences in the light most favorable to the party opposing the motion." Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir.2003) (quoting Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir.1996)). Accordingly, the following facts from the record are either undisputed or presented in the light most favorable to the nonmoving party.

Nicole P. Eramo ("Eramo") is an Associate Dean of Students at the University of Virginia ("UVA"). Rolling Stone and Wenner Media are the publishers of Rolling Stone magazine. Sabrina Rubin Erdely ("Erdely") worked as a reporter and Contributing Editor for Rolling Stone.

On November 19, 2014, defendants published an article written by Erdely and entitled "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" (the "Article"). Compl. ¶ 45. The Article contained a graphic depiction of the alleged gang-rape of a UVA student, referred to as "Jackie," at a Phi Kappa Psi fraternity party. According to the Article, Jackie's mother informed an academic dean that Jackie had a "bad experience" at a party. Id. ¶ 56. The academic dean then put Jackie in touch with Eramo.

At the time, Eramo's duties at UVA included performing intake of sexual assault complaints and providing support to purported victims. In this position, Eramo also participated in panel discussions and attended conferences on sexual assault. She also provided quotations for articles appearing in the Cavalier Daily, UVA's student-run newspaper, was interviewed on WUVA regarding UVA's sexual misconduct policy, and gave brief interviews to local news channels. Pl.'s Resp. to Defs.' First Set of Interoggs. Nos. 1–3. On campus, Eramo was seen as "an expert in all issues related to sexual assault" and the "point person" for reports of sexual misconduct. 30(b)(6) Dep. of Alan Groves, 82:7-11, 333:16-18.

In her pitch to Rolling Stone, Erdely stated that her article would "focus on a sexual assault case on one particularly fraught campus ... following it as it makes

its way through university procedure to its resolution, or lack thereof." "Campus Rape" by Erdely, Dkt. 116, Ex. 7. The Article describes Jackie's interactions with Eramo, including how Jackie shared information about two other victims of the same fraternity. Throughout her investigation, Erdely spoke with a number of students about sexual assault at UVA; her notes reflect that several students communicated their admiration of Eramo. Erdely Reporting Notes, RS004381, RS004165, Dkt. 104, Ex. 15. As publication neared, some students expressed to Erdely concerns that her portrayal of Eramo was inaccurate. Dep. of Sara Surface 118:18-119:18.

***2** Erdely relied heavily on the narrative Jackie provided in writing the Article, so much so that she did not obtain the full names of Jackie's assailants or contact them. Nor did Erdely interview the individuals who found Jackie the night of her alleged gang-rape. Similarly, Erdely did not obtain certain corroborating documents Jackie claimed to have access to and was unable to confirm with Jackie's mother Jackie's assertion that her mother had likely destroyed the dress Jackie wore on the night of the alleged rape. Additionally, Erdely was not granted an interview with Eramo to ask about the university's policies. Instead, Eramo's superiors made UVA President, Teresa Sullivan, available.

After its release, the Article created a "media firestorm" and was viewed online more than 2.7 million times. Rolling Stone issued a press release contemporaneously with the Article, and on November 26, 2014, Erdely appeared on the Brian Lehrer Show and the Slate DoubleX Gabfest podcast. On these shows, Erdely discussed the allegations made in the Article.

The complaint asserts that the Article and subsequent media appearances destroyed Eramo's reputation as an advocate and supporter of victims of sexual assault. She was attacked by individuals on television and the internet, and she received hundreds of threatening, vicious emails from members of the public. As a result, Eramo suffered "significant embarrassment, humiliation, mental suffering and emotional distress." Compl. ¶ 207.

Upon further investigation by independent entities, it was reported that the Article, and key components of Jackie's story, could not be substantiated. Within two weeks of the Article's publication, the fraternity where Jackie's alleged attack took place produced evidence demonstrating that no social gathering was held on the night in question and that no member of the fraternity matched the description given by Jackie for her primary attacker. Id. ¶ 90. Additionally, The Washington Post ran an article addressing the fact that Erdely did not contact Jackie's accused assailants.

On December 5, 2014, Rolling Stone issued a statement (the "Editor's Note") that acknowledged the discrepancies in Jackie's account, blamed Jackie for misleading Erdely, and claimed that its trust in Jackie had been "misplaced." Id. ¶ 91. This statement appeared appended to the online Article, and also by itself on a separate URL. On March 23, 2015, four months after the Article was published, the Charlottesville Police Department issued a report regarding its investigation of Jackie's assault. The report stated that Jackie had told Eramo a wholly different tale of sexual assault than the story published in the Article. Ultimately, the police concluded that there was no substantive basis in fact to conclude that an incident occurred consistent with the facts in the Article. In April 2015, after a report by the Columbia Journalism Review described the Article as a "journalistic failure" and concluded that defendants "set aside or rationalized as unnecessary essential practices of reporting," Rolling Stone "officially retracted" and removed the Article from its website. Id. ¶ 14. Eramo granted a limited interview to the Columbia Journalism Review as part of their investigation for the report.

On May 12, 2015, Eramo filed a six-count defamation action arising not only from the allegations in the Article but also from other statements made by the defendants in subsequent media appearances. On May 29, 2015, defendants removed the instant action from the Circuit Court for the City of Charlottesville pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Following the close of discovery, plaintiff moved for partial summary judgment and defendants moved for summary judgment. The court held a hearing on the motions on August 12, 2016. The motions have been fully briefed and are now ripe for disposition.

Standard of Review

***3** An award of summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a genuine dispute of material fact exists, the court must "view the facts and all justifiable inferences arising therefrom in the light most favorable to the nonmoving party." Libertarian Party of Va. v. Judd, 718 F.3d 308, 313 (4th Cir.2013). "When faced with cross-motions for summary judgment, [courts] consider each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." Bacon v. City of Richmond, 475 F.3d 633, 636–37 (4th Cir.2007). "The court must deny both motions if it finds that there is a genuine dispute of material fact, but if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." Sky Angel U.S., LLC v. Discovery Commc'ns., LLC, 95 F.Supp.3d 860, 869 (D.Md.2015) (citations omitted).

Discussion

I. Public Official or Limited-Purpose Public Figure

Both sides have moved for summary judgment on the issue of whether Eramo was a public official or a limited-purpose public figure. If Eramo was a public official or limited-purpose public figure at the time of publication, as part of her defamation case, she must prove by clear and convincing evidence that defendants acted with actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Gertz v. Robert Welch, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The issue of whether Eramo was a public official or limited-purpose public figure is a question of law to be resolved by the court. Wells v. Liddy, 186 F.3d 505, 531 (4th Cir.1999). The court starts with a presumption that Eramo was a private individual at the time of publication, subject to defendants' burden of proving that plaintiff was a public official or limited-purpose public figure. Foretich v. Capital Cities/ABC, 37 F.3d 1541, 1553 (4th Cir.1994).

A limited-purpose public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Gertz , 418 U.S. at 361, 94 S.Ct. 2997. Importantly, these individuals are subject to the actual malice standard for two reasons: (1) because of "their ability to resort to the 'self-help' remedy of rebuttal" as these individuals "usually enjoy significantly greater access [to the media] than private individuals"; and (2) because they have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood." Foretich, 37 F.3d at 1552. To determine whether a plaintiff is a private person or a limited-purpose public figure in relation to a particular public controversy, defendants must prove the following:

> "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation."

Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir.1982); Foretich, 37 F.3d at 1553 (noting defendant's burden of proof). The second and third factors are often combined and are the heart of the inquiry: "whether the plaintiff had voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome." Foretich, 37 F.3d at 1553.

The scope of the controversy thus becomes a threshold determination. See Hatfill v. The New York Times Co., 532 F.3d 312, 322 (4th Cir.2008) (stating that the court "first address[es] the nature of the 'particular public controversy' that gave rise to the alleged defamation"). Significantly, it "would be inappropriate to shrink all controversies to the specific statements of which a plaintiff complains." Nat'l Life Ins. Co. v. Phillips Pub., Inc., 793 F.Supp. 627, 637 (D.Md.1992). Instead, the court defines the scope through a fair reading of the Article in its entirety. See Hatfill, 532 F.3d at 323 ("[I]t stands to reason that we should look to the scope of the message conveyed in ... the articles ... [plaintiff] is challenging.").

*4 Here, a fair reading of the Article suggests that the controversy at issue is UVA's response to allegations of sexual assault. The record warrants the determination that Eramo voluntarily assumed a position of "special prominence" on this issue: she took advantage of her access to local media, specifically by appearing on WUVA, providing input to The Cavalier Daily, and

speaking to local affiliates of national news networks. See Carr v. Forbes, 259 F.3d 273, 281 (4th Cir.2001) (finding plaintiff voluntarily assumed a prominent public presence and attempted to influence the outcome because he attended public meetings, wrote editorials for the local press, and was quoted in the local media). Furthermore, the volume of her media appearances, and in some instances their depth, supports the conclusion that Eramo attempted to influence the outcome of the controversy. In 2013, for instance, Eramo authored an opinion piece regarding the University's process for handling sexual assault complaints. See Faltas v. State Newspaper, 928 F.Supp. 637, 645 (D.S.C.1996) (finding that a teacher and Public Health physician voluntarily assumed a role of special prominence and attempted to influence the outcome because she authored an opinion piece and several letters on the issue and had appeared on various radio programs). The court thus concludes that defendants have met their burden as to the second and third factors. Foretich, 37 F.3d at 1553 ("Typically, we have combined the second and third requirements, to ask 'whether the plaintiff had voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy.' ") (citing Reuber v. Food Chemical News, Inc., 925 F.2d 703, 709 (4th Cir.1991)).

Regarding the fourth and fifth factors, Eramo's numerous local media appearances and their temporal proximity to the Article, in addition to the Office of Civil Rights investigation UVA was under at the time, indicate that the controversy at issue, UVA's response to allegations of sexual assault, existed prior to publication of the Article. See Fitzgerald, 691 F.2d at 669 ("The public controversy existed before and after publication of the alleged defamatory article.... The plaintiff had been interviewed for another article in the previous year."). The record also supports the determination that Eramo retained "public figure" status at the time of the alleged defamation: she remained in her position when the article was published. Only several months later was she moved to a different position within the UVA community. Fitzgerald, 691 F.2d at 668 (listing that "the plaintiff retained public-figure status at the time of the alleged defamation" as the fifth factor in determining limited-purpose public figure status).

Plaintiff argues that defendants are unable to show that she had access to effective communication, the first factor, because the Family Educational Rights and Privacy Act ("FERPA") prevented her from speaking to the media. Additionally, UVA would not allow Eramo to speak with Erdely prior to publication. The court is unpersuaded. While FERPA may have precluded Eramo from speaking about Jackie's case, the court cannot agree that it prevented her from speaking about UVA's policy regarding sexual assault allegations in a general sense. Likewise, UVA's unwillingness to allow Eramo to contact the media may have put her in the difficult position of deciding between her job and her reputation. However, the court believes that, despite this prohibition, Eramo still had greater access to The Cavalier Daily or other local news outlets than private citizens, satisfying the first factor. See Fiacco v. Sigma Alpha Epsilon Fraternity, 528 F.3d 94, 100 (1st Cir.2008) (finding a university administrator had greater access to media when he had been mentioned by name in eleven newspaper articles over the past year). Her access becomes even more apparent upon consideration of the limited interview Eramo granted to the Columbia Journalism Review several months after the Article's publication and without the permission of her superiors. Thus, the court's analysis of the five requirements for limited-public figure status, and its overall review of the record, lead to the conclusion that defendants have met their burden of establishing that, at the time of publication, Eramo warranted the limited-purpose public figure designation. [1]

II. Actual Malice

*5 A public official, public figure, or limited-purpose public figure may recover for a defamatory falsehood only on a showing of "actual malice." New York Times Co. v. Sullivan, 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). At summary judgment, "the appropriate ... question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255–56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Defendants ask the court to decide, as a matter of law, that plaintiff has failed to forecast evidence that would support a jury determination in plaintiff's favor.

Actual malice "requires at a minimum that the statements were made with reckless disregard for the truth."

Harte–Hanks Commc'ns., Inc. v. Connaughton, 491 U.S. 657, 667, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Reckless disregard means that defendants must have "entertained serious doubts as to the truth of [their] publication." St. Amant v. Thompson, 390 U.S. 727, 730, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The court evaluates "the factual record in full." Connaughton, 491 U.S. at 688, 109 S.Ct. 2678. Furthermore, because actual malice is a subjective inquiry, a plaintiff "is entitled to prove the defendant's state of mind through circumstantial evidence." Id. at 668, 109 S.Ct. 2678.

It is helpful to review what other courts have determined is and is not sufficient evidence. For example, it is well settled that "failure to investigate will not alone support a finding of actual malice." Connaughton, 491 U.S. at 692, 109 S.Ct. 2678; see also Biro v. Conde Nast, 807 F.3d 541, 546 (2d Cir.2015) ("We recognize that although failure to investigate does not in itself establish bad faith, reliance on anonymous or unreliable sources without further investigation may support an inference of actual malice."). Similarly, departure from journalistic standards is not a determinant of actual malice, but such action might serve as supportive evidence. Reuber v. Food Chemical News, Inc., 925 F.2d 703, 712 (4th Cir.1991) (en banc), cert. denied, 501 U.S. 1212, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991). "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted." Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir.1969), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970) (stating that repetition is one factor that may be probative of actual malice); see also St. Amant, 390 U.S. at 732, 88 S.Ct. 1323 ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant."). Furthermore, while actual malice cannot be inferred from ill will or intent to injure alone, "[i]t cannot be said that evidence of motive or care never bears any relation to the actual malice inquiry." Connaughton, 491 U.S. at 688, 109 S.Ct. 2678; see also Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 315 n. 10 (5th Cir.1995) ("[E]vidence of ill will can often bolster an inference of actual malice."). Finally, "evidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence." Harris v. City of Seattle, 152 Fed.Appx. 565, 568 (9th Cir.2005).

Here, as in most similar cases, plaintiff largely relies on circumstantial evidence. See Herbert v. Lando, 441 U.S. 153, 170, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) ("It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself."). Although failure to adequately investigate, a departure from journalistic standards, or ill will or intent to injure will not singularly provide evidence of actual malice, the court believes that proof of all three is sufficient to create a genuine issue of material fact. Plaintiff, however, goes further. Pointing to Erdely's own reporting notes, plaintiff also forecasts evidence that could lead a reasonable jury to find that Erdely had "obvious reasons to doubt [Jackie's] veracity" or "entertained serious doubts as to the truth of [her] publication." Goldwater, 414 F.2d at 337; St. Amant, 390 U.S. at 731, 88 S.Ct. 1323.

***6** First, plaintiff offers evidence that could lead a jury to determine that Erdely had a preconceived story line and may have consciously disregarded contradictory evidence. See Harris, 152 Fed.Appx. at 568 (noting that evidence of a preconceived story line can speak to whether defendant acted with actual malice). A jury could conclude from Erdely's pitch for the Article that Erdely expected to find inaction from the university's administration. She described how the Article would highlight "the various ways colleges have resisted involvement on the issue of sexual assault on campus; [and how it would] focus on a sexual assault case on campus ... following it as it makes its way through university procedure to its resolution, or lack thereof." "Campus Rape" by Erdely, Dkt. 116, Ex. 7. Erdely had also previously published five similar articles, and deposition testimony suggests that students felt that Erdely did not listen to what they told her about Eramo. Dep. of Sara Surface 110:25-111:3; Dep. of Alex Pinkerton 190:5-15.

Second, plaintiff has produced evidence supporting the inference that Erdely should have further investigated Jackie's allegations. See Biro, 807 F.3d at 546 (stating that failure to investigate further, in certain circumstances, may support an finding of actual malice). The record suggests that Erdely knew the identity of at least one of the individuals who found Jackie the night of her alleged rape. Erdely Reporting Notes RS004261, Dkt. 104, Ex. 7. Erdely, however, did not seek to contact this individual. Plaintiff cites evidence that could lead

a factfinder to determine that others at Rolling Stone knew Erdely did not reach out to these individuals to corroborate Jackie's story. Dep. of Sean Woods 135-136. Additionally, Jackie never provided the full names of her assailants. Consequently, Erdely was unable to test the reliability of Jackie's story with them. The record also supports a finding that Rolling Stone knew that Erdely had not approached these purported wrongdoers. Dep. of Elisabeth Garber-Paul 153:14-154:8. Erdely's notes similarly reveal that Jackie had told Elderly she possessed, or at least had access to, certain documents that could have corroborated her story of the rape. Erdely never received a copy of these documents, and Erdely's notes imply inconsistencies in Jackie's claims about them. Erdely Reporting Notes RS004483, RS004476, Dkt. 104, Ex. 7 (noting that Jackie's mother had these documents, that Jackie likely did not tell her mother about these documents, and that Jackie later told Erdely that her mother had the documents). Finally, Erdely, despite trying, did not speak with Jackie's mother to confirm Jackie's claim that her mother had destroyed the blood-stained dress Jackie wore the night of the alleged rape. From these facts, a reasonable jury could conclude that Erdely should have investigated further, and that her failure to do so could imply that Erdely acted with actual malice.

Third, plaintiff has presented evidence suggesting that Erdely had reasons to doubt Jackie's credibility. E.g., Erdely Reporting Notes RS004404, RS004118, RS004115, Dkt. 104, Ex. 7 (Erdely noted disbelief about Jackie's assertion as to the identities of the two other victims; Erdely was put on notice that Jackie's alleged rape, by individuals supposedly being recruited into the fraternity, occurred several months before fraternity recruitment events; and that Erdely found Jackie's story of three women being gang-raped at the same fraternity "too much of a coincidence"). Erdely was aware that Jackie's account of her alleged rape had changed but, nonetheless, did not press Jackie to explain the inconsistencies. Dep. of Emily Renda 36:17-24 (stating a different number of assailants were involved than what Erdely reported in the article); Dep. of Sabrina Rubin Erdely 37:8-14; see Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir.1987) ("[C]ourts have upheld findings of actual malice when a defendant failed to investigate a story weakened by inherent improbability, internal inconsistency, or apparently reliable contrary information.") (citing sources). Rolling Stone's fact checker was also cognizant of Jackie's inconsistent stories. Dep. of Elisabeth Garber-Paul 290:13-17 (affirming that she knew Jackie's story of sexual assault changed over time). Moreover, a jury could find that Rolling Stone knew that Jackie's version of the story had not been vetted. Dep. of Elisabeth Garber-Paul 77:19-78:3; 104:20-24 (stating she knew that Rolling Stone had not reached out to certain individuals who were quoted in the Article and alleged to have found Jackie on the night of the rape, in part, because Jackie refused to provide their contact information). The court believes this evidence, taken in a light most favorably to the nonmoving party, could support a finding that Erdely and Rolling Stone were cognizant of Jackie's inconsistencies and credibility problems at the time of publication.

*7 Fourth, plaintiff offers evidence suggesting that at least three individuals advised Erdely that her portrayal of Eramo was inaccurate. Dep. of Sara Surface 118:18-119:18; Dep. of Alex Pinkerton 144:11-21; see St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1318 (3d Cir.1994) (denying summary judgment on the issue of actual malice when a source's testimony "flatly contradicted" what the article portrayed); Bressler v. Fortune Magazine, 971 F.2d 1226, 1252 (6th Cir.1992) (Batchelder, J., dissenting) (asserting that the reporters exhibited reckless disregard when their own notes did not support the article's statements and the reporters also relied on a second-hand source over a firsthand account that described the event differently). In addition, Erdely's notes show that one student reported that the administration did a better job investigating her sexual assault allegations than the police. Erdely Reporting Notes RS004190, Dkt. 104, Ex. 7. Another individual told Erdely that Eramo was "passionate" about obtaining punishment and "making sure ... something punitive ... sticks." Id. RS004147. Jackie disclosed to Erdely that Eramo "wasn't as shocked as you might think" upon hearing of the two other victims, but then "got pissed at the frat" and suggested that the fraternity could lose its charter. Id. RS004312; see Zerangue, 814 F.2d at 1071 ("A verdict for the plaintiff has been upheld when a reporter's own notes showed that she was aware of facts contradicting her story.") (citing Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944, 950 (5th Cir.1983)). Erdely's notes also indicate that Jackie's version of how she met Eramo may have been incorrect, a fact which could support a finding that Erdely should have

investigated further in the face of her source's seemingly wavering consistency.

Fifth, plaintiff points to deposition testimony from which a jury could reasonably infer that Erdely harbored ill will for Eramo or intended to injure the administration. Connaughton, 491 U.S. at 667–68, 109 S.Ct. 2678 (suggesting that motive can support an ultimate finding of actual malice). Erdely told a student that she hoped the Article would bring changes to the structure of UVA's administration. When a student attempted to provide Erdely with Eramo's "point of view," Erdely referred to that student as an "administrative watchdog." Dep. of Sara Surface 162:10-17; cf. Guccione v. Flynt, 618 F.Supp. 164, 166 (S.D.N.Y.1985) (finding plaintiff had presented sufficient circumstantial evidence, including evidence of derogatory comments, to survive summary judgment on the issue of actual malice). While ill will or intent to injure alone is insufficient to show actual malice, plaintiff has also advanced evidence indicating Erdely had a preconceived story line, did not adequately investigate in the face of contradictory information, and had a reasonable basis upon which she would likely understand that her portrayal of Eramo was inaccurate. The court believes that a reasonable jury could infer actual malice in light of this record.

Finally, plaintiff offers evidence regarding how, between the November 18 publication date and the December 5th Editor's Note, Rolling Stone, through internal conversations and discussions with outside sources, concluded that their trust in Jackie had been "misplaced." A jury could determine that this evidence also supports a finding of actual malice. See David Elder, Defamation: A Lawyer's Guide § 7.7 (July 2016) (discussing how "some types of evidence [ ] relate back and provide inferential evidence of defendant's knowing or reckless disregard of falsity at the time of publication"); Franco v. Cr onfel, 311 S.W.3d 600, 607 (Tex. App.2010) ("Circumstantial evidence showing reckless disregard may derive from the defendant's words or acts before, at, or after the time of the communication.' ") (quoting Clark v. Jenkins, 248 S.W.3d 418, 435 (Tex.App.2008)). Conversely, the post-publication process could speak to defendants' good faith in publishing the original article. Elder, supra § 7.7; Hoffman v. Washington Post Co., 433 F.Supp. 600, 605 (D.D.C.1977), aff'd, 578 F.2d 442 (D.C.Cir.1978) (suggesting that a prompt retraction can negate an inference of actual malice). The court believes a jury should determine the proper effect of this evidence. Gunning v. Cooley, 281 U.S. 90, 94, 50 S.Ct. 231, 74 L.Ed. 720 (1930) ("Issues that depend on the credibility of the witnesses, and the effect or weight of evidence, are to be decided by the jury.").

Arguably, a reasonable jury could find that none of the evidence presented independently supports a finding of actual malice by clear and convincing evidence. Taken as a whole, however, a jury could conclude otherwise. Tavoulareas v. Piro, 817 F.2d 762, 790 (D.C.Cir.1987), cert. denied, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987) ("[A] plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence."). Therefore, the court heeds the Fourth Circuit's admonition that summary judgment should be employed carefully when addressing a party's subjective state of mind. See Nat'l Life Ins. Co. v. Phillips Pub., Inc., 793 F.Supp. 627, 632 (D.Md.1992) (citing Herold v. Hajoca Corp., 864 F.2d 317, 319 (4th Cir.1988)) ("[W]here possibly subjective evaluations are at issue, as here where a determination of whether Defendants acted with actual malice is at issue, the Fourth Circuit has cautioned against a Court taking those determinations away from a jury."); see also Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F.Supp. 1204, 1211 (D.Md.1993), aff'd, 34 F.3d 1066 (4th Cir.1994) ("Because the question of actual malice involves subjective evaluations, the Court is reluctant to take the malice determination from a jury."); Denny v. Seaboard Lacquer, Inc., 487 F.2d 485, 491 (4th Cir.1973) ("Where state of mind is at issue, summary disposition should be sparingly used."). The court will thus deny defendants' motion for summary judgment as to actual malice.

III. The Challenged Statements

***8** Both sides have also moved for summary judgment on the issue of whether the challenged statements are actionable. "In Virginia, the elements of libel are (1) publication of (2) an actionable statement with (3) the requisite intent." Chapin v. Knight–Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir.1993). To be actionable, a statement must contain a "provably false factual connotation," must be "of or concerning" the plaintiff, and must "tend[ ] to harm the reputation [the plaintiff]." WJLA–TV v. Levin, 264 Va. 140, 156, 564 S.E.2d 383 (2002); Gazette, Inc v. Harris, 229 Va. 1, 37, 325 S.E.2d 713 (1985); Chapin, 993 F.2d at 1093. It is for the court to decide whether a statement has a provably false factual connotation or is

protected opinion and whether a statement is capable of having a defamatory meaning, that is, tending to harm the plaintiff's reputation. CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 294 (4th Cir.2008); Hatfill v. New York Times Co., 416 F.3d 320, 330 (4th Cir.2005).

In deciding whether statements convey a factual connotation or are protected opinion, the court looks to "the context and tenor of the article," whether the language is "loose, figurative, or hyperbolic language which would negate the impression that the writer" is making a factual assertion, and whether the statement is "subject to objective verification." Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir.1998). Even when a statement is subject to verification, the statement will remain protected if it is "clear to all reasonable listeners that [the statement is] offered ... as exaggerated rhetoric intended to spark the debate" or "the opinion of the author drawn from the circumstances related." CACI, 536 F.3d at 301; Chapin, 993 F.2d at 1093. "Locating the line separating constitutionally protected speech from actionable defamation can be difficult and requires consideration of the nature of the language used and the context and general tenor of the article to determine whether the statement can reasonably be viewed as an assertion of actual fact." Choi v. Kyu Chul Lee, 312 Fed.Appx. 551, 554 (4th Cir.2009). If "a reasonable factfinder could conclude that the statements ... imply an assertion [of fact]," the statements are not protected. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Additionally, "factual statements made to support or justify an opinion can form the basis of an action for defamation." WJLA–TV, 264 Va. at 156, 564 S.E.2d 383; see also AvePoint, Inc. v. Power Tools, Inc., 981 F.Supp.2d 496, 506 (W.D.Va.2013).

Merely because the statements may be deemed to have a false factual connotation, however, is not sufficient to support a defamation action. See Katz v. Odin, Feldman & Pittleman, P.C., 332 F.Supp.2d 909 (E.D.Va.2004) ("[T]he fact that some of the alleged statements may have been false, without more, is not sufficient to maintain a cause of action for defamation."). The statements must also be capable of having a defamatory meaning. See Perry v. Isle of Wight Cty., No. 2:15cv204, 2016 WL 1601195, at *3 (E.D.Va. April 20, 2016). A statement that "tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" has a defamatory meaning. Chapin, 993 F.2d at 1092; see also Restatement (Second) of Torts § 559, cmt. b ("Communications are often defamatory because they tend to expose another to hatred, ridicule or contempt."); Moss v. Harwood, 102 Va. 386, 387, 46 S.E. 385 (1904) ("It is sufficient if the language tends to injure the reputation of the party,... [or] to hold him up as an object of scorn, ridicule, or contempt."). In determining whether a statement is capable of having a defamatory meaning, the court considers the plain and natural meaning of the words in addition to the inferences fairly attributable to them. Pendleton v. Newsome, 290 Va. 162, 172, 772 S.E.2d 759 (2015) (citing Wells v. Liddy, 186 F.3d 505, 523 (4th Cir.1999)); Vaile v. Willick, No.6:07cv00011, 2008 WL 2754975, at *4 (W.D.Va. July 14, 2008) ("Because a defamatory charge may be made 'by inference, implication or insinuation,' the Court must look not only to the actual words spoken, but also to all inferences fairly attributable to them.") (quoting Carwile v. Richmond Newspapers, 196 Va. 1, 7, 82 S.E.2d 588 (1954)). However, whether the plaintiff was actually defamed remains a question to be resolved by the factfinder. Pendleton, 290 Va. at 172, 772 S.E.2d 759.

***9** Defendants argue that the challenged statements are not actionable because, as a matter of law, they are protected opinion and not capable of harming Eramo's reputation. In contrast, plaintiff contends that the challenged statements are factual and defamatory per se. "[A] statement is defamatory per se if it, among other circumstances,... 'impute[s] to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment.' " CACI, 536 F.3d at 292–93 (quoting Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 7, 82 S.E.2d 588 (1954)).

After reviewing the Article, the court believes that it is not "clear to all reasonable listeners" that all twelve statements targeted by the plaintiff are "exaggerated rhetoric" or "the opinion of the author." CACI, 536 F.3d at 301. Unlike the regularly-published advice column in Biospherics, "A Rape on Campus" is described as a "Special Report" on the front cover of the magazine. 151 F.3d at 181. Contrary to the talk-show host in CACI, Erdely has not admitted to "making frequent use of hyperbole." On the contrary, Erdely has written at least five other similarly-styled, solemn and fact-intensive

articles about rape. These circumstances support the notion that "A Rape on Campus" was largely a report of a factual occurrence. Likewise, the characterization of the article as an investigation in subsequent interviews bolsters the court's understanding that the general tenor of the Article, and reasonable understanding of it, is one of factual assertion. Compl. Ex. C (describing the Article as an "investigation of campus rape" on the Brian Lehrer show); Biospherics, 151 F.3d at 184 (looking to the general tenor of the article to determine whether the statements were assertions of fact or opinion).

Looking to each statement, only one, the "deck" of the article, can fairly be characterized as hyperbole and not factual.[2] The use of the phrase "a whole new kind of abuse" is similar to the term "hired-killers" to describe military contractors. CACI, 536 F.3d at 301. Like the phrase "hefty mark-up" in Chapin, the challenged statement is "just too subjective a word to be proved false." 993 F.2d at 1093. While the question is close, when looking to the general tenor of the Article, the court believes the challenged phrase "consists of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labler's underlying assertions." Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir.1996). Erdely seemingly used "exaggerated or figurative language to drive home an underlying factual assertion." Cashion v. Smith, 286 Va. 327, 341, 749 S.E.2d 526 (2013) (McClanahan, J., dissenting). This figurative language remains protected while the underlying factual assertions do not. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 129–132 (1st Cir.1997) (finding one challenged statement to be hyperbole and another to be an assertion of fact); Williams v. Garraghty, 249 Va. 224, 233, 455 S.E.2d 209 (1995) (finding plaintiff's statements about a specific event and subsequent receipt of derogatory notes to be factual assertions but plaintiff's expression that she believed the notes and event were sexual harassment to be opinion).

***10** As to the remaining statements, the court is persuaded that a reasonable understanding is that they assert factual connotations regarding Eramo and the administration's actions. See Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 715–16, 636 S.E.2d 447 (2006) (finding that statements relating that plaintiff "just takes people's money" contained "a provably false factual connotation"). For example, a jury could find that the "trusted UVA dean" either did or did not discourage Jackie from sharing her story, that Eramo did or did not tell Jackie that "nobody wants to send their daughter to the rape school," and that Eramo did or did not have a nonreaction to Jackie's assertion that two other individuals were raped at the same fraternity. Fuste v. Riverside Healthcare Ass'n, 265 Va. 127, 133, 575 S.E.2d 858 (2003) ("In other words, [the statements] are capable of being proven true or false."). Even the statements asserting that the administration should have acted in light of Jackie's allegation that two other individuals were raped at the Phi Kappa Psi fraternity is capable of conveying a verifiable fact: that the administration did not act. See Milkovich, 497 U.S. at 18, 110 S.Ct. 2695 ("[E]xpressions of 'opinion' may often imply an assertion of objective fact."); Restatement (Second) of Torts § 566, cmt. b (Am. Law Inst. 1965) (describing "an opinion in form" that is "apparently based on facts ... that have not been stated"). Therefore, the court finds the remaining challenged statements impart what a reasonable reader would believe to be factual.

Similarly, considering all reasonable inferences, the court believes that the statements are capable of having a defamatory meaning. Chapin, 993 F.2d at 1092, 1104–05 (statements are capable of a defamatory meaning if they tend to harm the plaintiff's reputation, hold her up as an object of scorn, ridicule or contempt, or otherwise make her appear "odious, infamous, or ridiculous") (citing McBride v. Merrell Dow and Pharmaceuticals, Inc., 540 F.Supp. 1252, 1254 (D.D.C.1982) and Adams v. Lawson, 58 Va. 250, 255–56 (1867)); Wells, 186 F.3d at 523 ("We look not only to the actual words spoken, but also to inferences fairly attributable to them.") (citations omitted). A reasonable factfinder could conclude that the challenged statements imply the defamatory meaning plaintiff ascribes to them: that Eramo discouraged Jackie from sharing her story, including filing a formal complaint; that Eramo had no reaction to Jackie's story of two other victims; and that the administration did nothing in light of these allegations. Restatement (Second) of Torts § 614(2) (stating that the "jury determines whether a communication, capable of a defamatory meaning, was so understood"); Chapin v. Greve, 787 F.Supp. 557, 564 (E.D.Va.1992) ("The dispositive question presented is whether or not a reasonable factfinder could conclude that the article or statements in the article state or imply, in their plain and natural sense, the defamatory meanings ascribed to them by plaintiffs.").

Plaintiff, however, asks the court to further find that the challenged statements are defamatory per se. Stamathis v. Flying J, Inc., 389 F.3d 429, 440 (4th Cir.2004) ("The critical distinction between defamation per se and other actions for defamation is that a person so defamed is presumed to have suffered general damages, and any absence of actual injury is considered only in diminution of damages."). As with actual malice, it is instructive to review what other courts have found to be defamatory per se. For example, in Cretella v. Kuzminkski, the district court found the assertions that plaintiff caused embarrassment to his employer and was in danger of losing his professional license to be defamatory per se. 640 F.Supp. 741, 763 (E.D.Va.2009). Similarly, in Carwile v. Richmond Newspapers, statements implying that the plaintiff was guilty of conduct for which "the plaintiff could and should be subject to disbarment proceedings" were held to be defamatory per se. 196 Va. 1, 8, 82 S.E.2d 588 (1954). Here, however, the court believes that the alleged defamatory meaning ascribed to the challenged statements does not give rise to presumed damages. This is not to imply that Eramo has or has not been damaged; it is to keep the determination of damages, and the determination of whether the statements actually defamed Eramo, with the factfinder. [3] Pendleton, 290 Va. at 172, 772 S.E.2d 759 (stating that whether the statements defamed plaintiff is a question for the jury).

*11 Next, plaintiff asks the court to conclude, as a matter of law, that all twelve statements are "of or concerning" Eramo. Defendants do not contest plaintiff's contention that the statements are "of and concerning" Eramo except in regards to the "deck" of the Article. The court, however, finds that the deck is hyperbole, not subject to verification, and therefore not actionable. Thus, it is irrelevant whether the deck is of or concerning Eramo. As to the other statements, there is no dispute that these statements are of or concerning Eramo. Cf. Magill v. Gulf & Western Indus., Inc., 736 F.2d 976, 979 (4th Cir.1984) (stating that summary judgment is inappropriate if there is a dispute as to the conclusions to be drawn from undisputed facts). Thus, with the exception of the "deck" of the Article, the court will grant plaintiff's motion for partial summary judgment on the issue of whether the other statements are of or concerning Eramo. The court will deny plaintiff's motion for partial summary judgment as to whether the statements are defamatory per se, and will deny defendants' motion for summary judgment regarding whether the statements are protected opinion and not capable of having a defamatory meaning. The court believes that the latter question, as to whether the statements actually have a defamatory meaning, is properly committed to the jury.

IV. Republication

Plaintiff asks the court to find that Rolling Stone's December 5th statement acknowledging discrepancies in Jackie's account (the "Editor's Note") was a republication published with actual malice. Plaintiff asserts that the addition of an appendix to the original Article affected substantive changes such to render the combined Editor's Note and Article a "republication" under the law. In contrast, defendants contend that the December 5th Editor's Note is not a republication because it did not reaffirm the substance of the Article. Instead, defendants urge the court to view the Editor's Note as an "effective retraction."

While the Virginia Supreme Court has not yet faced the issue, the Fourth Circuit has upheld the application of the single publication rule, which dictates that defamatory forms of mass communication or aggregate publication support only a single cause of action. See Morrissey v. William Morrow & Co., Inc., 739 F.2d 962, 967–68 (4th Cir.1984). Jurisdictions that have adopted the single publication rule are "nearly unanimous" in applying it to internet publications. Atkinson v. McLaughlin, 462 F.Supp.2d 1038, 1051–52 (D.N.D.2006). It is less clear how the republication exception to the single publication rule applies in the context of electronic media. In re Philadelphia Newspapers, LLC, 690 F.3d 161, 174 (3d Cir.2012).

The republication exception is meant to give plaintiffs an additional remedy when a defendant edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience. In re Davis, 347 B.R. 607, 611 (W.D.Ky.2006). Stated differently, republication occurs when the speaker has "affirmatively reiterated" the statement. Clark v. Viacom Int'l Inc., 617 Fed.Appx. 495, 505 (6th Cir.2015). In the context of internet articles, other courts have held that "a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience." Yeager v. Bowlin, 693 F.3d 1076, 1082 (9th Cir.2012); see also Davis, 347 B.R. at 612 ("[W]here substantive material is added to a website, and that

material is related to defamatory material that is already posted, a republication has occurred.").

Under Virginia defamation law, the question of whether plaintiff has proved the element of publication is a factual one for the jury. Thalhimer Bros. v. Shaw, 156 Va. 863, 871, 159 S.E. 87 (1931) (finding sufficient evidence to submit to the jury the question of publication). It follows, then, that republication is also for the factfinder to determine.[4] Woodhull v. Meinel, 145 N.M. 533, 202 P.3d 126, 131 (N.M.Ct.App.2008) ("The question of whether an Internet republication has occurred is highly factual in that it turns on the content of the second publication as it relates to the first."); Weaver v. Lancaster Newspaper, Inc., 592 Pa. 458, 926 A.2d 899, 907 (2007) (finding a genuine issue of fact regarding whether there was a republication).

***12** Here, it is not disputed that defendants appended the original Article. However, a reasonable jury could find that the defendants did not act with intent to recruit a new audience. Likewise, there is a genuine dispute regarding whether defendants "affirmatively reiterated" the challenged statements. See Clark, 617 Fed.Appx. at 505 (stating that republication occurs when the speaker "affirmatively reiterates" the statement and that the doctrine of republication "focuses upon audience recruitment"). From deposition testimony, the court believes a reasonable jury could determine that the December 5th Editor's Note "effectively retracted" only the statements regarding the alleged rape, not the statements about Jackie's interactions with Eramo. Dep. of Erdely 282:6-10; Dep. of William Dana 308:6-15; cf. Nevada Independent Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337, 345 (1983) (finding that an attempted correction could be considered a republication). Conversely, a factfinder could determine that the challenged statements were either "substantially altered or added to" or that they were not. Yeager, 693 F.3d at 1082. Accordingly, in the court's view, there remains a genuine issue of fact warranting jury consideration. The court will deny plaintiff's motion for partial summary judgment on the issue. Consequently, the court declines to reach the question of whether there was a republication made with actual malice.

Conclusion

For the foregoing reasons, the court will grant in part and deny in part the parties' motions for summary judgment and partial summary judgment. The Clerk is directed to send copies of this memorandum opinion and the accompanying order to all counsel of record.

ORDER

For the reasons stated in the accompanying memorandum opinion, it is now

ORDERED

that the parties' motions for summary judgment and partial summary judgment are granted in part and denied in part. Specifically, the court concludes, as a matter of law, as follows:

1. Plaintiff was a limited-purpose public figure at the time of publication;
2. There is a genuine issue of material fact regarding actual malice;
3. The "deck" is hyperbole not subject to verification and, therefore, is not actionable;
4. The remaining statements are assertions of fact and capable of a defamatory meaning;
5. The remaining statements are not defamatory per se; and
6. There is a genuine issue of material fact as to whether defendants republished the Article on December 5th.

The Clerk is directed to send copies of the order and the accompanying memorandum opinion to all counsel of record.

All Citations

--- F.Supp.3d ----, 2016 WL 5234688

Footnotes

1 Because limited-purpose public figures and public officials both must prove actual malice, the court need not decide whether Eramo was a public official.

2 The "deck" refers to the phrases just below the headline of an article and above the first sentences. In "A Rape on Campus," the deck stated: "Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began."

3 Or, otherwise, as the parties may agree to stipulate.

4 Generally, republications are separate torts. WJLA–TV v. Levin, 264 Va. 140, 153, 564 S.E.2d 383 (2002). In consequence, the court believes that republication only satisfies the first element of a defamation claim. Plaintiff must again prove the other elements of defamation, namely actionable statements and intent. Chapin, 993 F.2d at 1092 (listing the Virginia elements of defamation). In this instance, the effect of the Editor's Note will be relevant in determining whether the statements are actionable and whether the defendants had the requisite intent, should a jury find defendants republished the challenged statements.

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Re: Phi Kappa Psi v. Rolling Stone, et al.— Demurrer
Circuit Court file no. CL 15 – 479; hearing May 17, 2016

Dear Counsel:

I have now had a chance, since August 1, to fully review this matter, including re-reading all of the pleadings as well as many of the cases cited, and reviewing my notes from the May 17 hearing. The issue before the Court is whether Defendant's Demurrer should be sustained or overruled.

Procedural Posture

Plaintiff The Virginia Chapter of Phi Kappa Psi Fraternity ("PKP") filed a complaint November 9, 2015, against Defendants Rolling Stone LLC, Wenner Media LLC, Straight Arrow Publishers LLC, and Sabrina Rubin Erdely.

The Defendants then filed their Demurrers to the Complaint March 3, 2016.[1]

Plaintiff then filed a Response to the Demurrer March 25, 2016, and Defendants on April 11 filed a Reply to the Response in Further Support of the Demurrers to the Complaint.

The Parties appeared May 17, 2016, to argue the Demurrer.

Defendants submitted a letter with authority and further argument dated June 29, 2016, and Plaintiff submitted a similar letter on June 30. I have read these letters in addition to the pleadings and the cases.

Legal Authority and Standard for Considering Demurrer

A demurrer tests the legal sufficiency of a pleading. The issue is whether the Complaint states a cause of action for which relief may be granted. Pendleton v. Newsome, 290 Va. 162, 171, 772 S.E. 2d 759 (2015); Welding, Inc. v. Bland County Service Auth., 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001); Grossman v. Saunders, 237 Va. 113, 119, 376 S.E.2d 66, 69 (1989). The question is: does the Complaint contain sufficient factual recitations or allegations to support or sustain the granting of the relief requested?

A demurrer is not interested in or dependent on the evidence—neither its strength nor a determination of whether the Plaintiff can prove its case. In ruling on a demurrer the Court does not consider the anticipated proof but only the legal sufficiency of the pleadings, and it considers the facts and allegations in the light most favorable to the plaintiff. Glazebrook v. Board of Supervisors of Spotsylvania County, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003); Welding, above, 261 Va. at 226, 541 S.E.2d at 913; Luckett v. Jennings, 246 Va. 303, 307, 435 S.E.2d 400, 402 (1993).

A demurrer accepts all well-pleaded facts or allegations as true, along with all reasonable inferences drawn therefrom. That is, the Court considers as admitted all facts expressly or impliedly alleged or that may fairly and justly be inferred from the facts alleged. Glazebrook, Luckett, Grossman, above; Cox Cable Hampt., Rds. v. City of Norfolk, 242 Va. 394, 397 (1991).

[1] Defendants were all served in late January or early February 2016, and the time for Defendants to file a responsive pleading was extended by agreement of the parties to March 3, 2016.

So if I accept all Plaintiff says as true, does Plaintiff then prevail? If so, I should overrule the demurrer. Put another way, given all that is alleged, is this a case where a jury or judge ought to be allowed to decide whether the allegations are true or have been proved?

There is another way of expressing this standard when ruling on a demurrer. In the context of defamation, many of the cases and counsel have restated this standard, particularly with regard to the issue of whether there is defamatory content or meaning, but also with regard to the other two issues, by asserting that the Court has a "gatekeeping function", and must determine whether the article is capable or susceptible of such defamatory meaning, whether it is capable of being reasonably understood to refer to the plaintiff, and whether it is capable of being proved true or false; if not, on any count, the demurrer should be sustained.

Nevertheless, even with this standard, in considering a demurrer the Court should not engage in evaluating evidence outside of the pleadings. So it is the facts as pleaded upon which the court must make its ruling. For anything outside of the pleadings, dependent on the evidence presented at trial, the Court would have to reserve its gatekeeping function for trial, before submission to the jury, perhaps on a motion for summary judgment or motion to dismiss.

However, in this case, the Plaintiff made the entire article--in fact both the print and online versions--an exhibit to the Complaint. Therefore, in my view, the entire article is made a part of the Complaint for purposes of notice, allegations, and consideration of the demurrer.

Factual Background

Plaintiff's claims are based on the content of an article that appeared in the *Rolling Stone* magazine November 19, 2014.[2] *Rolling Stone* magazine is published by Defendant Rolling Stone LLC, with its member (owning) companies Defendants Wenner Media LLC and Straight Arrow Publishers LLC. The article was written by Defendant Sabrina Rubin Erdely.

In the article a violent rape is recounted by the purported victim, which takes place at the Phi Kappa Psi (also PKP or "Phi Psi") fraternity house on the edge of the University of Virginia grounds, at a PKP-sponsored function, by individuals some or all of which are stated or understood to be associated with the fraternity.

In the article describing the event, Phi Kappa Psi at UVA is mentioned at least 18 times by name (Phi Kappa Psi, PKP, or Phi Psi). There are at least 9 other references to "that

[2] The article appeared in the December 4, 2014 print edition of the magazine, but was posted on its online edition on November 19, 2014. They are both incorporated into the Complaint. ¶33 of the Complaint.

fraternity", "a frat", "the fraternity", "his frat", etc., which in context specifically refer to Phi Kappa Psi at UVA. There are at least 8 times where the term "gang rape" is used, many in the same phrase or sentence as "Phi Kappa Psi" or its variations.

The Complaint

Plaintiff's Complaint (Counts 1 and 2) alleges that both the print article and the on-line version are defamatory of PKP, in that they contain false statements that accuse the fraternity itself and its members of criminal activity involving moral turpitude, brutish and violent behavior, and hiding the truth, both directly and indirectly painting the fraternity in a false light, and holding the fraternity up to public criticism, ridicule, and scorn, resulting in damage to the fraternity's reputation, and causing anger and distress, and hurting its ability to acquire new members.[3]

The Demurrer

Defendants say that Plaintiff cannot prevail, and that it has not stated a cause of action because:

1) The article complained of is not "of and concerning" Phi Kappa Psi at UVA.
2) The article is not defamatory.
3) The statements complained of are not factual statements but opinions.[4]

Analysis and Discussion of Authority

Whether the Complaint states a cause of action turns on three points or inquiries

1. Whether the article is of, about, concerning or focused on Plaintiff;

[3] The original Complaint also includes a subsequent post-article statement and interview (Counts 3 and 4), although they are not the basis for a separate count, as they were withdrawn by Plaintiff at the May 17, 2016, hearing, and the allegations contained there are not an independent basis for recovery, and would be relevant or pertinent here, if at all, only in so much as they reinforce, support, or corroborate any facts or issues related to the two articles.

[4] The Demurrer originally also addressed two other matters not at issue here—Counts 3 and 4, which were withdrawn, and the request for attorney's fees, which also was withdrawn by Plaintiff at the May 17 hearing. Defendants also point out that the article contains many factually true statements.

2. Whether the article--if of, about, concerning or focused on Plaintiff--is defamatory of Plaintiff; and,

3. Even if the article is of and concerning PKP, and the content of the article, or at least a good portion of it, holds Plaintiff in a bad light, are such statements factual in nature and susceptible of being proved true or false, or just opinion? (In the context of the demurrer, on this third point, do Defendants' claims turn on their interpretation of the article, as opposed to what it actually says?)

Of and Concerning

The first issue raised in the Demurrer and to be addressed here, is whether the article and the purportedly false and defamatory statements contained in it have to do with—that is, were "of and concerning"—the plaintiff, the fraternity Phi Kappa Psi at UVA, as opposed to the individuals involved, all fraternities at UVA, fraternities in general, or the University of Virginia itself. So, if the article is false, or contains significant false statements, and if the article is--or such statements in it are--in fact defamatory (both issues discussed below), the question is: "Who is defamed by such?" The defamation, if it exists, must be about or focused on the Plaintiff Phi Kappa Psi in order for it to prevail.

If the article or such false and defamatory statements are just about the alleged individual perpetrators who just happened to be members of PKP, or were simply attending a PKP function, that is not sufficient, nor is that it happened at the frat house (whether an official function or not). Plaintiff must show that the statements in the article, when taken as a whole, were either solely or primarily about the fraternity.

Defendants, in their written responses and in argument at the hearing, assert that the statements, or the bulk of them, and the focus and tenor of the article, are about "Drew", the purported initial offender, or "rogue" members or pledges of the fraternity, or fraternities in general, or the University of Virginia.

Plaintiff, in the Complaint, cites and quotes numerous passages from the article that focus specifically and repeatedly on the Phi Kappa Psi fraternity. Just to mention a few, from the Complaint, there is a reference to a "Phi Kappa Psi brother"[5] (¶35, page 14 of Complaint), "his fraternity Phi Kappa Psi", "The upper tier frat…", and "Phi Psi" (¶35, page 15), a "Phi Kappa Psi

[5] One initially wonders what difference does it make, to the writer, that the individual is a member of the fraternity if that is not going to be a major focus of the article?

date function" (¶¶40, pages 17-18), and the victim "taking on" her individual alleged assailants "*and their fraternity*". (¶42, page 18, *italics* added). Furthermore the Complaint recounts a moment when one individual apparently is reluctant to participate in the severe assault, and another says, "don't you want to be a brother? *We all* had to do it" (page 16, *italics* added). The Complaint also refers to the illustration of the PKP house, and the letters "PKP" displayed on a banner" (¶42, pages 18-19). There is a reference to "tracing this incident back 30 years ago" to PKP (¶47, page 20).[6] There are other PKP-related allegations in the Complaint.

Also, in considering the "of and concerning" requirement, the question is, is the article, or are sufficient statements in the article, about or focused on the University of Virginia Phi Kappa Psi chapter itself, either instead of or conjointly with the University of Virginia, other fraternities at UVA, or fraternities in general. The short answer, in the Court's view, is "yes".

As stated above, in the Complaint Plaintiff alleges numerous points at which the Phi Kappa Psi fraternity at UVa is mentioned, not just as the location of the alleged offense, but as the actual offender, the "adversary" who must be proceeded against. I do not recall any other fraternity besides Phi Kappa Psi being mentioned by name; it is certainly the only one repeated over and over.

To the extent that Phi Kappa Psi at Brown University is mentioned, it arguably is mentioned to lend credence to the idea that PKP is a "bad egg" wherever found, particularly at UVA, where other mentions of PKP at UVA include Ms. Seccuro's rape at Phi Kappa Psi and two other girls who are described as victims of a PKP rape.

If one considered only the first two pages of the article, one might be persuaded that the article was going to address fraternities in general, or sexual assault on campuses in general. The first two paragraphs (on page 68 of the print article) mention a fraternity house, a fraternity party, and PKP once. But it appears that the writer is simply preparing the reader for what is coming; taking the entire article as a whole does not allow this interpretation or conclusion:

On page 69 is a photograph of the PKP house and the lettering "PKP" on the banner. On page 70 of the print article (the second page of the story) is the second reference to Phi Kappa Psi, including "his fraternity", "the frat house", and the "frat party". But then we read this line: "But her concerns go beyond *taking on* her alleged assailants and *their fraternity*". It continues. When referring to the Brown incident, it turns out it was "Phi Kappa Psi--*of all fraternities*". Page 73. Then on page 75 of the print article, "The UVa administration took no action to warn

[6] Also in the on-line article there are three photographs of the Phi Kappa Psi fraternity house, two from the outside and one on the inside (of a room), all with identifying captions. The print article has the inside photo, but PKP is not identified, and it does not have the two outside photos.

the campus that *an allegation* of gang rape had been made *against an active fraternity*". This is followed on that same page by "You can trace UVA's cycle of sexual violence and institutional indifference back at least 30 years—and incredibly the trail leads back *to Phi Psi*". It refers to "gang raped" in the context of Phi Psi and the Phi Psi house twice (on page 75). This is followed by "two other women...assaulted at *his* frat house". On page 76, again we see "UVA strategy of doing nothing to warn the campus of gang rape allegations *against a fraternity*", and Jackie learned of "two other young women who were *Phi Kappa Psi gang rape victims*." It then follows on that page in the 3rd column an account of one of the young women "gang-raped as a freshman at the *Phi Psi house*", and the other "assaulted by four men in a *Phi Psi* bathroom", and Jackie's helplessness "when she thought about "*Phi Psi*". And finally, at the end of that page, continuing over to the next page, speaking of gang rape allegations "*against* [not "at"] one of UVA's oldest and most powerful fraternities". (All *italics* added.) There are, thus, at least six references in two pages to "gang rape" linked to Phi Kappa Psi, and not all describing one event.

One cannot read these latter portions and not see that it is a reasonable interpretation that the article is singling out PKP at UVA, not some other fraternity or fraternities in general. There is no other fraternity named or alluded to that could be the object of these references. It is naïve to argue that all taken together this did not put the spotlight on PKP to the exclusion of other frats.

The case of Darling v. Piniella, Civ. A. 91-5219, 1991 U.S. Dist. Lexis 13546, 1991 WL 193524 (E.D.Pa.), is instructive on this point. After a Major League baseball game, the losing team's manager, Lou Piniella[7], made some critical remarks about one of the umpires in the game. The Major League Umpires' Association filed suit, alleging that the statements about this particular umpire defamed all umpires (at least those in the MLUA, which presumably the criticized umpire was). Aside from the issue of whether the statements made were factual or opinion—and the Court assumed the statements were defamatory—the dispositive issue was whether they were "of and concerning" the Plaintiff Umpires' Association.

In ruling that the statements were not "of and concerning" the MLUA, it was important to the Court that "[n]one of the statements on which plaintiff MLUA's claim is predicated identify, refer to, describe or concern the MLUA." At page 4 of opinion. This certainly is in contrast to the case before us, where references to PKP are ubiquitous. While the main part of the opinion talks about the remarks being about one specific person, the Court again mentions that "Here, the statements are clearly not 'of and concerning' plaintiff MLUA. MLUA was neither named nor referred to, and the statements neither apply to...plaintiff MLUA". At page 6 of opinion. The same cannot be said of the *Rolling Stone* article and the UVA fraternity Phi Kappa Psi. "The MLUA...alleged no set of facts that would entitle it to relief." At page 6. "[F]or an

[7] Whom I remember as a player when I was in Little League and then in high school!

organization to have a cause of action for defamation, the remarks must be directed toward the organization." At page 7, citing Church of Scientology of Cal. v. Flynn, 578 F. Supp. 266, 268 (D. Mass. 1984) (where the statement "was directed at the action of one or a few members, not at the organization"). The organization must be "the object of the alleged defamations", or "the remarks must somehow identify the organization or implicate the organization as actively encouraging the behavior of their members". At page 8. In our case, the fraternity itself is repeatedly identified and mentioned, and there are facts from which it can be reasonably inferred that the fraternity approved, condoned, supported, and even encouraged or facilitated such actions of the various unnamed or unknown (or nonexistent) individuals. So this meets the Darling test. The *Rolling Stone* article is certainly amenable to the conclusion that it was not just one or a few individuals viewed as "the problem", but rather the UVA fraternity as a whole was painted in a bad light.

So this article is not just about rape, or just about sexual assault at colleges in general, or at UVA, or even a greater likelihood of rape at fraternity events, at least not as a matter of law. Whether the article was focused on PKP may be a matter for the factfinder--the jury or judge--to decide. But the Court finds that the article is certainly capable or susceptible of the interpretation that if it is defamatory, it is defamatory as to Phi Kappa Psi and that in the article there is a clear basis from which to argue the primary focus of the article was PKP at UVA.

As pleaded, taken as a whole, the article is primarily and significantly about this particular fraternity, and was certainly "of and concerning" the Plaintiff, and the article's intent and focus was not just the individual assailants, or fraternities in general, or all fraternities at UVA, or the University itself, but rather this fraternity in particular. The combination of the numerous repeated, direct, explicit references to Phi Kappa Psi, combined with several implied references to "a major frat", "a top tier frat", the "frat that was suspended", in conjunction with the various individuals referenced as affiliated with the fraternity, if borne out by the evidence, clearly establishes that it is the fraternity itself that is the main target of the article.

It is not, in the Court's view, just as likely that the article, as pleaded, raises the likelihood or even possibility that rogue members or aspiring members were responsible for the described rape, or were the main actors, as suggested by Defendants. The article taken as a whole, again as pleaded, clearly paints the rape as a fraternity event and happening. That is a clear possible interpretation, in the Court's view, of the references to previous PKP events and accusations, and the discussion about UVA's responsibility to confront or sanction this particular fraternity for the risk it presented to the rest of the University and it students.

So if such article or statements therein are false and defamatory, it is the fraternity, at least primarily, that is being defamed and damaged. The excerpts cited and quoted in the Complaint allow argument that the intent was to paint PKP in a bad light and cause people to

think badly of it, as an entity, as an organization. So I disagree with Defendants on this point, and would overrule the demurrer based on that argument.

Again, the main point is not whether I find such, but whether, in light of the demurrer, the plaintiff has pleaded enough to allow the factfinder to draw such conclusions. In the Court's view, Plaintiff has definitely pleaded enough facts which, if proved and believed, would justify a jury in finding that it is the fraternity itself that would be damaged by any defamatory and recklessly false statements. So the Complaint withstands the Demurrer on this point.

Defamatory Content

The next question is whether, even if the article was solely or primarily about PKP, was it or the tenor of the account and statements contained therein defamatory. That is, does it hold the fraternity up to scorn and ridicule, or paint them in a bad light. With regard to the demurrer, the question is whether the article is capable or susceptible of defamatory meaning. This is a legal issue, to be resolved by the Court.

The case of Webb v. Virginian-Pilot Media Companies, LLC, 287 Va. 84, 752 S.E. 2d 808 (2014), was cited by both parties. The Virginian-Pilot newspaper published an article about Phillip Webb and his two sons. Mr. Webb was a high school assistant principal at an area high school, and previously was a successful track coach at a neighboring high school. The article, without making any false statements, discussed disparate outcomes for two boys (one of them one of Mr. Webb's sons), after an altercation resulting in criminal charges. (Both boys were charged with felonies, and both convicted of misdemeanors.) Webb's son was allowed to stay at his high school and continue to compete in track, eventually going on to college, while the other boy was required to transfer to stay in school, and eventually dropped out of school. A spokesman for the school system was quoted as saying that the Webb boy did not get any preferential treatment simply because of his father's position. The father sued alleging the article falsely implied that his son did get special treatment, despite what the article said.

The Court discussed whether the requirement of defamatory meaning could be by implication, inference, insinuation, or innuendo. The Court stated that it could, but that such inferred meaning must come from the words themselves, and be a reasonable interpretation thereof. 287 Va. at 89. The question there was "whether the words and statements complained of...are reasonably capable of the meaning ascribed to them..." Id., quoting Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 8-9, 82 S.E. 2d 588, 592 (1954).

This is a question of law to be decided by the Court on demurrer as a part of its essential "gatekeeping function", prior to submission to the jury. Id. at 90-91, citing Perk v. Vector

Resources Group, 253 Va. 310, 316-17, 485 S.E. 2d 140, 144 (1997). The Court ruled in Webb that, as a matter of law, the article was not reasonably capable of defamatory meaning.[8] Id. at 91.

Pendleton v. Newsome, 290 Va. 162 (2015), cited by Plaintiff, is also enlightening on this issue. In this tragic case a seven-year old child died from severe allergic reaction to a peanut given to her by another student. On several occasions the defendant Superintendent of Schools made public statements about the importance of parents alerting the school to such severe allergies, having a health/safety plan of action, and supplying the school with proper medications and resources. The clear implication—though never stated explicitly—was that the child's mother failed to do such, and was therefore responsible for her child's death.

In fact, the mother, who was a Licensed Practical Nurse, had actually informed the school of her child's severe allergy, had filled out a "Standard Health/Emergency Plan", and had brought to school an EpiPen to counter anaphylactic reactions. (She was told the EpiPen was not needed and that the school had all the necessary resources and medications, and the mother could take the Pen home to use there.) Therefore, the clear implications and insinuations of the parent's failures or negligence, on all three points, were false.

The Court reviewed the trial judge's sustaining of Defendant's demurrer. The Court first noted that a statement clearly implying the mother was responsible for her child's death is capable of defamatory meaning. This is a legal question for the Court. Whether the statement implied the mother was responsible and whether she was defamed thereby was for the factfinder. In that case, in the words of the Webb opinion, above, the defamatory meaning came from the words themselves. (In Webb, unlike Pendleton and our case, the words did not imply Mr. Webb had done anything wrong.)

In reversing the trial court's sustaining of the demurrer, the Court ruled that it cannot be said that the words are not capable of defamatory meaning. Citing Carwile, above, they said the words are reasonably capable of defamatory meaning when aided by innuendo reasonably inferred from the words themselves.

The facts of the current case are much more akin to Pendleton than to Webb. When the term "gang rape" and PKP are uttered in the same breath, it seems inescapable. The repeated references to "gang rape", in conjunction with the fraternity, along with the specific behaviors, acts, and statements described or repeated, are clearly capable of and susceptible to defamatory meaning. And these are direct statements, not just indirect or innuendo. So this also is not a reason to sustain the Demurrer.

[8] Unlike the present case, Webb involved statements that were literally true, and rested entirely on innuendo.

Factual Assertions or Opinion?

The final question is, if the article is of and concerning Phi Kappa Psi, and if the statements are potentially defamatory, are they factual statements, assertions, or accusations, or are they merely statements of opinion? That is, are they amenable or susceptible to being proved true or false, or just interpretations that can be neither true nor false? This too is a legal issue for the Court.

Fuste v. Riverside Healthcare Ass'n., 265 Va. 127, 575 S.E. 2d 858 (2003), addresses the requirement that the defamatory statement be factual and not a matter of opinion. In that case statements were made about two physicians who left their practice after a dispute. Among other things, the statements asserted the physicians left suddenly, were unprofessional, abandoned their patients, and that there were questions about their competence, that they were not taking patients, and left the area. In the context of a demurrer, the Court ruled that such statements must be a "provably false factual connotation". Pure expressions of opinions (such as, for example, "he did not make his patients a high enough priority"), dependent on the speaker's viewpoint, are not actionable. The court there ruled that some of the statements were factual, and some opinion.

In this case, there were numerous statements that are factual assertions, and demonstrably true or false. Whether there was or was not a gang rape is subject to proof; it could be proved that there was or was not a broken glass table and that Jackie got shards of glass in her back; it could be proved whether Drew existed, and worked at the UVA pool, and whether there was a PKP event, or whether anyone sexually assaulted Jackie in any way resembling the depiction in the article. It could be proved true or false whether one of the purported individuals said "We all had to do it." These are all factual assertions, susceptible of proof. In fact even the inferences—that such sexual assaults were commonplace and accepted behavior at Phi Kappa Psi, or that the fraternity condoned, encouraged, or required such gang rape activities—are subject to being proved to be true or not.

For that matter it could be proved whether Dean Eramo said what was attributed to her—"no one wants their daughters to go to the rape school"—or whether Jackie's friends discouraged her from reporting the "rape".[9]

Whether either side will be able to prove whether such statements are true or false at trial is a different matter, but the point is that such statements are factual assertions and are capable of being proved true or false—they either happened or they did not. Thus, they are factual statements and not a matter of opinion. They are susceptible to proof by evidence. If they were

[9] These quotes also go to the issue of whether the entire article or a substantial portion of it was fabricated by Erdely and *Rolling Stone*, or whether it was fabricated by Jackie and embellished by Erdely and *Rolling Stone, and* negligently and recklessly published in failing to check out sources and confirm reports before publishing.

asserted and they were not true, and if they are defamatory, and if they had to do with Phi Kappa Psi, then Plaintiff may recover. Thus, the Demurrer will not be sustained on this ground.

Conclusion

As Plaintiff responded at oral argument, many if not most of Defendants' arguments are properly directed to the factfinder. The jury or judge hearing the case will have to decide 1) if the statements were made, 2) if they were false, 3) if it was the defendants that made them, 4) if the article held the plaintiff in a poor light, and 5) if any damages were occasioned by or flow or resulted therefrom. So much of Defendants' arguments are more appropriately made to the judge or jury hearing the case. If there is a need to take evidence, or to consider the strength of evidence or likelihood of proof, or interpretation of evidence, such is not a proper consideration upon a demurrer. It is not a matter of the evidence, and what the article actually said, but what the Complaint says it says. I cannot try the case in order to rule on the demurrer.

The Court is only ruling that the Complaint contains enough allegations such that Plaintiff may prevail if proved to be true, and the jury could so find. I note that the totality of the Complaint itself is sufficient without the full content of the article, and that Plaintiff has pleaded sufficient facts without the article, but since the entire article was made a part of the pleading the Court may consider such in overruling the Demurrer. Based on the pleadings, I do not find as a matter of law that 1) the article is not of and concerning Phi Kappa Psi, 2) nor that it is not capable of defamatory meaning, 3) nor that it is a matter of opinion and interpretation as opposed to a matter of factual assertion. Rather, I find that the article, as pleaded, is capable of being reasonably viewed as "of and concerning" Plaintiff[10], that it is capable of being considered defamatory in content[11], and that it is factual and susceptible of being proved true or false[12]. Therefore I overrule the Demurrer on all three grounds.

I ask Mr. Albro and Mr. Smolla to prepare the order reflecting my ruling in this letter. Unless agreed otherwise by the parties, Defendants should file their Answer(s) within 21 days of the date the Court enters such order.

Very Truly Yours,

Richard E. Moore

[10] See Darling, above, at page 5: "capable of being reasonably understood as intended to refer to [the plaintiff]".
[11] See Carwile, above, 196 Va. at 13: "reasonably capable of the meaning ascribed to them by innuendo", Webb, above, 287 Va. at 91: "not reasonably capable of the defamatory meaning", and Pendleton, above, 290 Va. at 173: "capable of conveying the defamatory innuendo".
[12] See Fuste, above, 265 Va. at 133: "capable of being proved true or false".