COUNTERSPEECH, COSBY, AND LIBEL LAW: SOME LESSONS ABOUT "PURE OPINION" & RESUSCITATING THE SELF-DEFENSE PRIVILEGE

Clay Calvert[*]

Abstract

Using the recent federal district court opinions in *Hill v. Cosby* and *Green v. Cosby* as analytical springboards, this timely Article explores problems with the concept of pure opinion in libel law. Specifically, *Hill* and *Green* pivoted on the same allegedly defamatory statement attorney Martin Singer made on behalf of comedian Bill Cosby, yet the judges involved reached opposite conclusions regarding whether it was protected as pure opinion. Furthermore, this Article analyzes notions of counterspeech and the conditional self-defense privilege in libel law in arguing for shielding Singer's statement from liability. Although the self-defense privilege was flatly rejected in *Green* because it was not recognized under the relevant state law, it merits renewed consideration in similar cases where attorneys verbally punch back against their clients' accusers in the court of public opinion.

---

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Amy Barrett for her excellent work on early drafts of this Article.

INTRODUCTION

Although allegations had sensationally swirled around him for nearly a decade,[1] actor and comedian Bill Cosby faced a new, rising tide of claims in late 2014 that he sexually assaulted multiple women over the course of many years.[2] Four women alone, including former supermodel Janice Dickinson,[3] came forward in November 2014 "to repeat the decades-old accusations of being drugged, raped or molested."[4] All totaled, more than fifteen women by the close of 2014 publicly accused Cosby of assault, often involving allegations he drugged them.[5]

During a November 15, 2014 interview on National Public Radio (NPR), however, Cosby refused to comment.[6] This was consistent with

1. *See* Corky Siemaszko, *Sex Case vs. Cosby Is Tossed: Pa. DA Pans Evidence*, N.Y. DAILY NEWS (Feb. 18, 2005, 12:00 AM), http://www.nydailynews.com/archives/news/sex-case-cosby-tossed-pa-da-pans-evidence-article-1.618566 (reporting on Andrea Constand's accusation "that Cosby gave her a knockout drug and groped her at his Philadelphia-area mansion," and noting that a few days after Constand made her allegations, "a 57-year-old California lawyer named Tamara Green surfaced and claimed Cosby put the moves on her 30 years earlier after giving her two knockout pills").

2. *See* Bill Carter, *Cosby Is Off Another Show as Rape Accusations Swirl*, N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/15/business/media/appearance-by-bill-cosby-with-david-letterman-canceled-as-rape-allegations-swirl.html?_r=0 (reporting that criticism of Cosby "is escalating with renewed attention to allegations that he sexually assaulted women in several incidents decades ago").

3. Emily Smith, *Model Janice Accuses Cosby*, PRESSREADER (Nov. 19, 2014), www.pressreader.com/usa/new-york-post/20141119/281646778441287.

4. Bill Carter et al., *Comeback by Bill Cosby Unravels as Rape Claims Re-emerge*, N.Y. TIMES (Nov. 19, 2014), http://www.nytimes.com/2014/11/20/business/media/bill-cosby-fallout-rape-accusations.html.

5. Trip Gabriel, *Philadelphia Laments Bill Cosby's Now-Tarnished Image*, N.Y. TIMES (Dec. 7, 2014), http://www.nytimes.com/2014/12/08/us/philadelphia-laments-native-son-bill-cosbys-now-tarnished-image.html.

6. *See* Kirthana Ramisetti, *Cosby Silent on Rape Allegations*, PRESSREADER (Nov. 16, 2014), http://www.pressreader.com/usa/new-york-daily-news/20141116/281522224385022.

his silence on the accusations since they began to resurface one month earlier.[7] As *USA Today* reported on November 19, 2014, "Cosby seems determined to ignore the noise and continue working."[8]

But just two days later, the silence was shattered by Cosby's attorney, Martin Singer,[9] whom *Variety* aptly dubbed a "[c]ombative litigator."[10] Singer issued a blistering statement that ripped into the accusers, asserting that

> [t]he new, never-before-heard claims from women who have come forward in the past two weeks with unsubstantiated, fantastical stories about things they say occurred 30, 40, or even 50 years ago have escalated far past the point of absurdity . . . . These brand new claims about alleged decades-old events are becoming increasingly ridiculous, and it is completely illogical that so many people would have said nothing, done nothing, and made no reports to law enforcement or asserted civil claims if they thought they had been assaulted over a span of so many years.
>
> Lawsuits are filed against people in the public eye every day. There has never been a shortage of lawyers willing to represent people with claims against rich, powerful men, so it makes no sense that not one of these new women who just came forward for the first time now ever asserted a legal claim back at the time they allege they had been sexually assaulted.[11]

---

7. *See* Jonathan Lai, *Cosby Lawyer Says Comedian Won't "Dignify" Allegations of Sexual Assault*, PHILA. INQUIRER (Nov. 16, 2014), http://www.philly.com/philly/news/local/20141116_Cosby_silent_on_sexual_assault_allegations.html (reporting that "Cosby has not commented publicly on the allegations since they resurfaced last month").

8. Andrea Mandell & Ann Oldenburg, *What Will Bill Cosby's Legacy Be?*, USA TODAY (Nov. 19, 2014, 6:52 PM), http://www.usatoday.com/story/life/people/2014/11/18/bill-cosby-legacy-forever-damaged-rape-allegations/19176659.

9. Manuel Roig-Franzia et al., *Accusations Recast an American Cultural Icon*, PRESSREADER (Nov. 23, 2014), https://www.pressreader.com/usa/the-washington-post-sunday/20141123/281479274722602.

10. Cynthia Littleton & Ted Johnson, *Bill Cosby Scandal Boils over in New Media Climate*, VARIETY (Nov. 25, 2014, 10:00 AM), http://variety.com/2014/biz/news/bill-cosby-sexual-assault-allegations-public-opinon-1201364071.

11. Roig-Franzia et al., *supra* note 9.

The statement, in whole or in part, was soon picked up by a bevy of media outlets, ranging from *People*[12] to CNN[13] to the *Washington Post*.[14]

From a robust First Amendment[15] perspective, Cosby and his counselor were simply engaging in a measure of what the U.S. Supreme Court in *United States v. Alvarez*[16] called "counterspeech."[17] As Justice Louis Brandeis explained approximately ninety years ago, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[18] Viewed in the most generous and charitable light, then, Singer was merely adding more speech to the metaphorical marketplace of ideas[19] to counter the claims of Cosby's accusers and to provide the public with another, different perspective to consider in searching for the truth, as it were, about the comedian's conduct.[20] As Professor Paul Horwitz notes, "The market-place of ideas metaphor is generally understood to relate directly to the search for truth. . . ."[21] Bridging the marketplace and counterspeech concepts, Professors Daniel Ho and Frederick Schauer wrote in 2015 that "in the

12. *See* Lynette Rice, *Bill Cosby's Lawyer Speaks Out: The Media Vilification Has to Stop*, PEOPLE (Nov. 21, 2014, 10:45 PM), http://www.people.com/article/bill-cosby-rape-laywer-statement-martin-singer.

13. *See* Steve Almasy, *Lawyer: Cosby Being Vilified by 'Unsubstantiated, Fantastical Stories*,*'* CNN (Nov. 22, 2014, 5:34 PM), http://www.cnn.com/2014/11/21/showbiz/bill-cosby-attorney-statement.

14. *See* Roig-Franzia et al., *supra* note 9.

15. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties that apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

16. 132 S. Ct. 2537 (2012).

17. *Id.* at 2549.

18. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by* Bradenburg v. Ohio, 395 U.S. 444 (1969).

19. The marketplace-of-ideas theory of free expression "represents one of the most powerful images of free speech, both for legal thinkers and for laypersons." MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 2 (2001). It has been described as "the dominant First Amendment metaphor." LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 237 (1991). *See generally* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6–8 (1992) (providing an overview of the goals, strengths, and weaknesses of the marketplace-of-ideas theory).

20. *See* Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 479 (1997) (noting that the marketplace of ideas "refers to the public and social search for truth").

21. Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 488–89 (2005).

classic marketplace theory, as Justice Brandeis observed in *Whitney*, the remedy for confusion and fraud is counter-speech."[22]

Although Singer's statement certainly succeeded in garnering Cosby's views widespread media attention, it also backfired badly by sparking libel[23] litigation against the comedic septuagenarian.[24] In October 2015, Renita Hill sued Cosby for defamation[25] in Pennsylvania.[26]

Singer's statement quoted above is cited prominently in Hill's complaint.[27] Hill calls it—along with a comment Cosby made during a *Florida Today* television interview[28] and a letter written by his wife, Camille Cosby, which was published in the *Washington Post*[29]—defamatory.[30] Just a day before Singer made his statement, Hill told a reporter for a Pittsburgh television station that Cosby had sexually abused her.[31]

Contending that Singer was acting as Bill Cosby's "agent, authorized representative, lawyer, servant, and/or employee"[32] when Singer issued his statement, Hill alleges that it, along with the *Florida Today* interview and *Washington Post* letter, were

> made and broadcast with the intent to paint Renita; and the other woman who had come public with allegations and accusations of sexual abuse, as liars. Said statements

22. Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1180 (2015).

23. *See generally* REPORTERS COMM. FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK 3 (Gregg P. Leslie ed., 7th ed. 2011) ("Libel occurs when a false and defamatory statement about an identifiable person is published to a third party, causing injury to the subject's reputation.").

24. *See* Tribune Wire Reports, *Bill Cosby Charged in 2004 Sex Assault Case; Attorneys Vow 'Vigorous Defense*,*'* BALT. SUN (Dec. 30, 2015, 10:53 PM), http://www.baltimoresun.com/news/ct-bill-cosby-criminal-charges-20151230-story.html.

25. Defamation, as Professor Joseph King writes, "is the tort theory that provides a civil remedy for communications that harm a victim's reputation." Joseph H. King, Jr., *Defining the Internal Context for Communications Containing Allegedly Defamatory Headline Language*, 71 U. CIN. L. REV. 863, 868 (2003).

26. Complaint para. 53, Hill v. Cosby, No. GD15-18156 (Pa. Ct. Com. Pl. Oct. 14, 2015), 2016 WL 247009.

27. *Id.* para. 38.

28. *Id.* para. 41.

29. *Id.* para. 42.

30. *Id.* para. 48.

31. *Id.* paras. 36–37. Hill told her story to reporter Ralph Iannotti of KDKA. *See* Ralph Iannotti, *Local Woman Latest to Come Forward Accusing Bill Cosby of Being Sexual Predator*, CBS PITTSBURGH (Nov. 20, 2014, 11:15 PM), http://pittsburgh.cbslocal.com/2014/11/20/local-woman-latest-to-come-forward-accusing-bill-cosby-of-being-sexual-predator (describing Hill's allegations).

32. Complaint, *supra* note 26, para. 39.

> explicitly provide that the women's stories are "unsubstantiated," "fantastical," and "absurd," among other derogatory descriptions. The statements also imply that the women were merely coming forth with the abuse stories in order to extort money from Cosby.[33]

In addition to playing a front-and-center role in Renita Hill's lawsuit, Singer's November 21, 2014 statement found its way into the amended complaint for defamation filed on behalf of three women—Tamara Green, Therise Serignese, and Linda Traitz—in federal court in Massachusetts.[34] As attorneys for those women, each of whom claims Cosby sexually abused her, put it in the amended complaint:

> On or about November 21, 2014, Defendant Cosby, by and through his agent, authorized representative, lawyer, servant, and/or employee Martin D. Singer, responded to Plaintiff Serignese's disclosure, as well as to similar accusations by multiple other women made publicly in the preceding weeks, by issuing a written defamatory response to numerous media outlets. (This defamatory statement is referred to herein as "the November 21 defamatory statement.")
>
> In the November 21 defamatory statement, Defendant Cosby, by and through Singer, stated explicitly, stated in effect, stated by innuendo, implied, and/or insinuated, that Defendant Cosby's sexual assault against Plaintiff Serignese (among other women) never occurred, and therefore that Plaintiff Serignese (among other women) lied and was a liar.[35]

In a nutshell, multiple women in late 2014 accused Cosby of sexual assault. Cosby's attorney, in turn, fought back in the court of public opinion. He issued a statement to the news media deriding their allegations as "unsubstantiated, fantastical stories"[36] and arguing that it was "completely illogical"[37] for them, having said and done nothing for so many years, to suddenly come forward. Several of those women—in two separate lawsuits—then countered by suing Cosby for defamation based upon Singer's statement, claiming it portrayed them as liars.[38] But

---

33. *Id.* para. 51.

34. Amended Complaint at 9–10, Green v. Cosby, 99 F. Supp. 3d 223 (D. Mass. 2015) (No. 3:14-cv-30211-MGM), 2015 WL 219030.

35. *Id.*

36. *See supra* note 11 and accompanying text.

37. *See supra* note 11 and accompanying text.

38. Complaint, *supra* note 26; Amended Complaint, *supra* note 34.

what makes this situation so striking—and what exposes vast problems with the fact-versus-opinion distinction in libel law addressed in this Article—is what happened next with the two lawsuits pivoting on Singer's statement.

On February 9, 2016, U.S. District Judge Arthur Schwab in *Hill v. Cosby*[39] concluded that Singer's statement was "a pure opinion"[40] and thus was "protected and not actionable as defamatory speech."[41] Schwab, sitting in the Western District of Pennsylvania, therefore dismissed with prejudice Renita Hill's defamation claim based on Singer's statement.[42]

But exactly four months earlier, U.S. District Judge Mark G. Mastroianni of Massachusetts in *Green v. Cosby*[43] rejected the same pure opinion argument and instead held "there is a sufficient factual question as to the meaning readers would have given to the statement to preclude dismissal at this stage."[44] Judge Mastroianni reasoned that

> when read in its entirety, the statement is capable of being understood as asserting not just that the allegations made during the previous two weeks were unsubstantiated, but also as implying they were false and entirely without merit. The court cannot predict whether a jury will actually conclude the statement implied that fact and, if so, whether the assertion of fact was false . . . .[45]

Thus, as attorney Eriq Gardner wrote for the *Hollywood Reporter* in January 2016, after Judge Schwab issued an initial ruling that was later corrected on unrelated grounds in February 2016,[46] two federal judges reached "diametrically opposed"[47] conclusions involving the same statement and the same pure opinion defense. Gardner added that "different states have slightly different laws about defamation, but everything is guided by the First Amendment, and what makes this situation remarkable is that the two judges were, in part, addressing *the*

39. No. 15cv1658, 2016 U.S. Dist. LEXIS 15795 (W.D. Pa. Feb. 9, 2016), *aff'd*, 665 F. App'x 169 (3d Cir. 2016).

40. *Id.* at *13.

41. *Id.* at *14.

42. *Id.* at *27.

43. 138 F. Supp. 3d 114 (D. Mass. 2015).

44. *Id.* at 137.

45. *Id.* at 136–37.

46. Hill v. Cosby, No. 15cv1658, 2016 U.S. Dist. LEXIS 7300 (W.D. Pa. Jan. 21, 2016), *corrected and superseded by* 2016 U.S. Dist. LEXIS 15795.

47. Eriq Gardner, *Bill Cosby's Legal Win Points to Rupture in Judicial Reading of Defamation Law*, HOLLYWOOD REP. (Jan. 21, 2016, 12:44 PM), http://www.hollywoodreporter.com/thr-esq/bill-cosbys-legal-win-points-858000.

same exact statement."[48] The dueling opinions provide an ideal case study for analyzing the pure opinion defense.

This Article examines the pure opinion defense and the problems with it, which are vividly illustrated by the disparate rulings in the recent *Hill* and *Green* defamation suits. Initially, Part I provides a primer on pure opinion as one facet of the larger, uneasy dichotomy in libel law between assertions of fact and opinion. In the process, it also reviews the U.S. Supreme Court's ruling in *Milkovich v. Lorain Journal Co.*,[49] given that it—like *Hill* and *Green*—involved an allegation that the plaintiff was a liar.[50]

Part II then analyzes in greater detail the rulings in *Hill* and *Green* related to Martin Singer's November 21, 2014 statement. It attempts to identify specific points of disagreement and contention between the two judges in those cases on the pure opinion defense.

Next, Part III argues that Singer's statement should be protected and treated as the type of "rhetorical hyperbole"[51] one reasonably expects from an attorney responding to serious and sensational allegations involving a high-profile celebrity client. Specifically, Part III asserts that the common law self-defense privilege—a conditional privilege recognized by some, but not all, courts in libel cases that allows individuals to "use reasonable means to defend themselves against an assault, an unfair business practice, *or libel*"[52]—supports protecting Singer's statement.

However, *Green v. Cosby* flatly rejected applying the self-defense privilege because Judge Mastroianni concluded that "the state substantive law governing Plaintiffs' claims does not recognize this privilege."[53] Yet, the essence of this privilege, when coupled with the hyperbolic nature of speech expected from a lawyer zealously defending a client against reputation-harming allegations of rape, militate in favor of non-liability.

Finally, this Article concludes in Part IV by suggesting that the *Cosby* cases illustrate that all courts should consider recognizing the conditional self-defense privilege, at least in cases where an attorney defends his client in the court of public opinion, and that they clarify the fine line that defines precisely where and when the privilege is lost. Without such elucidation, the self-defense privilege risks becoming as slippery as the pure opinion privilege proved in *Hill* and *Green*.

---

48. *Id.*

49. 497 U.S. 1 (1990).

50. *Id.* at 2.

51. *Milkovich*, 497 U.S. at 17.

52. KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 166 (9th ed. 2014) (emphasis added).

53. 138 F. Supp. 3d 114, 141 (D. Mass. 2015).

I. PURE OPINION IN DEFAMATION LAW: WADING INTO MURKY WATERS AND REVIEWING THE LITERATURE AND CASE LAW

This Part starts broadly, addressing the fact-versus-opinion dichotomy in defamation law. It then drills down deeper into the concept of pure opinion, including how it is defined under the laws of Pennsylvania and Florida that were applied, respectively, in *Hill v. Cosby* and *Green v. Cosby*.

A. *The Importance of the Fact v. Opinion Distinction*

First Amendment scholar Rodney Smolla observes that "the distinction between fact and non-fact is ubiquitous in modern defamation law and derives from both common-law and constitutional law doctrines."[54] The problem, he writes, is that "[a]t both the common law and constitutional law levels, courts and commentators have long struggled over the distinction between 'fact' and 'opinion.'"[55] It thus is not surprising that Professor Robert Trager and his co-authors assert that "[t]o attempt to separate statements of fact from statements of opinion is to venture onto one of the law's slipperiest of slopes."[56]

Ashley Messenger, senior associate general counsel for NPR, concurs. She notes that "the distinction between a 'factual assertion' and an 'opinion' is fuzzy, and many courts have acknowledged the difficulty distinguishing the two."[57] Indeed, as Professor Adam Lamparello wrote in 2015, judicial efforts to draw a line between actionable facts and protected opinion have resulted in a "confusing and unprincipled jurisprudence."[58]

Although often decidedly difficult to decipher, the difference is pivotal. That is because statements of opinions typically are privileged, while those characterized as facts are actionable.[59] As the U.S. Supreme Court famously put it *Gertz v. Robert Welch, Inc.*[60] in 1974:

---

54. 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 6:1, Westlaw (database updated May 2016).

55. *Id.*

56. ROBERT TRAGER ET AL., THE LAW OF JOURNALISM & MASS COMMUNICATION 182 (2d ed. 2010).

57. Ashley Messenger, *The Problem with* New York Times Co. v. Sullivan*: An Argument for Moving from a "Falsity Model" of Libel Law to a "Speech Act Model,"* 11 FIRST AMEND. L. REV. 172, 199 (2012).

58. Adam Lamparello, *The Case for Defamatory Opinion*, 25 GEO. MASON U. C.R. L.J. 301, 321 (2015).

59. *See* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 264 (1993) (elaborating that "[i]f the alleged defamation was an 'opinion' rather than a statement of 'fact,' it was privileged regardless of the publisher's fault or state of mind").

60. 418 U.S. 323 (1974).

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[61]

That language, as Judge Robert Sack writes, "had a deep, virtually instantaneous impact on the law of defamation."[62] He emphasizes that "[c]ourt after court employed the *Gertz* language as a mandate for a constitutionally based rule providing immunity for all expressions of opinion."[63]

B. *The Limited Impact of* Milkovich

The Court's 1990 decision in *Milkovich v. Lorain Journal Co.*, however, initially seemed to substantially rein in the opinion privilege. *Milkovich* held that the First Amendment does not provide "a wholesale defamation exemption for anything that might be labeled 'opinion.'"[64] The *Milkovich* Court also rebuffed the notion that the First Amendment required "the creation of an artificial dichotomy between 'opinion' and fact."[65]

On the other hand, the Court in *Milkovich* was clear that "a statement of opinion relating to matters of public concern which does not contain a *provably false factual connotation* will receive full constitutional protection."[66] It added that "loose, figurative, or hyperbolic language"[67] negates the idea that a defendant speaker was attempting to convey a verifiable factual statement.

As Smolla sums it up, *Milkovich* simply shifted the constitutional distinction from one of fact/opinion to one of fact/non-fact, signaling a change in terminology rather than a shift of substance.[68] Reflecting a similar understanding, Judge Sack writes that the *Milkovich* Court "gave with one hand what it took away with the other: Opinion is not protected per se by the Constitution, yet because opinion can be proved neither true nor false and a plaintiff must prove falsity to succeed, it remains nonactionable as a matter of constitutional law."[69]

---

61. *Id.* at 339–40 (footnote omitted).

62. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 4.2.3.A (4th ed. 2016), Bloomberg (database updated 2016).

63. *Id.*

64. 497 U.S. 1, 18 (1990).

65. *Id.* at 19.

66. *Id.* at 20 (emphasis added).

67. *Id.* at 21.

68. 1 SMOLLA, *supra* note 54, § 6:2.

69. SACK, *supra* note 62, § 4.2.4.B.

More than a quarter century after *Milkovich*, it is clear the case "actually had little if any practical impact on the disposition of defamation cases generally."[70] As Professor Len Niehoff and NPR counsel Ashley Messenger argue in a 2016 article, "lower courts have used a variety of strategies to avoid the constraints of an ostensibly controlling Supreme Court opinion that is deeply and unworkably confused."[71] In fact, as Judge Sack writes, "from time to time, courts revert to the apparent state of the law prior to *Milkovich*: to the effect that statements of opinion are absolutely privileged under the First Amendment."[72] The bottom line is that "*Milkovich* had little impact on the law."[73]

C. *Pure Opinion*

One facet of the modern fact-versus-opinion muddle involves so-called pure opinions. A pure opinion is among the defenses typically available to defamation defendants.[74] As articulated in a comment to the *Restatement (Second) of Torts*:

> The simple expression of opinion, or *the pure type*, occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character . . . . The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated.[75]

As Professor Richard Maloy writes, "Pure opinion is not actionable because if the facts on which the statement is based are revealed to the

---

70. Len Niehoff & Ashley Messenger, Milkovich v. Lorain Journal *Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. MICH. J.L. REFORM 467, 467 (2016).

71. *Id.* at 468.

72. SACK, *supra* note 62, § 4.2.4.B.

73. Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 COLUM. L. REV. 294, 322 (2000).

74. *See* John Bruce Lewis & Gregory V. Mersol, *Opinion and Rhetorical Hyperbole in Workplace Defamation Actions: The Continuing Quest for Meaningful Standards*, 52 DEPAUL L. REV. 19, 21–22 (2002) (writing that "[d]efenses available to the defendant include: the truth of the statement; the plaintiff's consent to the statement; fair comment; *the expression of pure opinion*; and the existence of an absolute, conditional, or qualified privilege" (emphasis added) (footnotes omitted)).

75. RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (AM. LAW INST. 1977) (emphasis added).

person to whom the statement is made (or that person knows of them), that person is permitted to reach a different conclusion based on those same facts."[76] For a pure opinion to exist, one of two things must happen: either the speaker must state the facts upon which it is based—what Smolla aptly calls a "factual predicate"—or the facts must be "already known to the recipient."[77] A pure opinion thus amounts to a "personal view on the objective facts *already* stated."[78] Professors Kent Middleton and William Lee assert that a key aspect of the pure opinion privilege is that "the facts must be stated accurately and interpreted plausibly."[79] Professors Derigan Silver and Ruth Walden sum it up by noting that "pure opinion should never be actionable."[80]

Pure opinions, however, must be distinguished from mixed opinions, which are actionable and exist when "*undisclosed defamatory facts* would be inferred by the recipient."[81] This flows from section 566 of the *Restatement (Second) of Torts*, which advises that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it *implies the allegation of undisclosed defamatory facts* as the basis for the opinion."[82]

As attorneys John Lewis and Gregory Mersol encapsulate it, "a mixed opinion consists of a statement of opinion by the speaker that implies the existence of undisclosed defamatory facts" and "may be actionable."[83] Professor Wendy Gerwick Couture thus distills the difference between non-actionable pure opinions and actionable mixed opinions to its most basic level when she writes that "[p]ure opinions do not imply any undisclosed defamatory facts, while mixed opinions do."[84]

1. Pure Opinion in Pennsylvania

It is critical to consider pure opinion under Pennsylvania law because Judge Schwab applied the Keystone State's substantive law of libel in Renita Hill's defamation action against Bill Cosby.[85] Initially, whether a

76. Richard H.W. Maloy, *The Odyssey of a Supreme Court Decision About the Sanctity of Opinions Under the First Amendment*, 19 TOURO L. REV. 119, 131 n.64 (2002).

77. 1 SMOLLA, *supra* note 54, § 6:29.

78. *Id.*

79. MIDDLETON & LEE, *supra* note 52, at 153.

80. Derigan Silver & Ruth Walden, *A Dangerous Distinction: The Deconstitutionalization of Private Speech*, 21 COMMLAW CONSPECTUS 59, 104 (2012).

81. 1 SMOLLA, *supra* note 54, § 6:30 (emphasis added).

82. RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977) (emphasis added).

83. Lewis & Mersol, *supra* note 74, at 38.

84. Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 LA. L. REV. 381, 439 (2013).

85. *See* Hill v. Cosby, No. 15-1658, 2016 U.S. Dist. LEXIS 15795, at *5 n.2 (W.D. Pa. Feb. 9, 2016) (noting that "[t]he parties agree, as does this Court, that Pennsylvania substantive law

particular statement is an opinion or a fact in Pennsylvania "is a question of law for the trial court."[86]

Pennsylvania, in turn, has adopted the *Restatement (Second) of Torts*'s definition of pure opinion.[87] Thus, a Commonwealth Court of Pennsylvania in 2009 held that a statement was "protected as a pure expression of opinion" because it "was based upon facts that were disclosed in the article and does not imply the existence of undisclosed facts."[88] This builds, in turn, from a 2002 Commonwealth Court decision holding that "[i]t is clear that expressions of pure opinion that rely on disclosed facts are not actionable."[89]

Conversely, mixed opinions are actionable in Pennsylvania. As one Pennsylvania court wrote in 2001, "Communicated opinions are actionable when they can be reasonably understood to *imply the existence of undisclosed defamatory facts*."[90]

2. Pure Opinion in Florida

In *Green v. Cosby*, a diversity jurisdiction case,[91] U.S. District Judge Mark Mastroianni applied Florida libel law to the defamation claims of plaintiffs Therese Serignese and Linda Traitz,[92] based upon Martin Singer's November 21, 2014 statement to the media.[93] Thus, although the case currently pends in a Massachusetts federal court, it is imperative to consider the substantive law of Florida.[94]

---

applies to the claims asserted in this case").

86. Green v. Mizner, 692 A.2d 169, 174 (Pa. Super. Ct. 1997).

87. *Id.*; *see also* Mitchell v. Plasmacare, Inc., No. 11-430, 2011 U.S. Dist. LEXIS 59160, at *16 (W.D. Pa. June 2, 2011) ("Pennsylvania courts have adopted the Restatement (Second) of Torts ('Restatement') which recognizes that a defamatory statement in the form of an opinion is actionable 'only if it implies the allegation of undisclosed defamatory facts as the basis for that opinion.'").

88. Alston v. PW-Phila. Weekly, 980 A.2d 215, 221 (Pa. Commw. Ct. 2009).

89. Feldman v. Lafayette Green Condo. Ass'n, 806 A.2d 497, 501 (Pa. Commw. Ct. 2002).

90. Hemispherx Biopharma, Inc. v. Asensio, No. 3970, 2001 Pa. Dist. & Cnty. Dec. LEXIS 222, at *26 (Pa. Ct. Com. Pl. Sept. 6, 2001) (emphasis added).

91. 28 U.S.C. § 1332(a) (2012). Diversity jurisdiction is "the subject-matter jurisdiction of the federal courts to decide disputes between citizens of different states." Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 119 (2003); *see* Lennes Omuro et al., *Removing a Case to Federal Court When Diversity Jurisdiction Exists*, HAW. B.J., Nov. 2014, at 5, 9 (noting that diversity jurisdiction for federal courts exists when "the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs" and "when none of the plaintiffs in an action share citizenship with any defendant").

92. 138 F. Supp. 3d 114, 124 (D. Mass. 2015).

93. *Id.* at 122 (transcribing Singer's statement in its entirety).

94. In this instance, diversity jurisdiction occurred because defendant Bill Cosby "is a citizen of Massachusetts and Plaintiffs are citizens of either California or Florida" and the "[p]laintiffs each assert they are entitled to damages in excess of the statutory threshold amount." *Id.* at 119.

In Florida, as in Pennsylvania, "whether a statement is one of fact or opinion is a question of law."[95] A Florida appellate court wrote in January 2016 that "[s]tatements of pure opinion are not actionable."[96] Under Sunshine State law, "[a] statement is pure opinion, as a matter of law, when it is based on facts which are otherwise known or available to the reader or listener."[97] A pure opinion thus amounts to "commentary on the facts presented."[98] As with Pennsylvania discussed above,[99] Florida also adopts the *Restatement (Second) of Torts*'s definition of pure opinion.[100]

Mixed expressions of opinion, however, are not protected in Florida.[101] A Florida appellate court in 1999 described the difference between pure and mixed expressions of opinion this way:

> Pure opinion is based upon facts that the communicator sets forth in a publication, or that are otherwise known or available to the reader or the listener as a member of the public. Mixed opinion is based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to the communication. Rather the communicator implies that a concealed or undisclosed set of defamatory facts would confirm his opinion.[102]

The bottom line, then, is that Pennsylvania and Florida both recognize the pure opinion defense and, in turn, define it in similar fashion in accord with the *Restatement (Second) of Torts*'s definition. With this background on the fact-versus-opinion dichotomy and the concept of pure opinion in mind, this Article turns, in compare-and-contrast fashion, to the cases of *Hill v. Cosby* and *Green v. Cosby* to examine how the judges addressed the pure opinion issue.

---

95. Sager v. City of Port Richey, No. 8:10-cv-1069-T-30TGW, 2010 U.S. Dist. LEXIS 123875, at *30 (M.D. Fla. Nov. 22, 2010).

96. Blake v. Giustibelli, 182 So. 3d 881, 884 n.1 (Fla. Dist. Ct. App. 2016).

97. Razner v. Wellington Reg'l Med. Ctr., 837 So. 2d 437, 442 (Fla. Dist. Ct. App. 2002).

98. Town of Sewall's Point v. Rhodes, 852 So. 2d 949, 951 (Fla. Dist. Ct. App. 2003).

99. *See* Mitchell v. Plasmacare, Inc., No. 11-430, 2011 U.S. Dist. LEXIS 59160, at *16 (W.D. Pa. June 2, 2011); *supra* note 87 and accompanying text.

100. *See* E. Air Lines, Inc. v. Gellert, 438 So. 2d 923, 927 (Fla. Dist. Ct. App. 1983) (using the Restatement as the rule of law), *overruled on other grounds by* Ter Keurst v. Miami Elevator Co., 486 So. 2d 547 (Fla. 1986); *see also* Stembridge v. Mintz, 652 So. 2d 444, 446 (Fla. Dist. Ct. App. 1995) (observing that in *Gellert*, a Florida appellate court followed section 566 of the *Restatement (Second) of Torts*).

101. Morse v. Ripken, 707 So. 2d 921, 922 (Fla. Dist. Ct. App. 1998).

102. *Id.* (quoting Hay v. Indep. Newspapers, Inc. 450 So. 2d 293, 295 (Fla. Dist. Ct. App. 1984)).

II. A TALE OF TWO DEFAMATION SUITS: DIVERGENT VIEWS ON PURE OPINION IN THE COSBY CASES

In February 2016, U.S. District Judge Arthur Schwab in *Hill v. Cosby* held that Martin Singer's November 21, 2014 statement[103] to the media was protected as pure opinion.[104] Just four months earlier, U.S. District Judge Mark Mastroianni in *Green v. Cosby* rejected that conclusion, finding instead that Singer's statement was one of actionable mixed opinion because it was "capable of being understood as asserting not just that the allegations made during the previous two weeks were unsubstantiated, but also as implying they were false and entirely without merit."[105] How did the judges reach these disparate conclusions? To answer that question, this Part first examines *Hill* and then turns to *Green*.

A. Hill v. Cosby

In *Hill*, Judge Schwab began his pure opinion analysis, which spanned a mere three paragraphs,[106] by noting that Singer's statement was made in direct response to a media interview that plaintiff Renita Hill had given in which she accused Bill Cosby of sexual abuse and rape.[107] Schwab distilled the meaning of Singer's statement down to describing Renita Hill's "and other women's allegations against Defendant [Cosby] as 'beyond absurd'" and as labeling "their accounts of past events as 'unsubstantiated, fantastical stories.'"[108]

Schwab's analysis focused heavily on the fact that "*any attorney*"—not just Singer—representing "*any defendant* must advance a position contrary to that of the plaintiff."[109] Singer—in Schwab's view—was simply engaging in what this Article calls counterspeech.[110] Taking a position contrary to an accuser in the court of public opinion flows naturally from what Schwab emphasized was the duty of an attorney "actively engaged in the zealous representation of his client."[111] This, in turn, derives from the preamble to the American Bar Association's Model Rules of Professional Conduct, which admonishes that "[a]s advocate, a

103. *See supra* note 11 and accompanying text (setting forth the Singer statement at issue).

104. No. 15-CV1658, 2016 U.S. Dist. LEXIS 15795, at *13–14 (W.D. Pa. Feb. 9, 2016), *aff'd*, 665 F. App'x 169 (3d Cir. 2016).

105. 138 F. Supp. 3d 114, 136–37 (D. Mass. 2015).

106. *Hill*, 2016 U.S. Dist. LEXIS 15795, at *13–15.

107. *Id.* at *13.

108. *Id.*

109. *Id.* at *14 (emphasis added).

110. *See supra* notes 15–22 and accompanying text (addressing the counterspeech doctrine).

111. *Hill*, 2016 U.S. Dist. LEXIS 15795, at *15.

lawyer *zealously asserts the client's position* under the rules of the adversary system."[112]

Explaining what might be viewed as the point-versus-counterpoint framework applied to the facts in *Hill*, Schwab wrote that Renita Hill

> publicly claimed she was sexually abused and raped by Defendant—which is *her position*; and Defendant, through his attorney, publicly denied those claims by saying the "claims" are unsubstantiated and absurd—which is *his legal position*. This sort of purely opinionated speech articulated by Defendant's attorney is protected and not actionable as defamatory speech.[113]

In brief—and in Judge Schwab's estimation—both Renita Hill and Bill Cosby (via Martin Singer) were simply staking out their legal positions. Hill claimed she was raped by Cosby, and Cosby retorted that was absurd.[114]

From a public-policy perspective, it seems important that Schwab cited approvingly here the high court's pre-*Milkovich* ruling in *Gertz v. Robert Welch, Inc.*, which was addressed above in this Article.[115] Specifically, Schwab quoted *Gertz* for the proposition that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on *the competition of other ideas*."[116] In other words, the back-and-forth and the give-and-take between a news media interview by Renita Hill and a contrary statement to the news media by Martin Singer fits naturally within the sparring that occurs in marketplace-of-ideas theory.[117] Schwab arguably believes this is precisely how the marketplace of ideas is supposed to function.

At the end of the day, Schwab concluded that Singer's statement was "a pure opinion,"[118] with the judge noting he "[did] not find the Martin Singer Statement include[d] language which implies the existence of undisclosed defamatory facts about Plaintiff."[119] He thus held that Singer's statement "fail[ed] to support Plaintiff's claim for defamation."[120] Schwab's opinion was affirmed by a unanimous three-

---

112. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2014) (emphasis added).

113. *Hill*, 2016 U.S. Dist. LEXIS 15795, at *14 (emphasis added).

114. *Id.*

115. *See supra* notes 60–63 and accompanying text.

116. *Hill*, 2016 U.S. Dist. LEXIS 15795, at *14 (emphasis added) (quoting Gertz v. Robert Welch Inc., 418 U.S. 323, 339–40 (1974)).

117. *See supra* notes 19–22 and accompanying text (addressing the marketplace-of-ideas theory).

118. *Hill*, 2016 U.S. Dist. LEXIS 15795, at *13.

119. *Id.* at *15.

120. *Id.*

judge panel of the U.S. Court of Appeals for the Third Circuit in December 2016.[121]

B. Green v. Cosby

In *Green v. Cosby*, Judge Mastroianni's analysis of the pure opinion question regarding Singer's statement stretched for four paragraphs.[122] He began by noting that a pure opinion exists either when the speaker states the facts upon which he is basing his opinion or when those facts are known or otherwise available to the audience.[123] Mastroianni observed that the factual parts of Singer's statement—namely, "the length of time between when the incidents allegedly occurred and the date on which any particular allegation became public"—were uncontested as true.[124]

Mastroianni, however, disagreed with Cosby's attorneys on the overall meaning that one could reasonably take away from Singer's statement.[125] Cosby contended the meaning was pure opinion—that the allegations against him "were unsubstantiated."[126] Judge Mastroianni, however, found that "when read in its entirety, the statement is capable of being understood as asserting not just that the allegations made during the previous two weeks were unsubstantiated, but also as *implying* they were false and entirely without merit."[127] He thus held "there is a sufficient factual question as to the meaning readers would have given to the statement to preclude dismissal at this stage."[128]

In brief, then, Mastroianni drew a critical distinction between *unsubstantiated* allegations (Cosby's interpretation of Singer's statement) and *false, meritless* allegations. Although he never expressly opined as such, Mastroianni arguably was suggesting that Singer was not simply stating that the plaintiffs *lacked proof* (unsubstantiated) behind their allegations, but that they were, in fact, *liars* (false and meritless).

The latter interpretation brings one back to *Milkovich v. Lorain Journal*, addressed above in the article.[129] There, the Supreme Court treated as actionable fact the allegation that a wrestling coach was—like Cosby's accusers, at least as implied by Singer's statement in the view of

121. Hill v. Cosby, 665 F. App'x 169 (3d Cir. 2016).
122. 138 F. Supp. 3d 114, 136–37 (D. Mass. 2015).
123. *Id.* at 136.
124. *Id.*
125. *Id.* at 136–37.
126. *Id.*
127. *Id.* (emphasis added).
128. *Id.* at 137.
129. *See supra* Section I.B.

Judge Mastroianni—a liar.[130] Specifically, in *Milkovich* a sports columnist, Theodore Diadiun, penned a column implying that "Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match."[131]

Diadiun's column, however, actually came out and somewhat more directly called Michael Milkovich a liar, unlike anything Martin Singer expressly stated about Cosby's accusers. Specifically, the column asserted that a lesson to be learned from Michael Milkovich escaping responsibility at the hands of the Ohio High School Athletic Association (OHSAA) for allegedly encouraging his student-athletes to fight an opponent was "[i]f you get in a jam, *lie your way out*."[132] Diadiun added that anyone who saw the wrestling meet in question "knows in his heart that Milkovich . . . *lied*" at a hearing before the OHSAA.[133] The Supreme Court ultimately found for Michael Milkovich in his libel suit, reasoning that "[t]he dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that . . . Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative."[134]

C. *Comparing* Hill *with* Green

Comparing Judge Schwab's opinion in *Hill* with that of Judge Mastroianni in *Green*, several key differences stand out. First and foremost, Schwab focused on the role played by all defense attorneys in zealously advocating on behalf of their clients.[135] This was completely missing from Mastroianni's opinion in *Green*. In brief, Schwab took into account and into context the role of the speaker—that Singer was, in essence, supposed to make such remarks on behalf of a client attacked during a news media interview.

There is a possible problem, however, with Judge Schwab's apparent reliance on the fact that attorneys are expected to make statements like those of Martin Singer on behalf of their clients in fulfilling an ethical obligation of zealous advocacy.[136] To the extent this influenced Schwab's decision to characterize Singer's statement as pure opinion, one must wonder whether ordinary people *unfamiliar* with the ethical duties of

130. Milkovich v. Lorain Journal, Co., 497 U.S. 1, 21 (1990).

131. *Id.* at 3.

132. *Id.* at 4 (emphasis added).

133. *Id.* at 5 (emphasis added).

134. *Id.* at 21.

135. *See supra* notes 108–11 and accompanying text.

136. *See supra* notes 109–12 and accompanying text (addressing Schwab's analysis of this consideration).

attorneys would take away this same understanding. In other words, as a judge, Arthur Schwab understands well the responsibilities of attorneys. Yet this may not be the understanding of an ordinary, reasonable person—someone who is *not* a judge, *not* a lawyer, and *not* otherwise schooled in the ethical dictates of the ABA's Model Code of Professional Conduct.

This is important in libel law because, at common law, the interpretation of a statement is "based on reasonableness and ordinary meaning."[137] As the U.S. Supreme Court wrote in *Masson v. New Yorker Magazine, Inc.*,[138] the key is "the meaning a statement conveys to a *reasonable reader*."[139] In *Milkovich*, the Court opined that "[t]he dispositive question in the present case then becomes whether a *reasonable factfinder* could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding."[140] For instance, in a case involving a dispute over whether a statement was one of pure opinion (as in the pair of *Cosby* cases at the heart of this Article), New York's highest appellate court wrote in 2014 that the issue hinges on "whether a *reasonable reader* would consider the statement connotes fact or nonactionable opinion."[141] Sometimes courts substitute the term "ordinary reader" in determining "whether a statement should be viewed as one of fact or one of opinion."[142]

A valid issue thus is whether Judge Schwab—in bringing to his own reading of Singer's statement his knowledge of the lawyerly tenet of zealous advocacy—was acting as a reasonable and ordinary reader would. In other words, would an ordinary and reasonable reader bring this same background and sensibility to the text and, in doing so, interpret it as little more than the garden-variety rhetoric one expects from an attorney? Perhaps, then, by *not* interjecting the zealous advocacy maxim into his analysis in *Green*, was Judge Mastroianni functioning as more of an ordinary and reasonable reader than Judge Schwab in *Hill*? How one resolves these questions may directly affect who one thinks—Schwab or Mastroianni—got it right on the question of pure opinion.

---

137. David M. Cohn, Comment, *The Problem of Indirect Defamation: Omission of Material Facts, Implication, and Innuendo*, 1993 U. CHI. LEGAL F. 233, 237.

138. 501 U.S. 496 (1991).

139. *Id.* at 515 (emphasis added).

140. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) (emphasis added).

141. Davis v. Boeheim, 22 N.E.3d 999, 1005 (N.Y. 2014) (emphasis added).

142. Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir. 1985).

A second major difference between the judges' approaches is that Schwab appealed to *Gertz* on the question of pure opinion,[143] while Mastroianni did not. Schwab quoted *Gertz* not merely for the proposition that there is no such thing as a false idea, but also for its embracement of "the competition of other ideas"[144] as a method for resolving disputes. This is absent in Mastroianni's *Green* opinion. Schwab arguably intimated that the marketplace of ideas and the court of public opinion was the better place to resolve the battle between Renita Hill and Bill Cosby.[145]

Instead of turning to *Gertz*, Mastroianni's analysis—although never citing *Milkovich* on the pure opinion issue—is much more Milkovichian, at least to the extent that Mastroianni concluded that a reasonable interpretation of Singer's statement was that the accusers' allegations were "*false* and entirely *without merit*."[146] Mastroianni came closer than Schwab in finding that Singer impliedly called Cosby's accusers liars.

Ultimately then, the disparate outcomes in *Hill* and *Green* simply confirm what others have already observed about libel law—namely, that distinguishing protected opinion from actionable speech is far from easy.[147] A message's latent and lurking implication—one that pushes a pure opinion into the actionable realm of mixed opinion—rests in the eye of the reader, with Schwab and Mastroianni reading the exact same text quite differently.

Rather than providing only descriptive analysis, this Article next contends that a strong argument can be made for shielding the Singer statement. Admittedly, the author's views are tainted by a pro-First Amendment bias and thus are discounted as such. Furthermore, the analysis below is not a stance on whether, in fact, Cosby sexually assaulted the women in *Hill* and *Green*. That is a matter of criminal law, not tort law. Part III, instead, is merely one academic's take on Singer's November 21, 2014 statement to the news media.

III. A MATTER OF SELF-DEFENSE? EXPLORING THE COMMON LAW SELF-DEFENSE PRIVILEGE AND OTHER RATIONALES TO PROTECT THE SINGER STATEMENT

Why, from a pro-First Amendment perspective, should Martin Singer's statement be shielded from defamation liability in the twin

143. *See* Hill v. Cosby, No. 15cv1658, 2016 U.S. Dist. LEXIS 15795, at *14 (W.D. Pa. Feb. 9, 2016) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).

144. *Id.* at *5.

145. *See id.*

146. Green v. Cosby, 138 F. Supp. 3d 114, 137 (D. Mass. 2015) (emphasis added).

147. *See supra* notes 55–58 and accompanying text (addressing the trouble courts have in distinguishing opinions from facts in libel law).

Cosby cases? Although no single legal theory—be it pure opinion, on which the judges split in *Hill* and *Green*, or something else—may provide a definitive or satisfactory answer, cobbling together several rationales points the way in that direction. This Part addresses three of those reasons.

A. *The Common Law Self-Defense Privilege*

Initially, as explained above,[148] Judge Mastroianni squarely rejected the self-defense privilege in *Green* because it is not recognized under Florida law.[149] Yet, the core notion of the conditional self-defense privilege—when blended with the First Amendment doctrine of counterspeech[150]—arguably supports safeguarding the November 21, 2014 statement of Martin Singer.

What is the self-defense privilege? As Judge Robert Sack explains it, "The right to defend oneself against defamation is a recognized interest. An individual is *privileged to publish defamatory matter in response to an attack upon his or her reputation*; the speaker is given more latitude in such a situation than if the statements were not provoked."[151] Rodney Smolla places this privilege within the broader context of a "conditional common-law privilege to make statements for the protection of the speaker's own legitimate interests," including "statements made to defend one's reputation in response to attack by another."[152]

According to a comment in the *Restatement (Second) of Torts*, the conditional privilege of self-defense

> exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is *reasonably necessary* to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment . . . . Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another, *including the statement that his accuser is an unmitigated liar*.[153]

148. *See supra* note 53 and accompanying text.

149. *Green*, 138 F. Supp. 3d at 143.

150. *See supra* notes 15–22 and accompanying text (addressing counterspeech).

151. SACK, *supra* note 62, § 9.2.1 (emphasis added) (footnote omitted).

152. 2 SMOLLA, *supra* note 54, § 8:47.

153. RESTATEMENT (SECOND) OF TORTS § 594 cmt. k (AM. LAW. INST. 1977) (emphasis added).

The U.S. Court of Appeals for the Tenth Circuit in 1991 interpreted the *Restatement*'s language quoted above to stand for the general proposition "that one whose reputation is under attack has the right to defend himself."[154] Interestingly, as the U.S. Court of Appeals for the First Circuit noted in 2011, the privilege pre-dates the Supreme Court's seminal defamation decision of *New York Times Co. v. Sullivan*[155] and thus it "has its roots not in the First Amendment but in the common law."[156]

Those roots, in turn, stretch back for more than a century, with the Supreme Judicial Court of Massachusetts remarking in 1902 that "[o]ne attacked by a slander or libel has a right to defend himself, but he has no right to turn his defense into a slanderous or libelous attack, *unless it clearly appears that such attack was necessary for his justification*."[157] A 1936 *Harvard Law Review* article notes that "[i]t is generally stated that defamation is qualifiedly privileged if reasonably incident to self-defense."[158] In fact, an 1899 opinion by the Supreme Court of Michigan observes that "[t]he law justifies a man in repelling a libelous charge by a denial or an explanation" and adds that a person "has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false."[159]

The qualified—rather than absolute—nature of the self-defense privilege in defamation law is indicated by the inclusion of phrases quoted above such as "reasonably necessary,"[160] "appropriate manner,"[161] "reasonably incident,"[162] "good faith,"[163] and "not with malice."[164]

Under the logic of this privilege, then, when Martin Singer issued his November 21, 2014 statement, he was simply acting in response to what he and his client considered were defamatory, reputation-harming statements that Cosby sexually assaulted women. Colloquially put,

---

154. Lee v. Calhoun, 948 F.2d 1162, 1166 (10th Cir. 1991).

155. 376 U.S. 254 (1964).

156. Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 18 (1st Cir. 2011).

157. Borley v. Allison, 63 N.E. 260, 261 (Mass. 1902) (emphasis added).

158. Recent Case, *Libel and Slander—Defenses—Qualified Privilege of Libelling Plaintiff to Defend Deceased Relative from Plaintiff's Slander*, 49 HARV. L. REV. 839, 840 (1936).

159. Brewer v. Chase, 80 N.W. 575, 577 (Mich. 1899).

160. RESTATEMENT (SECOND) OF TORTS § 594 cmt. k (AM. LAW. INST. 1977) (emphasis added).

161. *Id.*

162. Recent Case, *supra* note 158, at 840.

163. *Brewer*, 80 N.W. at 577.

164. *Id.*

Singer was slinging mud back at the mudslingers. The problem, however, is that the self-defense or reply privilege is qualified and "is lost if it is 'abused.'"[165] Did Singer's statement abuse this privilege?

The U.S. Court of Appeals for the Fourth Circuit wrote in 1994 that a person abuses and thus loses the conditional self-defense privilege if "(1) his reply includes substantial defamatory matter that is *'irrelevant' or 'non-responsive'* to the initial attack; (2) his reply includes substantial defamatory matter that is *'disproportionate'* to the initial attack; or (3) the publication of his reply is *'excessive,' i.e.*, is addressed to too broad an audience."[166] A fourth factor that some courts, such as the Supreme Court of Nevada in 2002, consider is whether the responsive statement "is made with malice in the sense of actual *spite or ill will*."[167] As Judge Sack writes, "Being defamed is not a license to defame,"[168] and this quartet of factors provide a means by which courts can make that determination.

The hypothetical question—one relevant in a state that, unlike Florida in *Green*, recognizes the self-defense privilege—thus becomes whether Singer's statement went beyond the limits of what was "reasonably necessary to defend"[169] Bill Cosby's reputation. As to the excessiveness factor considered in such an abuse-of-privilege analysis,[170] it is clear that Singer conveyed his message to an audience that was about as broad as possible by issuing it to the news media. And yet, to the extent that Cosby's accusers were also giving news media interviews to make their attacks, the scope may not be excessive at all. As attorneys for Cosby argued in their unsuccessful motion to dismiss in *Green*, "Each of the plaintiffs ignited this controversy by *going to the media* and *publicly accusing* Mr. Cosby of sexual assault."[171] As the cliché goes, Cosby was merely fighting fire with fire.

Similarly, as to the first and second factors in an abuse-of-privilege analysis,[172] Singer's statement arguably does not contain irrelevant information or appear to be disproportionate to the attacks made against Cosby. The statement does *not*, for example, impute to the women things

165. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1559 (4th Cir. 1994).

166. *Id.* (emphasis added).

167. State v. Eighth Judicial District Court, 42 P.3d 233, 239 (Nev. 2002) (emphasis added).

168. SACK, *supra* note 62, § 9.2.1.

169. RESTATEMENT (SECOND) OF TORTS § 594 cmt. k (AM. LAW. INST. 1997).

170. *See supra* note 167 and accompanying text.

171. William H. Cosby Jr.'s Memorandum of Law in Support of His Motion to Dismiss at 23, Green v. Cosby, No. 3:14-cv-30211-MGM, 2015 WL 1360190 (D. Mass. Feb. 27, 2015) [hereinafter Motion to Dismiss] (emphasis added).

172. *See supra* note 167 and accompanying text.

such as sexual promiscuity,[173] sexually transmitted diseases,[174] criminal convictions,[175] or other reputation-damning activities that clearly would be irrelevant as character attacks having nothing to do with their allegations of sexual assault. Rather, Singer simply attacks the women's stories about sexual assault. He questions why they waited so long to come forward and argues it is "completely illogical that so many people would have said nothing, done nothing, and made no reports to law enforcement or asserted civil claims if they thought they had been assaulted over a span of so many years."[176] The women raised the issue of sexual assault and Singer tries to debunk it by questioning why they waited so long.

Finally, as to the fourth factor—whether Singer's statement was "made with malice in the sense of actual spite or ill will"[177]—it seems likely that Cosby would argue the statement was made *out of necessity*—not spite or ill will—to counter an avalanche of attacks upon his reputation. Additionally, Singer would likely claim that his statement was tendered as an advocate serving his client zealously. The problem here, however, to paraphrase the U.S. Supreme Court in *Cohen v. California*,[178] is that one person's ill will and spite is another person's zealous advocacy.[179] This fourth factor thus does little to resolve the question of whether Singer's statement abused the self-defense privilege.

Ultimately, in proffering the self-defense privilege argument in *Green*, Cosby's attorneys contended that *not* recognizing it

> would present those who are verbally attacked with a Hobson's Choice: either remain silent and allow accusations to stand unanswered, or publicly deny them and invite the expense, burdens and vexations of a defamation suit. Such a result would be especially inequitable when the Plaintiffs have waited decades to publicize their accusations, given the purpose of statutes of limitations to require that factual

173. Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 28 (1996) (noting that "various courts have held that it is defamatory to say of the plaintiff that she is unchaste").

174. *See* Peter Meijes Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 321 (1987) (noting that a "traditional category of defamation is an imputation of a loathsome disease").

175. *See* PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 87 (4th ed. 2014) (remarking that "[e]xamples of defamation that have generally been recognized as libel per se include allegations of criminal wrongdoing").

176. Roig-Franzia et al., *supra* note 9.

177. State v. Eighth Judicial District Court, 42 P.3d 233, 239 (Nev. 2002).

178. 403 U.S. 15 (1971).

179. *See id.* at 25 (opining that "one man's vulgarity is another's lyric").

> disputes be litigated before evidence and witnesses have disappeared and memory has faded.[180]

Perhaps, then, when the policy concerns that animate the conditional self-defense privilege are coupled with both the doctrine of counterspeech ("the remedy to be applied is more speech, not enforced silence")[181] and some of the hyperbolic rhetoric strewn in Singer's statement—terms such as "fantastical"[182] and "absurdity"[183]—there is good reason, under the totality of the circumstances, to shield it from defamation liability. There may, in fact, be yet another reason to do so, and it is explored immediately below.

B. *Singer Lacks Direct Knowledge of What Happened*

In an article written before Judge Schwab issued his February 2016 opinion in *Hill*, Professor Len Niehoff and NPR counsel Ashley Messenger argue there is a crucial reason to characterize statements such as those of Martin Singer and Bill Cosby's wife, Camille Cosby, as expressions of opinion rather than fact.[184] Critically, they emphasize that Singer was *not* present in the rooms both where and when the alleged sexual assaults occurred—only Bill Cosby and his alleged victims were there—and thus reasonable readers should know that Singer "cannot have a personal, empirical basis for charging Cosby's accusers with lying."[185] In other words, Singer was not at the scenes of the alleged crimes. Niehoff and Messenger thus assert that

> when Cosby's lawyer says these women have "fabricated stories" what he is *really* saying is that he believes his client's version over the versions of his accusers (and, of course, we also recognize that he gets paid to do so). When the rest of us—spectators to these events—express our own views ("Cosby is lying" or "His accusers are in it for a shakedown") we are doing the same thing.[186]

Building from this premise, Niehoff and Messenger stress that Cosby's "lawyer, his wife, and his fans,"[187] therefore, "cannot possibly know the truth."[188] Thus, Singer's statement shades toward opinion rather

180. Motion to Dismiss, *supra* note 171, at 1.
181. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
182. Roig-Franzia et al., *supra* note 9.
183. *Id.*
184. Niehoff & Messenger, *supra* note 70, at 480.
185. *Id.*
186. *Id.* (footnote omitted).
187. *Id.* at 490.
188. *Id.*

than fact because it "does *not* mean: 'I know whom I believe because I know what happened.'"[189]

A possible problem with this analysis—something, perhaps surprisingly, not addressed by Niehoff and Messenger—is that it omits the respondeat superior,[190] agency-based nature of the relationship between Cosby and Singer. Namely, as Judge Mastroianni wrote in *Green*, "Singer gave the statement while acting as [Cosby's] *authorized agent, employee, or authorized representative* and he knew or should have known the statement was false when it was made."[191] Thus, as a legal fiction, when Singer speaks in his official capacity by releasing a formal statement, so too does Bill Cosby speak along with him.[192]

In *Green*, in fact, Judge Mastroianni held that "respondeat superior liability [was] sufficiently pled."[193] He reasoned that

> those making Defendant's public statements had an open line of communication with him as well as some historical perspective on his public relations matters. Based on the facts and inferences, the court finds it plausible at this point to conclude (1) those agents would have had, at a minimum, some sense of Defendant's alleged conduct, such that their duty of care would have required them to take steps to determine the truth or falsity of the statements, and (2) the content of their responsive statements demonstrates such reasonable care was not taken.[194]

The respondeat superior nature of the Cosby–Singer relationship thus cuts toward concluding that Singer's statement is defamatory and actionable, despite reasonable readers' understanding, as Niehoff and Messenger point out, that Singer was never present when and where the alleged sexual assaults occurred. Parsed differently, Singer may be one step removed from the scenes of Cosby's alleged crimes, but Singer stands right next to Cosby when he speaks for him.

---

189. *Id.* (emphasis added).

190. *See* John Dwight Ingram, *Vicarious Liability of an Employer-Master: Must There Be a Right of Control?*, 16 N. ILL. U. L. REV. 93, 93 (1995) (observing that "[u]nder the doctrine of respondeat superior, a master is liable for injuries or damage to the person or property of third persons resulting from the acts of the master's servant, if the acts of the servant are within the scope of the servant's employment").

191. Green v. Cosby, 138 F. Supp. 3d. 114, 121 (D. Mass. 2015) (emphasis added).

192. *Cf.* David C. Rittenhouse, *Scope of Employment Test in Relation to Slander Action*, 1 WM. & MARY L. REV. 98, 99 (1957) (observing that it is "well settled that a corporation may be liable for a slander spoken by its servant or agent").

193. *Green*, 138 F. Supp. 3d at 139.

194. *Id.*

C. *Consideration of the Macro Context*

In its 1984 decision in *Ollman v. Evans*,[195] the U.S. Court of Appeals for the District of Columbia Circuit stressed that in distinguishing protected opinions from actionable facts, courts should consider, in addition to three other factors,[196] "the broader social context into which the statement fits."[197] This is one of the so-called "*Ollman* factors"[198] and part of what has been called "famous four-factor *Ollman* test."[199]

Decades after *Milkovich*, "many lower courts have continued to rely on multi-factor analyses to gauge the actionability of alleged defamatory falsehoods."[200] The District of Columbia Circuit, in fact, deployed *Ollman*'s broader social-context factor in 2013.[201] Similarly, New York's highest appellate court in 2014 considered "the broader social context and surrounding circumstances"[202] in sorting out fact from opinion. Similarly, the Supreme Court of Ohio continues to consider "the broader context" in fathoming what is fact and what is opinion,[203] as does the Supreme Court of New Mexico.[204] In brief, some twenty-six years after *Milkovich*, many courts still evaluate the broader social context in which a statement is made.

In *Hill* and *Green*, the broader social context—the context beyond the simple language used in Singer's statement—militates in favor of safeguarding Singer's statement. The broader social context includes at least three factors:

---

195. 750 F.2d 970 (D.C. Cir. 1984).

196. In addition to social context, the appellate court wrote that courts must also consider in the fact-versus-opinion analysis "the common usage or meaning of the allegedly defamatory words themselves," as well as "the degree to which the statements are verifiable" and "the immediate context of the allegedly defamatory statement." *Id.* at 979–81, 983.

197. *Id.* at 983.

198. David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 98 (1991).

199. James F. Ponsoldt, *Challenging Defamatory Opinions as an Alternative to Media Self-Regulation*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 45, 49 (1998).

200. Nat Stern, *The Intrinsic Character of Defamatory Content as Grounds for a Uniform Regime of Proving Libel*, 80 MISS. L.J. 1, 42 (2010).

201. Farah v. Esquire Magazine, 736 F.3d 528, 535 (D.C. Cir. 2013).

202. Davis v. Boeheim, 22 N.E.3d 999, 1005 (N.Y. 2014).

203. Wampler v. Higgins, 752 N.E.2d 962, 977 (Ohio 2001).

204. Fikes v. Furst, 81 P.3d 545, 551 (N.M. 2003) (opining that the court "look[s] to 'the broader social context into which the statement fits'" (quoting Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984))).

1) multiple criminal allegations regarding the most serious of sexual offenses, rape, including the use of drugs to sedate victims;[205]

2) a high-profile celebrity who is made, as a result of those allegations, to appear to be a raving hypocrite, with the "image of the man once dubbed 'America's dad' . . . forever tarnished in the public's eyes;"[206] and

3) "an $850-an-hour lawyer with a reputation for playing rough on behalf of clients like Charlie Sheen and Arnold Schwarzenegger when they found themselves embroiled in controversy."[207]

That is a combustible combination of sordid factors—sex, drugs, crime, celebrity, and a celebrity attorney. Readers of the Singer statement thus should expect it to be caustic, vehement, and hyperbolic—counterspeech of the kind necessary to attract media attention and to rise above the growing chorus of loud voices of Cosby's accusers. This macro-level social context should indicate to readers that when they see words such as "fantastical,"[208] "absurdity,"[209] "ridiculous,"[210] and "illogical"[211] laced in a statement made to the media, this is the realm of opinion, not fact.

In summary, the traditional common law theory of a self-defense privilege, when coupled with the Neihoff and Messenger contention that Singer is not claiming that he knows what happens because he was not there when it did, as well as the broader social context into which the Singer statement was released, collectively suggest that it merits protection from defamation liability even if the pure opinion defense is not applicable.

IV. CONCLUSION

A November 2015 article in *The New York Times* astutely observed that the defamation cases against Bill Cosby "open a conversation on the

205. *See supra* notes 1–5 and accompanying text.

206. Patricia Holbrook, *Expect Imperfections in Our Inperfect World*, ATLANTA J. (Dec. 12, 2014, 12:00 AM), http://www.myajc.com/news/lifestyles/religion/expect-imperfections-in-our-inperfect-world/njQgf/?icmp=ajc_internallink_invitationbox_apr2013_ajcstubtomyajcpremium.

207. Lorne Manly & Graham Bowley, *Cosby Team's Strategy: Hush Accusers, Insult Them, Blame the Media*, N.Y. TIMES (Dec. 28, 2014), https://www.nytimes.com/2014/12/29/arts/cosby-teams-strategy-hush-accusers-insult-them-blame-the-media.html.

208. Roig-Franzia et al., *supra* note 9.

209. *Id.*

210. *Id.*

211. *Id.*

ground rules for how vehemently a lawyer can speak out in a defense of a client who says he is wrongfully accused."[212] The cases also illustrate, as this Article demonstrated in Part II, the inherent slipperiness of the pure opinion determination in defamation law: Two courts considering the exact same statement reached diametrically opposed conclusions on that question in *Hill* and *Green*.[213]

From a pro-free speech perspective, the century-plus-old self-defense privilege, as explored in Part III, deserves serious consideration in future cases similar to *Hill* and *Green* where an attorney attempts to fight back in the court of public opinion by denigrating the heavily publicized stories of individuals who accuse a client of profoundly serious criminal offenses. If the pure opinion privilege does not work in such situations—it did in *Hill*, but not in *Green*—then perhaps states like Florida that have not adopted the self-defense privilege should give it a second look. It may just be time to resuscitate the self-defense privilege for precisely such scenarios.

If that becomes the case—if the self-defense privilege is to be deployed in future cases similar to *Hill* and *Green*—then courts need to make more explicit when that privilege is lost. The current four-factor approach[214] certainly provides something for jurists to hold on to in making this determination, but courts thus far have never applied it to a case involving attorneys who speak out on behalf of their clients. The attorney-client scenario thus adds a layer of complication to the self-defense issue, including the question of respondeat superior addressed in Section II.C.

Bill Cosby's victory at the district court level in *Hill* ultimately was affirmed by the U.S. Court of Appeals for the Third Circuit in December 2016.[215] In doing so, a unanimous three-judge panel wholeheartedly sustained Judge Schwab's ruling that Martin Singer's statement constitutes pure opinion and therefore is shielded from defamation liability.[216]

---

212. Sydney Ember & Graham Bowley, *Defamation Suits Against Cosby Point to Peril of Belittling Accusers*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/business/media/defamation-suits-against-cosby-point-to-peril-of-belittling-accusers.html.

213. *See supra* notes 143–56 and accompanying text.

214. *See supra* notes 166–67 and accompanying text.

215. 665 F. App'x 169 (3d Cir. 2016).

216. *See id.* at 175 ("We assume that a reasonable recipient could read the Singer Statement as proffering an opinion—based on underlying facts—that Hill lied. Singer nevertheless disclosed the factual basis for his opinion.").