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## ***Milkovich*, #MeToo, and “Liars”:** Defamation Law and the Fact-Opinion Distinction

Pooja Bhaskar  
*Fordham University School of Law*

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## NOTES

### **MILKOVICH, #METOO, AND “LIARS”: DEFAMATION LAW AND THE FACT-OPINION DISTINCTION**

*Pooja Bhaskar\**

*Since the start of the #MeToo movement, sexual assault survivors have increasingly turned defamation law against their alleged assaulters. In these #MeToo defamation cases, an alleged victim publicly claims that another person, usually someone of considerable wealth and fame, sexually assaulted them. The alleged assaulter then calls their accuser a liar, causing their accuser to sue their alleged assaulter for defamation. These cases have consistently raised an element of the defamation analysis that has long challenged courts: distinguishing between statements of actionable “fact” and nonactionable “opinion.”*

*#MeToo defamation cases raise the question of whether an alleged assaulter’s claim that their accuser lied constitutes actionable fact or nonactionable opinion. The U.S. Supreme Court attempted to provide guidance on how to conduct fact-opinion analyses in a case similar to #MeToo cases, where a plaintiff sued the defendant for calling them a liar. However, U.S. courts diverge in their approaches to the fact-opinion analysis and have come to varying results on the fact-opinion question in #MeToo defamation cases.*

*This Note argues that, when properly applied, the fact-opinion distinction does not shield alleged assailants from defamation liability because the alleged assailants’ claims that their alleged victims lied constitute implicit assertions of eyewitness testimony about a factual matter.*

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\* J.D. Candidate, 2020, Fordham University School of Law; A.A.S., 2015, SUNY Schenectady County Community College; B.S., 2014, Skidmore College. Thank you to Professor Benjamin Zipursky for his invaluable guidance; to my editor Elaina Aquila for her critical eye and unwavering support; and to the editors and staff of the *Fordham Law Review* for their skillful editing. I would also like to thank my family, friends, and Lee for their love and encouragement.

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#### INTRODUCTION

The emotional cost alone of bringing up such memories publicly . . . is pure bankruptcy. . . . It is the deep end of a pool where I cannot swim. It is a famous man telling you that you are a liar for what you have remembered.

—Amber Tamblyn<sup>1</sup>

Over the course of a year, the #MeToo movement<sup>2</sup> led to sexual misconduct allegations against at least 425 prominent figures across various industries in the United States.<sup>3</sup> Notable examples of alleged<sup>4</sup> sexual

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1. Amber Tamblyn, Opinion, *Amber Tamblyn: I'm Done with Not Being Believed*, N.Y. TIMES (Sept. 16, 2017), <https://www.nytimes.com/2017/09/16/opinion/sunday/amber-tamblyn-james-woods.html> [<https://perma.cc/R5BS-JCZJ>] (speaking about actor James Woods's attempt to pick the author up when she was underage).

2. Tarana Burke originally created the “Me Too” campaign in 2007. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/8L6K-6VKK>]. Subsequently, “Me Too” was popularized as a hashtag following Alyssa Milano's October 2017 tweet, which Milano published as a response to then-recent sexual assault allegations against Harvey Weinstein. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/623A-C5YU>]. The #MeToo movement gives a voice to sexual harassment victims, and “give[s] people a sense of the magnitude of the problem.” *Id.*

3. Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/> [<https://perma.cc/Q9WZ-HWS5>].

4. Bill Cosby is the only #MeToo figure to have been convicted of sexual assault as of September 26, 2019. See *Morning Edition: Bill Cosby and the #MeToo Movement*, NPR (Sept. 26, 2018), <https://www.npr.org/2018/09/26/651710715/bill-cosby-and-the-metoo-movement> [<https://perma.cc/5J4V-GPBZ>]. As of October 6, 2019, Cosby is appealing this conviction. See Jon Hurdle, *Bill Cosby's Appeal Begins with Sharp Questioning by Judges*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/arts/television/bill-cosby-new-trial-appeal.html> [<https://perma.cc/8YWK-64YH>].

assaulters include Donald Trump,<sup>5</sup> Harvey Weinstein,<sup>6</sup> Jeffrey Epstein,<sup>7</sup> and Brett Kavanaugh.<sup>8</sup> Responses from the accused figures have largely consisted of denials.<sup>9</sup> Several sexual assault accusations, followed by alleged assailants' denials,<sup>10</sup> have led to defamation suits.<sup>11</sup>

The defamation suits involving Bill Cosby illustrate the nature of these claims. After several women publicly claimed that Bill Cosby sexually assaulted them, Cosby's attorney made statements to the media on Cosby's behalf<sup>12</sup> that not only denied these claims but either implied that the women were liars<sup>13</sup> or explicitly called the women liars.<sup>14</sup> In response, a number of these women sued Cosby for defamation, in each case alleging that, in calling her a "liar" through his attorney, he damaged her reputation.<sup>15</sup> Cosby replied

5. See *Zervos v. Trump*, 74 N.Y.S.3d 442 (Sup. Ct. 2018), *aff'd*, 94 N.Y.S.3d 75 (App. Div. 2019).

6. See Bill Chappell, *Judge Dismisses Ashley Judd's Sexual Harassment Claim Against Harvey Weinstein*, NPR (Jan. 10, 2019), <https://www.npr.org/2019/01/10/683993516/judge-dismisses-ashley-judds-sexual-harassment-claim-against-harvey-weinstein> [<https://perma.cc/GQP9-EKWT>] (stating that Judd's defamation claim could move forward).

7. See Ali Watkins & Vivian Wang, *Jeffrey Epstein Is Accused of Luring Girls to His Manhattan Mansion and Abusing Them*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/nyregion/jeffrey-epstein-sex-trafficking.html> [<https://perma.cc/2A2J-EYK5>].

8. See *Full Transcript: Christine Blasey Ford's Opening Statement to the Senate Judiciary Committee*, POLITICO (Sept. 26, 2018, 6:22 PM), <https://www.politico.com/story/2018/09/26/christine-blasey-ford-opening-statement-senate-845080> [<https://perma.cc/K4KJ-ZAHM>].

9. See Sarah Almkhatar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> [<https://perma.cc/8XWW-VUBK>]; *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (May 18, 2019), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations> [<https://perma.cc/JU39-ZWFH>].

10. This Note uses legalistic terms to refer to the legal stage of accusations and the technical positions of the parties involved. Women who have publicly accused someone of assaulting them and are plaintiffs in #MeToo defamation suits are referred to as "accusers" or a variation thereof. Likewise, those accused of sexual assault, the defendants in these defamation suits, are referred to as "the accused," or another such variation. The purpose of this terminological choice is to avoid confusion as to whether the sexual assault crime underlying the defamation claim was tried in court. In the #MeToo defamation suits discussed in this Note, the sexual assaults underlying the defamation claims were not pursued in a criminal law capacity, and the alleged victims also did not pursue civil claims against their alleged assaulters.

11. Daniel Jackson, *Sex-Assault Accusers Turn to Defamation Lawsuits in #MeToo Era*, COURTHOUSE NEWS SERV. (Jan. 25, 2018), <https://www.courthousenews.com/sex-assault-accusers-turn-to-defamation-lawsuits-in-metoo-era/> [<https://perma.cc/VCY5-S7GJ>].

12. See *infra* notes 76–78.

13. See *Hill v. Cosby*, 665 F. App'x 169, 172 (3d Cir. 2016); *Green v. Cosby*, 138 F. Supp. 3d 114, 121–23 (D. Mass. 2015).

14. See *Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430, 439 (Ct. App. 2017) (presenting the content of Singer's denial, wherein he describes Janice Dickinson's rape allegation as "an outrageous defamatory lie"); see also Jackson, *supra* note 11.

15. See *Hill*, 665 F. App'x at 173; *Green*, 138 F. Supp. 3d at 121; *Dickinson*, 225 Cal. Rptr. 3d at 441.

that, because it was merely his opinion that the respective women were liars, he was protected from defamation liability.<sup>16</sup>

When a defamation defendant claims the allegedly defamatory statement constitutes nonactionable opinion, the court engages in a fact-opinion analysis to determine whether the defamation claim can move forward.<sup>17</sup> Thus, a key inquiry in #MeToo defamation cases is whether a claim that a sexual assault accuser is a “liar” constitutes nonactionable opinion or actionable fact.<sup>18</sup>

Courts have come to differing conclusions on whether the defendants in these defamation suits may avoid liability through an opinion defense,<sup>19</sup> in part because courts across the country utilize different fact-opinion analyses.<sup>20</sup> This variation exists despite the fact that the U.S. Supreme Court has provided a fact-opinion framework in this very context. In *Milkovich v. Lorain Journal Co.*,<sup>21</sup> the defendant called the plaintiff a liar in a newspaper column relating to a controversial high school sporting event.<sup>22</sup> The Court clarified how the fact-opinion analysis should be conducted and found that the “liar” allegation was actionable.<sup>23</sup> However, lower courts have subsequently used different analyses and arrived at different conclusions on whether a “liar” allegation is actionable.<sup>24</sup>

A pair of Bill Cosby #MeToo defamation cases involving the exact same “liar” statement demonstrate the issue. In this statement, Cosby’s attorney characterized the sexual assault allegations as “unsubstantiated, fantastical stories . . . [that] have escalated far past the point of absurdity” and that “it is completely illogical” that anyone would wait decades to give any indication

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16. See, e.g., *Hill*, 665 F. App’x at 171–72; *Green*, 138 F. Supp. 3d at 121–22; *Dickinson*, 225 Cal. Rptr. 3d at 439–40.

17. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13–15 (1990) (describing the transition from the common law’s lack of distinction between statements of fact and opinion to U.S. Supreme Court jurisprudence forming such a distinction); see also *infra* Part II (describing #MeToo and #MeToo-related cases in which courts analyzed the fact-opinion question after the defamation defendants argued that they were shielded from liability because their allegedly defamatory statements were opinions).

18. See *infra* Part I.C (demonstrating that the “fact-opinion” distinction is more complex than distinguishing between facts and opinions to determine whether a statement is actionable for defamation). However, scholarship and court opinions continue to use the “fact-opinion” phraseology in reference to current methods of defamation analysis, and so this Note will likewise do the same.

19. Compare *Hill*, 665 F. App’x 169 (finding that the alleged assaulter prevailed on the fact-opinion question), and *Dickinson*, 225 Cal. Rptr. 3d 430 (finding that the alleged assaulter prevailed on the fact-opinion question), with *Green*, 138 F. Supp. 3d 114 (finding that the accuser prevailed on the fact-opinion question), and *Zervos v. Trump*, 74 N.Y.S.3d 442 (Sup. Ct. 2018), *aff’d*, 94 N.Y.S.3d 75 (App. Div. 2019) (finding that the accuser prevailed on the fact-opinion question).

20. See *infra* Part II (illustrating the variety of fact-opinion analyses utilized by courts, even when different courts use the same type of analysis).

21. 497 U.S. 1 (1990).

22. *Id.* at 3.

23. See *infra* Part I.C.2 (explaining the Court’s holding).

24. See *infra* Part II.B.

that they had been assaulted.<sup>25</sup> In *Hill v. Cosby*,<sup>26</sup> the Third Circuit ruled that this statement constituted nonactionable opinion.<sup>27</sup> But in *Green v. Cosby*,<sup>28</sup> the District of Massachusetts held that this statement was actionable fact.<sup>29</sup>

The #MeToo movement continues to raise important discussions about the prevalence of sexual harassment in the workplace, power dynamics, and the cultural and systemic responses to these issues.<sup>30</sup> Events like Brett Kavanaugh's confirmation hearing<sup>31</sup> and the emergence of #MeToo abroad<sup>32</sup> demonstrate that the movement is gathering momentum. Participants in the #MeToo movement will likely continue to use defamation as a legal tool,<sup>33</sup> making it important to clarify the fact-opinion analysis so that litigants can rely on more predictable results.

This Note addresses how the fact-opinion distinction should be applied to #MeToo "liar" cases. It argues that a proper application of *Milkovich* leads to a core feature of #MeToo defamation cases that courts have not adequately considered—the defendant's role as a first-person witness in the alleged sexual assault underlying the defamation claim. Part I provides an overview

25. *Hill*, 665 F. App'x at 172; *Green*, 138 F. Supp. 3d at 122.

26. 665 F. App'x 169 (3d Cir. 2016).

27. *Id.* at 175–77.

28. 138 F. Supp. 3d 114 (D. Mass. 2015).

29. *Id.* at 132, 134.

30. See generally Kim Elsesser, *The Latest Consequence of #MeToo: Not Hiring Women*, FORBES (Sept. 5, 2019, 3:30 PM), <https://www.forbes.com/sites/kimelsesser/2019/09/05/the-latest-consequence-of-metoo-not-hiring-women/> [<https://perma.cc/CYH8-85M6>]; Gene Marks, *When Men Are Afraid to Interact with Women at Work, It Harms the Whole Company*, GUARDIAN (Sept. 5, 2019, 6:00 PM), <https://www.theguardian.com/business/2019/sep/05/when-men-are-afraid-to-interact-with-women-at-work-it-harms-the-whole-company> [<https://perma.cc/47G9-VW7U>].

31. See Clare Foran, *After Outpouring of Personal Stories, Congress Still Grappling with Kavanaugh Confirmation Fallout*, CNN (Oct. 20, 2018, 8:08 AM), <https://www.cnn.com/2018/10/20/politics/metoo-congress-women-harassment-assault/index.html> [<https://perma.cc/RRM3-HJC9>].

32. A notable example is #MeToo's arrival in India. See Manveena Suri, *India's #MeToo Moment?: Media and Entertainment Industry Shaken by Allegations*, CNN (Oct. 18, 2018, 8:51 PM), <https://www.cnn.com/2018/10/10/asia/india-metoo-intl/index.html> [<https://perma.cc/EB6J-H87V>].

33. See Ethan Krasnoo, *Exploring the Role of Defamation in the #MeToo Narrative*, REAVIS PAGE JUMP LLP (Sept. 21, 2018), <https://rpjlaw.com/exploring-defamation-metoo-narrative/> [<https://perma.cc/Z5QY-B5P9>] (opining that "defamation will continue to play a large role in the #MeToo movement"). Additionally, there are #MeToo defamation cases that have only been heard on procedural matters, as of January 4, 2019. See, e.g., *Bernstein v. O'Reilly*, 307 F. Supp. 3d 161 (S.D.N.Y. 2018) (denying Bill O'Reilly's motion to seal particular agreements filed in connection with his motion to compel arbitration and/or dismiss the complaint); *Ex parte Moore*, No. 1170638, 2018 WL 3947715 (Ala. Aug. 17, 2018) (affirming the lower court's denial of Roy Moore's motion for change of venue). There are also #MeToo defamation claims that have yet to be filed. See, e.g., Chappell, *supra* note 6 (explaining that Ashley Judd's defamation suit against Harvey Weinstein will move forward); James B. Stewart, Rachel Abrams & Ellen Gabler, "If Bobbie Talks, I'm Finished": *How Les Moonves Tried to Silence an Accuser*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/business/les-moonves-bobbie-phillips-marv-dauer-cbs-severance.html> [<https://perma.cc/6SVN-HWVP>] (stating that Bobbie Phillips has hired a lawyer to pursue defamation claims against Les Moonves).

of defamation law and its use in the #MeToo era and explores how the fact-opinion distinction has evolved. Part II explores how courts have applied fact-opinion analyses in defamation claims that are factually similar to *Milkovich*, including in #MeToo cases. Finally, Part III proposes a fact-opinion analysis that is more consistent with *Milkovich* and that focuses on the defamation defendant's possession of undisclosed facts as a consequence his<sup>34</sup> role as a first-person witness in the underlying alleged sexual assault.

## I. DEFAMATION LAW AND THE FACT-OPINION DISTINCTION

The First Amendment represents the United States' strong cultural interests in the freedom of speech.<sup>35</sup> The right to free expression is balanced against individuals' common law right to reputation, which is protected under defamation law.<sup>36</sup>

Alleged sexual assaulters have historically used defamation law against their accusers. However, sexual assault accusers have begun using defamation law against their alleged assaulters in the #MeToo era to protect their own reputations from claims that they lied about their assaults.<sup>37</sup> These defamation suits have raised new legal questions<sup>38</sup> but have more notably perpetuated the inconsistent fact-opinion distinction.<sup>39</sup>

Part I.A provides a brief overview of defamation law. Part I.B then outlines the use of defamation law in the context of sexual assault and #MeToo defamation cases. Finally, Part I.C describes the critical Supreme Court case *Milkovich v. Lorain Journal Co.* and its impact on the fact-opinion distinction.

### A. Defamation: A Mechanism for Reputational Protection

The law of defamation protects against the reputational harm that a written or spoken statement causes to the subject of the statement.<sup>40</sup> "Defamation"

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34. *But see* Quentin Fottrell, *A Difficult #MeToo Question: How Many Women Are Accused of Sexual Harassment?*, MARKETWATCH (Aug. 26, 2018, 6:42 PM), <https://www.marketwatch.com/story/a-difficult-metoo-question-how-many-women-are-accused-of-sexual-harassment-2018-08-21> [<https://perma.cc/S6JN-YMF3>] (demonstrating that women have also been accused of sexual assault and explaining the difficulty of calculating how many alleged assailants are women).

35. *See* U.S. CONST. amend. I.

36. *See* Bryson Kern, Note, *Reputational Injury Without Reputational Attack: Addressing Negligence Claims for Pure Reputational Harm*, 83 *FORDHAM L. REV.* 253, 257–58 (2014) (describing the importance of reputation and the harms resulting from an attack on reputation).

37. *See infra* Part I.B.

38. *See infra* Part I.B (discussing the self-defense privilege and attorneys' liability under defamation law for statements made on behalf of their clients, both issues which have been raised in recent #MeToo defamation cases).

39. *See infra* Part II.

40. The Restatement (Second) of Torts defines "defamation" as "[a] communication [which] tends so 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." *RESTATEMENT (SECOND) OF TORTS* § 559 (AM. LAW INST. 1977).



operates as a generic catchall term for the twin torts of libel and slander.<sup>41</sup> Libel specifically refers to defamation through words embodied in a tangible form, whether written or printed, and slander refers to defamation through gestures or spoken words.<sup>42</sup>

At common law, defamation was “essentially a strict liability tort with most rules stacked in the plaintiff’s favor.”<sup>43</sup> The common law cause of action required only an unprivileged, false, and defamatory publication that was either “actionable irrespective of special harm” or was “the legal cause of special harm to the other.”<sup>44</sup> However, a common law plaintiff did not have to show that the allegedly defamatory statement actually harmed their reputation,<sup>45</sup> was false,<sup>46</sup> or was made with any degree of malice or fault.<sup>47</sup> Thus, common law defamation enabled a plaintiff to prevail against a defendant with relative ease.<sup>48</sup>

Beginning in 1964,<sup>49</sup> a series of Supreme Court decisions placed First Amendment restrictions on common law defamation, balancing the traditional recognition of reputational interests with the constitutional protection of free speech.<sup>50</sup> New burdens were placed on defamation plaintiffs with the introduction of new analytical elements,<sup>51</sup> making it more difficult for plaintiffs to prevail on their defamation claims. The modern cause of action requires that a speaker communicate a false, defamatory, and

41. 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1:10 (2d ed. 2018). For the purpose of this Note, “defamation” will act as a catchall term for both libel and slander. This Note uses the terms “speaker” and “publisher” interchangeably, with no intent to invoke either written or spoken statements specifically but rather to invoke defamatory or allegedly defamatory statements generally. *See also id.* § 1:15 (further detailing how prima facie cases for libel and slander differ).

42. *Id.* § 1:11.

43. *Id.* § 1:4.

44. RESTATEMENT (FIRST) OF TORTS § 558 (AM. LAW INST. 1938). In defamation law, special harm refers to pecuniary loss “capable of being measured in money with approximate exactness.” *Id.* § 575 cmt. b.

45. *Id.* § 559 cmt. d.

46. SMOLLA, *supra* note 41, § 1:8.

47. *Id.*

48. *Id.* § 1:7. Quoting Lord Mansfield, Justice Oliver Wendell Holmes, Jr. noted that, in common law defamation, “[w]hatever a man publishes, he publishes at his peril.” *Peck v. Tribune Co.*, 214 U.S. 185, 189 (1909).

49. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

50. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (reiterating the Supreme Court’s “recognition of the [First] Amendment’s vital guarantee of free and uninhibited discussion of public issues” and recognizing societal interest in reputation as “another side to the equation”); *see also* SMOLLA, *supra* note 41, § 1:1 (stating that “[a] free, open, and decent society values the free exchange of news and information, but also demands avenues of redress for damaging falsehoods”). Contrast with Australia’s “strict defamation laws,” which require “the publisher to prove that the [defamation] allegations are true [and] ‘can be used to stymie public debate.’” Clarissa Sebag-Montefiore, *Geoffrey Rush’s Defamation Trial Becomes a #MeToo Reckoning for Australia*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/world/australia/geoffrey-rush-metoo-defamation.html> [https://perma.cc/LWL7-5FCL] (quoting Matt Collins, a Victoria-based defamation lawyer).

51. *See Sullivan*, 376 U.S. at 279–80 (establishing that public official plaintiffs must prove that allegedly defamatory statements were made with a fault level of “actual malice,” with knowledge or reckless disregard as to a statement’s falsity).

unprivileged statement to another with fault consisting of, at minimum, negligence.<sup>52</sup> Further, the relevant constitutional minimum requirements change depending on whether a plaintiff is a public or private person<sup>53</sup> and whether the defamatory speech concerns a public or private matter.<sup>54</sup> Additionally, states vary as to whether they impose a stricter fault requirement than actual malice and when they impose special harm requirements.<sup>55</sup>

Defamation has therefore evolved to incorporate more free speech protections, to the defendant's benefit.

### B. Defamation Law's Use in the #MeToo Era

Historically, alleged sexual assaulters, rather than their accusers, have utilized defamation lawsuits where an alleged sexual assault underlies the defamation claim.<sup>56</sup> In response to being accused of sexual assault, alleged assailants file defamation suits against their accusers to protect their own reputations.<sup>57</sup>

The possibility of such retaliation<sup>58</sup> discourages victims from reporting their sexual assaults.<sup>59</sup> With defamation suits, accused assaulters can circumvent rape shield laws designed to prevent admission of victims' past sexual histories as evidence in sexual assault cases.<sup>60</sup> This is because rape

52. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977). The exact requirements include “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Id.*

53. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending the “actual malice” fault requirement to public figures).

54. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (extending the “actual malice” fault requirement to private persons making claims regarding allegedly defamatory statements about matters of public concern).

55. SMOLLA, *supra* note 41, § 1:34.

56. *See* Jackson, *supra* note 11.

57. *Id.*

58. Other forms of retaliation in response to reporting sexual assaults include further sexual assault, threats, and violence. Leah M. Slyder, Note, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors*, 68 CASE W. RES. L. REV. 543, 552 (2017).

59. In 2016, about 80 percent of sexual assaults and rapes went unreported, making it the most underreported violent crime. RACHEL E. MORGAN & GRACE KENA, U.S. DEP'T OF JUSTICE, NCJ 252121, CRIMINAL VICTIMIZATION, 2016: REVISED 7 (2018), <https://www.bjs.gov/content/pub/pdf/cv16re.pdf> [<https://perma.cc/9YR4-2UVT>] (reporting that in 2016, 23.2 percent of rapes or sexual assaults were reported, compared with 57 percent of robberies, 43.9 percent of assaults, 52.2 percent of domestic violence crimes, 43.6 percent of stranger violence crimes, and 48 percent of violent crimes involving injury). Although reporting inconsistencies make it difficult to accurately measure how frequently sexual assaults are falsely reported, statistics show that false reporting rates range between 2 and 10 percent. NAT'L SEXUAL VIOLENCE RES. CTR., FALSE REPORTING 3 (2012), [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf) [<https://perma.cc/7F8L-SXEP>].

60. Slyder, *supra* note 58, at 553–54 (describing a case where the alleged sexual assaulter sued his accuser for defamation and “[t]he trial focused on the role that [the victim] played in her own sexual assault”); *see also* Leslie Berkseth et al., *Rape and Sexual Assault*, 18 GEO. J.

shield laws, which are relatively weak to begin with,<sup>61</sup> do not extend to civil proceedings in most states.<sup>62</sup>

The threat of defamation suits thus operates as a strong deterrent<sup>63</sup> to sexual assault victims bringing claims against their assaulters.<sup>64</sup> For example, as a possible backlash to the #MeToo movement, alleged sexual assaulters on college campuses are now more likely to file defamation suits against victims who report their assaulters.<sup>65</sup> Likewise, public figures accused of sexual assault have also brought defamation suits against their alleged victims.<sup>66</sup>

However, alleged sexual assault victims have also recently begun turning to defamation claims as a cause of action against their alleged assaulters.<sup>67</sup> These defamation suits raise other legal questions, in addition to the fact-opinion distinction, that have not yet been thoroughly explored.

One example is the common law self-defense privilege.<sup>68</sup> In some jurisdictions, defamation defendants may successfully claim this defense if

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GENDER & L. 743, 799 (2017) (stating that “rape shield laws do not generally protect civil litigants”).

61. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 55 (2002) (stating that “rape shield laws admit[] evidence of the sexual history between the complainant and the defendant himself”). Anderson also argues against certain provisions in Rule 412 of the Federal Rules of Evidence that allow sexual history to be admitted as evidence under certain circumstances. *Id.* at 55–56.

62. Slyder, *supra* note 58, at 553–54.

63. Other strong deterrents to reporting sexual assault include victim-blaming and victimization by the criminal justice system itself. *Id.* at 550–53. Dr. Christine Blasey Ford, who testified at Kavanaugh’s confirmation hearing that he sexually assaulted her in high school, is a notable example of an alleged sexual assault victim who was publicly victim-blamed. See *Full Transcript: Christine Blasey Ford’s Opening Statement to the Senate Judiciary Committee*, *supra* note 8. Dr. Ford noted in her opening statement, “I have had to relive my trauma in front of the entire world, and have seen my life picked apart by people on television, in the media, and in [the Senate Judiciary Committee] who have never met me or spoken with me.” *Id.*

64. *But see* Mark Morales, *#MeToo Cited as One Reason Rape Reports Increased 22% in New York in 2018*, CNN (Jan. 3, 2019, 7:07 PM), <https://www.cnn.com/2019/01/03/us/nypd-crime-stats-briefing/index.html> [<https://perma.cc/9PWU-UVT4>] (describing the #MeToo movement’s positive effect on increased rape reports in New York City in 2018).

65. See Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims’ Attorneys*, 65 DRAKE L. REV. 293, 356–61 (2017).

66. See, e.g., Maggie Astor, *Roy Moore Sues 4 Women, Claiming Defamation and Conspiracy*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/us/politics/roy-moore-lawsuit.html> [<https://perma.cc/2QVC-AUP6>]; Daniel Kreps, *Drake Files Fraud Lawsuit Against Woman Over False Pregnancy, Rape Claims*, ROLLING STONE (Sept. 19, 2018, 2:29 PM), <https://www.rollingstone.com/music/music-news/drake-fraud-lawsuit-false-pregnancy-rape-claims-726305/> [<https://perma.cc/6BFW-5CE5>].

67. See Jackson, *supra* note 11; *infra* Part II. One sexual assault victim described her decision to come forward about her alleged assault by Les Moonves: “The moment I read that there were other women [Les Moonves] had victimized, the light bulb went off . . . I had to grapple with the fact that I had allowed the same monster to victimize me twice, in the 1990s and once again some 20 years later.” See Stewart, Abrams & Gabler, *supra* note 33.

68. See, e.g., *McKee v. Cosby*, 236 F. Supp. 3d 427, 443 (D. Mass. 2017), *aff’d*, 874 F.3d 54 (1st Cir. 2017); *Green v. Cosby*, 138 F. Supp. 3d 114, 140–42 (D. Mass. 2015); see also Clay Calvert, *Counterspeech, Cosby, and Libel Law: Some Lessons About “Pure Opinion”*

they made their allegedly defamatory statement to defend their own reputations.<sup>69</sup> In #MeToo defamation cases, the self-defense argument is that the alleged assailant was protecting their own reputation by calling their accuser a liar—so they cannot be liable for defamation.<sup>70</sup>

Courts have come to inconsistent conclusions on whether an alleged assailant who calls their accuser a liar can properly claim the self-defense privilege. The court in *Green v. Cosby* addressed the self-defense argument at the motion to dismiss stage, where the plaintiff's allegations, in this case sexual assault allegations, are presumed to be true.<sup>71</sup> The court noted that, when a defendant's allegedly defamatory statement includes material they know or believe is false, they cannot successfully claim the self-defense privilege.<sup>72</sup> Accordingly, the court stated that Cosby could not invoke the self-defense privilege at the motion to dismiss stage.<sup>73</sup> However, the court in *McKee v. Cosby*<sup>74</sup> felt differently, asserting that individuals cannot be limited to "no comment" statements when responding to public sexual assault allegations.<sup>75</sup>

Another legal issue in #MeToo defamation cases is an attorney's potential defamation liability for making statements on behalf of their clients to defend them against sexual assault allegations. This question has been raised in Bill Cosby's #MeToo defamation cases, where Cosby's attorney, Martin Singer, either explicitly or implicitly called Cosby's accusers liars to defend Cosby against sexual assault allegations.<sup>76</sup> In most of these cases, Cosby was the only named defendant, and the courts treated Singer's statements as being made by Cosby because Singer made them on Cosby's behalf in the scope of

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& *Resuscitating the Self-Defense Privilege*, 69 FLA. L. REV. 151, 170–78 (2017) (arguing that the self-defense privilege should apply to #MeToo "liar" statements in defamation cases); Kristina T. Pham & Kevin D. Whittaker, *Will Defamation Claims in the #MeToo Movement Revive the Self-Defense Privilege for Employers?*, 2018 EMERGING ISSUES 8669 (predicting a resurgence of the self-defense privilege that may benefit employers).

69. See RESTATEMENT (SECOND) OF TORTS § 594 (AM. LAW INST. 1977). Not all jurisdictions recognize the self-defense privilege. See, e.g., *Green*, 138 F. Supp. 3d at 140–41 (rejecting Cosby's self-defense argument because the applicable Florida law does not recognize the self-defense privilege).

70. See *Green*, 138 F. Supp. 3d at 140–42.

71. *Id.* at 142.

72. *Id.* (citing ROBERT D. SACK, SACK ON DEFAMATION § 9:2.1 (4th ed. 2010)).

73. *Id.*

74. 236 F. Supp. 3d 427 (D. Mass. 2017), *aff'd*, 874 F.3d 54 (1st Cir. 2017).

75. *Id.* at 443. Despite the conflicting outcomes in these #MeToo cases, the common law self-defense privilege may ultimately be favorable to #MeToo defamation suit defendants. The common law requires that a reply to a defamatory statement (1) be directed only at the initial defamatory attack, without adding irrelevant statements; (2) be proportional to the defamatory attack, and (3) be directed to the appropriate—and not an unnecessarily wide—audience. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559–63 (4th Cir. 1994). Under the proportionality requirement, a defendant may properly allege that their attacker "is an unmitigated liar." *Id.* at 1562 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 115 (5th ed. 1984)).

76. See *Hill v. Cosby*, 665 F. App'x 169 (3d Cir. 2016); *McKee*, 236 F. Supp. 3d 427; *Green*, 138 F. Supp. 3d 114; *Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430 (Ct. App. 2017).

his role as Cosby's attorney.<sup>77</sup> Ultimately, whether attorneys can themselves be liable for defamation when acting on behalf of their client for their client's benefit remains largely unexplored.<sup>78</sup>

*C. Fact and Opinion: Fair Comment, Milkovich, and Varying Tests*

Common law courts used fact-opinion analyses to determine whether defamation defendants successfully claimed protection under the fair comment privilege.<sup>79</sup> Later, beginning in the latter half of the twentieth century, the Supreme Court took on the task of defining and clarifying that distinction.<sup>80</sup> However, a clear framework for determining whether statements constitute fact or opinion has eluded courts.<sup>81</sup>

Part I.C.1 describes the common law fact-opinion analysis. Part I.C.2 explains how the Supreme Court case *Milkovich v. Lorain Journal Co.* sought to change the common law fact-opinion analysis. Finally, Part I.C.3 describes how little effect *Milkovich* had on the fact-opinion analysis.

1. The Fact-Opinion Distinction's Origins in the Common Law

Until 1964, when the Supreme Court first acknowledged constitutional protection for opinions,<sup>82</sup> the fact-opinion distinction existed exclusively under the common law. At common law, the fair comment defense protected a defamation defendant's right to publicly discuss certain public subjects, even if done in a defamatory manner.<sup>83</sup> Fair comment was the common law's principal mechanism for balancing the need for public discourse with the need to redress reputational harm to individuals.<sup>84</sup> A defendant could successfully claim this qualified privilege by showing that the statement at issue concerned a matter of public interest, the statement was based on facts either stated or known to the audience, the statement was the defendant's opinion, and the defendant's sole motivation for the statement was not to harm the plaintiff.<sup>85</sup>

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77. See *Hill*, 665 F. App'x at 175–76; *McKee*, 236 F. Supp. 3d at 434; *Green*, 138 F. Supp. 3d at 118.

78. For an article opining that an attorney should not be liable for defamation when speaking for their client, see Calvert, *supra* note 68, at 165.

79. See *infra* notes 83–86.

80. See *infra* Part I.C.2.

81. SMOLLA, *supra* note 41, § 6:1.

82. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964) (determining “for the first time the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct”); see also 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, 305 (2000) (explaining the Supreme Court’s concern for protection of opinion in *New York Times Co. v. Sullivan*).

83. Rodney W. Ott, Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 763 (1990).

84. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990).

85. RESTATEMENT (FIRST) OF TORTS § 606 (AM. LAW INST. 1938).

Fair comment protected pure, as opposed to mixed, opinion.<sup>86</sup> Pure opinion included two types of statements. First, where the speaker states facts and expresses an opinion based on those facts.<sup>87</sup> Second, where the speaker does not express the facts on which the opinion is based, but the particular facts are either assumed due to their notoriety or known because another person has stated them.<sup>88</sup> Statements implying the existence of undisclosed facts unknown to their audience were referred to as mixed opinion and, unlike pure opinion, were actionable for defamation.<sup>89</sup>

In famous dictum from *Gertz v. Robert Welch, Inc.*,<sup>90</sup> the Supreme Court unwittingly laid the groundwork for blanket nonactionability of pure opinion when it stated:

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.<sup>91</sup>

The *Gertz* dictum was widely read<sup>92</sup> to say that statements of pure opinion were not actionable, effectively rendering the fair comment privilege unconstitutional.<sup>93</sup> In 1977, the Restatement (Second) of Torts rejected the possibility of actionable pure opinion<sup>94</sup> and instead clarified that opinions are “actionable only if [they] impl[y] the allegation of undisclosed defamatory facts as the basis for the opinion.”<sup>95</sup> Courts subsequently attempted to formulate tests for distinguishing fact and opinion pursuant to the *Gertz* dictum and Restatement.<sup>96</sup>

The D.C. Circuit’s en banc decision in *Ollman v. Evans*<sup>97</sup> greatly influenced the interpretation and application of the fact-opinion distinction. Judge Kenneth Starr, writing for the majority, interpreted *Gertz* as implying

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86. See RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (AM. LAW INST. 1977) (explaining that fair comment was held to apply to pure opinions).

87. *Id.*

88. *Id.*

89. *Id.*; see also *infra* notes 159–63 and accompanying text (expanding on the difference between pure and mixed opinion).

90. 418 U.S. 323 (1974).

91. *Id.* at 339–40.

92. The *Gertz* dictum “had a deep, virtually instantaneous impact on the law of defamation.” ROBERT D. SACK, SACK ON DEFAMATION § 4:2.3 (5th ed. 2017). For a list of cases ultimately holding in accordance with the idea that opinions are not actionable under the Constitution, see Sack, *supra* note 82, at 313 nn.102–09.

93. See RESTATEMENT (SECOND) OF TORTS § 566 cmts. b–c (AM. LAW INST. 1977). After the Supreme Court issued its *Gertz* opinion, courts began explicitly holding that *Gertz* rendered fair comment obsolete, referring to fair comment in their opinions but ultimately deciding the cases based on the Constitution or declaring fair comment superfluous. SACK, *supra* note 92, § 4:2.3.

94. See Sack, *supra* note 82, at 310.

95. RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977); see *id.* § 566 cmt. b.

96. See *supra* note 92 and accompanying text; see also *Ollman v. Evans*, 750 F.2d 970, 977 (D.C. Cir. 1984) (en banc) (describing the different methods employed by courts to distinguish fact from opinion as including judgment calls, single factors like verifiability, and multifactor tests).

97. 750 F.2d 970 (D.C. Cir. 1984) (en banc).

a constitutional duty “to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection.”<sup>98</sup> The court discussed the problems with different ways of distinguishing between fact and opinion. Bright-line rules fail to account for the complexity and richness of the English language, in which words can mean different things in different contexts.<sup>99</sup> However, analyses based on judgment calls or that articulate a complex rule may have an unwanted deterrent effect on free speech because it would be impossible for the public to predict what a court might deem permissible.<sup>100</sup> The *Ollman* court thus settled on a four-factor test to guide its analysis of whether a statement constituted fact or opinion.<sup>101</sup>

The *Ollman* test considers these four factors: (1) the statement’s specific language, including its common usage; (2) the statement’s verifiability; (3) the allegedly defamatory statement in the full context of its entire publication; and (4) the broader context of the statement’s publication, including the implications of social conventions.<sup>102</sup> These factors still greatly influence courts’ fact-opinion analyses.<sup>103</sup>

Two years later, in *Philadelphia Newspapers, Inc. v. Hepps*,<sup>104</sup> the Supreme Court determined that, under the Constitution, the plaintiff has the burden of proving an allegedly defamatory statement’s falsity, at least in media cases involving matters of public concern.<sup>105</sup> The *Hepps* holding marked a further shift from common law defamation, which did not require the plaintiff to prove falsity.<sup>106</sup>

## 2. The Supreme Court’s Fact-Opinion Analysis in *Milkovich*

The Supreme Court finally addressed the fact-opinion distinction in *Milkovich*, where the defendant was sued for defamation because he called the plaintiff a liar.<sup>107</sup>

Michael Milkovich, a high school wrestling coach, had testified at an athletics association hearing regarding a violent altercation at a wrestling match involving his team.<sup>108</sup> The association then put the team on probation.<sup>109</sup> Subsequently, after parents and wrestlers sued the association and Milkovich also testified in that proceeding, the association’s unfavorable ruling was overturned.<sup>110</sup>

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98. *Id.* at 975.

99. *Id.* at 974–78.

100. *Id.*

101. *Id.* at 979.

102. *Id.*

103. See Sack, *supra* note 82, at 316 nn.115–16 (listing court opinions using the same or similar factors in their fact-opinion analyses). But see Ott, *supra* note 83, at 781–84 (discussing divergent applications of the *Ollman* factors).

104. 475 U.S. 767 (1986).

105. *Id.* at 768–69.

106. See SMOLLA, *supra* note 41, § 1:8.

107. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 4–5 (1990).

108. *Id.* at 3–4.

109. *Id.* at 4.

110. *Id.*

The next day, a local newspaper published an article written by a columnist, J. Theodore Diadiun, who was present at the wrestling match and at the athletics association hearing.<sup>111</sup> The column, entitled “Maple Beat the Law with the ‘Big Lie,’” claimed that Milkovich had perjured himself at the court proceeding.<sup>112</sup> In the column, Diadiun stated that “anyone who attended the . . . wrestling meet” learned a lesson: “If you get in a jam, lie your way out. If you’re successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.”<sup>113</sup> Towards the end of the article, Diadiun reiterated that “[a]nyone who attended the meet . . . knows in his heart that Milkovich . . . lied at the hearing.”<sup>114</sup>

The Supreme Court used *Milkovich* as an opportunity to reject the widespread interpretation that *Gertz* created a blanket constitutional protection for all opinion.<sup>115</sup> Chief Justice William Rehnquist explained, “we do not think this [dictum] from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled ‘opinion’” and that “such an interpretation . . . would . . . ignore . . . that expressions of ‘opinion’ may often imply an assertion of objective fact.”<sup>116</sup>

The Court demonstrated how an expression of opinion could imply a factual assertion. First, the Court explained that the statement, “In my opinion John Jones is a liar,” could imply a false assertion of fact.<sup>117</sup> Even if the speaker states the facts on which this opinion is based, those facts could be incorrect or incomplete, or the speaker could have incorrectly evaluated the facts.<sup>118</sup> Second, the Court explained that a statement cannot be protected simply because its speaker specifically contextualizes it as an opinion.<sup>119</sup> If an opinion implies a false assertion of fact, it can be harmful to one’s reputation, regardless of whether it was prefaced with “In my opinion” or “I think.”<sup>120</sup>

The Court further opined that existing constitutional doctrine sufficiently protected First Amendment rights. The *Milkovich* Court noted that *Hepps* provides constitutional protection for “statement[s] of opinion relating to matters of public concern which do[] not contain a provably false factual connotation.”<sup>121</sup> Additional Supreme Court cases provide constitutional protection against statements that contain “rhetorical hyperbole” and that cannot, therefore, be “interpreted as stating actual facts” about a person.<sup>122</sup> Finally, Supreme Court cases establishing fault requirements for statements

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111. *Id.* at 3; *see also id.* at 28 (Brennan, J., dissenting).

112. *Id.* at 4 (majority opinion).

113. *Id.* at 4–5.

114. *Id.* at 5.

115. *Id.* at 18.

116. *Id.*

117. *Id.*

118. *Id.* at 18–19.

119. *Id.* at 19.

120. *Id.*

121. *Id.* at 20.

122. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 53–55 (1988)).



of opinion regarding matters of both public concern and public figures or officials provide further constitutional protection for “robust” “debate on public issues.”<sup>123</sup>

Accordingly, the Court rejected the use of factor tests commonly used by lower courts to identify statements of opinion<sup>124</sup> and clarified that “[t]he dispositive question [is] whether a reasonable factfinder could conclude that the statements in the . . . column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.”<sup>125</sup> In other words, could a reasonable factfinder conclude that an allegedly defamatory statement implied an assertion of fact?<sup>126</sup>

In applying this question to the *Milkovich* facts, the Supreme Court emphasized that Diadiun’s failure to use “loose, figurative, or hyperbolic language” and the article’s “general tenor” would indicate to a reader that Diadiun “was seriously maintaining that [Milkovich] committed the crime of perjury.”<sup>127</sup> The Court further concluded that Diadiun’s perjury claim could be proved true or false, based on a comparison of Milkovich’s testimony before the athletics association and his testimony before the court.<sup>128</sup> It thus concluded that Diadiun’s “liar” statement was actionable.<sup>129</sup>

Notably, the Supreme Court did not use two pieces of context on which a lower court had relied in finding that Diadiun’s column constituted nonactionable opinion. In *Scott v. News-Herald*,<sup>130</sup> a sister case to *Milkovich*, the Supreme Court of Ohio considered Diadiun’s article in a defamation suit brought by H. Don Scott, the school superintendent who testified with Milkovich at both the athletics association hearing and at court and was also a target of Diadiun’s column.<sup>131</sup> The U.S. Supreme Court noted that the Ohio Supreme Court relied on the large caption accompanying Diadiun’s article, “TD Says,” as well as the article’s placement in the newspaper’s sports section, which is “a traditional haven for cajoling, invective, and hyperbole.”<sup>132</sup> Despite its awareness of the Ohio Supreme Court’s use of these pieces of context, the U.S. Supreme Court declined to incorporate them into its own analysis of the column.<sup>133</sup>

In a dissenting opinion, Justice William Brennan agreed with the fact-opinion rule set out by Chief Justice Rehnquist’s majority opinion but

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123. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

124. *Id.* at 19. The court opined that these factor tests create an “artificial dichotomy” between fact and opinion. *Id.*

125. *Id.* at 21.

126. Scholars note that, despite the Court’s desire to eliminate the “artificial dichotomy” of factors tests, its own dispositive question does not actually accomplish this objective. *See Sack, supra* note 82, at 322–25.

127. *Milkovich*, 497 U.S. at 21.

128. *Id.*

129. *Id.* at 19.

130. 496 N.E.2d 699 (Ohio 1986).

131. *Milkovich*, 497 U.S. at 8.

132. *Id.* at 9 (quoting *Scott*, 496 N.E.2d at 707–08).

133. *See infra* notes 351–56 and accompanying text.

disagreed with its application to the facts in *Milkovich*.<sup>134</sup> In particular, he disagreed with the majority's conclusion that Diadiun's statements implied a factual assertion that Milkovich lied.<sup>135</sup> Justice Brennan acknowledged that Diadiun revealed facts on which the columnist relied, including that Diadiun was personally present at the wrestling match where the infamous incident occurred and at the athletics association hearing.<sup>136</sup> However, Justice Brennan also emphasized that Diadiun's statement shows where the columnist began guessing and pointed to language like "probably" and "apparently," to the statement's tone, and to contextual details like the "TD Says" caption.<sup>137</sup> Justice Brennan also found it problematic that Diadiun did not personally attend the court hearing, did not quote testimony from the hearing, and did not have any detailed secondhand information about Milkovich's court statements.<sup>138</sup> Based on these details, Justice Brennan concluded that Diadiun's statements could not reasonably be interpreted to imply an assertion of fact.

### 3. An Unchanged Landscape: Fact-Opinion Analyses After *Milkovich*

*Milkovich*'s impact was relatively subtle and did not alleviate the confusion around the fact-opinion distinction.<sup>139</sup> Although *Milkovich* rejected a blanket protection for opinion, opinions not implying underlying facts still receive constitutional protection since they cannot be proved true or false.<sup>140</sup> Therefore, *Milkovich* merely shifted the analysis to focus on whether allegedly defamatory statements contain provably false factual assertions.<sup>141</sup>

Courts tend to rely on *Milkovich* so far as it requires that actionable statements contain provably false assertions of fact and provides that rhetorical language is not actionable.<sup>142</sup> However, courts continue to rely on pre-*Milkovich* case law to assess whether a statement is provably false.<sup>143</sup> Hence, courts still use factors like those applied in *Ollman*,<sup>144</sup> along with other fact-opinion tests, despite the Supreme Court's disapproval of them.<sup>145</sup>

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134. *Milkovich*, 497 U.S. at 25 (Brennan, J., dissenting).

135. *Id.* at 28.

136. *Id.*

137. *Id.* at 29, 32.

138. *Id.* at 29–30.

139. SMOLLA, *supra* note 41, § 6:2; *see also* Sack, *supra* note 82, at 322 (stating that "*Milkovich* had little impact on the law").

140. *See* SACK, *supra* note 92, § 4:2.4.

141. SMOLLA, *supra* note 41, § 6:2; *see also* *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 219 (1990) (opining that, "[b]ecause the criteria used by lower courts since *Gertz* to distinguish fact from opinion are consistent with *Milkovich*'s limitations, the law of defamation will remain essentially the same in many jurisdictions").

142. SACK, *supra* note 92, § 4:2.4.

143. *Id.*

144. *See* *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc).

145. *See* *Milkovich v. Lorain Journal Co.*, 479 U.S. 1, 19 (1990).

Three basic fact-opinion approaches persist in state courts: the verifiability test, the undisclosed defamatory facts test, and the totality of the circumstances test.<sup>146</sup>

Jurisdictions like Illinois<sup>147</sup> and New Jersey<sup>148</sup> use fact-opinion tests emphasizing verifiability, where courts are more likely to find statements actionable if they are capable of being proved true or false, and statements are protected from liability if they are not verifiable.<sup>149</sup> This test requires a determination as to whether the statement suggests specific factual assertions that can be proved true or false.<sup>150</sup> Additionally, statements are less likely to be found actionable if they are determined to contain “loose, figurative or hyperbolic language.”<sup>151</sup> A final element is whether the audience would reasonably interpret a statement to have a defamatory meaning, which courts assess by considering the context in which the statement appears.<sup>152</sup>

Some states, such as Georgia,<sup>153</sup> Pennsylvania,<sup>154</sup> and Washington<sup>155</sup> rely on disclosure, the approach of the Restatement (Second) of Torts to the fact-opinion analysis.<sup>156</sup> Under this test, courts are likely to find a statement actionable if it fails to disclose the underlying defamatory facts serving as the basis of the opinion.<sup>157</sup> The Restatement further expands this test by distinguishing between pure and mixed opinions.<sup>158</sup> Pure opinions are those in which the audience knows the underlying facts, either because the speaker disclosed them or because they were already aware of them.<sup>159</sup> Mixed opinions fail to explicitly disclose, but still imply, the existence of underlying defamatory facts.<sup>160</sup>

This distinction is important because it highlights that an opinion’s impact on its audience varies depending on whether it communicates the underlying facts. If the statement of opinion discloses the underlying facts on which the opinion is based, the audience is less likely to perceive it as a defamatory factual statement.<sup>161</sup> For example, the Restatement provides the following

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146. Ott, *supra* note 83, at 770–74. Ott’s note predated the Supreme Court’s issuance of its *Milkovich* opinion by a matter of months. A post-*Milkovich* analysis of state court fact-opinion tests distinguishes eight different categories. Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 499–552 (1994). Most of these factors can be condensed into the three categories described by Ott.

147. See *Solaia Tech., LLC v. Specialty Publ’g Co.*, 852 N.E.2d 825, 840 (Ill. 2006).

148. See *DeAngelis v. Hill*, 847 A.2d 1261, 1269 (N.J. 2004).

149. Ott, *supra* note 83, at 770–71.

150. SMOLLA, *supra* note 41, § 6:45.

151. *Id.*

152. *Id.*; see also *DeAngelis*, 847 A.2d at 1268.

153. See *Davita Inc. v. Nephrology Assocs., P.C.*, 253 F. Supp. 2d 1370, 1374 (S.D. Ga. 2003).

154. See *Sprague v. Porter*, No. 02930, 2013 WL 6143734, at \*8 (Pa. Ct. Com. Pl. Nov. 1, 2013).

155. See *Dunlap v. Wayne*, 716 P.2d 842, 847 (Wash. 1986) (en banc).

156. RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977).

157. *Id.*

158. *Id.* § 566 cmt. b.

159. *Id.*

160. *Id.*

161. *Id.* § 566 cmt. c.

illustration: “A writes to B about his neighbor C: ‘I think he must be an alcoholic.’”<sup>162</sup> The audience, B, could reasonably conclude that A’s opinion is based on undisclosed facts—perhaps A saw C acting in a manner that would support his opinion that C is an alcoholic. Compare with the following scenario: “A says to B about C, a city official: ‘He and his wife took a trip on city business a month ago and he added her expenses in as a part of his own.’ B responds: ‘If he did that he is really a thief.’”<sup>163</sup> Here, the audience, A, would likely understand that B’s opinion is based purely on the facts that A himself provided, and that B is therefore not implying a statement of defamatory fact.

Finally, some states, like Massachusetts,<sup>164</sup> California,<sup>165</sup> and New York,<sup>166</sup> use the totality of the circumstances fact-opinion analysis. Under this test, courts weigh a number of factors to determine whether the allegedly defamatory statement is actionable for defamation.<sup>167</sup> These factors can include any combination of the statement’s literary context, existence of cautionary terms, the statement’s social context, verifiability, and whether the statement consists of rhetorical hyperbole.<sup>168</sup>

## II. FACT OR OPINION?: DIFFERING ANALYSES AND DIVERGING RESULTS IN #MeTOO DEFAMATION CASES

Of the eleven existing defamation cases predicated on a claim that the accuser is a liar,<sup>169</sup> eight arise from #MeToo-era sexual assault accusations and three arise from accusations of criminal conduct, including sexual assault, that arose prior to the #MeToo wave in fall 2017.<sup>170</sup> This Part discusses the eight cases that addressed the fact-opinion distinction.<sup>171</sup>

In five of the remaining eight cases, the plaintiff prevailed on the fact-opinion question. However, in three others, including cases decided in the

162. *Id.* § 566 illus. 3.

163. *Id.* § 566 illus. 5.

164. *See Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1162 (Mass. 1993).

165. *See Overhill Farms, Inc. v. Lopez*, 119 Cal. Rptr. 3d 127, 139 (Ct. App. 2010).

166. *See Davis v. Boenheim*, 22 N.E.3d 999, 1005 (N.Y. 2014) (explaining that New York has “adopted a holistic approach” to the fact-opinion analysis).

167. SMOLLA, *supra* note 41, § 6:47; *see also supra* note 146 and accompanying text.

168. SMOLLA, *supra* note 41, § 6:47.

169. This count does not include *Milkovich*.

170. *See infra* Parts II.A–B. This count only includes defamation cases with opinions issued as of September 19, 2019.

171. Two of the eleven cases did not address the fact-opinion distinction. As of September 19, 2019, one of these cases has addressed only procedural matters. *See Ex parte Moore*, No. 1170638, 2018 WL 3947715 (Ala. Aug. 17, 2018) (affirming a lower court’s denial of Roy Moore’s motion for change of venue). One case was dismissed. *See Katelyn Caralle, Judge Throws Out Defamation Lawsuit Against Bill O’Reilly, Fox News: It Is ‘Wholly Insufficient,’* WASH. EXAMINER (Mar. 6, 2019, 9:42 AM), <https://www.washingtonexaminer.com/news/judge-throws-out-defamation-lawsuit-against-bill-oreilly-fox-news> [<https://perma.cc/5KUU-LYHS>]. Finally, one defamation suit brought against Alan Dershowitz in April 2019 is pending as of September 26, 2019. *See Tom Winter & Rich Schapiro, Alan Dershowitz: My Sex Abuse Accuser Has Hurt the ‘Me Too’ Movement*, NBC NEWS (Sept. 24, 2019, 1:32 PM), <https://www.nbcnews.com/news/us-news/alan-dershowitz-my-sex-abuse-accuser-has-hurt-me-too-n1058226> [[perma.cc/VW8R-5YJG](https://perma.cc/VW8R-5YJG)].

First Circuit, Third Circuit, and the Central District of California, the defendant prevailed on the fact-opinion analysis.

Part II.A will assess how the fact-opinion analysis was conducted in cases where the court determined that a “liar” allegation was actionable. Part II.B will examine how the fact-opinion analysis was implemented in cases where the court determined that a “liar” allegation was not actionable.

#### A. Actionable “Liar” Statements

In each of the following cases, the court rejected the defendant’s argument that his “liar” statement constituted opinion, finding instead that the “liar” statement was actionable fact.

Parts II.A.1 and II.A.2 examine fact-opinion analyses in pre-#MeToo cases where the plaintiff accused the defendant, or another person close to the defendant, of committing a crime, and the defendant subsequently called the plaintiff a liar. Parts II.A.3, II.A.4, and II.A.5 examine courts’ fact-opinion analyses in #MeToo defamation cases.

##### 1. Actionable Fact in *Davis v. Boeheim*

In *Davis v. Boeheim*,<sup>172</sup> the New York Court of Appeals found that, pursuant to a fact-opinion analysis, the allegedly defamatory statements at issue were actionable.<sup>173</sup> The statements were made by Syracuse University and James Boeheim, the university’s head basketball coach, in response to the plaintiffs’ claims of sexual abuse by Bernie Fine, the associate head coach.<sup>174</sup> The plaintiffs, Robert Davis and Michael Lang, alleged that the abuse happened in the 1980s, when they were about eleven years old and continued for almost twenty years.<sup>175</sup> In 2005, Davis reported the abuse to the university’s new chancellor, but the university concluded a few months later that the allegations were unfounded.<sup>176</sup> In 2011, the claims resurfaced and Boeheim publicly stated, “‘Bernie [Fine] has my full support,’ and that he had known Fine for over 40 years and had ‘never seen or witnessed anything to suggest that [Fine] would be involved in any of the activities alleged.’”<sup>177</sup> Boeheim also said that he “would have taken action” if he had known of such conduct.<sup>178</sup> Boeheim further called the plaintiffs liars and claimed that their allegations were financially motivated.<sup>179</sup>

Davis and Lang then commenced a defamation action against Boeheim and the university, who in turn filed a motion to dismiss on the grounds that the statements were not defamatory because they constituted nonactionable

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172. 22 N.E.3d 999 (N.Y. 2014).

173. *Id.* at 1001.

174. *Id.*

175. *Id.*

176. *Id.* at 1002.

177. *Id.*

178. *Id.*

179. *Id.*

opinions.<sup>180</sup> The trial court granted the motion, and the appellate division affirmed, determining that based on the totality of the circumstances, a reasonable reader could conclude that the statements constituted nonactionable opinion.<sup>181</sup> Davis and Lang argued that, contrary to the lower courts' opinions, the statements constituted actionable facts or mixed opinion.<sup>182</sup>

The New York Court of Appeals agreed with Davis and Lang.<sup>183</sup> Using a totality of the circumstances test, it examined: (1) whether the specific language of the statement had a readily understood, precise meaning; (2) whether the statements were capable of being proved true or false; and (3) whether the published or broader social context indicated to a reader that the statement was more likely to be opinion rather than fact.<sup>184</sup>

The court determined that the first factor was satisfied because Boeheim used "specific, easily understood language to communicate that Davis and Lang lied, their motive was financial gain, and Davis had made prior similar statements for the same reason."<sup>185</sup> The court also found that the second factor was met because Boeheim's assertions that the plaintiffs were motivated by money and that Davis had made false statements in the past were capable of being proved true or false.<sup>186</sup>

In analyzing the third factor, the court invoked the pure and mixed opinion distinction laid out in the Restatement<sup>187</sup> and determined that Boeheim's statements constituted actionable mixed opinion.<sup>188</sup> Specifically, a reasonable reader could understand Boeheim to be speaking with authority and based on undisclosed facts, given his status as a well-respected member of the university.<sup>189</sup> Additionally, Boeheim's position as head coach left him "well placed to have information about the charges" and the fact that his statement was released before the university's statement would suggest that he had access to otherwise confidential information.<sup>190</sup> Further, Boeheim's longtime friendship with Fine suggested that he based his statements on particular details known to him because of that existing relationship.<sup>191</sup> Finally, because these statements were published in news-related articles, rather than an op-ed or letter to the editor, the reasonable reader would be more willing to conclude that they stated or implied facts.<sup>192</sup>

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180. *Id.* at 1002–03.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1005.

185. *Id.* at 1006.

186. *Id.*

187. *See* RESTATEMENT (SECOND) OF TORTS § 566 cmts. b–c (AM. LAW INST. 1977) (explaining that the difference between pure and mixed opinions is that pure, nonactionable, opinions disclose underlying facts whereas mixed, actionable opinions fail to disclose underlying facts but imply to their audience that they exist).

188. *Davis*, 22 N.E.3d at 1007.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

The New York Court of Appeals thus concluded that Boeheim's allegations that the plaintiffs lied were actionable under a totality of the circumstances fact-opinion analysis in light of the statement's specific language, verifiability, and literary and social context.<sup>193</sup>

## 2. Actionable Fact in *Giuffre v. Maxwell*

In *Giuffre v. Maxwell*,<sup>194</sup> the Southern District of New York concluded that Ghislaine Maxwell's claim that Virginia Giuffre lied when she claimed Maxwell was involved in her sexual abuse was actionable.<sup>195</sup> Giuffre, an alleged victim of Jeffrey Epstein's sex trafficking ring,<sup>196</sup> had experienced repeated sexual abuse when she was a minor over the span of about three years and publicly alleged that Maxwell was involved in her trafficking.<sup>197</sup> In response, Maxwell stated through her agent that these allegations were "untrue," were "shown to be untrue," and that the "claims are obvious lies."<sup>198</sup>

Subsequently, Giuffre filed a defamation claim against Maxwell, and Maxwell filed a motion to dismiss, claiming in part that the allegedly defamatory statements were not actionable.<sup>199</sup> Whereas Maxwell claimed her statements did not actually call Giuffre a liar, Giuffre argued they effectively did, and the court settled the question through a fact-opinion analysis.<sup>200</sup>

The court employed the same totality of the circumstances test used in *Davis v. Boeheim* and determined that the statements were actionable.<sup>201</sup> First, the statement was readily understood to have the factual meaning that Giuffre lied about Maxwell's involvement with Giuffre's sexual abuse, "and that some verifiable investigation . . . occurred and [came] to a definitive conclusion proving that fact."<sup>202</sup> Further, although Maxwell did not use the word "liar," her claims that Giuffre's allegations were "obvious lies" and had

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193. *See id.* at 1002–03, 1005.

194. 165 F. Supp. 3d 147 (S.D.N.Y. 2016).

195. *Id.* at 152. This case subsequently settled in May 2017. Kat Tenbarge, *Epstein Files Unsealed: Thousands of Accusers' Documents Have Been Released from the Defamation Suit Against His Ex-Girlfriend and Alleged 'Madam,'* BUS. INSIDER (Aug. 9, 2019, 10:42 AM), <https://www.businessinsider.com/epstein-giuffre-v-maxwell-unsealed-thousands-documents-defamation-2019-8> [<https://perma.cc/YB83-Z4BH>]. In August 2019, court documents from this case were unsealed, revealing thousands of pages worth of details about accusations from multiple women and involving a number of high-profile men, including Donald Trump and Prince Andrew. *See id.*

196. *See* Sheila Dang et al., *Jeffrey Epstein Accuser Links Powerful Men to Financier: Civil Court Filing*, REUTERS (Aug. 9, 2019, 3:05 PM), <https://www.reuters.com/article/us-people-jeffrey-epstein-documents/jeffrey-epstein-accuser-links-powerful-men-to-financier-civil-court-filing-idUSKCN1UZ27X> [<https://perma.cc/62SG-T4KM>].

197. *Giuffre*, 165 F. Supp. 3d at 150.

198. *Id.*

199. *Id.*

200. *Id.* at 151.

201. *Id.* at 151–52.

202. *Id.* at 152.

been “shown to be untrue” amounted to the same thing, as Giuffre’s allegations could not be shown to be untrue without her being a liar.<sup>203</sup>

Second, the statements were capable of being proved true or false: “Sexual assault of a minor is a clear-cut issue; either transgression occurred or it did not. Either Maxwell was involved or she was not. The issue is not a matter of opinion . . . . The answer depends on facts.”<sup>204</sup>

Third, the statements’ context would indicate to an audience that facts, not opinions, were being communicated. This is because Maxwell’s agent crafted a press release with the intention of releasing it to the media to publicly refute Giuffre’s sexual abuse history and Maxwell’s role in it.<sup>205</sup>

Thus, the court determined that Maxwell’s implied allegation that Giuffre lied was actionable under a totality of the circumstances test that included specific language, verifiability, and literary and social context.<sup>206</sup>

### 3. Actionable Fact in *Zervos v. Trump*

In *Zervos v. Trump*,<sup>207</sup> the New York Supreme Court ruled that Donald Trump’s assertion that a sexual assault accuser lied was actionable for defamation.<sup>208</sup> After being “fired” as a contestant on *The Apprentice*, Summer Zervos continued seeking employment opportunities with Trump.<sup>209</sup> Zervos alleged that during a meeting at Trump’s New York office, he kissed her twice and that, at another meeting at the Beverly Hills Hotel, he engaged in unwanted sexual contact with her.<sup>210</sup>

Zervos decided to come forward about her experiences after Trump became the Republican Party presidential nominee, so that the public could fully evaluate him as a candidate.<sup>211</sup> The next day, Trump released a statement denying he met Zervos “at a hotel or greeted her inappropriately.”<sup>212</sup> Additionally, during a campaign rally, Trump claimed that the “allegations are 100% false,” that “[t]hey are made up, they never happened,” that “[t]hese claims defy reason, truth, logic, common sense,” and that “[t]hey’re made without supporting witnesses.”<sup>213</sup> Finally, Trump tweeted that nothing “ever happened with any of these women. Totally made up nonsense to steal the election.”<sup>214</sup>

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203. *Id.*

204. *Id.*

205. *Id.* at 153.

206. *Id.* at 152.

207. 74 N.Y.S.3d 442 (Sup. Ct. 2018), *aff’d*, 94 N.Y.S.3d 75 (App. Div. 2019).

208. *Id.* at 449.

209. *Id.* at 444.

210. *Id.*

211. *Id.* at 445.

212. *Id.*

213. *Id.*

214. *Id.* For a complete account of Trump’s numerous public statements at rallies, debates, and on Twitter calling his accusers, including Zervos, liars, see *id.* at 445–46.



Zervos filed suit three days before Trump was sworn in as president of the United States.<sup>215</sup> She alleged that Trump's claims, that she lied and had political motives, were defamatory.<sup>216</sup> Trump then moved for dismissal or for a continuance until he left office based on presidential immunity.<sup>217</sup>

After rejecting Trump's presidential immunity argument,<sup>218</sup> the court employed the totality of the circumstances test articulated in *Davis v. Boenheim* and concluded that Trump's statements were actionable.<sup>219</sup> Trump used "specific, easily understood language" to convey that Zervos lied to serve personal interests,<sup>220</sup> and his statements were capable of being proved true or false since they concerned whether Zervos's goal was to advance her own interests.<sup>221</sup>

The court put particular emphasis on the third factor—context. It reasoned: first, Trump was the only person aside from Zervos who knew what their interaction was like; second, Trump called Zervos a liar as a matter of fact, using language such as "phony stories," "totally false," and "fiction"; and third, a reasonable audience could understand Trump's assertions as fact, considering that he "knows exactly what transpired."<sup>222</sup> The court also stated that the fact that Trump made these assertions on the campaign trail<sup>223</sup> did not render them protected rhetorical hyperbole.<sup>224</sup>

The court therefore found that Trump's assertions that Zervos was a liar were actionable for defamation under a totality of the circumstances test that considered specific language, verifiability, and literary and social context.<sup>225</sup> The New York Appellate Division later affirmed this decision.<sup>226</sup>

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215. *Id.* at 446.

216. *Id.*

217. *Id.*

218. *Id.* at 446–48. The *Zervos* court determined that *Clinton v. Jones*, 520 U.S. 681 (1997) did not preclude this defamation claim, since "[n]o one is above the law" and no authority supports the dismissal or stay of a civil action "related purely to unofficial conduct because defendant is the President of the United States." *Zervos*, 74 N.Y.S.3d at 448.

219. *Id.*

220. *Id.* at 449 (quoting *Davis v. Boenheim*, 22 N.E.3d 999, 1006 (N.Y. 2014)).

221. *Id.* On appeal, the court further explained that the denial of an accusation is not automatically actionable for defamation, but once uttered in conjunction with a claim that the accuser is lying, the denial becomes actionable as a "specific factual statement about another that is reasonably susceptible of defamatory meaning." *Zervos v. Trump*, 94 N.Y.S.3d 75, 88 (App. Div. 2019). The appellate court also clarified that, though the use of the word "liar" could be categorized as nonactionable rhetorical hyperbole, it is not rhetorical hyperbole where the defendant uses it as part of a denial of factual allegations against him. *Id.* at 88–89.

222. *Zervos*, 74 N.Y.S.3d at 449.

223. The fact-opinion distinction is often used to shield political expression, including outrageous political speech, from defamation liability. SACK, *supra* note 92, § 4:3.1[B].

224. *Zervos*, 74 N.Y.S.3d at 449. *But see* *Clifford v. Trump*, 339 F. Supp. 3d 915, 925 (C.D. Cal. 2018) (finding that Trump's "liar" assertions were protected rhetorical hyperbole in part because he was responding to accusations from a person who "publicly styl[ed] herself as an adversary to the President" by filing a defamation suit against him).

225. *Davis v. Boenheim*, 22 N.E.3d 999, 1005 (N.Y. 2014).

226. *See generally Zervos*, 94 N.Y.S.3d 75 (App. Div. 2019).

#### 4. Actionable Fact in *Dickinson v. Cosby*

In *Dickinson v. Cosby*,<sup>227</sup> the California Court of Appeal determined that statements made by attorney Martin Singer, on behalf of his client Bill Cosby, were actionable.<sup>228</sup> Janice Dickinson alleged that Cosby drugged and raped her in 1982, and though she did not disclose this in her 2002 autobiography, she did so in a 2014 television interview after other women had publicly accused Cosby of drugging and raping them.<sup>229</sup> An uncorroborated media story reported that Dickinson had wanted to include her alleged rape in her autobiography but that Cosby and his attorneys had pressured her publisher, HarperCollins, out of it.<sup>230</sup> Cosby, through Singer, distributed a demand letter to media outlets and issued a press release, calling Dickinson a liar in each.<sup>231</sup>

Dickinson filed suit against Cosby, claiming in part that he defamed her by “publicly brand[ing] her a liar,” and Cosby responded by filing a motion under the California “anti-SLAPP statute” designed to limit predatory litigation that stifles free speech.<sup>232</sup> Because the court determined that Cosby met his initial burden under the anti-SLAPP statute, the burden shifted to Dickinson to demonstrate a probability of prevailing on her claim.<sup>233</sup> Cosby argued that Dickinson could not prevail on her defamation claim regarding either the demand letter or the press release because both constituted nonactionable opinions.<sup>234</sup>

##### *a. The Demand Letter*

Singer’s demand letter called Dickinson’s rape allegation a “defamatory fabrication.”<sup>235</sup> The letter attributed to Dickinson the story that Cosby and his lawyers pressured HarperCollins into removing details of the alleged rape from her autobiography.<sup>236</sup> It called this “yet another fabrication . . . just like the alleged rape that never happened.”<sup>237</sup> Several times, the letter encouraged the media outlets to confirm with HarperCollins that Dickinson

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227. 225 Cal. Rptr. 3d 430 (Ct. App. 2017).

228. *Id.* at 458.

229. *Id.* at 438–39.

230. *Id.* at 439.

231. *Id.* at 439–41.

232. *Id.* at 441. Anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes have been enacted across the country in response to predatory litigation initiated to stifle a litigation defendant’s free speech rights. Andrew Roth, Comment, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. REV. 741, 741–45. Anti-SLAPP motions provide a mechanism to “weed[] out, at an early stage, meritless claims arising from protected activity.” *Dickinson*, 225 Cal. Rptr. 3d at 442.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 439.

237. *Id.*

was lying, as Cosby's legal team allegedly never had any contact with the publisher.<sup>238</sup>

The California court used a different version of the totality of the circumstances fact-opinion analysis than the New York court used in *Davis v. Boenheim*. First, the court examined the language itself to determine whether the statement disclosed the underlying facts without implying the existence of other undisclosed facts justifying the opinion.<sup>239</sup> Second, the court considered the context of the statement: to whom the statement was directed, the forum in which the statement was made, the statement's author, and whether the statement constituted "predictable opinion" (statements made in an adversarial setting).<sup>240</sup>

The court determined that the demand letter implied the "provably false assertion of fact . . . that Cosby did not rape Dickinson, and she is lying when she says that he did."<sup>241</sup> Singer's characterizations of Dickinson's allegations as "false and outlandish claims," "outrageous and defamatory lie[s]," and a "defamatory fabrication" implied fact rather than opinion.<sup>242</sup> Further, the demand letter did not communicate nonactionable opinion just because it disclosed facts regarding Dickinson's autobiography and claimed HarperCollins could confirm that the rape story and assertions that Cosby pressured it not to print the story were lies.<sup>243</sup> First, even if the letter disclosed these facts, it did not disclose all facts on which the opinion was based; second, Dickinson's evidence was that one of these purported facts was itself false; and third, the language of the letter stated an additional fact that "the alleged rape never happened."<sup>244</sup>

In turning to the context portion of the fact-opinion analysis, the court relied heavily on Singer's role as Cosby's attorney to support its determination that, at the very least, Singer's letter was capable of being interpreted as a factual, absolute denial.<sup>245</sup> The court emphasized that this was more than an anonymous internet posting; "this was a lawyer's letter threatening litigation and setting out the factual and legal basis for it."<sup>246</sup> Further, Singer was speaking for Cosby, "who, in turn, would certainly know whether or not he sexually assaulted Dickinson."<sup>247</sup>

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238. *Id.* at 439–40.

239. *Id.* at 457.

240. *Id.* at 458. Statements found to be "predictable opinions" are those made in an adversarial setting, where an audience would expect the speaker to use "fiery rhetoric or hyperbole" and which would signal that a statement which may otherwise seem like one of fact is actually opinion. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 459.

244. *Id.*

245. *Id.* at 460.

246. *Id.*

247. *Id.*

b. *The Press Release*

The court determined that the press release, like the demand letter, contained statements of fact rendering it actionable. The press release communicated that “Janice Dickinson’s story accusing Bill Cosby of rape is a lie” and reiterated the claim that HarperCollins could confirm that Cosby’s legal team never tried to discourage it from publishing the rape allegation.<sup>248</sup> Singer used unconditional language and repeated the same facts relied on in the demand letter.<sup>249</sup>

The press release contained the same problems as the demand letter: Singer failed to disclose other facts on which he relied, falsely stated that HarperCollins could confirm his story, and expressly stated that Dickinson’s allegations were lies.<sup>250</sup> The court further relied on context. In part because of the press release’s title, “Statement of Martin D. Singer Attorney for Bill Cosby,” and its dissemination to the public, it would be reasonable for the average reader to assume that Singer was speaking for Cosby as his attorney.<sup>251</sup>

The court therefore concluded that both the demand letter and press release were actionable as defamation under a totality of the circumstances test that considered disclosure and context.<sup>252</sup>

5. Actionable Fact in *Green v. Cosby*

In *Green v. Cosby*,<sup>253</sup> the court determined that statements made by attorney Martin Singer, on behalf of his client Bill Cosby, were actionable as defamation.<sup>254</sup> Three different plaintiffs accused Cosby of drugging and sexually assaulting them in the 1970s and publicly disclosed the alleged assaults between 2005 and 2014.<sup>255</sup> In response, Singer made several public statements denying the claims and calling the plaintiffs liars.<sup>256</sup>

The plaintiffs filed defamation claims alleging that Cosby knew each statement was false, that the statements were widely read, and that these statements damaged the plaintiffs’ reputations.<sup>257</sup> Cosby then filed a motion to dismiss,<sup>258</sup> arguing in part that the statements at issue expressed statements of opinion and were therefore not actionable.<sup>259</sup>

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248. *Id.* at 440.

249. *Id.* at 461.

250. *Id.*

251. *Id.*

252. *See id.* at 457–58.

253. This case has since been settled. *See* Graham Bowley, *7 Women Suing Bill Cosby Reach Settlement in Defamation Case*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/arts/television/cosby-defamation-lawsuit-settlement.html> [<https://perma.cc/59R4-AMK5>].

254. *Green v. Cosby*, 138 F. Supp. 3d 114, 133, 135, 137 (D. Mass. 2015).

255. *Id.* at 120–21.

256. *Id.* at 121–23.

257. *Id.* at 121.

258. *Id.* at 118–19.

259. *Id.* at 131, 135–36.

*a. The Newsweek Statement*

In a statement provided to *Newsweek*, Singer called one of the plaintiff's allegations "a 10-year-old, discredited accusation that proved to be nothing at the time, and is still nothing."<sup>260</sup> Cosby argued this was predictable opinion, a statement that an audience would understand to be a "one-sided expression of opinion rather than fact."<sup>261</sup> The court used a totality of the circumstances test that examined whether the general tenor or use of figurative or hyperbolic language indicated that the speaker was communicating opinion and whether the statement was capable of being proved true or false.<sup>262</sup>

The court rejected Cosby's predictable opinion argument in part because the statement's general tenor did not "negate[] the impression that [Cosby] was asserting an objective fact."<sup>263</sup> The court further determined that Cosby's specific language had a clear literal meaning, allowing the reasonable conclusion that it implied the assertion of a defamatory fact.<sup>264</sup> In particular, the literal meaning of the statement, that the allegations had been proved to be meritless, was not undercut by hyperbolic or figurative language.<sup>265</sup> Finally, the court determined that the statement was capable of being proved true or false.<sup>266</sup> Both Cosby's implication that an investigation was conducted and the general "gist" of the statement, that the plaintiff made up the allegations, were "sufficiently specific 'to be susceptible to proof or disproof.'"<sup>267</sup>

*b. The Statement of November 21, 2014*

In a statement made on November 21, 2014,<sup>268</sup> Singer described the plaintiff's sexual assault claims as "unsubstantiated, fantastical stories," adding that "it is completely illogical that so many people would have said nothing . . . if they thought they had been assaulted over a span of so many years."<sup>269</sup> Cosby argued, among other defenses, that this statement was nonactionable because it expressed opinion.<sup>270</sup> The court applied Florida's fact-opinion test, which requires that nonactionable opinions provide the

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260. *Id.* at 121.

261. *Id.* at 132.

262. *Id.* at 131–32.

263. *Id.* at 132. The court also concluded that, in contrast with relevant California case precedent applying predictable opinion, Cosby's statement was not made in the context of pending or completed litigation. *Id.* at 131–32.

264. *Id.* at 133.

265. *Id.* at 133–34.

266. *Id.* at 133.

267. *Id.* (quoting *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 2d. 890, 898 (Ct. App. 1993)).

268. This statement was also litigated in *Hill*. See *infra* Part II.B.2.a.

269. *Green*, 138 F. Supp. 3d at 122.

270. *Id.* at 136.

underlying facts on which the opinion is based and that the analysis include consideration of context.<sup>271</sup>

Cosby argued that the statement provided sufficient underlying facts because it described events that allegedly occurred “30, 40, or even 50 years ago.”<sup>272</sup> However, the court rejected this reasoning because the statement in its entirety could be understood to assert more than that the allegations were unsubstantiated “but also as implying they were false and entirely without merit.”<sup>273</sup>

The court therefore determined that the *Newsweek* statement was actionable under a totality of the circumstances fact-opinion analysis that considered language and verifiability<sup>274</sup> and that the statement of November 21, 2014, was actionable under a fact-opinion analysis that considered disclosure and context.<sup>275</sup>

### B. Nonactionable “Liar” Statements

In each of the following cases, the court determined that the defendant’s “liar” statements were not actionable. Part II.B.1 examines the fact-opinion analysis in a non-#MeToo case where the plaintiff accused the defendant of committing a crime—and the defendant claimed that the plaintiff lied. Parts II.B.2 and II.B.3 examine fact-opinion analyses in #MeToo defamation cases.

#### 1. Nonactionable Opinion in *Clifford v. Trump*

In *Clifford v. Trump*,<sup>276</sup> a court determined that Donald Trump’s “liar” statements were nonactionable in a case where Stephanie Clifford, commonly known as Stormy Daniels, brought a defamation suit against Trump.<sup>277</sup> Clifford claimed that she had an affair with Trump in 2006 and that in 2011 she agreed to discuss the affair with a magazine.<sup>278</sup> She further claimed that a few weeks after agreeing to discuss the affair, a man approached and threatened her in an attempt to dissuade her from discussing the affair.<sup>279</sup> After Trump was elected president, Clifford had a sketch artist draw the man who had threatened her and released this sketch to the public on April 17, 2018.<sup>280</sup> The following day, Trump tweeted: “A sketch years

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271. *Id.*

272. *Id.*

273. *Id.* at 137.

274. *Id.* at 131–32.

275. *Id.* at 136.

276. 339 F. Supp. 3d 915 (C.D. Cal. 2018).

277. *See id.* at 925–26.

278. *Id.* at 919.

279. *Id.*

280. *Id.*

later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!”<sup>281</sup>

Clifford then filed a defamation suit against Trump, claiming he “meant to convey that [she] is a liar” and “that she was falsely accusing the individual depicted in the sketch of committing a crime, where no crime had been committed.”<sup>282</sup> Trump moved to dismiss the plaintiff’s complaint, claiming in part that his tweet was nonactionable opinion.<sup>283</sup>

The court used a verifiability fact-opinion test that required consideration of whether the statement was provably false and whether the statement constituted rhetorical hyperbole.<sup>284</sup> Clifford satisfied the first prong since Trump’s tweet could be proved false if the man who allegedly threatened Clifford existed or if Clifford did not lie about the threats.<sup>285</sup> However, the court found that Clifford failed to satisfy the second prong because Trump’s tweet constituted “rhetorical hyperbole” and because of the tweet’s context.<sup>286</sup>

The court determined that Trump’s tweet constituted “rhetorical hyperbole” because Trump used an incredulous tone, which suggested that his statement was not intended to be understood as a literal statement about Clifford but instead “sought to use language to challenge [her] account.”<sup>287</sup> The court cited the Supreme Court’s holding in *Milkovich* that a statement with a tone characterized as “exaggerated[] and heavily laden with emotional rhetoric and moral outrage” made that statement nonactionable rhetorical hyperbole.<sup>288</sup>

The court next found contextual support for its conclusion that Trump’s tweet constituted rhetorical hyperbole. First, Clifford presented herself as a political adversary to the president, and Trump’s response to such a person could properly be characterized as political rhetorical hyperbole.<sup>289</sup> The court analogized the facts to those of a case where the defendant, who had run for office against a public official, included various defamatory statements about the public official on his website.<sup>290</sup> Because the “website’s tone” and “campaign context” suggested political rhetorical hyperbole, the defendant’s statements could not properly be found to constitute defamation.<sup>291</sup> Similarly, because Clifford publicly presented herself as a

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281. *Id.*; see also Donald Trump (@realDonaldTrump), TWITTER (Apr. 18, 2018, 6:08 AM), <https://twitter.com/realdonaldtrump/status/986547093610299392> [<https://perma.cc/Q4V5-8RNJ>].

282. *Clifford*, 339 F. Supp. 3d at 919.

283. *Id.* at 918, 920.

284. *Id.* at 926. Although the court also includes the actual malice fault standard in its “*Bentley/Milkovich*” test, it is omitted from this discussion since it is not part of the fact-opinion analysis.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 926–27.

289. *Id.* at 927.

290. *Id.*

291. *Id.*

“political adversary” to Trump, having previously challenged the legitimacy of his 2016 election, the court determined that Trump’s tweet was rhetorical hyperbole.<sup>292</sup>

Second, the court found that context supported a conclusion that Trump’s tweet constituted rhetorical hyperbole because he made a single statement, rather than a sustained attack on Clifford.<sup>293</sup> The court distinguished the facts from a case in which a talk show host repeatedly claimed on air that he had proof that a judge was corrupt.<sup>294</sup> In this case, the court determined that the talk show host’s statements were actionable due to his repeated efforts, spanning months, to prove that the judge was corrupt.<sup>295</sup> Here, because Trump neither repeated the allegations nor provided support for his views, the court found the cases sufficiently distinct to conclude that Trump’s tweet was rhetorical hyperbole, and thus the court found that the tweet was nonactionable opinion under a verifiability<sup>296</sup> fact-opinion test.<sup>297</sup>

## 2. Nonactionable Opinion in *Hill v. Cosby*

In *Hill v. Cosby*, the Third Circuit concluded that statements made by Cosby, his attorney Martin Singer, and his wife Camille Cosby were all nonactionable pure opinion. Renita Hill alleged that Cosby drugged and sexually assaulted her in the 1980s, beginning when she was sixteen years old.<sup>298</sup> Too intimidated at the time of the abuse to disclose it, Hill later felt encouraged by numerous other women who publicly came forward about their sexual abuse by Cosby.<sup>299</sup> She then shared her own story with a reporter in 2014.<sup>300</sup> Hill filed a suit in response to three statements, each spoken by or on behalf of Cosby, claiming that each defamed her.<sup>301</sup>

The court relied on the language of the Restatement, that a statement is not defamatory unless it implies the existence of undisclosed defamatory facts, to analyze the fact-opinion question in each of these statements.<sup>302</sup>

### a. *Singer’s Statement*

Singer characterized<sup>303</sup> Hill’s sexual assault claims as “unsubstantiated, fantastical stories.”<sup>304</sup> He further stated that it is “completely illogical that

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292. *Id.*

293. *Id.*

294. *Id.*

295. *Bentley v. Bunton*, 94 S.W.3d 561, 568–74 (Tex. 2002).

296. *See Clifford*, 339 F. Supp. 3d at 926.

297. *Id.* at 928.

298. *Hill v. Cosby*, 665 F. App’x 169, 171 (3d Cir. 2016).

299. *Id.*

300. *Id.*

301. *Id.* at 173.

302. *Id.* at 175.

303. This statement was also litigated in *Green*. *See supra* Part II.A.5.b.

304. *Hill*, 665 F. App’x at 172.



so many people would have said . . . [or] done nothing . . . if they thought they had been assaulted over a span of so many years.”<sup>305</sup>

The court concluded that Singer’s statement represented an opinion supported by sufficient disclosed facts to render it nonactionable.<sup>306</sup> Specifically, the statement included details and explanations such as the alleged abuse having “occurred 30, 40, or even 50 years ago,” the “absurdity” that a sexual assault victim would remain silent for so many years, and that “[t]here has never been a shortage of lawyers willing to represent people with claims against rich, powerful men, so it makes no sense that” these women never took legal action at the time they were allegedly assaulted.<sup>307</sup> According to the court, these details from Singer’s statements were sufficient to “allow[] the recipient to draw his or her own conclusions ‘on the basis of an independent evaluation of the facts.’”<sup>308</sup> Therefore, the court determined that Singer’s statements were nonactionable.

*b. Bill Cosby’s Statement*

The court also found Bill Cosby’s statement nonactionable because it also disclosed sufficient underlying facts.<sup>309</sup> Cosby stated: “I know people are tired of me not saying anything, but a guy doesn’t have to answer to innuendos. People should fact-check. People shouldn’t have to go through that and shouldn’t answer to innuendos.”<sup>310</sup>

The court determined that Cosby’s labelling of Hill’s sexual assault allegations as “innuendos” served the purpose of explaining why he refused to respond to them.<sup>311</sup> Further, Cosby “invited the recipient to conduct his or her own investigation,” which the court determined was dissimilar to calling Hill a liar.<sup>312</sup> Although the court did not find that Cosby disclosed underlying facts, it found it sufficient that Cosby invited the public to “fact-check” and thus did not find his statement to be actionable.<sup>313</sup>

*c. Camille Cosby’s Statements*

Finally, the court determined that Camille Cosby’s statements were nonactionable. Camille Cosby said, “[t]here appears to be no vetting of my husband’s accusers before stories are published or aired.”<sup>314</sup> Further, she

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305. *Id.*

306. *Id.* at 173–74.

307. *Id.* at 172, 175–76.

308. *Id.* at 176.

309. *Id.*

310. *Id.* at 172.

311. *Id.* at 176.

312. *Id.*

313. *Id.* at 172, 176.

314. *Id.* at 173.

compared the rape allegations against Cosby to the fabricated rape allegations at the University of Virginia.<sup>315</sup>

The court stated that even if the statements concerned Hill, they could not reasonably be understood to imply undisclosed facts.<sup>316</sup> The court further determined that a reasonable audience would understand that, as Cosby's wife, Camille Cosby would defend her husband against any allegations of wrongdoing without implicating any underlying facts regarding a specific accusation.<sup>317</sup>

Thus, under a disclosure fact-opinion analysis,<sup>318</sup> the court found that the three statements made by Singer, Bill Cosby, and Camille Cosby constituted nonactionable opinions.

### 3. Nonactionable Opinion in *McKee v. Cosby*

The court in *McKee v. Cosby*<sup>319</sup> determined that a statement made by Singer constituted nonactionable opinion.<sup>320</sup> In December 2014, after over twenty other women had come forward with sexual assault allegations against Cosby, Kathrine McKee revealed her own allegations that Cosby had raped her in 1974.<sup>321</sup> After the *New York Daily News* published a story about McKee's allegations, Singer immediately sent the newspaper a letter admonishing it for publishing the story.<sup>322</sup> The statement asserted that the *Daily News* failed to uphold a "credibility threshold" and failed to investigate "[a]mple . . . readily available" evidence demonstrating McKee's lack of reliability and credibility.<sup>323</sup> Singer further provided a list of statements McKee had allegedly made about her relationship with Cosby and her past occupation as a Las Vegas showgirl.<sup>324</sup> Each piece of information in this list included citations to news articles and other sources.<sup>325</sup> McKee alleged that Singer leaked copies of this letter to the media, the letters were widely disseminated, and the letter was defamatory.<sup>326</sup>

After McKee sued Cosby for defamation, Cosby filed a motion to dismiss.<sup>327</sup> The court granted the motion on the grounds that the letter conveyed Singer's opinion that McKee was not credible, McKee's credibility was incapable of being proved true or false, and that the *Daily News* failed to

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315. *Id.* See generally *Elias v. Rolling Stone LLC*, 872 F.3d 97 (2d Cir. 2017); Sydney Ember, *Rolling Stone to Pay \$1.65 Million to Fraternity Over Discredited Rape Story*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/business/media/rape-uva-rolling-stone-frat.html> [<https://perma.cc/H3J2-WT2D>].

316. *Hill*, 665 F. App'x at 177.

317. *Id.*

318. See *id.* at 175.

319. 874 F.3d 54 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675 (2019).

320. *Id.* at 63–64.

321. *Id.* at 58.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* at 59.

327. *Id.*

investigate.<sup>328</sup> On appeal, Cosby argued that Singer's letter focused on the *Daily News's* conduct rather than on McKee's,<sup>329</sup> while McKee argued that a reader could conclude that Singer's assertions were based on undisclosed facts.<sup>330</sup>

The court implemented a fact-opinion analysis that focused on whether the speaker disclosed the facts on which their opinion relied.<sup>331</sup> The court disagreed with Cosby's argument that the letter did not adequately concern McKee and thus did not defame her.<sup>332</sup> The court observed that most of the letter's contents related to McKee's relationship with Cosby and her credibility rather than her "alleged general propensity to lie."<sup>333</sup>

However, the court further found that Singer's letter disclosed sufficient facts to protect it from actionability.<sup>334</sup> The court cited the letter's "heavy" inclusion of citations to other sources, indicating "extensive underlying facts" to support Singer's contention that McKee lacked credibility.<sup>335</sup> According to the court, whether the facts were probative was irrelevant to the fact-opinion analysis, as long as the facts "[we]re not both false and defamatory."<sup>336</sup> Finally, the court concluded that "a reasonable reader would not understand Singer 'to be suggesting that he was singularly capable of evaluating' McKee's credibility based on undisclosed evidence."<sup>337</sup> Rather, readers could draw their own conclusions from the sources provided in the letter.<sup>338</sup> Therefore, the court concluded that Singer's letter was not actionable for defamation under a disclosure fact-opinion analysis.<sup>339</sup>

### III. A FACT-OPINION ANALYSIS EXPLICITLY INCLUDING THE DEFAMATION DEFENDANT'S FIRST-PERSON WITNESS ROLE

Until recent #MeToo-era cases, courts have not had much opportunity to address the fact-opinion analysis in fact patterns similar to *Milkovich*,<sup>340</sup> where the defendant has firsthand knowledge of the crime underlying the defamation suit. However, the resurgence of the *Milkovich* fact pattern in the #MeToo context highlights the need to reexamine how the Court analyzed the fact-opinion distinction in *Milkovich* and how that analysis informs the way the fact-opinion analysis in #MeToo cases should be conducted.

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328. *Id.*

329. *Id.* at 62.

330. *Id.* at 63.

331. *Id.* at 61.

332. *Id.* at 63.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 63–64 (quoting *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730–31 (1st Cir. 1992)).

338. *Id.* at 64; see RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (AM. LAW INST. 1977) (explaining that the value of including underlying facts in a statement of opinion is that audiences can come to their own conclusions based on the information presented).

339. See *McKee*, 874 F.3d at 61.

340. See *supra* Part I.C.2.

This Note proposes that fact-opinion analyses should incorporate the defamation defendant's first-person experience with the alleged underlying crime that they were accused of committing. Because the defendant was alleged by their accuser to have been present and involved in the commission of the crime, they are effectively a potential first-person witness to the crime. When a defendant is a first-person witness, their assertion that the plaintiff lied is an implicit use of first-person witness testimony and therefore constitutes reliance on undisclosed underlying facts.<sup>341</sup>

Part III.A revisits the *Milkovich* defendant's experience as a first-person witness, as well as the analogous #MeToo defendant's role as a first-person witness. Part III.B proposes a fact-opinion analysis focusing on the defendant's role as first-person witness to the underlying crime and examines how successfully the cases presented in Part II considered this factor in their fact-opinion analyses.

*A. Reexamining the Role of Disclosure When a Defamation Defendant Is a First-Person Witness to the Underlying Crime*

The fact-opinion analyses utilized by courts in factually similar circumstances<sup>342</sup> to *Milkovich* demonstrate that courts use different tests<sup>343</sup> and apply similar tests differently.<sup>344</sup> Additionally, many courts fail to recognize the portion of *Milkovich* most relevant to this particular factual scenario: where the defendant was a first-person witness to the underlying events at issue, the defendant possesses undisclosed underlying facts. Thus, an allegation that the plaintiff lied, spoken by a defendant who allegedly has first-person experience with the incident in question, should be found to be actionable.

This is the case both in *Milkovich* and in #MeToo defamation cases. Part III.A.1 revisits *Milkovich* to examine how the defendant's role as a first-person witness played into the Supreme Court's fact-opinion analysis. Part III.A.2 draws a parallel between the *Milkovich* defendant's role as a first-person witness to the events underlying the defamation claim and the #MeToo defendant's role as first person witness to the alleged sexual assault and argues that the #MeToo defendant's first-person witness role should likewise affect the fact-opinion analysis.

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341. See RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977).

342. See *supra* Part II.

343. Compare *Hill v. Cosby*, 665 F. App'x 169 (3d Cir. 2016) (relying on disclosure), with *Green v. Cosby*, 138 F. Supp. 3d 114 (D. Mass. 2015) (employing a totality of the circumstances test).

344. Compare *Zervos v. Trump*, 74 N.Y.S.3d 442 (Sup. Ct. 2018), *aff'd*, 94 N.Y.S.3d 75 (App. Div. 2019) (using a totality of the circumstances fact-opinion analysis that considered the allegedly defamatory statement's specific language, verifiability, and literary and social context), with *Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430 (Ct. App. 2017) (implementing a totality of the circumstances fact-opinion analysis that considered disclosure and social context).

1. The *Milkovich* Defendant as First-Person Witness and Possessor of Undisclosed Underlying Facts

In *Milkovich*, Diadiun's statement included several indications that his assertions that Milkovich lied were based on undisclosed underlying facts that he possessed because of his personal experience. In his column, Diadiun stated that he was "among the 2,000-plus witnesses of the meet" and that he "also attended the [athletics association] hearing," putting him in "a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board."<sup>345</sup> Diadiun also stated that the school's student body and "anyone who attended the . . . wrestling meet" learned a lesson from Milkovich about lying to get out of a "jam."<sup>346</sup> He further stated that "[a]nyone who attended the meet," including an "impartial observer, knows in his heart" that Milkovich committed perjury at the hearing.<sup>347</sup> Diadiun's statement, that one had to be present at these events to conclude Milkovich lied, implied that there was relevant information that could only be gleaned by one's presence at both events. In other words, Diadiun's assertion implied the existence of undisclosed facts underlying his opinion.<sup>348</sup>

The Supreme Court's fact-opinion analysis in *Milkovich* is consistent with Diadiun's possession of undisclosed facts due to his experience as a first-person witness. The court determined that the statement was verifiable because it could objectively be proved true or false and because it lacked "the sort of loose, figurative, or hyperbolic language" which would indicate a statement incapable of being proved true or false.<sup>349</sup> Although Diadiun used language like "knows in his heart," which could conceivably be found to be hyperbolic,<sup>350</sup> the hyperbole is cut down by the rest of his assertion, that anyone who attended the wrestling meet and therefore had access to information observable at the meet would "know[] in his heart" that Milkovich lied.

The Court further determined that the statement's general tenor indicated the statement was verifiable.<sup>351</sup> However, in so concluding, it declined to lend analytical weight to contextual evidence of the column's caption, "TD Says," and the column's placement in the sports section.<sup>352</sup> The Court acknowledged that the Ohio Supreme Court relied on these details in

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345. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 5 n.2 (1990).

346. *Id.* at 6.

347. *Id.* at 7.

348. See SMOLLA, *supra* note 41, § 6:28 (explaining that the Restatement's rule is that a statement of opinion is actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion").

349. See *Milkovich*, 497 U.S. at 21.

350. In his dissent, Justice Brennan stated that this was "obvious hyperbole" since Diadiun would not have "researched what everyone who attended the meet knows in his heart." *Milkovich*, 497 U.S. at 32 (Brennan, J., dissenting).

351. *Id.* at 21 (majority opinion).

352. See generally *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986).

concluding, in a sister opinion,<sup>353</sup> that Diadiun's statements were not actionable.<sup>354</sup> The Ohio Supreme Court specifically read Diadiun's column as presenting his view, "based upon [his] having witnessed the original altercation and [athletics association] hearing" that Milkovich lied.<sup>355</sup> However, it ultimately interpreted Diadiun's statements to be nonactionable opinion because, according to the Ohio Supreme Court, "Diadiun [was] not making an attempt to be impartial."<sup>356</sup>

The U.S. Supreme Court's acknowledgement and ultimate rejection of the Ohio Supreme Court's analysis supports the Court's opposite interpretation of Diadiun's reliance on firsthand experience. Rather than constituting nonactionable opinion, Diadiun's statement constituted actionable fact because his presence at the wrestling meet and hearing implicated reliance on undisclosed underlying facts. The Court's fact-opinion analysis in *Milkovich* therefore supports a reading that Diadiun's role as firsthand witness moved the outcome of the fact-opinion analysis in Milkovich's favor.

## 2. The #MeToo Defamation Defendant as First-Person Witness and Possessor of Undisclosed Underlying Facts

The #MeToo defendant's experience as firsthand witness to the alleged underlying crime should likewise impact the fact-opinion analysis in #MeToo defamation cases.

Allegations of sexual assault are unique as an underlying crime to a defamation claim because the accused assailant has firsthand knowledge of what happened. Thus, like Diadiun in *Milkovich*, the defendants in #MeToo defamation cases are firsthand witnesses to the alleged underlying crime, a fact which is key to a fact-opinion analysis. When a #MeToo defendant, in defending himself against sexual assault allegations,<sup>357</sup> calls his accuser a liar, he invokes the existence of undisclosed facts to which he is personally privy. It is therefore not merely a matter of the defendant's opinion that the plaintiff allegedly lied; the defendant necessarily presents such a statement as one of fact because the defendant himself *would* know for a fact whether the plaintiff lied.

#MeToo defamation defendants who are not the alleged assailants, but are nevertheless close to the alleged assailant, also have access to undisclosed facts underlying their statements that the accuser lied.<sup>358</sup> Because these defendants possess undisclosed facts as a result of their relationship with the

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353. *Id.*

354. *Milkovich*, 497 U.S. at 8.

355. *Id.* at 9 n.3.

356. *Id.*

357. Some #MeToo defendants have attempted to use the fact that they called their accuser a liar to defend their own reputation as a defense to the defamation claim. See *supra* Part I.B (discussing the self-defense privilege).

358. See *supra* Part II.A.1 (discussing *Davis* in which the defendant, Boenheim, had a close friendship with the alleged assailant, Fine, and was sued for calling Fine's accusers liars).

alleged assailant, their “liar” statements should likewise be found actionable.<sup>359</sup>

The analysis does not differ in #MeToo defamation cases involving statements made by the defendants’ attorney on their behalf. In these cases, although the attorney made one or more of the statements at issue, the attorney’s client is the named defendant in the defamation suit.<sup>360</sup> Further, an audience to a statement made by an attorney on their client’s behalf would likely not understand the attorney to have first-person knowledge of the sexual assault. Rather, the attorney represents their client’s perspective on the sexual assault allegation in a role commonly understood to be dutifully representing their client’s response.<sup>361</sup> However, the attorney’s role as their client’s mouthpiece in this context accomplishes the same end: the attorney represents the views of their client, the first-person witness to the alleged sexual assault.<sup>362</sup> Therefore, statements made by attorneys on behalf of clients should be subject to the same analysis and would likely be found actionable.

*B. A Proper Framework for the Fact-Opinion Analysis Where the Defamation Defendant Is a First-Person Witness to the Underlying Alleged Crime*

In defamation cases predicated on an underlying allegation that the defendant committed a crime, the fact-opinion analysis should consider the defendant’s firsthand knowledge of the alleged underlying crime. The first-person witness consideration also applies to defendants who are close to the alleged assailant or speak for them as their attorney.

Inclusion of additional analytical components into a fact-opinion analysis, such as the statement’s language, verifiability, and context, should be limited to their relevance to the defendant’s role as a first-person witness to the alleged crime. These other factors should not be used to expand the analysis beyond consideration of the defendant’s role as a first-person witness.

Finally, when applied to #MeToo defamation cases, this fact-opinion analysis should yield the conclusion that the defendant’s “liar” statement is

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359. *But see infra* notes 376–77 (discussing why the court in *Hill* properly found that Camille Cosby’s “liar” statement was not actionable pursuant to her spousal relationship with the alleged assailant).

360. In three of the four Cosby suits surrounding a statement made by his attorney, Martin Singer, Cosby was the only named defendant. *See McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675 (2019); *Hill v. Cosby*, 665 F. App’x 169 (3d Cir. 2016); *Green v. Cosby*, 138 F. Supp. 3d 114 (D. Mass. 2015). In the fourth suit, Cosby was the only named defendant until the plaintiff amended her complaint to add Singer as a defendant. *Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430 (Ct. App. 2017). The amended complaint added allegations that Singer acted at Cosby’s direction in his capacity as Cosby’s agent, lawyer, and/or employee. *Id.* at 444. The complaint also alleged that Singer acted with reckless disregard in issuing his statements without conducting a reasonable investigation, including failing to interview Cosby as a witness. *Id.*

361. *See supra* Part I.B (discussing various Cosby cases where one or more of the alleged defamatory statements were made by Cosby’s attorney).

362. *See supra* Part I.B.

actionable.<sup>363</sup> This is because the defendant, in having called the plaintiff a liar, implied possession of undisclosed facts underlying this claim. Conversely, where the defendant is not a first-person witness *and* does not have direct access to a first-person witness, their “liar” statement should be found nonactionable.

Part III.B.1 singles out the cases discussed in Part II that incorporate the defendant’s first-person knowledge into their fact-opinion analyses. Part III.B.2 explains which cases discussed in Part II failed to include the defendant’s first-person witness role in their fact-opinion analyses.

### 1. Application of the First-Person Witness Framework: The #MeToo Defamation Cases That Considered the First-Person Witness Role in Their Fact-Opinion Analyses

Out of the eight cases discussed in Part II, three consider the defendant’s role as a first-person witness, or their closeness to the first-person witness, in their fact-opinion analyses and conclude that the “liar” statements were actionable.<sup>364</sup> One case also considered a defendant’s closeness to the first-person witness and correctly determined that the statement was *not* actionable.<sup>365</sup>

The court in *Zervos v. Trump*<sup>366</sup> acknowledged that Trump was “the only person other than [Zervos] who knows what happened between the two of them” and that an audience to his statements would be “cognizant that [Trump] knows exactly what transpired.”<sup>367</sup> Thus, although the court’s analysis included other analytical elements that did not focus on Trump’s role as a first-person witness, it nevertheless afforded this concept analytical weight in determining that Trump’s statements were actionable.

In *Davis v. Boenheim*, the New York Court of Appeals based its conclusion that the allegedly defamatory statements at issue were actionable partially on a consideration of the defendant’s firsthand experience.<sup>368</sup> In this case, James Boenheim claimed that Robert Davis and Michael Lang lied about having been sexually abused by their former basketball coach, Bernie Fine.<sup>369</sup> The court considered that an audience to Boenheim’s statements could understand him to be in possession of undisclosed facts.<sup>370</sup> This was in part due to Boenheim’s longtime friendship with Fine, which could suggest that Boenheim had particular knowledge about Fine due to the relationship.<sup>371</sup>

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363. This analysis is limited to the fact-opinion determination. Other parts of the defamation analysis may still preclude the #MeToo plaintiff from succeeding on her defamation claim against her alleged assaulter.

364. *See supra* Parts II.A.1, II.A.3–4.

365. *See supra* Part II.B.2.c.

366. *See supra* Part II.A.3.

367. *See Zervos v. Trump*, 74 N.Y.S.3d 442, 448–49 (Sup. Ct. 2018), *aff’d*, 94 N.Y.S.3d 75 (App. Div. 2019).

368. *See supra* Part II.A.1.

369. *See Davis v. Boenheim*, 22 N.E.3d 999, 1001–02 (N.Y. 2014).

370. *See id.* at 1007.

371. *See id.*



In this case, Boeheim was not the alleged assailant but was a person close to the alleged assailant,<sup>372</sup> and the court properly relied on Boeheim's friendship with Fine in concluding that Boeheim's remarks were actionable because Boeheim had access to the first-person witness to the underlying alleged crime.

In *Dickinson v. Cosby*,<sup>373</sup> the court largely based its conclusion that the statements at issue were actionable on other analytical elements but acknowledged attorney Martin Singer's position as a mouthpiece for Cosby, who "would certainly know whether or not he sexually assaulted Dickinson."<sup>374</sup>

The court in *Hill v. Cosby* considered Camille Cosby's close relationship with her husband in determining that her statement was nonactionable opinion. This Note argues that when a defendant is close to the alleged assailant,<sup>375</sup> the court should conclude that the statement is actionable because the defendant likely possesses undisclosed facts pursuant to the relationship. However, the court *correctly* concluded that Camille Cosby's statement was not actionable because a spousal relationship is unique. As the court stated, a reasonable audience would understand that Camille Cosby would defend her husband without implicating underlying facts relating to the sexual assault allegations.<sup>376</sup> Additionally, no reasonable audience would understand a spouse to be acting as a mouthpiece as they would understand an attorney to be communicating for their client in a legal matter.<sup>377</sup> The *Hill* court therefore properly considered Camille Cosby's spousal relationship with Bill Cosby in determining that her statement was not actionable.

The *Davis*, *Dickinson*, and *Zervos* courts relied in part on the defendant's possession of first-person knowledge in rejecting the existence of an opinion protection.<sup>378</sup> However, some of these courts were not as explicit about the importance of the first-person knowledge as they could have been. While the *Davis* and *Dickinson* courts identified and, to varying degrees, relied on the defendant's personal knowledge,<sup>379</sup> only the *Zervos* court expressly recognized and relied on the importance of Trump's firsthand knowledge of the underlying alleged sexual assault.<sup>380</sup>

Finally, although the *Hill* court properly considered Camille Cosby's unique spousal relationship with Bill Cosby and determined that her statement was not actionable, it failed to consider Cosby and Singer's legal

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372. *See id.* at 1001, 1007.

373. *See supra* Part II.A.5.

374. *See Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430, 460 (Ct. App. 2017).

375. Such as James Boeheim, who had a close relationship with Bernie Fine in *Davis*. *See supra* Part II.A.1.

376. *See Hill v. Cosby*, 665 F. App'x 169, 173 (3d Cir. 2016).

377. *See supra* Part III.A.2.

378. *See Dickinson*, 225 Cal. Rptr. 3d at 460; *Davis v. Boeheim*, 22 N.E.3d 999, 1007 (N.Y. 2014); *Zervos v. Trump*, 74 N.Y.S.3d 442, 449 (Sup. Ct. 2018), *aff'd*, 94 N.Y.S.3d 75 (App. Div. 2019).

379. *See Dickinson*, 225 Cal. Rptr. 3d at 460; *Davis*, 22 N.E.3d at 1007.

380. *See Zervos*, 74 N.Y.S.3d at 449.

relationship and resulting firsthand knowledge of the underlying alleged sexual assault in analyzing whether their statements were actionable.<sup>381</sup>

## 2. Application of the First-Person Witness Framework: The #MeToo Defamation Cases That Failed to Consider the First-Person Witness Role in Their Fact-Opinion Analyses

Notably, all of the cases that found the statements at issue to be nonactionable failed to consider the defendant's first-person witness role in conducting a fact-opinion analysis.<sup>382</sup>

The court in *Clifford v. Trump* failed to include reference to Trump's role as first-person witness to the alleged underlying crime.<sup>383</sup> Instead, the court focused its fact-opinion analysis on verifiability and whether Trump's statements were political rhetorical hyperbole.<sup>384</sup>

In *Hill v. Cosby*, the court's fact-opinion analysis focused on disclosure but to a literal degree.<sup>385</sup> Rather than exploring whether Cosby, as first-person witness to the underlying sexual assault crime, had access to undisclosed facts, the court determined that Singer and Cosby's statements contained sufficient references to other sources of underlying facts to render them nonactionable.<sup>386</sup>

Finally, although the court in *McKee v. Cosby* relied heavily on disclosure in its fact-opinion analysis, it did not consider whether the defendant, as first-person witness, had access to undisclosed underlying facts.<sup>387</sup> Instead, it concluded that the statement, written by Cosby's attorney and containing numerous citations to publicly available sources, disclosed sufficient underlying facts to make it nonactionable.<sup>388</sup>

Two #MeToo defamation cases where the statements at issue were found to be actionable did not consider the defendant's role as first-person witness: *Green v. Cosby*<sup>389</sup> and *Giuffre v. Maxwell*.<sup>390</sup> In *Green*, the court focused its analysis on the statements' general tenor,<sup>391</sup> verifiability,<sup>392</sup> and specific language.<sup>393</sup> The court failed to lend analytical weight to Cosby's first-person experience even though this Cosby case involved a statement spoken directly by Cosby rather than through his attorney. The court in *Giuffre* used

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381. See *Hill*, 665 F. App'x at 175–76.

382. See *id.*; *supra* Parts II.B.1, II.B.3. But see *supra* Part III.B.1 (explaining that the *Hill* court properly determined that Camille Cosby's statement was not actionable because of her spousal relationship with Bill Cosby).

383. See *supra* Part II.B.1.

384. See *Clifford v. Trump*, 339 F. Supp. 3d 915, 926 (C.D. Cal. 2018).

385. See *supra* Part II.B.2.

386. See *Hill*, 665 F. App'x at 175–76.

387. See *supra* Part II.B.3.

388. See *McKee v. Cosby*, 874 F.3d 54, 63 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675 (2019).

389. See *supra* Part II.A.5.

390. See *supra* Part II.A.2.

391. See *Green v. Cosby*, 138 F. Supp. 3d 114, 131–32 (D. Mass. 2015).

392. See *id.* at 133.

393. See *id.* at 133, 136–37.

a totality of the circumstances fact-opinion analysis that also failed to consider Maxwell's personal knowledge of the alleged underlying events in concluding that Maxwell's statement was actionable.<sup>394</sup>

Overall, courts have largely failed to adequately consider defendants' first-person witness role in defamation cases predicated on an underlying allegation that the defendant, or a person close to them, committed a crime. Only three courts out of the eight discussed in Part II gave analytical weight to the defendant's first-person knowledge,<sup>395</sup> whereas the remaining five failed to raise this factor in their fact-opinion analyses.<sup>396</sup>

#### CONCLUSION

The #MeToo movement has brought new light to problems with the current application of the fact-opinion analysis across the country. The Supreme Court in *Milkovich v. Lorain Journal Co.* did not provide particularly effective closure to the confusion and inconsistency surrounding the fact-opinion analysis. But *Milkovich* informs how the analysis can be properly implemented, at least in cases where the defendant is a first-person witness to the underlying crime.

Although some of the courts that addressed #MeToo or #MeToo-related cases acknowledged the defendant's role as first-person witness to the alleged sexual assault,<sup>397</sup> only the New York Supreme Court, in *Zervos v. Trump*, explicitly focused its fact-opinion analysis on this factor.<sup>398</sup> However, the law in *Milkovich* supports such a focus in fact-opinion analyses and yields the conclusion that #MeToo defendants are not protected by the fact-opinion distinction.

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394. *See supra* Part II.A.2.

395. *See supra* Part III.B.1.

396. *See supra* Part III.B.2.

397. *See supra* Part III.B.1.

398. *Zervos v. Trump*, 74 N.Y.S.3d 442, 448–49 (Sup. Ct. 2018), *aff'd*, 94 N.Y.S.3d 75 (App. Div. 2019).