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**Convicting Cosby: How Civil Justice Brought the First Conviction of the #MeToo Era**

1. Introduction

Bill Cosby is where he belongs. He was sentenced to three to ten years in state prison after a jury returned a historic guilty verdict in a case built on voluminous evidence supporting his guilt. His prosecution will always remain unique as the first successful prosecution in the #MeToo Era. And while the re-opening of the case was instigated in 2014 with the outpouring of more than sixty brave women willing to speak out about how Cosby drugged and sexually assaulted them, the groundwork for the successful conviction had been laid nearly a decade earlier. The framework for the case that landed Cosby in an eight-by ten-cell was built by a courageous woman named Andrea Constand and two fearless crime victim rights attorneys named Dolores Troiani and Bebe Kivitz. They stood up to Cosby when law enforcement failed to act in 2005 by filing a civil lawsuit against Cosby which developed absolutely critical evidence to the future criminal prosecution. Without their work, which remained unknown to authorities until 2015, it is probable that Cosby could never have been held accountable.

1. Comedian v. Comedian: Hannibal Buress Reignites Allegations Against Cosby

In 2005 Bill Cosby was still on top. He was a mega star still deeply involved with the production of television and movies. He was still a comedy legend and had recently been delivering commencement addresses and publishing books. He had amassed a tremendous fortune. Years earlier he had reportedly made a push to purchase NBC. Lurking beneath his colossal celebrity status and wealth, however, was a monster. For decades Cosby had been drugging and sexually assaulting women. For the first time he would be put under the microscope of seasoned detectives only to have the plug abruptly pulled on the investigation. Nearly a decade later a comedian would tell a joke he had told many times before and awaken what would soon become a national phenomenon of Americans finally listening to survivors of sexual assault. The wave of momentum that followed would come crashing down on Cosby on April 26, 2018, when a jury declared him guilty of sexual assault charges and what little remained of his pristine public veneer would be stripped away by the evidence of his own misdeeds.

* 1. The Assault & 2005 Investigation

In January 2004, Bill Cosby invited Andrea to his home under the pretense of discussing her career and her recent decision to return to her home country of Canada. At the time, Andrea was the Director of Operations for the Temple University Women’s Basketball Team, having recently returned from a professional basketball career overseas. She had met Cosby in 2001 and what she did not know, as Cosby would later admit, was that he was immediately attracted to her. Like many survivors, she soon became a target. For years he had ingratiated himself into her family life and acted as a mentor and father figure. When Andrea eventually told Cosby that she wanted to return to Canada, he decided to strike, inviting her to his home to talk about her plans to leave Philadelphia.

When Andrea arrived to Cosby’s mansion in January 2004, she and Cosby sat at the kitchen table and began talking; she explained that she had been feeling stressed and was having difficulty sleeping. She then went to use the bathroom, and Cosby went upstairs. When she returned to the kitchen Cosby opened his hand and produced three blue pills and told her to “[p]ut them down.” He said, “[t]hese are your friends . . . they’ll help take the edge off . . . they’ll help you relax.” She thought the pills were herbal supplements, as the two had discussed natural and herbal remedies frequently before and she knew Cosby did not drink alcohol or use drugs. Like so many others before her, she trusted Cosby and took the three pills. She used a glass of water that Cosby had poured before her arrival. Cosby also insisted that she try a glass of wine he had poured for her, telling her it was a rare and fine wine that would also help her relax.

Soon, the substance Cosby delivered had the desired effect—to render the strong and athletic Andrea semi-conscious and helpless. Shortly after ingesting the wine, water, and the three blue pills, Andrea began to feel ill; she was slurring her words, her mouth felt dry and cottony, and she had double vision. She told Cosby that she was seeing two of him. She stood up, but could not stand on her own. Her legs were shaky and felt rubbery. Cosby took her arm and helped her to a couch. He laid her down on her left side, telling her to relax. Andrea was soon unconscious as a result of the intoxicants Cosby administered. She later recalled, during a brief bout of semi-consciousness, that Cosby was lying on the couch behind her, penetrating her vagina with his fingers and fondling her breasts. He also took her hand, placed it on his penis and masturbated himself with it. Throughout the assault, she was trying to move, but could not. She wanted to speak to tell him to stop, but she could not. She was completely incapacitated. As she explained to the jury at trial:

I wanted it to stop. I couldn’t say a thing. I was trying to get my hands to move, my legs to move, and the message just wasn’t getting there. I was weak. I was limp. And I could not fight him off

The next thing she remembered was waking up on the couch around 4:00 or 5:00 in the morning, disheveled, with her bra around her neck and her pants partially unzipped. After getting herself together, she stood up and walked toward the kitchen door. Cosby was standing in the doorway, wearing only a robe and slippers. He told her that there was a muffin and a cup of tea for her on the table and she departed.

In January 2005, Andrea became the first person to ever report to law enforcement that she was sexually assaulted by Bill Cosby, telling her local police in Durham, Ontario, Canada about being drugged and assaulted by Cosby in his mansion. Local police took notes on the report and forwarded the complaint to police in Philadelphia, who then forwarded it to Cheltenham Township Police Department, who had jurisdiction over Cosby’s Montgomery County estate. The police in Cheltenham, along with county-level investigators worked for the next month investigating the case before then-District Attorney Bruce L. Castor, who had served in that elected position since 2000 and had well-known aspirations for higher political office,[[2]](#footnote-2) abruptly declined to prosecute the case. He issued a press release, a document that would later become the center piece of one early controversy in the case, stating his purported reasons to drop the investigation. The press release was issued on the same day detectives had met to develop a list of next steps to complete the investigation.[[3]](#footnote-3)

With no criminal charges forthcoming, Andrea filed suit. She sued Cosby for battery and other claims related to the sexual assault as well as American Media, Inc.[[4]](#footnote-4) (AMI) and Marty Singer, Esq., one of Cosby’s personal lawyers, for defamation based on a story published by American Media subsidiary *The National Enquirer* where Cosby was interviewed about the criminal investigation shortly after it was closed. The litigation lasted a little more than a year before being settled.

* 1. The Release of the Deposition

Public awareness of sexual assault allegations against Cosby was reignited in October 2014 with a comedy routine by Hannibal Burress, a Philadelphia native, at the Trocadero Theatre, a now closed historic venue located in Center City Philadelphia. Buress, who had been doing his bit about Cosby for about six months before it went viral, pilloried the comedy legend over his penchant for telling others to live their most wholesome life. Buress called Cosby out for holding himself up as a moral pillar when he had faced multiple accusations of sexual assault in the past. The bit concluded with one instruction: “You leave here, Google ‘Bill Cosby rape’ . . . [it] has more results than Hannibal Buress.” While many in the audience laughed, some actually followed his directions and a furor ensued.

 A firestorm of allegations against Cosby—some heard before and some not—followed and almost all of them involved drug facilitated sexual assault. In total, more than sixty women would come forward with allegations against Cosby, nearly every single one barred by applicable criminal and civil statutes of limitations.[[5]](#footnote-5) Based on these new and renewed allegations, the *Associated Press* sought to unseal some of the legal filings from the civil suit *Constand v. Cosby* that followed the 2005 criminal investigation into Cosby.

 When the lawsuit was first filed in 2005, privacy and confidentiality became major sticking points for all parties. Both Andrea and Cosby filed for broad protective orders which were denied by the trial judge, Hon. Eduardo C. Robreno.[[6]](#footnote-6) The court did, however, temporarily seal all motions related to discovery and discovery disputes. This was done in part because, necessarily, such motions may include excerpts from depositions and other discovery, which is done in private and not subject to the same sort of “strong presumption” of public access like most other court filings.[[7]](#footnote-7) After the trial court entered this temporary seal, the *Associated Press* moved to intervene and lift the seal.[[8]](#footnote-8) While the trial court denied this motion, it also stated that it would reconsider at the time dispositive motions were filed in the case. The court separately noted that if the seal was not extended it would lapse.[[9]](#footnote-9)

 One particular issue that was heavily litigated in the case surrounded Cosby’s deposition. Troiani, who took Cosby’s deposition, described his demeanor changing over time. He began with what she suspected was his normal routine, being polite, joking, putting on the act that everyone loved and expected. As she challenged him more and pressed him for the truth, he became evasive. Finally, when he knew he could not ramble his way around tough questions with nonsensical prattle, he became obstructive. Troiani and Kivitz were not deterred and sought court intervention to force Cosby to answer questions surrounding exactly what he did with seven prescriptions worth of Quaaludes he had fraudulently obtained from a doctor. In doing so they attached some of the most damaging excerpts from his deposition transcript. Cosby would soon admit that he used the Quaaludes with women he wanted to have sex with and that he knew full well the effects the pills would have. There can be little doubt these admissions played a role in Cosby’s choice to settle the civil suit.

Less than a year after the *Associated Press* tried to intervene and unseal certain legal filings, the case would settle. The parties entered into a Confidential Settlement Agreement. Cosby paid Andrea $3,380,000; AMI paid $20,000. While the Confidential Settlement Agreement required the parties to keep the discovery, including the transcript of Cosby’s four-day deposition, confidential under all but very limited circumstances, it did not address a sealing mechanism, if any, with the trial court. The parties never presented the Confidential Settlement Agreement to the court for approval.[[10]](#footnote-10)

After Buress’ comedy routine exploded on the internet, the *Associated Press* went back to court to access the court filings.[[11]](#footnote-11) While the filings were no longer technically under the temporary seal, Cosby and his legal team did object to the release of the filings. It was their burden to demonstrate “good cause” so as to obtain a protective order.[[12]](#footnote-12) Ultimately, the trial court determined that Cosby failed to meet his burden to permanently seal the filings.[[13]](#footnote-13) Part of this decision rested with the trial court determining that because Cosby had held himself out as a “public moralist” while also committing acts that were at best improper and at worst criminal, the public interest in the matter was heightened. Judge Robreno stated:

This case, however, is not about Defendant’s status as a public person by virtue of the exercise of his trade as a televised or comedic personality. Rather, Defendant has donned the mantle of public moralist and mounted the proverbial electronic or print soap box to volunteer his views on, among other things, childrearing, family life, education, and crime. To the extent that Defendant has freely entered the public square and “thrust himself into the vortex of th[ese] public issue[s],” he has voluntarily narrowed the zone of privacy that he is entitled to claim.

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Rather, the stark contrast between Bill Cosby, the public moralist and Bill Cosby, the subject of serious allegations concerning improper (**and perhaps criminal**) conduct, is a matter as to which the AP—and by extension the public—has a significant interest.[[14]](#footnote-14)

On July, 6, 2015, shortly after the decision came down, the filings became public and the *Associated Press* published them online.[[15]](#footnote-15) After the news alert from the *Associated Press*, four more outlets had published stories. Then, a reporter from the *New York Times* contacted the court reporting agency that transcribed Cosby’s deposition. Apparently misunderstanding the order from the trial court, the agency released full transcripts of the four days of Cosby’s deposition. It was immediately posted to the internet. The barn door was opened never to be closed again.

1. The Criminal Case is Re-Opened

The now publicly available deposition not only increased public scrutiny of Cosby and the allegations against him, it also sparked a new interest from law enforcement. I was sitting at my desk on the afternoon of July 6, 2015, when the then-District Attorney Risa Vetri Ferman emailed me asking what the statute of limitations was for Aggravated Indecent Assault (a criminal offense that included digital penetration) in January 2004. Not thinking much of it I did some quick research and replied that it was twelve years, meaning our office would be able to bring charges in such a case until the last day in December 2015 (in order to be conservative and account for the crime having occurred first day of January 2004). I did not realize until later that day when I saw the news that my boss was emailing to ask whether we could still potentially prosecute Bill Cosby.

It was from that day, with the explosive admissions in the deposition in hand, that a team of prosecutors and investigators started a renewed investigation into Andrea’s allegations that in January 2004 Bill Cosby sexually assaulted her while she was legally unconscious.[[16]](#footnote-16) Those efforts would ultimately result in criminal charges being filed on December 30, 2015. Cosby would be tried twice before being convicted on April 26, 2018. On September 25, 2018, he was sentenced to three to ten years in state prison and labeled a sexually violent predator. From the re-opening of the investigation to sentencing the case would last more than three years and Cosby would run through more than two-dozen criminal defense attorneys of record. But none of what was accomplished could have been done without the important work of Andrea’s civil attorneys, Troiani and Kivitz. And it was only with the release of the deposition in July 2015 that law enforcement knew to even approach them.

1. The Impact of the Civil Case

The Confidential Settlement Agreement would become important at several different turns during the prosecution, but initially it helped explain why law enforcement learned along with the public what lawyers involved in the civil case knew for years about Cosby’s true history with drugs and sexual assault. When the Agreement was reached, it not only prohibited parties from disclosing discovery materials and speaking publicly, it also prohibited Andrea from ever initiating a criminal complaint against Cosby. What this meant is that only if law enforcement approached Andrea or her attorneys could they disclose what discovery had revealed. Just days after the deposition was released, authorities from Montgomery County did just that, approaching Troiani and asking her to discuss the civil litigation. Even then she could not disclose much, but she was able to explain that if subpoenaed, she could turn over her file. Once a subpoena was issued it revealed a treasure trove of evidence against Cosby that would ultimately help win his conviction.

In particular, the lawsuit: (1) rebutted a claim by the former District Attorney that he had “promised” not to prosecute Cosby; (2) produced evidence of damaging admissions by Cosby regarding his use of Quaaludes for women that he wished to have sex with; (3) uncovered a con that Cosby played on law enforcement during the original investigation in 2005; and (4) preserved phone and travel records that would be used to blow a hole in Cosby’s claim that the prosecution was barred by the statute of limitations.

* 1. A “Promise” That Never Was

Less than two weeks after Cosby was arrested, his attorneys filed their first petition for *habeas corpus*. The petition centered around a purported “promise” that then-District Attorney Castor claimed he made with Cosby’s criminal defense attorney that he would never prosecute Cosby so as to strip him of any rights Cosby would have with regard to the Fifth Amendment to the United States Constitution during the civil litigation process.[[17]](#footnote-17) The tall tale crafted by Castor had many holes and the materials generated from the civil litigation were critical to debunking his story and to the trial judge’s finding that his story was simply not credible.[[18]](#footnote-18)

Castor, who was the elected District Attorney when Cosby was first investigated in 2005, had left the office and only months ago lost a bid to re-take his old job.[[19]](#footnote-19) He took the witness stand on February 2, 2015, to testify about his alleged conduct in 2005. At various stages it was reported, by Castor, Cosby’s criminal defense attorney’s, and the media, that Castor had “promised” or “agreed” to never prosecute Cosby, essentially granting him transactional immunity.[[20]](#footnote-20), [[21]](#footnote-21) In September 2015, in seemingly his first public statements ever about this supposed promise, Castor told a reporter he had signed a “written declaration” affirming that Cosby would never be prosecuted so as to strip him of any rights he would have against self-incrimination.[[22]](#footnote-22), [[23]](#footnote-23) After this media interview Castor also exchanged a series of emails with then-District Attorney Ferman advising that he made an agreement amongst the parties, including Andrea’s lawyers, that Cosby would never be prosecuted.[[24]](#footnote-24) When he finally testified under oath, Castor delivered a brand-new version, stating that he had in fact delivered a “sovereign edict” whereby he decided, as The Sovereign, that Cosby would never be prosecuted and that, as a result of this legal assessment, Cosby could never invoke his rights against self-incrimination at a future deposition.[[25]](#footnote-25)

The *habeas* hearing, and in particular the cross examination of Castor, centered on several major areas, including many very significant inconsistencies in his testimony compared to past statements.[[26]](#footnote-26) Perhaps what decided the day, though, was what Cosby did and did not do during the police investigation and civil litigation. First, Troiani correctly testified that had Cosby invoked his Fifth Amendment rights at his deposition it would have been favorable to Andrea’s case because they would be entitled to an adverse inference instruction.[[27]](#footnote-27) In addition, Troiani testified about the atmosphere during defendant’s 2005-2006 depositions. Far from a man unburdened from the threat of criminal prosecution being forced to answer questions put to him, Cosby refused to answer questions or was intentionally non-responsive. Cosby became more and more contentious as the deposition went on. It came to the point, Troiani testified, that she was forced to file motions to compel with the court in order to force Cosby to answer questions. During the entirety of the litigation, the existence of a “promise,” “agreement,” or “edict” never once came up, either during pre-depositions stipulations or during motions to determine whether Cosby should be compelled to answer certain questions. Troiani testified that an initial provision in the Confidential Settlement Agreement proposed by Cosby was that the victim would: (1) “release” Cosby from all criminal liability, (2) bind Andrea so that she could not cooperate with a future law enforcement investigation, and (3) require that all parties destroy their files.

In addition, it became clear through the civil suit that Cosby likely waived any right he had to invoke the Fifth Amendment in any event. It was learned through the civil case that while Cosby was initially under investigation for the sexual assault of Andrea in 2005, he and his legal team were already negotiating with the *National Enquirer* to give an interview about the investigation in exchange for AMI spiking the story involving another survivor, Tamara Green. First, this (along with the interview he gave to police) demonstrates Cosby was apparently not concerned with incriminating himself. Second, both the interview he ultimately gave to the *National Enquirer* along with his police interview, waived his right to invoke because he voluntarily revealed the facts underlying the assault allegation.[[28]](#footnote-28)

Ultimately the trial judge used all of this evidence to reject the *habeas* petition, and by extension find that the testimony by Castor, whether it was about a promise, agreement, edict, or otherwise to be incredible.[[29]](#footnote-29)

* 1. The Deposition

While the evidence presented at the *habeas* hearing allowed the case to move forward, and was therefore vital to the case, from the perspective of trial evidence there may have been nothing more powerful than excerpts from Cosby’s deposition. Cosby went into great detail in the deposition about procuring Quaaludes, testifying that he told the prescribing doctor he had a back problem but that both knew he would never use the pills himself. He said he wanted to use them like “a drink” and have them around “just in case.” He described administering the pills to one woman who became “high” and walked like she had “too much to drink.” He admitted that he never gave the pills to a man. Cosby was forced to admit that he had given Quaaludes to other women, including women that had not yet come forward.

Cosby also admitted to knowing the effects of Quaaludes because he had been given a similar Central Nervous System depressant after surgery. He admitted that Central Nervous System depressants made him sleepy and that he never used them personally because he wanted to “stay awake.” Cosby’s admitted familiarity with Central Nervous System depressants was critical to the conviction. Cosby claimed to police and during his deposition, and seemingly maintains to this day, that he gave Andrea Benadryl. The main ingredient in that product is diphenhydramine which, just like Quaaludes, has Central Nervous System depressant effects. Cosby’s admissions in the deposition opened the door for a forensic toxicologist to testify about the effects of Central Nervous System depressants like diphenhydramine and Quaaludes. It also allowed the jury to draw an inference that it was no mistake for Cosby to have administered such a drug to Andrea and that he was well aware of her condition at the time he sexually assaulted her.

Whether Cosby had in fact given Andrea Benadryl was a major point of contention in the criminal case. Although diphenhydramine could have effects consistent with what Andrea described, and has in fact been used in drug facilitated sexual assault cases many times before,[[30]](#footnote-30) there was no forensic evidence that Cosby had in fact given her that drug. At the time of his police interview he turned over Benadryl pills he claimed to carry with him everywhere as a sleep aid and passed them off to police to prove as much. The Benadryl pills he gave police, however, were pink and not blue. Cosby and Andrea both agreed the pills he gave her in 2004 were blue.

During the 2005 investigation, no one questioned whether Cosby still had the same blue Benadryl pills that he gave to Andrea or why he had turned over pink Benadryl pills when he claimed to have administered blue pills. Despite this, Cosby would make a fatal misstep in his deposition when he volunteered that at the time of the 2005 criminal investigation he still had the exact same box of Benadryl pills he claimed to have used with Andrea. Of course these pills, which he claims to have carried with him everywhere, did not make their way into the hands of police. Instead Cosby attempted a ruse—which he almost got away with—by turning over pink Benadryl pills. He had even directed his driver, while in the police interview, to go down to his car and retrieve the pills from his overnight bag.

Years later at his criminal trial the jig was up. Because Cosby had admitted in his deposition that he still possessed the exact same pills he administered to Andrea the jury was able to see the truth of the matter: that turning over the pink Benadryl pills, and claiming what he gave Andrea was Benadryl in the first place, was all an elaborate ruse. After all, if you were an innocent man and you wanted to be cooperative with police, why would you produce pink Benadryl tablets during your police statement in 2005 when you knew you were still in possession of the same box of blue Benadryl pills you used on the alleged victim in 2004? If Cosby had given Andrea blue Benadryl pills, still possessed them, and carried them everywhere to use as a sleep aid as he claimed, why not turn those blue pills over to police? What I suggested to the jury in closing, and what is still true today, is that only Cosby and God know exactly what he gave to Andrea. He was simply never forthcoming with what that drug was.

* 1. Statute of Limitations

The final critical aspect of the civil litigation were extensive phone and travel records for Cosby in 2004 – 2005. The records were only preserved through the civil litigation and became important during the second trial after the defense’s “star witness,” Marguerite Jackson, collapsed under cross examination. That witness claimed she had a conversation with Andrea during which Andrea said she planned to frame a celebrity with a sexual assault allegation in order to get rich. This story had featured prominently in the defense’s case; her claims dominated the defense opening statement and much of their cross examinations throughout trial. After this witness was dispatched, in part by the use of Temple University records produced at the last moment that proved she was not with Andrea when she claimed this conversation occurred, the jury had no choice but to discount the defense theory that centered around her testimony. The defense then pivoted to what had largely been a pre-trial legal argument that Cosby could not have assaulted Andrea in January 2004, and therefore within the statute of limitations, because he was not in Pennsylvania during the relevant time period.

So, with their star witness fallen, the defense focused the jury on this theory that the crime must have occurred in 2003. Thankfully, Cosby had produced voluminous telephone billing records, travel itineraries, and flight records for his private jet during the civil suit. While these records could not prove beyond all doubt that Cosby was in Cheltenham during January 2004, they did prove beyond a reasonable doubt that there were two days when he was at his Montgomery County residence. When lined up with Andrea’s own phone records and the trial testimony it became clear that their statute of limitations defense was bunk. Beyond that, however, it allowed the jury to clearly see what was apparent by the close of the defense case: they put all their eggs in the basket of this supposed star witness and Andrea’s purported framing of Cosby, and when that witness imploded they wanted the jury to believe this could not have happened within the statute of limitations. Their transformed case theory was perhaps the best evidence of how weak their entire defense was.

1. Conclusion

It is nearly impossible to reduce the criminal prosecution of a world-famous celebrity with unlimited resources—that endured two trials and lasted more than three years—to any number of written pages. There are many more aspects of the case that are fascinating from both a real-world and legal perspective. People often point to the number of “Prior Bad Act” witnesses at our disposal as the hallmark issue in the case. While hearing the testimony from six brave women (between both trials) who took the stand to support Andrea and disclose their own traumas was extraordinarily powerful for many reasons, the reality is that without the hard work of Andrea and her civil attorneys it is hard to imagine what the outcome of this prosecution would have been.

Of course, evidence aside, there is one final point to be made about the impact of the civil case on our criminal prosecution. In 2005 Andrea was told by the District Attorney that he could not or—perhaps worse—would not, help her. She turned to the civil justice system and she reached a just result. When I first met her she was unique compared to other survivors of sexual assault I had encountered before. Though I believe she was still deeply affected by the trauma she suffered, she had an extraordinary resolution, introspection, and strength. While that no doubt came in part from who she is as a person I also believe that having her voice heard through the civil suit and then having the resources to meaningfully engage in quality therapy and self-healing were critical to her recovery from an unspeakable trauma. Put simply she was in a very different place in 2015 when she agreed to cooperate than she was in 2005. The process of two trials no doubt took a serious toll but it is probable that without her having achieved the result she did through the civil justice system she could not have taken that first step back into the fray of the criminal justice system. Of course no one can say whether justice would have ever been done, but thanks to Andrea we should all be glad that it was.

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2. Politics PA, Mar. 1, 2013, https://www.politicspa.com/brucecastor-com-and-other-moves-by-the-montco-commish/46391/v (last visited October 1, 2019). [↑](#footnote-ref-2)
3. Brief for Appellee, Commonwealth v. Cosby, No. 3314 EDA 2018 (Pa. Super. July 25, 2019). [↑](#footnote-ref-3)
4. American Media, Inc. has been prominent in the news recently as their practice of “catch-and-kill”—when they purchase a story believed to be damaging to a prominent person, often a male celebrity, and agree to not publish that story in exchange for a different story or some other thing of value from the celebrity—has been revealed and investigated. *The Washington Post*, Dec. 12, 2018, https://www.washingtonpost.com/lifestyle/style/publisher-of-the-national-enquirer-admits-to-hush-money-payments-made-on-trumps-behalf/2018/12/12/ebf24b76-fe49-11e8-83c0-b06139e540e5\_story.html (last visited September 30, 2019); *TIME*, Apr. 11, 2019, https://time.com/5568149/national-enquirer-for-sale-trump-bezos-scandals/ (las visited September 30, 2019). This was exactly what they did with the Cosby/Constand story. AMI purchased the story of another accuser, Tamara Green, and agreed to not publish it if Cosby agreed to give an exclusive interview about the Montgomery County criminal investigation and thank *The National Enquirer* for allegedly assisting in the apprehension of his son’s murderer. [↑](#footnote-ref-4)
5. While the assaults disclosed by many of these women were barred, a slew of defamation lawsuits followed their disclosures. These were frequently filed by the survivors but Cosby himself also countersued. *See The New York Times*, Apr. 5, 2019, https://www.nytimes.com/2019/04/05/arts/television/cosby-defamation-lawsuit-settlement.html

(last visited October 1, 2019); *The Guardian*, May 31, 2019 https://www.theguardian.com/world/2019/may/31/bill-cosby-countersuit-defamation-case-dropped (last visited October 1, 2019). [↑](#footnote-ref-5)
6. *Constand v. Cosby*, 112 F. Supp. 3d. 308, 309 n.2 (E.D. Pa. 2015) [↑](#footnote-ref-6)
7. *Id.* at 310, 312 (citing *Leucadia, Inc. v. Applied Extrusion Techs., Inc.,* 998 F.2d 157, 165 (3d Cir.1993) (“‘there is a presumptive [common law] right to public access to all material filed in connection with nondiscovery pretrial motions,’ there is ‘no such right as to discovery motions and their supporting documents.’”); *see also* *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 33 (1984); *United States v. Wecht,* 484 F.3d 194, 208 (3d Cir. 2007). [↑](#footnote-ref-7)
8. *Constand*, 112 F. Supp. 3d. at 310. [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. *Id.* at 318. [↑](#footnote-ref-10)
11. In total, the *Associated Press* sought sixteen different court filings. *Id*. at 312. [↑](#footnote-ref-11)
12. “Good cause” is meant “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Fed. R. Civ. Pro.* 26(c). The Third Circuit utilizes factors to balance the interest of the public against the interest of the private litigant(s): (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; **(**3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 786–87 (3d Cir.1994). [↑](#footnote-ref-12)
13. *Constand*, 112 F. Supp. 3d. at 319. [↑](#footnote-ref-13)
14. *Id*. at 315 – 16, 317 (emphasis added). Cosby would appeal this ruling to the Third Circuit. The appeal was denied as moot, however in a footnote the Third Circuit did express reservations over the trial court’s analysis as it related to Cosby’s purportedly reduced expectation of privacy because he held himself out as a “public moralist.” *Constand v. Cosby*, 833 F.3d 405, 413 n.8 (2016). [↑](#footnote-ref-14)
15. *Constand*,833 F.3d at 408. [↑](#footnote-ref-15)
16. In Pennsylvania, the term “unconscious” for purposes of a sexual assault prosecution, means In this context, “unconscious” means that the victim is lacking knowledge or awareness of both her own sensations and external events, and that she was not in the normal waking state, if even for only portions of the sexual assault. “Unconscious” means the victim can be intermittently unconscious throughout the assault, but at all relevant times, in such an impaired physical and mental condition so as to be unable to knowingly consent. *Commonwealth v. Erney*, 698 A.2d 56, 59 (Pa. 1997). [↑](#footnote-ref-16)
17. Brief for Appellee, Commonwealth v. Cosby, No. 3314 EDA 2018 (Pa. Super. July 25, 2019). [↑](#footnote-ref-17)
18. *Id.*; Commonwealth v. Cosby, Findings of Fact, Conclusions of Law and Order Sur Defendant’s Motion to Suppress Evidence Pursuant to Pa. R. Crim. P. 581(I) (Pa. Ct. Com. Pl. Montgomery Dec. 5, 2016) [↑](#footnote-ref-18)
19. Brief for Appellee, Commonwealth v. Cosby, No. 3314 EDA 2018 (Pa. Super. July 25, 2019). [↑](#footnote-ref-19)
20. *Id.* There is no such thing as transactional immunity in Pennsylvania. Though a district attorney may enter into a contractual agreement not to prosecute a defendant, he may not ***unilaterally*** confer what amounts to transactional immunity. “Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness.” *Commonwealth v. Swinehart*, 642 A.2d 504, 506 (Pa. Super. 1994), *aff’d,* 664 A.2d 957 (Pa. 1995). Use immunity is available only through a court order. *Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992). [↑](#footnote-ref-20)
21. There have been cases where the government makes a promise or agreement and later try to renege. First, in those cases there is never a dispute that the promise was made in the first place. Second, in those cases the government is simply estopped from using evidence derived from the promise or reaping the benefit that was supposed to flow from the promise. *Commonwealth v. Ginn*, 587 A.2d 314 (Pa. 1991) (financial fraud case where government and defendant agreed that a mutually acceptable accountant would review records and if it was determined no funds were diverted case would be dismissed); *Commonwealth v. Hainesworth*, 82 A.2d 444 (Pa. Super. 2013) and *Dunn v. Colleran*, 247 F.3d 450 (3d Cir. 2001) (cases where government entered guilty plea based on promise for reduced time on sex offender registry or for sentencing in specific range, respectively). [↑](#footnote-ref-21)
22. Brief for Appellee, Commonwealth v. Cosby, No. 3314 EDA 2018 (Pa. Super. July 25, 2019). [↑](#footnote-ref-22)
23. Castor would also make disparaging public comments about Andrea that ultimately resulted in Andrea suing Castor for defamation. She was represented by none other than Troiani and Kivitz. Castor then sued Andrea, Troiani, and Kivitz. Ultimately Andrea settled the case against Castor. *Philadelphia Inquirer*, Jan. 31, 2019, https://www.inquirer.com/news/andrea-constand-bill-castor-lawsuit-cosby-20190201.html (last visited October 1, 2019). Castor’s suit against Andrea was dismissed at the pleadings stage. *Philadelphia Inquirer*, Apr. 5, 2018, https://www.inquirer.com/philly/news/cosby/bruce-castor-andrea-constand-lawsuit-bill-cosby-trial-jury-selection-20180405.html (last visited October 1, 2019). [↑](#footnote-ref-23)
24. *Id.* [↑](#footnote-ref-24)
25. *Id.* [↑](#footnote-ref-25)
26. *Id.* Castor contradicted his claim that the case could never be re-opened several times. In the 2005 press release Castor wrote, “District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise.” He was quoted in an article in the *Philadelphia Inquirer* just days before the hearing about the press release as stating, “I put in there that if any evidence surfaced that was admissible then I would revisit the issue. And that evidently is what the D.A. is doing.” He also wrote in a September 25, 2015, email to District Attorney Ferman that he “never agreed we would not prosecute Cosby.” Furthermore, Castor repeatedly stated and testified that he made this alleged agreement in consultation with Andrea’s lawyers and that it was then-First Assistant District Attorney Ferman that carried out communication with Andrea’s lawyers. This was flatly and unequivocally denied by Andrea’s lawyers and in a deposition of Ferman in the related defamation case filed by Andrea against Castor. [↑](#footnote-ref-26)
27. *See Harmon v. Mifflin County School Dist.*, 713 A.2d 620, 623-24 (Pa. 1998) *citing Beers v. Muth*, 151 A.2d 465 (1959). [↑](#footnote-ref-27)
28. *Rogers* v. *United States*, 340 U.S. 367 (1951) (“courts have uniformly held that, where [in]criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details.”); *Prep v. Pennsylvania Turnpike Commission*, 29 Pa. D. & C. 2d 665, 678 (1962) (finding witness in a civil lawsuit could not invoke Fifth Amendment when he had previously testified before an investigating grand jury without invoking privilege); *Williams v. Baker*, 2017 WL 1282455 (W.D. Pa. 2017). [↑](#footnote-ref-28)
29. Brief for Appellee, Commonwealth v. Cosby, No. 3314 EDA 2018 (Pa. Super. July 25, 2019); Commonwealth v. Cosby, Findings of Fact, Conclusions of Law and Order Sur Defendant’s Motion to Suppress Evidence Pursuant to Pa. R. Crim. P. 581(I) (Pa. Ct. Com. Pl. Montgomery Dec. 5, 2016) (finding there was “no agreement not to prosecute and no ‘quid pro quo;’ that the trial court “credit[ed] the testimony of Ms. Kivitz and Ms. Troiani;” and that testimony by Castor was “equivocal” with “numerous inconsistencies in [his] testimony and writings”). [↑](#footnote-ref-29)
30. In London, England, a man named John Worboys, who worked as a cab driver to facilitate his crimes, administered diphenhydramine to his victims prior to sexually assaulting them. Barry McOwen was convicted in Pennsylvania of multiple charges of child rape for mixing diphenhydramine in a “special juice” prior to assaulting his minor victims. *See also* Laura K. Bechtel & Christopher P. Holstege, *Criminal Poisoning: Drug-Facilitated Sexual Assault*, 25 Emerg Med Clin N Am 499, 519 (2007). [↑](#footnote-ref-30)